

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

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

IRA R. SLUSS, Petitioner

**vs.) No. 11-0291 (BOR Appeal No. 2045076)
(Claim No. 2004034943)**

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER,
SHADY SPRINGS STONE COMPANY
and DOUGLAS W. CRUISE, Respondent**

MEMORANDUM DECISION

Petitioner Ira R. Sluss, by Paige Flanigan, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. The West Virginia Office of Insurance Commissioner, by Mary Rich Maloy, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated January 20, 2011, in which the Board affirmed a September 13, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's April 1, 2009, decision that Mr. Sluss has been fully compensated by a prior 10% permanent partial disability award for occupational pneumoconiosis. 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.

Following exposure to dust hazards in the course of his employment as a welder/mechanic with Shady Springs Stone Company and Douglas W. Cruise, Mr. Sluss filed a claim for workers' compensation benefits. On April 9, 2004, the claim was held compensable for occupational pneumoconiosis and Mr. Sluss was granted a 10% permanent partial disability award. On July 15, 2009, Dr. Rasmussen examined Mr. Sluss and diagnosed him with clinical

occupational pneumoconiosis after finding evidence of radiographic changes consistent with occupational pneumoconiosis. Dr. Rasmussen noted that Mr. Sluss's thirty-five year smoking habit contributed to his pulmonary function impairment, and found that he suffers from a 25% impairment of pulmonary function. Dr. Rasmussen then found that all of the pulmonary function impairment is "attributable in significant part to occupational dust exposure." At a hearing on August 4, 2010, the Occupational Pneumoconiosis Board testified that Mr. Sluss suffers from an overall pulmonary function impairment of 20%, but only 10% of his pulmonary function impairment is attributable to occupational pneumoconiosis.

In its Order affirming the claims administrator's April 1, 2009, decision, the Office of Judges held that Mr. Sluss was fully compensated through his prior 10% permanent partial disability award for occupational pneumoconiosis. Mr. Sluss disagrees and asserts, per the opinion of Dr. Rasmussen, that he is entitled to an additional 15% permanent partial disability award, for a total permanent partial disability award for occupational pneumoconiosis of 25%.

The Office of Judges found that the evidence of record indicates that the Occupational Pneumoconiosis Board's conclusion that any pulmonary function impairment over 10% is attributable to Mr. Sluss's history of smoking was not clearly wrong. Additionally, both the Office of Judges and the Occupational Pneumoconiosis Board noted that Dr. Rasmussen's impairment rating did not separate the portion of Mr. Sluss's pulmonary impairment due to smoking from the portion of his impairment due to exposure to occupational dust. The Board of Review reached the same reasoned conclusion in its decision of January 20, 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: October 2, 2012

CONCURRED IN BY:

Justice Robin J. Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh

DISSENTING:

Chief Justice Menis E. Ketchum