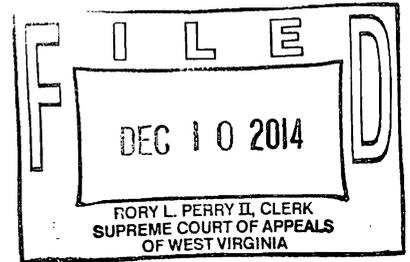


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET No. 14-0764



JUDY VANNOY AKERS,
Defendant Below, Petitioner

vs.)

PATRICIA JONES (formerly Akers),
Plaintiff Below, Respondent

Appeal from a Final Order
of the Circuit Court of Kanawha County
(10-C-746)

And

**WEST VIRGINIA CONSOLIDATED PUBLIC
RETIREMENT SYSTEM, a corporation, d/b/a
WEST VIRGINIA CONSOLIDATED PUBLIC
RETIREMENT BOARD,**
Defendant Below, Respondent

PETITIONER JUDY VANNOY AKERS' BRIEF

Counsel for Petitioner, Judy Vannoy Akers

RANDAL W. ROHRIG - WWSB #3121

Counsel of Record

THE ROHRIG LAW FIRM

1512 Princeton Avenue

Princeton, WV 24740

(304) 425-2116

rwrlawoffice@citlink.net

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ASSIGNMENTS OF ERROR

- 1. THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA, ERRED BY FAILING TO RULE THAT THE WEST VIRGINIA CONSOLIDATED PUBLIC RETIREMENT BOARD (hereinafter referred to as "Board") WAS WITHOUT AUTHORITY TO AWARD A POSTHUMOUS DISABILITY RETIREMENT TO A DECEASED ACTIVE EMPLOYEE (DANNY AKERS) FOUR MONTHS AFTER HIS DEATH.**

- 2. THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA, ERRED BY ITS DETERMINATION THAT WEST VIRGINIA CODE §5-10-25 (DISABILITY RETIREMENT) PROVIDES STATUTORY AUTHORITY FOR A POSTHUMOUS DISABILITY RETIREMENT.**

- 3. THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA, ERRED IN ITS DECISION THAT WEST VIRGINIA C.S.R. §162-5-19.2 MANDATES THE AWARD OF A POSTHUMOUS DISABILITY RETIREMENT WHEN SAID RULE DID NOT EVEN COME INTO EXISTENCE UNTIL APRIL 12, 2010. IF THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA, WAS CORRECT IN APPLYING THE 2010 AMENDMENTS TO WEST VIRGINIA C.S.R. §162-5-19.2, THEN, AS A MATTER OF PLAIN ERROR, THIS COURT SHOULD DETERMINE THAT THE 2010 AMENDED C.S.R. §162-5-19.3 (SURVIVOR ANNUITY) WAS THE CONTROLLING RULE WHICH REQUIRED JUDY AKERS BE AWARDED A PRERETIREMENT DEATH BENEFIT ANNUITY PURSUANT TO WEST VIRGINIA CODE §5-10-27(b)(1).**

- 4. THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA, ERRED BY RULING THAT JUDY AKERS WAS PROPERLY DENIED HER RIGHT TO A PRERETIREMENT DEATH BENEFIT ANNUITY PURSUANT TO WEST VIRGINIA CODE §5-10-27((b)(1).**

CURRENT PROCEDURAL HISTORY

There are two appeals in this action from the July 10, 2014, Order of the Circuit Court of Kanawha County, West Virginia (Judge Tod J. Kaufman) which granted summary judgment to the West Virginia Consolidated Public Retirement Board as to their denials of two proposed Domestic Relations Orders sent by Petitioner Patricia Jones to the Board. The second appeal was filed by the widow of Danny Akers, who died while still an active employee of the Department of Highways and who was not old enough to retire and had not been granted a disability retirement at the time of his death. The Circuit Court, in its aforesaid Order, did deny Widow Judy Akers' Cross-Claim for preretirement death benefit annuity and granted the Board's summary judgment finding that the posthumous disability retirement was proper.

