IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2000 Term

FILED
December 11, 2000
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 27831

RELEASED
December 11, 2000
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

ROBERT S. RHODES,
Appellant,

V.

WORKERS' COMPENSATION DIVISION AND
ANCHOR GLASS CONTAINER,
Appellees.

Appeal from the Workers' Compensation Appeal Board
Appeal No. 50896
Claim No. 98-55465-OP
REVERSED AND REMANDED

Submitted: October 4, 2000
Filed: December 11, 2000

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JUSTICE DAVIS delivered the Opinion of the Court.

JUSTICES STARCHER AND MCGRAW dissent and reserve the right to file dissenting opinions.

JUSTICE SCOTT concurs and reserves the right to file a concurring opinion.

SYLLABUS BY THE COURT

1. """The primary object in construing a statute is to ascertain and give effect to the intent of the legislature." Syllabus Point 1, *Smith v. State Workmen's Compensation Commissioner*, 159 W. Va. 108, 219 S.E.2d 361 (1975).' Syllabus point 2, *Anderson v. Wood*, 204 W. Va. 558, 514 S.E.2d 408 (1999)." Syllabus point 2, *Expedited Transportation Systems, Inc. v. Vieweg*, ___ W. Va. ___, 529 S.E.2d 110 (2000).

2. """'Statutes in pari materia, must be construed together and the legislative intention, as gathered from the whole of the enactments, must be given effect.' Point 3., Syllabus, *State ex rel. Graney v. Sims*, 144 W. Va. 72[, 105 S.E.2d 886 (1958)]. Syl. pt. 1, *State ex rel. Slatton v. Boles*, 147 W. Va. 674, 130 S.E.2d 192 (1963)." Syl. pt. 1, *Transamerica Com. Fin. v. Blueville Bank*, 190 W. Va. 474, 438 S.E.2d 817 (1993).' Syllabus point 2, *Beckley v. Kirk*, 193 W. Va. 258, 455 S.E.2d 817 (1995)." Syllabus point 3, *Expedited Transportation Systems, Inc. v. Vieweg*, ___ W. Va. ___, 529 S.E.2d 110 (2000).

3. When a party objects to the findings and conclusion of the Occupational Pneumoconiosis Board, made in connection with a Workers' Compensation claim for occupational pneumoconiosis benefits, and submits new medical evidence in connection with the objection, W. Va. Code § 23-4-8c(d) (1993) (Repl. Vol. 1998) requires the objecting party to bear the burden of questioning the Occupational Pneumoconiosis Board regarding the new medical evidence at the hearing therein required.

Davis, Justice:

In this appeal from a decision of the Workers' Compensation Appeal Board, a Workers' Compensation claimant argues that his claim for benefits for occupational pneumoconiosis was improperly denied. We find that when a party objects to the findings and conclusion of the Occupational Pneumoconiosis Board, made in connection with a Workers' Compensation claim for occupational pneumoconiosis benefits, and submits new medical evidence in connection with the objection, W. Va. Code § 23-4-8c(d) (1993) (Repl. Vol. 1998) requires the objecting party to bear the burden of questioning the Occupational Pneumoconiosis Board regarding the new medical evidence at the hearing therein required. Because this procedure was not clearly established prior to this opinion, we reverse this case and remand for additional proceedings.

I.

FACTUAL AND PROCEDURAL HISTORY

Robert S. Rhodes (hereinafter "Mr. Rhodes"), claimant below and appellant herein, was employed by Anchor Glass Container (hereinafter "Anchor") in Keyser, West Virginia, for approximately twenty-two years, ending in October 1995, when the plant closed.[1] On April 29, 1998, Dr. Carl Liebig diagnosed Mr. Rhodes with occupational pneumoconiosis (hereinafter "OP"). Consequently, based upon Dr. Liebig's diagnosis and Mr. Rhodes' history of workplace dust exposure, Mr. Rhodes filed a Workers' Compensation claim for OP benefits. On July 30, 1998, the Workers' Compensation Division (hereinafter

[1]Mr. Rhodes was employed in Anchor's batch and tank department.

