

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

February 4, 2014

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

ELMER J. BLAIR,
Claimant Below, Petitioner

vs.) **No. 11-0537** (BOR Appeal No. 2044972)
(Claim No. 2006025234)

MASON MINING, LLC,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Elmer J. Blair, by Samuel Hanna, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Mason Mining, LLC, by H. Dill Battle III, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated February 25, 2011, in which the Board affirmed an August 6, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's October 1, 2007, decision granting Mr. Blair a 3% 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. Blair was employed as an electrician with Mason Mining when he injured his lower back while lifting a tool bag on December 16, 2005. On January 25, 2006, the claim was held compensable for lumbar sprain/strain. Mr. Blair has undergone three independent medical evaluations to determine the amount of permanent impairment resulting from the compensable injury. On December 6, 2006, Dr. Mir found that Mr. Blair had 13% whole person impairment after placing him in Category III of West Virginia Code of State Rules § 85-20-Table C (2006). Dr. Mir then recommended a 3% permanent partial disability award after apportioning for a prior

10% permanent partial disability award. On October 13, 2009, Dr. Guberman found that Mr. Blair had 15% whole person impairment. He then apportioned for the prior 10% permanent partial disability award and found that Mr. Blair had 5% whole person impairment as a result of the compensable injury. Dr. Guberman also placed Mr. Blair in Category III of West Virginia Code of State Rules § 85-20-Table C, and adjusted his amount of whole person impairment to 10% because 5% does not fall within the 10-13% whole person impairment range mandated by Category III of West Virginia Code of State Rules § 85-20-Table C. Dr. Guberman then recommended an additional 7% permanent partial disability award after noting that Mr. Blair had already received a 3% permanent partial disability award for the compensable injury. On March 9, 2010, Dr. Bachwitt performed an independent medical evaluation and placed Mr. Blair in Category II of West Virginia Code of State Rules § 85-20-Table C. He then found that Mr. Blair was fully compensated through the prior 10% permanent partial disability award.

In its Order affirming the October 1, 2007, claims administrator's decision, the Office of Judges held that Mr. Blair is entitled to a 3% permanent partial disability award for the December 16, 2005, injury. Mr. Blair disputes this finding and asserts, per the opinion of Dr. Guberman, that he is entitled to an additional 7% permanent partial disability award.

The Office of Judges found that the preponderance of the evidence establishes that Mr. Blair was properly placed in Category III of West Virginia Code of State Rules § 85-20-Table C, as was found by Drs. Mir and Guberman. The Office of Judges then found that Dr. Guberman's method of apportioning for the prior 10% permanent partial disability award before applying West Virginia Code of State Rules § 85-20 (2006) permits a double recovery, and therefore relied on Dr. Mir's recommendation of a 3% permanent partial disability award for the December 16, 2005, injury. The Board of Review reached the same reasoned conclusions in its decision of February 25, 2011. We agree with the reasoning and conclusions of the 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: February 4, 2014

CONCURRED IN BY:

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

DISSENTING:

Justice Menis E. Ketchum