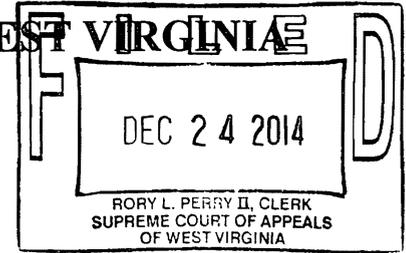


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 14-0734



PATRICIA JONES (formerly Akers),
(Petitioner/plaintiff below)

PETITIONER,

vs.)

APPEAL FROM THE CIRCUIT COURT
OF KANAWHA COUNTY (10-C-746)

WEST VIRGINIA PUBLIC EMPLOYEES RETIREMENT SYSTEM,
A CORPORATION D/B/A WEST VIRGINIA PUBLIC
CONSOLIDATED RETIREMENT BOARD
(Respondent/defendant below)

RESPONDENT,

and

JUDY VANNOY AKERS
(Respondent/defendant below)

RESPONDENT.

PETITIONER'S REPLY BRIEF
TO THE
BRIEF OF JUDY VANNOY AKERS

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PETITIONER'S REPLY

Judy Vannoy Akers has mixed the issue raised in her appeal (Docket No. 14-0764) with the issues before this Court in the Jones' appeal (Docket No. 14-0734). The Board granted Danny Akers a posthumous disability retirement award. The survivor annuity benefits are being paid pursuant to the disability retirement statute, not the pre-retirement survivor annuity statute. Nevertheless, it does not matter whether the Board pays the benefits pursuant to the disability retirement statute or the preretirement survivor annuity statute: either way, a valid QDRO requires that those survivor annuity benefits be paid to Patricia Akers Jones and not Judy Vannoy Akers.

A. PRERETIREMENT SURVIVOR BENEFITS ARE SUBJECT TO A QDRO

On pages 3, 4, 8, 9, and 13 of her brief, Judy Vannoy Akers argues that West Virginia Code 5-10-27(b) mandates that preretirement survivor annuity benefits be paid to a participant's *actual surviving spouse* regardless of whether there has been a properly entered QDRO. She quotes testimony of Ann Lambright to the Circuit Court of Mercer County (the Honorable Omar Aboulhosn) in March of 2010 to support her argument.

As a matter of law, both Ms. Lambright and Ms. Akers are in error because of the express provisions of West Virginia Code 5-10-46:

"The right of any person *to any benefit provided for in this article* shall not be subject to execution, attachment, garnishment, the operation of bankruptcy or insolvency laws, or other process whatsoever, nor shall any assignment thereof be enforceable in any court *except that the benefits or contributions under this system shall be subject to "Qualified Domestic Relations Orders" as that term is defined in Section 414(p)(26 USCS Section 414[p]) of the Internal Revenue Code as applicable to government plans...*" (West Virginia Code 5-10-46, *emphasis added.*)

Preretirement survivor annuity benefits are benefits provided by the Retirement System pursuant to West Virginia Code 5-10-27. That statute even refers to the annuity provisions of 5-10-24. Contrary to Ms. Akers' argument on page 10 of her brief, the I.R.S. Code also permits a QDRO to restrict paying benefits to a *former spouse* who is entitled to *preretirement survivor annuity benefits*. See 26 U.S.C. 414(p)(5) and 26 U.S.C. 417(c).

The Board agrees that a QDRO attaches preretirement survivor annuity benefits. Specifically, when presenting its motion for summary judgment to the Circuit Court of Kanawha County, the Board argued as follows in its memorandum of law in support of its motion for summary judgment:

"Mrs. Akers' Cross Claim suggests she misapprehends the importance of the type of benefit awarded. A pre-retirement death benefit would have, in this case, resulted in her receiving a slightly higher monthly annuity; however, it would not in any way impact the dispute regarding QDRO brought by Ms. Jones. Pursuant to W.Va. Code R. §162-1-6, a QDRO can apply to the interest of not only a member or retirant in PERS, but also a beneficiary. Moreover, there is no exclusion of pre-retirement death benefits from the QDRO rules. *Id.* Therefore, in terms of the claims brought by the Petitioner, it makes no difference whether the Board ultimately treated Mr. Akers' death as pre-or post-retirement." (App 432)

