

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

October 31, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

RUSSELL E. FLETCHER, Petitioner

vs.) **No. 11-0404** (BOR Appeal No. 2044853)
(Claim No. 2009051354)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
WEST VIRGINIA DIVISION OF HIGHWAYS,
Respondent**

MEMORANDUM DECISION

Petitioner Russell E. Fletcher, by John Blair, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. The West Virginia Division of Highways, by Patricia Jennings, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated February 14, 2011, in which the Board reversed a June 8, 2009, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's August 11, 2008, decision rejecting Mr. Fletcher's application for occupational pneumoconiosis benefits and held the claim compensable for occupational pneumoconiosis. The Court has carefully reviewed the records, written arguments, and appendices contained in the petition, and the case is mature for consideration.

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. Fletcher alleges that he suffers from occupational pneumoconiosis as a result of exposure to occupational dust hazards during the course of his employment. He was employed with the West Virginia Division of Highways from 2002 to July 16, 2008, as a prison work-release supervisor. In a February 5, 2009, deposition, Mr. Fletcher stated that his job duties entailed supervising prisoners while they performed various types of manual labor along

highways. Mr. Fletcher alleges that he was exposed to road dust and coal dust from passing coal trucks while employed in this capacity. Prior to 2002, Mr. Fletcher was employed by various mining companies, although it appears that he worked primarily in an office; however, he alleges exposure to occupational dust hazards while employed in this capacity as well.

In its decision reversing the Office of Judges, the Board of Review held that the Office of Judges' Order was clearly wrong and that the evidence of record fails to establish that Mr. Fletcher was exposed to the hazards of occupational pneumoconiosis. The Board of Review then reinstated the June 11, 2008, claims administrator's decision.

West Virginia Code § 23-4-1(b) (2008) states that in order to be eligible for workers' compensation benefits related to occupational pneumoconiosis, a claimant must have been exposed to the "hazards of occupational pneumoconiosis." In *Meadows v. Workmen's Compensation Com'r*, 157 W.Va. 140, 145, 198 S.E.2d 137, 139 (1973), this Court held that "a 'hazard,' as contemplated by the statute, consists of any condition where it can be demonstrated that there are minute particles of dust in abnormal quantities in the work area." In *Sluss v. Workers' Compensation Com'r*, 174 W.Va. 433, 436, 327 S.E.2d 413, 415 (1985), this Court rejected the proposition that a claimant can demonstrate exposure merely by employment at a dusty location, such as a mine site, and reiterated the holding in *Meadows* that a claimant must demonstrate the presence of a hazard through a showing that "minute particles of dust exist in abnormal quantities in the work area."

In its Order, the Office of Judges found that prior to 2002, Mr. Fletcher worked primarily in an office environment and did not meet the prerequisite dust exposure requirements. The Office of Judges further found that Mr. Fletcher's deposition testimony establishes that he was exposed to occupational dust hazards from 2002 to July 16, 2008. The Board of Review agreed with the Office of Judges' conclusion that Mr. Fletcher was not exposed to occupational dust hazards prior to 2002. The Board of Review noted that Mr. Fletcher's testimony asserting that he has been exposed to occupational dust hazards is the only evidence of record. The Board of Review further noted that Mr. Fletcher's working environment is in the open air along highways. Based upon this Court's decisions in *Meadows* and *Sluss*, although Mr. Fletcher may have been exposed to dust during the course of his employment, he did not demonstrate that he was exposed to "abnormal quantities" of dust.

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: October 31, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin J. Davis
Justice Brent D. Benjamin
Justice Thomas E. McHugh

DISSENTING:

Justice Margaret L. Workman