

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

April 14, 2014

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

WESLEY R. STACY,
Claimant Below, Petitioner

vs.) **No. 12-1283** (BOR Appeal No. 2047105)
(Claim No. 2009085662)

A T MASSEY COAL COMPANY, INC.,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Wesley R. Stacy, by John C. Blair, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. A T Massey Coal Company, Inc., by Bradley A. Crouser, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated September 12, 2012, in which the Board affirmed a March 15, 2012, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's November 15, 2010, decision granting Mr. Stacy a 0% permanent partial disability award. 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. Stacy worked as a maintenance foreman for A T Massey Coal Company. On March 18, 2009, he was using a blow torch when a piece of hot metal fell in his right ear. The claim was held compensable for an open wound of the ear drum, foreign body in the ear, and unspecified perforation tympanic. Joseph B. Touma, M.D., then performed a tympanoplasty on Mr. Stacy's right ear drum. Following the surgery, Dr. Touma found that Mr. Stacy showed improvement and had no pain or drainage in the right ear. P. C. Corro, M.D., then evaluated Mr. Stacy. Dr. Corro based his evaluation on an audiological examination performed by the audiologist Randy

Walker. Dr. Corro found that speech discrimination was 100% in the right ear. However, Dr. Corro found that there was some conductive component in his right ear and that Mr. Stacy's right ear hearing could still improve closer to the normal hearing of the left ear. After eight months, Mr. Walker performed another audiological examination and Dr. Corro issued a second evaluation of Mr. Stacy's hearing impairment. Dr. Corro again found that Mr. Stacy had a 100% speech discrimination score. Dr. Corro determined that Mr. Stacy had no whole person impairment for hearing loss in the right ear. On November 15, 2010, the claims administrator granted Mr. Stacy no permanent partial disability award based on Dr. Corro's report. Dr. Touma then evaluated Mr. Stacy and found that he had 1.98% whole person impairment for hearing loss of the right ear. Dr. Touma also found that Mr. Stacy had 76% right speech discrimination. On March 15, 2012, the Office of Judges affirmed the claims administrator's decision. The Board of Review then affirmed the Order of the Office of Judges on September 12, 2012, leading Mr. Stacy to appeal.

The Office of Judges concluded that Dr. Corro's opinion regarding Mr. Stacy's impairment was more consistent with the weight of the evidence of record and was more reliable than the opinion of Dr. Touma. The Office of Judges determined that the findings of Dr. Corro were based on an audiology report which had good testing reliability. The Office of Judges determined that the frequency scores for air and bone conduction in the right ear were consistent with Dr. Corro's finding of no monaural hearing impairment. The Office of Judges also found that the speech discrimination score was consistent with Dr. Corro's finding of no impairment. By comparison, the Office of Judges found that it was not clear, considering the audiogram testing, how Dr. Touma arrived at his 1.98% impairment rating. The Office of Judges determined that neither the frequency scores nor the speech discrimination scores contained in Dr. Touma's report would entitle him to a 1.98% whole person impairment rating. The Office of Judge found that there did not appear to be any correlation between Dr. Touma's impairment recommendation and the radiogram results. The Board of Review then adopted the findings of the Office of Judges and affirmed its Order.

We agree with the conclusions of the Board of Review and the findings of the Office of Judges. Mr. Stacy has not demonstrated that he is entitled to a greater than 0% permanent partial disability award for hearing loss related to his right ear injury. Dr. Corro's report shows that Mr. Stacy has 0% whole person impairment for hearing loss. Dr. Corro's recommendation is consistent with the audiological evidence in the record and the remaining evidence in the record. The Office of Judges was within its discretion in relying on Dr. Corro's recommendation. Dr. Touma's impairment recommendation was not consistent with the audiological evidence in his report, and the Office of Judges provided sufficient justification to not rely on his opinion.

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: April 14, 2014

CONCURRED IN BY:

Chief Justice Robin J. Davis
Justice Margaret L. Workman
Justice Allen H. Loughry II

DISSENTING:

Justice Menis E. Ketchum

Justice Brent D. Benjamin, disqualified