

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

FILED

**JOSEPH CRAIG DORSEY,
Claimant Below, Petitioner**

June 6, 2025

v.) No. 24-ICA-422 (JCN: 2023006378)

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

**BLACKHAWK MINING, LLC,
Employer Below, Respondent**

MEMORANDUM DECISION

Petitioner Joseph Craig Dorsey appeals the September 23, 2024, order of the Workers' Compensation Board of Review ("Board"). Respondent Blackhawk Mining, LLC ("Blackhawk") filed a timely response.¹ Mr. Dorsey did not file a reply. The issue on appeal is whether the Board erred in affirming the claim administrator's order that denied a request for the medication OFEV-100 mg ("OFEV").

This Court has jurisdiction over this appeal pursuant to West Virginia Code § 51-11-4 (2024). 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.

On May 13, 2024, the claim administrator issued an order that denied an April 30, 2024, request from Ryan Waddell, D.O., for OFEV. The claim administrator did not provide any reasoning, basis, or rationale for its denial. Mr. Dorsey protested this order.

Mr. Dorsey submitted into the Board's record an internet article from WebMD titled "OFEV – Uses, Side Effects, and More." The article notes that OFEV is a medication used to treat lung diseases that cause lung scarring. Mr. Dorsey also submitted into the Board's record a "Statement of Medical History Pursuant to 20 C.F.R. § 725.414(a)(3)(i)(A)" which is an unsigned document with Mr. Dorsey's name at the top. The document lists the names and addresses of various physicians who, presumably, treated Mr. Dorsey, and the dates of treatment. The document also lists the general nature of the treatment given by the various physicians. The nature of most of the treatment involves breathing issues, pneumonia, and

¹ Mr. Dorsey is represented by Samuel B. Petsonk, Esq. Blackhawk is represented by T. Jonathan Cook, Esq.

CT scans. These two documents are the only pieces of evidence Mr. Dorsey submitted to the Board.

The Board issued an order dated September 23, 2024, affirming the claim administrator's order that denied the request for OFEV. The Board held that Mr. Dorsey did not establish that the medication is medically related and reasonably required in the course of treatment for the compensable condition. Mr. Dorsey now appeals the Board's order.

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.

Syl. Pt. 2, *Duff v. Kanawha Cnty. Comm'n*, 250 W. Va. 510, 905 S.E.2d 528 (2024).

On appeal, Mr. Dorsey argues that the Board erred in finding that OFEV was not medically related and reasonably required treatment for his compensable occupational pneumoconiosis. First, Mr. Dorsey contends that the claim administrator must provide an injured or diseased worker with medically related and reasonably required treatment for a compensable injury pursuant to West Virginia Code § 23-4-3. Mr. Dorsey points out that the "Discussion" section of the Board's order does not mention any of his evidence, although the Board acknowledged that the claim administrator received the request for OFEV from the treating physician.

Second, Mr. Dorsey also contends that there is no evidence that he suffers from any pulmonary fibrosis other than his compensable occupational pneumoconiosis and that OFEV is prescribed for the exclusive purpose of treating pulmonary fibrosis. Additionally, Mr. Dorsey notes that his impairment related to his occupational pneumoconiosis has been

rated at 65% whole person.² Mr. Dorsey makes an alternative argument that even if he had some unrelated pulmonary disease, OFEV could still be authorized in the claim pursuant to West Virginia Code of State Rules § 85-20-21 (2006). Mr. Dorsey suggests that the claim should be remanded for consideration of Dr. Waddell's opinion as to whether an unknown pulmonary fibrosis was preventing recovery by aggravating the compensable condition.

Next, Mr. Dorsey alleges that the Board did not properly weigh the evidence pursuant to West Virginia Code § 23-4-1g, which provides that "[i]f, after weighing all of the evidence regarding an issue in which a claimant has an interest, there is a finding that an equal amount of evidentiary weight exists favoring conflicting matters for resolution, the resolution that is most consistent with the claimant's position will be adopted." Mr. Dorsey asserts that the employer submitted no evidence to the Board and thus, the Board was obligated to conclude that the evidentiary weight either favored him or that there was an equal amount of weight if Blackhawk's closing argument were given credit. Mr. Dorsey notes that Blackhawk argued to the Board that OFEV was properly denied because it was prescribed for idiopathic pulmonary fibrosis, a noncompensable condition. However, Mr. Dorsey contends that the Board failed to recognize that, pursuant to West Virginia Code § 23-4-9b, the employer carries the burden to prove apportionment to an unrelated cause. Since Blackhawk submitted no evidence to the Board, Mr. Dorsey argues that it did not establish that he suffered from any pulmonary fibrosis unrelated to his compensable condition. Further, Mr. Dorsey argues that he produced his medical history and documentation about the uses of OFEV that indicated that his treating physician prescribed a medication that was medically related and reasonably required to treat his compensable condition. Also, Mr. Dorsey notes that Blackhawk possessed all of the documentation from Dr. Waddell, but it did not discuss or consider it in its denial of benefits.

