

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

October 31, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

VIRGIL V. ADKINS, Petitioner

vs.) **No. 11-0401** (BOR Appeal No. 2044930)
(Claim No. 2003010373)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
CITY OF HUNTINGTON, Respondent**

MEMORANDUM DECISION

Petitioner Virgil V. Adkins, by Maria Goldcamp¹, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. The City of Huntington, by Scott Sheets, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated February 16, 2011, in which the Board affirmed a July 23, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's July 5, 2007, decision granting Mr. Adkins a 0% permanent partial disability award for bilateral knee sprain/strain and closing the claim for permanent partial 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. Adkins alleges that he injured his knees while employed as a firefighter with the City of Huntington. On May 22, 2003, Dr. Bachwitt performed an independent medical evaluation

¹ On July 13, 2011, Ms. Goldcamp withdrew from the representation of Mr. Adkins, and he is now represented by Michael Davenport. The petition and appendix submitted by Ms. Goldcamp remain the only documents of record filed by Petitioner.

and found that the normal aging process could account for the degenerative changes Mr. Adkins was currently experiencing in his knees. On June 6, 2007, following the evaluation by Dr. Bachwitt, the claim was held compensable for bilateral knee sprain/strain. On June 11, 2007, Dr. Bailey performed an independent medical evaluation and diagnosed Mr. Adkins with chronic bilateral knee pain as a result of bilateral knee osteoarthritis and two total knee replacements for each knee. She agreed with Dr. Bachwitt and found that Mr. Adkins's complaints are a direct result of osteoarthritis due to the normal aging process, and are unrelated to Mr. Adkins's work as a firefighter. Based on the compensable diagnosis of bilateral knee sprain/strain and the finding that Mr. Adkins's complaints are related to severe osteoarthritis, Dr. Bailey recommended a 0% permanent partial disability award. On February 18, 2008, Dr. Guberman performed an independent medical evaluation under the apparent assumption that osteoarthritis was a compensable component of the claim, and recommended a 51% permanent partial disability award for osteoarthritis of both knees. On May 28, 2009, the Board of Review remanded the claim to the Office of Judges and extended the time frame for submitting additional evidence, with specific instructions that supplemental reports apportioning between the compensable and non-compensable components of the claim be submitted by the parties. On August 11, 2009, Dr. Guberman authored a supplemental report and was apparently still under the impression that osteoarthritis was a compensable component of the claim. He recommended that Mr. Adkins be granted a 44% permanent partial disability award for osteoarthritis and attributed the remainder of his prior recommendation to non-compensable conditions.

On July 23, 2010, the Office of Judges affirmed the July 5, 2007, claims administrator's decision granting a 0% permanent partial disability award, and also affirmed an October 27, 2008, Order of the Office of Judges, which affirmed the July 5, 2007, claims administrator's decision. In its Order, the Office of Judges found that osteoarthritis is not a compensable component of the claim, and that Dr. Guberman's recommendations are not credible because both of his recommendations are based on the assumption that osteoarthritis is a compensable component. The Office of Judges then found that the other two independent medical evaluations of record fail to corroborate that there is any permanent impairment attributable to the compensable diagnosis of bilateral knee sprain/strain. Finally, the Office of Judges found that Dr. Bailey properly calculated Mr. Adkins's amount of permanent impairment based on the compensable diagnosis of bilateral knee sprain/strain, and in so doing found that Mr. Adkins has sustained a 0% whole person impairment as a result of his compensable injuries. The Board of Review reached the same reasoned conclusions in its decision of February 16, 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 31, 2012

CONCURRED IN BY:

Justice Robin J. Davis
Justice Brent D. Benjamin
Justice Thomas E. McHugh

DISSENTING:

Chief Justice Menis E. Ketchum
Justice Margaret L. Workman