STATEMENT OF THE CASE

Petitioner/Respondent Judy Akers' deceased husband was married to Petitioner/Plaintiff Patricia Jones for approximately 30 years. They separated in 2006 and a Final Order was entered on June 30, 2008 (Vol. I, App. 107) with Petitioner Jones being ordered to prepare a Domestic Relations Order. On June 4, 2009, a hearing was held in front of the Honorable Mary Ellen Griffith, at which time he was ordered to execute the recently prepared Domestic Relations Order naming his ex-spouse, Patricia Jones, as the surviving spouse of any and all preretirement and post-retirement benefits over his objection (Vol. I, App 121). Additionally, he was to name her beneficiary of any pre-retirement surviving spouse benefit, all of which he did in court on June 4, 2009. (Vol. I, App 136). Unfortunately, Ms. Jones never filed the beneficiary form, even though it was tendered to her at the Courthouse in Mercer County.

Danny Akers and Judy Akers got married on September 6, 2009. (Vol. I, App 136). Danny Akers thereafter unexpectedly died from chronic renal disease on December 16, 2009. (Vol. 1, App 137). At the time of his death, Danny Akers was still an active employee of the Department of Highways. (Vol. I, App 168). He had not yet attained non-disability retirement age of 55 years of age and he had not been granted disability retirement.

In January, 2010, Judy Akers received an application for preretirement death benefits annuity sent to her by the Consolidated Public Retirement Board. She completed all the required documents and forwarded the same to the Board. (Vol. I, App 147, 149). Thereafter, the Board then communicated with widow Judy Akers and advised that they had inadvertently overlooked her husband's disability retirement application filed in September, 2009, and they would consider the same in the next meeting in March, 2010. (Vol. I, App 162). On March 3, 2010, the Board granted the disability retirement application posthumously and began paying the surviving widow, Judy Akers. (Vol. I, App 163).

Although the petitioner, Patricia Jones, places great emphasis on post-separation actions of Danny Akers in regard to what he thought was his share of his retirement benefits, the only thing he did after the hearing on June 4, 2009, was to get married to Judy Akers, who had been caring for him for several years.

The Final Divorce Decree in this case is quite complicated, as this Court can readily see. (Vol. I, App 107). Present counsel was not involved in the divorce case until the DRO was prepared in 2009. Buried within this multi-page Final Order is the reality that Mr. Akers not only gave up three years of credited service after separation of the parties in 2006, but he also gave up his right to elect and determine the future of his one-half of his retirement upon his death. Quite simply, the proposed DRO that was signed and entered over his objection eliminated his control over his share of his own retirement benefits to, upon his death, take care of his and Patricia Jones' children, and also completely eliminated, according to Petitioner Jones, his ability to provide for his surviving widow upon his death from his share of his retirement benefits.

One of the reasons that the Board rejected the June 4, 2009 DRO is because it gave Patricia Jones one-half of three years of service post-separation to which she was not entitled by law. (Vol. I, App 606).

The second reason that the June 4, 2009 DRO was rejected was because it forced the participant to choose a particular type of annuity in face of the Rules which give, unequivocally, the participant the right to make his election. (Vol. I, App 606).

After Danny Akers' death in December, 2009, Plaintiff Jones prepared and entered another DRO in December, 2010. This one was rejected because, according to Executive Director Ann Lambright, the Fourth Circuit Court of Appeals did not allow for posthumous QDROs to be entered and additionally it provided Ms. Jones with one-half of post-separation service, to which by law she was not entitled. (Vol. I, App 606).

In early 2010, Judy Akers and the Estate of Danny Akers were sued by Plaintiff Patricia Jones. (Vol. II, App 435). Ann Lambright was the Executive Director of Consolidated Public Retirement Board at all times relevant hereto and was subpoenaed to testify on March 29, 2010. (See Vol. II, App 606). During Ann Lambright's testimony she explained that Danny Akers had not yet met the requirements of retirement as he had not attained the age of 55. As a result of him being an active employee and not a retirant, he had the election to leave to his surviving spouse as Ann Lambright testified,

"He would be eligible to leave to his surviving spouse, and it has to be his spouse at the time of death - - - **yes, spouse at the time of death.** A. What is known as a surviving spouse benefit and it's in the statute." (Emphasis added). (Vol. II, App 623).

Executive Director Ann Lambright confirmed that the law trumps any beneficiary forms entered into prior to his remarriage.

