

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

December 13, 2013

RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

DAVID HENRY,
Claimant Below, Petitioner

vs.) **No. 12-0501** (BOR Appeal No. 2046470)
(Claim No. 2010123252)

WHEELING HOSPITAL, INC.,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner David Henry, by M. Jane Glauser, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Wheeling Hospital, Inc., by Lucinda L. Fluharty, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated March 26, 2012, in which the Board affirmed a September 12, 2011, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's August 31, 2010, decision rejecting the claim. 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. Henry worked for Wheeling Hospital as a painter for almost two years. In the later part of 2008, after he had stopped working, Mr. Henry began experiencing breathing problems. Dr. Lenkey then found that, given Mr. Henry's history of significant paint exposure, he could have occupational-induced painter's asthma. Based on Dr. Lenkey's assessment, Mr. Henry filed a claim for worker's compensation benefits. On August 31, 2010, the claims administrator rejected Mr. Henry's application. Following the rejection, Dr. Fino performed an independent medical evaluation of Mr. Henry and found no evidence of a respiratory condition related to his work and no evidence of asthma regardless of etiology. On September 12, 2011, the Office of

Judges affirmed the claims administrator's decision. The Board of Review then affirmed the Order of the Office of Judges on March 26, 2012, leading Mr. Henry to appeal.

The Office of Judges concluded that Mr. Henry failed to show that he suffered from an occupational disease. The Office of Judges considered the assessment of Dr. Lenkey, but found that he did not make a definitive diagnosis of occupational asthma. The Office of Judges also found that the pulmonary function studies relied on by Dr. Lenkey were not valid. The Office of Judges also found that Mr. Henry did not show that asthma could be seen to have followed as a natural incident of paint exposure at work. The Office of Judges found that no physician or industrial hygienist had found that Mr. Henry's work with Wheeling Hospital had resulted in an occupational disease. Finally the Office of Judges found that there was no evidence that Mr. Henry's work for Wheeling Hospital was the proximate cause of any occupational disease. The Office of Judges found that there was no evidence which linked any condition to Mr. Henry's employment. The Office of Judges was also persuaded by the fact that Mr. Henry's alleged breathing problems started after he had ceased working at Wheeling Hospital and had not improved since then. The Board of Review adopted the findings of the Office of Judges and affirmed its Order. The Board of Review also denied Mr. Henry's motion to remand the case to add an additional chargeable employer.

We agree with the conclusions of the Board of Review and the findings of the Office of Judges. Mr. Henry has not demonstrated that he received an occupational disease in the course of and resulting from his employment. The assessment of Dr. Lenkey did not provide a definitive diagnosis of asthma and he did not submit any other medical evidence demonstrating that he has developed a lung condition. Mr. Henry has also not demonstrated that any such condition is occupationally related. He has not shown that he contracted an occupational disease as a natural incident of his work as a painter or his exposure to paint fumes. Additionally, Mr. Henry has not submitted any evidence demonstrating that his work at Wheeling Hospital was the proximate cause of any lung condition. The Board of Review was within its discretion to deny Mr. Henry's motion to remand the case to the Office of Judges for the purpose of adding an additional chargeable employer to the claim.

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: December 13, 2013

CONCURRED IN BY:

Chief Justice Brent D. Benjamin
Justice Robin J. Davis
Justice Margaret L. Workman
Justice Menis E. Ketchum
Justice Allen H. Loughry II