FILED September 10, 2025

STATE OF WEST VIRGINIA SUPREME COURT OF APPEALS

C. CASEY FORBES, CLERK SUPREME COURT OF APPEALS OF WEST VIRGINIA

James B. Harvey, Claimant Below, Petitioner

v.) No. 25-181 (JCN: 2014010885) (ICA No. 24-ICA-297)

Hobet Mining, Employer Below, Respondent, and West Virginia Offices of the Insurance Commissioner, in its capacity as administrator of the Old Fund, Respondent

MEMORANDUM DECISION

Petitioner James B. Harvey appeals the January 29, 2025, memorandum decision of the Intermediate Court of Appeals of West Virginia ("ICA"). *See Harvey v. Hobet Mining*, No. 24-ICA-297, 2025 WL 328229 (W. Va. Ct. App. Jan. 29, 2025) (memorandum decision). Respondent West Virginia Offices of the Insurance Commissioner ("WVOIC"), in its capacity as administrator of the Old Fund, filed a timely response. The issue on appeal is whether the ICA erred in affirming the June 27, 2024, decision of the West Virginia Workers' Compensation Board of Review, which affirmed the claim administrator's order granting 10% permanent partial disability for occupational pneumoconiosis ("OP").

The claimant asserts that the Occupational Pneumoconiosis Board ("OP Board") wrongly disregarded valid reliable pulmonary function test results, showing that the claimant had 20% pulmonary impairment attributable to OP, based on its practice of relying on the pulmonary function study with the better volumes. The claimant argues that the OP Board's preference for pulmonary function studies with better volumes is not in accordance with West Virginia workers' compensation law. Therefore, in view of the reliable, probative, and substantial evidence of record, the claimant argues that he is entitled to a 20% permanent partial disability award for OP. WVOIC counters by arguing that non-occupational factors, such as emphysema caused by the claimant's long and heavy smoking habit, account for all of the pulmonary impairment above 10%.²

¹ The claimant is represented by counsel Mark J. Grigoraci, and WVOIC is represented by counsel Sean Harter. The employer, Hobet Mining, did not file a response.

² At a May 2024 final hearing, the OP Board stated that the volumes in a March 2022 pulmonary function study were "much less" than its pulmonary function study from October 2020

Therefore, WVOIC argues that the Board of Review and the ICA did not err in affirming the 10% permanent partial disability award for OP based on the OP Board's findings.

This Court reviews questions of law de novo, while we accord deference to the Board of Review's findings of fact unless the findings are clearly wrong. Syl. Pt. 3, *Duff v. Kanawha Cnty. Comm'n*, 250 W. Va. 510, 905 S.E.2d 528 (2024). Upon consideration of the record and briefs, we find no reversible error and therefore summarily affirm. *See* W. Va. R. App. P. 21(c).

Affirmed.

ISSUED: September 10, 2025

CONCURRED IN BY:

Chief Justice William R. Wooton Justice C. Haley Bunn Justice Charles S. Trump IV Justice Thomas H. Ewing Senior Status Justice John A. Hutchison

and, within a two-year period, the OP Board uses the study having "the better volumes." The OP Board explained that it has "always taken the best test within a two-year period unless there [are] obviously findings radiographically of a worsening of, such as a progressive massive fibrosis or some other indication that correlates with that change in pulmonary function." The OP Board testified that the possibility that the claimant has worsening pathology that has not yet been detected was "extremely small." The OP Board further stated that its pulmonary function study from October 2020 showed a carboxyhemoglobin level of 6.0, which indicated that the claimant was still smoking cigarettes. The OP Board concluded that it would not be reasonable to attribute all of the claimant's pulmonary impairment to OP. Therefore, based upon its October 2020 pulmonary function study and the medical evidence, the OP Board found that the claimant had 10% pulmonary impairment attributable to OP and 5% pulmonary impairment attributable to non-occupational factors, including cigarette smoking and emphysema.