

BEFORE THE STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

COPY

DEXTER L. GORE,

Petitioner,

SUPREME COURT NO.:

v.

BOONE COUNTY PARKS AND RECREATION
COMMISSION,

and

THE INSURANCE COMMISSIONER OF
WEST VIRGINIA in its capacity as
ADMINISTRATOR OF THE OLD FUND,

Respondents.

Appeal No.: 2045475
Judicial Claim No: 990055401
Bd. of Rev. Order: 03/31/2011



BRIEF ON BEHALF OF THE
PETITIONER, DEXTER L. GORE

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Respondents.

I. ISSUE ON APPEAL

Whether the claimant is entitled to an additional 5% permanent partial disability award.

II. STATEMENT OF THE CLAIM

The claimant injured his low back and hip on March 1, 1999, while lifting cinderblocks. By order dated April 5, 1999, the Claims Administrator ruled the claim compensable and subsequently authorized surgery.

Dr. Ramanathan Padmanaban examined the claimant on October 27, 2009, at the request of the Claims Administrator. Forward flexion was reduced to 50 degrees. Sacral hip flexion angle was limited to 20 degrees. True lumbar extension was 20 degrees with sacral hip extension angle of 5 degrees. True lumbar lateral flexion was 20 degrees to the left and right. Using the range of motion model from the AMA Guides to the Evaluation of Permanent Impairment, 4th Edition, Dr. Padmanaban diagnosed a 9% wholeperson impairment for lost range of motion. He also

concluded that the claimant satisfied the diagnostic criteria for AMA Table 75 Category IIE which provides for an additional 10% wholeperson medical impairment rating for any claimant who has a “surgically treated disc lesion with residual medical documented pain and rigidity...” Combining the 9% wholeperson medical impairment rating for lost motion with the 10% rating based upon Table 75 criteria, Dr. Padmanaban diagnosed an 18% wholeperson medical impairment related to the claimant’s injury on March 1, 1999. (Exhibit A).

West Virginia Code §23-4-6(i) provides “once the degree of medical impairment has been determined that degree of impairment shall be the degree of permanent partial disability that shall be awarded to the claimant.” (emphasis added).

Dr. Padmanaban did not recommend an 18% permanent partial disability award as directed in nondiscretionary terms by West Virginia Code §23-4-6(i). Instead, he proceeded to reduce the 18% impairment recommendation to 13%. In so doing, Dr. Padmanaban relied upon Workers’ Compensation Rule 85-20-64.1 which provides that any “permanent partial disability assessment in excess of the range provided in the appropriate category as identified by the rating physician shall be reduced to the (sic) within the range set forth below [in Table 85-20-a, b, or c].”

Dr. Padmanaban reported that the claimant’s lumbar spine diagnosis would be classified within Lumbar Category III of Table 85-20-C. That Table provides for low back injuries to be compensated with a permanent partial disability award not to exceed 13%.

By order dated January 13, 2010, the Claims Administrator granted the claimant a 13% permanent partial disability award. The claimant protested and introduced a Closing Argument dated January 14, 2011, enunciating the legal basis for the claimant’s position that he should be granted an additional 5% permanent partial disability award for a total of 18%. (Exhibit B).

By decision dated January 4, 2011, the Office of Judges affirmed the Claims Administrator’s order dated January 13, 2010, granting a 13% permanent partial disability award.

(Exhibit C). The claimant appealed. By order dated March 31, 2011, the Board of Review affirmed the Office of Judges' decision granting the claimant a 13% permanent partial disability award. (Exhibit D). It is from this order that the claimant appeals.

III. LEGAL AUTHORITIES

Anderson & Anderson Contractors, Inc. v. Latimer,
162 W.Va. 803, 807-08, 257 S.E.2d 878, 881 (1979) (citing
Sheppe v. West Virginia Bd. of Dental Exmrs.,
147 W.Va. 473, 128 S.E.2d 620 (1962)).

Appalachian Power Co. v. State Tax Dep't of West Virginia,
195 W.Va. 573, 466 S.E.2d 424 (1995)

CNG Transmission Corp. v. Craig,
___ W.Va. ___, ___ S.E.2d (No. 29996, Apr. 26, 2002)

Maikotter v. University of West Virginia Bd. of Trustees/West Virginia Univ.,
206 W.Va. 692, 527 S.E.2d 802 (1999).

Phillip Leon M. v. Greenbrier County Bd. of Educ.,
199 W.Va. 400, 404, 484 S.E.2d 909, 913 (1996),
200 W.Va. 521, 490 S.E.2d 340 (1997). Accord Syl. pt. 1

Repass v. Workers' Compensation Division,
212 W.Va. 86, 569 S.E.2d 162 (2002)

Rowe v. W.Va. Dept. of Corrections,
170 W.Va. 230, 292 S.E.2d 650 (1982)

Simpson v. WVOIC,
678 S.E.2d 1 (W.Va. 2009)

State ex. rel. McKenzie v. Workers' Compensation Commissioner,
___ W.Va. ___, ___ S.E. ___ (No. 29645, June 28, 2002)

West Virginia Code § 23-4-6(i)

West Virginia Code §§23-5-15(b-c)

IV. ARGUMENT

When the West Virginia Supreme Court grants an appeal from the Workers' Compensation Board of Review, review of the Board's final order is guided by West Virginia Code §23-5-15 (2005) which directs that:

(b) [i]n 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[.]

