

**STATE OF WEST VIRGINIA**  
**SUPREME COURT OF APPEALS**

**Edward L. Hoskins,**  
**Claimant Below, Petitioner**

vs.) **No. 22-0500** (BOR Appeal No. 2057690)  
(JCN: 2014001477)

**American Electric Power Company, Inc.,**  
**Employer Below, Respondent**

**MEMORANDUM DECISION**

Petitioner Edward L. Hoskins appeals the decision of the West Virginia Workers' Compensation Board of Review ("Board of Review"). Respondent American Electric Power Company, Inc., filed a timely response.<sup>1</sup> Mr. Hoskins petitioned to reopen his claim for occupational pneumoconiosis, however; the claims administrator denied the request to reopen the claim in an order dated March 8, 2021. The Workers' Compensation Office of Judges ("Office of Judges") affirmed the decision in its November 30, 2021, order. The order of the Office of Judges was affirmed by the Board of Review on June 2, 2022. Upon our review, we determine that oral argument is unnecessary and that a memorandum decision affirming the Board of Review's decision is appropriate. *See* W. Va. R. App. P. 21.

In a claims administrator order dated March 11, 2016, Mr. Hoskins was granted an award of 10% permanent partial disability due to occupational pneumoconiosis. On July 18, 2018, Mr. Hoskins petitioned to reopen the claim, but he was found to have been fully compensated by the prior 10% award in an order issued by the claims administrator on December 27, 2018. The petitioner underwent pulmonary function studies at East Ohio Regional Hospital on August 27, 2019, after complaining about dyspnea with exercise and a persistent cough. He denied a history of smoking, and his prebronchodilator FVC was 87% of predicted, and the postbronchodilator was 86% of predicted.<sup>2</sup> The prebronchodilator FEV1 was 83% of predicted, and the postbronchodilator

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<sup>1</sup>Petitioner, Edward L. Hoskins, is represented by William C. Gallagher, and respondent, American Electric Power Co., Inc., is represented by James W. Heslep.

<sup>2</sup>FVC is the volume of air that can be forcefully exhaled from the lungs after a maximal inspiration. *See* W. Va. Code R. § 85-20-52.9(d)(1).

FEV1 was 83% of predicted.<sup>3</sup> The prebronchodilator FEV1/FVC ratio was 68, and the postbronchodilator FEV1/FVC ratio was 70.<sup>4</sup> Diffusion studies revealed DLCO of 45% of predicted and DL/VA of 91% of predicted.<sup>5</sup> Blood gas revealed a pCO<sub>2</sub> of 35.6 and pO<sub>2</sub> of 77.2.<sup>6</sup>

On March 3, 2021, Mr. Hoskins filed a second application to reopen his claim, along with accompanying pulmonary function studies from the Respiratory and Occupational Lung Disease Clinic at Reynolds Memorial Hospital, dated December 17, 2020. The pulmonary function studies revealed that the petitioner's pCO<sub>2</sub> was 35.0, and the pO<sub>2</sub> was 96.0. On the same date, Mr. Hoskins underwent pulmonary function studies at Reynolds Memorial Hospital. The prebronchodilator FVC was 72% of predicted, and the postbronchodilator FVC was 77% of predicted. The prebronchodilator FEV1 was 78% of predicted, and the postbronchodilator FEV1 was 84% of predicted. The prebronchodilator FEV1/FVC was 77, and the postbronchodilator FEV1/FVC was 78. Diffusion studies revealed a DLCO of 48% of predicted and a DL/VA of 82% of predicted. At the time of testing, the petitioner's carboxyhemoglobin was 0.80.

