

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2000 Term

FILED

July 13, 2000
DEBORAH L. McHENRY, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 27056

RELEASED

July 14, 2000
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

ROBERT L. BOGGESS,
Appellant,

v.

WORKERS' COMPENSATION DIVISION and
UNION CARBIDE CORPORATION,
Appellees.

Appeal from the Workers' Compensation Appeal Board
Appeal No. 49310
Claim No. 93-29111

AFFIRMED

AND

No. 27057

ROBERT L. PAYNE,
Appellant,

v.

WORKERS' COMPENSATION DIVISION and
AFFILIATED TRANSPORT, INC., MONTGOMERY TANK LINES and
CHEMICAL LEAMAN TANK LINES,
Appellees.

Appeal from the Workers' Compensation Appeal Board
Appeal No. 49309
Claim No. 92-68781

AFFIRMED

Submitted: April 18, 2000
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JUSTICE SCOTT delivered the Opinion of the Court.

CHIEF JUSTICE MAYNARD and JUSTICE STARCHER concur and reserve the right to file a concurring opinion.

JUSTICE MCGRAW dissents and reserves the right to file a dissenting opinion.

SYLLABUS BY THE COURT

1. “Once a disputed regulation is legislatively approved, it has the force of a statute itself. Being an act of the West Virginia Legislature, it is entitled to more than mere deference; it is entitled to controlling weight. As authorized by legislation, a legislative rule should be ignored only if the agency has exceeded its constitutional or statutory authority or is arbitrary or capricious.” Syl. Pt. 2, *West Virginia Health Care Cost Review Auth. v. Boone Mem’l Hosp.*, 196 W. Va. 326, 472 S.E.2d 411 (1996).

2. Title 85 of the West Virginia Code of State Rules, Series 1, § 20.8.5(b) (1986) requires exclusive use of the Kory predicted normal values for interpreting the results of ventilatory function tests in occupational pneumoconiosis claims.

3. “Interpretations as to the meaning and application of workers’ compensation statutes rendered by the Workers’ Compensation Commissioner, as the governmental official charged with the administration and enforcement of the workers’ compensation statutory law of this State, pursuant to W. Va. Code § 23-1-1 (1997) (Repl. Vol. 1998), should be accorded deference if such interpretations are consistent with the legislation’s plain meaning and ordinary construction.” Syl. Pt. 4, *State ex rel. ACF Indus., Inc. v. Vieweg*, 204 W.Va. 525, 514 S.E.2d 176 (1999).

Scott, Justice:

The Appellants, Robert L. Boggess and Robert L. Payne, seek the reversal of final orders of the Workers' Compensation Appeal Board ("Appeal Board"), issued on September 30, 1999, concerning the Appellants' claims for occupational pneumoconiosis¹ benefits. The sole issue before this Court is whether Title 85 of the West Virginia Code of State Rules, Series 1, § 20.8.5(b) (1986), a legislative rule governing ventilatory function testing in occupational pneumoconiosis claims, requires exclusive use of the Kory predicted normal values for the interpretation of test results. We answer this query in the affirmative, and accordingly, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Evaluating Impairment of Pulmonary Function

In order to fully appreciate the facts of these consolidated cases, one needs at least a rudimentary understanding of how impairment of pulmonary function is evaluated under the workers' compensation law of this state. Impairment of pulmonary function, or breathing impairment, is assessed principally through ventilatory function testing. During this testing, the claimant exhales forcibly into an

¹ West Virginia Code § 23-4-1 (1998) defines "occupational pneumoconiosis" as "a disease of the lungs caused by the inhalation of minute particles of dust over a period of time due to causes and conditions arising out of and in the course of the employment." The term includes the following diseases: "silicosis, anthracosilicosis, coal worker's pneumoconiosis, commonly known as black lung or miner's asthma, silico-tuberculosis (silicosis accompanied by active tuberculosis of the lungs), coal worker's pneumoconiosis accompanied by active tuberculosis of the lungs, asbestosis, siderosis, anthrax and any and all other dust diseases of the lungs and conditions and diseases caused by occupational pneumoconiosis" which meet the statutory definition. W. Va. Code § 23-4-1.

