

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2018 Term

**Nos. 17-1060, 17-1061, 17-1063, 17-1123
Consolidated**

**FILED
November 2, 2018**

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

**LESTER PENNINGTON, JR.,
Petitioner**

v.

**WEST VIRGINIA OFFICE OF THE INSURANCE COMMISSIONER,
and MOUNTAINEER COAL COMPANY,
Respondents**

and

**RICHARD L. ARTHUR,
Petitioner**

v.

**WEST VIRGINIA OFFICE OF THE INSURANCE COMMISSIONER,
and ELK RUN COAL COMPANY, INC.,
Respondents**

and

**ROBERT D. WEST,
Petitioner**

v.

**EMC METALS, INC.,
Respondent**

and

**RANDY KEFFER,
Petitioner**

v.

**FOLA COAL COMPANY, LLC,
Respondent**

**Appeals from the West Virginia
Workers' Compensation Board of Review**

AFFIRMED

**Submitted October 10, 2018
Filed: November 2, 2018**

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**JUSTICE ARMSTEAD delivered the Opinion of the Court.
CHIEF JUSTICE WORKMAN dissents and reserves the right to file a dissenting
Opinion.
JUSTICE LOUGHRY suspended and therefore not participating, and
JUSTICE FARRELL sitting by temporary assignment.**

SYLLABUS BY THE COURT

1. *W.Va. Code, 23-4-15(b)* [2010], in cases not involving the death of the claimant, sets forth two time limitations regarding the filing of an application for occupational pneumoconiosis benefits: (1) within three years from and after the last day of the last continuous period of sixty days or more during which the claimant was exposed to the hazards of occupational pneumoconiosis or (2) within three years from and after a diagnosed impairment due to occupational pneumoconiosis was made known to the claimant by a physician.

2. Where a claim for occupational pneumoconiosis benefits has been denied, a new application may be filed, in cases not involving the death of the claimant, based on the same date of last exposure as the prior claim, if filed pursuant to the first time limitation and attendant requirements of *W.Va. Code, 23-4-15(b)* [2010]: within three years of the date of last exposure to occupational dust. If not filed within that time limitation, a new application may be filed pursuant to the second time limitation of *W.Va. Code, 23-4-15(b)* [2010]: within three years from and after a diagnosed impairment due to occupational pneumoconiosis was made known to the claimant by a physician. Under the second time limitation, the new application, will not be referred to the Occupational Pneumoconiosis Board unless the Physician's Report filed with the claimant's new application sets forth a diagnosed impairment due to occupational pneumoconiosis.

Justice Armstead:

In these consolidated workers' compensation cases, four claimants challenge the decisions of the Workers' Compensation Board of Review which rejected their applications for occupational pneumoconiosis ("OP") benefits. The Board rejected the applications pursuant to *W.Va. Code, 23-4-15(b)* [2010]. That statute provides a claimant with two separate and distinct time limitations within which to file an OP claim: (1) within three years of the claimant's date of last exposure to the hazards of OP or (2) within three years of the date a diagnosed impairment due to OP was made known to the claimant by a physician.

It is undisputed that none of the four claimants filed an application or claim within three years of their date of last exposure. The progressive nature of the disease, however, brings into consideration the second component of *W.Va. Code, 23-4-15(b)* [2010], *i.e.*, when a diagnosed impairment due to OP was made known to the claimant by a physician.

According to the claimants, without further exposure to occupational dust, a new claim for OP benefits can be filed at any time and referred to the Occupational Pneumoconiosis Board for analysis, regardless of the three year time limitation, as long as the claimant has not been informed by a physician of an impairment due to OP. The Commissioner and the claimants' employers contend, however, that the claimants' position would result in the filing of numerous, duplicate claims, unsupported by any evidence, which would excessively burden the work of the Occupational Pneumoconiosis Board. The

Commissioner and the employers emphasize that, none of the four claims herein, filed years after the date of last exposure to occupational dust, set forth a diagnosed impairment. Thus, the Commissioner and the employers assert that the claims were properly rejected by the Board of Review.

Upon review, this Court concludes that the claimants' position is without merit and that the claims were properly rejected pursuant to *W.Va. Code*, 23-4-15(b) [2010]. The decisions of the Board of Review in all four cases are, therefore, affirmed.

