

**SUPREME COURT NO.: 11-1722
BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

CYNTHIA S. LEWIS,)
PETITIONER,)
v.)
INSURANCE COMMISSIONER OF WV)
IN ITS CAPACITY AS ADMINISTRATOR)
OF THE OLD FUND,)
RESPONDENT,)
and)
TRINITY MEDICAL CENTER WEST, INC.,)
EMPLOYER.)

**B.O.R. APPEAL NO.: 2045919
CLAIM NO.: 960022062
BOR ORDER DATE: 11/14/2011**

**RESPONSE TO PETITION FOR APPEAL ON BEHALF
OF THE OFFICE OF INSURANCE COMMISSIONER**

**OFFICE OF INSURANCE
COMMISSIONER OLD FUND,**

By Counsel,

**Jack M. Rife
State Bar No. 7782**

**Workers' Compensation Litigation Division
Post Office Box 4318
Charleston, West Virginia 25364
(304) 558-0708**

January 13, 2012

IV. ARGUMENT

The decision of the BOR should be affirmed because no reversible error was committed and the decision is correct as a matter of law.

Standard of Review

W.Va. Code §23-5-15 sets forth the standard of review of an appeal before this Court.

(b) In reviewing a decision of the board of review, the supreme court of appeals shall consider the record provided by the board and give deference to the board's findings, reasoning and conclusions, in accordance with subsections (c) and (d) of this section.

(c) If the decision of the board represents an affirmation of a prior ruling by both the commission and the office of judges that was entered on the same issue in the same claim, the decision of the board may be reversed or modified by the supreme court of appeals only if the decision is in clear violation of constitutional or statutory provision, is clearly the result of erroneous conclusions of law, or is based upon the board's material misstatement or mischaracterization of particular components of the evidentiary record. The court may not conduct a de novo re-weighing of the evidentiary record. If the court reverses or modifies a decision of the board pursuant to this subsection, it shall state with specificity the basis for the reversal or modification and the manner in which the decision of the board clearly violated constitutional or statutory provisions, resulted from erroneous conclusions of law, or was based upon the board's material misstatement or mischaracterization of particular components of the evidentiary record.

W.Va. Code §23-5-15.

Argument

The Board of Review correctly affirmed the Office of Judge's decision which properly denied the request for consideration of additional permanent partial disability pursuant to W.Va. Code §23-4-16(a)(2).

"[T]he commission shall disburse the workers' compensation fund to the employees of employers subject to this chapter who have received personal injuries in the course of and resulting from their covered employment"
W.Va. Code §23-4-1. There are three elements which must be proved by the claimant in order for a claim to be held compensable: (1) a personal injury; (2) received in the course of employment; and (3) which resulted from that employment. Barnett v. State Workmen's Compensation Commissioner, 153 W.Va. 796, 172 S.E.2d 698 (1970). There must be a causal connection between the claimant's injury and the claimant's employment. Emmel v. State Compensation Director, 150 W.Va. 277, 145 S.E.2d 29 (1965); Deverick v. State Compensation Director, 150 W.Va. 145, 144 S.E.2d 498 (1965).

"A claimant in a workmen's compensation proceeding has the burden of proving his claim." Staubs v. State Workmen's Compensation Commissioner, 153 W.Va. 337, 168 S.E.2d 730 (1969); Sowder v. State Workmen's Compensation Commissioner, 155 W.Va. 889, 189 S.E.2d 674 (1972). "Where proof offered by a claimant to establish his claim is based wholly on speculation, such proof is unsatisfactory and is inadequate to sustain the claim." Clark v. State Workers' Compensation Commissioner, 155 W.Va. 726, 187 S.E.2d 213 (1972).

W.Va. Code §23-4-1g(b) states;

[e]xcept as provided in subsection (a) of this section, a claim for compensation filed pursuant to this chapter must be decided on its merit and not according to any principle that requires statutes governing workers' compensation to be liberally construed because they are remedial in nature. No such principle may be used in the application of law to the facts of a case arising out of this chapter or in determining the constitutionality of this chapter.

Further, that same section sets forth the standard for the evaluation of evidence in subsection (a) which states:

For all awards made on or after the effective date of the amendment and reenactment of this section during the year two thousand three, resolution of any issue raised in administering this chapter shall be based on a weighing of all evidence pertaining to the issue and a finding that a preponderance of the evidence supports the chosen manner of resolution. The process of weighing evidence shall include, but not be limited to, an assessment of the relevance, credibility, materiality and reliability that the evidence possesses in the context of the issue presented. Under no circumstances will an issue be resolved by allowing certain evidence to be dispositive simply because it is reliable and is most favorable to a party's interests or position. If, after weighing all of the evidence regarding an issue in which a claimant has an interest, there is a finding that an equal amount of evidentiary weight exists favoring conflicting matters for resolution, the resolution that is most consistent with the claimant's position will be adopted.

