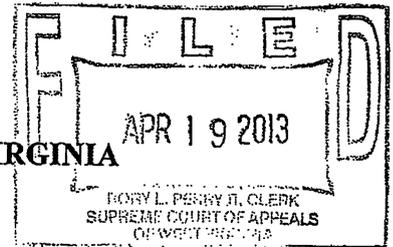


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No. 13-0312

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



CLARA L. STINNETT,

PETITIONER,

V.

BOR APPEAL NO.: 2047625

JCN: 990024403

DOI: 08/31/1998

WV DEPT. OF CORRECTIONS,

EMPLOYER,

and

WEST VIRGINIA OFFICE OF INSURANCE
COMMISSIONER IN ITS CAPACITY AS
ADMINISTRATOR OF THE WORKERS'
COMPENSATION OLD FUND,

RESPONDENTS.

Response

BRIEF OF OLD FUND IN OPPOSITION TO APPEAL
AND IN SUPPORT OF BOARD OF REVIEW FINAL ORDER

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ATTORNEY GENERAL OF WEST VIRGINIA

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No. 13-0312

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CLARA L. STINNETT, CLAIMANT,

PETITIONER,

v.

BOR APPEAL NO.: 2047625

JCN: 990024403

DOI: 08/31/1998

WV DEPT. OF CORRECTIONS,
EMPLOYER,

and

WEST VIRGINIA OFFICE OF INSURANCE
COMMISSIONER IN ITS CAPACITY AS
ADMINISTRATOR OF THE WORKERS'
COMPENSATION OLD FUND,
STATUTORY PARTY,

RESPONDENTS.

**BRIEF OF OLD FUND IN OPPOSITION TO APPEAL AND
IN SUPPORT OF BOARD OF REVIEW FINAL ORDER**

I.

STATEMENT OF CASE

A. Procedural History of Claim Issue in Litigation.

Pending before this Honorable Court is the appeal petition of Clara L. Stinnett (hereinafter "claimant" or "petitioner") from a final order of the Board of Review (hereinafter "BOR") dated February 25, 2013 (Petitioner's Appendix, at 184), which affirmed a decision of the Office of Judges (hereinafter "OOJ") dated September 11, 2012 (Petitioner's Appendix, at 78), and in which decision the OOJ affirmed the Claim Administrator's award order dated July 28, 2011 (Petitioner's Appendix, at 71) denying claimant's request to reopen her claim for further consideration of permanent partial disability benefits.

B. Statement of Facts.

By date of September 1, 1998, the claimant signed and dated her "Employees' and Physicians' Report of Injury" claim form seeking workers' compensation benefits and thereafter filed it with the former Workers' Compensation Commission ("WCC"). In the claim form, the claimant asserted she was injured on August 31, 1998, when she slipped down a steep incline and hit a parked vehicle. See, Old Fund appendix, Exhibit 1, at 000001.

The claimant's claim was held compensable by order dated September 22, 1998. Old Fund appendix, Exhibit 2, at 000002. By later order dated January 14, 2005, the compensable conditions were listed as:

1. 847.2 Sprain/Strain Lumbar Regi; and
2. 813.4 Fracture Lower Radius/Uln.

Old Fund appendix, Exhibit 7, at 000014.

By order entered January 21, 2000, claimant received her initial award of permanent partial disability ("PPD") benefits. The claimant was awarded 22% PPD based upon the December 27, 1999, Independent Medical Examination ("IME") report of Dr. Guberman. Old Fund appendix, Exhibit 3, at 000003. In the order awarding PPD, the claimant's claim was closed.

The claim was again considered for PPD by order dated January 8, 2002, which found the claimant was entitled to no additional PPD based upon the December 10, 2001, report of Dr. Guberman. Old Fund appendix, Exhibit 4, at 000004. The claimant was found to have been fully compensated by the previous 22% PPD award. The claimant protested the order, but it was later affirmed by the OoJ on October 31, 2002. Old Fund appendix, Exhibit 6, at 000011.

In issue at this time is the Claim Administrator's award order dated July 28, 2011, wherein the claimant's request, received July 22, 2011, to reopen her claim for consideration of

additional PPD was denied as being time barred. The claimant protested his order to the OOJ.