Frankly, it was also stunning that Ms. Lambright testified to the Circuit Court of Mercer County (the Honorable Omar Aboulhosn) that "you're not a beneficiary of the joint and survivor" (see App 689) when West Virginia Code 5-10-2(6) defines a "beneficiary" to mean "...any person, except a retirant, who is entitled to, or will be entitled to, an annuity or other benefit payable by the retirement system." This includes the payments under the joint and survivor annuity, *and the Board's "Benefit Option Form" specifically proves this fact!* (See the Benefit Option Form, App 215.) Furthermore, former WVCSR 162-1-7 specifically establishes that a survivor beneficiary may exist whether a member dies *prior to* retirement or *following* retirement:

“7.1. The several Retirement Systems to be administered by the Board have varying and different definitions of who a survivor beneficiary may be if the member dies prior to retirement and following retirement. The Board has adopted the procedures in this section for the payment of death benefits for all systems. (Former WVCSR 162-1-7, **emphasis added**)

Clearly, West Virginia Code 5-10-46 establishes that a QDRO does apply to pre-retirement benefits, and Patricia Akers Jones could be the beneficiary of either the pre-retirement survivor annuity benefits or the post retirement (disability retirement) survivor annuity benefits. If either of the QDROs are enforceable, then Judy Vannoy Akers will lose the survivor annuity benefits.

B. DANNY AKERS ALSO GRANTED THE PRERETIREMENT SURVIVOR ANNUITY BENEFITS TO PATRICIA AKERS JONES IN THE DIVORCE.

On pages 2, 7, and 9, of her brief, Judy Vannoy Akers argues that the only benefits granted to Patricia Akers Jones were retirement benefits (and not preretirement benefits). She quotes the Family Court’s conclusion in a separate order from the June 4, 2009 hearing that “...upon Mr. Akers’ death, the alternate payee, Patricia Akers (now Jones), is the sole beneficiary of the retirement benefits accrued and earned by Danny Akers.” Nevertheless, in the final divorce order, Danny Akers granted Patricia Akers Jones all of the survivor annuity benefits available under the retirement plans:

“d.)The Petitioner shall receive the use, possession, and ownership of her retirement (the IRA), and one half (50%) of the Respondent's retirement assets accumulated as of the date of separation (defined benefit plan(s), 401k plan(s), and others, but not the credit union account) **and the Petitioner shall receive and be entitled to all survivor benefits, surviving spouse benefits, death benefits, survivor annuities, and the like available under the retirement plans.** The Respondent shall ensure that the Petitioner is named as the beneficiary of all survivor benefits, surviving spouse benefits, death benefits, survivor annuity benefits, and the like, and he shall provide her with the proof of same. A QDRO(s) shall be prepared by counsel for the Petitioner...” [Final Divorce Order, App 110, **emphasis added**]

In addition to the above, the fact that Mr. Akers signed the preretirement benefit form on June 4, 2009, proves he intended to give those rights to Ms. Jones. (App 135)

The Retirement Plan provides “Preretirement death annuities” in West Virginia Code 5-10-27. Simply stated, preretirement survivor annuity benefits are only available because the Retirement Plan provides them, and all survivor annuity benefits available under the plans were assigned to Patricia Akers Jones in the final divorce order.

The Family Court was not an appellate court on June 4, 2009; it did not have jurisdiction to change the property rights granted to Patricia Akers Jones in the final order of divorce. Segal v. Beard, 181 W.Va. 92, 380 S.E.2d 444 (1989).

In any event, as the record stands now, the survivor annuity benefits are awarded as a result of the disability retirement, not a preretirement survivor annuity. The argument of Judy Vannoy Akers is moot and without a legal basis.

C. A QDRO MAY RESTRICT ELECTIONS AND BENEFICIARY DESIGNATIONS

On page 10, Judy Vannoy Akers argues that West Virginia Code 5-10-24 does not apply and does not permit Patricia Akers Jones to be designated as the surviving spouse. In her brief, Ms. Akers has quoted the 2011 version of the statute, and not the statute effective in 2009 and 2010.

(1) Restriction of the Election of Benefits

The 2009 and 2010 version of West Virginia Code 5-10-24 recites the following:

“Upon divorce, a *member* may elect to change any of the retirement benefit options offered by the provisions of this section to a life annuity....Provided, however, that the retirant certifies under penalty of perjury that *no qualified domestic relations order that would restrict such an election is in effect..*”
(*emphasis added*)

The 2011 statute changed the word “member” to “retirant,” and refers to a certification that not only QDROs, but also final orders and other orders must not exist that would restrict such an election.

