

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

FILED

CARL GOODERHAM,
Claimant Below, Petitioner

September 30, 2025

v.) No. 24-ICA-483 (JCN: 2023019057)

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

SWVA, INC.,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Carl Gooderham appeals the November 7, 2024, order of the Workers' Compensation Board of Review ("Board"). Respondent SWVA, Inc. ("SWVA") timely filed a response.¹ Mr. Gooderham did not reply. The issue on appeal is whether the Board erred in affirming the claim administrator's order, which granted a 7.26% permanent partial disability award ("PPD") for occupational hearing loss.

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.

Mr. Gooderham completed an Employees' and Physicians' Report of Occupational Hearing Loss ("claim form") on February 15, 2023, alleging occupational hearing loss as a result of his employment at SWVA, where he worked in a rolling mill and finish department from 1987 to 2020. Mr. Gooderham's date of last exposure was December 15, 2020, when he retired. Included with Mr. Gooderham's claim form was an audiogram performed by an audiologist on February 24, 2023. The four-frequency air score reflected in the audiogram was 180 dB in the right ear and 175 dB in the left ear.

B. Joseph Touma, M.D., an otolaryngologist, reviewed the February 2023 audiogram and diagnosed bilateral sensorineural hearing loss, bilateral tinnitus, and occupational exposure to noise. Dr. Touma found Mr. Gooderham's medical history was non-contributory to his hearing loss. Based on his assessment that the audiogram revealed bilateral, down sloping, sensorineural hearing loss, a speech reception threshold of 30 on

¹ Mr. Gooderham is represented by Edwin H. Pancake, Esq. SWVA is represented by Steven K. Wellman, Esq., and James W. Heslep, Esq.

the right and 25 on the left, a speech discrimination score of 96% bilaterally, and Type A tympanograms, Dr. Touma opined that Mr. Gooderham's bilateral sensorineural hearing loss was directly attributable or perceptibly aggravated by industrial noise exposure in the course of and resulting from his employment. Dr. Touma recommended a 12% whole person impairment ("WPI") for work-related noise exposure based on a four-frequency total of 165 dB on the right and left. Dr. Touma provided no further explanation as to his calculation of Mr. Gooderham's impairment. By order dated June 22, 2023, the claim administrator held Mr. Gooderham's claim compensable for bilateral occupational hearing loss.

SWVA referred Mr. Gooderham to David A. Phillips, M.D., an otolaryngologist, for an independent medical evaluation regarding the occupational hearing loss claim. Dr. Phillips evaluated Mr. Gooderham on June 8, 2023, and noted Mr. Gooderham's employment history. The audiogram performed by an audiologist on May 23, 2023, revealed a four-frequency air conduction total of 170 dB on the right and left. Speech discrimination was 92% bilaterally. Although Dr. Phillips felt that Mr. Gooderham had a sufficient duration and intensity of noise exposure to contribute to noise-induced hearing loss, he also noted Mr. Gooderham's familial history of hearing loss; however, Mr. Gooderham attributed his father's hearing loss to his employment.

Dr. Phillips also reviewed Dr. Touma's report and audiogram and a report of Thomas Jung, M.D., from 2019.² Whereas Dr. Touma assigned the entire amount of hearing loss to noise exposure, Dr. Phillips noted that Dr. Jung declined to attribute any of Mr. Gooderham's hearing loss to occupational noise exposure and determined that the hearing loss was entirely due to a genetic condition.

Dr. Phillips observed that the audiogram performed in his office was quite similar to that performed in Dr. Touma's office. To calculate Mr. Gooderham's hearing loss impairment, Dr. Phillips used the four frequency totals in air of 170 dB for both ears and found a 13.2% WPI overall. However, opining that there "may be significant contributions ... from genetic or hereditary factors", Dr. Phillips allocated 50% of the loss to those factors and the remaining 50% to occupational noise. Dr. Phillips assigned a 7.26% WPI to Mr. Gooderham's occupational noise exposure.³

Dr. Phillips found that the overall configuration of the pure tone audiometry is consistent with a component of hereditary or genetic hearing loss; specifically, Dr. Phillips pointed to the audiogram's "steady decline in the loss with no peak and recovery" as an

² The report of Dr. Jung was not entered into the Board's record below.

³ Dr. Phillips, as SWVA notes, made a small error in calculating 50% of 13.2% when he calculated it to be a 7.26% impairment. As observed by SWVA, this error was in Mr. Gooderham's favor.

indicator of non-noise-related hearing loss. Dr. Phillips did not agree with Dr. Touma, who assigned all of Mr. Gooderham's hearing loss to noise exposure. Instead, Dr. Phillips concluded that Mr. Gooderham's hearing loss resulted from both genetic/hereditary factors and noise exposure.

By order dated June 22, 2023, the claim administrator granted Mr. Gooderham a 7.26% PPD award based on Dr. Phillips' report. Mr. Gooderham protested this order to the Board.