(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.

West Virginia Code §§23-5-15(b-c).

The specific issues raised in this appeal concern interpretation of statutes and rules. To questions of law, the Court applies de novo review. Phillip Leon M. v. Greenbrier County Bd. of Educ., 199 W.Va. 400, 404, 484 S.E.2d 909, 913 (1996), 200 W.Va. 521, 490 S.E.2d 340 (1997). Accord Syl. pt. 1, Appalachian Power Co. v. State Tax Dep't of West Virginia, 195 W.Va. 573, 466 S.E.2d 424 (1995).

When rules of an agency come into conflict with a West Virginia statute, the statute must control:

Any rules or regulations drafted by an agency must faithfully reflect the intention of the Legislature, as expressed in the controlling legislation. Where a statute contains clear and unambiguous language, an agency's rules or regulations must give that language the same clear and unambiguous force and effect that the language commands in the statute.

Syl. pt. 4, Maikotter v. University of West Virginia Bd. of Trustees/West Virginia Univ., 206 W.Va. 692, 527 S.E.2d 802 (1999). Or in other words: "Although an agency may have power to

promulgate rules and regulations, the rules and regulations must be reasonable and conform to the laws enacted by the Legislature.” Anderson & Anderson Contractors, Inc. v. Latimer, 162 W.Va. 803, 807-08, 257 S.E.2d 878, 881 (1979) (citing Sheppe v. West Virginia Bd. of Dental Exmrs., 147 W.Va. 473, 128 S.E.2d 620 (1962)).

The power of the Legislature is paramount when a court is faced with a conflict between a statute and a rule:

It is fundamental law that Legislature may delegate to an administrative agency power to make rules and regulations to implement the statute under which the agency functions. In exercising that power, however, an administrative agency may not issue a regulation which is inconsistent with, or which alters or limits its statutory authority.

Syl. pt. 3, Rowe v. W.Va. Dept. of Corrections, 170 W.Va. 230, 292 S.E.2d 650 (1982); accord, CNG Transmission Corp. v. Craig, ___ W.Va. ___, ___ S.E.2d (No. 29996, Apr. 26, 2002). State ex. rel. McKenzie v. Workers’ Compensation Commissioner, ___ W.Va. ___, ___ S.E. ___ (No. 29645, June 28, 2002). Though the courts have the power to harmonize a rule with an ambiguous statute, we must follow the will of the Legislature when expressed with clarity. “The judiciary is the final authority on issues of statutory construction, and we are obliged to reject administrative constructions that are contrary to the clear language of a statute.” Syl. pt. 5, CNG Transmission Corp. v. Craig, ___ W.Va. ___, ___ S.E.2d (No. 29996, Apr. 26, 2002).

In instances where an agency rule addresses some issue that is already the subject of Legislative action, “[i]f the intention of the Legislature is clear, that is the end of the matter, and the agency’s position only can be upheld if it conforms to the Legislature’s intent. Syl. pt. 3, in part, Appalachian Power Co. v. State Tax Dep’t of West Virginia, 195 W.Va. 573, 466 S.E.2d 424 (1995).

The same standard must be applied to the rule in this case. A rule promulgated by the Board of Managers that mandates the use of a non-legislatively created guide for the examination of certain injuries is valid only to the extent that the mandated guide does not conflict with the specific dictates of the Legislature as expressed by statute. Those aspects of the mandated guide that are in conflict are invalid.

West Virginia Code §23-4-6(i) provides in relevant part as follows:

The degree of permanent disability other than permanent total disability shall be determined exclusively by the degree of whole body medical impairment that a claimant has suffered... . Once the degree of medical impairment has been determined, that degree of impairment shall be the degree of permanent partial disability that shall be awarded to the claimant. (emphasis added).

Although the Legislature gives the Commission authority to “adopt standards for the evaluation of claimants and the determination of a claimant’s degree of whole body medical impairment” the Legislature clearly intended that a claimant be compensated based upon medical impairment personal to him. Each claimant is to be compensated commensurate with the degree of his medical impairment. Not some preconceived estimate of impairment based upon diagnosis codes. Tables 85-20-a, b and c base permanent partial disability awards upon diagnosis rather than actual wholeperson medical impairment specific to the claimant. Similar diagnosis related estimates of impairment have already been considered by the Court and found to be in direct conflict with specific unambiguous Workers’ Compensation statutes. Repass v. Workers’ Compensation Division, 212 W.Va. 86, 569 S.E.2d 162 (2002). In Repass, the Court concluded that a Diagnosis Related Estimate Model of permanent partial disability conflicts with “the proper time for making an impairment rating, the proper treatment of progressive injuries, the procedure for reopening a claim, and the consideration of a second injury.” The Court ruled that any medical examination conducted using a Diagnosis Related Estimate of impairment is “invalid and unreliable.”