"the Division") issued a non-medical "Claim Decision" stating that Mr. Rhodes was entitled to the presumption that "any chronic respiratory disability resulted from [his] employment."[2] Mr. Rhodes was then evaluated by the Occupational Pneumoconiosis Board (hereinafter "OP Board") on September 24, 1998. The OP Board's evaluation included a patient history, a physical examination, pulmonary function studies and an X-ray of the chest. In its report disclosing its findings, the OP Board noted that Mr. Rhodes had been exposed to a dust hazard for approximately twenty-two years as a glass plant worker. In addition, the Board stated:

> Physical examination shows the claimant to be in fair general clinical condition. He is not in any respiratory distress at rest. Chest cage is well formed. There are harsh breath sounds. There are no rales. There is mild wheezing present bilaterally. Heart sounds are of good quality with no murmurs.
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> . . . .
>
> **X-RAY INTERPRETATION: CHEST PA** views of the chest are within normal limits in their appearance with NO EVIDENCE of

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[2]This presumption is not conclusive. *See* W. Va. Code § 23-4-8c(b) (1993) (Repl. Vol. 1998):

> 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 such claimant or deceased employee has sustained a chronic respiratory disability, then it shall be presumed that such claimant is suffering or such 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 shall not be conclusive.*

(Emphasis added).

occupational pneumoconiosis identified.

As a result of its evaluation, the OP Board made no diagnosis of OP.

Based upon the OP Board's failure to diagnose OP, the Division, by order dated December 3, 1998, notified Mr. Rhodes that no award of benefits was being granted. Thereafter, on January 28, 1999, Dr. Ray A. Harron interpreted the OP Board's X-ray on behalf of Mr. Rhodes. Dr. Harron indicated that the X-ray quality was grade one. His report also stated that the X-ray revealed parenchymal abnormalities consistent with pneumoconiosis, but no pleural abnormalities consistent with pneumoconiosis. Dr. Edward Aycoth also read the OP Board's X-ray on behalf of Mr. Rhodes and reported the film quality as grade one. Dr. Aycoth's report further stated:

> The heart, mediastinum, bony thorax, costophrenic angles and hemidiaphragms are within normal limits.
>
> There are scattered rounded density opacities measuring up to 3 mm. in diameter throughout both lungs. The lungs are well aerated and free of active disease.
>
> IMPRESSION:
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> Pneumoconiosis category 1/0, p/q.

Mr. Rhodes protested the Division's order granting no award of benefits for OP, and the case was submitted to the Workers' Compensation Office of Judges (hereinafter "OOJ") for review. In support of his protest, Mr. Rhodes submitted the reports of Drs. Harron and Aycoth. A hearing for the purpose of adducing the testimony of members of the OP Board was then held on August 11, 1999. The

two page transcript from this hearing indicates that counsel for Mr. Rhodes was the only attorney making an appearance. No one appeared for the employer or on behalf of the Division. Counsel for Mr. Rhodes failed to question any member of the OP Board. In a total of four lines of transcript, the record simply notes the style of the case and the claim number, and states that "[t]he Claim will be submitted." Thereafter, by order dated October 8, 1999, the OOJ announced its decision affirming the Commission's order denying benefits to Mr. Rhodes. The order stated in part:

> The record evidence supports the Division's Order granting the claimant no award for occupational pneumoconiosis. The Board examined the claimant on September 24, 1998, and found that the chest x-ray was within normal limits. This report is reliable and credible and supports the Division's Order. The claimant has failed to show that the findings of the Board are clearly wrong.
>
> The claimant submitted the x-ray report of Dr. Edward Aycoth who reviewed the x-rays taken by the Board and opined that the claimant suffered from minimal pneumoconiosis. However, this report was not submitted to the Board for review and comment as required in the procedures for occupational pneumoconiosis cases. *See* 85 CSR [1,] § 20 *et seq*. At the final hearing scheduled for this matter on August 11, 1999, the claim was submitted on the existing record. Members of the Board were not requested to review the evidence submitted by the claimant and discuss the reliability and credibility of Dr. Aycoth's report. This procedure should not be circumvented. Accordingly, the Division's Order is affirmed.

