

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

BRIAN S. WISE,
Claimant Below, Petitioner

vs.) **No. 18-0393** (BOR Appeal No. 2052237)
(Claim No. 2004051634)

MURRAY AMERICAN ENERGY, INC.,
Employer Below, Respondent

FILED
November 2, 2018

EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Brian S. Wise, by M. Jane Glauser, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Murray American Energy, Inc., by Denise D. Pentino and Aimee M. Stern, its attorneys, filed a timely response.

The issue on appeal is the amount of permanent partial disability resulting from the compensable conditions in the claim. The claims administrator issued an Order dated April 7, 2016, granting no additional permanent partial disability to Mr. Wise. The Workers' Compensation Office of Judges affirmed the claims administrator's decision on September 15, 2017. This appeal arises from the Board of Review's Final Order dated March 26, 2018, in which the Board affirmed the Order of the Office of Judges. 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. Wise, a coal miner, was working at Consolidation Coal's Shoemaker Mine (now Murray American Energy, Inc.'s Ohio County Mine) on June 1, 2004, when he suffered an injury to his hip while shoveling and picking up rocks. The claim was originally held compensable for sprain/strain of the hip and thigh. On February 18, 2005, the claims administrator granted Mr. Wise a 5% permanent partial disability award.

Lumbar sprain, herniated disc and intervertebral disc were subsequently added as compensable diagnoses in the claim. Mr. Wise underwent a partial medial facetectomy with partial hemilaminectomy and foraminotomy on the left from L3 to S1 to treat his compensable injuries. The claims administrator granted an additional 8% award, for a total of 13%, to Mr. Wise on October 24, 2011, based upon the secondary conditions in the claim. On February 11, 2016, failed low back surgery syndrome was added as a compensable diagnosis in the claim.

On March 31, 2016, Joseph Grady, M.D., performed an independent medical evaluation of Mr. Wise to determine the amount of his permanent impairment suffered as a result of the newly added compensable condition of failed low back surgery syndrome. Dr. Grady noted that Mr. Wise presented with complaints of persistent problems with lower back and lower leg pain. Dr. Grady concluded that all of the compensable conditions in this claim had reached maximum medical improvement. He further stated, "I do not expect resolution of his condition at this point. He is being managed medically and it is my expectation that will continue for the foreseeable future, but I believe he is plateaued with regards to his chronic condition." Dr. Grady placed Mr. Wise in Lumbar Category II of the American Medical Association's, *Guides to the Evaluation of Permanent Impairment* (4th ed 1993), which provides 12% impairment due to Mr. Wise's low back surgery from L3-4 through L5-S1. Dr. Grady found 5% impairment for Mr. Wise's decreased lumbar flexion and 2% impairment for his decreased lumbar extension. Dr. Grady combined the 7% impairment due to range of motion losses with the 12% impairment due to the spinal surgery, which resulted in an 18% whole person impairment. Dr. Grady then applied West Virginia Code of State Rules § 85-20 (2006), classifying Mr. Wise as Lumbar Category III due to his spinal surgery. Dr. Grady noted that West Virginia Code of State Rules § 85-20 (2006) Lumbar Category III provides a maximum impairment rating of 13%, and, therefore, he decreased Mr. Wise's impairment to 13%. Because Mr. Wise had previously been granted a 13% award in 2011, Dr. Grady opined that there should be no additional permanent partial disability award in this claim.

On April 7, 2016, the claims administrator issued an Order granting no additional permanent partial disability award to Mr. Wise based upon the findings of Dr. Grady. Mr. Wise protested the claims administrator's decision. Mr. Wise argued that Dr. Grady's impairment rating was premature because Mr. Wise was in need of additional treatment.

Mr. Wise continued to pursue medical treatment and additional evaluations to address his long standing, significant pain. The claims administrator, in an Order dated May 16, 2016, authorized Mr. Wise's request by David Lynch, M.D., for a referral to a pain clinic. By Order dated June 2, 2016, the claims administrator authorized an MRI of the lumbar spine. Mr. Wise was approved for a consultation with a pain clinic in an Order dated June 28, 2016. The claims administrator also authorized Mr. Wise's request for an L5-S1 interlaminar epidural. An additional epidural steroid injection request was granted on December 29, 2016. Following a request by Dr. Lynch, the claims administrator authorized a consultation for a spinal cord stimulator at the WVU Pain Clinic on March 30, 2017. During this time of treatment, Mr. Wise argued that he had not reached maximum medical improvement when he was evaluated by Dr. Grady on March 31, 2016.

On September 15, 2017, the Office of Judges affirmed the April 7, 2016, Order of the claims administrator. The Office of Judges concluded that Mr. Wise did not prove by a preponderance of the evidence that he was not at maximum medical improvement as found by Dr. Grady. The Office of Judges further concluded that Mr. Wise did not prove by a preponderance of the evidence that he has more than 13% permanent partial disability related to his injuries in this claim. Mr. Wise appealed the decision of the Office of Judges. On March 26, 2018, the Board of Review affirmed the final decision of the Office of Judges dated September 15, 2017. The Board also denied Mr. Wise's request for a remand of the claim.

After review, we agree with the reasoning and conclusions of the Office of Judges as affirmed by the Board of Review. Although Mr. Wise is undergoing continued treatment for pain management, the evidence supports Dr. Grady's opinion that the compensable conditions have reached a plateau. Mr. Wise has not met his burden of proving, by a preponderance of the evidence, that his compensable injury had not reached maximum medical improvement at the time of Dr. Grady's evaluation.

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: November 2, 2018

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Elizabeth D. Walker
Justice Paul T. Farrell sitting by temporary assignment
Justice Tim Armstead
Justice Evan H. Jenkins

Justice Allen H. Loughry II suspended and therefore not participating.