

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

PHILLIP M. CLINE, Petitioner

December 14, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) No. 101306 (BOR Appeal No. 2044588)
(Claim No. 2009091911)

WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
HANOVER RESOURCES, LLC, Respondent

MEMORANDUM DECISION

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated October 4, 2010, in which the Board affirmed a May 18, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's August 4, 2009, decision to deny Mr. Cline's application for occupational pneumoconiosis benefits. 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.

In its Order, the Office of Judges held that Mr. Cline was not exposed to the hazards of occupational pneumoconiosis for the requisite amount of time to sustain a claim. Mr. Cline disputes this finding and asserts that the Office of Judges' reliance on the dust samples provided by Hanover Resources is faulty because he testified in his deposition that these samples were not representative of the level of respirable dust to which he was exposed, because Hanover Resources would change its manner of operation at times of dust sampling.

W. Va. Code R. § 85-20-52.2 provides:

If the employer submits credible evidence demonstrating that it has been in compliance with OSHA and/or MSHA permissible exposure levels, as determined by sampling and testing performed in compliance with OSHA and/or MSHA regulations for the dust alleged by the injured worker, then the Commission, Insurance Commissioner, private carrier or self-insured employer, whichever is applicable, may consider that the dust exposure alleged by the injured worker does not suffice to satisfy the exposure requirements of W. Va. Code §§23-4-1(b) and 23-4-15(b) only for the period(s) covered by the sampling or testing. In order for the evidence to be deemed credible, it must be based upon regularly scheduled exposure samples from each work area where harmful exposure has been alleged, which samples will be obtained by certified industrial hygienists as defined by OSHA and/or MSHA regulations or government agencies, and the samplings must be obtained during the period for which the employer is seeking to avoid chargeability. The employer shall provide to all parties to the claim all discoverable communications to and from the industrial hygienist, and the entire test file, including the results of the industrial hygienist. In the absence of other relevant evidence, periods for which injured workers can demonstrate by credible evidence that the employer's sampling and test results do not accurately reflect conditions in the injured worker's work areas shall be included by the Commission, Insurance Commissioner, private carrier or self-insured employer, whichever is applicable, for the period of dust exposure which the claimant has alleged to be harmful.

The Office of Judges relied on the opinion of Mr. Burge Speilman, President of Mountaineer Mine and Mine Safety, who stated that he reviewed the mine's dust sampling results from January 19, 2006, to April 22, 2009. The Federal Mine Safety and Health Administration's respirable dust standard requires that the mine atmosphere where each miner is working be at or below 2.0 milligrams of coal dust per respirable meter of air. Mr. Speilman stated that the dust sampling results at Hanover Resources were in compliance with Federal Mine Safety and Health Administration standards, and that the samples were representative of the respirable dust to which Mr. Cline would be exposed.

Mr. Cline asserts that the job function his employer had listed in its records was not the job function that he actually performed, and that from October 2008 to May 1,

2009, dust samples in the area where he actually worked were not considered. The Office of Judges found that even if the dust samples in the area where Mr. Cline contends that he worked from October 2008 to May 1, 2009, exceeded Federal Mine Safety and Health Administration respirable dust standards, he did not have the requisite amount of exposure to the hazards of occupational pneumoconiosis pursuant to W. Va. Code § 23-4-1, which requires exposure to the hazards of occupational pneumoconiosis in West Virginia over a continuous period of not less than two years during the last ten years immediately preceding the date of his last exposure to such hazards, or for any five of fifteen years immediately preceding the date of such last exposure. The Board of Review reached the same reasoned conclusion in its decision of October 4, 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 decision of the Board of Review is affirmed.

Affirmed.

ISSUED: December 14, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Menis E. Ketchum

Justice Thomas E. McHugh