

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

ROGER D. SHREWSBURY, Petitioner

November 2, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) No. 101041 (BOR Appeal No. 2044368)
(Claim No. 2008044567)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
TOP GUN, INC., Respondent**

MEMORANDUM DECISION

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated July 27, 2010, in which the Board affirmed an April 2, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's denial of any permanent partial disability award for occupational pneumoconiosis. The appeal was timely filed by the petitioner and a response was filed by the Office of Insurance Commissioner. 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, response, 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.

Mr. Shrewsbury asserts the Occupational Pneumoconiosis Board found he suffers from 15% pulmonary impairment, however, it improperly attributed his impairment to a history of cigarette smoking and cardiac problems. As a result, Mr. Shrewsbury states the Board of Review gave improper weight to the Board's evidence finding his pulmonary issues were unrelated to occupational pneumoconiosis. The Office of Insurance Commissioner

asserts the Board of Review properly determined Mr. Shrewsbury does not suffer from occupational pneumoconiosis based upon his history of cigarette smoking and cardiac problems.

In its Order the Office of Judges considered the evidence of record and the findings of the Occupational Pneumoconiosis Board in determining Mr. Shrewsbury does not suffer from Occupational Pneumoconiosis. It held “[t]he claimant’s long history of tobacco abuse, as well as his well documented cardiac problems, indicate that his pulmonary function impairment is due to causes unrelated to the workplace.” (April 2, 2010, Office of Judges Order, p. 5). The Office of Judges, too, found no basis for finding that Mr. Shrewsbury does suffer from Occupational Pneumoconiosis or for disputing the Claims Administrator’s findings. The Board of Review reached the same reasoned conclusion in affirming the Office of Judges in its decision of July 27, 2010.

For the foregoing reasons, we find that the decision of the Board of Review is not in clear violation of constitutional or statutory provision, clearly the result of erroneous conclusions of law, or is based upon the Board's material misstatement or mischaracterization of particular components of the evidentiary record. Therefore, the denial any permanent partial disability award for Occupational Pneumoconiosis is affirmed.

Affirmed.

ISSUED: November 2, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Menis E. Ketchum

Justice Thomas E. McHugh