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BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
CHARLESTON, WEST VIRGINIA

In The Matter of:

Argus Energy, LLC, Employer

PETITIONER,

FILE COPY



SUPREME COURT NO.: 21-0209

JCN NO.: 2018000604

BD OF REV. NO.: 2053142

BD OF REV. ORD.: 2-10-2021

vs.

ALJ ORD.: 6-25-2018

CA ORDER: 8-21-2017

Clifford Marenko, Claimant

RESPONDENT.

REPLY BRIEF ON BEHALF OF RESPONDENT

CLIFFORD MARENKO

Anne L. Wandling, Esq.
WV Bar ID # 3916
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229 Stratton Street
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Logan, WV 25601
304-752-2838

TABLE OF AUTHORITIES

1. *W.Va. Code* §23-4-15(b)
2. *W.Va. Code* §23-5-12(b)
3. *W.Va. Code* §23-4-1g
4. *W.Va. Code* §23-4-15b

QUESTIONS PRESENTED

Whether the employer/appellant has established that the June 25, 2018 decision of Administrative Law Judge was clearly wrong. *W.Va. Code §23-5-12(b)*; and whether the Administrative Law Judge was correct in ruling this claim compensable.

STATEMENT OF CASE & ARGUMENT

On August 21, 2017, the Claim Administrator denied the Claimant's application for Occupational Pneumoconiosis. Following a protest by the Claimant, the Office of Judges issued an order on June 25, 2018 which reversed the order of the Claim Administrator and held the claim compensable on a non-medical basis subject to the presumption that any chronic respiratory impairment the Claimant has arose out of his employment.

"The Administrative Law Judge also held the claim to be timely filed under *W.Va. Code §23-4-15(b)* stating:

"The Claimant has established he was exposed to hazards of Occupational Pneumoconiosis two out of ten years to prosecute a claim and ten out of fifteen to qualify for the statutory presumption. As he has not been diagnosed with impairment, since his prior diagnosis was reversed, he is not untimely."

The Employer filed an appeal to the Board of Review. On February 10, 2021, the Board affirmed the ALJ's prior ruling that the claim had been timely filed.

The Employer has again appealed and is requesting that the August 21, 2017 Order which denied the claim be reinstated.

On July 25, 2018, the Employer, Argus Energy, LLC in the above-captioned claim moved that the Board of Review accept an appeal of the Administrative Law Judge's Decision of June

25, 2018 on jurisdictional issue.

The Claimant had objected to this motion under *W.Va. Code §23-4-15b* as amended which provides that if the Administrative Law Judge concludes after the protest hearings that the claim should be referred to the Occupational Pneumoconiosis Board for its review, the order entered shall be interlocutory only and may be appealed only in conjunction with an appeal from a final order with respect to the findings of the Occupational Pneumoconiosis Board.

In this case, The Administrative Law Judge's Decision of June 25, 2018 reversed the Claim Administrator's Order of August 21, 2017 which denied the application for occupational pneumoconiosis and held the claim compensable on a non-medical basis subject to the presumptions that any chronic respiratory impairment the Claimant may have also arose out of his employment.

The claim was then referred to the Occupational Pneumoconiosis Board which issued an Order on October 4, 2018 that sufficient evidence was found to justify a degree of Occupational Pneumoconiosis with no more than the 10% pulmonary impairment found in a previous claim.

Since the Board continued with its acceptance of the appeal on jurisdictional issue, the Claimant's position is that on June 25 2018, the Office of Judges made the correct decision in holding this claim compensable on a non-medical basis subject to the presumption that any chronic respiratory impairment the Claimant may have arose out of the employment.

The Employer has failed to make any convincing argument to show that this decision should be reversed under *W.Va. Code §23-5-12(b)* which provides:

"The Board may affirm the order or decision of the Administrative Law Judge or remand

the case for further proceedings. It shall reverse, vacate or modify the order or decision of the Administrative Law Judge if the substantial rights of the petition or petitioners have been prejudiced because the Administrative Law Judge's findings are:

- (1) In violation of statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the Administrative Law Judge; or
- (3) Made upon unlawful procedures; or
- (4) Affected by other error or law; or
- (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

In fact, the preponderance of the evidence establishes that the Administrative Law Judge made the correct decision. This standard is found in *W.Va. Code 24-4-1g* which provides:

"§23-4-1g. Weighing of evidence

(a) For all awards made on or after the effective date of the amendment and reenactment of this section during the year two thousand three, resolution of any issue raised in administering this chapter shall be based on a weighing of all evidence pertaining to the issue and a finding that a preponderance of the evidence supports the chosen manner of resolution. The process of weighing evidence shall include, but not be limited to, an assessment of the relevance, credibility, materiality and reliability that the evidence processes in the context of the issue presented. Under no circumstances will an issue be resolved by allowing certain evidence to be dispositive simply because it is reliable and is most favorable to a party's interests or position. If, after weighing all of the evidence regarding an issue in which a claimant has an interest, there is a finding that an equal amount of evidentiary weight exists favoring conflicting matters for resolution, the resolution that is most consistent with the claimant's position will be adopted."

Preponderance of the evidence means proof is more likely so than not so. In other words, a preponderance of the evidence means such evidence, when considered and compared with

opposing evidence is more persuasive or convincing. Preponderance of the evidence may not be determined by merely counting the number of witnesses, reports, evaluations, or other items of evidence. Rather, it is determined by assessing the persuasiveness of the evidence including the opportunity for knowledge, information possessed, and manner of testifying or reporting.

The Claimant's date of last exposure to a dust hazard was December 31, 2013, according to his deposition given on January 22, 2018. He testified he has not worked anywhere since when he was exposed to coal dust or other hazard. He worked almost continuously from 1992 to 2013 in or around West Virginia coal mines and last worked for the employer in 2013 when it shut down.

