

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

**DAVID KING II,
Claimant Below, Petitioner**

v.) No. 26-ICA-76 (JCN: 2023023085)

**JUSTICE FAMILY GROUP, LLC,
Employer Below, Respondent**

**FILED
September 25, 2026**

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

MEMORANDUM DECISION

Petitioner David King II appeals the March 15, 2024, order of the Workers' Compensation Board of Review ("Board") which held this claim compensable on a non-medical basis but found Mr. King was not entitled to the statutory presumption, and the January 29, 2026, order of the Board granting Mr. King a 0% permanent partial disability ("PPD") award for occupational pneumoconiosis ("OP"). Respondent Justice Family Group, LLC ("Justice Family Group") filed a response.¹ Mr. King did not file a reply.

This Court has jurisdiction over this appeal pursuant to West Virginia Code § 51-11-4 (2026). After considering the parties' arguments, the record on appeal, and the applicable law, this Court finds there is error in the Board's decision but no substantial question of law. For the reasons set forth below, a memorandum decision vacating and remanding for further proceedings is appropriate under Rule 21 of the West Virginia Rules of Appellate Procedure.

On March 22, 2022, Mr. King completed an Employee's Report of OP and indicated that his last date of exposure to OP was January 20, 2020. Mr. King reported occupational exposures to the hazards of OP while working as an electrician in the following coal mines: WV Mine Power from April 22, 2008, through August of 2011; Alex Energy from August of 2011 through June of 2014; Leer North ICG from January of 2015 through September of 2015; Kingston Mining from October of 2017 through January of 2019; Panther Creek

¹ Mr. King is represented by Reginald D. Henry, Esq., and Lori J. Withrow, Esq. The Justice Family Group is represented by Billy R. Shelton, Esq.

Mining, LLC, from January of 2019 through June of 2019; and Bluestone Industries from July of 2019 through January of 2020.²

Mr. King underwent a pulmonary function test at New River Breathing Center on March 22, 2022, and the spirometry and diffusion studies were both normal. In addition, Afzal Ahmed, M.D., reviewed a chest x-ray dated March 22, 2022, and found no evidence of OP. On April 25, 2022, Richard Spencer, M.D., completed a Physician's Report of OP and diagnosed Mr. King with impairment due to OP. On June 27, 2023, the claim administrator denied Mr. King's claim for OP and found he was not exposed to the hazards of OP pursuant to West Virginia Code § 23-4-1 (2021) and/or did not timely file his claim pursuant to West Virginia Code § 23-4-15(b) (2010). Mr. King protested this order.

On August 29, 2023, Mr. King was deposed and testified that he was exposed to an occupational dust hazard on a daily basis from April of 2005 through January 20, 2020. He stated he was exposed to limestone and sandstone dust from crushing rock when he worked in a mine quarry for Boxley Aggregates from April of 2005 through April of 2008. Mr. King also testified that he was exposed to occupational dust hazards while working as an electrician in the coal mines for the following employers: West Virginia Mine Power from April 22, 2008, through August of 2011; Alex Energy from August of 2011 through June of 2014; Leer North ICG from January of 2015 through September of 2015; Kingston Mining from October of 2017 through March or April of 2018; Legacy Land Management from August of 2018 through December of 2018; Panther Creek Mining from January of 2019 through June of 2019; and Bluestone Industries from July of 2019 through January of 2020. In addition, Mr. King testified that he was exposed to dust hazards from February of 2016 through July of 2016 when he installed electrical systems in a rock quarry for J&P Electrical Contractors and from July of 2016 through approximately September of 2017 when he worked as an electrician and mechanic for Appalachian Aggregates in a rock quarry. Mr. King denied being exposed to an occupational dust hazard from February 24, 2020, to the present in his work as an electrician and mechanic for Weyerhaeuser.

On March 15, 2024, the Board entered an interlocutory order reversing the claim administrator's June 27, 2023, order and holding this claim compensable on a non-medical basis but found Mr. King's claim was not subject to the statutory presumption. The Board held that Mr. King failed to prove he was exposed to an occupational dust hazard for a period of ten years during the fifteen years immediately preceding his date of last exposure, which is the requisite amount of time needed to qualify for the rebuttable presumption that his pulmonary impairment is attributable to OP pursuant to West Virginia Code § 23-4-8c(b) (2009). The Board calculated that Mr. King had enough exposure to maintain a claim

² On this form, Mr. King stated he was exposed to the hazards of OP for twelve years, but the employment history he listed equates to eight years and eight months of exposure.

for OP. However, since he had only nine years and four months of exposure from January 20, 2005, through January 20, 2020, the Board found that Mr. King's claim was not entitled to the presumption. The Board then referred this claim to the OP Board for an evaluation of PPD resulting from OP.

