

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

April 16, 2014

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

RICHARD LESTER,
Claimant Below, Petitioner

vs.) No. 12-1344 (BOR Appeal No. 2047370)
(Claim No. 2003008163)

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

and

**K & J ENERGY, INC.,
C & S MINING CORPORATION,
SOUTHERN GOLD MINING, INC.
and BLUE FALCON MINING, INC.,
Employers Below, Respondents**

MEMORANDUM DECISION

Petitioner Richard Lester, by John Blair, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. The West Virginia Office of Insurance Commissioner, by Mark Bramble, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated November 7, 2012, in which the Board affirmed a May 30, 2012, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's April 29, 2011, decision which held that Mr. Lester was fully compensated by his prior 25% permanent partial disability award and was therefore not entitled to an additional permanent partial disability award. 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 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. Lester, a coal miner, developed occupational pneumoconiosis due to hazardous dust exposure in the course of his employment. He was granted a total award of 25% permanent partial disability by the claims administrator on April 4, 2009. Subsequent pulmonary testing revealed that Mr. Lester's lung impairment had increased to 30%. Though Mr. Lester's impairment increased, the Occupational Pneumoconiosis Board determined on March 15, 2011, that he was entitled to no more than 25% permanent partial disability for his compensable occupational pneumoconiosis. Jack Kinder, M.D., testified, on behalf of the Occupational Pneumoconiosis Board, in a hearing before the Office of Judges on May 5, 2012, that Mr. Lester did in fact suffer from 30% lung impairment; however, only 25% of that impairment was attributable to occupational pneumoconiosis. The other 5% was determined to be the result of cigarette smoking. He acknowledged that there had been a slight progression in Mr. Lester's lung impairment, but he remained of the opinion that only 25% of the impairment was due to occupational pneumoconiosis. Bradley Henry, M.D., also of the Occupational Pneumoconiosis Board, concurred.

The claims administrator determined on April 29, 2011, that Mr. Lester had been fully compensated by his prior award of 25% permanent partial disability and was therefore not entitled to an additional permanent partial disability award. The Office of Judges affirmed the claims administrator's decision in its May 30, 2012, Order. It found that the evidentiary record failed to establish that the Occupational Pneumoconiosis Board's determination was clearly wrong. Significant weight was given to the Board's finding that 5% of Mr. Lester's lung impairment was caused by cigarette smoking. Mr. Lester argued that his x-rays reflected a progression of his lung impairment. Dr. Kinder and Dr. Henry testified on behalf of the Occupational Pneumoconiosis Board and agreed that the x-rays revealed a progression. However, Dr. Kinder opined that due to Mr. Lester's cigarette smoking history and the fact that he ceased working in June of 2001, no additional impairment could be attributed to occupational pneumoconiosis. Consequently, the Office of Judges held that he was entitled to no more than a 25% permanent partial disability award due to occupational pneumoconiosis.

The Board of Review adopted the findings of fact and conclusions of law of the Office of Judges and affirmed its Order in its November 7, 2012, decision. This Court agrees with the reasoning and conclusions of the Board of Review. Mr. Lester has a significant cigarette smoking history, and there is no evidence on the record to indicate that the Occupational Pneumoconiosis Board's decision was incorrect.

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: April 16, 2014

CONCURRED IN BY:

Chief Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Margaret L. Workman

Justice Menis E. Ketchum

Justice Allen H. Loughry II