West Virginia Code §23-4-6(i) clearly directs that “Once the degree of medical impairment has been determined that degree of impairment shall be the degree of permanent partial disability that shall be awarded to the claimant.” This code section requires that a claimant’s permanent partial disability award be equal to his wholeperson medical impairment rating, but the Legislature left the method of determining wholeperson medical impairment to the Board of Managers.

The Board of Managers adopted Rule 85-20-64.1 which provides “permanent partial disability assessments shall be determined based on the range of motion models contained in the Guides Fourth.” (emphasis added). The Board of Manager’s decision to determine impairment based upon AMA Range of Motion criteria found in the Fourth Edition of the AMA Guides is well within its discretion to adopt rules to evaluate each claimant’s medical impairment as intended by the Legislature.

Once wholeperson medical impairment has been calculated using the Range of Motion Model of Impairment found in the 4th Edition of the AMA Guides, West Virginia Code §23-4-6(i) directs that the claimant be compensated with a permanent partial disability award in the same amount as the wholeperson medical impairment rating. In this claim, Dr. Ramanathan Padmanaban concluded that the claimant has an 18% wholeperson medical impairment. According to the unambiguous and non-discretionary provisions of West Virginia Code §23-4-6(i), the claimant should have been granted an 18 % permanent partial disability award.

Even though West Virginia Code §23-4-6(i) provides that “permanent partial disability shall be determined exclusively by the degree of whole body medical impairment that the claimant has suffered” the Board of Managers adopted regulations Rule 85-20-64.1 and 64.2 in direct conflict with that statute. Those rules provide as follows:

64.1. Pursuant to West Virginia Code §23-4-3b(b), the Commission hereby adopts the following ranges of permanent

partial disability for common injuries and diseases. Permanent partial disability assessments shall be determined based upon the range of motion models contained in the Guides Fourth. Once an impairment level has been determined by range of motion assessment, that level will be compared with the ranges set forth below. Permanent partial disability assessments in excess of the range provided in the appropriate category as identified by the rating physician shall be reduced to within the ranges set forth below: (emphasis added)

64.2. Lumbar Spine Impairment: The range of motion methodology for assessing permanent impairment shall be used. However, a single injury or cumulative injuries that lead to a permanent impairment to the Lumbar Spine area of one's person shall cause an injured worker to be eligible to received permanent partial disability award with the ranges identified in Table §85-20-C. The rating physician must identify the appropriate impairment category and then assign an impairment rating within the appropriate range designated for that category.

Table 85-20-C Category III permits lumbar injuries to be compensated with a permanent partial disability award from 10% to 13%. Permanent partial impairment above 13% is not granted as an award. Instead, that impairment is disregarded and the claimant's permanent partial disability level is reduced to the unexplained preconceived diagnosis related impairment rating applicable to all claimants with a similar diagnosis regardless of actual wholeperson impairment personal to him. Please note that Tables 85-20 a, b and c are not part of the Fourth Edition of the AMA Guides which provides the standards used in West Virginia Workers' Compensation claims to measure wholeperson impairment. It therefore falls beyond the scope for criteria identified in Rule 85-20-64.1 which can be used to rate wholeperson medical impairment.

Rule 85-20-64.2, Table 85-20-C and that portion of Rule 85-20-64.1 which calls for reduction of permanent partial disability determinations are inconsistent with statutory law and Supreme Court precedent in Repass. Those rules are invalid and should be given no affect.

Please note that the West Virginia Supreme Court in Simpson v. WVOIC, 678 S.E.2d 1 (W.Va. 2009) addressed certain aspects of Rule 85-20 and its tables but the Court was not asked

to address whether Rule 85-20-64.1 and Tables 85-20 a, b and c conflict with the clear unambiguous terms of West Virginia Code §23-4-6(i). As such, the Simpson decision sheds no light upon the issue presently before the Board.

The only medical evidence of record demonstrates a 10% wholeperson medical impairment which West Virginia Code §23-4-6(i) directly equates to a 10% permanent partial disability award.

The Claims Administrator has no valid authority to reduce permanent partial disability awards below wholeperson medical impairment levels. Any rule supporting such action is in direct conflict with West Virginia Code §23-4-6(i). The Office of Judges was clearly wrong to affirm the 13% permanent partial disability award in this claim.

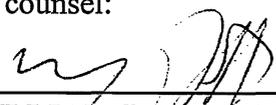
V. CONCLUSION

For the foregoing reasons, please reverse the Board of Review's order dated March 31, 2011, affirming the Office of Judges' decision dated January 4, 2011, and grant the claimant an additional 5% permanent partial disability award for a total of 18%.

Respectfully submitted,

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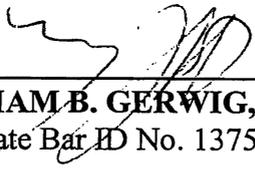
CERTIFICATE OF SERVICE

I, William B. Gerwig, III, do hereby certify that the foregoing "*Brief on Behalf of the Petitioner, Dexter L. Gore*" has been served upon all parties of record by depositing a true and exact copy thereof, via the United States mail, postage prepaid and properly addressed on this 6th day of APRIL 2011, as follows:

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