

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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CASE NO. _____

CHRISTOPHER SARGENT,

Petitioner,

JCN: 2024003153

vs.

DLE: 06/20/2023

ALPHA METALLURGICAL RESOURCES, INC., Employer,

Respondent.

PETITIONER'S BRIEF

BRIEF FILED ON BEHALF OF THE CLAIMANT
FROM AN APPEAL OF A FINAL DECISION OF THE WEST VIRGINIA
WORKERS' COMPENSATION BOARD OF REVIEW

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INTRODUCTORY NOTE

The Petitioner will be referred to as Claimant; the Workers' Compensation Board of Review will be referred to as BOR; the Administrative Law Judge will be referred to as ALJ; the third-party administrator will be referred to as CA; Alpha Metallurgical Resources, Inc. will be referred to as Employer; occupational pneumoconiosis will be referred to as OP; coal worker's pneumoconiosis is referred to as CWP; the Occupational Pneumoconiosis Board will be referred to as OP Board.

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ASSIGNMENT OF ERRORS

THE BOR WAS CLEARLY WRONG FINDING CLAIMANT DID NOT PROVE TO A PREPONDERANCE OF EVIDENCE THAT HE WAS EXPOSED TO THE HAZARDOUS OCCUPATIONAL DUST DURING HIS EMPLOYMENT WITH THE EMPLOYER.

STATEMENT OF THE CASE

An Employees' Report of OP dated June 20, 2023, states that Claimant was exposed to occupational dust hazards through his employment in the coal mining industry and concrete industry for around 19 years. He presently works for Employer. **[Exhibit 1]**

In a Physician's Report of OP dated August 16, 2023, Dr. Spencer reported Claimant has a diagnosed impairment attributable to OP. **[Exhibit 2]**

Pulmonary function test results from New River Breathing Center dated June 21, 2023, indicated spirometry: normal and DLCO: moderate reduction. **[Exhibit 3]**

An Employer's Report of OP dated August 28, 2023, noted that Claimant was employed as a miner operator and last worked on July 11, 2023. The Employer did not believe Claimant was exposed to excessive levels of dust. **[Exhibit 4]**

By order of the CA dated August 30, 2023, the claim was rejected for OP. **[Exhibit 5]**

A chest CT scan dated October 8, 2023, revealed minimal nodularity and reticular changes at the apices with no suspicious pulmonary nodule or mass. **[Exhibit 6]**

The Claimant testified via deposition on March 21, 2024, that from 1994 to 2004 he worked for Quikrete, a concrete plant. He described that he packed

concrete into bags and was exposed to silica dust by dragging sand into a big dryer before he put it into the bags with the concrete. He explained that he worked for various coal mining companies from 2004 to August of 2021 when he began working for Employer. In May Of 2022 he did return to Carter Roag for a brief period, but returned to Employer in August of 2022. Claimant explained that he wore a 3M mask for about half of the time. He testified that the sampling levels taken August 23, 2021, through May 25, 2022, were not indicative of the typical conditions he worked under because on days that he wore the dust sampler he was provided people to help him hang curtain to lessen the amount of dust. However, when he was not wearing the dust sampler, he hung curtain himself. He stated he was not certified by MSHA for the collection and submission of dust samples, nor did he have any training for maintaining or calibrating dust pumps. He testified that he was exposed to hazardous occupational dust through the entirety of his employment as a miner/shuttle car operator for all employers, and while Employer may have had less dust than his prior employers, he was still exposed to occupational dust with Employer.

[Exhibit 7]

The Employer submitted dust sampling results from various dates from October 27, 2021, through May 24, 2023. **[Exhibit 8]**

The Employer submitted a report from James McIntosh, Certified Industrial Hygienist, dated August 7, 2024. He indicated that he reviewed

approximately 131 air sample results for the Claimant from August 23, 2021, to May 25, 2022, and August 1, 2022, to July 10, 2023. He stated that the sampling conformed to federal regulations and were valid and representative of Claimant's dust exposure at Employer. He opined that Claimant did not have any exposure to hazardous dust levels during his employment with Employer. **[Exhibit 9]**

By decision dated October 7, 2024, the BOR affirmed the CA's decision, denying the claim for OP. **[Exhibit 10]** The Claimant now appeals.

SUMMARY OF ARGUMENT

The BOR's decision was clearly wrong in view of the reliable, probative and substantial evidence of the whole record, thus, causes extreme prejudice to the substantial rights of the Claimant, and should be reversed pursuant to West Virginia Code § 23-5-12a(b).

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner submits that the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument.

ARGUMENT

Under West Virginia Code § 23-5-12a(b), the Intermediate Court of Appeals "shall reverse, vacate, or modify the order or decision of the Workers' Compensation Board of Review, if the substantial rights of the petitioner or

petitioners have been prejudiced because the Board of Review's findings are: (1) In violation of statutory provisions; (2) In excess of the statutory authority or jurisdiction of the Board of Review; (3) Made upon unlawful procedures; (4) Affected by other error of law; (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."

Further, West Virginia Code § 23-4-1g requires that the resolution of the instant issue requires a weighing of all evidence pertaining to the issue and a finding that a preponderance of the evidence supports the chosen manner of resolution. If, after weighing all the evidence regarding an issue, there is a finding that an equal amount of evidentiary weight exists for each side, the resolution that is most consistent with the claimant's position will be adopted.

