

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

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

ROGER D. DAMRON,
Claimant Below, Petitioner

vs.) **No. 11-1166** (BOR Appeal No. 2045589)
(Claim No. 2001025485)

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

and

BROWNING FORK COAL SERVICES,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Roger D. Damron, 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 20, 2011, in which the Board affirmed a February 11, 2011, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's September 23, 2010, denial of Mr. Damron's application to reopen his claim on a permanent partial disability basis because there was no documentation to substantiate reopening filed with the request. 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. Damron was an employee of Browning Coal Services on September 21, 2000, when he twisted his left leg. He was diagnosed with an acute left knee sprain. The claim was found compensable for a sprained left knee on December 1, 2000. Mr. Damron was granted a 1% permanent partial disability award for the injury to his left knee on August 11, 2005, but this percentage was increased to 3% by the Office of Judges on April 2, 2007. On August 10, 2010, almost five years since the initial grant of permanent partial disability, Mr. Damron submitted an application to the claims administrator to reopen his claim on a permanent partial disability basis. The application did not include any evidence of progression or aggravation of Mr. Damron's injury and the claims administrator denied the request on September 23, 2010, because it failed to include documentation to substantiate the request for reopening. The decision was affirmed by the Office of Judges on February 11, 2011, and by the Board of Review on July 20, 2011, leading to this appeal.

Following the September 23, 2010, denial of the request for reopening, Mr. Damron was evaluated by Dr. Poletajev, who stated that there was a progression in Mr. Damron's condition.

The Office of Judges determined that the report of Dr. Poletajev established a prima facie cause for reopening the claim on a permanent partial disability basis because it showed a progression or aggravation of Mr. Damron's condition. The Office of Judges, however, found that such a showing was time barred because Mr. Damron had failed to submit the evidence within five years of August 11, 2005, when he was initially granted a permanent partial disability award, as required under West Virginia Code § 23-4-16(a)(2) (2005). The Office of Judges found that because Mr. Damron had failed to file a substantiated application for reopening within the statutory time limit, future requests for permanent partial disability benefits under this claim were time barred. The Board of Review affirmed the Order of the Office of Judges.

We agree with the conclusion of the Board of Review. Mr. Damron's application failed to establish a prima facie cause for reopening because it did not disclose a progression or aggravation of his condition. West Virginia Code § 23-5-3 (2009). Mr. Damron has not made any other substantiated requests within the five year time limit set out in West Virginia Code § 23-4-16(a)(2), and any future request for reopening on a permanent partial disability basis are time barred and shall be refused.

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

Justice Menis E. Ketchum
Justice Allen H. Loughry II