On June 2, 2024, George L. Zaldivar, M.D., issued a report detailing his independent medical examination, which was performed at the request of the claim administrator. Dr. Zaldivar opined that Mr. King had a 0% impairment based on the pulmonary function study, blood gas studies, and a chest x-ray, performed on May 29, 2024, which revealed no abnormalities. On August 13, 2024, the OP Board examined Mr. King and issued a report finding he had been exposed to an occupational dust hazard for approximately fifteen and a half years, reported shortness of breath for three to four years, wheezing for three to four years, and a chronic morning cough for five years. The OP Board noted that this was a "non-presumptive claim." Chest x-rays revealed no evidence of OP, and a pulmonary function study was performed at the Occupational Lung Center on August 13, 2024, as part of the OP Board's evaluation. The OP Board was unable to make a diagnosis of OP.

On October 22, 2024, the claim administrator issued an order granting no impairment related to OP, as the OP Board was not able to make a diagnosis of OP. Mr. King protested this order. On December 17, 2025, the OP Board testified at a hearing. Johnsey L. Leef III, M.D., testified that upon review of the chest x-ray dated August 13, 2024, he saw no pleural or parenchymal changes consistent with OP. Jack Kinder, M.D., the OP Board chair, testified that he could not make a diagnosis of OP based upon the non-presumptive nature of the claim and the negative imaging evidence. Importantly, Dr. Kinder testified that the March 22, 2022, pulmonary function study was the best study of record, and it demonstrated 10% impairment. He did not think there was any evidence that rebutted the statutory presumption if it were applied to this claim. However, given that the claim was non-presumptive, he did not find any impairment related to OP. Mallinath Kayi, M.D., further testified that he agreed with the testimony of Drs. Leef and Kinder. On January 29, 2026, the Board affirmed the claim administrator's October 22, 2024, order and granted Mr. King a 0% PPD award for OP. It is from the Board's interlocutory order dated March 15, 2024, and its order dated January 29, 2026, that Mr. King now appeals.

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. King asserts two assignments of error. First, he argues the Board was clearly wrong in denying the statutory presumption pursuant to West Virginia Code § 23-4-8c(b). Second, he argues that the Board was clearly wrong in finding he did not prove by a preponderance of the evidence that he sustained more than 0% PPD due to OP. West Virginia Code § 23-4-8c(b) states as follows:

If it can be shown that the claimant or deceased employee has been exposed to the hazard of inhaling minute particles of dust in the course of and resulting from his or her employment for a period of 10 years during the 15 years immediately preceding the date of his or her last exposure to such hazard and that the claimant or deceased employee has sustained a chronic respiratory disability, it shall be presumed that the claimant is suffering or the deceased employee was suffering at the time of his or her death from occupational pneumoconiosis which arose out of and in the course of his or her employment. This presumption is not conclusive.

In this case, the Board's March 15, 2024, interlocutory order held that Mr. King did not meet the requirements of West Virginia Code § 23-4-8c(b) because he failed to prove he was exposed to an occupational dust hazard for a period of ten years during the fifteen years immediately preceding his date of last exposure. The Board stated that it relied on Mr. King's testimony to calculate that he had only nine years and four months of exposure from January 20, 2005, through January 20, 2020. In this appeal, the parties dispute whether the Board should have considered *Sluss v. Workers' Comp. Comm'r*, 174 W. Va. 433, 327 S.E.2d 413 (1985) and counted the intervals between Mr. King's dust exposure. However, the Board's March 15, 2024, order fails to provide an analysis of how it calculated the nine years and four months of exposure and further fails to state with particularity exactly which dates of employment were counted or if it considered the intervals between exposure. The calculation in this case is complicated by many factors including Mr. King's lengthy and varied employment history which includes significant gaps, Mr. King's work in both the coal mines and the rock quarry, and Mr. King's listing of different employers and dates of employment in his Employee's Report of OP compared to the information provided in his deposition testimony. The Board's March 15, 2024, order

fails to make sufficient findings of fact and conclusions of law to support its decision and to allow this Court to resolve the disputes on appeal. “Where the lower tribunal[] . . . mak[es] only general, conclusory or inexact findings[,] we must vacate the judgment and remand the case for further findings and development.” *Province v. Province*, 196 W. Va. 473, 483, 473 S.E.2d 894, 904 (1996). Therefore, we remand the matter to the Board with directions to address these issues through the entry of an amended order that contains sufficient findings of fact and conclusions of law to permit meaningful appellate review, including the taking of additional evidence, if necessary.

We acknowledge that we review the Board’s opinions under a clearly wrong standard of review. However, this deferential standard does not relieve the Board from addressing and weighing the evidence submitted and the meritorious arguments made by the parties. In remanding, we emphasize that our decision should not be seen as forecasting the outcome of the case. We direct the Board to provide sufficient analysis of the evidence in this claim.

Accordingly, the Board’s March 15, 2024, and January 29, 2026,³ orders are vacated, and this case is remanded to the Board for further proceedings consistent with this decision.

Vacated and Remanded.

ISSUED: September 25, 2026

CONCURRED IN BY:

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

³ We vacate the Board’s January 29, 2026, order related to PPD because the determination of whether Mr. King is entitled to the statutory presumption could impact the determination of whether he is entitled to PPD for OP. We also note that if the statutory presumption applies to this claim, it is possible that further testimony from the OP Board may be necessary to determine the amount of OP-related impairment.