

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

May 24, 2013

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

CLINTON A. MOONEY,
Claimant Below, Petitioner

vs.) **No. 11-0516** (BOR Appeal No. 2045063)
(Claim No. 2002019145)

U.S. STEEL MINING COMPANY, LLC,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Clinton A. Mooney, by Reginald Henry, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. U.S. Steel Mining Company, by Howard Salisbury Jr., its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated February 24, 2011, in which the Board affirmed a September 17, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's December 7, 2009, decision denying Mr. Mooney's request for permanent total disability benefits. The Court has carefully reviewed the records, written arguments, and appendices contained in the briefs, and the case is mature for consideration.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Rules of Appellate Procedure.

Mr. Mooney filed an application for permanent total disability benefits on May 6, 2002, after sustaining multiple work-related injuries over the course of several years. Mr. Mooney has undergone multiple independent medical evaluations in order to determine the amount of permanent impairment attributable to his compensable injuries. On November 21, 2005, Dr. Guberman performed an independent medical evaluation and found that Mr. Mooney sustained 5% whole person impairment for injuries to his jaw and mandible, 14% for injuries to his left knee, and 4% for injuries to his left ankle. Factoring in prior permanent partial disability awards

for occupational pneumoconiosis totaling 25%, Dr. Guberman found that Mr. Mooney sustained 41% whole person impairment as a result of his compensable injuries. On July 25, 2006, Dr. Mukkamala performed an independent medical evaluation and found that Mr. Mooney sustained 3% whole person impairment for injuries to his jaw and mandible, 3% for injuries to his left knee, and 4% for injuries to his left ankle. Dr. Mukkamala also factored in the prior permanent partial disability awards for occupational pneumoconiosis totaling 25%, and found that Mr. Mooney sustained 33% whole person impairment as a result of his compensable injuries. On February 24, 2009, Dr. Smith examined Mr. Mooney and found that he sustained 12% whole person impairment as a result of the injuries to his mandible, based on his persistent complaints of pain. On November 25, 2009, the Permanent Total Disability Review Board stated in its final recommendations that Mr. Mooney failed to meet the whole person impairment threshold required for further consideration of permanent total disability benefits, pursuant to West Virginia Code § 23-4-6(n)(1) (1999). The Permanent Total Disability Review Board found that Mr. Mooney sustained 4% whole person impairment for the injuries to his left ankle; 3% whole person impairment for the injuries to his left knee; 12% whole person impairment for the injuries to his mandible; and 0% whole person impairment for occupational pneumoconiosis, based on the results of a November 13, 2001, spirometry study. The Permanent Total Disability Review Board then found that Mr. Mooney suffered a total whole person impairment of 19%.

In its Order affirming the claims administrator's December 7, 2009, decision, the Office of Judges held that Mr. Mooney failed to meet the statutory whole person impairment threshold necessary for further consideration of permanent total disability benefits, pursuant to West Virginia Code § 23-4-6(n)(1). Mr. Mooney disputes this finding and asserts that the evidence of record demonstrates that he sustained a sufficient amount of whole person impairment necessary to meet the statutory threshold.

The Office of Judges gave significant consideration to the evaluations of Dr. Mukkamala and Dr. Smith. The Office of Judges found that the evidence of record demonstrates that Mr. Mooney sustained 4% whole person impairment as a result of his left ankle sprain. Further, the Office of Judges found that Mr. Mooney sustained 3% whole person impairment as a result of his left knee injury, based on the opinion of Dr. Mukkamala. The Office of Judges noted that Dr. Guberman found evidence of ligament laxity, while Dr. Mukkamala did not, and afforded more weight to the opinion of Dr. Mukkamala because he examined Mr. Mooney while Dr. Guberman performed a records review. The Office of Judges found that Dr. Smith's recommendation of 12% whole person impairment for injuries to the mandible is the most persuasive. The Office of Judges then found that even if Mr. Mooney's prior 25% permanent partial disability award for occupational pneumoconiosis is considered, he still fails to meet the necessary whole person impairment threshold. The Board of Review reached the same reasoned conclusions in its decision of February 24, 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: May 24, 2013

CONCURRED IN BY:

Chief Justice Brent D. Benjamin

Justice Robin J. Davis

Justice Margaret L. Workman

Justice Allen H. Loughry II

DISSENTING:

Justice Menis E. Ketchum