I. Lester Pennington, Jr.

Pennington was an underground coal miner and general laborer with approximately twenty-four years of exposure to occupational dust. Prior to the current claim, Pennington filed four unsuccessful claims for OP benefits.¹ The current claim, no. 2016008333, is dated July 22, 2015, and lists May 21, 1998, as Pennington's date of last exposure to occupational dust. A Physician's Report and radiology report were filed in conjunction with the claim. Although the radiology report indicated "simple pneumoconiosis," the Physician's Report stated that it was unknown whether Pennington's capacity for work was impaired by OP.

¹ All four of Pennington's prior OP claims, nos. 850018570, 900019489, 9300062421 and 2001003946, were referred to the Occupational Pneumoconiosis Board, and, in all four, the OP Board found insufficient evidence to make a diagnosis of OP. In the last of the prior OP claims, no. 2001003946, the Occupational Pneumoconiosis Board's October 31, 2000, report stated that there was insufficient pleural or parenchymal (elemental) evidence to establish a diagnosis of occupational pneumoconiosis.

On January 25, 2016, the Claim Administrator rejected the claim. The Claim Administrator cited the last of Pennington's prior OP claims, no. 2001003946, and stated that, because Pennington had no exposure to occupational dust thereafter, his current claim was without merit.²

The Claim Administrator's decision, however, was reversed by the Office of Judges. The Office of Judges determined that Pennington was not barred from filing the current claim with the same date of last exposure as the prior claim, no. 2001003946. Central to the decision of the Office of Judges was *W.Va. Code*, 23-4-15(b) [2010], which provides that the application for occupational pneumoconiosis benefits shall be filed

within three years from and after the last day of the last continuous period of sixty days or more during which the employee was exposed to the hazards of occupational pneumoconiosis or *within three years from and after a diagnosed impairment due to occupational pneumoconiosis was made known to the employee by a physician* and unless filed within the three-year period, the right to compensation under this chapter is forever barred, such time limitation being hereby declared to be a condition of the right and hence jurisdictional, or, in the case of death, the application shall be filed by the dependent of the employee within two years from and after the employee's death, and such time limitation is a condition of the right and hence jurisdictional. (emphasis added)

It is undisputed that Pennington had no exposure to occupational dust after 1998 and that he did not file the current claim within three years thereof. However, the Office of

² The Claim Administrator stated: "Your claim is considered to be a duplicate of prior claim 2001003946 and is denied on the basis of no additional exposure."

Judges relied on the “diagnosed impairment” language of *W.Va. Code, 23-4-15(b)* [2010]. Noting that OP can onset for treatment at a later date, the Office of Judges concluded that additional exposure is not required to file a new claim and that the three year statute of limitation, as to Pennington, would only have been triggered by a “diagnosed impairment” made known to him by a physician. Thus, because he had not been informed that he had a diagnosed impairment due to OP, he was not barred from filing the current claim, even with the same date of last exposure as the prior claim.

On November 2, 2017, the Board of Review reversed the Office of Judges. Citing *W.Va. Code, 23-4-15(b)* [2010], the Board of Review reinstated the Claim Administrator’s rejection of Pennington’s claim and said without elaboration:

In an occupational pneumoconiosis claim that does not involve a death, the claimant must satisfy one of the following criteria: (1) file the claim within three years from and after the last day of the last continuous period of sixty days or more during which the claimant was exposed to the hazards of occupational pneumoconiosis, or (2) file the claim within three years from and after a diagnosed impairment due to occupational pneumoconiosis was made known to the claimant by a physician. Neither of these criteria has been met in this claim. Therefore, the rejection of the claim must be reinstated.

II. Richard L. Arthur

Arthur, a coal miner with twenty-two years of exposure to silica and coal dust, filed

two prior, unsuccessful claims for OP benefits.³ His current claim, no. 2016009150, is dated September 14, 2015, and lists January 13, 2000, as the date of last exposure to occupational dust. A Physician's Report and radiology report were filed in conjunction with the claim. The radiology report indicated simple pneumoconiosis. However, the Physician's Report stated that it was unknown whether Arthur's capacity to work was impaired by OP.

