

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

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

JOHNNIE L. BRAGG, Petitioner

vs.) **No. 11-0434** (BOR Appeal No. 2044968)
(Claim No. 2002035557)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
BANDMILL COAL CORPORATION, Respondent**

MEMORANDUM DECISION

Petitioner Johnnie L. Bragg, 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 Gary Mazezka, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated February 18, 2011, in which the Board affirmed an August 24, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's July 23, 2009, decision granting Mr. Bragg a 4% permanent partial disability award for injuries to his lumbar spine. 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. Bragg was employed as a heavy equipment operator with Bandmill Coal Corporation. On December 26, 2001, he injured his lower back when he slipped on the bottom step of a rock truck. Mr. Bragg is seeking a permanent partial disability award of 8% for his lower back injury based on a June 9, 2008, independent medical evaluation performed by Dr. Carlson. After the examination by Dr. Carlson, Dr. Bachwitt performed an independent medical evaluation on May 7, 2009, and found that Mr. Bragg has an 8% whole person impairment of his lumbar spine, with half of the impairment attributable to preexisting degenerative changes. He

therefore recommended a 4% permanent partial disability award for the December 26, 2001, lumbar spine injury. On April 23, 2010, Dr. Jin performed an independent medical evaluation and found that Mr. Bragg has a 16% whole person impairment of his lumbar spine, with one-fourth of the impairment attributable to the work-related injury. Dr. Jin recommended a 5% permanent partial disability award. Dr. Jin disagreed with Dr. Carlson's recommendation and found that he failed to address the degenerative changes that predated the compensable injury.

In its Order reversing the July 23, 2009, claims administrator's decision, the Office of Judges held that Mr. Bragg is entitled to a 5% permanent partial disability award for his lumbar spine injury. The Office of Judges found that Drs. Bachwitt and Jin apportioned for preexisting degenerative changes, while Dr. Carlson did not, and that Dr. Carlson's failure to apportion causes his opinion to be awarded less evidentiary weight. The Office of Judges then found that the opinions of Drs. Bachwitt and Jin are similar, and also found that their opinions are of equal evidentiary weight. In accordance with West Virginia Code § 23-4-1g (2003), the Office of Judges held that Mr. Bragg is entitled to the 5% permanent partial disability award recommended by Dr. Jin, rather than the 4% award recommended by Dr. Bachwitt, because Dr. Jin's recommendation better supports Mr. Bragg's position. The Board of Review reached the same reasoned conclusion in its decision of February 18, 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:

Chief Justice Menis E. Ketchum

Justice Robin J. Davis

Justice Margaret L. Workman

Justice Thomas E. McHugh

Justice Brent D. Benjamin, Disqualified