"But the law trumps the beneficiary form because he was remarried at the time that he died." (Vol. II, App 606, Pg. 627).

Ann Lambright further confirmed that,

"No matter what he (Danny Akers) chose, I don't care **if he had chosen your client (Patricia Jones), she would not have been able to receive it because the preretirement section of the Code (WV Code §5-10-27(b)(1)) says that the surviving spouse has to receive that benefit.** The actual surviving spouse, not the surviving ex-spouse." (Vol. II, App 606, Pg. 627). (Code reference added). (Emphasis added).

The Jones Domestic Relations Order followed the language in the Final Order which required Danny Akers to name his former spouse as a beneficiary of all preretirement benefits. According to the statutory law of West Virginia, a domestic relations order cannot require a participant to name a certain beneficiary as Director Lambright opined,

"The QDRO cannot require a participant, who at that point is not retired yet, a QDRO cannot require a participant to name anybody as the beneficiary and it also cannot require the participant to choose one of the options." (Vol. II, App 606, Pg. 632).

Executive Director Lambright was clear that a QDRO cannot direct the participant, Danny

Akers, to choose the same beneficiary as the Final Order directed him to because the IRS would disqualify the State of West Virginia's Plan and further that the West Virginia Legislature had adopted this specific model QDRO which cannot be changed. Director Lambright confirmed the QDROs are only for retirement benefits. (Vol. II, App 606, Pg. 647). Preretirement death triggers the application of the preretirement death benefit statute (W.Va. Code §5-10-27(b)). (See Vol. II, App 606, Pgs. 653-654).

Executive Director Lambright opined,

“ . . . It converted the surviving spouse benefit that Mrs. Akers was to receive under the preretirement code section I just gave to you (§5-10-27) . . . to a disability benefit. It doesn't change the dollars, but what it changes is the tax benefits. It is much more beneficial tax wise, both federal and state, to have a disability pension rather than a surviving spouse pension.” (Vol. II, App 606, Pgs. 48-49). (Code reference added).

Executive Director Lambright further confirmed that Patricia Jones never sent the proposed QDRO to the Board for approval prior to Family Law Judge Griffith entering it on June 4, 2009, which is the way the Board always handles proposed QDROs. As she testified, this one (DRO) is unique in that you didn't send us a draft before she (the Family Judge) signed it. Further questioning revealed that Executive Director Lambright and the Board never received Danny Akers' designation of Patricia Jones as the annuitant of the preretirement benefits which Mr. Akers signed in the Courthouse on June 4, 2009. Executive Director was asked to assume that she received the preretirement designation to Petitioner Patricia Jones and she was asked to assume that Danny Akers got married, which happened when Danny Akers married on September 6, 2009, then any preretirement death benefit election means nothing because he remarried and died before he retired.” (See Vol. II, App 606, Pg. 674).

Executive Director Lambright further confirmed that the DRO that was submitted and rejected was because the DRO involved things that dealt with preretirement benefits and QDROs can

only deal with retirement benefits.” (See Vol. II, App 606, Pgs. 71-72).

Executive Director Lambright summed up Patricia Jones’ predicament when she confirmed that a surviving spouse is preretirement and that there is no surviving spouse in post-retirement situations.

“ . . . Surviving spouse or survivor beneficiary goes to preretirement benefit language after that and electing a joint and survivor annuity and naming the alternate payee as the beneficiary thereof actually it doesn’t quite make sense. You are not a beneficiary of the joint and survivor.” (Vol. II, App 606, Pg. 89).

Thereafter, Petitioner Patricia Jones filed an injunction and mandamus in the Kanawha County Circuit Court which was summarily dismissed. This Honorable Court then reversed the dismissal of Ms. Jones’ claims against the Board and against Mrs. Akers and sent it back for further proceedings. During the course of this proceeding, all matters pending in the Circuit Court of Mercer County by Patricia Jones against Judy Akers and the Estate of Danny Akers were dismissed without prejudice by Order of the Mercer County Circuit Court. (See Vol. II, App 446).

