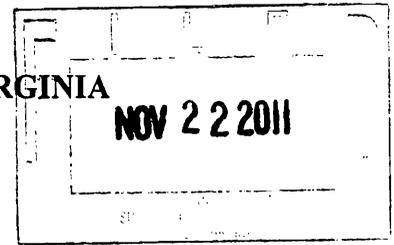


DO NOT REMOVE
FILE COPY
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON



GEORGE C. TURLEY,

Petitioner,

v.

ALLEGHENY ENERGY SERVICE CORPORATION,

Respondent.

Supreme Court No. 11-1452

Appeal No. 2045353

OOJ Case ID: A307-006283

Carrier No. 200706808

**RESPONSE BRIEF ON BEHALF OF THE RESPONDENT,
ALLEGHENY ENERGY SERVICE CORPORATION**

TIMOTHY E. HUFFMAN (State Bar ID: 1814)

JACKSON KELLY PLLC

Post Office Box 553

Charleston, West Virginia 25322

Counsel for the Respondent,

Allegheny Energy Service Corporation

November 21, 2011

TABLE OF CONTENTS

I. STATEMENT OF THE CASE 1

II. STATEMENT OF THE FACTS..... 2

III. ISSUE 7

IV. ARGUMENT..... 7

V. CONCLUSION..... 11

TABLE OF AUTHORITIES

Cases

Beirne v. Smith,
214 W.Va. 771, 591 S.E.2d 329, (W. Va. 2003)..... 10

Clark v. State Workmen’s Compensation Commissioner,
155 W.Va. 726, 187 S.E.2d 213 (1972)..... 7

Eady v. State Workmen’s Compensation Commissioner,
148 W.Va. 5, 132 S.E.2d 642 (1963)..... 8

Haines v. State Workmen’s Compensation Commissioner,
151 W.Va. 152, 150 S.E.2d 883 (1966)..... 8

McGeary v. State Workmen’s Compensation Commissioner,
148 W.Va. 436, 135 S.E.2d 345 (1964)..... 8

Statutes

West Virginia Code § 23-4-1g 7

West Virginia Code § 23-4-6(n)(1) 8

West Virginia Code § 23-4-6(n)(4)(A) 6, 9

West Virginia Code §23-5-15 9

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

GEORGE C. TURLEY,

Petitioner,

v.

ALLEGHENY ENERGY SERVICE CORPORATION,

Respondent.

Supreme Court No. 11-1452
Appeal No. 2045353
OOJ Case ID: A307-006283
Carrier No. 200706808

**RESPONSE BRIEF ON BEHALF OF THE RESPONDENT,
ALLEGHENY ENERGY SERVICE CORPORATION**

I. STATEMENT OF THE CASE

This claim relates to an application for permanent total disability benefits filed by the claimant. An order was entered by the self-insured claims administrator on September 5, 2008, denying the claimant's application for benefits finding that the claimant had not met the threshold for pursuing a permanent total disability award. The claimant protested that ruling and after litigation, a final order was entered by the administrative law judge on January 10, 2011, affirming the September 5, 2008 ruling.

Thereafter, the claimant filed an appeal to the Board of Review and by final order of August 25, 2011, the Board of Review affirmed the Office of Judges' order of January 10, 2011. This proceeding is a petition for review by the claimant from the Board of Review's final order of August 25, 2011.

II. STATEMENT OF THE FACTS

This claim relates to an application for permanent total disability benefits filed by the claimant based upon a variety of workers' compensation claims filed during the course of his lifetime. In particular, the claimant filed Claim No. 670025941, which related to a neck injury for which he was hospitalized three to four weeks after being involved in a motor vehicle accident.

The claimant also filed Claim No. 820045395 with regard to an injury on February 11, 1982, involving a fracture of the radius and ulna of his right arm. The claimant was off work for approximately twelve weeks for that injury and later returned to work as an electrician.

The claimant's next claim was Claim No. 860000626 and was related to a July 1, 1985 right ankle injury. The claimant had surgery by Dr. Fathy in that claim for a tear of the collateral ligament and was off work for approximately twelve weeks.

Thereafter, the claimant filed Claim No. 970017820 with regard to his July 25, 1996 injury to his right knee. The claimant had arthroscopic surgery in his right knee following that injury and after physical therapy, was off work for several weeks. Eventually the claimant was required to undergo a total unilateral meniscectomy.

