

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

October 17, 2012

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

DENNIS D. DOSS, Petitioner

vs.) No. 11-0266 (BOR Appeal No. 2044933)
(Claim No. 2000005680)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER,
SOUTHERN HEATING & COOLING CO., and
B & H TRUCKING CO., INC., Respondent**

MEMORANDUM DECISION

Petitioner Dennis D. Doss, by Reginald D. Henry, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. The West Virginia Office of the Insurance Commissioner, by David Stuart, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated January 14, 2011, in which the Board affirmed an August 13, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's decision finding the claimant fully compensated by a prior award of 20% permanent partial disability impairment 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. Doss ceased his employment in July of 1999. An award of 20% permanent partial disability for occupational pneumoconiosis was awarded prior to the instant appeal in this claim. On June 2, 2010, the Occupational Pneumoconiosis Board ("OPB") examined Mr. Doss and determined that the previous award of 20% fully compensated Mr. Doss.

On June 2, 2010, the Office of Judges questioned the OPB members about two pulmonary function studies. Dr. Jack Kinder testified that Mr. Doss had smoked one and a half packs of cigarettes a day for twenty-four years and that his smoking history was enough to have caused the lung damage itself. It was Dr. Kinder's considered opinion that Mr. Doss does not suffer any additional impairment resulting from occupational pneumoconiosis and was fully compensated with his prior 20% permanent partial disability award.

Based on the OPB findings, the testimony of the OPB, and the pulmonary studies, the Office of Judges found that the OPB was not clearly wrong in its decision finding that Mr. Doss had been fully compensated by the previously awarded 20% permanent partial disability. The Office of Judges determined that any impairment in excess of the previous 20% would be attributable to the claimant's long smoking history and cardiac difficulties. The Office of Judges found no basis 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 January 14, 2011.

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 decision of the Board of Review is affirmed.

Affirmed.

ISSUED: October 17, 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