Mr. Rhodes then appealed his case to the Workers' Compensation Appeal Board (hereinafter "WCAB"), seeking a statutory five percent permanent partial disability award for OP without

impairment pursuant to W. Va. Code §§ 23-4-8c(b) (1993) (Repl. Vol. 1998)[3] and 23-4-6a (1995) (Repl. Vol. 1998).[4] By order dated April 27, 2000, the WCAB affirmed the order of the OOJ, and incorporated the same, by reference, as its own findings of fact and conclusions of law. The WCAB also indicated that its decision was based upon its conclusion that "the Occupational Pneumoconiosis Board has specifically found that it 'cannot make a diagnosis of occupational pneumoconiosis.' (Emphasis added.) We firmly believe that this finding is sufficient to rebut the non-conclusive presumption found in West Virginia Code § 23-4-8c(b), and justifies the Division's refusal of a 5% statutory award." Finally, the WCAB explained:

> West Virginia Code § 23-4-6a mandates that "the office of judges shall affirm the decision of the Occupational Pneumoconiosis Board made following hearing unless the decision is clearly wrong in view of the reliable, probative and substantial evidence on the whole record." We find nothing in the evidence to show that the Occupational Pneumoconiosis Board was clearly wrong. To the contrary, we find that the record as a whole, even without the statutory mandate of West Virginia Code § 23-4-6a, overwhelmingly, on strong and reliable evidence, supports the conclusion that the claimant is not entitled to a presumptive 5% statutory award. Given the deference which we are required by statute, and decisions of the West Virginia Supreme Court of Appeals, to give to the findings of the Occupational Pneumoconiosis Board and the Administrative Law Judge, we would be committing gross error to find otherwise.

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[3]*See supra* note 2 for text of W. Va. Code § 23-4-8c(b).

[4]W. Va. Code § 23-4-6a states in relevant part:

> [I]f it shall be determined by the division in accordance with the facts in the case and with the advice and recommendation of the occupational pneumoconiosis board that an employee has occupational pneumoconiosis, but without measurable pulmonary impairment therefrom, such employee shall be awarded and paid twenty weeks of benefits at the same benefit rate as hereinabove provided.

It is from this April 27, 2000, order of the WCAB that Mr. Rhodes now appeals.

II.

STANDARD OF REVIEW

This appeal primarily involves questions of law. We have previously explained that we review *de novo* questions of law decided by the WCAB.

> As we said in *Barnett v. State Workmen's Compensation Com'r.*, 153 W. Va. 796, 812, 172 S.E.2d 698, 707 (1970), "[w]hile the findings of fact of the [WCAB] are conclusive unless they are manifestly against the weight of the evidence, the legal conclusions of the appeal board, based upon such findings, are subject to review by the courts." Conclusions of law are subject to de novo scrutiny. Syl. pt. 3, *Adkins v. Gatson*, 192 W. Va. 561, 453 S.E.2d 395 (1994); Syl. pt. 1, *Randolph County Board of Education v. Scalia*, 182 W. Va. 289, 387 S.E.2d 524 (1989). Where the issue on an appeal is clearly a question of law or involving an interpretation of a statute, we apply a de novo standard of review. Syl. pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995); Syl. pt. 1, *University of West Virginia Bd. of Trustees on Behalf of West Virginia University v. Fox*, 197 W. Va. 91, 475 S.E.2d 91 (1996).

Conley v. Workers' Comp. Div., 199 W. Va. 196, 199, 483 S.E.2d 542, 545 (1997). To the extent that our decision in this case requires us to consider factual findings made by the WCAB, we will not reverse absent a finding that the WCAB's decision is plainly wrong.

> "'This Court will not reverse a finding of fact made by the Workmen's Compensation Appeal Board unless it appears from the proof upon which the appeal board acted that the finding is plainly wrong.' Syl. pt. 2, *Jordan v. State Workmen's Compensation Commissioner*, 156 W. Va. 159, 191 S.E.2d 497 (1972), quoting, Syllabus, *Dunlap v. State Workmen's Compensation Commissioner*, 152 W. Va. 359,

> 163 S.E.2d 605 (1968)." Syllabus, *Rushman v. Lewis*, 173 W. Va. 149, 313 S.E.2d 426 (1984).

Syl. pt. 1, *Conley*. We have also explained that

> [T]he plainly wrong standard of review is a deferential one, which presumes an administrative tribunal's actions are valid as long as the decision is supported by substantial evidence. Syl. pt[.] 3, *In re: Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996); *Frymier-Halloran v. Paige*, 193 W. Va. 687, 695, 458 S.E.2d 780, 788 (1995).

Conley, 199 W. Va. at 199, 483 S.E.2d at 545.

