

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

October 2, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

FLOYD E. NOE, Petitioner

vs.) **No. 11-0356** (BOR Appeal No. 2044856)
(Claim No. 940036207)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
PREPARATION PLANT MAINTENANCE, INC.,
Respondent**

MEMORANDUM DECISION

Petitioner Floyd E. Noe, by John Blair, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. The West Virginia Office of Insurance Commissioner, by Jon Snyder, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated February 2, 2011, in which the Board affirmed a July 21, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's October 21, 2009, decision denying Mr. Noe's request for permanent total disability benefits. 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. Noe was most recently employed as a foreman with Preparation Plant Maintenance, Inc. Mr. Noe filed an application for permanent total disability benefits on November 15, 2004. On November 18, 2007, Dr. Walker performed an independent medical evaluation for the purpose of determining whether Mr. Noe is permanently and totally disabled. Dr. Walker noted that the claim has been held compensable for the following conditions: low back strain, ankle sprain, left knee sprain on two separate occasions, hematoma of the hand, electrocution, and

headaches. Dr. Walker found that Mr. Noe sustained a 31% whole person impairment as a result of his compensable injuries. On June 2, 2008, Dr. Miller performed a psychiatric independent medical evaluation, with particular attention paid to any psychiatric effects that may have resulted from the electrocution injury. Dr. Miller recommended a 0% psychiatric permanent partial disability award. He also found that Mr. Noe does not have any psychiatric or neuropsychological consequences related to the electrocution injury. On October 8, 2009, the Permanent Total Disability Review Board stated in its final recommendation that Mr. Noe failed to meet the 50% whole person impairment threshold required for further consideration of a permanent total disability award pursuant to West Virginia Code § 23-4-6(n)(1) (2005). The Permanent Total Disability Review Board found that the evaluations by Drs. Walker and Miller presented the most current and accurate assessment of the amount of Mr. Noe's whole person impairment. The Permanent Total Disability Review Board then found that Mr. Noe suffered a total whole person impairment of 31%.

In its Order affirming the claims administrator's October 21, 2009, decision, the Office of Judges held that because Mr. Noe failed to meet the statutory 50% whole person impairment threshold, his application for permanent total disability benefits must be denied. Mr. Noe disputes this finding and asserts that the evidence of record demonstrates that he is entitled to further consideration of a permanent total disability award.

Pursuant to West Virginia Code § 23-4-6(n)(1), in order to apply for a permanent total disability award, a claimant must have been awarded a sum totaling 50% in permanent partial disability awards or 35% in statutory awards; after meeting this requirement, the Permanent Total Disability Review Board must evaluate the claimant and make a finding that he has sustained a 50% or more whole person impairment or 35% in statutory disability awards in order to be eligible for further consideration of a permanent total disability award.

As noted by the Office of Judges, the function of the Permanent Total Disability Review Board is to determine whether a claimant has met the statutory threshold for further consideration of a permanent total disability award. The Permanent Total Disability Review Board found that Mr. Noe failed to meet the 50% threshold contained in West Virginia Code § 23-4-6(n)(1), and the Office of Judges found that the Permanent Total Disability Review Board's determination was not made in error. The Office of Judges further found that the reports of Drs. Walker and Miller, on which the Permanent Total Disability Review Board relied, were persuasive. The Board of Review reached the same reasoned conclusion in its decision of February 2, 2011. We agree with the reasoning and conclusions of the Board of Review.

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: October 2, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Margaret L. Workman

Justice Thomas E. McHugh