

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

JERRY L. HENDRICKS, Petitioner

vs.) No. 101122 (BOR Appeal No. 2044130)
(Claim No. 2001004246)

FILED

October 26, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER, and
BAYLOR MINING, INC., Respondent

MEMORANDUM DECISION

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated August 10, 2010, in which the Board affirmed a February 17, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's July 25, 2007 Order, which denied Mr. Hendricks a permanent total disability award. The appeal was timely filed by the petitioner, and the West Virginia Office of Insurance Commissioner filed a response. The Court has carefully reviewed the records, written arguments, and appendices contained in the petition, and the case is mature for consideration.

Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this matter is appropriate for consideration under the Revised Rules. Having considered the parties' submissions 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.

The Board of Review affirmed the Office of Judge's Order, which denied Mr. Hendricks a permanent total disability award. Mr. Hendricks argues that the Board of Review wrongly assumed that, because his last compensable injury yielded no impairment, his exertion level should not be reduced to below sedentary. Mr. Hendricks states that this conclusion fails to account for his later development of carpal tunnel syndrome as well as the progression of his prior compensable injuries.

Mr. Hendricks also argues that Dr. Paul Forberg's report should not have been

rejected due to its equivocality. Mr. Hendricks asserts that Dr. Forberg found him permanently and totally disabled. Also, Mr. Hendricks states that the Board of Review found that his psychological deterioration is due to non-compensable factors, which is a conclusion that is not medically supported.

Finally, Mr. Hendricks claims that the Board of Review failed to ascribe sufficient weight to his receipt of a Social Security disability award, which was predicated in large part upon his compensable injuries.

The Office of Judges, however, relied upon the reports of Jukey Dotson, Casey Vass, and Mark Hileman in concluding that Mr. Hendricks is capable of performing work characterized as “light.” (Feb. 17, 2010 Office of Judges Order, p. 13-14.) Mr. Hileman’s report was rendered on February 21, 2009, and Mr. Vass’s November 10, 2006 report is not so dated so as to be inaccurate. *Id.* at p. 7, 9. These reports concluded that Mr. Hendricks is capable of performing at the light exertion range; accordingly, the Office of Judges found that a preponderance of the evidence supports the conclusion that Mr. Hendricks is not permanently and totally disabled from an orthopedic standpoint. *Id.* at p. 17.

Furthermore, Dr. Forberg’s report was found to be equivocal in nature because it concluded that Mr. Hendricks is permanently and totally disabled, but it also noted that a modified work assignment would be appropriate under certain circumstances. *Id.* at p. 13. Due to this disparity, the Board of Review ascribed it less weight, and this Court will not conduct a *de novo* re-weighing of the evidentiary record. W. Va. Code § 23-5-15(c).

Lastly, with respect to Mr. Hendricks’s claim that his Social Security disability award should have been ascribed more weight in the determination of whether he is permanently and totally disabled, this Court notes that, while receipt of a Social Security disability award may be “persuasive evidence of the onset of [permanent total disability],” it is not conclusive. *Lambert v. Workers’ Comp. Div.*, 211 W. Va. 436, 448, 566 S.E.2d 573, 585 (2002). Rather, the Office of Judges found that the fully developed vocational rehabilitation record indicated that Mr. Hendricks is capable of working at the light exertional level and that he has mild psychological impairment attributable to his compensable condition. (Feb. 17, 2010 Office of Judges Order, pp. 16-17.) Accordingly, the Office of Judges affirmed the denial of a permanent total disability award, and the Board of Review reached the same reasoned conclusion in affirming the Office of Judges in its August 10, 2010 decision.

For the foregoing reasons, we find that the decision of the Board of Review is not in clear violation of constitutional or statutory provision, clearly the result of erroneous conclusions of law, or based upon the Board’s material misstatement or mischaracterization of particular components of the evidentiary record. Therefore, the denial of a permanent total disability award is affirmed.

Affirmed.

ISSUED: October 26, 2011

CONCURRED IN BY:

Chief Justice Margaret Workman

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Menis E. Ketchum

Justice Thomas E. McHugh