On November 7, 2024, the Board affirmed the claim administrator's order granting a 7.26% PPD award. The Board found Dr. Phillips' report to be persuasive, particularly noting that Dr. Phillips explained his calculations and that he apportioned the impairment rating due to finding the steady decline in hearing loss with no peak or recovery consistent with a hereditary or genetic factor. On the other hand, the Board did not find Dr. Touma's report to be persuasive because he did not explain why he based his calculation on a four-frequency total of 165 dB (bilaterally) when his audiogram revealed a four-frequency total of 180 dB on the right and 175 dB on the left. Mr. Gooderham 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. Gooderham argues that the Board erred in affirming the claim administrator's order granting a 7.26% PPD, as Dr. Phillips derived this rating from an unsupported apportionment of an overall 13.2% impairment. Thus, Mr. Gooderham asserts

that he should either receive a 13.2% PPD award or a 12% PPD award based on Dr. Touma's evaluation. The reports by Drs. Phillips and Touma, Mr. Gooderham argues, are "technically identical" pursuant to West Virginia Code of State Rules § 85-20-47.3 since the four frequency totals differ by less than 15 dB. In this same vein, Mr. Gooderham also argues that the Board failed to properly weigh the evidence pursuant to West Virginia Code § 23-4-1g, which provides that where there is an equal amount of evidentiary weight, the matter will be decided in a manner most consistent with the claimant's position. Thus, Mr. Gooderham asserts that he is entitled to receive the impairment based on the audiogram that yields the highest degree of impairment, i.e., Dr. Phillips' overall rating of 13.2%. Finally, Mr. Gooderham argues that Dr. Phillips included "unsupported hearsay" when he referenced the opinion of Dr. Jung, whose report and records were not included in the record considered by the Board.

In support of his position, Mr. Gooderham cites *Duff* and argues that the employer must prove that preexisting conditions contributed to his overall impairment and prove the degree of impairment attributable to the preexisting condition. Although Mr. Gooderham acknowledges that *Duff* concerned apportionment in the context of a back injury, he contends that it is nonetheless applicable in this hearing loss claim, and that the Board's failure to apply *Duff* was erroneous. Mr. Gooderham argues that the Board's evidence did not include any reliable record upon which to base a 50% apportionment of his impairment. We disagree.

In support of the Board's order, SWVA asserts that Mr. Gooderham's audiogram is "atypical of a pure noise-induced hearing loss." SWVA argues that the *Duff* decision, regarding the impairment related to a back injury, is "grounded upon the fact that one cannot ... simply look at an MRI or other diagnostic tool and say definitively that some of the impairment is unrelated to the compensable injury" in the absence of pre-claim records with ratable criteria. Unlike an MRI in an injury claim, SWVA points out, the pattern in an audiogram reveals to an otologist or otolaryngologist whether the hearing loss is occupationally related (noise-induced) or is due to some other cause. Further, SWVA notes that the evaluating physician is required to consider whether there is a non-compensable cause of the hearing loss and to exclude this impairment from the award. Thus, SWVA asks that we affirm the Board's order.

Upon review, we conclude that the Board did not err in affirming the order granting a 7.26% PPD award and finding that Dr. Phillips' apportionment was proper. The Board acknowledged the Supreme Court of Appeals of West Virginia's ("SCAWV") decision in *Duff* regarding apportionment, but noted differences between occupational injury claims and claims for occupational hearing loss. The Board noted that the formulas and procedures prescribed in West Virginia Code § 23-4-6b and West Virginia Code of State Rules § 85-20-47, used to rate noise-induced hearing loss, reveal that the legislature carved out a specific method to calculate occupational hearing loss impairment. We agree with the Board and note that West Virginia Code of State Rules § 85-20-47.8 is unique and provides

that otologists/otolaryngologists should “estimate the true noise induced hearing loss thresholds and explain his or her calculations on the basis of medical and audiological findings” when an audiogram pattern is atypical for occupational noise-induced hearing loss. As the Board found below, Dr. Phillips explained his calculation, noting that the audiogram’s configuration was consistent with a component of hereditary or genetic hearing loss due to the steady decline in the loss with no peak or recovery.

Further, we do not find error in the Board’s determination that Dr. Touma’s report was not persuasive because he failed to explain the discrepancy between the four-frequency total in his audiogram versus the total that he used in his impairment calculation. Nor do we agree with Mr. Gooderham’s assertion that Dr. Phillips relied on unsupported hearsay when he considered Dr. Jung’s report. Dr. Phillips did not base his apportionment or his impairment rating on Dr. Jung’s report, but instead based his rating on the audiogram performed in his office. Dr. Phillips disagreed with Dr. Jung’s opinion that none of Mr. Gooderham’s hearing loss was attributable to occupational noise; Dr. Phillips merely referenced Dr. Jung’s report to point out that another physician also felt that some amount of Mr. Gooderham’s impairment was due to a non-occupational factor.

As the SCAWV 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). With this deferential standard of review in mind, based on the foregoing, we cannot conclude that the Board was clearly wrong in affirming the claim administrator’s order granting a 7.26% PPD award for occupational hearing loss.

Accordingly, we affirm the Board’s November 7, 2024, order.

Affirmed.

ISSUED: September 30, 2025

CONCURRED IN BY:

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