

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

**KENNA JOHNSTON,
Claimant Below, Petitioner**

FILED
September 12, 2013
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) **No. 11-1740** (BOR Appeal No. 2045980)
(Claim No. 2010120621)

**CRW WEST VIRGINIA,
Employer Below, Respondent**

MEMORANDUM DECISION

Petitioner Kenna Johnston, by John H. Shumate Jr., his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. CRW West Virginia, by H. Toney Stroud, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated November 30, 2011, in which the Board affirmed a May 13, 2011, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges modified the claims administrator's January 20, 2010, decision denying Mr. Johnston's application for workers' compensation benefits 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. Johnston worked in several positions for CRW West Virginia (Quikrete) beginning on March 2, 2007. He was diagnosed with occupational pneumoconiosis on June 5, 2009, by Dr. Mehta. On January 20, 2010, the claims administrator denied Mr. Johnston's application for workers' compensation benefits, and found that the injury did not occur in the course of and resulting from his employment.

The Office of Judges modified the claims administrator's Order, and held that Mr. Johnston failed to meet the requirements of West Virginia Code § 23-4-1 (2008). On appeal, Mr. Johnston argues that Dr. Mehta, as his treating physician, is in the best position to diagnose

occupational pneumoconiosis, and that his opinion is supported by appropriate diagnostic testing along with medical history, thus, the claim should be held compensable. CRW West Virginia maintains that the denial of workers' compensation benefits was proper, and notes that there are several inconsistencies in Mr. Johnston's testimony regarding his history of breathing problems and the use of respirators.

The Office of Judges concluded that Mr. Johnston failed to establish that he was exposed to the hazards of occupational pneumoconiosis over a continuous period of not less than two years during the ten years immediately preceding the date of his last exposure to such hazards. It noted that the preponderance of the evidence indicates that Mr. Johnston was not exposed continuously to minute particles of dust in abnormal quantities during his employment with CRW West Virginia. It noted that he acknowledged that he wore a tight fitting OSHA approved dust respirator. Further, a report by James McIntosh, an industrial hygienist, also found that Mr. Johnston was not exposed to hazardous levels of airborne dust during his employment. The Office of Judges further noted that while this was the non-medical stage of compensability, the medical records establish that despite Mr. Johnston's testimony otherwise, he has a history of breathing problems predating his employment with CRW West Virginia. Thus, the Office of Judges held that Mr. Johnston failed to meet the requirement of West Virginia Code § 23-4-1, and the application for workers' compensation benefits was properly denied. The Board of Review reached the same reasoned conclusions in its decision of November 30, 2011. We agree with the reasoning and conclusions of the Board of Review.

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 12, 2013

CONCURRED IN BY:

Justice Robin J. Davis
Justice Margaret L. Workman
Justice Menis E. Ketchum
Justice Allen H. Loughry II

DISSENTING:

Chief Justice Brent D. Benjamin