A “retirant” is defined to mean “any member who commences an annuity payable by the retirement system.” West Virginia Code 5-10-2(23). When Danny Akers filed for disability retirement, which was granted posthumously, he met the definition of “retirant.” He started the process that led to the survivor annuity benefits that are payable under the disability retirement provisions of the statute because of his death. Even Judy Vannoy Akers agrees that a QDRO can attach disability retirement benefits and survivor annuity payments made upon the death of the disabled participant.

A QDRO is supposed to be prepared and entered when a plan member divorces his or her spouse. This is often years before the member becomes a “retirant.” The former spouse can only protect his or her rights granted in the final divorce order with a QDRO that restricts the election of benefits: the QDRO, according to the 2009 and 2010 version of the statute, may restrict the election of benefit options to prevent the member from electing a lifetime annuity that removes the survivor annuity benefits that the former spouse should receive pursuant to the final order of divorce.

The legislature’s reference to “... no qualified domestic relations order that would restrict such an election” is an acknowledgement that a QDRO can restrict an election. It restricts both preretirement and post-retirement elections according to West Virginia Code 5-10-46 because all benefits are payable pursuant to the terms of the retirement system.

(2) **Restriction of the Designation of Beneficiary**

The 2009 and 2010 version of West Virginia Code 5-10-24 recites the following:

“Upon remarriage, a retirant may name the new spouse an annuitant for any of the retirement benefit options offered by the provisions of this section....Provided, however, that the retirant certifies under penalty of perjury that *no qualified domestic relations order that would restrict such a designation is in effect...*” (*emphasis added*)

The 2011 statute refers to a certification that not only QDROs, but also final orders and other orders must not exist that would restrict such a designation.

As stated above, when Danny Akers filed for disability retirement, which was granted posthumously, he met the definition of “retirant.” He started the process that led to the survivor annuity benefits that are payable under the disability retirement provisions of the statute because of his death. Judy Vannoy Akers agrees that a QDRO can attach disability retirement survivor annuity benefits.

The legal analysis for the restriction of benefit elections above also applies to a restriction of the designation of beneficiaries for preretirement survivor annuities. The legislature’s reference to: “...no qualified domestic relations order that would restrict such a designation” is an acknowledgement that a QDRO can restrict a designation of beneficiaries. It restricts both preretirement and post-retirement designations. West Virginia Code 5-10-46. This Court has held that a QDRO can restrict a designation of a beneficiary to be a former spouse. King v. King, 2011 LEXIS 242, No. 35696 (May 16, 2011).

D. JUDY VANNOY AKERS MISUNDERSTANDS THIS COURT’S PRIOR OPINION

On pages 6 and 7 of her brief, Judy Vannoy Akers quoted a paragraph from this Court’s prior opinion which remanded the case back to the Circuit Court of Kanawha

County. She argues that this Court placed “great emphasis” on post-divorce election of beneficiary forms, and once the record was developed, it rendered this Court’s prior opinion as containing “misstatement of fact.” (See Judy Vannoy Akers’ Brief at page 7)

This Court took the facts from the complaint as true, and the record now establishes that the complaint was correct. In May 2009, Danny Akers changed the name of his survivor beneficiary for preretirement benefits from Patricia Akers (Jones) to his fiancé, Respondent Judy Vannoy (now Akers), and his grandson in violation of the parties’ agreement. (Compare App 132 with App 134) Danny Akers did the very thing that he agreed not to do: he changed his election of the preretirement survivor benefits and designated someone other than Patricia Akers Jones to be his preretirement beneficiary.

While it is true that on June 4, 2009, Danny Akers named Patricia Akers Jones as his preretirement death beneficiary on the Board’s form, he again violated the final order of divorce because: (1) he failed to submit the form to the Board (App 673) and (2) he failed to elect a survivor annuity. Instead, he only elected that Patricia Akers Jones would receive the reimbursement of his contributions. (App 135) Even Ms. Lambright acknowledged that choosing the preretirement option that provides for only a return of contributions for a person who has worked for more than ten years is a “...really bad benefit for his – the people that he wants to get the money for.” (App 623)

The parties agree that once Danny Akers remarried, the forms to designate the preretirement survivor benefits became moot because of the application of West Virginia Code 5-10-27, *however, the final divorce order and the QDROs were not rendered moot by the remarriage*. Those orders prevail over the remarriage. West Virginia Code 5-10-46.

