

**STATE OF WEST VIRGINIA**

**SUPREME COURT OF APPEALS**

**FILED**

July 17, 2013

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

**CLARENCE T. SMITH SR.,  
Claimant Below, Petitioner**

vs.) **No. 11-1423** (BOR Appeal No. 2045793)  
(Claim No. 2010128688)

**SHAW GROUP, INC.,  
Employer Below, Respondent**

**MEMORANDUM DECISION**

Petitioner Clarence T. Smith Sr., by Patrick Maroney, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. The Shaw Group, Inc., by Michael Watson, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated September 21, 2011, in which the Board affirmed a March 10, 2011, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's March 18, 2010, decision rejecting the claim for workers' compensation benefits for occupational pneumoconiosis. 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.

On April 23, 2009, Mr. Smith filed an application for workers' compensation benefits for occupational pneumoconiosis. Mr. Smith has introduced evidence that indicates intermittent exposure to the hazards of occupational pneumoconiosis from 2001 through his date of last exposure on January 14, 2009. In 2003, he retired and worked thereafter only in the event of a manpower shortage. In its decision affirming the March 18, 2010, claims administrator's decision, the Office of Judges held that the preponderance of the evidence does not establish that Mr. Smith was exposed to the hazards of occupational pneumoconiosis for the statutorily

prescribed time necessary for the prosecution of a claim for occupational pneumoconiosis benefits.

West Virginia Code § 23-4-1(b) (2003) provides in part that “compensation shall not be payable for the disease of occupational pneumoconiosis, or death resulting from the disease, unless the employee has been exposed to the hazards of occupational pneumoconiosis in the State of West Virginia over a continuous period of not less than two years during the ten years immediately preceding the date of his or her last exposure to such hazards, or for any five of the fifteen years immediately preceding the date of his or her last exposure.” The Office of Judges found that pursuant to the Statute, Mr. Smith’s exposure from 1994 forward can be reasonably considered if he can demonstrate exposure to the hazards of occupational pneumoconiosis for five of the last fifteen years, or that his exposure from 1999 forward can be considered if he demonstrates exposure for a continuous period of two years out of the last ten. After reviewing Mr. Smith’s employment history, the Office of Judges found that the preponderance of the evidence does not demonstrate that he was exposed to the hazards of occupational pneumoconiosis for five years out of the last fifteen years, or for a continuous period of two years out of the last ten years. The Board of Review reached the same reasoned conclusions in its decision of September 21, 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: July 17, 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