

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

December 13, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

LAWRENCE G. BURNS, Petitioner

vs.) **No. 11-0482** (BOR Appeal No. 2045174)
(Claim No. 2004050577)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
PINE RIDGE COAL COMPANY, LLC, Respondent**

MEMORANDUM DECISION

Petitioner Lawrence Burns, by Wendle Cook, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Pine Ridge Coal Company, by Ann Rembrandt¹, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated February 15, 2011, in which the Board affirmed an October 13, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's February 3, 2009, decision granting Mr. Burns no additional permanent partial disability award for occupational pneumoconiosis because he was fully compensated by a prior 10% award. 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. Burns was employed as an underground coal miner with Pine Ridge Coal Company. On September 9, 2004, the Occupational Pneumoconiosis Board found that there was sufficient evidence to justify a diagnosis of occupational pneumoconiosis, with 10% of Mr. Burns's

¹ On April 18, 2012, Ms. Rembrandt withdrew from the representation of Pine Ridge Coal Company, which is now represented by Henry C. Bowen.

pulmonary function impairment attributable to occupational pneumoconiosis. On November 25, 2008, the Occupational Pneumoconiosis Board confirmed its prior diagnosis of occupational pneumoconiosis and found that no more than 10% of Mr. Burns's pulmonary function impairment is attributable to occupational pneumoconiosis. In both reports the Occupational Pneumoconiosis Board found that there is no radiographic evidence of occupational pneumoconiosis. On November 4, 2009, Dr. Rasmussen conducted diagnostic testing and reported results that are consistent with a 40% pulmonary function impairment. At a September 1, 2010, Occupational Pneumoconiosis Board hearing, the Occupational Pneumoconiosis Board testified that it did not find Dr. Rasmussen's report to be a reliable indicator of the amount of Mr. Burns's pulmonary function impairment attributable to occupational pneumoconiosis. The Occupational Pneumoconiosis Board found that there was no evidence that his condition had worsened and further found that Dr. Rasmussen's studies included no indication that any worsening of his condition was related to occupational pneumoconiosis. The Occupational Pneumoconiosis Board further testified that there was some evidence of non-occupational impairment due to cardiac surgery, which also damaged the left lung. The Occupational Pneumoconiosis Board testified that patients with progressive occupational pneumoconiosis typically have radiographic evidence of occupational pneumoconiosis.

In its decision affirming the February 3, 2009, claims administrator's decision, the Office of Judges held that Mr. Burns has been fully compensated by a prior 10% permanent partial disability award for occupational pneumoconiosis. Mr. Burns disputes this finding and asserts that the evidence of record clearly demonstrates that he is entitled to a 40% permanent partial disability award for occupational pneumoconiosis.

The Office of Judges held that the conclusions of the Occupational Pneumoconiosis Board were not clearly wrong. In making its decision, the Office of Judges took note of the Occupational Pneumoconiosis Board's finding that there was some evidence of non-occupational impairment, the Occupational Pneumoconiosis Board's finding that there was no radiographic evidence of occupational pneumoconiosis, and the Occupational Pneumoconiosis Board's finding that there was no clinical or radiographic evidence of worsening of Mr. Burns's condition. The Office of Judges found that if the 40% impairment in pulmonary function found by Dr. Rasmussen was an accurate representation of Mr. Burns's impairment attributable to occupational pneumoconiosis, radiologic evidence of occupational pneumoconiosis would be present. The Office of Judges found that the record was consistently void of any radiographic evidence of occupational pneumoconiosis, but does document residual damage from heart surgery. The Board of Review reached the same reasoned conclusion in its decision of February 15, 2011. 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: December 13, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Margaret L. Workman

Justice Thomas E. McHugh