

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

MARVIN ROBERTS, Petitioner

December 16, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) No. 101248 (BOR Appeal No. 2044300)
(Claim No. 950019550)

WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
GUDEKAUF CORP., Respondent

MEMORANDUM DECISION

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated September 2, 2010, in which the Board affirmed a February 23, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's denial of Mr. Roberts' request for additional permanent partial disability based upon Dr. Anil C. Nalluri. The appeal was timely filed by the petitioner and a response was filed by the West Virginia Office of Insurance Commissioner. 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 petition, response, 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 Order Judges Order granting Mr. Roberts 2% permanent partial disability based upon Dr. Brian Quigley's independent medical examination. Mr. Roberts asserts the Office of Judges improperly denied 22% permanent partial disability as recommended by Dr. Nalluri in his separate independent medical examination. This assertion is based upon Mr. Roberts' wife being present during Dr.

Nalluri's examination and not being present during Dr. Quigley's and Mr. Roberts' failure to have any improvement in his chronic pain. The Office of Insurance Commissioner responds the difference between the suggested impairment ratings of 2% and 22% necessitates a closer look at the reports. Dr. Nalluri's impairment rating would necessitate intensive outpatient treatment, day hospital, and occasional to frequent inpatient hospitalizations; none of these elements are present in Mr. Roberts medical records.

The Office of Judges reviewed the reports submitted by both Drs. Quigley and Nalluri and found the history taken by each greatly differed from each other and review of other reports of record were critical. (February 23, 2010 Office of Judges Order, p. 8). Therefore, it reviewed the notes of Dr. Patricia Bailey who found Mr. Roberts was "making progress", noted improvement to the point that she was hopeful the twice a month psychotherapy would be reduced to once a month. *Id.* The Office of Judges held "[i]t is unlikely that the claimant had a total relapse in the two months between his visits to Dr. Quigley and Dr. Nalluri." *Id.* It further held Mr. Roberts suffers from significant non-compensable physical conditions and the psychological problems were compounded by these non-compensable factors. *Id.*, p. 9. The Office of Judges, too, found no basis for awarding Mr. Roberts any additional permanent partial disability for his depression or for disputing the Claims Administrator's findings. The Board of Review reached the same reasonable conclusion in affirming the Office of Judges in its decision of September 2, 2010.

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 is based upon the Board's material misstatement or mischaracterization of particular components of the evidentiary record. Therefore, the Court affirms the Board of Review Order denying an additional award of permanent partial disability for Mr. Roberts psychiatric component.

Affirmed.

ISSUED: December 16, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Thomas E. McHugh

DISSENTING:

Justice Menis E. Ketchum