Finally, it is prudent to note that "[w]hen the Workers' Compensation Appeal Board reviews a ruling from the Workers' Compensation Office of Judges it must do so under the standard of review set out in W. Va. Code § 23-5-12(b) (1995), and failure to do so will be reversible error." Syl. pt. 6, *Conley*. W. Va. Code § 23-5-12(b) (1995) (Repl. Vol. 1998) also directs, in relevant part, that

> [The WCAB] shall reverse, vacate or modify the order or decision of the administrative law judge if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative law judge's findings are:
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> (1) In violation of statutory provisions; or
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> (2) In excess of the statutory authority or jurisdiction of the administrative law judge; or
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> (3) Made upon unlawful procedures; or
>
> (4) Affected by other error of law; or
>
> (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
>
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

With due regard for these standards, we now consider the issue raised on appeal.

III.

DISCUSSION

Mr. Rhodes is the only party who filed a brief in connection with this appeal. There has been no response from the employer, who is no longer in business, or the Division. Mr. Rhodes simply argues that the reports of Drs. Harron and Aycoth, in addition to the initial diagnosis of Dr. Liebig, provided reliable, probative and substantial evidence that he suffers from OP. Consequently, in light of the liberality rule,[5] Mr. Rhodes contends that he is entitled to the five percent statutory award for OP without impairment.

As noted above, the OOJ affirmed the Division's award of no benefits. In reaching this decision, the OOJ concluded that Mr. Rhodes had failed to show that the findings of the OP Board were clearly wrong.[6] This decision of the OOJ, which was subsequently affirmed by the WCAB and

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[5]*See Crouch v. West Virginia Workers' Comp. Comm'r*, 184 W. Va. 730, 732, 403 S.E.2d 747, 749 (1991) ("As a general rule, the claimant's evidence in a workers' compensation case must be liberally construed in his favor. Moreover, this Court has stated that a claimant is entitled to all reasonable inferences that can be drawn from the evidence. *Javins v. Workers' Compensation Commissioner*, 173 W. Va. 747, 320 S.E.2d 119 (1984); *Sluss v. Workers' Compensation Commissioner*, 174 W. Va. 433, 327 S.E.2d 413 (1985).").

[6]Pursuant to W. Va. Code § 23-4-6a

> If an employee is found to be permanently disabled due to occupational pneumoconiosis, as defined in section one [§ 23-4-1] of this article, the percentage of permanent disability shall be determined by the

(continued...)

incorporated into its own order, was based in significant part upon the fact that the "[m]embers of the [OP] Board were not requested to review the evidence submitted by [Mr. Rhodes] and [to] discuss the reliability and credibility of Dr. Aycoth's report." Thus, the issue which must be addressed to resolve this appeal is whether the OP Board is required to review and comment on evidence submitted by a claimant protesting an adverse decision of the Division rendered in an OP claim after the OP Board has conducted its hearing/examination and submitted its findings and conclusions, and, if so, who bears the burden of advancing this procedure.

This is an issue of first impression for this Court. In order to settle it, we look to the Workers' Compensation statutes. Because those statutes do not expressly address the issue, we must endeavor to ascertain, from the text provided, what procedure the legislature intended. "'"The primary object in construing a statute is to ascertain and give effect to the intent of the legislature." Syllabus Point 1, *Smith v. State Workmen's Compensation Commissioner*, 159 W. Va. 108, 219 S.E.2d 361

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[6](...continued)

> degree of medical impairment that is found by the occupational pneumoconiosis board. The division shall enter an order setting forth the findings of the occupational pneumoconiosis board with regard to whether the claimant has occupational pneumoconiosis and the degree of medical impairment, if any, resulting therefrom. That order shall be the final decision of the division for purposes of section one [§ 23-5-1], article five of this chapter. If such a decision is objected to, *the office of judges shall affirm the decision of the occupational pneumoconiosis board made following hearing unless the decision is clearly wrong in view of the reliable, probative and substantial evidence on the whole record. . . .*

(Emphasis added).

(1975).' Syllabus point 2, *Anderson v. Wood*, 204 W. Va. 558, 514 S.E.2d 408 (1999)." Syl. pt. 2, *Expedited Transp. Sys., Inc. v. Vieweg*, ___ W. Va. ___, 529 S.E.2d 110 (2000).