On February 2, 2016, the Claim Administrator rejected Arthur's current claim for OP benefits. That claim and prior claim no. 2002026846 listed the same January 2000 date as Arthur's date of last exposure. Because Arthur had no exposure to occupational dust after January 2000, the Claim Administrator ruled that the current claim was a duplicate of claim no. 2002026846 and should be rejected. However, the Claim Administrator was reversed by the Office of Judges. The Office of Judges determined that Arthur was not barred from filing the current claim with the same date of last exposure to occupational dust as the prior claim.

It was undisputed that Arthur had no exposure to occupational dust after January 2000 and did not file the current claim within three years thereof. However, the Office of Judges

³ Arthur's two prior claims, nos. 970058770 and 2002026846, were referred to the Occupational Pneumoconiosis Board, and, in both, the OP Board found insufficient evidence to make a diagnosis of OP. In the latter claim, no. 2002026846, the Occupational Pneumoconiosis Board's February 14, 2002, report stated that there was insufficient pleural or parenchymal (elemental) evidence to establish a diagnosis of occupational pneumoconiosis. Arthur's date of last exposure in that claim, no. 2002026846, was listed as January 2000.

relied on the “diagnosed impairment” language of *W.Va. Code, 23-4-15(b)* [2010], and concluded that additional exposure is not required to file a new claim. Thus, the three year statute of limitation set forth in the statute, as to Arthur, would only have been triggered by a “diagnosed impairment” made known to him by a physician and, since he had not been informed by a physician of such an impairment, he was not barred from filing the current claim.

On November 2, 2017, the Board of Review reversed the Office of Judges and reinstated the Claim Administrator’s rejection of the claim. The Board of Review relied on *W.Va. Code, 23-4-15(b)* [2010], in the same manner as it did regarding Pennington.

III. Robert D. West

West, a plant worker and truck driver/mechanic with thirty-one years of exposure to occupational dust, filed a prior, unsuccessful claim for OP benefits.⁴ His current claim, no. 2016016561, is dated November 19, 2015, and lists January 6, 2003, as the date of last exposure to occupational dust. A Physician’s Report and radiology report were filed in conjunction with the claim. The radiology report indicated simple pneumoconiosis.

⁴ West retired on June 1, 2003. His prior claim, no. 2007212246 (a/k/a no. 2006032303), listed 2003 as his date of last exposure. The Physician’s Report stated “possible OP” but indicated no impairment of West’s capacity to work. In its October 5, 2006, report, the Occupational Pneumoconiosis Board found insufficient evidence to make a diagnosis of OP, *i.e.*, there was insufficient pleural or parenchymal (elemental) evidence to establish a diagnosis of occupational pneumoconiosis.

Nevertheless, the Physician's Report stated that it was unknown whether West's capacity to work was impaired by OP.

On April 12, 2016, the Claim Administrator rejected West's current claim for OP benefits. Because West had no additional exposure to occupational dust after 2003, the date of last exposure in the prior claim, the Claim Administrator determined that West's current claim was simply a duplicate of the prior claim. However, the Claim Administrator was reversed by the Office of Judges. The Office of Judges determined that West was not barred from filing the current claim with the same date of last exposure as the prior claim.

As with Pennington and Arthur, it was undisputed that West had no additional dust exposure and that he did not file the current claim within three years of the date his exposure ceased. However, the Office of Judges relied on the "diagnosed impairment" component of *W.Va. Code, 23-4-15(b)* [2010], and concluded that additional exposure is not required to file a new claim. The three year statute of limitation, as to West, would only have been triggered by a "diagnosed impairment" made known to him by a physician and, since he had not been informed by a physician of such an impairment, he was not barred from filing the current claim for OP benefits. According to the Office of Judges, for claims not filed within three years of the date of last exposure, *W.Va. Code, 23-4-15(b)* [2010], does not require evidence of impairment when the claimant files an application for OP benefits.

On November 2, 2017, the Board of Review reversed the Office of Judges and reinstated the Claim Administrator's rejection of West's claim. The Board of Review relied on *W.Va. Code*, 23-4-15(b) [2010], in the manner it did regarding Pennington and Arthur.

