

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

**RONNIE HAMILTON,
Claimant Below, Petitioner**

vs.) No. 18-0540 (BOR Appeal No. 2052310)
(Claim No. 2016010374)

**PINNACLE MINING COMPANY, LLC.,
Employer Below, Respondent**

**FILED
November 2, 2018**

EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Ronnie Hamilton by Reginald D. Henry, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Pinnacle Mining Company, LLC, by H. Dill Battle III, its attorney, filed a timely response.

The issue on appeal is the amount of permanent partial disability for occupational hearing loss in the claim. The claims administrator granted Mr. Hamilton an additional 10% permanent partial disability award for occupational hearing loss on March 2, 2016. On November 7, 2017, the Workers' Compensation Office of Judges affirmed the 10% permanent partial disability award granted by the claims administrator. This appeal arises from the Board of Review's Order dated May 18, 2018, in which the Board affirmed the November 7, 2017, Order of the Office of Judges. 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.

Mr. Hamilton retired on June 27, 2014. A majority of his employment was spent in the underground mining industry. Mr. Hamilton reported that he was exposed to large amounts of heavy equipment and industrial noise during his career. Prior to the present claim, Mr. Hamilton was granted a 7.7% award for occupational hearing loss on July 9, 2003. He continued to

experience a deterioration of his hearing and tinnitus, with his hearing loss being aggravated by background noise.

On September 2, 2015, Mr. Hamilton filed an Employee's and Physician's Report of Occupational Hearing Loss, signed by Robert M. Jones, M.D, to reopen his claim for hearing loss. Attached to the Report was an audiogram performed by Sharon Jividen, Au. D., which shows speech discrimination in the left ear being 80 percent at 85 decibels, and the right ear being 76 percent at 90 decibels. The audiogram also showed four frequency totals for both right and left ears to be 240 decibels. Based upon Mr. Hamilton's bilateral sensorineural hearing loss, Dr. Jones recommended 28.6% impairment attributed to noise-induced hearing loss. Dr. Jones also recommended binaural hearing aids for Mr. Hamilton.

Mr. Hamilton was examined by David A. Phillips, M.D., on January 29, 2016, for an independent medical evaluation. An audiology report was performed by Jaime G. Gorby, Au. D., CCC-A. Dr. Phillips found moderate loss of hearing, bilateral, that began gradually sixteen years ago and may be related to noise exposure. Mr. Hamilton attributed the noise exposure to engine noise and industrial noise over his career. His hearing loss is aggravated by background noise. Dr. Phillips determined that 62% of Mr. Hamilton's hearing loss would be attributable to occupational exposure, with the remaining 38% attributable to non-occupational factors, such as aging. Dr. Phillips opined that he had 17.7% permanent impairment attributable to noise-induced hearing loss. This would represent an additional 10% impairment over the 7.7% that was previously granted.

On March 2, 2016, the claims administrator awarded Mr. Hamilton an additional 10% permanent partial disability award based upon the report of Dr. Phillips. The claims administrator noted that Mr. Hamilton was granted a prior 7.7% permanent partial disability award for occupational hearing loss in 2003. Mr. Hamilton protested the claims administrator's decision.

An independent medical evaluation was conducted by P. C. Corro, M.D., on August 14, 2017. To prepare for the examination, Dr. Corro reviewed an audiogram performed by Randy Mabry, Au. D., as well as the records of Drs. Phillips and Jones. Dr. Corro noted that Mr. Hamilton's hearing continues to deteriorate, and his hearing loss is partly attributable to industrial noise exposure. The hearing loss is sensorineural, partly attributable to industrial noise exposure. Based upon the audiogram of Dr. Jones where 28.6% impairment was obtained, Dr. Corro applied the median ratio technique and concluded that 10.9% impairment can be attributed to non-industrial exposure. As a result of the examination, Mr. Hamilton has an additional 10% whole person impairment for occupational hearing loss.

By Final Decision dated November 7, 2017, the Office of Judges affirmed the claims administrator's March 2, 2016, decision. The Office of Judges found that both Dr. Corro and Dr. Phillips opined that Mr. Hamilton has a total of 17.7% hearing loss from occupational causes. Both Drs. Corro and Phillips determined that testing suggests other factors are contributing to Mr. Hamilton's hearing loss in addition to occupational noise. Mr. Hamilton retired in 2014; however, audiometric testing shows marked deterioration of hearing loss, even at low

frequencies. His audiograms revealed loss patterns that are not typical of occupational exposure. The Office of Judges noted that Dr. Jones did not factor for non-occupational exposure and made no adjustment to account for impairment attributable to non-occupational causes. Based upon the evidence, the Office of Judges affirmed the claims administrator's decision and awarded Mr. Hamilton a total of 17.7% whole person impairment, which is an additional 10% beyond his 7.7% award. On May 18, 2018, the Board of Review adopted the findings of fact and conclusions of law as adopted by the Office of Judges, and affirmed its decision to award an additional 10% permanent partial disability award for occupational hearing loss.

After review, we agree with the decision of the Board of Review. Mr. Hamilton has not demonstrated with reliable and credible evidence that he is entitled to an additional permanent partial disability award beyond the 17.7% award that was granted. Audiometric testing within the record indicates that a portion of Mr. Hamilton's hearing loss is attributable to non-occupational exposure. Dr. Jones did not factor for non-occupational causes of hearing loss. Dr. Corro and Dr. Phillips did adjust their ratings for non-occupational causes and opined that Mr. Hamilton has 17.7% hearing loss from occupational causes. It is clear that Dr. Jones did not properly consider Mr. Hamilton's medical and occupational history in determining the etiology of Mr. Hamilton's hearing loss.

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: November 2, 2018

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Elizabeth D. Walker
Justice Paul T. Farrell sitting by temporary assignment
Justice Tim Armstead
Justice Evan H. Jenkins

Justice Allen H. Loughry II suspended and therefore not participating.