

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

BRIAN E. FURNER, Petitioner

May 7, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) No. 101463 (BOR Appeal No. 910059369)
(Claim No. 2044457)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
T-H MID AMERICA, LTD. PARTNERSHIP,
Respondent**

MEMORANDUM DECISION

Petitioner Brian E. Furner, by Robert Stultz, his attorney, appeals the West Virginia Workers' Compensation Board of Review's Order denying an additional permanent partial disability award.

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated October 13, 2010, in which the Board affirmed a March 11, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's October 3, 2008, denial of an additional permanent partial disability award for the petitioner's cervical spine injury. The Court has carefully reviewed the records, written arguments, and appendices contained in the petition, and the case is mature for consideration.

Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this matter is appropriate for consideration under the Revised Rules. Having considered the petition and the relevant decision of the lower tribunal, the Court is of the opinion that the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the Court determines that there is no prejudicial error. This case does not present a new or significant question of law. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

The Board of Review affirmed the holding that the petitioner had been fully compensated for the cervical spine by previous permanent partial disability awards. The petitioner disagrees and argues that it was incorrect to apply West Virginia Code of State Rules § 85-20 to the range of motion findings since the initial examination was prior to June 14, 2004. Although petitioner asserts

that he is entitled to an additional 7% permanent partial disability award, he fails to cite to any specific authority to support his argument.

In its Order affirming the claim administrator's denial of an additional permanent partial disability award for the cervical spine, the Office of Judges found the evaluations of Drs. Steinman and Jin to be the most credible and persuasive. Both of these evaluations found the petitioner fully compensated for the cervical spine. It also noted that the flaw in Dr. Milan's evaluation was the failure to apply West Virginia Code of State Rules § 85-20 to range of motion recommendations. Under West Virginia Code of State Rules § 85-20-64.1 (2006), "[p]ermanent partial disability assessments shall be determined based upon the range of motion models contained in the Guides Fourth." The Board of Review reached the same reasoned conclusions in affirming the Office of Judges in its decision of October 13, 2010.

For the foregoing reasons, we find that the decision of the Board of Review is not in clear violation of any constitutional or statutory provision, nor is it clearly the result of erroneous conclusions of law, nor is it based upon a material misstatement or mischaracterization of the evidentiary record. Therefore, the Board of Review Order is affirmed.

Affirmed.

ISSUED: May 7, 2012

CONCURRED IN BY:

Justice Robin J. Davis
Justice Margaret L. Workman
Justice Thomas E. McHugh

DISSENTING:

Chief Justice Menis E. Ketchum

Justice Brent D. Benjamin, Not Participating