The BOR Correctly Affirmed the OOJ Decision Finding that the Claimant's Request for an Evaluation and Consideration of Additional Permanent Partial Disability is Time Barred under W.Va. Code §23-4-16(a)(2).

The Board of Review correctly affirmed ALJ Armstrong's decision of March 16, 2011. In short, the decision is not wrong as a matter of law. The evidence before ALJ Armstrong demonstrated that the request for an evaluation for the purpose of determining additional permanent partial disability

for the recently added compensable condition of disturbance of salivary secretions was time barred.

The statutory framework governing this dispute is set forth in W.Va. Code §23-4-16 which provides that in any claim in which an award of permanent disability was made, any reopening request must be made within five years of the date of the initial award. As noted above, the facts essentially are not in dispute. The Claimant was initially granted permanent partial disability in this claim by order dated October 25, 2001 which also closed this claim for additional permanent partial disability benefits. Therefore, future requests for consideration of additional permanent partial disability were to be submitted pursuant to the statutory deadlines for filing requirements under W.Va. Code §23-4-16 because they were efforts to reopen this claim for a modification, change or reopening of a prior award. Under the statutory framework set forth in W.Va. Code §23-4-16 a request for additional permanent partial disability had to be submitted on or before October 25, 2006. It is undisputed that the Claimant sought to have an evaluation for the purpose of ascertaining additional permanent partial impairment by letter dated January 15, 2009. The request for an evaluation was not submitted on or before October 25, 2006; as such, the request was not timely filed pursuant to W.Va. Code §23-4-16(a)(2).

The Claimant urges that the Court reverse both the BOR and the OOJ arguing that W.Va. Code §23-4-16(a)(2) does not govern this dispute and alleges that the Claimant's request for a permanent partial disability evaluation

is not a request for additional permanent partial disability. The fundamental flaw in the Claimant's logic rests in the mistaken conclusion noted in his brief that "it can hardly be said that the claimant's claim was closed by final order on October 25, 2001." Indeed, that is exactly what happened. As noted above, the order of October 25, 2001 did in fact clearly and expressly grant the initial award of permanent partial disability and then closed this claim for permanent partial disability benefits. Thus, W.Va. Code §23-4-16(a)(2) is controlling with respect to any subsequent requests for consideration of additional impairment.

The Claimant further argues that this claim is not time barred pursuant to Bowers v. West Virginia Office of the Insurance Commissioner, 686 S.E.2d 49 (W.Va. 2009); *citing*, Bowman v. Workmen's Compensation Commissioner, 148 S.E.2d 708 (W.Va. 1966). However, the Claimant's reliance upon these decisions is misplaced. Again, the order of October 25, 2001 did close this claim for permanent partial disability benefits; therefore there is no question with respect to the beginning date for the running of the statutory period for reopening for additional permanent partial disability. Moreover, contrary to Claimant's charge that the period for reopening is extended where "there has been a subsequent increase to the original permanent partial disability award", the simple fact is that this protest is governed by the amended version of W.Va. Code §23-4-16(a)(2) with a date of injury or date of last exposure on or after May 12, 1995. The currently enacted version of our reopening statute eliminated the provision extending the period for filing of a reopening application upon the granting of any subsequent increase in the initial

permanent partial disability award. Thus, the granting of any additional or subsequent awards of permanent partial disability is irrelevant and does not operate to extend the tolling of the statute of limitations for reopening requests in this claim.

V. CONCLUSION

The Worker's Compensation Board of Review and the Office of Judges were correct to affirm the Claim Administrator order denying the Claimant's request for an evaluation for consideration of additional permanent partial impairment. The Board of Review decision of November 14, 2011 should be affirmed.

INSURANCE COMMISSIONER OF WV
IN ITS CAPACITY AS ADMINISTRATOR
OF THE OLD FUND

By counsel,



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V.

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EMPLOYER.

CERTIFICATE OF SERVICE

I, Jack M. Rife, Legal Counsel to the Office of Insurance Commissioner Old Fund, do hereby certify that copies of the foregoing "*Response to Petition for Appeal*" and "*Commissioner's Appendix of Documents*" were served upon the parties of record this 13th day of January, 2012, by United States Mail, to the following persons properly addressed as follows:

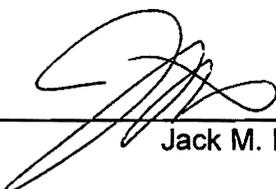
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