

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

November 16, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

JERRY W. NAPIER, Petitioner

vs.) **No. 11-0212** (BOR Appeal No. 2044956)
(Claim No. 2000009041)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
KANAWHA CORPORATION, Respondent**

MEMORANDUM DECISION

Petitioner Jerry W. Napier, by John H. Shumate Jr., appeals the decision of the West Virginia Workers' Compensation Board of Review granting no permanent partial disability award. The West Virginia Office of Insurance Commissioner, by Jack M. Rife, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated January 26, 2011, in which the Board affirmed an August 27, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's April 3, 2009, order granting no permanent partial disability award for bilateral cubital tunnel syndrome. The Court has carefully reviewed the records, written arguments, and appendices contained in the petition, and the case is mature for consideration.

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.

Mr. Napier worked for many years as a heavy equipment operator at a surface mine. He filed a claim for carpal tunnel syndrome, which was held compensable. Mr. Napier received a 12% permanent partial disability award for bilateral carpal tunnel syndrome. Cubital tunnel syndrome, however, was not added to Mr. Napier's claim until following entry of an Order by this Court on October 15, 2008, reversing the Office of Judges in part and holding cubital tunnel syndrome as a compensable component of Mr. Napier's claim.

Following this Court's October 15, 2008, Order directing that cubital tunnel syndrome be added as a compensable component, Mr. Napier was examined by Dr. David Jenkinson. Dr. Jenkinson found no "convincing evidence" of cubital tunnel syndrome. He found no objective abnormality of any kind in Mr. Napier's upper limbs, and he noted that Mr. Napier had no pain or numbness in the typical ulnar nerve distribution. Dr. Jenkinson also observed that Mr. Napier had no muscle wasting or weakness or localized weakness, which would be signs of cubital tunnel syndrome. Additionally, Mr. Napier did not have a positive Tinel's sign over the ulnar nerve at the elbow.

Dr. Jenkinson also stated that Mr. Napier exhibited

clear signs for symptom exaggeration in that he attempts to demonstrate a complete loss of pinprick sensation diffusely over both upper limbs from elbow to hand in a diffuse non-dermatomal pattern. He also has other multiple subjective complaints of pain in his feet, knees and neck, none of which is substantiated by any objective abnormality.

The claims administrator relied on this report in granting no permanent partial disability.

Mr. Napier, however, urges this Court to grant him an additional 9% permanent partial disability award for his cubital tunnel syndrome. In support of this request, Mr. Napier relies on the reports of Dr. William Kennedy and Dr. Johnny Dy. Dr. Kennedy, who rendered his report on July 10, 2003, acknowledged that Mr. Napier's electrodiagnostic studies did not reveal cubital tunnel syndrome, but he also stated that this fact alone did not preclude the diagnosis. Dr. Kennedy found 21% whole person impairment, which also included an impairment rating for Mr. Napier's bilateral carpal tunnel syndrome. Mr. Napier seeks an additional award for a total of 21% impairment, as found by Dr. Kennedy.

On October 5, 2004, Dr. Dy also diagnosed bilateral ulnar neuropathy (cubital tunnel syndrome) and recommended a 6% permanent partial disability award for bilateral cubital tunnel syndrome. Dr. Dy found a total of 18% permanent partial disability, with 12% attributable to Mr. Napier's bilateral carpal tunnel syndrome.

The Office of Judges affirmed the claims administrator's April 3, 2009, Order denying a permanent partial disability award for Mr. Napier's cubital tunnel syndrome. The Office of Judges accorded more weight to Dr. Jenkinson's report than those of Drs. Kennedy and Dy as Mr. Jenkinson's was most recent in time. Dr. Jenkinson also noted significant symptom magnification and highlighted a lack of objective evidence of cubital tunnel syndrome. Namely, Mr. Napier's May 17, 1999, electrodiagnostic study found only carpal tunnel syndrome, not any evidence of cubital tunnel syndrome. The Board of Review affirmed the Office of Judges.

The Board of Review's January 26, 2011, Order affirming the denial of a permanent partial disability award for cubital tunnel syndrome should be affirmed. The Board of Review

found Dr. Jenkinson's report to be the most accurate assessment of Mr. Napier's current impairment, and because it did not materially misstate or mischaracterize any portion of the evidentiary record, this Court will not re-weigh the evidence.

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 decision of the Board of Review is affirmed.

Affirmed.

ISSUED: November 16, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Margaret L. Workman
Justice Thomas E. McHugh

DISSENTING:

Justice Brent D. Benjamin