

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

July 26, 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, 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 briefs, and the record presented, the Court finds that a memorandum decision is appropriate under Rule 21 of the Revised Rules.

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 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 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.

Here, the evidence clearly establishes Mr. Hatfield had abnormal diffusion impairment on October 7, 2008, and a normal study was found during the February 11, 2009, study. According to West Virginia Code of State Rules § 85-20-52.9.c:

when blood gas studies are performed and abnormal values are obtained and thereafter new blood gas studies are performed and show normal or significantly higher values the insurance commissioner may direct the parties to furnish additional evidence and / or order additional studies at the laboratory utilized by the Occupational Pneumoconiosis Board or other laboratories to determine if the values are unreliable or incorrect or clearly attributable to some identifiable disease or illness other than occupational pneumoconiosis.

The record does not establish that this requirement was considered by the Office of Judges nor the Occupational Pneumoconiosis Board in considering Mr. Hatfield's impairment from occupational pneumoconiosis. The Court finds that the Office of Judges erred in failing to follow the requirements set forth in West Virginia Code of States Rules § 85-20-52.9.c. Therefore, this matter

shall be remanded for further proceedings consistent with the requirements of West Virginia Code of State Rules § 85-20-52.9.c.

For the foregoing reasons, we find that the decision of the Board of Review is in clear violation of constitutional or statutory provisions, is so clearly the result of erroneous conclusions of law, and is so clearly wrong based upon the evidentiary record that even when all inferences are resolved in favor of the board's findings, reasoning, and conclusions, there is insufficient evidence to support to sustain the decision. Therefore, the Court hereby reverses the Board of Review Order granting 0% permanent partial disability and remands this matter for further evidentiary development including additional evidence submitted by the parties and additional pulmonary function studies to determine Mr. Hatfield's true impairment.

Reversed and remanded.

ISSUED: July 26, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum

Justice Brent D. Benjamin

Justice Robin J. Davis

Justice Margaret L. Workman

DISSENTING:

Justice Thomas E. McHugh