

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

February 20, 2013
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

NORMA R. McINTIRE,
Claimant Below, Petitioner

vs.) **No. 11-0869** (BOR Appeal No. 2045292)
(Claim No. 900043644)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER**
Commissioner Below, Respondent

and

PHILLIPS LIGHTING COMPANY,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Norma R. McIntire, by Robert Stultz, her attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Phillips Lighting Company, by Ann Rembrandt, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated May 6, 2011, in which the Board affirmed an October 28, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's April 15, 2009, decision granting Ms. McIntire no additional permanent partial disability award for occupational pneumoconiosis. The Court has carefully reviewed the records, written arguments, and appendices contained in the briefs, and the case is mature for consideration.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and 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 no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Rules of Appellate Procedure.

Ms. McIntire worked in the plant for Phillips Lighting Company. The claim was held compensable for occupational pneumoconiosis based upon the statutory presumption, and she received a 20% permanent partial disability award in 2007. On April 15, 2009, the claims administrator granted Ms. McIntire no additional permanent partial disability award based upon the Occupational Pneumoconiosis Board's findings.

The Office of Judges held that the preponderance of the evidence did not establish that Ms. McIntire is entitled to an additional permanent partial disability award due to occupational pneumoconiosis. On appeal, Ms. McIntire disagrees and asserts that Dr. Lenkey's finding that she suffered from 30% impairment due to occupational pneumoconiosis is supported by objective pulmonary testing and clinical findings and therefore she is entitled to an additional 10% permanent partial disability award. Phillips Lighting Company maintains that the Occupational Pneumoconiosis Board was correct in finding that Ms. McIntire suffers from no more than 20% impairment due to occupational pneumoconiosis.

Under West Virginia Code § 23-4-6a (2005), "the Office of Judges shall affirm the decision of the Occupational Pneumoconiosis Board made following hearing unless the decision is clearly wrong in view of the reliable, probative and substantial evidence on the whole record." Here, the Occupational Pneumoconiosis Board concluded that Ms. McIntire had no more than 20% impairment due to occupational exposure. The Occupational Pneumoconiosis Board noted that the slow decline since 1990 was not associated with occupational exposure. The Office of Judges noted that the Occupational Pneumoconiosis Board considered Dr. Lenkey's findings and opinion, along with Ms. McIntire's work history, smoking history, objective findings, radiographic findings, and clinical findings in determining her impairment. The Office of Judges concluded that the Occupational Pneumoconiosis Board's findings were not clearly wrong. The Board of Review reached the same reasoned conclusions in its decision of May 6, 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: February 20, 2013

CONCURRED IN BY:

Chief Justice Brent D. Benjamin
Justice Robin J. Davis
Justice Margaret L. Workman
Justice Allen H. Loughry II

DISSENTING:

Justice Menis E. Ketchum