E. **POSTHUMOUS QDROs ARE CONSISTENT WITH THE LAW AND PLAN**

The December 9, 2010 QDRO is identical to the June 4, 2009 QDRO except it eliminates paragraph 7(f) which directed Danny Akers to elect a joint (and) survivor annuity and designate Patricia Akers Jones as the surviving spouse or survivor beneficiary. After all, by the entry of the December 9, 2010 QDRO, Mr. Akers had died and he could not elect any benefit or designate any beneficiary.

As stated above, a “beneficiary” is defined to mean “...*any person, except a retirant, who is entitled to, or will be entitled to, an annuity or other benefit payable by the retirement system.*” West Virginia Code 5-10-2(6), *emphasis added*. The Circuit Court rejected the QDRO, in part, because it was entered after the death of Danny Akers.

Patricia Akers Jones argued in her brief that a posthumous QDRO, like the December 9, 2010 QDRO, is enforceable because: (a) it is not at odds with any designated beneficiary for the disability retirement benefits [Mr. Akers died before he made the election of a benefit], (b) the June 4, 2009 QDRO, *like the Board’s model QDRO*, has language stating that it can be amended; (c) West Virginia Code 5-10-44 and the express language of the model QDRO and the 2009 QDRO permits **prospective** amendments, and finally; (d) federal jurisprudence supports enforcing posthumous QDROs, specifically, the rationale of the Court in National City Corporation v. Ferrell, 2005 U.S. Dist. LEXIS 36149 [N.D.W.Va. 2005]. In response, Judy Vannoy Akers only challenges the above by arguing that “...her right to **preretirement death benefits** vested on the date her husband died, December 16, 2009.” She then cites five federal cases, each of which are easily distinguished from the case *sub judice*.

Before addressing each federal case cited by Ms. Akers, it is important to note that the Board awarded a disability retirement survivor annuity, and not a preretirement survivor annuity. Although a valid QDRO renders the outcome the same whether a disability retirement survivor annuity is paid or a preretirement survivor annuity is paid, Ms. Akers started her argument on an incorrect premise.

Samaroo v. Samaroo

On page 11 of her brief, Ms. Akers cites Samaroo v. Samaroo, 193 F.3rd 185 (3rd Cir. 1999) as supporting that “...the majority of courts have held that a QDRO entered after the participant’s death does not supersede the rights of a surviving spouse...” and then in her brief she purports to quote page 187 of Samaroo to support her argument.

Nowhere on page 187 does Samaroo state what is quoted by Ms. Akers in her brief: in fact, the quote is nowhere in the Samaroo opinion or in Davenport v. Davenport 146 F.Supp.2d 770 (M.D.N.C. 2001).

The Samaroo Court was divided (2 to 1) and specifically stated in footnote 3:

“Our holding and opinion are limited to the particular facts before us, and it is not necessary that we reach the broader issue expressed in the dissent’s characterization of our holding, *infra* at 192.” *Id.*, @ 190

A critical fact that the Court in Samaroo observed was the absence of language in the final divorce order and property settlement granting survivor annuity benefits. The Samaroo Court stated that “...*neither the decree nor the property settlement mentions any rights to the Samaroo’s survivor annuity* *Id.*,@ 187, *emphasis added*. In fact, the wife and the drafting attorney admitted that they had “...*never thought about survivor rights to the pension.*” *Id.* @ 188, *emphasis added*. Those are not the facts in the case *sub judice*.

The Akers' divorce order specifically states that Patricia Akers Jones is to receive all survivor annuities and surviving spouse benefits available under the retirement plans. Furthermore, the June 4, 2009 QDRO directed Mr. Akers to make the proper election of benefits and designation of beneficiary consistent with that divorce order.

The Court in Ferrell, citing the ERISA statute, established that a domestic relations order (DRO), usually the final divorce order, may grant the former spouse the right to survivor benefits: *the QDRO merely enforces those rights already conferred in that divorce order*. Unlike Samaroo, the facts in Ferrell are similar to those in the case *sub judice*.

