

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

MURRAY AMERICAN ENERGY, INC.,
Employer Below, Petitioner

vs.) **No. 21-0220** (BOR Appeal No. 2055710)
(Claim No. 2020018182)

ALBERT BAILEY,
Claimant Below, Respondent

MEMORANDUM DECISION

Petitioner Murray American Energy, Inc., by Counsel Aimee M. Stern, appeals the decision of the West Virginia Workers' Compensation Board of Review ("Board of Review"). A response was not filed on behalf of Mr. Bailey.

The issue on appeal is compensability. The claims administrator rejected the claim on March 26, 2020. The Workers' Compensation Office of Judges ("Office of Judges") reversed the decision in its September 8, 2020, Order and held the claim compensable for occupational noise-induced hearing loss. The Order was affirmed by the Board of Review on February 19, 2021.

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.

The standard of review applicable to this Court's consideration of workers' compensation appeals has been set out under W. Va. Code § 23-5-15, in relevant part, as follows:

(c) In reviewing a decision of the Board of Review, the Supreme Court of Appeals shall consider the record provided by the board and give deference to the board's findings, reasoning, and conclusions

(e) If the decision of the board effectively represents a reversal of a prior ruling of either the commission or the Office of Judges that was entered on the same issue in the same claim, the decision of the board may be reversed or modified by the Supreme Court of Appeals only if the decision is in clear violation of constitutional or statutory provisions, is clearly the result of erroneous conclusions of law, or is so clearly wrong based upon the evidentiary record that even when all inferences are resolved in favor of the board's findings, reasoning, and conclusions, there is insufficient support to sustain the decision. The court may not conduct a de novo reweighing of the evidentiary record

See Hammons v. W. Va. Off. of Ins. Comm'r, 235 W. Va. 577, 582-83, 775 S.E.2d 458, 463-64 (2015). As we previously recognized in *Justice v. West Virginia Office Insurance Commission*, 230 W. Va. 80, 83, 736 S.E.2d 80, 83 (2012), we apply a de novo standard of review to questions of law arising in the context of decisions issued by the Board. *See also Davies v. W. Va. Off. of Ins. Comm'r*, 227 W. Va. 330, 334, 708 S.E.2d 524, 528 (2011).

Mr. Bailey alleged below that he sustained hearing loss as a result of his employment in coal mines. On December 21, 2017, Richard Vasicek, D.O., signed an Audiometrics Results form in which he noted that Mr. Bailey's exposure history included daily ringing in the ears, a blood relative with hearing loss, prescription drugs, high blood pressure, noise exposure at other jobs, noisy hobbies, weapons fire, and the use of gas powered home equipment. It was noted that Mr. Bailey was a sheet metal worker for nine years. At home, he used a weed eater, lawn mower, chainsaw, and an air compressor. He also hunted and shot guns once a month.

The Employees' and Physicians' Report of Occupational Hearing Loss was completed on January 19, 2020, and indicates Mr. Bailey worked for Murray American Energy from January 2018, through June 2018 as a longwall supervisor. From 1992 to 2017, he worked at Federal No. 2 as a longwall supervisor. Mr. Bailey worked at Whitetail Mining from 2001 to 2002 as a miner operator, bolter, and rock duster. In 1992 he was employed at Pitt Energy as a utility man and at MDM Mining as a miner operator. Mr. Bailey worked for Tygart Coal Company from 1980 to 1982 as a miner operator. Mr. Bailey stated that he was no longer working due to disability. His medical history included hyperlipidemia and hypertension. The physicians' section was completed by Peter Wentzel, M.D., who listed the diagnosis as bilateral sensorineural hearing loss directly attributable to or perceptibly aggravated by industrial noise exposure.

An Employee Medical History Hearing Loss form was completed by Mr. Bailey on February 9, 2020. He stated that his past medical problems included high cholesterol, heart disease, high blood pressure, and vascular problems. He stated that his industrial noise exposure was daily heavy equipment use, but he used earmuffs. Mr. Bailey hunted two to three times a year. He also rode motorcycles in the summer, for which he used ear plugs.

On February 10, 2020, Laura Kraft, Human Resources Supervisor, provided an employment history for Mr. Bailey's time at Marion County Coal Company (Murray American Energy). Mr. Bailey worked from January 2, 2018, to June 24, 2018. From June 24, 2018, to

September 7, 2018, he was out on short-term disability. Mr. Bailey returned on September 8, 2018, and worked until September 15, 2018, when he resigned.