Finally, the claimant filed Claim No. 2000049165 for injuries sustained in a motor vehicle accident on March 1, 2000. At that time, the claimant sustained injuries to a pre-existing degenerative condition in his neck. He continued to have neck pain after the injury and as a result of diagnostic testing, it was determined that he was suffering from bilateral carpal tunnel syndrome. The claimant eventually had surgical release in both wrists.

Thereafter, on January 3, 2005, the claimant filed an application for permanent total disability benefits citing the above five claims and noting that he was 57 years of age when he began receiving social security disability benefits and having retired on December 7, 2001. On his application for benefits, the claimant reported having received an 8% permanent partial disability award for his low back injury sustained on February 9, 1982, in Claim No. 82-45395. The claimant also reported a 4% permanent partial disability award for a right arm injury in 1985, a 5% award for a leg conclusion on July 1, 1985, a 2% permanent partial disability award for his right knee for an injury in 1998, and a 10% permanent partial disability award as a result of a , the claimant reported having received an 8% permanent partial disability award for his low back injury sustained on February 9, 1982, in Claim No. 82-45395. The claimant also reported a 4% permanent partial disability award for a right arm injury in 1985, a 5% award for a leg conclusion on July 1, 1985, a 2% permanent partial disability award for his right knee for an injury in 1998, and a 10% permanent partial disability award as a result of a C5 fracture in 1966. The claimant's application for permanent total disability benefits also noted a number of non-compensable conditions subsequent to the filing to his latest workers' compensation claim, including stress, receiving death threats, crying, having tremors, and slipping on ice in 2001, injuring his left shoulder and neck. The claimant also cited severe neck pain from a motorcycle accident on March 11, 2002, during which he struck a tree to avoid hitting a deer.

In support of his petition for permanent total disability benefits, counsel for the claimant submitted into the record a copy of an order from the Workers' Compensation Division dated August 20, 2003, granting the claimant a 25% permanent partial disability award in Claim No. 2000049165. The claimant was also granted a 2% permanent partial disability award on November 7, 1997, in Claim No. 97-17820, a 5% permanent partial disability award on May 29,

1987, in Claim No. 86-60264 and an 8% permanent partial disability award on June 7, 1983 in Claim No. 82-45295 and a 10% award of benefits entered on April 24, 1968, in Claim No. 67-25941. Evidence was offered indicating the claimant was granted full social security benefits on March 15, 2005, and lastly, a 5% psychiatric permanent partial disability award in Claim No. 2000049165, by order of May 12, 2005.

When the application for benefits was filed, the claimant underwent an independent medical evaluation regarding his permanent total disability petition on March 7, 2007, by Dr. Joseph E. Grady. Dr. Grady diagnosed chronic neck pain with a history of 50% compression fracture of the C5 vertebrae and the later development of multi-level degenerative changes; a healed fracture of the right radius ulnar; a history of a right ankle surgery for collateral ligament tear with residual right ankle pain; history of right knee surgery with reported excision of the medial lateral menisci; history of a surgical sprain superimposed upon previous cervical fracture and degenerative changes from an earlier injury and a history of bilateral carpal tunnel syndrome with surgery. Based upon his evaluation, Dr. Grady assigned 1% wholeman impairment for each wrist for the carpal tunnel syndrome; a 15% wholeman impairment for the rating of the claimant's cervical spine and an 8% rating for his right lower extremity. Dr. Grady found no permanent impairment with regard to the claimant's complaints of abdominal wall hernia but did recommend a 1% impairment for the whole person for the claimant's right elbow injury. Dr. Grady's cumulative impairment for compensable conditions was 23% wholeman impairment.

Additionally, the claimant underwent a psychiatric evaluation by Dr. Bobby Miller on March 14, 2007 in relation to his petition for permanent total disability benefits. Dr. Miller noted a history of eleven prior workers' compensation claims which the claimant received

a total of 55% permanent partial disability. Based upon his evaluation, Dr. Miller diagnosed Dysthymic Disorder and concluded that the claimant's overall psychiatric impairment fell into the slight range. Dr. Miller recommended a total wholeman psychiatric impairment of 4%.

On June 16, 2008, the Permanent Total Disability Reviewing Body reviewed the claimant's application for permanent total disability benefits. In its final recommendations of August 18, 2008, the Reviewing Body recommended that the application be denied since the claimant had no more than a combined value of 27% whole person impairment and therefore, did not meet the required statutory threshold of 50% whole body impairment. Based on the recommendations of the Permanent Total Disability Reviewing Body, a final order was entered on September 5, 2008, denying the claimant's request for a permanent total disability award, finding that the claimant did not meet the required statutory threshold. The claimant protested that ruling.

In support of his protest, the claimant offered into evidence the May 11, 2010 report of Dr. Ramanathan Padmanaban. Dr. Padmanaban opined that the claimant had 18% whole person impairment for the cervical spine, 4% for his right forearm, 5% for his right ankle, 20% for the right knee and 5% for psychiatric impairment for a total of 47% under the Combined Values Chart of the *AMA Guides*. Dr. Padmanaban further opined that if 12% was added for the claimant's carpal tunnel syndrome, the combined value would have the claimant at 52% whole person impairment.

Thereafter, the claimant was evaluated by Dr. P. B. Mukkamala at the request of the employer. In his report of September 7, 2010, Dr. Mukkamala reported a 15% whole person impairment for the cervical spine, 4% for the claimant's right knee, 4% for the right forearm fracture, for a total of 21% whole person impairment for all compensable injuries. Dr.

Mukkamala further opined that if the claimant's total right knee replacement were compensable, that would equate to an additional 20% whole person impairment and would then raise the combined value of all of the claimant's impairments to 35% whole person impairment.

Thereafter, the claim was submitted for decision and a final order was entered by the administrative law judge on January 10, 2011. In that ruling, the administrative law judge reviewed the evidence of record and concluded that Dr. Padmanaban's estimates of whole person impairment did not conform to the statute nor in some respects to the proper evaluation methods to be utilized in arriving at whole person impairment. On that basis, the administrative law judge found Dr. Padmanaban's evaluation not to be the most reliable estimation of the claimant's impairment as required by the statute. The administrative law judge also reviewed the reports of Drs. Grady and Miller and the report offered by the employer from Dr. Mukkamala. All of those physicians concluded that the claimant's whole person impairment from all compensable conditions, would not have met the required statutory threshold of 50%. The administrative law judge further noted that contrary to arguments advanced by the claimant at the time the claim was submitted for decision, *West Virginia Code* § 23-4-6(n)(4)(A), required that carpal tunnel impairment not be included in the threshold calculation for determining whether or not the claimant met the permanent total disability threshold by statute. On the basis of his evaluation of the evidence, the administrative law judge entered an order on January 10, 2011, affirming the self-insured employer's order of September 5, 2008, which denied the claimant's application for permanent total disability benefits.

Thereafter, the claimant filed an appeal to the Board of Review and by final order of August 25, 2011, the Board of Review affirmed the Office of Judges' order of January 10,

2011. This proceeding is a petition for review by the claimant from the Board of Review's final order of August 25, 2011.

III. ISSUE

WHETHER THE CLAIMANT MET THE BURDEN OF PROOF IMPOSED UPON HIM TO SHOW BY PROPER AND SATISFACTORY EVIDENCE THAT HE MEETS THE REQUIRED THRESHOLD FOR THE GRANTING OF A PERMANENT TOTAL DISABILITY AWARD?

IV. ARGUMENT

THE CLAIMANT FAILED TO MEET THE BURDEN OF PROOF IMPOSED UPON HIM TO SHOW BY PROPER AND SATISFACTORY EVIDENCE THAT HE MEETS THE REQUIRED THRESHOLD FOR THE GRANTING OF A PERMANENT TOTAL DISABILITY AWARD.

This Honorable Court has consistently held that the burden of establishing a claim for workers' compensation benefits rests upon the person who asserts it. *Clark v. State Workmen's Compensation Commissioner*, 155 W.Va. 726, 187 S.E.2d 213 (1972). The difficulty in administering this burden arises in interpreting the evidence in light of the provisions of *West Virginia Code* § 23-4-1g. That code section provides that the resolution of any issue shall be based on a weighing of all evidence pertaining to the issue and a finding that a preponderance of the evidence supports the manner of resolution. Under those circumstances an issue will not be resolved by allowing certain evidence to be dispositive simply because it is reliable and most favorable to the claimant's interest. Only after weighing the evidence and finding that an equal amount of evidentiary weight exists, will the resolution that is most consistent with the claimant's position be adopted. *West Virginia Code* § 23-4-1g.

To be eligible for consideration of a permanent total disability award in a claim in which the petition for a permanent total disability award was filed after 2003, the claimant must

have been awarded the sum of 50% in prior permanent partial disability awards. Upon filing his application, the claim will then be re-evaluated by the Examining Body to determine if the claimant has suffered a single whole body medical impairment of 50% or more resulting from either a single occupational injury or occupational disease or a combination of occupational injuries and diseases.

