

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

KENNETH D. BOWLES,
Claimant Below, Petitioner

vs.) **No. 17-0245** (BOR Appeal No. 2051662)
(Claim No. 2011018963)

THE NEW WV MINING, INC.,
Employer Below, Respondent

FILED

November 22, 2017
EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Mr. Bowles requests a reopening of his claim on a permanent partial disability basis. On October 29, 2015, the claims administrator denied his request. In a Decision dated November 3, 2016, the Workers' Compensation Office of Judges affirmed the claims administrator's denial of reopening. This appeal arises from the Board of Review's Final Order dated February 14, 2017, in which the Board affirmed the November 3, 2016, Order of the Office of Judges. The Court has carefully reviewed the records, written arguments, and appendices contained in the briefs, and the case is mature for consideration. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, we affirm the decision of the Board of review.

Mr. Bowles filed a petition to reopen his prior claim for consideration of an adjustment to his permanent partial disability award for occupational pneumoconiosis. As an underground coal miner and electrician, he has a history of exposure to the hazards of dust for over forty years. He was last exposed to dust on November 9, 2010. Mr. Bowles was granted a 25% permanent partial disability award for occupational pneumoconiosis in Claim No. 900066319 on May 30, 1991. Mr. Bowles testified by telephonic deposition that he had been a heavy smoker for over thirty years.

Mr. Bowles was examined by the Occupational Pneumoconiosis Board on June 9, 2011. He presented with moderate wheezing throughout both lung fields. X-rays showed the presence of bullous emphysema in the upper lobes of the lungs. When compared to the Board's prior study of May 2, 1996, there was no change. At the time of examination, Mr. Bowles's carboxyhemoglobin level was 4.7%, which strongly suggested that he was smoking prior to his

examination. The Board advised that Mr. Bowles had no more than 25% impairment for his occupational pneumoconiosis, which was the amount awarded to him in Claim No. 900066319.

Mr. Bowles submitted a pulmonary function study from the Lung Disease and Sleep Disorders Clinic dated March 20, 2012. The study showed a decreased diffusion capacity, which was 60% of the predicted value. Vishnu Patel, M.D., concluded that the pulmonary function test was consistent with moderate emphysema, pneumoconiosis, and chronic obstructive pulmonary disorder. The study contained no tracings or carboxyhemoglobin test.

A pulmonary function test from the Lung Disease and Sleep Disorders Clinic dated February 24, 2015, was submitted by Mr. Bowles. The study documented an impression of chronic obstructive pulmonary disorder, emphysema, pneumoconiosis, and occupational asthma. This study also did not contain tracings or a carboxyhemoglobin test.

The Employer submitted repeat pulmonary function studies from the Occupational Lung Center dated September 2, 2015. Pre-bronchodilator studies revealed an FVC of 4.65, FEV1 of 2.29, and an FEV1/FVC of 49%. The diffusion study was found to be invalid because the carboxyhemoglobin level measured 3.3%, which shows he was smoking on the date of the evaluation.

By Order dated October 29, 2015, the claims administrator denied his petition to reopen the claim for consideration of additional permanent partial disability benefits. The claims administrator stated that the evidence did not indicate an aggravation or progression of Mr. Bowles's occupational pneumoconiosis. Mr. Bowles protested the claims administrator's decision.

In a Final Order dated November 3, 2016, the Office of Judges found that Mr. Bowles has not established an aggravation or progression of his injury or new facts not previously considered that would entitle him to a greater award. The Office of Judges found that the pulmonary function tests of record were not valid for the purpose of establishing that Mr. Bowles has increased breathing impairment. Mr. Bowles submitted two pulmonary function tests dated March 20, 2012, and February 24, 2015. Neither study contained tracings, which West Virginia Code of State Rules § 85-20-52 (2006) requires to show the reliability of the ventilator studies. Because the tracings were not included, the Office of Judges deemed the reports to be unreliable.

The Office of Judges also found the pulmonary function studies of March 20, 2012, and February 24, 2015, to be unreliable because the tests were submitted without an accompanying carboxyhemoglobin test. West Virginia Code of State Rules § 85-20-52.9 (2006) states that a carbon monoxide diffusion capacity of the lungs test without an accompanying carboxyhemoglobin test, or a carboxyhemoglobin value of 3.1% or higher, cannot be considered as a valid measure of impairment. The Office of Judges found that the diffusion study dated September 2, 2015, was unreliable because the measured carboxyhemoglobin level was 3.3%, which is beyond the threshold established by Rule 20.

The Office of Judges affirmed the claims administrator's Order dated October 29, 2015.

The Office of Judges concluded that Mr. Bowles failed to show an aggravation or progression of his injury or new facts not previously considered that would entitle him to a greater award for his occupational pneumoconiosis. The Board of Review affirmed the reasoning and conclusions of the Office of Judges in its decision dated February 14, 2017. On appeal, Mr. Bowles, by Reginald Henry, his attorney, asserts that pulmonary testing indicates additional impairment above the award previously granted. The New WV Mining, Inc., by T. Jonathan Cook, its attorney, argues that the spirometry and diffusion studies could not be relied upon to show a progression or aggravation of a pulmonary condition. Because the record does not contain reliable evidence of additional permanent partial disability impairment, the Board of Review's Order should be affirmed. Mr. Bowles has not established a prima facie cause of a progression or aggravation of his former occupational pneumoconiosis injury to warrant a reopening of the claim.

For the foregoing reasons, we find that the decision of the Board of Review is not in clear violation of any constitutional or statutory provision, nor is it clearly the result of erroneous conclusions of law, nor is it based upon a material misstatement or mischaracterization of the evidentiary record. Therefore, the decision of the Board of Review is affirmed.

Affirmed.

ISSUED: November 22, 2017

CONCURRED IN BY:

Chief Justice Allen H. Loughry II

Justice Robin J. Davis

Justice Margaret L. Workman

Justice Menis E. Ketchum

Justice Elizabeth D. Walker