

22-0135

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In the  
SUPREME COURT OF APPEALS OF WEST VIRGINIA  
Charleston, West Virginia



ROCKSPRING DEVELOPMENT, INC.,

Petitioner,

vs.

Appeal No. 2057120  
JCN: 2016017091  
Order Date: 01/21/2022

RANDY BROWN

Respondent.

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BRIEF ON BEHALF OF CLAIMANT/RESPONDENT  
RANDY BROWN

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Counsel for Respondent  
December 21, 2022

**RESPONSE BRIEF**  
**TYPE OF APPEAL**

The claimant/respondent, Randy Brown, tenders this response to the petitioner, Rockspring Development Inc.'s, petition for appeal of the January 21, 2022, order of the Workers' Compensation Board of Review which affirmed the June 28, 2021, decision of the Office of Judges which upheld the Claim Administrator's order of December 6, 2018, granting the respondent an additional 20% permanent partial disability award for a total of 50% permanent partial disability for occupational pneumoconiosis. The respondent asserts that the decision of the Workers' Compensation Board of Review contains no reversible error and therefore, must be affirmed.

**STATEMENT OF THE CASE**

The respondent in this case is a former underground coal miner with more than thirty-seven years of coal dust exposure who filed a claim for occupational pneumoconiosis benefits and was initially granted a 30% permanent partial disability award in 2016.

The respondent filed a reopening in this claim and was once again referred to the Occupational Pneumoconiosis Board for testing on September 25, 2018. The Board's radiologist, Johnsey L. Leef, III compared the September 25, 2018, x-ray to the previous x-ray obtained by the Board on August 16, 2016. The x-ray portion of the Board's September 25, 2018, findings indicate Dr. Leef once again found nodular fibrosis consistent with occupational pneumoconiosis with areas of coalescence that had increased slightly from the previous examination consistent with progressive massive pulmonary fibrosis. However, the Board's spirometry test results on September 25, 2018, were not reproducible/acceptable and were invalid for determining impairment. As a result, the Board utilized pulmonary function studies obtained at Vanderbilt Medical Center on October 18, 2017, and determined the respondent's impairment to be 50% based upon his FEV1/FVC ratio of 52.

By order dated December 6, 2018, the Claim Administrator granted the respondent an additional 20% permanent partial disability award for occupational pneumoconiosis, for a total of 50% based upon the findings of the Occupational Pneumoconiosis Board on September 25, 2018. The petitioner subsequently protested the additional 20% award.

On May 3, 2020, the respondent underwent a bilateral lung transplant surgery at Vanderbilt Medical Center which was authorized and paid for by the petitioner in this claim. Following a successful lung

transplant, the respondent had several pulmonary function studies performed at Vanderbilt between May 20, 2020 and August 3, 2020, which showed improved breathing.

The final Board to Review hearing with the Occupational Pneumoconiosis Board was postponed from March 4, 2021, until May 5, 2021, due to the complexity of the issues involved in this case. At the May 5<sup>th</sup> hearing, Dr. Willis, the Board's radiologist on that day, testified that he reviewed an August 3, 2020, chest x-ray obtained at Vanderbilt which showed evidence of a previous sternotomy and other post-surgical changes consistent with a double lung transplant surgery. Dr. Willis opined that the lungs looked normal and he did not see any evidence of occupational pneumoconiosis. Dr. Willis also stated that there was no longer evidence of any occupational pneumoconiosis, including the progressive massive pulmonary fibrosis as was found by Dr. Leef in 2018.

Dr. Jack Kinder, Chairman of the Occupational Pneumoconiosis Board, also testified on May 5<sup>th</sup> and explained that the Board was unable to use its spirometry results obtained on September 25, 2018, because they were not reproducible/acceptable and were invalid for determining impairment. Due to that fact, the Board chose to use the respondent's pulmonary function study results from Vanderbilt Medical Center on October 18, 2017, to determine the respondent's impairment. Based upon his FEV1/FVC ratio of 52, the Board recommended a 50% permanent partial disability which represented an additional 20% over and above the previous 30% already granted to the respondent. Based upon questioning from petitioner's counsel, Dr. Kinder stated he had reviewed pulmonary function testing performed at Vanderbilt on August 3, 2020, and noted that it did not contain a diffusion study. He said the respondent had a successful lung transplant and his pulmonary function, based upon the August 3, 2020 results did appear to be normal. However, Dr. Kinder reiterated it was his opinion, after considering all of the evidence, that the respondent had a 50% impairment due to his occupational pneumoconiosis, despite the successful double lung transplant surgery the respondent had undergone. Dr. Kinder made it clear that the basis for his opinion was because he felt that clinically it was more appropriate to base the respondent's impairment upon the pre-transplant lung function of his "native lungs." Despite any evidence to the contrary, Dr. Kinder testified he believed that 50% impairment was an appropriate recommendation at which to stay based upon the impairment in the respondent's "native lungs." Dr. Bradley Henry, another Board Member, stated he concurred with the opinions of both Dr. Willis and Dr. Kinder. Dr. Henry added that he did not see any diffusion testing results that were performed after the double lung transplant and felt it was appropriate to base his impairment recommendation on the October 18, 2017, spirometry results from Vanderbilt.

