

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

DORIS J. ORR,
Claimant Below, Petitioner

vs.) No. 100837 (BOR Appeal No. 2044056)
(Claim No. 980021440)

WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER,
Commissioner Below, Respondent

and

EAGLE CONVEX GLASS,
Employer Below, Respondent

FILED
June 9, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated June 8, 2010, in which the Board affirmed a January 25, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's January 1, 2007 Order, holding Ms. Orr fully compensated by a 5% permanent partial disability award previously granted for occupational pneumoconiosis. The appeal was timely filed by the petitioner, and a response was filed by the West Virginia Office of Insurance Commissioner ("WVOIC"). The Court has carefully reviewed the records, written arguments, and appendices contained in the petition, and the case is mature for consideration.

Pursuant to Revised Rule 1(d), this matter should be, and hereby is, set for consideration under the Revised Rules of Appellate Procedure. Having considered the parties' submissions and the relevant decision of the lower tribunal, the Court is of the opinion that the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the Court determines that there is no prejudicial error. This case does not present a new or significant question of law. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

The Board of Review affirmed the holding that Ms. Orr has been fully compensated by a prior 5% permanent partial disability award for occupational pneumoconiosis. Ms. Orr notes that blood gas studies performed at the East Ohio Regional Hospital on July 26, 2007 reveal 10% impairment, as interpreted by the Occupational Pneumoconiosis Board. Thus, she claims to be entitled to an additional 5% award for a total of 10% for occupational pneumoconiosis.

The Office of Judges, however, considered blood gas studies conducted on December 5, 2007, close to five months following the East Ohio Regional Hospital blood gas studies, and the testimony of the Occupational Pneumoconiosis Board. (Jan. 25, 2010 Office of Judges Order, p. 3.) Although the Occupational Pneumoconiosis Board did find that the East Ohio Regional Hospital tests suggested 10% impairment, the later-performed blood gas studies revealed normal findings. *Id.* The Occupational Pneumoconiosis Board testified that occupational pneumoconiosis is a permanent impairment that will not improve. *Id.* Because the later study shows normal blood gases, the East Ohio Regional Hospital results cannot be attributed to occupational pneumoconiosis. *Id.* at 4. Rather, those results would be attributable to some other cause or, potentially, normal variation.

Further, there is no x-ray evidence of occupational pneumoconiosis nor does Ms. Orr have pulmonary impairment that can be attributed to occupational pneumoconiosis. *Id.* The Occupational Pneumoconiosis Board concluded that Ms. Orr has been fully compensated by her prior 5% award. *Id.* Thus, the Office of Judges found Ms. Orr fully compensated by her prior 5% award, and the Board of Review reached the same reasoned conclusion in affirming the Office of Judges in its decision of June 8, 2010.

For the foregoing reasons, we find that the decision of the Board of Review is not in clear violation of constitutional or statutory provision, clearly the result of erroneous conclusions of law, or based upon the Board's material misstatement or mischaracterization of particular components of the evidentiary record. Therefore, the holding that Ms. Orr has been fully compensated by her prior 5% permanent partial disability award for occupational pneumoconiosis is affirmed.

Affirmed.

ISSUED: June 9, 2011

CONCURRED IN BY:
Chief Justice Margaret Workman
Justice Robin Jean Davis

Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh