

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

JONATHAN E. AUFFANT,
Claimant Below, Petitioner

vs.) **No. 21-0027** (BOR Appeal No. 2055462)
(Claim No. 2019003156)

MANPOWER,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Jonathan E. Auffant, by Counsel Edwin H. Pancake, appeals the decision of the West Virginia Workers' Compensation Board of Review ("Board of Review"). Manpower, by Counsel Jordan Martin and T. Jonathan Cook, filed a timely response.

The issue on appeal is compensability. The claims administrator rejected the claim on February 16, 2019. The Workers' Compensation Office of Judges ("Office of Judges") affirmed the decision in its June 15, 2020, Order. The Order was affirmed by the Board of Review on December 17, 2020.

The Court has carefully reviewed the records, written arguments, and appendices contained in the briefs, and the case is mature for consideration. 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.

The standard of review applicable to this Court's consideration of workers' compensation appeals has been set out under W. Va. Code § 23-5-15, in relevant part, as follows:

(c) In reviewing a decision of the Board of Review, the Supreme Court of Appeals shall consider the record provided by the board and give deference to the board's findings, reasoning, and conclusions

(d) If the decision of the board represents an affirmation of a prior ruling by both the commission and the Office of Judges that was entered on the same issue

in the same claim, the decision of the board may be reversed or modified by the Supreme Court of Appeals only if the decision is in clear violation of constitutional or statutory provision, is clearly the result of erroneous conclusions of law, or is based upon the board's material misstatement or mischaracterization of particular components of the evidentiary record. The court may not conduct a de novo reweighing of the evidentiary record

See Hammons v. W. Va. Off. of Ins. Comm'r, 235 W. Va. 577, 582-83, 775 S.E.2d 458, 463-64 (2015). As we previously recognized in *Justice v. West Virginia Office Insurance Commission*, 230 W. Va. 80, 83, 736 S.E.2d 80, 83 (2012), we apply a de novo standard of review to questions of law arising in the context of decisions issued by the Board. *See also Davies v. W. Va. Off. of Ins. Comm'r*, 227 W. Va. 330, 334, 708 S.E.2d 524, 528 (2011).

Mr. Auffant, a laborer, completed an Employees' and Physicians' Report of Injury indicating he suffered a lung injury due to exposure to sandblasting on July 20, 2018. The physicians' section was completed by Yousef Shweihat, M.D., who diagnosed acute silicosis secondary to silica dust exposure. On July 22, 2018, Mr. Auffant was treated by Stanley Perecko, M.D., who noted that Mr. Auffant sought emergency department treatment that day for bilateral lower extremity swelling and shortness of breath that had been present for the previous two to three days. A chest CT scan showed extensive bilateral ground-glass air-space disease, severe hepatic steatosis, and ankylosing spondylitis. A chest x-ray showed pulmonary edema. Dr. Perecko diagnosed hypervolemia, possible exacerbation of chronic heart failure, possible pneumonia, and right calf cellulitis.

Treatment notes from St. Mary's Medical Center indicate Mr. Auffant presented with shortness of breath and bilateral leg swelling on July 23, 2018. Mr. Auffant had an acute kidney injury and was a smoker. He was admitted to the hospital and placed on a ventilator. Mr. Auffant was discharged from the hospital on August 6, 2018, with the diagnoses of acute hypoxemic respiratory failure status post mechanical ventilation, interstitial lung disease, inhalation injury, acute kidney injury, sinus tachycardia, hypertension, and right lower extremity cellulitis.

In a September 13, 2018, treatment note, Yousef Shweihat, M.D., noted that Mr. Auffant was seen for follow-up after a recent hospital stay. Dr. Shweihat noted that a CT scan taken at the time of Mr. Auffant's hospital stay showed diffuse ground glass opacities and hypersensitivity reaction due to inhalation. On examination, Dr. Shweihat found good bilateral air entry. Mr. Auffant reported only minimal shortness of breath. A CT scan was performed that day and showed complete resolution of the bilateral upper lobe ground glass opacities. There was no evidence of suspicious nodules or infiltrates. Dr. Shweihat diagnosed acute respiratory failure with bilateral infiltrates and lung nodule. He opined that Mr. Auffant likely suffered from acute silicosis with secondary alveolar proteinosis due to a significant silica exposure; however, Dr. Shweihat was unable to confirm a diagnosis of acute silicosis. He opined that Mr. Auffant's rapid improvement supports the diagnosis.

On October 30, 2018, Mr. Auffant sought treatment at St. Mary's Medical Center for constant shortness of breath, a chronic cough, and bilateral foot swelling. Chest x-rays showed

hazy left lung infiltrates. A chest CT scan revealed bilateral ground glass airspace disease, small pleural effusion, and ankylosing spondylitis. Mr. Auffant was ultimately diagnosed with pneumonia. A left upper lobe BAL was performed on November 1, 2018, and showed rare clusters of atypical cells and mixed inflammatory cells with numerous macrophages. A chest x-ray was performed on November 4, 2018, and showed increased bilateral opacities representing edema or pneumonia. Mr. Auffant was discharged from the hospital on November 5, 2018, with a diagnosis of acute hypoxic respiratory failure secondary to pneumonia.

