

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

October 2, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

DANNY W. BOWLES, Petitioner

**vs.) No. 11-0337 (BOR Appeal No. 2044874)
(Claim No. 2006029550)**

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
PINNACLE MINING COMPANY, Respondent**

MEMORANDUM DECISION

Petitioner Danny W. Bowles, by Gregory Prudich, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Pinnacle Mining Company, by H. Dill Battle III, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated January 24, 2011, in which the Board affirmed a July 23, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's February 26, 2008, decision denying Mr. Bowles's request for a permanent total disability award based on a finding that he is able to engage in substantial gainful employment. The Court has carefully reviewed the records, written arguments, and appendices contained in the petition, and the case is mature for consideration.

Having considered the petition 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.

Mr. Bowles was most recently employed as an underground coal miner with Pinnacle Mining Company. On February 18, 2006, Mr. Bowles sustained a serious injury to his left leg and foot that ultimately resulted in a left below-the-knee amputation, and for which Mr. Bowles received a 45% permanent partial disability award. Mr. Bowles also previously received a 15% permanent partial disability award for occupational pneumoconiosis. On August 21, 2006, Mr. Bowles filed a request for permanent total disability benefits, and was determined to have met

the 50% statutory threshold required for consideration of a permanent total disability award. Therefore, the issue on appeal is whether Mr. Bowles is capable of engaging in substantial gainful employment. On July 28, 2006, Dr. Mukkamala performed an independent medical evaluation and concluded that Mr. Bowles should be able to return to work in any occupation that does not involve prolonged walking and frequent stooping or crawling. On July 31, 2008, Dr. Carlson performed an independent medical evaluation and stated that Mr. Bowles is permanently and totally disabled and is not a candidate for vocational rehabilitation. Ms. Lisa Goudy performed a vocational assessment on October 1, 2008, and found that Mr. Bowles is permanently and totally disabled. Ms. Goudy further found that he could not be successfully rehabilitated or retrained. In a July 22, 2008, deposition, rehabilitation consultant Mr. Mark Hileman stated that Mr. Bowles is capable of performing at the light physical demand level as long as he limits the amount of time that he spends walking and standing. On August 14, 2008, vocational consultant Mr. Arthur Lilly stated in a deposition that Mr. Bowles is capable of working at the light physical demand level.

In its Order affirming the claims administrator's February 26, 2008, decision, the Office of Judges held that the preponderance of the evidence indicates that Mr. Bowles is capable of engaging in substantial gainful employment at the light physical demand level, and is therefore not entitled to a permanent total disability award. Mr. Bowles disputes this finding and asserts that the evidence of record demonstrates that he is unable to engage in substantial gainful employment.

Pursuant to West Virginia Code § 23-4-6(n)(2) (2005), in order to receive a permanent total disability award, a claimant must be unable to engage in substantial gainful employment. The Office of Judges found that the record does not indicate that Mr. Bowles's ability to work has been reduced below the sedentary physical demand level. The Office of Judges noted that in addition to the vocational and medical evaluations indicating that Mr. Bowles is capable of engaging in substantial gainful employment, the treatment notes from the physician who treated him following the February 18, 2006, injury indicate that Mr. Bowles underwent a steady improvement and do not suggest that he is incapable of returning to some form of gainful employment. Mr. Bowles asserts that he developed a psychiatric condition following the February 18, 2006, accident and that this contributes to his inability to engage in gainful employment. As noted by the Office of Judges, a psychiatric condition has not been added as a compensable component in this claim. The Office of Judges found that the psychiatric evidence of record demonstrates that Mr. Bowles does not suffer from a psychiatric disability that would prevent him from returning to work. The Board of Review reached the same reasoned conclusion in its decision of January 24, 2011. We agree with the reasoning and conclusions of both the Office of Judges and 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 2, 2012

CONCURRED IN BY:

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Thomas E. McHugh

DISSENTING:

Chief Justice Menis E. Ketchum

Justice Margaret L. Workman