215 Va. 599

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RICHMOND, VIRGINIA

IN THE SUPREME COURT OF VIRGINIA

AT RICHMOND

ROY COOK,

Appellant

vs.

CLINCHFIELD COAL COMPANY
and/or
JEWELL RIDGE COAL CORPORATION,

Appellees

RECORD NO. 740653

LARRY GRANT BROWNING

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Abingdon, Virginia, 24210

COUNSEL FOR APPELLANT

November 26, 1974

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VIRGINIA
IN THE INDUSTRIAL COMMISSION

ROY COOK, Claimant

v. Claim No. 356-555 Opinion by JOYNER, Commissioner

CLINCHFIELD COAL COMPANY and/or
JEWELL RIDGE COAL CORPORATION, Employer
SELF INSURED

S. Strother Smith, III, Attorney at Law,
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for the Claimant.

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for the Defendants.

REVIEW before the full Commision at Richmond Virginia, on May 7, 1974.

This claim is before the full Commission for review of the opinion of Commissioner Evans of March 22, 1974.

The claimant had previously filed an application for hearing on March 27, 1968. The application was signed by the claimant and carried the notation: "I am temporarily located at 2113 Edwards Ave., Richmond, Va." In that application the claimant stated that:

> "I am disabled due to accident of 9/21/67. I was examined and told by Dr. S. G. Ketron & Dr. W. C. Elliot about middle of July 1967 I had 'rock dust' on my lungs. Both doctors told me they would notify the company and I relied on their statement. I was also told by

> the x-ray man at Lebanon Hospital I had 'rock dust.' No one told me how much. I also told the president of the union and he told me he would look into it and let me know. Later on he was killed. I also told Mullins, our committee man, and he said he would look into it. I think I also told Mr. Billy Thompson just before I returned to work on Jan. 2, 1968."

That claim was heard by Deputy Commissioner Rushbrooke on July 24, 1968, at which time the claimant failed to appear. Deputy Commissioner Rushbrooke's opinion of August 26, 1968 notes that ". . . no evidence was offered by the claimant in support of his application and the medical evidence contained in the file, which includes a report of Dr. William D. Deep, a physician seen by the claimant on his own initiative, fails to disclose the existence of any occupational disease."

The application was then dismissed for failure of the claimant to produce evidence in support of his claim, the dismissal being "subject to the right of the claimant to have it reinstated on the Commission's hearing docket should good cause therefor be shown."

The claimant again filed application for hearing on October 1, 1973, which was the subject of the hearing before Commissioner Evans on February 27, 1974, and his opinion of March 22, 1974.

Commissioner Evans found that the record failed to disclose that the claimant had obtained a diagnosis of an occupational disease prior to June 13, 1973. However, the claim-

ant testified (T-2) that "...he (Montie Meeks, attorney) sent me over to the medical center and they said I had dust and I never did even try to file for it." This was in reply to a question to the claimant regarding his claim of pneumoconiosis filed on March 27, 1968.

Although the claimant denied that he filed an application for hearing, it is clear from the claimant's testimony in this case that he underwent a medical examination and was advised that he had "dust" and it is also clear from the application for hearing, dated March 27, 1968, that the claimant was advised that he had an occupational disease and that he applied for compensation.

Upon review of this evidence we cannot agree that the claimant had not obtained a diagnosis prior to June 13, 1973. His own testimony at the hearing of this claim, as well as his own previous action in applying for compensation for an occupational disease and then failing to prosecute that claim, conflicts with this finding. The claimant can rise no higher than his own testimony, and for these reasons, the award of March 22, 1974 is reversed and set aside, and the claim is

Dismissed.

EVANS, Commissioner, dissenting:

I am not in accord with the majority opinion which denies compensation benefits to the claimant for a proven case of occupational pneumoconiosis based on a diagnosis communicated to the employee on July 7, 1973.

According to the testimony of the claimant he first obtained an oral diagnosis of an occupational pneumoconiosis during 1967. A claim on that diagnosis was timely filed and a hearing scheduled for July 24, 1968. When the case was called claimant did not appear although his counsel was present. The only medical evidence submitted at the hearing was a report of Dr. William D. Deep, a physician seen by the claimant on his own initiative.

Subsequent to the hearing the hearing Commissioner entered an award. Pertinent portions of the award are herewith quoted:

> "No evidence was offered by the claimant in support of his application and the medical evidence contained in the file, which includes a report of Dr. William D. Deep, a physician seen by the claimant on his own initiative, fails to disclose the existence of any occupational disease.
>
> "On the record before us we must, and hereby, do order that the application filed March 27, 1968, be dismissed for failure of the claimant to produce evidence in support of his claim for occupational disease."

I am of the opinion that the Deputy Commissioner found that there was insufficient evidence to establish the existence of an occupational pneumoconiosis. On the basis of this finding, claimant had a right to bring a new claim upon again obtaining a positive diagnosis of an occupational pneumoconiosis. Such a diagnosis was subsequently obtained and proof of the existence of the disease made at the hearing held on February 27, 1974, and an award accordingly entered.

I am of the opinion that compensation should be awarded since the claim filed in 1967 was denied on the basis of failure to prove the existence of the occupational pneumoconiosis.

ASSIGNMENTS OF ERROR

1. The Commission erred in not finding that Appellant was eligible for benefits set forth in Code of Virginia, 1950, Section 65.1-56 (20-a) as amended.

2. The Commission erred in its finding that the Appellant had obtained a compensable diagnosis of an occupational disease prior to July 7, 1973.