Mr. Auffant followed up with Dr. Shweihat on November 29, 2018, for shortness of breath and weight gain over the past two weeks. Examination showed crackles in both lower lung zones, as well as severe water retention and swelling. Dr. Shweihat diagnosed anasarca of unknown cause, abnormal chest CT scan, and history of acute silicosis and alveolar proteinosis. He opined that the water retention was likely caused by kidney or liver disease and recommended follow-up with Mr. Auffant's primary care physician.

Helgi Sigmundsson, M.D., evaluated Mr. Auffant for elevated liver enzymes and a gastrointestinal bleed on November 29, 2018. Testing was suggestive of Crohn's disease. It was noted that Mr. Auffant smokes half a pack of cigarettes a day and consumes six beers a day. Dr. Sigmundsson diagnosed alcoholic cirrhosis. A December 31, 2018, chest CT scan showed no evidence of exposure-related lung disease.

Marsha Bailey, M.D., performed an Independent Medical Evaluation on January 10, 2019, in which she noted that Mr. Auffant reported no breathing problems, shortness of breath, cough, or wheezing. Mr. Auffant stated that his lower extremity swelling resolved with Lasix. It was noted that Mr. Auffant had smoked cigarettes for fifteen years. Dr. Bailey opined that Mr. Auffant never suffered from acute silicosis. She stated that acute silicosis causes the alveolar spaces to be filled with a protein called proteinosis, which was not found on either of Mr. Auffant's bronchoscopies. Dr. Bailey noted that most cases of acute silicosis result in rapid death. Dr. Bailey opined that Mr. Auffant's respiratory failure on July 22, 2018, was the result of anasarca and generalized swelling, not a work-place exposure. She noted that Mr. Auffant's respiratory symptoms resolved after his swelling and fluid retention were treated. In fact, a chest CT scan was normal. Dr. Bailey found that Mr. Auffant's two bronchoscopies showed no environmental, infection, or occupational agent to explain Mr. Auffant's respiratory symptoms and failure. She stated that the bronchoscopy findings were consistent with acid reflux induced pneumonitis. Dr. Bailey noted that Mr. Auffant was hospitalized on October 30, 2018, for left lung pneumonitis due to aspiration of gastroesophageal reflux disease. Further, Mr. Auffant was diagnosed with lung issues as early as August 11, 2015, when he sought treatment for chest and leg pain. Mr. Auffant was diagnosed with large right lung pleural effusion, lower lobe atelectasis, and right pneumothorax. Dr. Bailey opined that Dr. Shweihat's diagnosis of acute silicosis was not based on objective medical evidence but rather on secondhand history from Mr. Auffant's family. Dr. Bailey found that Dr. Shweihat never obtained an occupational history from Mr. Auffant. The claims administrator rejected the claim on February 16, 2019.

Mr. Auffant testified in a May 22, 2019, deposition that he worked four shifts for the employer, three of which were spent operating an abrasion machine that sanded silica off of metal

parts. The machine blew silica everywhere, and Mr. Auffant stated that the breathing protection he was given was very thin. On the fourth day of his employment, Mr. Auffant developed difficulty breathing and swelling in his feet. At the time of his deposition, Mr. Auffant was no longer experiencing problems with his lungs or lower extremities. Mr. Auffant stated that he was recently diagnosed with stage 3 kidney disease. Mr. Auffant testified that he sustained a punctured lung, collapsed ribs, and acid reflux after falling down some stairs in 2015.

The Office of Judges affirmed the claims administrator's rejection of the claim in its June 15, 2020, Order. It found that the medical evidence fails to support a diagnosis of occupational silicosis, as made by Dr. Shweihat. A CT scan taken on December 31, 2018, showed no evidence of silicosis or any other exposure-related lung disease. Further, two separate bronchoscopies showed no evidence of silicosis. The Office of Judges noted that silicosis causes permanent scarring of the lungs, and the diagnosis is confirmed by CT scan, bronchoscopy, and biopsy. The Office of Judges found no medical evidence to support a diagnosis of silicosis. It determined that Mr. Auffant's symptoms were likely the result of generalized swelling. Mr. Auffant was diagnosed with kidney disease in October of 2018 and was placed on Lasix. Within a month of beginning the medication, Mr. Auffant's lung symptoms resolved. The Office of Judges found that this supports Dr. Bailey's opinion that Mr. Auffant's symptoms were not the result of a work-place exposure. The Board of Review adopted the findings of fact and conclusions of law of the Office of Judges and affirmed its Order on December 17, 2020.

After review, we agree with the reasoning and conclusions of the Office of Judges as affirmed by the Board of Review. Pursuant to West Virginia Code § 23-4-1, employees who receive injuries in the course of and as a result of their covered employment are entitled to benefits. For an injury to be compensable it must be a personal injury that was received in the course of employment, and it must have resulted from that employment. *Barnett v. State Workmen's Comp. Comm'r*, 153 W. Va. 796, 172 S.E.2d 698 (1970). A preponderance of the evidence indicates that Mr. Auffant's acute respiratory symptoms on July 20, 2018, were not the result of a work-place silica exposure.

Affirmed.

ISSUED: May 26, 2022

CONCURRED IN BY:

Chief Justice John A. Hutchison
Justice Elizabeth D. Walker
Justice Tim Armstead
Justice William R. Wooton
Justice C. Haley Bunn