instrument called a spirometer. The spirometer records the “[v]olume of air that can be forcefully exhaled from the lungs after a maximal inspiration,” known as the “forced vital capacity” (FVC), and the “[v]olume of air that can be exhaled forcefully from the lungs in one (1) second after a maximal inspiration,” termed the “forced expiratory volume in one (1) second” (FEV₁). 85 W. Va. C.S.R. § 85-1-20.8.4 (effective July 1, 1986). Ventilatory function test results are expressed as actual scores and as percentages of “predicted normal values” (e.g., FVC percent of predicted), which values are derived from a statistical analysis of persons with “normal” breathing. Once test results are obtained, the degree of breathing impairment is determined in accordance with the Table for Impairment of Pulmonary Function (Table 85-1A). 85 W. Va. C.S.R. § 85-1A-20.8.7.²

The results of ventilatory function tests performed by Appellants Boggess and Payne were interpreted against two sets of predicted normal values: the Kory predicted normal values and the Morris predicted normal values. The Kory predicted normal values were established in 1961 by Ross C. Kory, M.D., and others, who tested the breathing of 468 “normal men” at fifteen medical facilities of the U.S. Army and the U.S. Veteran’s Administration. The legislative rule now in question--section 20.8.5(b)--was

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% IMPAIRMENT	0	10	15	20	25	30	40	50	60	TOTAL
FVC % PRED.	80	75	70	67	64	61	58	55	52	50
FEV _{1.0} % PRED.	75	73	70	67	64	61	58	55	52	50
FEV _{1.0} /FVC	75	73	70	67	64	61	56	51	48	45
MVV 1% PRED.	80	75	70	67	64	61	58	55	52	50

85 W. Va. C.S.R. § 85-1A-20.8.7, in part.

adopted by the Legislature in 1986,³ and since then, the Occupational Pneumoconiosis Board (“OP Board”), has used only the Kory predicted values to interpret the results of ventilatory function tests. The Morris predicted normal values were derived from a study published in 1971 by J. F. Morris, M.D., and associates. The Morris study population was rural, consisted of 517 nonsmoking men and 471 nonsmoking women, ages twenty to eighty-four, and contained a large number of Mormons. Test results obtained by Dominic Gaziano, M.D., and submitted by the Appellants in the administrative proceedings below, were calculated using the Morris predicted values.

B. Boggess’ Claim

On December 23, 1992, Appellant Robert L. Boggess, a former employee of Appellee Union Carbide Corporation, filed an application for occupational pneumoconiosis benefits. On January 7, 1994, the Workers’ Compensation Commissioner (“Commissioner”) granted Boggess a 5% permanent partial disability award based on findings of the OP Board, dated December 9, 1993, in which the OP Board diagnosed occupational pneumoconiosis with no pulmonary functional impairment.

In March 1997, Boggess filed a petition to reopen his claim for additional

³ In 1985, the Commissioner adopted a set of emergency administrative rules governing the evaluation of medical evidence submitted in occupational pneumoconiosis claims. During the regular legislative session in 1986, the Commissioner’s emergency rules were modified and adopted by the West Virginia Legislature as legislative rules. *See Boyd v. Merritt*, 177 W. Va. 472, 473-74, 354 S.E.2d 106, 107-08 (1986). Section 20.8.5(b) was among the legislative rules so created.

permanent partial disability consideration. Attached to his petition was a report by Dr. Gaziano. The report documented a pulmonary function test which was administered to Boggess on February 22, 1997, and which produced an actual FVC of 3.31 and a FVC percent of predicted of 74%, using the Morris predicted normal values. At the conclusion of the report, Dr. Gaziano opined that Boggess “has asbestosis with a mild degree of pulmonary functional impairment.”

The Workers’ Compensation Division (“Division”) reopened Boggess’ claim, and on September 18, 1997, ventilatory function tests were performed for the OP Board.

The tests revealed an actual FVC of 3.11 and a FVC percent of predicted of 75%, using the Kory predicted normal values. Based in part on the test results, the OP Board, in a statement of findings dated September 18, 1997, diagnosed occupational pneumoconiosis with 10% pulmonary functional impairment, representing an additional 5% impairment above that previously found in Boggess’ claim. In accordance with the OP Board’s findings, the Division granted Boggess an additional 5% award in a decision dated November 19, 1997.