Selvey v. Long

On page 11 of her brief, Judy Vannoy Akers cites Selvey v. Long, 696 A.2d 102 (N. J. Appellate Div. 1997) for the proposition that: "In the absence of a valid QDRO entered prior to death, the New Jersey court determined that the second wife, the surviving spouse, alone was entitled to the widow benefits." This argument omits the fact that the New Jersey statute providing for its fireman's pension fund *did not have any provision which authorized a QDRO to protect a former wife*. The New Jersey Court stated:

"There is also no provision now in the law for a Qualified Domestic Relations Order (QDRO) under the PFRS that could have protected plaintiff's claim to a pension. Other pension or benefits systems provide for a spouse of many years who has been divorced. See. e.g., 42 U.S.C.A. § 402(b) (the survivors benefits section of the Social Security law). But our Legislature is free to eliminate such a benefit." Selvey v. Long, supra., @ 103, **emphasis added.**

The West Virginia statute is radically different from the New Jersey statute because West Virginia Code 5-10-46 specifically authorizes a QDRO to alienate the pension benefits and survivor annuities. Selvey provides absolutely no guidance to this Court.

Stahl v. Exxon Corp.

On page 12 of her brief, Judy Vannoy Akers cites Stahl v. Exxon Corp. 212 F.Supp. 2d 657 (S.D. Texas 2002) for the proposition that a fourth QDRO which was entered after the death of the husband was invalid simply because it was a posthumous QDRO. Ms. Akers has overlooked a key fact that distinguishes Stahl from both the facts in Ferrell and the facts in the case *sub judice*.

The divorce decree in Stahl did **not** provide that the wife would receive a survivor annuity after the death of the husband. Consider the following:

“Here, the one valid QDRO, limited in effect to the benefits under the thrift fund, as well as the final divorce decree, do not designate Beverly as Andrew’s surviving spouse for the purpose of receiving SSA benefits under the Plan.”
Stahl v. Exxon Corp. supra., at 670.

Three years *after* Stahl, the Court in Ferrell recognized that the right to the survivor benefits may be stated in the DRO (final divorce decree) and a QDRO merely enforces those rights previously granted in the final divorce decree.

Clearly, Danny Akers granted all of the survivor annuity benefits to Patricia Akers Jones in the final divorce decree. *Even the June 4, 2009, QDRO provides that all survivor annuity benefits are assigned to Ms. Jones, as stated in paragraph 7(b) where Ms. Jones is deemed to be the surviving spouse and in paragraph 7(f) where Mr. Akers was to designate her to receive those benefits.* Assuming for the sake of argument that the June 4, 2009 QDRO is not treated as a “QDRO,” it is at least a DRO entered *prior* to both the remarriage and death of Danny Akers which assigns all surviving spouse benefits to Patricia Akers Jones. Stahl is factually different and provides no guidance to this Court.

Hopkins v. AT&T Global Info Solutions Co.

On page 12 of her brief, Judy Vannoy Akers cites Hopkins v. AT&T Global Information Solutions Co., 105 F.3rd 153 (4th Cir. 1997) to support the Third Circuit's decision in Samaroo. Although a complete reading of Ferrell clearly explains why Hopkins does not bar posthumous QDRO's, the glaring fact in Hopkins that distinguishes it from the facts in the case *sub judice* and the facts in Ferrell is as follows:

“Paul Hopkins and Vera Hopkins, who married in 1960, were divorced in 1986. *In the divorce order, Mr. Hopkin's pension was deemed a marital asset; nevertheless, Vera Hopkins was not awarded a portion of the pension in the equitable distribution of the marital assets.* Instead, Mr. Hopkins was ordered to pay Vera Hopkins alimony.” Hopkins v. AT&T Global Information Solutions Co., supra, @ 154, ***emphasis added***.

Just like Samaroo and Stahl, there was no reference in the final divorce order at issue in Hopkins that the ex-wife was to receive survivor annuity benefits. Consequently, there was NO order in Samaroo, Stahl, and Hopkins that ***predated*** the death of the plan participant (the ex-husband in each case) which granted survivor benefits to each ex-wife, and the only orders that granted the survivor annuity benefits to those ex-wives were entered ***after*** the death of each ex-husband in each case.