Additionally, if the claimant has sustained a 35% statutory disability, then the claimant has met the required statutory threshold for the granting of a permanent total disability award. *West Virginia Code* § 23-4-6(n)(1).

This Court has also consistently held that the evidence when considered as a whole, must be sufficient to “make a reasonable person conclude that the claimant has established his claim.” *Eady v. State Workmen’s Compensation Commissioner*, 148 W.Va. 5, 132 S.E.2d 642 (1963). Furthermore, it must be remembered that the Commissioner is not bound by the conclusions stated in a single physician’s report, but rather must make an independent determination based upon all of the evidence in the claim. *Haines v. State Workmen’s Compensation Commissioner*, 151 W.Va. 152, 150 S.E.2d 883 (1966).

No provision of the workers’ compensation law gives to a physician, whether he be employed by the Commissioner, the claimant, or the employer, the authority to fix the percent of disability. That is the responsibility and duty of the Commissioner and so when evaluating the disability of the claimant, it is incumbent upon them to consider the physical findings of the examining physicians and determining therefrom and from all the other evidence in the case what award, if any, the claimant should receive. *McGeary v. State Workmen’s Compensation Commissioner*, 148 W.Va. 436, 135 S.E.2d 345 (1964).

Additionally, *West Virginia Code* §23-5-15 provides that where the decision of the Board of Review represents an affirmation of a prior ruling by the Office of Judges, that decision may only be reversed or modified by this Honorable Court if the Board of Review's decision is in clear violation of the constitutional or statutory provisions, 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. This Court may not conduct a *de novo* reweighing of the evidentiary record in such a claim.

Based upon the foregoing principles of law, the employer respectfully submits that the claimant has failed to sustain his proper burden to establish that the administrative law judge committed error in affirming the rejection of the claimant's application for permanent total disability benefits. More particularly, the administrative law judge conducted a thorough review of the evidence of record and reached the appropriate conclusion in determining that the claimant simply does not satisfy the statutory threshold requirement in order to be granted a permanent total disability award. The only physician who examined the claimant that concluded that he has at least 50% whole person impairment from his combined injuries, was Dr. Padmanaban. As was noted by the administrative law judge in his final order, Dr. Padmanaban's evaluation was not the most reliable as he recommended adding an impairment rating for carpal tunnel syndrome which is clearly excluded by the provisions of *West Virginia Code* § 23-4-6(n)(4)(A).

Additionally, while the claimant has raised constitutional issues regarding the exclusion of carpal tunnel impairment, that statute has **not** been determined by this Honorable Court to be unconstitutional and therefore, the exclusion of carpal tunnel impairment is proper under our statute. More specifically, this Honorable Court upheld the constitutionality of *West Virginia Code* § 23-4-6 and ruled that such section does not violate the equal protection clause of

the West Virginia Constitution. *See, Beirne v. Smith*, 214 W.Va. 771, 591 S.E.2d 329, (W. Va. 2003).

Additionally, it is clear from a review of the reports of Drs. Grady, Miller and Mukkamala, the claimant has failed to meet the required statutory threshold in order to be granted a permanent total disability award. For those reasons, the employer respectfully submits that the final order of the Office of Judges was correct, and the Board of Review acted properly in affirming that ruling. For that reason, the employer respectfully submits that the Board of Review's final order of August 25, 2011, and should be affirmed.

V. CONCLUSION

For the foregoing reasons, the employer respectfully submits that the Board of Review's final order of August 25, 2011, was proper and was in accordance with both the law and the evidence and therefore, should be affirmed.

Respectfully submitted,

ALLEGHENY ENERGY SERVICE CORPORATION

By Counsel,



TIMOTHY E. HUFFMAN

TIMOTHY E. HUFFMAN (State Bar ID: 1814)
JACKSON KELLY PLLC
Post Office Box 553
Charleston, West Virginia 25322

Counsel for the Respondent,
Allegheny Energy Service Corporation

November 21, 2011

CERTIFICATE OF SERVICE

I certify that on November 21, 2011, the foregoing *Response Brief on Behalf of the Respondent, Allegheny Energy Service Corporation*, was served upon the following Petitioner by placing a true and exact copy thereof in a properly addressed stamped envelope in the United States mail, postage prepaid:

William Turner, Esquire
Attorney at Law
206 W. Randolph Street,
Lewisburg, West Virginia 24901



TIMOTHY E. HUFFMAN