

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

ROBERT A. SCHULTZ, Petitioner

November 2, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) No. 101023 (BOR Appeal No. 2044208)
(Claim No. 2008004503)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
HOBET MINING, LLC, Respondent**

MEMORANDUM DECISION

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated July 27, 2010, in which the Board affirmed a March 1, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the 10% impairment of pulmonary function attributed to occupational pneumoconiosis. The appeal was timely filed by the petitioner and a response was filed by Hobet Mining, LLC. The Court has carefully reviewed the records, written arguments, and appendices contained in the petition, and the case is mature for consideration.

Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this matter is appropriate for consideration under the Revised Rules. Having considered the petition 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.

Mr. Schultz asserts the Board of Review improperly denied an award of permanent total disability or, in the alternative, an award of 25% permanent partial disability as the blood gas test results indicate Mr. Schultz suffers from significant pulmonary impairment. Hobet Mining asserts the medical records for Mr. Schultz do not support an additional award of permanent partial disability as the records indicate part of Mr. Schultz's impairment is attributable to cigarette smoking in addition to coal mining. Additionally, Hobet Mining asserts the Occupational Pneumoconiosis Board did not make any finding of occupational

pneumoconiosis but granted Mr. Schultz a 10% permanent partial disability award.

The Office of Judges reviewed the findings of the Occupational Pneumoconiosis Board and the relevant medical records and affirmed the Occupational Pneumoconiosis Board's finding that Mr. Schultz was not entitled to an additional award of permanent partial disability. (March 1, 2010, Office of Judges Order, p. 10-11). It further found Dr. D. L. Rasmussen's incremental treadmill exercise was performed incorrectly and, thus, was an inaccurate assessment of Mr. Schultz's impairment. *Id.* It further considered the reports of Drs. Rasmussen and George L. Zaldivar in determining the cause of Mr. Schultz's impairment, noting the doctors differed on the ultimate cause of Mr. Schultz's impairment. Dr. Zaldivar found Mr. Schultz's impairment was attributable, in part, to non-occupational causes and reduction of impairment was appropriate, while Dr. Rasmussen found some impairment attributable to non-occupational causes but attributing the majority to coal mining. *Id.* The Office of Judges, too, found no basis for an award or for disputing the Claims Administrator's findings. The Board of Review reached the same reasonable conclusion in affirming the Office of Judges in its decision of July 27, 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 is based upon the Board's material misstatement or mischaracterization of particular components of the evidentiary record. Therefore, the July 27, 2010 Board of Review order is affirmed.

Affirmed.

ISSUED: November 2, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Menis E. Ketchum

Justice Thomas E. McHugh