

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

TERRY M. STEELE II, Petitioner

July 26, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) No. 11-0066 (BOR Appeal No. 2044448)
(Claim No. 2008047552)

WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
CABELL GLASS COMPANY, INC., Respondent

MEMORANDUM DECISION

Petitioner, Terry M. Steele II, by Timothy P. Rosinsky, his attorney, appeals the Board of Review Order denying compensability for an occupational disease. Cabell Glass Company, by Steven K. Wellman, its attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated November 9, 2010, in which the Board affirmed an April 21, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's denial of compensability for an occupational disease. 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.

Mr. Steele was prescribed an Albuterol inhaler, on an as needed basis, as early as 1999. Later treatment records from that time indicate Mr. Steele suffers from asthma. Mr. Steele denied a prior history of asthma preceding his exposure to paint fumes while installing windows and frames, on June 10, 2008, and June 11, 2008, to the Marshall University Engineering Building. On these dates, Mr. Steele asserts the interior of the building was being painted and he was exposed to a fog of paint on both dates. This exposure allegedly resulted in his suffering chest pains and shortness of breath.

Chad Stewart, Mr. Steele's supervisor, confirmed the painting and fog of paint in the building on those dates.

On June 11, 2008, Mr. Steele was transported to St. Mary's Medical Center where he complained of a six-month history of chest pain and shortness of breath on exertion. At that time, Dr. Gregory A. Carico evaluated Mr. Steele and also documented Mr. Steele's history to include the above-named complaints as well as a history of smoking prior to 1995. After the claims administrator rejected Mr. Steele's claim, Dr. Carico amended his treatment notes to state Mr. Steele denied a prior history of asthma, denied smoking other than a pipe prior to 1995, and denied any complaints of chest pain or shortness of breath in the six months preceding the June 10, 2008, paint fume exposure.

Dr. Alejandro Lorenzana treated Mr. Steele following his release from St. Mary's Medical Center. It was Dr. Lorenzana's considered opinion that Mr. Steele possibly suffers from allergy-induced asthma, reactive airway dysfunction syndrome, mild obstructive ventilatory defect with reactive airways, airtrapping, hyperinflation, and an abnormal gas exchange possibly consistent with chronic obstructive pulmonary disease or asthma. Dr. George L. Zaldivar also evaluated Mr. Steele and concluded Mr. Steele does not suffer from occupational asthma or reactive airway dysfunction syndrome. Dr. Zaldivar stated a diagnosis of occupational asthma may only occur in instances where there is no prior history of asthma and a response occurs from occupational exposure.

The Office of Judges, in considering Mr. Steele's medical records, determined chest x-rays from June 10, 2008, indicate a possible chronic lung condition and the emergency room notes of June 11, 2008, indicate a cardiac episode following heavy lifting along with shortness of breath. Mr. Steele indicated he suffered from chest pain and discomfort on exertion several months prior to June 10, 2008. Mr. Steele was also found to have a history of asthma from 1999 forward. As a result, the Office of Judges held this long history of preexisting asthma and the emergency room report of a history of shortness of breath with exertion precludes compensability. "There are inconsistencies in the reporting of the events and the evidence does not satisfy [Mr. Steele's] evidentiary burden of a work-related injury." Thus, the Office of Judges found no basis for compensability 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 November 9, 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 Court affirms the Board of Review's Order denying Mr. Steele's claim for compensability of an occupational disease.

Affirmed.

ISSUED: **July 26, 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