

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

**JOHNNY R. HENDRICK,
Claimant Below, Petitioner**

FILED
March 14, 2013
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

**vs.) No. 11-0886 (BOR Appeal No. 2045260)
(Claim No. 2009055436)**

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

and

**CITY OF OAK HILL,
Employer Below, Respondent**

MEMORANDUM DECISION

Petitioner Johnny R. Hendrick, by Reginald D. Henry, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. The City of Oak Hill, by William T. Brotherton III, 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 a November 9, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's October 6, 2009, decision granting Mr. Hendrick 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.

Mr. Hendrick worked for the City of Oak Hill as a mechanic. The claim was held compensable for occupational pneumoconiosis based upon the statutory presumption, and he received a 10% permanent partial disability award in 2005. On October 6, 2009, the claims administrator granted Mr. Hendrick 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 Mr. Hendrick is entitled to an additional permanent partial disability award due to occupational pneumoconiosis. On appeal, Mr. Hendrick disagrees and asserts that the Board of Review was clearly wrong to conclude that he had no more than 10% impairment attributable to occupational pneumoconiosis. The City of Oak Hill maintains that the Occupational Pneumoconiosis Board was correct in finding that Mr. Hendrick suffers from no more than 10% 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 Mr. Hendrick had no more than 10% impairment due to occupational exposure. The Office of Judges noted that the Occupational Pneumoconiosis Board considered Dr. Rasmussen's findings and opinion, along with Mr. Hendrick's work history, smoking history, objective findings, and radiographic findings in determining his 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: March 14, 2013

CONCURRED IN BY:

Chief Justice Brent D. Benjamin

Justice Robin J. Davis

Justice Margaret L. Workman

Justice Menis E. Ketchum

Justice Allen H. Loughry II