

**STATE OF WEST VIRGINIA**

**SUPREME COURT OF APPEALS**

**FILED**

**June 29, 2012**

**RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA**

**JAMES V. WEST, Petitioner**

**vs.) No. 10-4029 (BOR Appeal No. 2044821)  
(Claim No. 2010099543)**

**WEST VIRGINIA OFFICE OF  
INSURANCE COMMISSIONER and  
DIVERSIFIED ENTERPRISE, INC., Respondent**

**MEMORANDUM DECISION**

Petitioner, James V. West, by Reginald D. Henry, his attorney, appeals the Board of Review order denying a referral to the Occupational Pneumoconiosis Review Board. Diversified Enterprise, Inc. (hereinafter "Diversified"), by Patricia A. Jennings, its attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated December 2, 2010, in which the Board affirmed a June 30, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's order denying Mr. West's claim for referral to the Occupational Pneumoconiosis Review Board. The appeal was timely filed by the petitioner and a response was filed by Diversified Enterprise, Inc. 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, response, 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 held the preponderance of the evidence fails to establish Mr. West's claim for occupational pneumoconiosis. Mr. West asserts while employed by Diversified Enterprise, he was exposed to a sufficient amount of dust for a diagnosis of occupational pneumoconiosis. Previously, Mr. West was granted a 10% Federal Black Lung award. Testing conducted, in conjunction with Mr. West's application for occupational pneumoconiosis benefits, by Dr. Metha indicated a "possible diagnosis of occupational pneumoconiosis." Dr. Afzal Ahmed performed

additional testing and concluded Mr. West has chronic obstructive pulmonary disease, further broken down into pleural effusion shape/size, p/p, and 0/1 profusion.

The Office of Judges reviewed Mr. West's medical evidence and employment history and held Mr. West's work conditions did not expose him to the hazards of occupational pneumoconiosis. It further determined that the majority of Mr. West's work did not involve exposure to dust in abnormal amounts except for a small percentage of the time. The evidence established that the majority of [Mr. West's] work was not in performing jobs which would expose him to a great amount of dust. Mr. West also acknowledged wearing respirators 10 - 20% of the time while employed by Diversified Enterprise. The Office of Judges, too, found no basis for referring Mr. West to the Occupational Pneumoconiosis Review Board or for disputing the Claims Administrator's findings. The Board of Review reached the same reasoned conclusion in affirming the Office of Judges in its decision of December 2, 2010.

For the foregoing reasons, we find that the decision of the Board of Review is not in clear statutory provision nor is the decision based upon the Board's material misstatement or mischaracterization of particular components of the evidentiary record. Therefore, the Court affirms the Board of Review Order.

Affirmed.

**ISSUED:** June 29, 2012

**CONCURRED IN BY:**

Chief Justice Menis E. Ketchum

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Thomas E. McHugh

**DISSENTING:**

Justice Margaret L. Workman