As stated above, in both Ferrell and in the case *sub judice*, the final divorce orders granted the rights to the survivor annuity benefits to the former spouses. A posthumous QDRO merely “recognizes” and, therefore, enforces those rights. A QDRO is defined as:

“a domestic relations order which creates ***or recognizes*** the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan...” 26 U.S.C. 414(p)(1)(A)(i) (***emphasis added***)

The decision in Hopkins is distinguished on the facts just like Samaroo and Stahl.

Ross v. Ross

Finally, on page 13 of her brief, Judy Vannoy Akers cites the decision of Ross v. Ross, 705 A.2d 784 (N. J. App. Div. 1998). In that case, the Court had a divorce decree and property settlement and agreement which specifically granted to the ex-wife an interest in one retirement plan (“Work-O-Lite”), but *failed to make any mention of the ex-wife’s interest in two other plans, the Nationwide Annuity and R & C/N pension plan*. The Court deemed the order and property settlement and agreement were sufficient to constitute a QDRO as to the “Work-O-Lite” plan, but ruled that the order and property settlement and agreement were not a QDRO regarding the Nationwide Annuity and the R & C/N pension plan.

The facts of Ross are distinguished from the case *sub judice* because Patricia Akers Jones was specifically granted all survivor annuity benefits in the final divorce order. And as stated previously, even assuming for the sake of argument that the June 4, 2009 QDRO is not treated as a “QDRO,” it is at least a DRO entered *prior* to both the remarriage and death of Danny Akers which assigns all surviving spouse benefits to Patricia Akers Jones.

Unlike Ross, there were *two* very specific orders entered in the Akers’ divorce case *prior* to both the remarriage and death of the plan participant (Danny Akers) that granted all survivor annuity benefits in plan to the alternate payee, Patricia Akers Jones. The December 9, 2010, QDRO that was entered after the death of Danny Akers merely recognizes and enforces the rights assigned to Patricia Akers Jones in the two prior orders.

Ross is distinguished and provides no guidance to this Court.

CONCLUSION

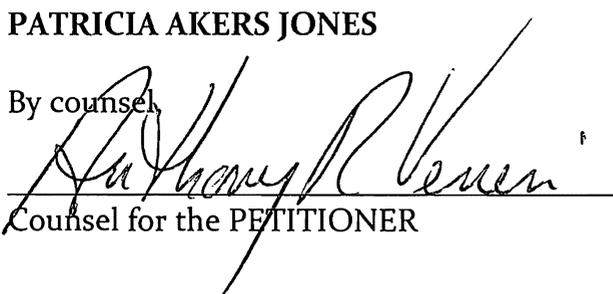
The response of Judy Vannoy Akers does not explain why a QDRO cannot order a plan participant to elect a particular benefit option providing for a survivor annuity and designate a former spouse as the beneficiary thereof since West Virginia Code 5-10-24 specifically refers to a QDRO that can restrict an election of benefit options and restrict the designation of a beneficiary. Ms. Akers does not address that former WVCSR 162-1-7 permitted Danny Akers to select Patricia Akers Jones to receive all of the survivor annuity benefits, *preretirement or post-retirement*, since she had an insurable interest in his life.

West Virginia Code 5-10-46 establishes that a QDRO also attaches preretirement survivor annuity benefits since those payments are made because they are part of the Retirement System provision for benefits. Federal tax law is the same for plans governed by 26 U.S.C. 414(p) and 26 U.S.C. 417(c). Danny Akers intended to grant preretirement survivor annuity benefits to Patricia Akers Jones, not only because of the clear language in the divorce order, but also because of the June 4, 2009 election form that he signed.

Judy Vannoy Akers' argument does not defeat the enforceability of the QDROs.

PATRICIA AKERS JONES

By counsel,


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CERTIFICATE OF SERVICE

I, **ANTHONY R. VENERI, ESQ.**, counsel for Petitioner Patricia Jones (formerly Akers), do hereby certify that I have this day served a true copy of the foregoing **PETITIONER'S REPLY BRIEF TO THE BRIEF OF JUDY VANNOY AKERS** upon **LENNA R. CHAMBERS, ESQ.**, counsel for the West Virginia Consolidated Public Retirement Board and upon **RANDAL R. ROHRIG, ESQ.**, counsel for Judy Vannoy Akers, by placing same in the United State Mail, postage prepaid addressed as follows::

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