

SUPREME COURT OF APPEALS OF WEST VIRGINIA

John Bego Sr. v. Bayer CropScience LP

Bego · No. No. 19-0300 · Decided July 9, 2020

SUMMARY

The West Virginia Supreme Court of Appeals affirmed the Board of Review’s denial of John Bego Sr.’s application for occupational hearing loss benefits. The court held that the evidence supported the conclusion that the progression of his hearing loss after November 1, 2006, was not occupationally caused. The court issued the decision as a memorandum decision under Rule 21 of the West Virginia Rules of Appellate Procedure.

CASE DETAILS

COURT	Supreme Court of Appeals of West Virginia
WRITING FOR THE COURT	Chief Justice Tim Armstead; Justice Elizabeth D. Walker; Justice Evan H. Jenkins; Justice John A. Hutchison; Justice Margaret L. Workman
JURISDICTION	West Virginia
DECIDED	July 9, 2020
DOCKET	No. 19-0300
DISPOSITION	affirmed
PROCEDURAL POSTURE	Petitioner appealed the West Virginia Workers’ Compensation Board of Review’s affirmance of the denial of his application for occupational hearing loss benefits.
STANDARD OF REVIEW	The court reviews the Board of Review’s decision for clear violation of a constitutional or statutory provision, clearly erroneous conclusions of law, or a material misstatement or mischaracterization of the evidentiary record.
PRECEDENTIAL VALUE	published memorandum decision
PARTIES	John Bego Sr. v. Bayer CropScience LP

TOPICS

workers compensation

appellate procedure

standard of review

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether the evidence established that the progression of Bego's hearing loss after November 1, 2006, was occupational hearing loss compensable under workers' compensation.
2. Whether the Workers' Compensation Board of Review's affirmance of the denial of benefits was clearly erroneous, legally invalid, or based on a material misstatement or mischaracterization of the evidence.

HOLDINGS

1. Bego failed to establish that the progression of his hearing loss after November 1, 2006, was due to occupational hearing loss.
2. The Board of Review's decision was not in clear violation of a constitutional or statutory provision, was not clearly the result of erroneous conclusions of law, and was not based on a material misstatement or mischaracterization of the evidentiary record.

KEY QUOTATIONS

"The evidence of record supports the claims administrator's decision that Mr. Bego has failed to establish that the progression of his hearing loss after November 1, 2006, is due to occupational hearing loss." (3)

"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." (3)

FACTUAL BACKGROUND

John Bego worked for Bayer CropScience and its predecessor beginning in 1976 in a very loud work environment, despite using earplugs. He had previously received a 2.2% permanent partial disability award for occupational hearing loss in 2004. In 2017, Dr. Katrib attributed additional bilateral sensorineural hearing loss to occupational noise exposure and assessed 19.61% impairment, while Drs. Phillips and Pollard concluded that the pattern and progression of the hearing loss, including conductive loss in the right ear and flat loss in the left ear, were not consistent with occupational noise-induced hearing loss.

PROCEDURAL HISTORY

The claims administrator denied Bego's application on June 16, 2017, finding that his current hearing loss was not consistent with occupational hearing loss. The Office of Judges affirmed on October 29, 2018, and the Board of Review affirmed on March 5, 2019. The Supreme Court of Appeals reviewed the Board's final order and affirmed.

DISPOSITION

affirmed

OPINION

PER CURIAM.

STATE OF WEST VIRGINIA SUPREME COURT OF APPEALS JOHN BEGO SR., FILED Claimant Below, Petitioner July 9, 2020 EDYTHE NASH GAISER, CLERK SUPREME COURT OF APPEALS vs.) No. 19-0300 (BOR Appeal No. 2053612) OF WEST VIRGINIA (Claim No. 2017019709) BAYER CROPSCIENCE LP, Employer Below, Respondent MEMORANDUM DECISION Petitioner John Bego, by Counsel Patrick Maroney, appeals the decision of the West Virginia Workers' Compensation Board of Review ("Board of Review").

Bayer CropScience LP, by Counsel Timothy Huffman, filed a timely response. This claim relates to an application for occupational hearing loss. On June 16, 2017, the claims administrator denied Mr. Bego's application for occupational hearing loss on the sole basis that his current hearing loss is not consistent with occupational hearing loss.

The Workers' Compensation Office of Judges ("Office of Judges") affirmed the rejection of the claim on October 29, 2018. This appeal arises from the Board of Review's Final Order dated March 5, 2019, in which the Board of Review affirmed the decision of the Office of Judges. 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 January 19, 2017, Mr. Bego completed an application for occupational hearing loss. A. Katim Katrib, M.D., completed the physician's section and found that Mr. Bego had sensorineural hearing loss bilaterally. Dr. Katrib recommended a 19.61% impairment due to work-related noise exposure.

Dr. Katrib indicated that Mr. Bego's forty years of exposure to a noisy work environment directly attributed to or perceptibly aggravated his bilateral sensorineural hearing loss. Mr. Bego underwent an independent medical evaluation with David A. Phillips, M.D., an otolaryngologist, on June 2, 2017.

