

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

February 3, 2015

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

**ARCELORMITTAL USA XMB PRINCETON DIVISION,
Employer Below, Petitioner**

vs.) No. 14-0309 (BOR Appeal No. 2048776)
(Claim No. 2011010393)

**JOEY W. ELLIS,
Claimant Below, Respondent**

MEMORANDUM DECISION

Petitioner Arcelormittal USA XMB Princeton Division, by Mark J. Grigoraci, its attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review.

This appeal arises from the Board of Review's Final Order dated February 25, 2014, in which the Board affirmed an August 29, 2013, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's June 15, 2012, decision granting Mr. Ellis a 10% permanent partial disability award for occupational pneumoconiosis. Arcelormittal USA XMB Princeton Division is appealing the Board of Review's Order that authorized a 10% 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. Ellis worked for Arcelormittal USA XMB Princeton Division as an underground miner for approximately six months and as a service miner, dozer operator, rock truck driver and end loader for approximately thirty and a half years. Mr. Ellis alleges he has occupational pneumoconiosis due to the dust hazards that he was exposed to as a miner. The Occupational

Pneumoconiosis Board found there was sufficient evidence to justify a diagnosis of occupational pneumoconiosis with 10% pulmonary function impairment attributable to this disease. The claims administrator granted Mr. Ellis a 10% permanent partial disability award for occupational pneumoconiosis.

The Office of Judges affirmed the claims administrator's decision and found that Mr. Ellis has a 10% functional impairment attributable to occupational pneumoconiosis. The Board of Review affirmed the Order of the Office of Judges. On appeal, Arcelormittal USA XMB Princeton Division disagrees and asserts that the 10% permanent partial disability award should be reversed because the Occupational Pneumoconiosis Board's findings are clearly wrong due to its findings being based upon an inaccurate smoking history. Mr. Ellis did not file a response brief.

Under West Virginia Code § 23-4-6a (2005), the Office of Judges must affirm the determination of the Occupational Pneumoconiosis Board unless the Board's decision is clearly wrong in view of the reliable, probative, and substantial evidence on the whole record. The Occupational Pneumoconiosis Board found Mr. Ellis had an overall 40% functional impairment with 10% of the total attributable to occupational pneumoconiosis and the remainder attributable to cigarette smoking. The Occupational Pneumoconiosis Board noted that Mr. Ellis had a thirty-one year history of dust exposure. The Office of Judges noted that Arcelormittal USA XMB Princeton Division argued that the Occupational Pneumoconiosis Board had an inaccurate history of Mr. Ellis's cigarette smoking in that he had over a seventy pack-year history of smoking instead of the thirty-five years given to the Occupational Pneumoconiosis Board. The Office of Judges found Arcelormittal USA XMB Princeton Division has the burden of demonstrating that the Occupational Pneumoconiosis Board's decision is clearly wrong and that Arcelormittal USA XMB Princeton Division has not met this burden. The Office of Judges concluded the Occupational Pneumoconiosis Board's findings and conclusions are persuasive and have not been demonstrated to be clearly wrong. Therefore, the Office of Judges held that Mr. Ellis has a 10% functional impairment attributable to occupational pneumoconiosis. The Board of Review affirmed the Order of the Office of Judges.

This Court agrees with the findings of the Office of Judges and the conclusions of the Board of Review. The Occupational Pneumoconiosis Board found Mr. Ellis has 10% impairment due to occupational pneumoconiosis. Arcelormittal USA XMB Princeton Division has failed to meet its burden of proving the Occupational Pneumoconiosis Board was clearly wrong.

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 3, 2015

CONCURRED IN BY:

Chief Justice Margaret L. Workman

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Allen H. Loughry II

DISSENTING:

Justice Menis E. Ketchum