

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

October 2, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

JACK RADFORD, Petitioner

**vs.) No. 11-0280 (BOR Appeal No. 2044894)
(Claim No. 840067259)**

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER,
RICHARD GOETTLE, INC., and
NATIONAL ENGINEERING & CONSTRUCTION
COMPANY, Respondent**

MEMORANDUM DECISION

Petitioner Jack Radford, pro se, appeals the decision of the West Virginia Workers' Compensation Board of Review. The West Virginia Office of Insurance Commissioner, by Jack Rife, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated January 26, 2011, in which the Board affirmed a July 28, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's September 21, 2009, denial of Mr. Radford's request for authorization of a lung transplant evaluation. 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.

Mr. Radford was exposed to occupational dust hazards while employed as a millwright/general laborer with Richard Goettle Inc. and National Engineering and Construction Company. He received a 20% permanent partial disability award for occupational pneumoconiosis, and underwent a double lung transplant on June 12, 2010. On May 9, 1997, Dr.

Loudon reviewed Mr. Radford's medical records and found that he had minimal indications of interstitial pulmonary fibrosis that may be related to the inhalation of dust particles, such as asbestos, that has not progressed within the last decade. Dr. Loudon also diagnosed Mr. Radford with severe emphysema that has been steadily progressing. Dr. Loudon found that Mr. Radford's pulmonary function impairment was the result of chronic obstructive pulmonary disease attributable to Mr. Radford's former smoking habit, and that occupational dust exposure played no material part in his pulmonary function impairment. Dr. Loudon further found that Mr. Radford required a lung transplant due to non-occupational disease. On February 19, 2010, Dr. Martin reviewed Mr. Radford's medical records. Dr. Martin found that Mr. Radford had no specific changes suggestive of asbestos-related disease, and was not able to implicate asbestos as playing a role in his lung condition. Dr. Martin diagnosed Mr. Radford with emphysema consistent with the type of pattern seen in excessive smokers. He also found that Mr. Radford's need for a lung transplant stems from non-occupational factors.

In its Order affirming the September 21, 2009, claims administrator's decision, the Office of Judges held that Mr. Radford's need for a lung transplant stems from non-occupational emphysema. Mr. Radford disputes this finding and asserts that he required a lung transplant because of his exposure to occupational dust hazards.

West Virginia Code of State Rules §85-20-18.2 (2006) discusses the authorization of organ transplants and states: "Transplants which are needed, in whole or in part, because of an intervening cause, such as long term alcohol consumption, smoking, or other tobacco use shall be declined coverage by the Commission, Insurance Commissioner, private carrier or self-insured employer, whichever is applicable."

On December 7, 1999, the Occupational Pneumoconiosis Board found that Mr. Radford has a 20% pulmonary function impairment due to occupational pneumoconiosis resulting from forty years' exposure to occupational dust hazards. The Occupational Pneumoconiosis Board also diagnosed Mr. Radford with emphysema. Based on the evidence of record, the Office of Judges found that Mr. Radford sustained a 20% whole person impairment due to occupational pneumoconiosis and an 80% whole person impairment due to non-occupational emphysema. The Board of Review reached the same reasoned conclusions in its decision of January 26, 2011. Therefore, pursuant to West Virginia Code of State Rules §85-20-18.2, Mr. Radford is not entitled to authorization for a bilateral lung transplant.

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: October 2, 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