

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

November 7, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MICHAEL NEILSON, Petitioner

vs.) **No. 11-0006** (BOR Appeal No. 2044728)
(Claim No. 2008011391)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
PENNZOIL-QUAKER STATE COMPANY, Respondent**

MEMORANDUM DECISION

Petitioner, Michael Neilson, by Patrick K. Maroney, his attorney, appeals the Board of Review Order denying a permanent partial disability award for occupational hearing loss. Pennzoil-Quaker State Company, by Gary W. Nickerson, its attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated December 3, 2010, in which the Board affirmed a June 8, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's denial of Mr. Neilson's request for a permanent partial disability award for occupational hearing loss. The Court has carefully reviewed the records, written arguments, and appendices contained in the petition, and the case is mature for consideration.

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 found that the preponderance of the evidence establishes Mr. Neilson does not suffer from occupational hearing loss. Mr. Neilson asserts the testing from Dr. Roger Shea establishes he has a 10 dB decrease in hearing as a direct result of his 35 year occupational exposure to industrial noise. Pat McCarthy conducted the audiogram, interpreted by Dr. Shea, establishing industrial hearing loss.

The Office of Judges held Dr. Shea's opinion that Mr. Neilson's hearing loss "was most likely due to noise exposure" is not a decisive conclusion that [Mr. Neilson] suffered from

impairment due to occupational noise induced hearing loss, since [Mr. Neilson's] hearing continued to decrease across all frequencies even though [Mr. Neilson] was no longer exposed to occupational noise. Further, Dr. Wallace opined, on review of Mr. Neilson's medical records, that Mr. Neilson does not suffer from noise induced hearing loss, since Mr. Neilson's hearing continued to decrease even though no continued exposure to occupational noise occurred. Additionally, Dr. Wallace's report was found more persuasive and reliable since Dr. Wallace is a board-certified otolaryngologist, as opposed to Dr. Shea and Ms. McCarthy. The Office of Judges, too, found no basis for granting an award of permanent partial disability, or for disputing the claim administrator's findings. The Board of Review reached the same reasoned conclusions in affirming the Office of Judges in its decision of December 3, 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: November 7, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin J. Davis
Justice Brent D. Benjamin
Justice Thomas E. McHugh

DISSENTING:

Justice Margaret L. Workman