The Division’s November 19, 1997, decision was protested by both Boggess and Union Carbide Corporation. On January 20, 1999, a hearing was held before an Administrative Law Judge (“ALJ”) for the purpose of taking the testimony of members of the OP Board. At the hearing, James H. Walker, M.D., chairman of the OP Board, testified that his opinion had changed subsequent to the issuance of the OP Board’s September 1997 findings due to a report from the Occupational Lung Center, which was submitted by Union Carbide. The Occupational Lung Center report compared the actual test results

documented in Dr. Gaziano's February 22, 1997, report to the Kory predicted normal values and showed, among other things, that Boggess' FVC percent of predicted was 78%. According to Dr. Walker, the percentages contained in the Occupational Lung Center report represent normal ventilatory function. Dr. Walker credited Dr. Gaziano's test results over the OP Board's September 18, 1997, results because higher actual volumes were recorded during Dr. Gaziano's testing. As stated at the hearing, Dr. Walker's opinion was that Boggess had been fully compensated by the original 5% award. OP Board members Jack L. Kinder, Jr., M.D., and Thomas M. Hayes, M.D., agreed with Dr. Walker's testimony.

In a decision dated March 2, 1999, an ALJ reversed the Division's November 19, 1997, decision and ordered that Boggess be granted no additional award beyond the original 5% permanent partial disability award. On September 30, 1999, the Appeal Board affirmed the ALJ's decision.

C. Payne's Claim

Appellant Payne, a retired plant worker, filed an application for occupational pneumoconiosis benefits on September 27, 1995. He was examined by the OP Board on November 7, 1996. Ventilatory function tests were conducted and resulted in an actual FVC of 3.15. Applying the Kory predicted normals, a FVC percent of predicted of 78% was generated. Based on the test results and other evidence, the OP Board, in its findings dated November 7, 1996, stated that it could not make a diagnosis of occupational pneumoconiosis. In accordance with the OP Board's findings, the Division issued an order on January 7, 1997, refusing to grant an award.

Payne and Appellee Montgomery Tank Lines protested the Division's order.

In support of his protest, Payne submitted the results of ventilatory function tests which were administered at Dr. Gaziano's direction in June 1995. These tests yielded an actual FVC of 3.20 and a FVC percent of predicted of 73%, using the Morris predicted normal values. At a hearing before an ALJ on January 27, 1999, Dr. Walker testified that neither the test results obtained by Dr. Gaziano in June 1995 nor the OP Board's tests in November 1996 supported any degree of impairment of pulmonary function. Dr. Kinder agreed with Dr. Walker. After the hearing, the matter was submitted for a decision. In a decision dated March 19, 1999, an ALJ affirmed the Division's January 7, 1997, order. Payne appealed, and by order dated September 30, 1999, the Appeal Board affirmed the ALJ's decision.

II. STANDARD OF REVIEW

In deciding whether to uphold the Appeal Board's decision, we apply the standard of review which this Court adopted in syllabus point two of *West Virginia Health Care Cost Review Authority v. Boone Memorial Hospital*, 196 W.Va. 326, 472 S.E.2d 411 (1996):

Once a disputed regulation is legislatively approved, it has the force of a statute itself. Being an act of the West Virginia Legislature, it is entitled to more than mere deference; it is entitled to controlling weight. As authorized by legislation, a legislative rule should be ignored only if the agency has exceeded its constitutional or statutory authority or is arbitrary or capricious.

III. DISCUSSION

The focal point of this controversy is section 20.8.5(b), a legislative rule which controls ventilatory function testing in occupational pneumoconiosis claims. The pertinent portion of the rule states:

The effort [of a claimant undergoing a ventilatory function test] shall be judged unacceptable and cannot be considered in evaluating pulmonary functional impairment when the subject:

(1) Has not reached full inspiration preceding the forced expiration; or

(2) Has not used maximal effort during the entire forced expiration; or

(3) Has not continued the expiration for at least five (5) seconds or until an obvious plateau in the volume-time curve has occurred; or

(4) Has an obstructed mouthpiece or a leak around the mouthpiece (obstruction due to tongue being placed in front of mouthpiece, false teeth falling in front of mouthpiece, etc.); or

(5) Has coughed or closed his glottis; or

(6) Has an unsatisfactory start of expiration, one characterized by excessive hesitation (or false starts), and therefore did not allow back extrapolation of time zero (0) (extrapolated volume on the volume-time tracing must be less than ten percent (10%) of the FVC); or

(7) Has an excessive variability between the three (3) satisfactory curves. The variation between the two (2) largest FEV₁'s of the three (3) satisfactory tracings should not exceed seven percent (7%) of the largest FEV₁ or one hundred (100) ml, whichever is greater.

