

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

January 14, 2014

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

ROBERT L. NOON,
Claimant Below, Petitioner

vs.) **No. 12-0555** (BOR Appeal No. 2046591)
(Claim No. 2010135998)

MEDFORD TRUCKING, LLC,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Robert L. Noon, by Patrick Kevin Maroney, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Medford Trucking, LLC, by Daniel G. Murdock, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated April 4, 2012, in which the Board affirmed an October 24, 2011, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's October 29, 2010, decision closing the claim on a temporary total disability benefits basis. 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. Noon was a truck driver for Medford Trucking, LLC. On May 19, 2010, Mr. Noon sustained a low back injury while trying to avoid a motor vehicle accident. X-rays taken after the injury revealed anterior and lateral osteophytosis and facet joint degenerative disease in his lumbar spine. But the claims administrator held his injury compensable. Mr. Noon also underwent an MRI at Charleston Area Medical Center which revealed mild degenerative disc disease and facet arthropathy. On October 19, 2010, Dr. Bachwitt performed an independent medical evaluation of Mr. Noon. He found that Mr. Noon has a lumbar strain which was

superimposed on pre-existing degenerative disc disease of the thoracic and lumbar spine. Dr. Bachwitt found that Mr. Noon had reached the maximum degree of medical improvement and required no additional treatment. On October 29, 2010, the claims administrator closed Mr. Noon's claim for temporary total disability benefits. Mr. Noon then came under the care of Dr. Cottrell and, after a conservative course of chiropractic treatment, Dr. Cottrell found that Mr. Noon was no longer improving. Dr. Cottrell found that Mr. Noon had degenerative disc disease which affected his right lower extremity. On October 24, 2011, the Office of Judges affirmed the claims administrator's decision. The Board of Review then affirmed the Order of the Office of Judges on April 4, 2012, leading Mr. Noon to appeal.

The Office of Judges concluded that Mr. Noon had reached the maximum degree of medical improvement and that he was not temporarily and totally disabled as a result of the compensable injury subsequent to Dr. Bachwitt's independent medical evaluation. The Office of Judges found that Mr. Noon's compensable injury was superimposed on pre-existing degenerative disc disease. The Office of Judges recognized that Mr. Noon continued to experience pain and weakness in his right leg. But the Office of Judges found that the medical evidence in the record suggested that Mr. Noon's symptoms were most likely due to his pre-existing degenerative condition. The Board of Review 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. Noon has not presented sufficient evidence to show that he continues to be temporarily and totally disabled as a result of his compensable injury. Mr. Bachwitt has not shown that he is entitled to additional temporary total disability benefits. The independent medical evaluation of Dr. Bachwitt shows that Mr. Noon has reached the maximum degree of medical improvement with respect to his compensable injury. The treatment notes of Dr. Cottrell show that Mr. Noon continues to experience pain in his back and weakness in his right leg. But Dr. Cottrell's report indicates that Mr. Noon's continuing symptoms, causing his disability, are related to his non-compensable degenerative condition.

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: January 14, 2014

CONCURRED IN BY:

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

Justice Brent D. Benjamin, not participating