IV. Randy Keffer

Keffer was employed in surface mining with May 15, 2010, as his date of last exposure to occupational dust. His current claim, no. 2017008634, is dated August 9, 2016, and sets forth no prior claims for OP benefits. A Physician's Report and radiology report were filed in conjunction with the claim. Although the radiology report stated "negative for pneumoconiosis," the Physician's Report completed by a nurse practitioner indicated a diagnosis of "coal dust exposure." Nevertheless, the Physician's Report further indicated that it was unknown whether Keffer had contracted OP and unknown whether his capacity to work was impaired by OP.

On November 2, 2016, the Claim Administrator rejected Keffer's current claim for OP benefits. Citing *W.Va. Code*, 23-4-15(b) [2010], the Claim Administrator noted that Keffer's claim was not filed within three years of May 15, 2010, his date of last exposure, and that, moreover, Keffer did not have a diagnosis of OP. The Claim Administrator, however, was reversed by the Office of Judges. The Office of Judges emphasized that Keffer's "coal dust exposure" diagnosis resulted from an earlier "black lung exam" conducted by the nurse practitioner. According to the Office of Judges, although Keffer was

a smoker, the exam determined that he suffered from a chronic cough, suggesting OP.

Nevertheless, the Office of Judges acknowledged:

An examination of the claimant's lung was unremarkable. [Nurse practitioner] Ms. Freeman diagnosed a chronic cough. * * * Ms. Freeman wrote that she did not know if the claimant had occupational pneumoconiosis, how long the claimant had occupational pneumoconiosis and whether the claimant's capacity for work was impaired due to occupational pneumoconiosis.

As stated above, Keffer's radiology report was "negative for pneumoconiosis"

The Board of Review reversed the Office of Judges on November 21, 2017, and reinstated the Claim Administrator's rejection of Keffer's claim. The Board of Review applied *W.Va. Code*, 23-4-15(b) [2010], as it did in the other three cases.

V. Standard of Review

Pennington, Arthur, West and Keffer appeal from the Board of Review's rejection of their claims for occupational pneumoconiosis benefits. This Court consolidated the claims for purposes of argument.

The standard of review in workers' compensation cases is provided by statute, *W.Va. Code*, 23-5-15 [2005], which states that deference shall be given to the Board of Review's "findings, reasoning and conclusions." Here, the Board of Review reversed the decisions of

the Office of Judges and reinstated the Claim Administrator's rejection of all four OP claims. As a result, subsection (d) of *W.Va. Code*, 23-5-15 [2005], is applicable which provides a detailed basis for reviewing the Board of Review's decisions:

(d) If the decision of the Board effectively represents a reversal of a prior ruling of either the commission or the Office of Judges that was entered on the same issue in the same claim, the decision of the board may be reversed or modified by the Supreme Court of Appeals only if the decision is in clear violation of constitutional or statutory provisions, is clearly the result of erroneous conclusions of law, or is so clearly wrong based upon the evidentiary record that even when all inferences are resolved in favor of the board's findings, reasoning and conclusions, there is insufficient support to sustain the decision. The court may not conduct a *de novo* re-weighing of the evidentiary record.⁵

Cf., *Wilkinson v. West Virginia Office Ins. Comm'n*, 222 W.Va. 394, 398, 664 S.E.2d 735, 739 (2008) (A different subsection of *W.Va. Code*, 23-5-15 [2005], applies where the Board of Review affirms both underlying administrative decisions).

VI. Discussion

A.

Pursuant to *W.Va. Code*, 23-4-1(a) [2008], workers' compensation benefits shall be

⁵ Syllabus point 2 of *Gill v. City of Charleston*, 236 W.Va. 737, 783 S.E.2d 857 (2016), holds: "Pursuant to *W.Va. Code* § 23-4-1g(a) (2003) (Repl. Vol. 2010), a claimant in a workers' compensation case must prove his or her claim for benefits by a preponderance of the evidence." *See* syl. pt. 1, *Staubs v. State Workmen's Comp. Comm'r*, 153 W.Va. 337, 168 S.E.2d 730 (1969) ("A claimant in a workmen's compensation proceeding has the burden of proving his claim."). *Accord*, syl. pt. 2, *Clark v. State Workmen's Comp. Comm'r*, 155 W.Va. 726, 187 S.E.2d 213 (1972).

