

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

September 13, 2019
EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

CATHY KIRKBRIDE,
Claimant Below, Petitioner

vs.) No. 18-0766 (BOR Appeal No. 2052774)
(Claim No. 2018009989)

MOUNTAINEER PARK, INC.,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Cathy Kirkbride, pro se, appeals the decision of the West Virginia Workers' Compensation Board of Review. Mountaineer Park, Inc., by Jane Ann Pancake, its attorney, filed a timely response.

The issue on appeal is compensability. The claims administrator rejected the claim on August 23, 2017. The Office of Judges affirmed the decision in its March 13, 2018, Order. The Order was affirmed by the Board of Review on June 29, 2018.

The Court has carefully reviewed the records, written arguments, and appendices contained in the briefs, and the case is mature for consideration. 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. Kirkbride, a card dealer, alleges that she developed allergies and asthma due to her work environment. An allergy test was performed on June 29, 2017, and was negative for everything but German cockroach, which showed a low reaction. A. T. Tamboli, M.D., completed an FMLA report on July 29, 2017, stating that Ms. Kirkbride had a chronic health condition, which continues for an extended period of time, that requires periodic treatment and may cause flare-ups. Leave was requested from September 21, 2017, to October 31, 2017. It was noted that Ms. Kirkbride experienced an exacerbation of her symptoms while at work. He listed the diagnoses as asthma, urticaria, allergen, cyanitis, and allergic conjunctivitis.

An Occupational Accident/Injury Report was completed on August 2, 2017. It states that Ms. Kirkbride was working in her assigned area and that her face was swollen, her eyes and mouth were itchy, and she had a rash on her face. She stated that she felt heaviness in her chest and a feeling of passing out on July 30th and 31st. She further asserted that she had a hard time sleeping due to her allergies and asthma.

The August 2, 2017, Employees' and Physicians' Report of Injury indicates Ms. Kirkbride alleged injuries to her skin and lungs. The injury was described as allergies and asthma due to cockroaches and mold. The physician's section was completed by Dr. Tamboli, who stated that she was capable of full duty work with medication, allergy shots, and environmental control. He stated that the conditions were a result of her occupation and listed the diagnoses as asthma, allergic rhinitis, and urticaria.

An undated mold sample summary indicates Ms. Kirkbride's work place humidity level was within acceptable limits, though it was slightly elevated. There were no visible microbial growths found. There was a slightly elevated level of ascospores in one area. It was noted that the spores are found everywhere in outdoor environments that that few have been reported to cause disease. The claims administrator rejected the claim on August 23, 2017.

A second Occupational Accident/Injury Report was completed on September 25, 2017, and states that Ms. Kirkbride was dealing cards when she experienced shortness of breath, hives, eye swelling, and chest tightness. She listed Doug Bruce as a witness. In her closing argument before the Office of Judges, Ms. Kirkbride stated that research studies have shown that exposure to dampness and mold can cause respiratory symptoms, asthma, hypersensitivity pneumonitis, rhinosinusitis, bronchitis, and respiratory infections. She asserted that her place of employment is damp and that there are at least ten areas that have mold. On the last day that she worked, her boss sent her home due to an asthma attack and hives.

The Office of Judges affirmed the claims administrator's rejection of the claim. It noted that Ms. Kirkbride asserts that she sustained an occupational disease as a result of her work environment. The physician's section of the Report of Injury lists both occupational and nonoccupational components in this claim. The Office of Judges found that it was unclear if Ms. Kirkbride was contending that work exacerbated her condition or caused it. It was also unclear if she suffered one isolated exposure or if she was subjected to continuous exposure. Ms. Kirkbride asserted on her Report of Injury that she has allergies and asthma due to cockroach and mold exposure. The Office of Judges noted that on the FMLA form, Dr. Tamboli stated that her symptoms were exacerbated at work, which indicates that she had preexisting problems. Ms. Kirkbride cited multiple instances of exposure on different forms. The Office of Judges concluded that she provided insufficient evidence to establish that her place of employment exposed her to mold, cockroaches, or dampness or that she developed asthma and allergies as a result. The Board of Review adopted the findings of fact and conclusions of law of the Office of Judges and affirmed its Order on June 29, 2018.

After review, we agree with the reasoning and conclusions of the Office of Judges as affirmed by the Board of Review. Though Ms. Kirkbride alleges that her work environment

exposed her to mold, dampness, and cockroaches, she provided no evidence in support. She therefore failed to show that she developed an occupational disease in the course of and resulting from her employment.

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: September 13, 2019

CONCURRED IN BY:

Chief Justice Elizabeth D. Walker

Justice Margaret L. Workman

Justice Tim Armstead

Justice Evan H. Jenkins

Justice John A. Hutchison