Mr. Hoskins also submitted a report from his Respiratory and Occupational Lung Disease Clinic Evaluation with Shawn Posin, M.D., on December 17, 2020. At the time of examination, the petitioner reported increased shortness of breath when walking distances, climbing stairs, and performing outdoor activities. He also denied a history of smoking. Dr. Posin noted that Mr. Hoskins has a military history as a green beret in Vietnam from 1965 to 1968, where he was exposed to Agent Orange and other chemicals. During his career while working for the employer, the petitioner was exposed to coal dust, silica, solvents, asbestos, sand, cement mortar, diesel fumes, fiberglass, fly ash, benzene, arsenic, ammonia, trichloroethylene, as well as several other gases. Dr. Posin made the following conclusions after examining Mr. Hoskins:

The patient is symptomatic and has been developing increased shortness of breath. He does have significant exposure from the military as well as working at power plants. His ABGs were within normal limits. His pulmonary function tests did not show significant abnormalities. Postbronchodilator FVC was at 5% disability per

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<sup>3</sup>FEV1 is the volume of air that can be exhaled forcefully from the lungs in one second after a maximal inspiration. *See* W. Va. Code of State Rules § 85-20-52.9(d)(2).

<sup>4</sup>FEV1/FVC refers to the forced expiratory volume (timed) to forced expiratory volume, which is expressed as a percentage. *See* W. Va. Code of State Rules § 85-20-52.9(d)(4).

<sup>5</sup>DLCO is the carbon monoxide diffusion capacity of the lungs. *See* W. Va. Code R. § 85-20-52.9(d)(14). DL/VA refers to the carbon monoxide diffusing capacity of the lungs per unit of alveolar volume. *See* W. Va. Code of State Rules § 85-20-52.9(d)(15).

<sup>6</sup>The partial pressure of carbon dioxide ("PCO<sub>2</sub>") is the measure of carbon dioxide within arterial or venous blood. It often serves as a marker of sufficient alveolar ventilation within the lungs. The partial pressure of oxygen ("PO<sub>2</sub>") is the measure of the pressure of oxygen dissolved in your blood. It helps determine how well oxygen moves from your lungs to your bloodstream.

table 85-20-a. His total lung capacity was diminished and concerning for a restrictive pattern. His DLCO of 48% corrected does show a diffusion abnormality that is consistent with a 20-50% disability. He has no history of smoking. His chest x-ray did not show any acute process with a negative b-read. It is my opinion to a reasonable degree of medical certainty that he has a 20% permanent partial disability due to occupational pneumoconiosis.

The petition for reopening was completed by Dr. Posin, who attached his evaluation and the pulmonary function studies taken at Reynolds Memorial Hospital.

In an order dated March 8, 2021, the claims administrator denied the petitioner's request to reopen his claim for permanent partial disability benefits. The claims administrator stated that the petitioner's pulmonary function studies failed to establish a whole person impairment greater than the 10% that was previously granted. Mr. Hoskins protested the claims administrator's decision.

In support of his protest, Mr. Hoskins was deposed on June 16, 2021, and described his exposure to occupational pneumoconiosis while working for the employer. He testified:

I basically limit myself to absolutely no physical activities. I have trouble going from point A to B. I live in a two-story house. I have to walk up the steps. I have to hold on, and I got to stop going up the steps. I'm looking for a place to sit down because I can't catch my breath. I'm basically limited to do what I can do. I don't do anything physical at all. . . I cough at night. I have trouble transferring from the prone position to an upright position because – I don't know whether it has something to do with my coughing. When I get up, I have a lot of coughing throughout the night. I'm going to say, I think its sputum or phellem that comes up constantly. . . I am not the man I used to be. That's all I'm trying to say.

Mr. Hoskins continued to testify that his coughing and wheezing increased over the years, and he is no longer physically active. He is unable to perform outdoor activities and hires helpers for yard work. He admitted to smoking for three or four years as a teenager, as well as smoking cigars on occasion. He was exposed to Agent Orange in Vietnam and has a 30 to 40% disability from the Veterans Administration.

At a hearing dated October 6, 2021, members of the Occupational Pneumoconiosis Board ("OP Board") testified about the petitioner's claim.<sup>7</sup> Dr. Kinder reviewed the OP Board's prior findings regarding the petitioner, as well as the pulmonary function study presented in support of the reopening application. According to Dr. Kinder, the diffusion studies taken at Reynolds Memorial Hospital were unacceptable. It was stated that the petitioner's prebronchodilator studies showed the possibility of a 10% impairment but not more than 10% impairment. Dr. Kinder further testified that the results of the new pulmonary function study from East Ohio Regional Hospital

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<sup>7</sup>The OP Board was comprised of Jack Kinder, M.D., Malinath Kayi, M.D., and Johnsey Leef III, M.D.

did not meet validity criteria set forth by the OP Board and concluded that the results did not support a reopening of the petitioner's claim. Dr. Kayi concurred with Dr. Kinder's testimony.