In said award order, the Claim Administrator explained:

The request from Clara L. Stinnett, dated 7-5-11, and received on 7-22-11 has been reviewed to consider reopening this for additional permanent partial disability payments. This claim cannot be reopened because it has been more than 5 years since the initial permanent partial disability award was granted. This decision is based on W. Va. Code § 23-4-16(a)(2) which says that any award for permanent partial disability must be made within 5 years of the initial award. Your initial award of permanent partial disability was made on 1-21-2000.

Petitioner's appendix, at 71.

Following expiration of the time frames for submissions of evidence, and after allowing time for submissions of closing arguments, the OOJ issued its decision affirming the Claim Administrator's order. In its decision, the OOJ's discussion and its conclusions are as follows:

DISCUSSION:

In claims with a Date of Injury or Date of Last Exposure on or after May 12, 1995, the following restrictions and limitations to reopening for PPD apply

Pursuant to W.Va. Code §23-4-16(a)(1), in any claim that has been closed without the entry of an order regarding the degree of impairment, or in any claim closed on a no lost time basis, reopening requests must be filed within five years of the date of the closure. Only two reopening requests may be filed within that five (5) year period.

Pursuant to W.Va. Code §23-4-16(a)(2), in any claim in which an award of permanent impairment has been made, reopening requests must be filed within five years of the date of the initial award. Only two reopening requests may be filed within that five (5) year period.

Occupational pneumoconiosis, and other occupational diseases identified by rule of the Commission, have a new five year period for reopening requests beginning upon the date of any subsequent permanent partial disability award.

However, in claims with a Date of Injury or Date of Last Exposure before May 12, 1995, reopening requests must be filed within five years or receipt of the last payment of any previous disability benefits. Also, the two-request restriction does not apply.

* * *

The issue in litigation is whether the claimant's reopening request of July 5, 2011, for additional consideration of permanent partial disability benefits secondary to the compensable injury of August 31, 1998, was submitted within the time limitations as set forth in W. Va. Code §23-4-16(a)(2) (2005). The claimant's counsel's closing argument of May 7, 2012, argues reversal of the Claim Administrator's Order of July 28, 2011, asserting that ". . . her request for permanent partial disability benefits following the surgery falls within the application of §23-4-16(a)(2)—in that it pertains to a medically progressive condition," (p,3); and that the claimant's request for permanent partial disability benefits was submitted within five years from the date of her obtaining maximum medical improvement following authorized surgery in May of 2010. The closing argument notes that the claimant's request for surgery was initially made in August 25, 2005, and it was not until May of 2010 that the surgery was authorized in compliance with an Order of the West Virginia Supreme Court of Appeals dated January 29, 2009. The claimant's closing argument asserts that the five-year statute of limitations was tolled during dependency of the litigation process which ultimately resulted in authorization for surgery per the Supreme Court's Order of July 29, 2009. The Insurance Commission's closing argument of June 22, 2012, urges affirmation of the Claim Administrator's Order of July 28, 2011, asserting that the claimant's July 5, 2011, petition for reopening was filed beyond the jurisdictional five-year timeframe provided in W. Va. Code §23-4-16(a)(2); and, additionally, that the claimant failed to present a prima facie evidentiary demonstration warranting reopening of the claim for permanent partial disability benefits---as the claimant failed to submit evidence disclosing a progression of the claimant's compensable condition or some facts not previously considered, as required by W. Va. Code §23-5-2 and 23-5-3.

Although the claimant's July 2011 request for additional consideration of permanent partial disability benefits following authorized surgery in June of 2010 was delayed in light of the approximate five-year litigation process involved in securing that authorization in May of 2010, (and her subsequent achievement of maximum medical improvement from Dr. Schmidt's surgery), the mandatory and unambiguous language of the W. Va. Code §23-4-16(a)(2) does not appear to allow for instances of reasonable excuse in tolling or waiving the otherwise apparent, jurisdictional mandatory five-year time limitation for requesting modification of an initial award as set forth in §23-4-16(a)(2). See Pugh v WCC Syl. Pt. 1, 424 S.E.2d, 759 (W. Va. 1992). Although the claimant asserts in her closing argument that the claimant's lumbar spine condition was a progressive condition; and, thus Dr. Schmidt's initial request for surgery in August of 2005 fell within a five-year timeframe from the Claim administrator's Order of January 8, 2002, (holding the claimant fully compensated for permanent partial disability benefits), the record is unpersuasive that the claimant's lumbar spine condition represented an occupational disease as opposed to a designated component of the traumatic injury of August 31, 1998. Moreover, even if the claimant's lumbar spine condition would be deemed a progressive occupational disease pursuant to §23-4-16(a)(2), the unambiguous language of that code section demonstrates that, nevertheless, the August 2005 request for surgery was made more than five years from the date of the claimant's initial permanent partial disability award of 22%

