

**STATE OF WEST VIRGINIA**

**SUPREME COURT OF APPEALS**

**FILED**

**JAMES L. ASBURY, Petitioner**

**March 22, 2012**  
**RORY L. PERRY II, CLERK**  
**SUPREME COURT OF APPEALS**  
**OF WEST VIRGINIA**

**vs.) No. 101454 (BOR Appeal No. 2044419)**  
**(Claim No. 2007021935)**

**WEST VIRGINIA OFFICE OF**  
**INSURANCE COMMISSIONER and**  
**MYSTIC, LLC, Respondent**

**MEMORANDUM DECISION**

Petitioner James L. Asbury, by John Blair, his attorney, appeals the West Virginia Workers' Compensation Board of Review's Order denying compensability of the claim for an occupational disease. The West Virginia Office of Insurance Commissioner, by Laura Young, its attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated October 13, 2010, in which the Board affirmed an April 7, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the Claims Administrator's April 28, 2009, rejection of the claim for degenerative arthritis of the right knee. The Court has carefully reviewed the records, written arguments, and appendices contained in the petition, and the case is mature for consideration.

Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this matter is appropriate for consideration under the Revised Rules. Having considered the petition and the relevant decision of the lower tribunal, the Court is of the opinion that the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the Court determines that there is no prejudicial error. This case does not present a new or significant question of law. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

The Board of Review affirmed the holding that the claimant had not suffered an occupational disease as defined under W. Va. Code § 23-4-1(f) (2008). The petitioner disagrees and argues there was no evidence offered to contradict the fact that his treating physician noted that natural degeneration was not the cause of the condition. Moreover, the petitioner asserts that he testified

that the symptoms occurred throughout his employment, but he treated it himself and the symptoms resolved.

In its Order affirming the Claims Administrator's rejection of the claim, the Office of Judges found that the preponderance of the evidence does not support a finding that the claimant suffers from an occupational disease. The Office of Judges noted a statement that knee problems had been documented, but found the record lacked such documentation. It also noted a significant accident outside petitioner's employment and a subsequent "Knee Evaluation" that found the pain was located in the right thigh due to a skiing accident. Ultimately, the Office of Judges found the claimant suffered an ordinary disease of life in the form of mild degenerative arthritis unrelated to his occupation. The Board of Review reached the same reasoned conclusions in affirming the Office of Judges in its decision of October 13, 2010.

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 Board of Review Order is affirmed.

Affirmed.

**ISSUED: March 22, 2012**

**CONCURRED IN BY:**

Chief Justice Menis E. Ketchum

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Margaret L. Workman

Justice Thomas E. McHugh