

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

December 13, 2012

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

WILLIAM F. BOKEY SR., Petitioner

vs.) No. 11-0477 (BOR Appeal No. 2045107)
(Claim No. 2009076888)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
CONSOLIDATION COAL COMPANY, Respondent**

MEMORANDUM DECISION

Petitioner William F. Bokey Sr., by Robert Stultz, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Consolidation Coal Company, by Gary Nickerson and James Heslep, its attorneys, filed a timely response.

This appeal arises from the Board of Review's Final Order dated February 16, 2011, in which the Board affirmed a September 27, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's August 26, 2009, decision granting Mr. Bokey a 10% 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. Bokey was employed as an underground coal miner with Consolidation Coal Company. On August 26, 2009, the claims administrator granted him a 10% permanent partial disability award for occupational pneumoconiosis based on a May 26, 2009, report from the Occupational Pneumoconiosis Board. In an August 4, 2010, hearing, the Occupational Pneumoconiosis Board testified that the prior 10% permanent partial disability award had been rebutted by a more recent diffusion study. The Occupational Pneumoconiosis Board also testified that there was no radiographic evidence of occupational pneumoconiosis.

In its decision reversing the August 26, 2009, claims administrator's decision, the Office of Judges held that Mr. Bokey has no functional impairment as a result of occupational pneumoconiosis. Mr. Bokey disputes this finding and asserts that the evidence of record clearly demonstrates that he has sustained some functional impairment as a result of occupational pneumoconiosis.

In its Order, the Office of Judges noted that the Occupational Pneumoconiosis Board found that Mr. Bokey's initial 10% permanent partial disability award for occupational pneumoconiosis was based on an abnormal diffusion study, and that the results of a repeat diffusion study were normal. The Office of Judges took note of the Occupational Pneumoconiosis Board's finding that if Mr. Bokey's initial diffusion impairment had been caused by occupational pneumoconiosis there would have been no improvement in his diffusion studies, and that therefore the initial abnormality was caused by some factor other than exposure to occupational dust. Finally, the Office of Judges found that the Occupational Pneumoconiosis Board's testimony was credible and reliable. The Board of Review reached the same reasoned conclusion in its decision of February 16, 2011. We agree with the reasoning and conclusions of the Board of Review.

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: December 13, 2012

CONCURRED IN BY:

Justice Robin J. Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh

DISSENTING:

Chief Justice Menis E. Ketchum