By order dated June 28, 2021, the Office of Judges affirmed the December 6, 2018, Claim Administrator order which granted the respondent an additional 20% award for occupational pneumoconiosis, for a total of 50%. The petitioner subsequently appealed this to the Workers' Compensation Board of Review.

By order dated January 21, 2022, the Workers' Compensation Board of Review affirmed the Office of Judges order dated June 28, 2021. The petitioner subsequently filed a petition for appeal with this Honorable Court.

### **ASSIGNMENT OF ERROR**

Does the January 21, 2022, decision of the Workers' Compensation Board of Review contain any reversible error?

### **ARGUMENT AND POINTS OF AUTHORITY**

The Board of Review's decision dated January 21, 2022, is clearly supported by the facts and applicable law, and does not contain any reversible error.

"In reviewing a decision of the Board of Review, the Supreme Court of Appeals shall consider the record provided by the Board and give deference to the Board's findings, reasoning, and conclusions, in accordance with subsection (d) and (e) of this section." W.Va. Code §23-5-15(d)(2005). The Board of Review correctly adopted the Findings of Fact and Conclusions of Law contained in the Administrative Law Judge's decision dated June 28, 2021, and incorporated the same by reference and were made a part of the Board of Review's record.

The standard of review which applies in this case before this Honorable Court is as follows:

"If the decision of the board represents an affirmation of a prior ruling by both the commission and 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 provision, or
- is clearly the result of erroneous conclusions of law, or
- is based upon the board's material misstatement or mischaracterization of particular components of the evidentiary record.

The court may not conduct a de novo reweighing of the evidentiary record." W.Va. Code §23-5-15(d)

Dr. Kinder provided detailed and extensive testimony regarding his opinion for stating that the respondent in this case was entitled to an additional 20% permanent partial disability award for a total of 50%. Dr. Kinder testified at the final Board to Review hearing on May 5, 2021. Dr. Kinder opined that clinically it was more appropriate to determine the respondent's impairment based upon the pre-transplant lung function of his "native lungs." Dr. Kinder explained that because the spirometry studies obtained by the Occupational Pneumoconiosis Board on September 25, 2018, were not reproducible/acceptable, the Board then relied upon pulmonary function studies from Vanderbilt dated October 18, 2017, in order to determine the respondent's pulmonary impairment. Based upon his FEV1/FVC ratio of 52, the Board recommended the additional 20% to the prior 30% for a total of 50% due to occupational pneumoconiosis. Dr. Kinder details the basis for his opinions beginning on page 9, line 9 of the hearing transcript and continuing through line 30 on page 11. His 50% opinion also factored in the respondent's double lung transplant and the pulmonary function studies from Vanderbilt which were performed after the transplant. Both Dr. Bradley Henry and Dr. John Willis agreed with the opinion of Dr. Kinder, that the respondent was entitled to an additional 20% permanent partial disability award for a total of 50% due to his occupational pneumoconiosis.


The testimony of the Board members from the hearing on May 5, 2021, should be given great deference based upon their years of experience as well as their knowledge of pulmonary medicine. Based upon the foregoing, the Board of Review's decision dated January 21, 2022, does not meet any of the criteria contained in W.Va. Code §23-5-15(d) which would allow for reversal or modification by this Honorable Court.

**CONCLUSION**

Wherefore, the claimant/respondent, Randy Brown, respectfully requests that the employer's petition be denied and that the January 21, 2022, decision of the Workers' Compensation Board of Review be affirmed in all respects.

Respectfully yours,

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Post Office Box 3709  
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By  \_\_\_\_\_

WV State Bar ID No: 3757

December 21, 2022

**CERTIFICATE OF SERVICE**

I, J. Robert Weaver, counsel for Respondent herein, do hereby certify that I served the foregoing Response to Petition upon the following by email, hand delivery and/or by mailing a true and accurate copy of the same via the United States Mail, postage prepaid, on this the 21<sup>st</sup> day of December 2022.

**EMAIL:**

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\_\_\_\_\_  
J. ROBERT WEAVER