paid to employees “who have received personal injuries in the course of and resulting from their covered employment.” Subsection (b) of that statute includes occupational pneumoconiosis within the phrase “personal injury.”⁶

Benefits, however, cannot be awarded on a diagnosis of OP alone. An impairment is also required. *W.Va. Code*, 23-4-6a [2005], states, in part, that there shall be no permanent partial disability awarded “based solely upon a diagnosis of occupational pneumoconiosis, it being the intent of the Legislature to eliminate any permanent partial disability awards for occupational pneumoconiosis without a specific finding of measurable impairment.” *See Wampler Foods, Inc. v. Workers’ Compensation Division*, 216 W.Va. 129, 140, 602 S.E.2d 805, 816 (2004) (The Legislature eliminated benefits for claimants who have OP “without measurable pulmonary impairment.”).

Pursuant to *W.Va. Code*, 23-4-6a [2005], the percentage of permanent disability is determined by the degree of medical impairment that is found by the Occupational Pneumoconiosis Board.⁷ In that regard, *W.Va. Code*, 23-4-8b [2005], requires the

⁶ Occupational pneumoconiosis is a progressive disease. *See W.Va. Code*, 23-4-16(a)(2) [2005], (Occupational pneumoconiosis is medically recognized as progressive in nature). *See also Lester v. State Workmen’s Comp. Comm’r*, 161 W.Va. 299, 303, 242 S.E.2d 443, 445 (1978) (Occupational pneumoconiosis “often does not become manifest until years after the victim was last exposed to the causes of the disease.”).

⁷ *W.Va. Code*, 23-4-8c(a) [2009], provides that the Occupational Pneumoconiosis Board’s report in an OP claim shall include “its findings and conclusions on every

claimant/employee and the employer to produce to the Board “all reports of medical and X-ray examinations which may be in their respective possession or control, showing the past or present condition of the employee.” Lastly, *W.Va. Code*, 23-4-8c(e) [2009], provides that, if the claimant receives a final decision that he or she has no evidence of occupational pneumoconiosis, the claimant is barred for three years from filing a new claim for OP benefits.⁸

The matter before us, however, concerns the application process prior to referral to the Occupational Pneumoconiosis Board. To receive OP benefits, the four claimants were required to satisfy the requirements of *W.Va. Code*, 23-4-15(b) [2010], regarding the current claims. *W.Va. Code*, 23-4-15(b) [2010], in cases not involving the death of the claimant, sets forth two time limitations regarding the filing of an application for occupational pneumoconiosis benefits: (1) within three years from and after the last day of the last

medical question in controversy.” Specifically, subsection (c) of that statute provides, in part, that the findings and conclusions of the Board shall determine whether the claimant “has contracted occupational pneumoconiosis and, if so, the percentage of permanent disability resulting therefrom.”

⁸ The three year bar in *W.Va. Code*, 23-4-8c(e) [2009], is not in contention herein. Pennington, Arthur and West’s current claims were filed approximately fifteen, thirteen and nine years respectively after the last OP Board decision in their prior claims. Keffer had no prior claim. Moreover, we note that the four appeals before us do not involve previously filed, but unruled upon, OP claims, or requests to modify rulings in prior OP claims.

continuous period of sixty days or more during which the claimant was exposed to the hazards of occupational pneumoconiosis or (2) within three years from and after a diagnosed impairment due to occupational pneumoconiosis was made known to the claimant by a physician.

B.

Here, the facts are undisputed. The current applications of Pennington, Arthur, West and Keffer consist of the Employees' Report of Occupational Pneumoconiosis, the Physician's Report and the radiology report. The applications also include the claimants' history of occupational dust exposure.⁹ Pennington, Arthur and West had prior OP claims which were referred to the Occupational Pneumoconiosis Board, resulting in findings in each case of insufficient evidence to make an OP diagnosis. Pennington, Arthur and West had no further occupational dust exposure. Moreover, neither they, nor Keffer, filed their current application for benefits within three years of their date of last exposure. Thus, the Board of

⁹ *West Virginia Code of State Rules* § 85-20-52.1, sets forth the following requirements for an application for OP benefits:

A properly completed application must be received before the potential claim will be considered by the Commission, Insurance Commissioner, private carrier or self-insured employer, whichever is applicable. A properly completed application must include 1) a completed WC-105 form; 2) a completed WC-205 form; 3) an ILO form properly completed by a certified "B" reader, and 4) a listing of all alleged exposures to harmful dust, including type of dust, and extent and duration of exposure with each named employer.