We find several of the Workers' Compensation statutes instructive to our consideration of the instant question. Thus, in conducting our analysis, we must consider together all the statutes related to this topic. """'Statutes in pari materia, must be construed together and the legislative intention, as gathered from the whole of the enactments, must be given effect.' Point 3., Syllabus, *State ex rel. Graney v. Sims*, 144 W. Va. 72[, 105 S.E.2d 886 (1958)]. Syl. pt. 1, *State ex rel. Slatton v. Boles*, 147 W. Va. 674, 130 S.E.2d 192 (1963)." Syl. pt. 1, *Transamerica Com. Fin. v. Blueville Bank*, 190 W. Va. 474, 438 S.E.2d 817 (1993).' Syllabus point 2, *Beckley v. Kirk*, 193 W. Va. 258, 455 S.E.2d 817 (1995)." Syl. pt. 3, *Expedited*. *See also Carvey v. West Virginia State Bd. of Educ.*, 206 W. Va. 720, 731, 527 S.E.2d 831, 842 (1999) ("Generally, '"[s]tatutes which relate to the same subject matter should be read and applied together so that the Legislature's intention can be gathered from the whole of the enactments." Syllabus Point 3, *Smith v. State Workmen's Compensation Comm'r*, 159 W. Va. 108, 219 S.E.2d 361 (1975).' Syl. pt. 3, *Boley v. Miller*, 187 W. Va. 242, 418 S.E.2d 352 (1992).").

First, we note that the OP Board plays an integral role in the decision of an OP claim: "[t]he function of the board is to determine *all* medical questions relating to cases of compensation for occupational pneumoconiosis under the direction and supervision of the commissioner." W. Va. Code §

23-4-8a (1999)[7] (Supp. 2000) (emphasis added).[8] *See also Newman v. Richardson*, 186 W. Va. 66, 69-70, 410 S.E.2d 705, 708-09 (1991) ("Because the Occupational Pneumoconiosis Board is composed of doctors who have 'by special study or experience, or both, acquired special knowledge of pulmonary diseases' (W. Va. Code, 23-4-8a, [1974]), the Board is to determine all medical questions in an occupational pneumoconiosis claim under the direction and supervision of the Commissioner. *Ferguson v. State Workmen's Compensation Commissioner*, 152 W. Va. 366, 163 S.E.2d 465 (1968)." (footnote omitted)).

Furthermore, the Division and the OOJ are mandated, in W. Va. Code § 23-4-6a (1995)

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[7]The version of W. Va. Code § 23-4-8a in effect at the time Mr. Rhodes asserted his claim was worded slightly differently: "The function of the board *shall be* to determine all medical questions relating to cases of compensation for occupational pneumoconiosis under the direction and supervision of the commissioner." W. Va. Code § 23-4-8a (1974) (Repl. Vol. 1998) (emphasis added). We find that the change from "shall be" to "is" does not materially change the meaning of the quoted language.

[8]To the extent a statute is unambiguous, it is not subject to interpretation:

> "[W]here the language of a statutory provision is plain, its terms should be applied as written and not construed." *DeVane v. Kennedy*, 205 W. Va. 519, 529, 519 S.E.2d 622, 632 (1999) (citations omitted). *See also* Syl. pt. 4, in part, *Daily Gazette Co., Inc. v. West Virginia Dev. Office*, 206 W. Va. 51, 521 S.E.2d 543 (1999) ("A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect." (internal quotations and citations omitted)); Syl. pt. 5, in part, *Walker v. West Virginia Ethics Comm'n*, 201 W. Va. 108, 492 S.E.2d 167 [(1997)] ("Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." (internal quotations and citations omitted)).

State ex rel. McGraw v. Combs Servs., 206 W. Va. 512, 519, 526 S.E.2d 34, 41 (1999).

(Repl. Vol. 1998), to give substantial weight to the OP Board's determination of a claimant's degree of medical impairment:

> If an employee is found to be permanently disabled due to occupational pneumoconiosis, as defined in section one [§ 23-4-1] of this article, *the percentage of permanent disability shall be determined by the degree of medical impairment that is found by the occupational pneumoconiosis board*. The division *shall* enter an order setting forth the findings of the occupational pneumoconiosis board with regard to whether the claimant has occupational pneumoconiosis and the degree of medical impairment, if any, resulting therefrom. That order *shall* be the final decision of the division for purposes of section one [§ 23-5-1], article five of this chapter. If such a decision is objected to, the office of judges *shall affirm* the decision of the occupational pneumoconiosis board made following hearing *unless* the decision is *clearly wrong* in view of the reliable, probative and substantial evidence on the whole record.

(Emphasis added). It is noteworthy that the above quoted provision repeatedly utilizes the term "shall."