Sometime after this Court’s memorandum opinion returning the case back to Judge Kaufman of the Kanawha County Circuit Court, Plaintiff/Petitioner filed an Amended Petition for Writ of Mandamus and an Amended Complaint for declaratory judgment, injunction, and damages. (See Vol. I, App 28). After answering that there were no allegations against her directly nor a request for damages, Judy Akers filed a Cross-Claim against West Virginia Consolidated Public Retirement Board. (See Vol. I, App 97). The gist of her Cross-Claim was that the Board was without jurisdiction to enter a posthumous disability retirement claim, but rather had a mandatory duty under the preretirement death benefit annuity (W.Va. Code §5-10-27(b)) to grant her the preretirement death benefit annuity. The Board filed an Answer to Mrs. Akers’ Cross-Claim and thereafter asserted a cross-claim against her for all of her payment of benefits and asserted West Virginia Code §5-10-44 as the authority. (Vol. II, App 101). This section applies only to underpayments and overpayments

made by either the employee or the employer to the Board. It does not apply to any payments made by the Board to the surviving spouse.

SUMMARY OF ARGUMENT

West Virginia Code §5-10-27(b)(1) mandates that the Board award Judy Akers the preretirement death benefit annuity earned by her deceased husband, Danny Akers. The Board had no authority to enter into a posthumous disability retirement on March 3, 2010, because the disability retirement statute, §5-10-25, is discretionary and not mandatory. WV CSR §162-2-2 did not provide any authority to grant a posthumous disability retirement until it was amended on July 6, 2012. The other rule the Board relied upon, CSR §162-5-19.2, was not in existence until April 12, 2010.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The issues in this appeal are a matter of statutory construction and as a result, oral argument should not be necessary. Additionally, Judy Akers believes that the facts and legal arguments should be adequately presented in the Briefs and the record on appeal and that the decisional process would not be significantly aided by oral argument.

ARGUMENT

STANDARD OF REVIEW

The legal issue in this case is the application and interpretation of two statutes, §5-10-24 and §5-10-27, along with the pertinent rules and regulations. This Court has previously held that “interpreting a statute or administrative rule or regulation presents a purely legal question subject to *de novo* review. See Syl.Pt.1, Appalachian Power Company v. Tax Department, 468 S.E.2d 424 (W.Va. 1995). Thus, the standard of review is *de novo*.

DISCUSSION

Judy Akers' appeal concerns the rulings of the lower court as contained in paragraphs 45, 46, 47, and 48. (Vol. I, App 1, Pgs. 17-18). It is clear that the lower court engaged in no independent analysis of the issues raised in the various motions for summary judgments and responses thereto. The Board's proposed order was entered verbatim by the lower court with the exception of the word "PROPOSED" eliminated and "FINAL" written in. (Vol. I, App 1).

The lower court found that West Virginia Code §5-10-25 (disability retirement) and West Virginia C.S.R. §162-5-19.2 mandate that the Board grant a disability retirement on March 3, 2010, to the active employee, Danny Akers, three months after his death on December 16, 2009.

The authority the Board cited in support of its decision to grant a posthumous disability retirement rather than a preretirement death benefit annuity was set forth as follows in the Board's answers to Petition/Plaintiff Jones' interrogatories,

"QUESTION 12. Specify why the CPRB has awarded and is paying to Respondent Judy Vannoy Akers survivor benefits under the disability retirement provisions in West Virginia Code 5-10-25 instead of survivor benefits under the pre-retirement death annuities provisions of West Virginia Code 5-10-27.

ANSWER: W.Va. Code §5-10-25 provides that the Board shall retire a member or former member who is totally and permanently incapacitated for employment by reason of a personal injury or disease 'upon application.' W.Va. Code R. §162-5-19.2 further provides that disability payments commence effective the first day of the month following application or the first day of the month following termination of employment and benefits, whichever occurs last. W.Va. Code R. §162-5-19.2 also provides that the Board shall process a disability retirement annuity as soon as administratively feasible upon receipt of properly executed forms. The Board received Mr. Akers' application for a disability retirement annuity on September 15, 2009, and was therefore required by law to proceed with processing the application and once approved, was required by law to commence the payments effective January 1, 2010." (Vol. I, App 267).