Review correctly concluded that the claimants failed to meet the first time limitation in *W.Va. Code, 23-4-15(b)* [2010], *i.e.*, that the application for OP benefits shall be filed “within three years from and after the last day of the last continuous period of sixty days or more during which the employee was exposed to the hazards of occupational pneumoconiosis.”

The second time limitation in *W.Va. Code, 23-4-15(b)* [2010], states that the application for OP benefits shall be filed “within three years from and after a diagnosed impairment due to occupational pneumoconiosis was made known to the employee by a physician.” However, none of the four claims include a diagnosed impairment due to OP. Although the radiology reports indicate “simple pneumoconiosis” regarding Pennington, Arthur and West, all three Physician’s Reports state that it is unknown whether their capacity for work has been impaired by OP. The radiology report for Keffer is “negative for pneumoconiosis.” Although Keffer’s Physicians’ Report indicates “coal dust exposure,” the Report further indicates that it is unknown whether he contracted OP and unknown whether his capacity for work has been impaired by OP.

The claimants ask this Court to reinstate the decisions of the Office of Judges. The claimants assert that because they were not informed by a physician that they have a diagnosed impairment due to OP, they were not barred from filing new claims, even (as in the case of Pennington, Arthur and West) with the same date of last exposure as in their prior claims. Thus, the claimants rely on the second time limitation in *W.Va. Code, 23-4-15(b)*

[2010], which states that the application for OP benefits shall be filed “within three years from and after a diagnosed impairment due to occupational pneumoconiosis was made known to the employee by a physician.” Pennington, Arthur and West emphasize that their current applications indicate a diagnosis of OP (with Keffer’s application listing “coal dust exposure”), but since they have yet to be informed of an actual impairment, their claims are timely and must be referred to the Occupational Pneumoconiosis Board.

The respondent Commissioner and employers acknowledge that the claimants may have developed simple pneumoconiosis due to the progressive nature of OP and without additional exposure to occupational dust. However, the respondents focus on the claimants’ assertion that these new claims must be referred to the Occupational Pneumoconiosis Board without any evidence of impairment. According to the respondents, *W.Va. Code, 23-4-15(b)* [2010], requires the claimant, and not the OP Board, to make the initial showing of “a diagnosed impairment due to occupational pneumoconiosis.” Otherwise, the respondents argue, the OP Board would be unreasonably burdened with the referrals of any number of new, unsupported claims from the same claimant, based upon the same date of last exposure and without any indication in the new application that the claimant has acquired an impairment due to OP since his or her prior, unsuccessful OP claim.

The current claims of Pennington, Arthur and West, thus raise a limited issue before this Court regarding the filing of new applications for OP benefits, where the claim is

unsupported by a diagnosed impairment, and with the same date of last exposure as a prior, unsuccessful claim following adverse findings by the OP Board.

The respondents correctly maintain that the import of the claimants' and the Office of Judges' interpretation of *W.Va. Code*, 23-4-15(b) [2010], is that a claimant may file unlimited OP claims, and have them all referred to the Occupational Pneumoconiosis Board, as long as the claimant has not been told by a physician that he or she has a diagnosed impairment due to OP. Such an interpretation could not have been reasonably intended by the Legislature. In syllabus point 2 of *Sheena H. v. Amfire, LLC*, 235 W.Va. 132, 772 S.E.2d 317 (2015), this Court confirmed:

It is the duty of a court to construe a statute according to its true intent, and give to it such construction as will uphold the law and further justice. It is as well the duty of a court to disregard a construction, though apparently warranted by the literal sense of the words in a statute, when such construction would lead to injustice and absurdity. Syl. Pt. 2, *Click v. Click*, 98 W.Va. 419, 127 S.E.194 (1925).