(8) Predicted values are derived from Kory's
Nomogram.

85 W. Va. C.S.R. § 85-1-20.8.5(b) (emphasis added). The Appellant argues that section 20.8.5(b) does not require the exclusive use of the Kory predicted normal values and actually prohibits their use. Conversely, the Appellees contend that the rule requires the exclusive use of the Kory predicted normals for the interpretation of ventilatory function tests.

Upon examination of the rule, we find the requirement that the Kory nomogram (i.e., Kory predicted normal values) be utilized exclusively in assessing the results of ventilatory function tests to be manifest. Section 20.8.5(b) states that a claimant's effort in performing a ventilatory function test shall be unacceptable when the subject does one of seven listed actions. The description of each action starts with the word "has," and each act is separated from the next one in the list by a semicolon and the word "or," with the exception of the seventh act, which is followed by a period. After the period, a sentence numbered "(8)" states: "Predicted values are derived from Kory's Nomogram." Clearly, this statement is not part of the list of unsuitable actions by a claimant during testing and was instead intended by the Legislature as a separate subpart of section 20.8.5, requiring use of the Kory predicted normals to evaluate ventilatory function test results. We will not allow the obvious clerical error in the numbering of the rule to subvert this legislative intent. As this Court has previously stated, "where it is apparent that a clerical error has been made in the drafting of legislation which renders its meaning obscure, we will correct such clerical error." *McClanahan v. Putnam County Comm'n*, 174 W.Va. 478, 481, 327 S.E.2d 458, 462 (1985). Accordingly, we hold that Title 85 of the West Virginia Code of State Rules, Series 1, § 20.8.5(b) requires

exclusive use of the Kory predicted normal values for interpreting the results of ventilatory function tests in occupational pneumoconiosis claims

Our ruling accords proper deference to the Commissioner's interpretation of section 20.8.5(b). In syllabus point four of *State ex rel. ACF Industries, Inc. v. Vieweg*, 204 W.Va. 525, 514 S.E.2d 176 (1999), we held:

Interpretations as to the meaning and application of workers' compensation statutes rendered by the Workers' Compensation Commissioner, as the governmental official charged with the administration and enforcement of the workers' compensation statutory law of this State, pursuant to W. Va. Code § 23-1-1 (1997) (Repl. Vol. 1998), should be accorded deference if such interpretations are consistent with the legislation's plain meaning and ordinary construction.

Because a legislative rule "has the force of a statute itself," the foregoing precept is applicable here. *Boone Mem'l Hosp.*, 196 W. Va. at 328, 472 S.E.2d at 414, syl. pt. 2, in part. As indicated in the Appeal Board's orders, the Commissioner's longstanding policy has been to require exclusive use of the Kory predicted values. Pursuant to this policy, the OP Board has used the Kory nomogram for assessing ventilatory function test results ever since section 20.8.5(b) was adopted. Because the Commissioner's interpretation of section 20.8.5(b) is consistent with the rule's plain meaning and ordinary construction, the holding in this case was reached with deference to that interpretation.

Appellants also argue that if section 20.8.5(b) requires use of the Kory predicted normal values, then the rule is unconstitutional as violative of substantive due process principles. No constitutional deficiency is apparent from the language of the rule itself. While Appellants' allegation of constitutional infirmity might have been developed below with an appropriate evidentiary showing, it was not. Due process arguments based upon inherent defects in the Kory predicted values would need support from the scientific community, which Appellants did not present to the ALJs or the Appeal Board. Therefore, under this Court's well-established "raise or waive" rule, we decline to consider today whether section 20.8.5(b) is constitutional. *See* Syl. Pt. 4, *State v. Browning*, 199 W. Va. 417, 485 S.E.2d 1 (1997) ("This Court will not consider an error which is not properly preserved in the record nor apparent on the face of the record.")

IV. CONCLUSION

For the foregoing reasons, we affirm the September 30, 1999, final orders of the Appeal Board.

Affirmed.