**THE WEST VIRGINIA DISABILITY RETIREMENT STATUTE §5-10-25
IS PERMISSIVE AND DISCRETIONARY.**

The West Virginia Legislature has provided for their public employees who become incapacitated for further employment with the State of West Virginia to be allowed a disability retirement. The language of the disability retirement statute in West Virginia is as follows,

“Upon the application of a member of the retirement system . . . who becomes totally and permanently incapacitated for employment by reasons of personal injury or disease **MAY be retired by the Board. . .”**
(Emphasis added). West Virginia Code §5-10-25(a).

There is no provision in the disability retirement statute (§5-10-25(a)) for the granting of disability retirement to an employee who is dead.

Danny Akers did not attain disability retirement while in the employment of the Department of Highways because his death terminated the employment relationship. See 56 C.J.S. Master and Servant, Section 68, at 423. See also Wong v. The Boeing Company, 618 P.2d 788 (1980). It is undisputed that Danny Akers was receiving pay from the Department of Highways, including donated leave from his co-workers up and to the time of his death on December 16, 2009. (Vol. I, App 171).

**THE APPLICATION OF THE WEST VIRGINIA PRERETIREMENT DEATH BENEFIT STATUTE
(W.VA. §5-10-27) IS MANDATORY IN THIS CASE**

The West Virginia Legislature provided for the death of one of its public employees prior to retirement in a separate statute. See West Virginia Code §5-10-27, et seq. Since the decedent, Danny Akers, was 53 at the time of his death, he was not eligible for retirement. Since he died prior to the awarding of the disability retirement and prior to obtaining the age of 55, and had over ten years of credited service, his preretirement death benefits are governed by West Virginia Code §5-10-27(b)(1) as follows,

“In the event any member who has ten or more years of credited service, or any former member with ten or more years of credited service and who is entitled to a deferred annuity, pursuant to section twenty-one of this article: Dies; and leaves a surviving spouse, the surviving spouse shall immediately receive an annuity computed in the same manner in all respects as if the member

had: (A) Retired the day preceding the date of his or her death, notwithstanding that he or she might not have attained age sixty or sixty-two years, as the case may be; (B) elected option A provided in section twenty-four of this article; and (C) nominated his or her surviving spouse as beneficiary.” (Emphasis added). West Virginia Code §5-10-27(b)(1).

The above operative words are “the surviving spouse shall immediately receive an annuity”. Thus, the surviving spouse, Judy Akers’, right to the pre-retirement death benefits as contained within West Virginia Code §5-10-27(b)(1) vested in Judy Akers when her husband, Danny Akers, a non-retired, non-disabled employee, died on December 16, 2010. See Hopkins v. AT&T Global Information Solutions, 105 F.3d 153 (1997).

The principles of statutory construction are clear and unambiguous. Both federal and state courts have recognized the two principles of statutory interpretation, (1) the principle that courts “must give effect to every word of a statute”, and (2) the principle that specific language in a statute governs general language.” See Broughman v. Carver, 624 F.3d 670 at 677 (4th Cir. Ct. of App. 2010). See also Parsons v. Marvin, 140 W.Va. 20 (1954).

“A statute is to be applied as written, not construed, where the intention thereof is made clear by the language used when considered in its proper context as it relates to the subject matter dealt with.” Appalachian Electric Power Company v. Kuntz, 76 S.E.2d 863, *ibid* at Syl. Pt. 1.

The disability retirement contained in West Virginia Code §5-10-25 is a discretionary, or general, rule wherein it states that upon application of a member (Danny Akers) of the retirement system . . . who becomes totally and permanently incapacitated for employment by reason of personal injury or disease “may be retired by the Board. . .”. Whereas the pre-retirement death annuity statute, West Virginia Code §5-10-27 specifically says in §(b)(1), “In the event any member who has ten or more years. . . dies; and leaves a surviving spouse, the surviving spouse shall immediately receive an annuity. . .”

The Board ignored the mandatory granting of pre-retirement death annuity to the widow, Judy

Akers, in favor of the permissive grant of a disability retirement after death, in clear violation of the aforesaid statute and rules and regulations of the Board. West Virginia, as in many other states, has recognized the right of a widow to receive benefits from their non-disabled, non-retired husband. Mongold v. Mayle, 192 W.Va. 353 (1994) (W.Va. Code §42-3-1, et seq.); Lagoie v. Bellomy, 129 W.Va. 685 (1947), (W.Va. Code §43-1-12); Worker's Compensation Death Benefits State ex rel Chris v. Cline, 209 W.Va. 202 (2006).

