

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

June 12, 2013
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

ARTHUR R. HARDY,
Claimant Below, Petitioner

vs.) **No. 11-1148** (BOR Appeal No. 2045315)
(Claim No. 2003005947)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER**
Commissioner Below, Respondent

and

M & H TRUCKING, INC.,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Arthur R. Hardy, by John C. Blair, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. The West Virginia Office of Insurance Commissioner, by David L. Stuart, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated July 13, 2011, in which the Board reversed an October 26, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's May 5, 2009, denial of Mr. Hardy's request to reopen his claim for an additional permanent partial disability award. 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. Hardy was in the employment of M & H Trucking on July 22, 2002, when, while attempting to put oil in his truck, he slipped and fell injuring his back. He was diagnosed with an acute lumbar sprain which was found compensable by the claims administrator on August 26, 2002. On December 31, 2003, Mr. Hardy was given a 14% permanent partial disability award for the injury to his lumbar and cervical spine. The award was based on the evaluation of Dr. Padmanaban. Mr. Hardy protested the amount of the award, arguing that the independent medical evaluation performed on June 4, 2004, by Dr. Carlson, who rated Mr. Hardy at 25% whole person impairment, should be the basis for his permanent partial disability award. Instead, on July 14, 2005, the Office of Judges, based on an evaluation by Dr. Landis, reduced the permanent partial disability award to 11%. Mr. Hardy appealed but the Order was affirmed by the Board of Review. Finally, his petition for appeal was refused by this Court on February 27, 2008.

On December 31, 2008, five years after the date of his initial award, Mr. Hardy filed an application to reopen his claim on a permanent partial disability basis. In support of his application, Mr. Hardy attached the June 4, 2004, independent medical evaluation of Dr. Carlson. On May 5, 2009, the claims administrator denied Mr. Hardy's application for reopening because the evaluation of Dr. Carlson was not new evidence. Mr. Hardy protested this decision and underwent an additional independent medical evaluation on July 7, 2010, by a chiropractor, Dr. Poletajev, who stated that Mr. Hardy had a 43% whole person impairment rating and that his condition had progressed since the initial award. The Office of Judges reversed the claims administrator on October 26, 2010, based on the evaluation by Dr. Poletajev, and granted Mr. Hardy's request for reopening. But this Order was reversed and vacated by the Board of Review on July 13, 2011, leading to this appeal.

The claims administrator, under West Virginia Code § 23-5-3 (2009), is permitted to deny a claimant's request to reopen a claim if the application "fails to establish a prima facie cause for reopening the claim." A claimant's application for reopening will not establish a prima facie cause if it does not "disclose a progression or aggravation" of the claimant's condition or it does not present new facts "which were not previously considered" in the adjudication of the claim.

The Office of Judges found that Mr. Hardy was entitled to reopen his claim because the evaluation of Dr. Poletajev evidenced a progression of Mr. Hardy's condition.

The Board of Review held that the decision of the Office of Judges was clearly wrong in using the evaluation of Dr. Poletajev as the basis for reopening Mr. Hardy's claim. The Board of Review found that Mr. Hardy's application for reopening his claim was based on the June 4, 2004, evaluation of Dr. Carlson. The Board of Review found that because Dr. Carlson's report was in the record of the initial permanent partial disability determination, the application did not disclose facts "which were not previously considered," according to West Virginia Code § 23-5-3. The Board of Review, further, held that Dr. Poletajev's report was not relevant because it was not included in Mr. Hardy's application.

We agree with the reasoning and conclusions of the Board of Review. The Office of Judges was clearly wrong in using the evaluation of Dr. Poletajev as the basis for Mr. Hardy's

request to reopen his claim. West Virginia Code § 23-5-3 clearly states that the application must establish a prima facie cause for reopening and that the claims administrator can refuse to reopen if the application does not disclose either a progression, an aggravation, or new facts. Mr. Hardy did not include the evaluation of Dr. Poletajev in his application. The report of Dr. Carlson had been previously considered and did not disclose a progression or an aggravation. Mr. Hardy's application failed to establish a prima facie cause for reopening and the claims administrator was permitted to deny his request for reopening.

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: June 12, 2013

CONCURRED IN BY:

Chief Justice Brent D. Benjamin
Justice Robin J. Davis
Justice Margaret L. Workman

DISSENTING:

Justice Menis E. Ketchum
Justice Allen H. Loughry