

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

April 24, 2012

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

RONALD H. CLEVINGER, Petitioner

**vs.) No. 101504 (BOR Appeal No. 2044689)
(Claim No. 2005013172)**

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
ANTHONY CRANE RENTAL, LP., Respondent**

MEMORANDUM DECISION

Petitioner, Ronald H. Clevenger, by Robert L. Stultz, his attorney, appeals the Board of Review order denying a reopening request for an additional award of permanent partial disability for occupational pneumoconiosis. The Office of Insurance Commissioner, by Anna L. Faulkner, its attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated October 26, 2010, in which the Board affirmed a June 9, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's denial of Mr. Clevenger's petition for reopening for additional permanent partial disability award. 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, 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 Mr. Clevenger failed to present sufficient evidence to establish he suffers from an aggravation or progression of his occupational pneumoconiosis sufficient to reopen the claim for additional permanent partial disability. Mr. Clevenger submits that a pulmonary study performed at Stonewall Jackson Memorial Hospital on January 21, 2010, establishes he suffers from severe restrictive disease as evidenced by his expired volume of 31.7% of predicted value. On

the other hand, the Office of Insurance Commissioner asserts the additional pulmonary study is invalid under West Virginia Code of State Rules § 85-20-52.9(e)(2) and Mr. Clevenger failed to present any additional evidence sufficient to establish a prima facie case of an aggravation or progression of his occupational pneumoconiosis.

The Office of Judges held Mr. Clevenger's requested reopening of this claim, but failed to present a prima facie showing, or some fact or facts which, if true, would demonstrate that there has been an aggravation or progression of his pulmonary function or some fact not previously considered which entitled him to some greater benefit than that which he has previously been granted. The Office of Judges further held Mr. Clevenger submitted evidence of an additional pulmonary study without any medical interpretation while claiming it demonstrates an aggravation of his condition or impairment due to occupational pneumoconiosis. Additionally, it held neither party offered any evidence establishing an aggravation or progression of Mr. Clevenger's occupational pneumoconiosis. The Office of Judges, too, found no basis for granting Mr. Clevenger's petition for reopening, or for disputing the claims administrator's findings. The Board of Review reached the same reasoned conclusions in affirming the Office of Judges in its decision of October 26, 2010.

For the foregoing reasons, we find that the decision of the Board of Review is not in clear violation of any constitutional or statutory provision, nor is it clearly the result of erroneous conclusions of law, nor is it based upon a material misstatement or mischaracterization of the evidentiary record. Therefore, the denial of Mr. Clevenger's request for reopening for additional permanent partial disability is affirmed.

Affirmed.

ISSUED: April 24, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Margaret L. Workman

Justice Thomas E. McHugh