In fact, in regard to the municipal retirements for policemen and firemen, West Virginia Code §8-22-26(a)(2) provides that the surviving spouse, in regard to death benefits, receives them until her or his death, just like West Virginia Code §5-10-27(b)(1).

THE BOARD ALSO RELIED UPON W.VA. CODE R. §162-5-19.2 AS AUTHORITY FOR GRANTING THE DECEASED, DANNY AKERS, POSTHUMOUS DISABILITY RETIREMENT. (Vol. I, App 255, 259).

CSR §162-5-19.2 did not exist until April 12, 2010. (See Vol. I, App 255, 259). Danny Akers applied in 2009 for his disability retirement and also died in 2009. The Rule in effect in 2009 under §162-5-19 was as follows,

“19.1 Any employee or former employee of a participating public employer who files his or her application for benefits and who may become eligible for benefits or who was eligible for benefits upon terminating his or her employment and files his or her application for benefits within one year after becoming otherwise eligible to receive retirement benefits, shall receive benefits accumulated as otherwise provided for in West Virginia Code §5-10, et seq. commencing the end of the month following the month after which he or she was last on the payroll of a participating public employer. Notwithstanding anything in this rule to the contrary, distribution shall be made in accordance with the provisions of West Virginia Code §5-10-27(b).” (Emphasis added).

When West Virginia Code Rule §162-5, et seq. was amended on April 12, 2010, the rules specifically acknowledge the preretirement survivor annuity in §162-5-19.3. This rule provides as follows,

“If a member dies prior to retirement and a survivor annuity is payable pursuant to West Virginia Code 5-10-27, the survivor annuity payout shall commence effective the first day of the month following the death of the member on the first day of the month following the last date the member is on the participating public employees’ payroll, whichever occurs last. Upon receipt of the properly executed form from the survivor, the Board shall process the survivor annuity as soon as administratively feasible.” (Emphasis added). (Vol. I, App 255, 259)

This rule is mandatory and follows the mandatory language of West Virginia Code §5-10-27. The Board completely overlooked the aforesaid Rule 19.3, but rather cited Rule §162-5-19.2 requiring the Board to issue a posthumous disability annuity. That section actually says the following,

**“19.2 Disability Retirement Annuity.
Disability payments will commence for any employee or former employee of a participating public employer who is approved for disability retirement annuity effective the first day of the month following application or the first day of the month following termination of employment and benefits, whichever occurs last. Upon receipt of properly executed forms submitted by the disability retiree as required pursuant to the Consolidated Public Retirement Board’s rule, Benefit Determination and Appeal, 162 C.R.S. 2, the Board shall process the disability retirement annuity as soon as administratively feasible.” (Emphasis added).**

Nowhere in that section is there any indication what happens if the employee dies prior to the approval of his disability retirement application. In fact, the language suggests (upon receipt of properly executed forms submitted by the disability retiree) implies that the disability retiree is alive. It is clear that Rule §162-5-19.2 applies only to the disability retiree and not to the surviving spouse. The subsequent Rule, §162-5-19.3, then states what the Board will do if a member dies prior to retirement and a survivor annuity is payable pursuant to West Virginia Code §5-10-27. Thus, the Rules determine what is to be done upon a deceased non-retired employee who leaves a survivor. (“Upon receipt of properly executed forms from the survivor, the Board shall process the survivor annuity as soon as administratively feasible.”).

THE DISABILITY RETIREMENT STATUTE §5-10-25 AND THE PRERETIREMENT DEATH BENEFIT STATUTE §5-10-27 HAS NEVER ADDRESSED POSTHUMOUS DISABILITY RETIREMENT. IN FACT, THE FIRST TIME THE RULES ADDRESS POSTHUMOUS DISABILITY RETIREMENT WERE WHEN THE RULES FOR DISABILITY RETIREMENT CONTAINED WITHIN §162-2, ET SEQ., WERE AMENDED ON JULY 6, 2012, BY THE ADDITION OF 162-2-2.4.

