

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Jeffrey Hill,
Claimant Below, Petitioner

vs.) **No. 21-0936** (BOR Appeal No. 2056860)
(Claim No. 2019016626)

Murray American Energy, Inc.,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Jeffrey Hill appeals the decision of the West Virginia Workers' Compensation Board of Review ("Board of Review"). Murray American Energy, Inc. filed a timely response.¹ The issue on appeal is permanent partial disability. The claims administrator granted a 10% permanent partial disability award on July 31, 2019. The Workers' Compensation Office of Judges ("Office of Judges") reversed the decision in its May 24, 2021, Order and granted a 0% permanent partial disability award. The Order was affirmed by the Board of Review on October 18, 2021. Upon our review, we determine that oral argument is unnecessary and that a memorandum decision affirming the Board of Review's decision is appropriate. *See* W. Va. R. App. P. 21.

Mr. Hill contends that he developed occupational pneumoconiosis in the course of and resulting from his employment as a coal miner. On September 11, 2018, he was evaluated by Melvin Saludes, M.D., at East Ohio Regional Hospital. It was noted that he had a significant history of cigarette smoking of approximately two packs a day for thirty years. At the time of the evaluation, he smoked half a pack a day. A chest x-ray was performed and showed Q/T opacities with a 1/1 profusion in all six lung zones. Pulmonary function testing showed a mild obstruction, and a diffusion study was normal. Dr. Saludes diagnosed simple occupational pneumoconiosis with approximately 20% impairment. It was noted that Mr. Hill's obstructive lung disease was the result of cigarette smoking but that his coal dust exposure was a contributing factor.

Mr. Hill filed a claim for occupational pneumoconiosis benefits on January 29, 2019. The claim was held compensable on a non-medical basis on March 21, 2019. Mr. Hill was examined by the Occupational Pneumoconiosis Board on June 11, 2019. It noted that Mr. Hill had thirty-six years of occupational exposure to the hazards of occupational pneumoconiosis. It also noted that Mr. Hill had a history of less than thirty-pack years of cigarette smoking. An x-ray was performed

¹Petitioner, Jeffrey Hill, is represented by J. Thomas Greene Jr. and T. Colin Greene, and respondent, Murray American Energy, Inc., is represented by Aimee M. Stern.

and showed insufficient pleural or parenchymal changes necessary to establish a diagnosis of occupational pneumoconiosis. The Board concluded that Mr. Hill's pulmonary function studies were normal, but his diffusion studies suggested 10% impairment. On July 31, 2019, Mr. Hill was granted a 10% permanent partial disability award. The employer protested the decision. On December 20, 2019, Mr. Hill underwent a diffusion study at CAMC Occupational Lung Center which was interpreted as normal.

Occupational Pneumoconiosis Board Members testified in a hearing before the Office of Judges on April 7, 2021. Jack Kinder, M.D., testified that the OP Board recommended 10% impairment based upon its June 11, 2019, testing, which showed 75% diffusion capacity. Dr. Kinder noted that the study performed at East Ohio Hospital showed an abnormal diffusion rate of 65%, which would be 15% impairment. However, after the bronchodilator study with super volume adjustment, there was no impairment. Dr. Kinder testified that Mr. Hill had a significant, thirty-eight-pack year history of cigarette smoking and opined that the slight decrease in Mr. Hill's diffusion study could be the result of smoking. He stated that the lung volume studies performed on December 20, 2019, at CAMC were the highest volumes of record and are therefore the best indicator of permanent impairment. Further, Mr. Hill had a negative x-ray. Dr. Kinder concluded that there was insufficient evidence to justify a diagnosis of occupational pneumoconiosis and, therefore, no impairment could be attributed to occupational pneumoconiosis. Mallinath Kayi, M.D., also of the Occupational Pneumoconiosis Board, concurred with Dr. Kinder's testimony.

In its May 24, 2021, order, the Office of Judges reversed the claims administrator's grant of a 10% permanent partial disability award and granted no award. It found that occupational pneumoconiosis is a progressive disease that does not improve. Therefore, testing which shows the highest volumes is normally considered to be the best indicator of impairment. The Office of Judges noted that the first two studies showed deficient diffusion results suggestive of impairment. However, the most recent testing, performed on December 20, 2019, showed no impairment. The Office of Judges found the opinion of the Occupational Pneumoconiosis Board was more reliable than the study performed by East Ohio Regional because the Occupational Pneumoconiosis Board had more evidence in the form of the new study. The Office of Judges therefore reversed the 10% permanent partial disability award and ruled that Mr. Hill was entitled to no award for permanent impairment. The Board of Review adopted the findings of fact and conclusions of law of the Office of Judges and affirmed the decision on October 18, 2021.

This Court may not reweigh the evidentiary record, but must give deference to the findings, reasoning, and conclusions of the Board of Review, and when the Board's decision effectively represents a reversal of a prior order of either the Workers' Compensation Commission or the Office of Judges, we may reverse or modify that decision only if it is in clear violation of constitutional or statutory provisions, is clearly the result of erroneous conclusions of law, or is so clearly wrong based upon the evidentiary record that even when all inferences are resolved in favor of the Board's findings, reasoning, and conclusions, there is insufficient support to sustain the decision. *See* W. Va. Code §§ 23-5-15(c) & (e). We apply a de novo standard of review to questions of law. *See Justice v. W. Va. Off. Ins. Comm'n*, 230 W. Va. 80, 83, 736 S.E.2d 80, 83 (2012).

After review, we agree with the reasoning and conclusions of the Office of Judges as affirmed by the Board of Review. West Virginia Code § 23-4-6a provides that the Office of Judges “shall affirm the decision of the Occupational Pneumoconiosis Board made following [the] hearing unless the decision is clearly wrong in view of the reliable, probative and substantial evidence on the whole record.” The most reliable testing of record was performed by the Occupational Pneumoconiosis Board on December 20, 2019, and it showed no impairment due to occupational pneumoconiosis. The Office of Judges, and by extension Board of Review, committed no error in finding the Occupational Pneumoconiosis Board’s opinion to be the most persuasive of record.

Affirmed.

ISSUED: September 14, 2023

CONCURRED IN BY:

Chief Justice Elizabeth D. Walker
Justice Tim Armstead
Justice John A. Hutchison
Justice William R. Wooton
Justice C. Haley Bunn