

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

WILLIAM H. GARRETSON, Petitioner

November 10, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) No. 101171 (BOR Appeal No. 2044449)
(Claim No. 2009051605)

WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
AT MASSEY COAL COMPANY, INC., Respondent

MEMORANDUM DECISION

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated August 19, 2010, in which the Board affirmed an April 19, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the Claims Administrator's denial of a permanent partial disability award for occupational pneumoconiosis. The appeal was timely filed by the petitioner and a response was filed by the Employer. 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, this Court is of the opinion that this matter is appropriate for consideration under the Revised Rules. Having considered the petition 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 Office of Judges found the Occupational Pneumoconiosis Board was not clearly wrong in finding the impairment was due to the claimant's extensive smoking history rather than the exposure to occupational dust. Mr. Garretson argues that there was insufficient evidence to rebut the presumption of occupational pneumoconiosis. He opines the Board was incorrect in placing him at a 10% impairment, arguing he was instead closer to a 20% impairment due to a combination of occupational dust exposure and smoking history.

In its Order affirming the Claim Administrator's denial of permanent partial disability award for occupational pneumoconiosis, the Office of Judges noted the lack of evidence demonstrating the claimant was entitled to the award. (April 19, 2010, Office of Judges Order, p. 4). It further noted none of the pulmonary function studies on the record demonstrate impairment. *Id.* at p. 3. The Office of Judges found, according to the evidence, that the Occupational Pneumoconiosis Board was not clearly wrong to attribute the impairment to the claimant's extensive 41 pack/year smoking history. The Board of Review reached the same reasoned conclusions in affirming the Office of Judges in its decision of August 19, 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 is based upon the Board's material misstatement or mischaracterization of particular components of the evidentiary record. Therefore, the August 19, 2010, Board of Review Order is affirmed.

Affirmed.

ISSUED: November 10, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin J. Davis
Justice Menis E. Ketchum
Justice Thomas E. McHugh

DISSENTING:

Justice Brent D. Benjamin, Disqualified