

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

ROGER L. HOLSTINE,
Claimant Below, Petitioner

FILED
October 4, 2013
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) **No. 12-0052** (BOR Appeal No. 2046365)
(Claim No. 2004052190)

WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER
Commissioner Below, Respondent

and

TONY WHITE,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Roger L. Holstine, by G. Patrick Jacobs, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. The West Virginia Office of Insurance Commissioner, by Brandolyn N. Felton, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated December 21, 2011, in which the Board affirmed an August 25, 2011, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's September 8, 2010, decision denying a reopening of the claim for temporary 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. Holstine was allegedly injured when a rock fell and knocked him down while he was working as a roof bolter. The claim was held compensable for lumbar sprain, thoracic sprain, and

shoulder sprain. The Office of Judges affirmed the claims administrator's decision, and held that Mr. Holstine's evidentiary presentation fails to establish a prima facie case for reopening the claim for temporary total disability benefits in conformity with the decision in *Bevins v. West Virginia Office of Ins. Comm'r*, 227 W.Va. 315, 708 S.E. 2d 509 (2010). On appeal, Mr. Holstine disagrees and asserts that the Office of Judges misinterpreted *Bevins* as requiring him to establish the medical foundation for the granting of the Social Security Disability Award and further requiring him to establish the overall basis for the granting of the Social Security Disability. Mr. Holstine argues that the basis of these burdens of proof cannot be found in *Bevins*. The West Virginia Office of Insurance Commissioner maintains that Mr. Holstine has failed to meet his burden of proof, and that the evidence does not establish that the requested reopening was necessary to replace his wages due to his compensable injury.

The Office of Judges concluded that the evidence, including the Social Security Administration's decision dated August 5, 2005, is not conclusive in establishing that the medical foundation for the granting of the Social Security Disability award was the compensable injury of May 18, 2004. It further concluded that Mr. Holstine's evidence failed to satisfy the standards set forth in *Bevins*, which states that a Claimant may be awarded temporary total disability benefits if he or she is eligible to receive an award based upon a progression or aggravation of the compensable injury or other medical evidence as allowed under West Virginia Code §§ 23-4-1c(b-c) (2009), 23-4-1c(e) (2009), and 23-4-16(b) (2005). Ultimately, the Office of Judges denied the reopening of the claim for temporary total disability benefits. The Board of Review reached the same reasoned conclusions in its decision of December 21, 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 4, 2013

CONCURRED IN BY:

Chief Justice Brent D. Benjamin
Justice Robin J. Davis
Justice Allen H. Loughry II

DISSENTING:

Justice Margaret L. Workman
Justice Menis E. Ketchum