Finally, Mr. Dorsey argues that the Board failed to give probative weight to the evidence which indicated that his treating physician, Dr. Waddell, requested OFEV. A treating physician's opinion, Mr. Dorsey argues, must be afforded greater probative weight than the Board gave it. We disagree with Mr. Dorsey's arguments.

Upon review, we conclude that the Board was not clearly wrong in view of the reliable, probative, and substantial evidence on the whole record in concluding that Mr. Dorsey failed to establish that OFEV is medically related and reasonably required to treat the compensable occupational pneumoconiosis. At the outset, we note that, as argued by Blackhawk, in contested West Virginia workers' compensation claims, the claimant bears

² We note that in a previous appeal, *Dorsey v. Blackhawk Mining, LLC*, No. 24-ICA-254, 2025 WL 1474095 (W. Va. Ct. App. May 22, 2025) (memorandum decision), it was established that Mr. Dorsey was granted a 65% permanent partial disability award for impairment related to his occupational pneumoconiosis.

the burden to present sufficient evidence that he or she is entitled to receive the benefit that was denied. In Syllabus Point 1 of *Deverick v. State Comp. Dir.*, 150 W. Va. 145, 144 S.E.2d 498 (1965), the Court held that the burden of proof in a worker's compensation claim rests on the one asserting the claim and that the "rule of liberality cannot be considered to take the place of proper and satisfactory proof." *Deverick* citing Syl. Pt. 2, *Hayes v. State Compensation Director et al.*, 149 W. Va. 220, 140 S.E.2d 443. The former "rule of liberality," which allowed evidentiary uncertainties or doubts to be resolved in favor of the employee,³ was abolished by the legislature in 2003 with the passage of West Virginia Code § 23-1-1(b) (2022).

In its order, the Board observed that pursuant to West Virginia Code § 23-4-3 and West Virginia Code of State Rules § 85-20, the claim administrator must provide medically related and reasonably required treatment and healthcare. The Board also cited West Virginia Code § 23-4-1g, which provides that the "resolution of any issue raised in administering this chapter shall be based on a weighing of all evidence pertaining to the issue, and a finding that a preponderance of the evidence supports the chosen manner of resolution." The basis of the Board's decision to affirm the denial of the medication was that Mr. Dorsey did not submit sufficient evidence to explain how OFEV is medically related and reasonably required for the compensable injury. For instance, the Board noted that Dr. Waddell's request for OFEV was not submitted into evidence. Finding that Mr. Dorsey did not establish that the medication is medically related and reasonably required in the course of treatment for the compensable condition, the Board affirmed the claim administrator's order.

We also find that Mr. Dorsey's argument with respect to West Virginia Code § 23-4-9b is misplaced. We note that this statute pertains to apportionment of a permanent partial disability award (fixing the amount of compensation allowed) in a workers' compensation claim where there is both a preexisting condition/injury and a compensable condition/injury of the same body part. The statute does not apply to medical treatment and we decline to apply it to the present case.

Finally, we note that in considering issues in protests, the Board has no access to documentation submitted to a claim administrator. The only evidence to which the Board has access is that submitted into the record by a party in the protest. Mr. Dorsey bore the burden of proving that OFEV is a medically related and reasonably required medical

³ See Justice Davis' concurring opinion explaining the rule of liberality and its abolishment in *Bias v. E. Associated Coal Corp.*, 220 W. Va. 190, 209, 640 S.E.2d 540, 559 (2006).

treatment for a compensable condition, and to prove his case, Mr. Dorsey needed to submit to the Board all evidence necessary to meet his burden. In the present case, Mr. Dorsey failed to submit to the Board evidence establishing that Dr. Waddell requested authorization for OFEV in order to treat the compensable occupational pneumoconiosis. Without Dr. Waddell's request or other medical documentation proving that OFEV was requested to treat Mr. Dorsey's occupational pneumoconiosis, the Board was not clearly wrong in finding that the burden of proof was not met.⁴ No probative weight could be given to Dr. Waddell's request for OFEV since the request was not submitted to the Board. The claim administrator's mere mention in its order that Dr. Waddell requested OFEV is insufficient to prove that the medication was requested as a treatment for the compensable condition.

We conclude that the Board was not clearly wrong in finding that Mr. Dorsey failed to establish that OFEV was requested as a treatment for his compensable occupational pneumoconiosis.

Accordingly, we affirm the Board's September 23, 2024, order.

Affirmed.

ISSUED: June 6, 2025

CONCURRED IN BY:

Chief Judge Charles O. Lorensen
Judge Daniel W. Greear
Judge S. Ryan White

⁴ We note that included in the appendix filed by Mr. Dorsey in his appeal are several documents that are not in the Board's record. Rule 6(b) of the West Virginia Rules of Appellate Procedure states that "[a]nything not filed with the lower tribunal shall not be included in the record on appeal unless the Intermediate Court or the Supreme Court grants a motion for leave to supplement the record on appeal for good cause shown." Here, no leave to supplement the record was requested and this Court did not grant any such leave. Thus, the extraneous documents in the appendix are not considered in this decision.