In his report dated June 7, 2017, Dr. Phillips stated that he reviewed past audiograms and was of the opinion that Mr. Bego had a very complex history of hearing loss dating back to 2004.¹ Dr. Phillips found that Mr. Bego has progressive bilateral hearing loss.

The right side loss had progressed to a severe to profound mixed hearing loss with a moderate flat loss of hearing. Dr. Phillips stated that due to Mr. Bego's progressive flat sensorineural hearing loss in the left ear and progressive mixed loss in the right ear only the left ear should be considered

due to the extreme asymmetry of his hearing loss. He also indicated that Mr. Bego was enrolled in the employer's hearing conversation program, which should have prevented progressive occupational hearing loss.

Dr. Phillips found that Mr. Bego had reached his maximum medical improvement and had 0% whole person impairment. Based upon the opinion of Dr. Phillips, the claims administrator rejected Mr. Bego's application for hearing loss benefits on June 16, 2017.

The claims administrator stated that Dr. Phillips found that his current hearing loss is not associated with occupational noise-induced hearing loss. The claims administrator denied the claim on the basis that Mr. Bego's current hearing loss is not related to employment at the Bayer CropScience facility. Mr. Bego protested the claims administrator's decision.

Mr. Bego testified at a deposition on November 13, 2017, regarding his work at Bayer CropScience. He initially was hired as a chemical operator in 1976. When Dow took over, he was moved to another area. The air building where he worked has three compressors, two air dryers, and two nitrous compressors. Mr. Bego testified that he worked in a very loud area. He stated that if you were standing two feet apart from another person, you would not be able to hear that person talking.

Although he used earplugs, he stated that they were not enough to decrease the noise level. He filed a prior hearing loss claim in 2004, and he was granted a 2.2% permanent partial disability award. Mr. Bego further testified that he believes that his hearing loss is a result of working in a loud environment.

On May 14, 2018, Dr. Katrib testified at deposition that he is a board certified specialist of the ear, nose, throat and neck. Dr. Katrib evaluated Mr. Bego and found that the audiogram revealed mixed hearing loss in his right ear and sensorineural hearing loss in his left ear. He explained that Mr. Bego may benefit from an exploration of his right ear because he has some mixed hearing loss in that ear.

Dr. Katrib stated that it was difficult to determine the nature of the hearing loss unless Mr. Bego undergoes surgery so that he could see if anything is abnormal in his middle ear. Robert E. Pollard, M.D., of Ear Nose and Throat Physicians and Surgeons performed a records review of Mr. Bego's claim.

In his report of July 21, 2018, Dr. Pollard stated that Dr. Katrib's rating of 19.6% whole person impairment appears to have been calculated without consideration for the pattern of hearing loss and obvious fact that much of the hearing loss in the 1 Mr. Bego filed a previous claim in 2004 which resulted in a permanent partial disability award of 2.2% for occupational hearing loss.

On October 30, 2008, under Claim No. 2007213209 involving an occupational hearing loss claim filed on November 1, 2008, the Office of Judges ruled that the progression of Mr. Bego's hearing loss since November 2006 is non-occupational in nature. 2 right ear is conductive and not at all consistent with occupationally derived loss. Dr. Pollard described the loss in the left ear as a "flat" loss not consistent with occupational noise exposure hearing loss.

He concluded that Mr. Bego's hearing loss in his right ear was conductive and not consistent with occupational hearing loss. The claim was submitted for a decision and a final Order was entered by the Office of Judges on October 29, 2018. It was found that the opinions of Dr. Phillips and Dr. Pollard that Mr. Bego's current right ear hearing loss is non-occupational in nature is more reliable than the opinion of Dr. Katrib.

The Office of Judges concluded that Dr. Katrib's impairment rating appears to have been calculated without consideration of the existence of conductive hearing loss in the right ear. Dr. Katrib did not address the issue of the significance of the flat pattern hearing loss in Mr. Bego's left ear, nor did he address the significance of the ascending bone score of 3000hz or the absence of recovery at 6000hz and 8000hz.

The Office of Judges concluded that Dr. Katrib did not sufficiently consider whether Mr. Bego's sensorineural hearing loss is due to causes other than occupational noise exposure. Accordingly, the Office of Judges affirmed the claims administrator's Order of June 16, 2017, which denied Mr. Bego's application for benefits on the basis that his current hearing loss was not consistent with occupational noise induced hearing loss.

The Board of Review adopted the findings and conclusions of law of the Office of Judges and affirmed the decision on March 5, 2019. After review, we agree with the Board of Review's decision. The evidence of record supports the claims administrator's decision that Mr. Bego has failed to establish that the progression of his hearing loss after November 1, 2006, is due to occupational 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: July 9, 2020
CONCURRED IN BY: Chief Justice Tim Armstead Justice Elizabeth D. Walker Justice Evan H. Jenkins Justice John A. Hutchison Justice Margaret L. Workman not participating 3