

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

JERRY M. JOHNSON,
Claimant Below, Petitioner

vs.) No. 100819 (BOR Appeal No. 2044181)
(Claim No. 2003049375)

WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER,
Commissioner Below, Respondent

and

ST. PIPELINE, INC. and L A PIPELINE
CONSTRUCTION COMPANY, INC.,
Employers Below, Respondents

FILED
July 25, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated June 9, 2010, in which the Board affirmed a February 26, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's December 29, 2008 Order holding that Mr. Johnson had been fully compensated by the 10% permanent partial disability award previously granted for impairment due to occupational pneumoconiosis. The appeal was timely filed by the petitioner, and the Insurance Commissioner filed a response. 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, the Court is of the opinion that this case is appropriate for consideration under the Revised Rules. Having considered the parties' submissions 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.

The Board of Review affirmed the holding that Mr. Johnson had been fully compensated by the 10% permanent partial disability award previously granted for impairment due to occupational pneumoconiosis. In arguing that he is entitled to an additional 15% award for a total 25% impairment, Mr. Johnson relies on Dr. Attila Lenkey's report, which found 25% impairment due to occupational pneumoconiosis. All evaluating physicians agree that Mr. Johnson has 100% lung impairment, but differ as to the amount attributable to occupational pneumoconiosis versus his significant smoking history, which is between 60 and 100 pack years.

The Office of Judges noted that the Occupational Pneumoconiosis Board found that Mr. Johnson's significant smoking history was sufficient to cause the lung damage apparent on Mr. Johnson's x-rays. (Feb. 26, 2010 Office of Judges Order, p. 4.) The Occupational Pneumoconiosis Board found that Mr. Johnson's impairment above the 10% previously found was attributable to bronchospastic disease as supported by the physical findings of wheezing and suppressed breath sounds found at the time of the Board's examination of Mr. Johnson. *Id.* Additionally, Mr. Johnson was on a bronchodilator and oxygen at the time of the examination. *Id.* Finally, the Occupational Pneumoconiosis Board noted that Mr. Johnson had no x-ray diagnosis of occupational pneumoconiosis. *Id.* Rather, the markings previously observed that formed the basis for his 10% award were not present by the time of the Board's subsequent review. Accordingly, the changes were attributable to inflammation. The Office of Judges therefore found that Mr. Johnson has been fully compensated by his prior 10% award for occupational pneumoconiosis, and the Board of Review reached the same reasoned conclusion in affirming the Office of Judges in its decision of June 9, 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 based upon the Board's material misstatement or mischaracterization of particular components of the evidentiary record. Therefore, the denial of the petitioner's request for an additional 15% permanent partial disability award is affirmed.

Affirmed.

ISSUED: July 25, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Menis E. Ketchum

Justice Thomas E. McHugh