by Order dated January 21, 2000. The claimant's request for additional permanent partial disability benefits per her petition of July 5, 2011, would seem to constitute a consideration of permanent partial disability, for facts not previously considered in reference to her lumbar fusion surgery in May of 2010. However, the unambiguous and mandatory language of §23-4-16(a)(2) compels the conclusion that the Claim Administrator's Order of July 28, 2011, must be affirmed; as, the claimant's request for reopening consideration of further permanent partial disability benefits on or about July 5, 2011, was filed beyond the permissible five year statute of limitation established in §23-4-16(a)(2).

CONCLUSIONS OF LAW:

The claimant's reopening petition of July 5, 2011, was filed more than five years from the date of the claimant's initial (22%) permanent partial disability award granted in the claim by Order dated January 21, 2000. Accordingly, the claimant's petition is subject to denial/rejection per the mandatory, unambiguous language of W. Va. Code §23-4-16(a)(2) (2005).

Accordingly, it is ORDERED the Claim Administrator's Order dated July 28, 2011, is AFFIRMED.

Petitioner's appendix, beginning at 78.

Thereafter, the claimant timely filed her appeal to the BOR from the OoJ decision. After allowing time for the parties to file briefs and for oral argument, by final order dated February 25, 2013, the BOR affirmed the OoJ decision and explained and held as follows:

The Workers' Compensation Board of Review has completed a thorough review of the record, briefs, and arguments. As required, the Workers' Compensation Board of Review has evaluated the decision of the Office of Judges in light of the standard of review contained in West Virginia Code § 23-5-12, as well as the applicable statutory language as interpreted by the West Virginia Supreme Court of Appeals.

Upon our review of this case, we have determined to affirm the decision of the Office of Judges. The Board adopts the findings of fact and conclusions of law of the Administrative Law Judge's Decision dated September 11, 2012, which relate to the issue on appeal, and the same are incorporated herein by reference, made a part hereof, and are ratified, confirmed and approved with the following modifications:

1. In Finding of Fact No. 15, "January 29, 2009" is modified to "July 29, 2009."
2. In Finding of Fact No. 16.d), "April 18, 2010" is modified to "April 18, 2007."

Accordingly, it is ORDERED that the final order of the Workers' Compensation Office of Judges dated September 11, 2012, is hereby AFFIRMED.

Petitioner's Appendix, beginning at 184. The claimant has now filed her appeal petition with this Court.

II.

SUMMARY OF ARGUMENT

The decision of the Office of Judges was properly and correctly reviewed by the Board of Review and the Final Order of the Board of Review is correct, as a matter of law. As demonstrated by this Court's authored opinions in Pugh v. Workers' Compensation Commissioner, 188 W.Va. 141, 424 S.E.2d 759 (1992); Bowers v. WVOIC, 224 W.Va. 398, 686 S.E.2d 49 (2009); and Bowman v. Workers' Comp. Comm'r, 150 W.Va. 592, 148 S.E.2d 708 (1966), as well as this Court's memorandum decisions cited hereinafter, the claimant's application for permanent partial disability benefits dated July 5, 2011 and received on July 22, 2011, was beyond the five (5) year statutory period set out in W. Va. Code § 23-4-16(a)(2) where the initial award of permanent partial disability benefits was made by award order dated January 21, 2000.

III.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

In accordance with Rule 18(a)(3), West Virginia Revised Rules of Appellate Procedure, the dispositive issue presented has previously been authoritatively decided in signed opinions and memorandum decisions of this Court. Accordingly, oral argument is not necessary. Moreover, since no new issue of law is presented, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

IV.

ARGUMENT

A. Standard of Review.

In Lovas v. Consolidation Coal Company, 222 W.Va. 91, 662 S.E.2d 645 (2008), this Court affirmed that West Virginia Code § 23-5-15 (2003)¹ provides the standard of review for appeals from the BOR to this Court. Applicable here, West Virginia Code §§ 23-5-15(b) and (c) provide as follows:

(b) In reviewing a decision of the BOR, 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 component of the evidentiary record.

