

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

SWVA, INC.,
Employer Below, Petitioner

vs.) **No. 15-1151** (BOR Appeal No. 2050508)
(Claim No. 2014030081)

MICHAEL I. PAYNE,
Claimant Below, Respondent

FILED
November 18, 2016
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner SWVA, Inc., by Steven K. Wellman, its attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review.

This appeal arises from the Board of Review's Final Order dated October 27, 2015, in which the Board affirmed a May 26, 2015, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's July 29, 2014, decision to reject the claim and held the claim compensable for occupational bilateral hearing loss. 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.

On December 26, 2013, Mr. Payne, a worker for SWVA, Inc., who was employed in the fabrication department until he retired on July 16, 2012, filed a claim for occupational hearing loss alleging that his employment exposed him to loud noises. A December 19, 2013, audiogram report showed hearing loss, which was consistent with noise-induced hearing loss. The audiogram revealed a moderate sensorineural hearing loss in both ears, more in the high frequencies with an 80% speech discrimination score on the right and 96% on the left. The

signing physician was Joseph Touma, M.D., an otolaryngologist. Mr. Payne stated that he became aware of his hearing loss in early 2000 from hearing tests conducted at SWVA, Inc.

Another audiogram was done on June 23, 2014, by Thomas Jung, M.D., as part of an independent medical evaluation. The audiogram report indicated that the left ear was quite similar to the audiogram conducted by the office of Dr. Touma in December of 2013. However, the right ear was significantly different. Another audiogram, apparently, completed on the same date, showed essentially the same hearing for both ears, very similar to that found by Dr. Touma. The significant difference in the audiograms was not explained by Dr. Jung.

An independent medical evaluation report from Dr. Jung dated July 29, 2014, provided that it was more likely than not that Mr. Payne's hearing loss was not related to noise exposure at SWVA, Inc. Dr. Jung opined that it was more likely caused by unrelated health conditions, including diabetes, hypercholesterolemia, coronary artery disease, and cigarette smoking as well as his genetic predisposition for hearing loss. Furthermore, attenuation studies demonstrated that adequate protection from occupational noise was available and that the claimant was in compliance with the Occupational Safety and Health Administration's Guidelines. Mr. Payne relayed to Dr. Jung that in the first twelve years of employment, he was not serious about using hearing protection but did so in the last five years. He denied any noisy, non-occupational activities, although he did use power woodworking tools without hearing protection. His father and brother had a history of hearing loss that occurred at a later age. Dr. Jung calculated 3.85% whole person impairment but attributed all of it to non-occupational causes. There were several audiograms in Mr. Payne's medical record. All of them showed patterns which are consistent, in whole or in part, with noise-induced hearing loss.

An affidavit from Christopher Artrip, SWVA, Inc's., manager of safety, health, and the environment, was completed. Mr. Artrip stated that SWVA, Inc., had a strong hearing conservation program where employees were required to wear hearing protection or were subject to discipline. He further stated that the program existed throughout Mr. Payne's employment. Based on the evidence before it, the claims administrator denied Mr. Payne's application for hearing loss on July 29, 2014.

Mr. Payne was deposed on September 25, 2014, and stated that his position at SWVA, Inc., exposed him to a great deal of noise. Mr. Payne testified that at his last job with SWVA, Inc., steel would come in on a conveyor and they would chop it to length and stack it. Until shortly before he retired, you had to run the conveyor manually to keep the steel coming to where it could be taken off by a crane. Every ten to twelve seconds, the steel was chopped, causing a large boom noise. He would run the conveyor and help stack the steel as well as the timber placed between the steel. He also loaded and unloaded trucks, and worked on the robot weld line which was rather noisy, sounding like someone hitting the brakes. Additionally, he worked on the wax line. Steel would come in on the conveyor belt and clamps would noisily grip the steel and then dip it in a wax tank. Mr. Payne was asked about the availability of hearing protection. The first hearing protection he used was foam earplugs. Occasionally, he had earmuffs. Over the years, he had noticed his hearing decreasing. Mr. Payne was asked about diabetes. He stated that this was not detected until September of 2012, when he had bloodwork in

preparation for knee surgery. He stated his various other physical ailments were well-controlled by medications.

The Office of Judges found that Mr. Payne's hearing loss was incurred in the course of and as a result of his employment with SWVA, Inc. The Office of Judges found that all the audiograms of record show patterns which are consistent, in whole or in part, with noise-induced hearing loss. Furthermore, the audiograms show that his hearing loss progressed after he began working at SWVA, Inc.¹ The Office of Judges found that Dr. Jung's opinion that the hearing loss was due to diabetes was not supported by medical evidence. The Office of Judges concluded that Mr. Payne's diabetes was well controlled by oral medication and there was no medical evidence submitted contradicting this. The Office of Judges also noted that there was no evidence that he suffers from diabetic neuropathy or any other health conditions related to diabetes. The Board of Review adopted the findings of the Office of Judges and affirmed its Order. After review, we agree with the consistent conclusions of the Office of Judges and Board of Review because their decisions were supported by the evidence in the record.

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: November 18, 2016

CONCURRED IN BY:

Justice Robin J. Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Allen H. Loughry II

DISSENTING:

Chief Justice Menis E. Ketchum

KETCHUM, C.J., dissenting:

¹ We note that the two main audiograms of record meet the criteria listed in West Virginia Code § 23-4-6b(d) (2009) because they show hearing loss well below the three thousand hertz.

I dissent from the majority's decision to affirm the Board of Review's final Order finding that the claimant has bilateral noise-induced hearing loss. Considering the claimant's use of hearing protection at work, combined with his pre-existing history of hearing loss, his family history of hearing loss, a history of diabetes and coronary artery disease, as well as many years of smoking, the claimant's hearing loss is more than likely not related to his occupation. The rejection of the claim should have been affirmed as the record shows that his hearing loss could not be attributed to his employment.