In a final decision dated November 30, 2021, the Office of Judges found that Mr. Hoskins did not submit evidence which would tend to justify but not compel the inference that there has been a progression or aggravation of his impairment due to occupational pneumoconiosis. The submitted pulmonary function studies from Reynolds Memorial Hospital that were reviewed by the OP Board showed, at most, 10% impairment, which the Office of Judges noted to have been previously awarded. However, the Office of Judges found the Reynolds Memorial Hospital diffusion studies to be invalid for the purpose of evaluating pulmonary impairment. Although the petitioner testified about his alleged decreased pulmonary functioning, the Office of Judges concluded that the testimony does not rebut the medical evidence in the record. The Office of Judges found that the claims administrator did not error in denying the petitioner's request to reopen the claim for permanent partial disability benefits due to occupational pneumoconiosis, and the claims administrator's order dated March 8, 2021, was affirmed. The Board of Review adopted the findings of fact and conclusions of law of the Office of Judges and affirmed its November 30, 2021, order on June 2, 2022.<sup>8</sup>

This Court may not reweigh the evidentiary record, but must give deference to the findings, reasoning, and conclusions of the Board of Review, and when the Board's decision affirms prior rulings by both the Workers' Compensation Commission and the Office of Judges, we may reverse or modify that decision only if it is in clear violation of constitutional or statutory provisions, is clearly the result of erroneous conclusions of law, or is based upon a material misstatement or mischaracterization of the evidentiary record. *See* W. Va. Code § 23-5-15(c) & (d). We apply a de novo standard of review to questions of law. *See Justice v. W. Va. Off. of Ins. Comm'n*, 230 W. Va. 80, 83, 736 S.E.2d 80, 83 (2012).

After review, we agree with the decision of the Office of Judges, as affirmed by the Board of Review. Mr. Hoskins was granted a 10% award of permanent partial disability benefits due to occupational pneumoconiosis on March 11, 2016. Mr. Hoskins petitioned to reopen his claim of permanent partial disability benefits due to occupational pneumoconiosis and argues that he made a prima facie case for reopening by alleging an aggravation or progression of his condition. For purposes of reopening of a workers' compensation claim under the provisions of West Virginia Code §§ 23-5-2 and 23-5-3, a claimant must make application in writing showing a progression or aggravation of the compensable condition or some other fact or facts which were not previously considered which would entitle the claimant to greater benefits than he or she has already received.

In support of his request for reopening, Mr. Hoskins submitted pulmonary function studies from Reynolds Memorial Hospital that were reviewed by the OP Board. On October 6, 2021, the OP Board members testified that the results of the new pulmonary function study did not meet the validity criteria set forth by the OP Board, and it was concluded that the results did not support a reopening of the petitioner's claim. The reliable medical evidence of the record, as well as the

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<sup>8</sup>The Board of Review corrected several minor typographical errors in the findings of fact of the Office of Judges' decision.

expert testimony by members of the OP Board supports the conclusion that the petitioner failed to establish that he sustained a progression or aggravation of the compensable injury to justify reopening of his claim for the consideration of additional permanent partial disability benefits. Therefore, the Board of Review's order dated June 2, 2022, is affirmed.

Affirmed.

**ISSUED: January 25, 2024**

**CONCURRED IN BY:**

Chief Justice Tim Armstead  
Justice Elizabeth D. Walker  
Justice John A. Hutchison  
Justice C. Haley Bunn

**DISSENTING:**

Justice William R. Wooton

WOOTON, Justice, dissenting:

I dissent to the majority's resolution of this case. I would have set this case for oral argument to thoroughly address the error alleged in this appeal. Having reviewed the parties' briefs and the issues raised therein, I believe a formal opinion of this Court was warranted – not a memorandum decision. Accordingly, I respectfully dissent.