Accord, syl. pt. 4, *Lewis County Board of Education v. Holden*, 234 W.Va. 666, 769 S.E.2d 282 (2015).

If a claimant for OP benefits is unable to meet the first time limitation set forth in *W.Va. Code*, 23-4-15(b) [2010], a further opportunity to file a claim is provided by the second time limitation, namely, filing within three years after a diagnosed impairment due

to OP is made known to the claimant by a physician. The statute, therefore, takes into account the progressive nature of the disease, yet precludes unsubstantiated, repeated claims which would unreasonably burden the Occupational Pneumoconiosis Board. In the present matter, the current OP claims could have reached the OP Board for analysis, if the applications had indicated a diagnosed impairment due to OP and were filed within the second time limitation under *W.Va. Code, 23-4-15(b)* [2010]. Otherwise, benefits cannot be awarded on a diagnosis of OP alone.

Consequently, this Court holds that where a claim for occupational pneumoconiosis benefits has been denied, a new application may be filed, in cases not involving the death of the claimant, based on the same date of last exposure as the prior claim, if filed pursuant to the first time limitation and attendant requirements of *W.Va. Code, 23-4-15(b)* [2010]: within three years of the date of last exposure to occupational dust. If not filed within that time limitation, a new application for benefits may be filed pursuant to the second time limitation of *W.Va. Code, 23-4-15(b)* [2010]: within three years from and after a diagnosed impairment due to occupational pneumoconiosis was made known to the claimant by a physician. Under the second time limitation, the new application, will not be referred to the Occupational Pneumoconiosis Board unless the Physician's Report filed with the claimant's new application sets forth a diagnosed impairment due to occupational pneumoconiosis.¹⁰

¹⁰ We find no conflict between the required "diagnosed impairment due to occupational pneumoconiosis" of *W.Va. Code, 23-4-15(b)* [2010], and the "presumption

Here, the prior claims of Pennington, Arthur and West were referred to the Occupational Pneumoconiosis Board and ultimately failed to result in an award of benefits. None of their current claims include a diagnosed impairment due to OP. All three Physician's Reports state that it is unknown whether their capacity for work has been impaired by OP. Pennington, Arthur and West insist, nevertheless, that their claims be referred to the OP Board. Under their theory, if their current claims are unsuccessful before the OP Board, *W.Va. Code*, 23-4-15(b) [2010], authorizes them to file similar, unsupported claims again and again, with a time limit only imposed when a physician informs them of a diagnosed impairment. This Court finds that interpretation notably unconvincing, and we conclude, as did the Board of Review, that the claims should not go forward.

Finally, Keffer's application for OP benefits was filed six years after his date of last exposure. Unlike Pennington, Arthur and West, he had no prior OP claims. Keffer's radiology report was negative for OP, and his Physician's Report revealed that it was

clause" found in *W.Va. Code*, 23-4-8c(b) [2009]. The latter provision states:

If it can be shown that the claimant or deceased employee has been exposed to the hazard of inhaling minute particles of dust in the course of and resulting from his or her employment for a period of ten years during the fifteen years immediately preceding the date of his or her last exposure to such hazard and that the claimant or deceased employee has sustained a chronic respiratory disability, it shall be presumed that the claimant is suffering or the deceased employee was suffering at the time of his or her death from occupational pneumoconiosis which arose out of and in the course of his or her employment. This presumption is not conclusive.

unknown whether he had contracted OP and unknown whether his capacity to work was impaired by OP. The record indicates that the Physician's Report, as well as the earlier "black lung exam," were completed by a nurse practitioner. Although the Physician's Report listed a diagnosis of "coal dust exposure," the Claim Administrator noted that "coal dust exposure" is not a legitimate diagnosis in an OP claim. Upon review, this Court finds no basis upon which to overturn the denial of Keffer's claim. Like Pennington, Arthur and West, Keffer would be free to file a claim within three years of receiving a diagnosed impairment due to occupational pneumoconiosis.

VII. Conclusion

This Court concludes that the current claims of Pennington, Arthur, West and Keffer for occupational pneumoconiosis benefits were properly denied by the Board of Review pursuant to *W.Va. Code*, 23-4-15(b) [2010]. The decisions of the Board in all four cases are, therefore, affirmed.

Affirmed.