This amended Rule, when filed On July 6, 2012, added a new section, 2.4. This section provides,

“When an application for disability retirement has been submitted by a member of the public employees retirement system or teachers retirement system who is ultimately determined by the Consolidated Public Retirement Board to have met all the disability requirements including an informative opinion by a Board approved physician, but who dies before the application is approved by the Board, the Board shall process the disability application and pay benefits as though the applicant were still alive and elected 100% joint and survivor disability annuity naming his or her surviving spouse. If the member was not married at the time of his or her death, the named beneficiary or beneficiaries shall be paid in accordance with his or her pre-retirement beneficiary form.” (Vol. I, App 242-243).

The disability retirement rule in effect on June 4, 2009, was silent as to any posthumous disability retirement. (See Vol. I, App 237). There was no §2.4. What remained in effect as to the rules of disability retirement §162-2-4 in both 2009 and continued with the amendment in 2012 was Rule §4.1 and §4.2. Section 162-2-4 entitled, “Initial Determination”, documents a two-step process in order to receive a disability retirement. First, the full Board shall consider the recommendation of the Board Review Committee and “is free to make any finding consistent with the facts.” Section 162-2-4.2 states that following the Board’s approval of disability retirement an applicant of a defined benefit retirement system shall submit all required forms to the Board within six months to commence his or her disability retirement annuity. (Vol. I, App 239). As one can see, this language infers that the applicant is alive.

THE BOARD IS REQUIRED TO FOLLOW THE RULES IN EFFECT IN 2009.

A change in the rules has been addressed by this Court in the recent case of West Virginia Consolidated Public Retirement Board v. Benny Jones, decided and filed on June 11, 2014, No. 13-

0937. In that case, this Court was reviewing the application of the *doctrine of equitable estoppel* as applied in Hudkins v. Public Retirement Board, 220 W.Va. 275, 647 S.E.2d 711 (2007). In the Hudkins case, Ms. Hudkins, at the time of separation from her employment with DHHR, had not yet reached 55 years of age and was not eligible for immediate retirement benefits under PERS (just like Danny Akers). Ms. Hudkins confirmed her right to convert her accumulated sick leave to service credit with the Board. (In the case at bar, Danny Akers continued to use his sick leave and also received donated sick leave from his fellow employees during the period of time that he was fighting for his life.) Two years after Ms. Hudkins' separation from her DHHR employment, the Board told her that she could not convert her sick leave to service credit. Therefore, the Board denied the same, but the Circuit Court found the elements of *equitable estoppel* were met and reversed the Board's denial. This Court then affirmed the reversal of the Board's denial and opined that Ms. Hudkins had established the elements of *equitable estoppel* based upon a Board employee having so advised her and the Board's long history of extending service credit for unused leave. The relevant and very significant portion of this Court's decision in Hudkins was the fact that the Board's rules were silent on the issue of conversion of sick leave to service credit when Ms. Hudkins separated from her employment with DHHR. (Just as in the case at bar, the Board's rules were silent as to posthumous disability retirement benefits when Danny Akers died in 2009.) In Hudkins, this Court stated,

“Furthermore, we note that since the Board had not even addressed in their rules the matter of unused sick leave credits until 2002 – more than two years following Ms. Hudkins' separation from her employment, Ms. Hudkins could not have been aware of the methodology used by the Board even if she had thoroughly examined the Board's rules.” Hudkins, *ibid.*, 647 S.E.2d at 717.

In the Benny Jones case, No. 13-0937, *ibid.*, the Board initially told Mr. Jones that he could be reinstated into the PERS program by paying the various contributions necessary in the plan. He did so. This Court then denied Mr. Jones his right to participate in the Public Employees Retirement

system on the basis that his employer told him he could participate wherein the facts of that case indicated that the Board initially told him he could participate. See Jones, id. at page 2 of the decision.

Although the facts of the case at bar do not raise the elements of *equitable estoppel*, the Jones case is significant because it concerned the interpretation of both the retirement statutes contained in West Virginia Code §5-10, et seq., and the rules of the Board contained in West Virginia C.S.R. §162, et seq.

