

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

JERRY W. MCCRACKEN,
Claimant Below, Petitioner

FILED
October 26, 2016
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) **No. 15-1083** (BOR Appeal No. 2050421)
(Claim No. 2008016195)

MOUNTAIN EDGE MINING, INC.,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Jerry W. McCracken, by Reginald D. Henry, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Mountain Edge Mining, Inc., by H. Toney Stroud, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated October 7, 2015, in which the Board affirmed a April 1, 2015, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's December 31, 2013, decision to not grant additional permanent partial disability benefits. 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. McCracken, a coal miner for Mountain Edge Mining, Inc., applied for occupational pneumoconiosis benefits in 2007. On December 10, 2007, the claims administrator held the claim compensable on a non-medical basis. On July 19, 2012, a report about Mr. McCracken's spirometry testing revealed lung function impairment. On August 23, 2012, Mr. McCracken submitted a permanent partial disability reopening application asserting he had an aggravation and/or progression of his occupational pneumoconiosis.

Medical records from Plateau Medical Center dated August 27, 2012, though March 25, 2013, showed that Mr. McCracken had been reporting for follow-ups. An x-ray of the chest revealed a small amount of increased density in the retrocardiac left lower lobe consistent with vascular crowding and/or atelectasis infiltrate; a small pleural effusion was also noted. Mr. McCracken admitted that he smoked one pack of cigarettes a day for thirty-five years. He underwent an x-ray of the abdomen and chest. The x-ray of the abdomen revealed a nonspecific abdominal gas pattern and questionable right renal calculi. The chest x-ray revealed right basilar atelectasis and/or scarring. The final assessment was abdominal pain of an unknown etiology, possible acute diverticulitis, hypertension, and chronic obstructive pulmonary disease.

Donald Rasmussen, M.D., examined Mr. McCracken and produced a report of his findings on February 7, 2013. Dr. Rasmussen opined the studies only indicated mild impairment in resting lung function and would not indicate more than 5% impairment. On October 22, 2013, the Occupational Pneumoconiosis Board examined Mr. McCracken and submitted its findings. The Occupational Pneumoconiosis Board noted that he had thirty years of exposure and had shortness of breath for ten to twelve years, which included a chronic cough and wheezing. Physical examination of Mr. McCracken revealed that he was in good general clinical condition. There were no rales. There was mild wheezing scattered throughout both lung fields. His heart sounds were of good quality with no murmurs. The Occupational Pneumoconiosis Board reviewed Mr. McCracken's chest x-ray and concluded that it showed some nonspecific consolidation at the right lung base, potentially scarring; however, a more acute infiltrate was not excluded. Overall, the Occupational Pneumoconiosis Board noted there was insufficient pulmonary parenchymal or pleural disease on which to establish a diagnosis of occupational pneumoconiosis.

On December 31, 2013, the claims administrator adopted the Occupational Pneumoconiosis Board's findings and concluded Mr. McCracken was fully compensated by his prior award of 5% permanent partial disability. The members of the Occupational Pneumoconiosis Board were called to testify at a hearing before the Office of Judges on January 21, 2015. Johnny Leef, M.D., testified that Mr. McCracken's earlier two x-rays were within normal limits. There was a minimal degree of scarring at the right lung base on the 2008 film, and on the 2013 film there was an infiltrate at the right lung base which was most likely representative of progressive scarring, but he noted they could not exclude an active process such as pneumonia. He testified that they did not see evidence of occupational pneumoconiosis. Jack Kinder, M.D., Chairman of the Occupational Pneumoconiosis Board, testified that he agreed with Dr. Leef's interpretation of the studies. Dr. Kinder opined that he suffered from 10% whole person impairment but attributed half of the impairment to his over thirty-year smoking history.

The Office of Judges determined that the Occupational Pneumoconiosis Board findings and conclusions were supported by the evidence of record. The Office of Judges found that Mr. McCracken had a significant smoking history. The Office of Judges also noted that the pathology images did not reveal obvious occupational pneumoconiosis. The Office of Judges concluded that a finding of 10% whole person impairment was supported by the evidence. The Office of Judges also found that the Occupational Pneumoconiosis Board's attribution of half the impairment to non-work related causes was proper because Mr. McCracken had a significant

smoking history and other non-work-related lung issues. The Board of Review adopted all the material findings of the Office of Judges and affirmed its Order.

After review, we agree with the consistent conclusions of the Office of Judges and the Board of Review. The evidence indicates that there was minimal impairment and that clear evidence of occupational pneumoconiosis was not found. Mr. McCracken had a significant history of smoking so it was not clearly wrong for the Occupational Pneumoconiosis Board to find that half of his impairment was non-work-related.

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 26, 2016

CONCURRED IN BY:

Chief Justice Menis E. Ketchum

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Margaret L. Workman

Justice Allen H. Loughry II