

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

April 24, 2014

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

KENNETH TUCKER,
Claimant Below, Petitioner

vs.) **No. 12-1169** (BOR Appeal No. 2047182)
(Claim No. 2011041749)

CONSOLIDATION COAL COMPANY,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Kenneth Tucker, by Robert Stultz, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Consolidation Coal Company, by Edward George III, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated September 4, 2012, in which the Board affirmed an April 9, 2012, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's July 11, 2011, decision which rejected the application for benefits as a duplicate of prior claim number 830063189. 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. Tucker, a coal miner, developed occupational pneumoconiosis in the course of his employment as the result of exposure to hazardous dust. Mr. Tucker's last date of employment and exposure was May 19, 1983. On July 19, 1984, his claim was held compensable on a non-medical basis in claim number 830063189. There is no indication in the record of the Occupational Pneumoconiosis Board's findings. Mr. Tucker again filed for benefits in 2011. The physician's report of occupational pneumoconiosis indicated that Mr. Tucker suffered from 15%

to 20% lung impairment with 10% of that impairment being directly attributable to occupational pneumoconiosis.

The claims administrator rejected the application for benefits on July 11, 2011, on the basis that the claim was a duplicate of Mr. Tucker's prior claim. The Office of Judges affirmed the claims administrator's decision in its April 9, 2012, Order. It found that the evidentiary record in this case contains no indication of the Occupational Pneumoconiosis Board's findings in claim number 830063189. It held that Mr. Tucker simply filed two applications for occupational pneumoconiosis benefits, because the date of last exposure was the same and no additional exposure was alleged.

The Board of Review adopted the findings of fact and conclusions of law of the Office of Judges and affirmed its Order in its September 4, 2012, decision. This Court agrees with the reasoning and conclusions of the Board of Review. Mr. Tucker has alleged no additional exposure since he last filed for occupational pneumoconiosis benefits. His application is therefore a duplicate of his previous request.

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: April 24, 2014

CONCURRED IN BY:

Chief Justice Robin J. Davis
Justice Brent D. Benjamin
Justice Margaret J. Workman
Justice Menis E. Ketchum
Justice Allen H. Loughry II