

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

**DAVID SCOTT,
Claimant Below, Petitioner**

FILED
January 14, 2014
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) **No. 12-0739** (BOR Appeal No. 2046755)
(Claim No. 2011040170)

**PINE RIDGE COAL COMPANY,
Employer Below, Respondent**

MEMORANDUM DECISION

Petitioner David Scott, by Wendle Cook, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Pine Ridge Coal Company, by Henry C. Bowen, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated May 18, 2012, in which the Board affirmed a December 12, 2011, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's June 14, 2011, decision rejecting Mr. Scott's claim for Occupational Pneumoconiosis on a non-medical 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. Scott allegedly suffered exposure to the hazards of occupational pneumoconiosis while holding several positions at Pine Ridge Coal Company and with its predecessors. He filed a prior claim for occupational pneumoconiosis in 1989 that was denied since the Occupational Pneumoconiosis Board could not find evidence of occupational pneumoconiosis. On January 26, 1990, the Occupational Pneumoconiosis Board concluded that there was no evidence Mr. Scott had occupational pneumoconiosis. Dr. Rasmussen determined on September 23, 2009, that Mr. Scott had occupational pneumoconiosis. Dr. Vance opined on May 24, 2011, that Mr. Scott had occupational pneumoconiosis but was unsure when he had contracted it. The claims

administrator's decision rejected Mr. Scott's claim for occupational pneumoconiosis on a non-medical basis.

The Office of Judges affirmed the claims administrator's decision and held that Mr. Scott is not entitled to an evaluation before the Occupational Pneumoconiosis Board because Mr. Scott has not suffered any additional occupational exposure since March 20, 1987, which resulted in no diagnosis or finding of pulmonary impairment. Mr. Scott disagrees and asserts that the first time a diagnosis of occupational pneumoconiosis was made by a physician was in September of 2009 by Dr. Rasmussen, and therefore, his application filed on May 24, 2011, is well within the three year statute of limitations. Pine Ridge Coal Company maintains that the new claim was correctly denied since Mr. Scott has not suffered any additional exposure since the Occupational Pneumoconiosis Board found that there was no evidence of occupational pneumoconiosis in his prior claim.

The Office of Judges concluded that the preponderance of the evidence shows that Mr. Scott is not entitled to an evaluation by the Occupational Pneumoconiosis Board. Mr. Scott filed a prior claim for occupational pneumoconiosis in 1989 where the Occupational Pneumoconiosis Board determined that there was no evidence of occupational pneumoconiosis. The Office of Judges determined that Mr. Scott has not suffered any additional occupational dust exposure since the date of last exposure in his prior claim for occupational pneumoconiosis. The Office of Judges noted that although occupational pneumoconiosis can progress in the absence of additional exposure, there must be occupational exposure for occupational pneumoconiosis to develop. The Office of Judges determined that whether Mr. Scott developed occupational pneumoconiosis prior to March 20, 1987, has already been decided in a prior claim. The Office of Judges held that Mr. Scott is not entitled to an evaluation before the Occupational Pneumoconiosis Board. The Board of Review reached the same reasoned conclusions in its decision of May 18, 2012. 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: January 14, 2014

CONCURRED IN BY:

Chief Justice Robin J. Davis

Justice Menis E. Ketchum

Justice Allen H. Loughry II

DISSENTING:

Justice Margaret L. Workman

Justice Brent D. Benjamin, Not Participating