**NEITHER WEST VIRGINIA CODE §5-10-25 NOR WEST VIRGINIA CODE §5-10-27(b)(1)
ARE AMBIGUOUS**

The Kanawha County Circuit Court's Final Order contains no finding that either West Virginia Code §5-10-24 or §5-10-27(b)(1) were ambiguous. As our Court has held, "A statute is ambiguous when the statute's language connotes doubtfulness, doubleness of meaning, or indistinctness or uncertainty of an expression." See United States Automobile Association v. Kimberly Lucas, January, 2014 Term of this Court, Appeal No.12-1500, filed February 4, 2014, citing Crockett v. Andrews, 172 S.E.2d 384, 387 (W.Va. 1970). Neither statute is susceptible of two or more constructions or have such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to their meaning. See Hereford v. Meek, 52 S.E.2d 740, 747 (W.Va. 1949). West Virginia Code §5-10-25, Disability Retirement, applies to people who are disabled while still employed and an active member of the retirement plan. West Virginia Code §5-10-27(b)(1) applies when an active employee dies preretirement with an actual surviving spouse.

Even though a court in West Virginia has never found West Virginia Code §5-10-25 nor §5-10-27(b)(1) as ambiguous, this Court has recognized that interpretations by the agency enforcing the statute are entitled to great weight and will not be disregarded unless it is clear that such construction by the agency is erroneous. See Evans v. Hutchinson, 214 S.E.2d 453, 456 (W.Va.

1975).

West Virginia Code §5-10-1, et seq. provides the Board with the powers to issue rules and regulations to assist in its task of providing retirement benefits to its members. This Court has decided that during its *de novo* review should examine a regulatory interpretation of a statute that includes deference to agency expertise and discretion. See Appalachian Power Co. v. State Tax Dept. of W.Va., 466 S.E. 2d at 43. This Court has gone on to hold that,

“Our law is clear that, ‘Once a disputed regulation is legislatively approved, it has the force of a statute itself. Being an act of the West Virginia Legislature, it is entitled to more than mere deference; it is entitled to controlling weight.’” See USAA v. Lucas, *ibid.* See also Syl.Pt.2, in part, West Virginia Health Care Cost Review Auth. v. Boone Mem’l Hospital, 472 S.E.2d 411 (W.Va. 1996).

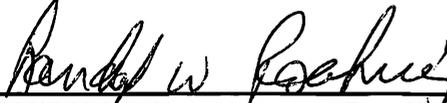
Therefore, in the case at bar, since the rules allowing a posthumous disability retirement were not added or adopted until July 6, 2012, the Board had no authority, statutorily, administratively, or otherwise, to grant Danny Akers a posthumous disability retirement benefit.

West Virginia Code §5-10-25 (disability retirement statute) and West Virginia Code §5-10-27(b)(1) (preretirement death benefit statute) have never contained any authority, nor did they ever recognize or allow a posthumous granting of a disability retirement until the rules were amended on July 6, 2012. (Vol. I, App 242).

CONCLUSION

For the reasons and analysis as stated above, the Circuit Court of Kanawha County erred and wrongfully denied Danny Akers’ widow, Judy Vannoy Akers, her right to preretirement death benefit annuity as provided for and mandated by West Virginia Code §5-10-27(b)(1). It is hereby requested that this Court enter an Order requiring the Board to enter a prospective order only granting Judy Akers a preretirement death benefit annuity pursuant to §5-10-27(b)(1), and for any and such other relief as the nature of this appeal may require.

RESPECTFULLY SUBMITTED,



RANDAL W. ROAHRIG (WV Bar #3121)
Counsel of Record for Petitioner Judy Vannoy Akers

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of December, 2014, true and accurate copies of the foregoing **PETITIONER JUDY VANNOY AKERS' BRIEF** were deposited in the U.S. Mail contained in postage-paid envelopes addressed to counsel for all other parties to this appeal as follows:

Anthony R. Veneri, Esq.
Veneri Law Offices
1600 W. Main Street
Princeton, WV 24740

Lenna R. Chambers, Esq.
Bowles, Rice, McDavid, Graff & Love LLP
P. O. Box 1386
Charleston, WV 25325-1386



RANDAL W. ROAHRIG - WV BAR #3121
Counsel of Record for Petitioner