In a March 16, 2020, treatment note, Steven Wetmore, M.D., noted that Mr. Bailey was disabled and last worked on June 20, 2018. Mr. Bailey was exposed to industrial noise most of his career in the coal mining industry. Dr. Wetmore noted that he occasionally hunted. Mr. Bailey reported constant bilateral tinnitus for several years. Mr. Bailey had preemployment testing on December 21, 2017, prior to working for Murray American Energy. The results showed normal hearing in the right ear through 6,000 hertz. Hearing was normal in the left ear through 2,000 hertz, but then severely dropped. An audiogram was performed by a certified audiologist the day of Dr. Wetmore's evaluation. It showed close to normal left ear low tones from 250 to 2,000 hertz. There was a significant drop in the left ear at 3,000 hertz. The right ear had a different pattern of hearing loss with an up-sloping audiogram from 250 to 2,000 hertz. Higher tones showed significant asymmetry compared to the left ear at 3,000 and 4,000 hertz, with significantly better hearing in the right ear. The left ear hearing loss was found to be compatible with noise-induced hearing loss, but the right ear hearing pattern was not. Dr. Wetmore noted that Mr. Bailey only worked for Murray American Energy for a few months and his preemployment audiogram showed essentially normal hearing in the right ear. The left ear showed preexisting hearing loss. Dr. Wetmore opined that Mr. Bailey sustained no additional hearing loss during the course of his employment with Murray American Energy. He stated that Mr. Bailey's hearing loss is the result of nonoccupational causes. Dr. Wetmore also opined that the left ear hearing loss would be unusual for occupational noise exposure because of the significant difference between the right and left ears.

The claims administrator rejected the claim on March 26, 2020. In its September 8, 2020, Order, the Office of Judges reversed the claims administrator's rejection of the claim and held the claim compensable for occupational noise-induced hearing loss. It began by noting that West Virginia Code § 23-4-6b(g) provides that

The Insurance Commissioner may allocate to and divide any charges resulting from the claim among the employers with whom the claimant sustained exposure to hazardous noise for as much as sixty days during the period of three years immediately preceding the date of last exposure. The allocation is based upon the time of exposure with each employer. In determining the allocation, the Insurance Commissioner shall consider all the time of employment by each employer during which the claimant was exposed and not just the time within the three-year period under the same allocation as is applied in occupational pneumoconiosis cases.

The Office of Judges also noted that this Court held in *Pioneer Pipe, Inc. v. Swain*, 237 W. Va. 689, 791 S.E.2d 168 (2016), that the term "may" in the statute gives the Insurance Commissioner discretion in deciding whether to allocate and divide charges for hearing loss between employers or to just charge one employer. The Office of Judges noted that the West Virginia Office of Insurance Commissioner stopped allocating charges between employers in hearing loss claims in 2006. In *Pioneer Pipe*, this Court also found that the statute does not require sixty days of exposure to hazardous noise for a single employer before it can be found solely responsible for a hearing

loss claim. The Court noted that West Virginia Code § 23-4-15(c) provides that jurisdiction for a hearing loss claim is based solely upon the claimant's date of last exposure.

The Office of Judges found that Mr. Bailey has a long history of industrial noise exposure while working in the mines, as found by both Drs. Wentzel and Wetmore. Mr. Bailey last worked for Murray American Energy on September 15, 2018, when he resigned. The Office of Judges determined that this was his date of last exposure and was sufficient to hold Murray American Energy chargeable for Mr. Bailey's hearing loss claim. The Office of Judges further concluded that it is more likely than not that Mr. Bailey's hearing loss is related, in part, to his employment for Murray American Energy. The Office of Judges remanded the case with instructions to hold the claim compensable and to refer Mr. Bailey for an evaluation to assess permanent impairment, if any. The Board of Review adopted the findings of fact and conclusions of law of the Office of Judges and affirmed its Order on February 19, 2021.

After review, we agree with the reasoning and conclusions of the Office of Judges as affirmed by the Board of Review. Pursuant to West Virginia Code § 23-4-1, employees who receive injuries in the course of and as a result of their covered employment are entitled to benefits. For an injury to be compensable it must be a personal injury that was received in the course of employment, and it must have resulted from that employment. *Barnett v. State Workmen's Comp. Comm'r*, 153 W. Va. 796, 172 S.E.2d 698 (1970). Mr. Bailey has shown by a preponderance of the evidence that he sustained some hearing loss as a result of his employment in coal mines. Dr. Wetmore found in his evaluation that Mr. Bailey's left ear hearing loss was compatible with noise-induced hearing loss, and Mr. Bailey has shown that he had a long history of occupational noise exposure. Because his date of last exposure was while he was working for Murray American Energy, it is the chargeable employer regardless of the amount of time Mr. Bailey was employed there. *See Pioneer Pipe, Inc. v. Swain*, 237 W. Va. 689, 791 S.E.2d 168 (2016).

Affirmed.

ISSUED: May 26, 2022

CONCURRED IN BY:

Chief Justice John A. Hutchison
Justice Elizabeth D. Walker
Justice Tim Armstead
Justice William R. Wooton

DISSENTING:

Justice C. Haley Bunn

BUNN, Justice, dissenting:

I dissent to the majority's resolution of this case because I would have set this case for oral argument to thoroughly address the error alleged in this appeal. Having reviewed the appendix record and Petitioner's brief, as well as the issues raised therein, I believe a formal opinion of this Court was warranted—not a memorandum decision. Accordingly, I respectfully dissent.