> The word "shall" is mandatory. *See State v. Allen*, ___ W. Va. ___, ___, ___ S.E.2d ___, ___, slip op. at 14 (No. 25980 Nov. 17, 1999) ("Generally, 'shall' commands a mandatory connotation and denotes that the described behavior is directory, rather than discretionary." (citations omitted)); Syl. pt. 1, *E.H. v. Matin*, 201 W. Va. 463, 498 S.E.2d 35 (1997) ("'It is well established that the word "shall," in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation.'" (citation omitted)).

Keplinger v. Virginia Elec. and Power Co., ___ W. Va. ___, ___, ___ S.E.2d ___, ___, slip op. at 24-25 (No. 27381 July 14, 2000).

Similarly, in a case where a claimant seeks a five percent statutory award for OP without impairment, such determination is to be made by the Division *with the advice and recommendation*

of the OP Board:

> [I]f it shall be determined by the division in accordance with the facts in the case and *with the advice and recommendation of the occupational pneumoconiosis board* that an employee has occupational pneumoconiosis, but without measurable pulmonary impairment therefrom, such employee shall be awarded and paid twenty weeks of benefits at the same benefit rate as hereinabove provided.

W. Va. Code § 23-4-6a[9] (emphasis added).[10]

Having observed the considerable deference afforded the OP Board, we now consider its procedural role in the processing of an OP claim. Once a claimant is referred by the Commissioner to the OP Board, *see* W. Va. Code § 23-4-8 (1990) (Repl. Vol. 1998) ("If the compensation claimed is for occupational pneumoconiosis, the commissioner shall have the power, after due notice to the employer, and whenever in the commissioner's opinion it shall be necessary, to order a claimant to appear for examination before the occupational pneumoconiosis board hereinafter provided."),[11] either the

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[9]*See supra* note 8.

[10]Additionally, we note that W. Va. Code § 23-4-6(h) (1999) (Supp 2000) states that "[f]or the purposes of [Chapter 23 of the West Virginia Code] a finding of the occupational pneumoconiosis board shall have the force and effect of an award." This Court previously examined that language in an earlier version of W. Va. Code § 23-4-6(h) and explained that the purpose of the provision is "to allow dependents to recover in those instances where the employee die[s] prior to a final ruling of the Commissioner." *Cole v. State Workmen's Compensation Comm'r*, 166 W. Va. 294, 301, 273 S.E.2d 586, 591 (1980) (citing *Charles v. State Workmen's Comp. Comm'r*, 161 W. Va. 285, 241 S.E.2d 816 (1978)).

[11]*Accord* 7A C.S.R. § 85-1-20.3 (1986). *See also Newman v. Richardson*, 186 W. Va. 66, 69, 410 S.E.2d 705, 708 (1991) ("After the Commissioner determines that the exposure requirements in a claim for occupational pneumoconiosis have been met, 'the Commissioner must refer the claim to the Occupational Pneumoconiosis Board. . . .' *Parker*[*v. Workers' Comp. Comm'r*], 174 (continued...)

Commissioner or the OP Board must then notify the employee/claimant[12] to appear before the OP Board. W. Va. Code § 23-4-8b (1971) (Repl. Vol. 1998) ("The occupational pneumoconiosis board, upon reference to it by the commissioner of a case of occupational pneumoconiosis, shall notify the employee, or in case he is dead, the claimant, and the employer, to appear before such board at a time and place stated in the notice.").[13] Where the employee asserting a claim for OP benefits is living, he or she is then required to submit to an examination by, or on behalf of, the OP Board. *Id.*[14] In addition, the employee

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[11](...continued)
W. Va. [181,] 183, 324 S.E.2d [142,] 144 [(1984)]; Syllabus, *Godfrey v. State Workmen's Compensation Commissioner*, 166 W. Va. 644, 276 S.E.2d 802 (1981); Syllabus Point 2, *Meadows v. State Workmen's* [*Compensation*] *Commissioner*, 157 W. Va. 140, 198 S.E.2d 137 (1973).").

[12]If the employee is deceased, his or her claim may be asserted by an appropriate dependent. *See, e.g.*, W. Va. Code § 23-4-10 (1999) (Supp. 2000) (identifying persons who may receive Workers' Compensation death benefits).

[13]*See also* 7A C.S.R. § 85-1-20.3 (1986) ("In the case of such reference, the Commissioner will notify the claimant and the interested employer or employers to appear before the [OP] Board at the time and place stated in the notice.").

