

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

September 13, 2019
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

LARRY DURST,
Claimant Below, Petitioner

vs.) **No. 18-0739** (BOR Appeal No. 2052741)
(Claim No. 2017016154)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER,**
Commissioner Below, Respondent

and

KANAWHA VALLEY CONSTRUCTION & ERECTION,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Larry Durst, by Edwin H. Pancake, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. The West Virginia Office of the Insurance Commissioner, by Henry C. Bowen, its attorney, filed a timely response.

The issue on appeal is compensability. The claims administrator rejected the claim for occupational pneumoconiosis on May 9, 2017. The Office of Judges affirmed the decision in its February 26, 2018, Order. The Order was affirmed by the Board of Review on July 25, 2018.

The Court has carefully reviewed the records, written arguments, and appendices contained in the briefs, and the case is mature for consideration. 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.

Mr. Durst, a former oiler, foreman, and crane operator, alleges that he developed occupational pneumoconiosis as a result of occupational exposure. A Work History Detail Report states that Mr. Durst began working in 1973. From 1994 to 2003, he worked exclusively through

the IUOE Union Hall in an administrative position. He last worked at a work site in March of 1994. The Employees' Report of Occupational Pneumoconiosis was completed on November 28, 2016, and indicates Mr. Durst was retired. He stated that he was diagnosed with occupational pneumoconiosis on October 26, 2016, by Jennifer Hadley, D.O. Mr. Durst alleged that he was exposed to the hazards of occupational pneumoconiosis for thirty-nine years. He indicated that his last employer with sixty days of continuous exposure was Kanawha Valley Construction around September of 1993. The Physician's Report of Occupational Pneumoconiosis was completed that same day by Dr. Hadley. She stated that Mr. Durst had occupational pneumoconiosis; however, she did not know how long he had been suffering from the disease or if he had impairment as a result. She noted that he had dyspnea, a chronic cough, and chest pain.

Mr. Durst completed interrogatories on July 12, 2017, in which he was asked to describe his job duties and dust exposure for each of his previous employers. For twenty of his twenty-four listed jobs Mr. Durst stated that he either could not recall his exposure or the work was short-term with limited exposure. For Research-Cotrell, he stated that he was a crane operator and that he was exposed to the hazards of occupational pneumoconiosis while mixing and pouring concrete. For Canonie Construction Company, Mr. Durst indicated that he was a crane operator and suffered exposure to the hazards of occupational pneumoconiosis while hammering pilings. For CJ Mahan Construction Company, he stated that he was a crane operator and was exposed to the hazards of occupational pneumoconiosis while driving pilings and mixing and pouring concrete. For Russell Construction Company, Mr. Durst indicated he was a crane operator and was exposed to the hazards of occupational pneumoconiosis while hammering pilings and from coal dust and fly ash.

Mr. Durst testified in a deposition on July 19, 2017, that he worked in the field until 1994. From 1994 to 2003, he worked in administration. While he was working in the field he was an oiler, a fireman, and a crane operator. He testified that he was exposed to dust for six months while working for Keyser Aluminum and Ross Brothers Construction. Mr. Durst stated that he was exposed to significant amounts of dust while working as a fireman for Grabo and Crane Brothers because he was required to shovel coal and clean ash for eight to twelve hours a day. Mr. Durst alleged that he was exposed to dust while setting iron for Jack Gilkerson.

The claims administrator rejected the claim on May 9, 2017. The Office of Judges affirmed the decision on February 26, 2018. It found that the evidence submitted failed to show that Mr. Durst met the exposure requirements of West Virginia Code § 23-4-1 (2018), which requires exposure to the hazards of occupational pneumoconiosis continuously during two of the previous ten years immediately before the date of last exposure, or any five of the previous fifteen years before the date of last exposure. Mr. Durst's date of last exposure was found to be March 31, 1994. He testified that he transferred to an administrative position in September of 1994 and no earnings were reported between April and August of 1994. Therefore, the relevant period for determining if the nonmedical requirements have been met is from March 31, 1979, to March 31, 1994.

The Office of Judges found that Mr. Durst completed interrogatories listing his work history, job duties, and exposure to the hazards of occupational pneumoconiosis. For the majority of the employers, he could not remember his job duties or exposure. For others, he merely listed the exposure as varied, which the Office of Judges found was not specific enough. The Office of

Judges concluded that the interrogatory responses and testimony fail to establish two years of continuous exposure during the ten years prior to his date of last exposure. The longest exposure period was for twenty-four months at Canonie; however, the work was not continuous since Mr. Durst had a six month gap in his employment. The next longest exposure period was with CJ Mahan Construction Company, where Mr. Durst worked for twenty months. The Office of Judges found that the remaining employers had far less exposure than two years.

The Office of Judges also found that Mr. Durst fell just short of five years of exposure in the fifteen years preceding his date of last exposure. In the fifteen year period, Mr. Durst worked for Union Boiler for eight months, Canonie for twenty-four months, CJ Mahon for twenty months, Kanawha Valley Construction for five months, and Russell Construction for two months. The total exposure is fifty-nine months, which is one month short of the five year exposure requirement. Therefore, the Office of Judges held that Mr. Durst failed to meet the non-medical exposure requirements of West Virginia Code § 23-4-1. The Board of Review adopted the findings of fact and conclusions of law of the Office of Judges and affirmed its Order on July 25, 2018.

After review, we agree with the reasoning and conclusions of the Office of Judges as affirmed by the Board of Review. The statutorily required exposure was not established in this case. A preponderance of the evidence fails to show that Mr. Durst was exposed to the hazards of occupational pneumoconiosis continuously during two of the previous ten years immediately before his date of last exposure, or any five of the previous fifteen years before the date of last exposure

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: September 13, 2019

CONCURRED IN BY:

Chief Justice Elizabeth D. Walker
Justice Margaret L. Workman
Justice Tim Armstead
Justice Evan H. Jenkins
Justice John A. Hutchison