

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

**CLIFFORD WHITE,
Claimant Below, Petitioner**

v.) No. 23-ICA-543 (JCN: 2013017058)

**MCELROY COAL/MURRAY AMERICAN ENERGY, INC.,
Employer Below, Respondent**

**FILED
April 22, 2024**

ASHLEY N. DEEM, DEPUTY CLERK
INTERMEDIATE COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Clifford White appeals the November 6, 2023, order of the Workers' Compensation Board of Review ("Board"). Respondent McElroy Coal/Murray American Energy, Inc., ("Murray") filed a response.¹ Mr. White did not reply. The issue on appeal is whether the Board erred in affirming the claim administrator's order, which found that Mr. White had been fully compensated by his prior permanent partial disability ("PPD") awards for occupational pneumoconiosis ("OP").

This Court has jurisdiction over this appeal pursuant to West Virginia Code § 51-11-4 (2022). After considering the parties' arguments, the record on appeal, and the applicable law, this Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision affirming the Board's order is appropriate under Rule 21 of the Rules of Appellate Procedure.

Mr. White filed a claim for OP benefits dated November 30, 2011, alleging that he had been exposed to the hazards of OP for twenty-three years. By order dated March 28, 2013, the claim was held compensable on a presumptive basis. Mr. White was examined by the OP Board on June 18, 2013. The claim administrator issued an order dated August 19, 2013, granting Mr. White a 5% PPD award based on the OP Board. The claim administrator issued an order dated February 1, 2017, granting Mr. White an additional 5% PPD award based on the findings of the OP Board dated December 20, 2016.²

¹ Murray is represented by Aimee M. Stern, Esq. Mr. White is represented by J. Thomas Greene, Jr., Esq., and T. Colin Greene, Esq.

² On June 14, 2019, Mr. White requested that this claim be reopened for additional PPD benefits. The claim was reopened by order of the claim administrator. Mr. White was examined by the OP Board on November 14, 2019. The OP Board concluded that Mr. White had no more pulmonary impairment attributable to OP than the 10% previously granted to him. By order dated December 17, 2019, the claim administrator granted no

On November 18, 2021, Shawn Posin, M.D., examined Mr. White. Mr. White underwent an x-ray that was positive for pneumoconiosis with a perfusion of 0/1. Pulmonary function studies were performed and produced an FVC of 2.97 L, 77% of predicted; an FEV1 of 2.38 L, 83% of predicted; and an FEV1/FVC of .80 L, 103% of predicted. A diffusion study produced a DLCO of 21.39, 71% of predicted. Dr. Posin opined that Mr. White has a 10% permanent impairment attributable to OP. On December 6, 2021, Mr. White requested that his claim be reopened for additional PPD benefits for OP based on Dr. Posin's report. The claim administrator issued an order dated December 20, 2021, reopening the claim for PPD benefits.

Mr. White was examined by the OP Board on May 5, 2022. Mr. White reported a smoking history of 0.8 packs per day for 40 years. An x-ray revealed mild nodular fibrosis consistent with simple occupational pneumoconiosis. The pulmonary function studies produced an FVC of 3.01 L, 77% of predicted, pre-bronchodilator, and 3.04 L, 77% of predicted, post-bronchodilator; an FEV1 of 2.46 L, 84% of predicted, pre-bronchodilator, and 2.54 L, 87% of predicted, post-bronchodilator; and an FEV1/FVC of 81.89%, 109% of predicted, pre-bronchodilator, and 83.58%, 111% of predicted, post-bronchodilator. The diffusion study produced a DLCO of 20.51, 67% of predicted. The OP Board found that Mr. White had no additional pulmonary impairment attributable to OP above the 10% he was previously granted.

The claim administrator issued an order dated June 23, 2022, granting no additional permanent partial disability award based upon the OP Board's May 5, 2022, findings. Mr. White protested this order. The members of the OP Board testified in this claim on August 16, 2023. Jack Kinder, M.D., the chairman of the OP Board, testified that the November 18, 2021, diffusion study by Dr. Posin has a better flow than the diffusion study performed for the OP Board, and demonstrates a 10% impairment. Dr. Kinder opined that Mr. White has no more than a 10% pulmonary impairment attributable to OP.

On November 6, 2023, the Board affirmed the claim administrator's order, which found that Mr. White had been fully compensated by his prior PPD awards for OP. The Board found that Mr. White failed to establish that the OP Board was clearly wrong. Mr. White now appeals the Board's order.

additional PPD award to Mr. White, based on the OP Board's findings. The OP Board testified at a hearing on April 7, 2021. Dr. Kinder noted that the blood gas study by Dr. Lenkey revealed 15% impairment. However, Dr. Kinder testified that he looked at the totality of the testing, including diffusion studies and blood gas study by Dr. Posin on November 18, 2021, and the OP Board's studies, which all represented a 10% impairment, and found 10% impairment. Further, he noted that the study with the best volumes showed no more than 10% impairment and opined that Mr. White had been fully compensated by his prior PPD awards, totaling 10%.

Our standard of review is set forth in West Virginia Code § 23-5-12a(b) (2022), in part, as follows:

The Intermediate Court of Appeals may affirm the order or decision of the Workers' Compensation Board of Review or remand the case for further proceedings. It shall reverse, vacate, or modify the order or decision of the Workers' Compensation Board of Review, if the substantial rights of the petitioner or petitioners have been prejudiced because the Board of Review's findings are:

- (1) In violation of statutory provisions;
- (2) In excess of the statutory authority or jurisdiction of the Board of Review;
- (3) Made upon unlawful procedures;
- (4) Affected by other error of law;
- (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.

Duff v. Kanawha Cnty. Comm'n, 247 W. Va. 550, 555, 882 S.E.2d 916, 921 (Ct. App. 2022).

On appeal, Mr. White argues that Dr. Kinder testified that some studies, including the OP Board's diffusion study, indicated that he could have as much as 15% impairment. Mr. White further argues that the medical evidence established that he has 15% impairment, and, thus, the OP Board is clearly wrong in finding that he has been fully compensated by his prior PPD awards totaling 10%. We disagree.

In *Rhodes v. Workers' Comp. Div.*, 209 W. Va. 8, 17, 543 S.E.2d 289, 298 (2000), the Supreme Court of Appeals of West Virginia held that the party protesting the findings of the OP Board has the burden to establish that the OP Board was clearly wrong.

Here, the Board determined that Mr. White failed to establish that the OP Board was clearly wrong. The OP Board's opinion, as affirmed by the Board, was that no more than 10% impairment was demonstrated, even though some studies suggested 15% impairment, because the diffusion study by Dr. Posin had the best flow/highest volume of all the studies. Thus, the Board found that Mr. White failed to establish with medical evidence that he has more than 10% impairment related to OP.

Upon review, we conclude that Mr. White has failed to meet his burden of establishing that the OP Board was clearly wrong and, therefore, we cannot conclude that the Board erred in adopting the OP Board's recommendation. As the Supreme Court of Appeals of West Virginia has set forth, "[t]he 'clearly wrong' and the 'arbitrary and capricious' standards of review are deferential ones which presume an agency's actions are

valid as long as the decision is supported by substantial evidence or by a rational basis.”
Syl. Pt. 3, *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996).

Accordingly, we affirm the Board’s November 6, 2023, order.

Affirmed.

ISSUED: April 22, 2024

CONCURRED IN BY:

Chief Judge Thomas E. Scarr
Judge Charles O. Lorensen
Judge Daniel W. Greear