[14]In this regard, W. Va. Code § 23-4-8b (1971) (Repl. Vol. 1998) states in relevant part:

> If the employee be living, he shall appear before the board at the time and place specified and submit to such examination, including clinical and X-ray examinations, as the board may require. If a physician licensed to practice medicine in the State shall make affidavit that the employee is physically unable to appear at the time and place designated by the board, such board shall, on notice to the proper parties, change the place and time as may reasonably facilitate the hearing or examination of the employee, or may appoint a qualified specialist in the field of respiratory disease to examine the claimant on behalf of the board.

Where the employee is deceased, W. Va. Code § 23-4-8b directs:

(continued...)

and the employer are required to provide the OP Board with "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." *Id.* *Accord* 7A C.S.R. § 85-1-20.3 (1986).

After completing its examination, the OP Board must then submit a written report to the commissioner detailing its findings and conclusions as to every medical question in controversy. W. Va. Code § 23-4-8c(a) (1993) (Repl. Vol. 1998).[15] *Accord* 7A C.S.R. § 85-1-20.4. In addition, the OP Board must file with the commissioner all evidence, including medical reports and X-ray examinations, produced by or on behalf of an employee/claimant or employer. *Id.*[16] Thereafter, if the employee/claimant

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[14](...continued)
If the employee be dead, the notice of the board shall further require that the claimant produce necessary consents and permits so that an autopsy may be performed, if the board shall so direct. When in the opinion of the board an autopsy is deemed necessary accurately and scientifically to ascertain and determine the cause of death, such autopsy examination shall be ordered by the board, which shall designate a duly licensed physician, a pathologist, or such other specialists as may be deemed necessary by the board, to make such examination and tests to determine the cause of death and certify his or their written findings, in triplicate, to the board, which findings shall be public records. In the event that a claimant for compensation for such death refuses to consent and permit such autopsy to be made, all rights for compensation shall thereupon be forfeited.

[15]A non-exhaustive list of specific findings and conclusions that must be set forth in the OP Board's written report is found in W. Va. Code § 23-4-8c(c) (1993) (Repl. Vol. 1998).

[16]With regard to this procedure, we have previously explained that:

The Occupational Pneumoconiosis Board's function is to determine, based upon their own examinations and any evidence from examinations produced by physicians on behalf of the claimant and employer, whether

(continued...)

or employer files any objections to the findings and conclusions of the OP Board, then, pursuant to W. Va. Code § 23-4-8c(d), the Commissioner or the OOJ must schedule a hearing. *Accord* 7A C.S.R. § 85-1-20.5. Specifically, W. Va. Code § 23-4-8c(d) states in relevant part:

> If objection has been filed to the findings and conclusions of the board, notice thereof *shall* be given to the board, and the members thereof joining in such findings and conclusions *shall* appear at the time fixed by the commissioner or office of judges for the hearing to submit to examination and cross-examination in respect to such findings and conclusions. At such hearing, evidence to support or controvert the findings and conclusions of the board shall be limited to examination and cross-examination of the members of the board, and to the taking of testimony of other qualified physicians and roentgenologists.

(Emphasis added). Use of the mandatory term "shall" demonstrates that the OP Board is unequivocally required to appear at the hearing and must submit to examination and cross-examination.

We are persuaded by the numerous provisions discussed above that the Legislature

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[16](...continued)
there is medical evidence of occupational pneumoconiosis. West Virginia Code § 23-4-8a (1981 Replacement Vol.). The Board must then submit its findings to the Commissioner in a written report. The Board's opinions as to the extent of occupational pneumoconiosis are, in the final analysis, a judgment based not only on objective factors, but also on subjective factors such as the presumption in favor of the results showing the least impairment. It is still for the Commissioner to review their findings, as well as all other evidence, to determine what percentage of disability exists. The Occupational Pneumoconiosis Board assists the Commissioner by interpreting its own test and examination results and those presented by employers and claimants from other laboratories and physicians.