In a prior claim, the Claimant's award was reversed by the Occupational Pneumoconiosis Board.

The Administrative Law Judge, in its decision of June 25, 2018 analyzed *W.Va. Code §23-4-15(b) and 23-4-15b* in depth in pages 8 through 12 of this decision.

In this case, the Claim Administrator asserted as a reason for the claim rejection was that it was untimely filed. The date of last exposure was December 13, 2013 and the filing date was July 7, 2017. The Administrative Law Judge correctly stated that the Claimant has yet to be diagnosed with impairment as his prior award was reversed by the Occupational Pneumoconiosis Board.

The Claimant agrees that the following statements made by the Administrative law Judge on pages 12 and 13 of the decision:

"It is concluded that it could not have been the intent of the Legislature to make a specific change to a statute of limitation and provide the Insurance Commissioner or other Claim Administrator with no authority to act on such change. Interpreting *§23-4-15b* as only applying

to the date of last exposure or the date occupational pneumoconiosis was made known to the employee, would render the amendment to §23-4-15(b), insofar as it concerns a “diagnosed impairment due to occupational pneumoconiosis;” meaningless. Therefore, it is further concluded that the construction of §23-4-15b which permits a review of the date occupational pneumoconiosis was made known to the employee, is herein disregarded and the construction which permits a review of “within three years from and after a diagnosed impairment due to occupational pneumoconiosis was made known to the employee by a physician”, is herein applied.

The above analysis concerning the importance of the statute of limitations involving a diagnosed impairment causes the Office of Judges to find that an additional exposure is not required to file another claim and that the three-year statute of limitations is triggered by a diagnosed impairment made known to the Claimant by a physician. The Claimant has yet to be diagnosed with impairment from occupational pneumoconiosis. He has three years to file his claim from the date of his diagnosed impairment.

Accordingly, the Claimant is not time barred from filing this claim as he has three years from the date he is diagnosed with impairment from occupational pneumoconiosis; his prior diagnosed impairment was reversed. His claim should be processed on a non-medical basis.”

CONCLUSION

As the employer has failed to establish that the ruling of the Administrative Law Judge was clearly wrong under *W.Va. §23-5-12(b)*, the Claimant urges this Board to affirm the following conclusions of law made by the Administrative Law Judge:

“The Claimant has established he was exposed to the hazards of occupational pneumoconiosis two out of ten years to prosecute a claim and ten out of fifteen years to qualify for the statutory presumption. As he has not been diagnosed with impairment, since his prior diagnosis was reversed, he is not untimely.


Accordingly, it is hereby ordered the Claim Administrator’s Order of August 21, 2017, be reversed and the claim held compensable on a non-medical basis subject to the presumption that any chronic respiratory impairment he may have arose out of his employment.”

The Employer has failed in its burden of proof that the ALJ Decision of June 25, 2018 was in error; and the Claimant is requesting that it be affirmed.

Respectfully submitted,

Clifford Marenko

By Counsel



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Certificate of Service

The undersigned hereby certifies that a true copy of the foregoing document by First Class United States Mail, postage prepaid, on the following persons at the address listed below on the 31st day of March, 2021:

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Argus Energy, LLC

AIG Claims, Inc.



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APPENDIX B – REVISED RULES OF APPELLATE PROCEDURE

WORKERS' COMPENSATION APPEALS DOCKETING STATEMENT



✓ Complete Case Title: Argus Energy, LLC v. Clifford Marenko
 Petitioner: Argus Energy, LLC Respondent: Clifford Marenko
 Counsel: Jordan Martin & T. Jonathan Cook Counsel: Donald C. Wandling
 Claim No.: 2018000604 Board of Review No.: 2053142
 Date of Injury/Last Exposure: 12-31-2013 Date Claim Filed: 6-17-2017
 Date and Ruling of the Office of Judges: 6-25-2018 ruled claim compensable
 Date and Ruling of the Board of Review: 2-10-2021 affirmed 00J order
 Issue and Relief requested on Appeal: Affirmation of 00J Order

CLAIMANT INFORMATION

Claimant's Name: Clifford Marenko
 Nature of Injury: Occupational Pneumoconiosis
 Age: 76 Is the Claimant still working? ☐ Yes ☒ No. If yes, where: _____
 Occupation: coal mines No. of Years: _____
 Was the claim found to be compensable? ☒ Yes ☐ No If yes, order date: _____

ADDITIONAL INFORMATION FOR PTD REQUESTS

Education (highest): _____ Old Fund or New Fund (please circle one)
 Date of Last Employment: _____
 Total amount of prior PPD awards: _____ (add dates of orders on separate page)
 Finding of the PTD Review Board: _____

List all compensable conditions under this claim number: Occupational Pneumoconiosis
 (Attach a separate sheet if necessary)

Are there any related petitions currently pending or previously considered by the Supreme Court?
☐ Yes ☒ No
 (If yes, cite the case name, docket number and the manner in which it is related on a separate sheet.)

Are there any related petitions currently pending below? ☐ Yes ☒ No
 (If yes, cite the case name, tribunal and the manner in which it is related on a separate sheet.)

If an appealing party is a corporation an extra sheet must list the names of parent corporations and the name of any public company that owns ten percent or more of the corporation's stock. If this section is not applicable, please so indicate below.

☐ The corporation who is a party to this appeal does not have a parent corporation and no publicly held company owns ten percent or more of the corporation's stock.

Do you know of any reason why one or more of the Supreme Court Justices should be disqualified from this case? ☐ Yes ☒ No
 If so, set forth the basis on an extra sheet. Providing the information required in this section does not relieve a party from the obligation to file a motion for disqualification in accordance with Rule 33.