The issue in this case is whether the Claimant's application for a claim of OP should have been approved.

Pursuant to W.Va. Code § 23-4-1(b), in order to file for OP benefits, the Claimant must show exposure to the hazards of OP in West Virginia over a continuous period of not less than two years during the ten years immediately preceding the date of last exposure to such hazards, or for any five of the fifteen years immediately preceding such date of last exposure. The claim must be filed within three years of the Claimant's last date of at least sixty continuous days of

exposure to the hazards of OP, or within three years of being advised by a physician he has impairment due to OP. W.Va. Code § 23-4-15(b). In the case at hand, there is no dispute concerning the Claimant meeting the proper time requirements for filing his OP claim. Instead, the dispute is whether the Claimant has shown he was exposed to the hazards of OP during his employment.

A hazard of OP, as contemplated by W.Va. Code § 23-4-1(b), has been described as "any condition where it can be demonstrated that there are minute particles of dust in abnormal quantities in the work area." Fletcher v. W.Va. Office of Ins. Comm'r, No. 11-0404 (W.Va. Supreme Court, October 31, 2012) (memorandum decision), (quoting Meadows v. Workmen's Com. Comm'r, 157 W.Va. 140, 145, 198 S.E.2d 137, 139 (1973)).

The BOR, when affirming the CA's denial of the claim, stated that Employer demonstrated the Claimant was not exposed to the hazards of dust during his employment, noting W. VA. CSR § 85-20-52.2, which provides that an employer may submit evidence demonstrating compliance with OSHA and/or MSHA permissible exposure levels that the insurance carrier may consider when finding whether or not the dust exposure satisfies the exposure requirements of W. Va. Code §§23-4-1(b) and 23-4-15(b), but only for the periods covered by the testing. **[Exhibit 10, p. 5]**

To be credible, the (1) results must be based on regularly scheduled exposure samples from each work area where the harmful exposure has been

alleged by Claimant; (2) the dust samples must have been obtained by a certified industrial hygienist as defined by OSHA and/or MSHA regulations or government agency; and (3) the samples must have been obtained during the period for which the employer is seeking to avoid chargeability. W. VA. CSR §85-20-52.2.

The BOR clearly erred in finding that W. VA. CSR §85-20-52.2 had been met. Specifically, element two requires that the sampling be obtained by a certified industrial hygienist as defined by OSHA and/or MSHA regulations or government agency. In this case, Claimant testified that he wore the dust sampler during testing days and he is not MSHA certified as required by W. VA. CSR §85-20-52.2 to collect dust samples. **[Exhibit 7]** Yet, the BOR decision incorrectly glossed over this glaring requirement and simply and incorrectly stated that Mr. McIntosh's report proved that W. VA. CSR §85-20-52.2 had been met, when, in fact, Mr. McIntosh's report only spoke about the federal regulations of 30 C.F.R. Part 70 Subpart C being met, and did not at all consider the requirements of W. VA. CSR §85-20-52.2. **[Exhibit 10, p.5]**

Further, the BOR decision failed to analyze, or even acknowledge, Claimant's sworn testimony that the samples he obtained were not representative of his actual dust exposure during his normal work shifts due to the fact that when he wore the sampler, other people assisted in hanging curtain as to keep him out of the dust, whereas when he was not wearing the sampler during a normal shift, he was hanging curtain by himself and thus was in the more

concentrated dust zone. **[Exhibit 7]** Instead, the BOR decision simply, again, provided a one-sentence determination that Mr. McIntosh's unsworn report proves Claimant was not exposed to hazardous occupational dust, in spite of the evidence of record that proves otherwise. **[See Exhibits 1, 2, 7, and 10]**

The evidence of record provides that the elements of W. VA. CSR §85-20-52.2 have not been met, and that the Claimant was, in fact, exposed to hazardous occupational dust during his employment with Employer. The BOR decision was clearly erroneous in its finding that W. VA. CSR §85-20-52.2 was met and by disregarding the Claimant's medical reports and testimony regarding his many years of extensive and significant dust exposure, and caused extreme prejudice to the Claimant by improperly blocking his OP claim. Accordingly, the BOR decision dated October 7, 2024, should be reversed pursuant to West Virginia Code § 23-5-12a(b).

PRAYER

WHEREFORE, based upon the foregoing, the Claimant respectfully moves this Honorable Court to **REVERSE** the BOR's decision of October 7, 2024, and authorize the claim for OP.

Respectfully submitted,
Christopher Sargent
By Counsel

A handwritten signature in cursive script, appearing to read "Reginald D. Henry".

Reginald D. Henry
WV State Bar #: 4933

A handwritten signature in cursive script, appearing to read "Lori J. Withrow".

Lori J. Withrow
WV State Bar # 13096

CERTIFICATE OF SERVICE

I, Reginald D. Henry, counsel for the Claimant herein, do hereby certify that I served the foregoing Petitioner's Brief and Appendix by forwarding a true copy thereof by File & Serve Xpress efilng, to the following:

Alysia Kozlowski, Esquire
400 Quarrier St.
Charleston, WV 25301

November 5, 2024

A handwritten signature in cursive script that reads "Reginald D. Henry". The signature is written in dark ink and is positioned above a horizontal line.

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