Javins v. Workers' Compensation Comm'r, 173 W. Va. 747, 757, 320 S.E.2d 119, 129-30 (1984) (footnote omitted).

intended that the OP Board comment on new medical evidence submitted in connection with a party's objection(s) to the OP Board's findings and conclusions. First, we note that upon the filing of objections to the findings and conclusions of the OP Board, a hearing is required at which the OP Board members must appear. The clear purpose of this hearing is to determine whether the OP Board's findings and conclusions are clearly wrong, which is the standard for reversing a decision of the commissioner thereupon based. Because the OP Board is charged with determining *all* medical questions relating to OP cases, and because of the substantial deference afforded the OP Board in connection with OP claims, when medical evidence challenging the accuracy of the OP Board's report is submitted by a party objecting to that report, the OP Board must be afforded the opportunity to review and comment on that evidence and its reliability. The Legislature has provided this opportunity in the form of the mandatory hearing. In addition, we believe the party challenging the OP Board's findings should bear the burden of questioning the OP Board regarding new medical evidence. In other words, the party challenging the OP Board's report bears the burden of establishing that his/her new evidence is reliable and demonstrates that the findings and conclusions of the OP Board are clearly wrong. Consequently, we hold that when a party objects to the findings and conclusion of the Occupational Pneumoconiosis Board, made in connection with a Workers' Compensation claim for occupational pneumoconiosis benefits, and submits new medical evidence in connection with the objection, W. Va. Code § 23-4-8c(d) (1993) (Repl. Vol. 1998) requires the objecting party to bear the burden of questioning the Occupational Pneumoconiosis Board regarding the new medical evidence at the hearing therein required.

We note that, in reaching the foregoing holding, this opinion does not take away the OOJ's

statutory authority to examine the evidence on the record, with due regard for the liberality rule, in reaching its decision in any given case. Rather, this opinion assures that the statutory scheme of having the OP Board examine medical evidence and comment thereon, so that the OOJ is provided a complete and adequate record[17] upon which to base its decision, will be followed.

In the instant case, the OP Board found no OP and Mr. Rhodes objected to its findings. Thereafter, a mandatory hearing was conducted pursuant to W. Va. Code § 23-4-8c(d). However, Mr. Rhodes failed to question the OP Board regarding the medical reports of Drs. Harron and Aycoth that were submitted in support of his objection to the OP Board's findings and conclusions. Because the procedure and burden set forth in this opinion were not heretofore clearly established, we find it appropriate to reverse the final order of the WCAB and remand this case for an additional hearing on Mr. Rhodes' objection to the OP Board's report in order to afford Mr. Rhodes an opportunity to meet his burden of

[17]The OOJ must base its decision upon its consideration of *the entire record*, which, as clarified in this opinion, must include the OP Board's comments on new medical evidence submitted in support of a protest: "Upon consideration of the *entire record*, the chief administrative law judge or other authorized adjudicator within the office of judges shall render a decision affirming, reversing or modifying the division's action." W. Va. Code § 23-5-9(c) (1999) (Supp. 2000) (emphasis added). *See also* W. Va. Code § 23-5-9(b) ("Subject to the rules of practice and procedure promulgated pursuant to section eight [§ 23-5-8] of this article, the record upon which the matter shall be decided shall include any evidence submitted by a party to the office of judges, *evidence taken at hearings conducted by the office of judges* and any documents in the division's claim files which relate to the matter objected to." (emphasis added)); 7A C.S.R. § 93-1-2.3(e) (1999) ("Subject to the limitations set forth in these rules, the record upon which a protest shall be decided shall include evidence submitted by a party to the Office of Judges, *evidence taken at hearings conducted by the Office of Judges* and any documents in the Division's claim files which relate to the protest." (emphasis added)).

questioning the OP Board with respect to the medical evidence he submitted in support of his objections.[18]

IV.

CONCLUSION

Based upon the foregoing, the April 27, 2000, order of the WCAB is reversed and this case is remanded for additional proceedings not inconsistent with this opinion.

Reversed and remanded.

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[18]Mr. Rhodes asserts that the liberality rule requires the reversal of the final order of the WCAB. We note, however, that the liberality rule does not relieve Mr. Rhodes of his burden of proving his claim.

> "Though the general rule in workmen's compensation cases is that the evidence will be construed liberally in favor of the claimant, the rule does not relieve the claimant of the burden of proving his claim and such rule can not take the place of proper and satisfactory proof." Point 3, Syllabus, *Staubs v. State Workmen's Compensation Commissioner,* 153 W. Va. 337[, 168 S.E.2d 730 (1969)].

Syl. pt. 3, *Clark v. State Workmen's Comp. Comm'r*, 155 W. Va. 726, 187 S.E.2d 213 (1972).