

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

JACKSON G. BARKER,
Claimant Below, Petitioner

vs.) No. 100829 (BOR Appeal No. 2044065)
(Claim No. 2002020741)

WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER,
Commissioner Below, Respondent

and

HOBET MINING INC. and HOBET
MINING & CONSTRUCTION COMPANY, INC.,
Employers Below, Respondents

MEMORANDUM DECISION

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated June 8, 2010, in which the Board affirmed a January 13, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's February 4, 2008 Order holding Mr. Barker fully compensated by a 10% permanent partial disability award previously granted for impairment due to occupational pneumoconiosis. The appeal was timely filed by the petitioner, and a response was filed by the West Virginia Office of Insurance Commissioner. 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.

FILED

July 25, 2011

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

The Board of Review affirmed the holding that Mr. Barker has been fully compensated by a 10% permanent partial disability award previously granted for impairment due to occupational pneumoconiosis. Mr. Barker, however, asserts that he is entitled to an additional 15% award based upon the findings of Dr. Dominic Gaziano. During an Occupational Pneumoconiosis Board hearing regarding Mr. Barker's claim, Dr. Jack L. Kinder, Jr. testified that, standing alone, Dr. Gaziano's report could represent as much as 25% impairment. But, Dr. Kinder also testified that Dr. Gaziano's study "shows volumes which are not as great as the study from the Board; and we cannot, therefore, utilize it to make any assessment of increased impairment."

In holding that Mr. Barker has been fully compensated by his prior 10% award, the Office of Judges relied on the findings of the Occupational Pneumoconiosis Board. (Jan. 13, 2010 Office of Judges Order, p. 4.) The Occupational Pneumoconiosis Board reviewed pulmonary function studies from 2002, 2007, 2008, and 2009, including Dr. Gaziano's report. *Id.* at p. 3. The Occupational Pneumoconiosis Board nonetheless concluded that Mr. Barker has 10% impairment attributable to occupational pneumoconiosis. *Id.* It discounted Dr. Gaziano's report due to the presence of better studies. *Id.* The Office of Judges, too, found no basis for further award or for disputing the Occupational Review Board's findings. The Board of Review reached the same reasoned conclusion in affirming the Office of Judges in its decision of June 8, 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% award for impairment due to occupational pneumoconiosis 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