

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

November 7, 2012

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

GARFIELD E. HATFIELD, Petitioner

vs.) **No. 11-0071** (BOR Appeal No. 2044934)
(Claim No. 2008037166)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
ROCKHOUSE CREEK DEVELOPMENT
CORPORATION, Respondent**

MEMORANDUM DECISION

Petitioner, Garfield E. Hatfield, by John C. Blair, his attorney, appeals the Board of Review Order granting him 0% permanent partial disability for occupational pneumoconiosis. Rockhouse Creek Development Corporation (hereinafter "Rockhouse"), by Patricia A. Jennings, its attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated December 20, 2010, in which the Board affirmed an August 13, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's 5% permanent partial disability award for occupational pneumoconiosis. 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 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. Hatfield ceased his employment with Rockhouse on March 25, 2008. An award of 5% permanent partial disability for occupational pneumoconiosis was made prior to the instant appeal in this claim. On October 7, 2008, the Occupational Pneumoconiosis Board examined Mr. Hatfield and found 10% impairment based on Mr. Hatfield's pulmonary function study showing

74% DL/VA diffusion and positive x-ray. Based on the Occupational Pneumoconiosis Board's recommendation, the claims administrator granted Mr. Hatfield a 5% permanent partial disability award. Thereafter, Rockhouse requested an additional pulmonary function study. On February 11, 2009, Mr. Hatfield participated in an additional pulmonary function study which found normal diffusion capacity.

The Office of Judges conducted a hearing and questioned the Occupational Pneumoconiosis Board members regarding the two pulmonary function studies. Dr. Jack Kinder testified that the February 11, 2009, pulmonary function study showing an improvement establishes that Mr. Hatfield does not suffer from occupational pneumoconiosis, which is a progressive disease that may remain stable or worsen but does not improve. It was Dr. Kinder's considered opinion that Mr. Hatfield does not suffer from any additional impairment resulting from occupational pneumoconiosis and was fully compensated with his prior 5% permanent partial disability award.

Based on the pulmonary function studies and Dr. Kinder's testimony, the Office of Judges held that the Occupational Pneumoconiosis Board was not clearly wrong in its decision to reverse its 10% impairment recommendation and determined the prior 5% award fully compensated Mr. Hatfield for his occupational pneumoconiosis. It was determined that the original study on October 7, 2008, showed approximately 10% diffusion impairment, while the February 11, 2009, studies showed better flow volumes and showed no impairment. As a result, the Office of Judges held that the permanent nature of occupational pneumoconiosis and the improved study establishes Mr. Hatfield's diffusion impairment on October 7, 2008, was not related to occupational pneumoconiosis. The Office of Judges then held Mr. Hatfield's October 7, 2008, diffusion impairment was unrelated to occupational pneumoconiosis and reversed the claims administrator's order and granted Mr. Hatfield a 0% permanent partial disability award. The Board of Review reached the same reasoned conclusion in affirming the Office of Judges in its decision of December 20, 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 Board of Review Order is affirmed.

Affirmed.

ISSUED: November 7, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin J. Davis
Justice Brent D. Benjamin
Justice Thomas E. McHugh

DISSENTING:

Justice Margaret L. Workman