Lovas, *supra* 662 S.E.2d at 645. See also Wilkinson v. West Virginia Office Insurance Commission, 222 W.Va. 394, 664 S.E.2d 735 (2008).

This Court, in Lovas, also stated:

In Barnett v. State Workmen's Compensation Commissioner, 153 W.Va. 796, 172 S.E.2d 698 (1970), this Court explained that "[w]hile the findings of fact of the [BOR] are conclusive unless they are manifestly against the weight of the evidence, the legal conclusions of the [BOR], based upon such findings, are subject to review by the courts." 153 W.Va. at 812, 172 S.E.2d at 707 (quoting Emmel v. State Compen. Dir., 150 W.Va. 277, 284, 145 S.E.2d 29, 34 (1965)). Conclusions of law are subjected to de novo inspection. Syl. Pt. 3, Adkins v. Gatson, 192 W.Va. 561, 453 S.E.2d 395 (1994). "Where the issue on an appeal

¹ This statute was amended in 2005; however, the subsections quoted herein were not altered.

from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a de novo standard of review.” Syl. Pt. 1, Chrystal R.M. v. Charlie A.L., 194 W.Va. 138, 459 S.E.2d 415 (1995). In syllabus point one of Appalachian Power Company v. State Tax Department, 195 W.Va. 573, 466 S.E.2d 424 (1995), this Court also explained that “[i]nterpreting a statute or an administrative rule or regulation presents a purely legal question subject to de novo review.”

Lovas, 662 S.E.2d at 649.

Thereafter, in Hale v. West Virginia Office of Ins. Com’r, 228 W.Va. 781, 724 S.E.2d 752 (2012), this Court stated that “[t]o the extent that our resolution of this matter requires us to interpret provisions contained in the West Virginia Code of State Rules, our review is de novo” thereby reaffirming that interpreting a statute or an administrative rule or regulation presents a purely legal question subject to de novo review. Hale, *supra* 724 S.E.2d at 755.

It is also well settled law that interpreting a statute or an administrative rule or regulation presents a purely legal question subject to de novo review. Syl. pt. 1, Appalachian Power Co. v. State Tax Department of West Virginia, 195 W.Va. 573, 466 S.E.2d 424 (1995); Simpson v. West Virginia Office of Ins. Com’r., 223 W.Va. 495, 678 S.E.2d 1, 10 (2009); Syl. pt. 2, Davies v. West Virginia Office of Ins. Com’r., 227 W.Va. 330, 708 S.E.2d 524 (2011).

In addition to the above determinations, in Fenton Art Glass Company v. West Virginia Office of the Insurance Commissioner, 222 W.Va. 420, 664 S.E.2d 761 (2008), this Court stated:

Because our consideration of the issues before us necessarily requires us to consider the standard of review of the BOR, we observe that “[w]hen the [BOR] reviews a ruling from the [OOJ] it must do so under the standard of review set out in W.Va. Code § 23-5-12(b) (1995), and failure to do so will be reversible error.” Syl. Pt. 6, Conley v. Workers’ Compensation Div., 199 W.Va. 196, 483 S.E.2d 542 (1997). West Virginia Code § 23-5-12(b) (1995), directs, in relevant part, that

The [BOR] may affirm the order or decision of the [OOJ] or remand the case for further proceedings. It shall reverse, vacate or modify the order or

decision of the [OOJ] if the substantial rights of the petitioner or petitioners have been prejudiced because the [OOJ]'s findings are:

- (1) In violation of statutory provisions; or
- (2) In excess of statutory authority or jurisdiction of the [OOJ]; or
- (3) Made upon unlawful procedures; or
- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion of clearly unwarranted exercise of discretion.

Fenton, 664 S.E.2d at 768.

It is respectfully asserted that in the BOR final order on appeal herein, the BOR complied with the requirements of West Virginia Code § 23-5-12(b); the BOR applied the proper standard of review to the decision of the OOJ; and the BOR final order is not in clear violation of constitutional or statutory provision, is not clearly the result of erroneous conclusions of law, and is not based upon the Board's material misstatement or mischaracterization of particular components of the evidentiary record.

B. Discussion.

Since the Claim Administrator's order protested to the OOJ herein was entered after July 1, 2003, the amendments to the workers' compensation law made in Senate Bill 2013, effective July 1, 2003, and re-enacted in 2005 apply. Wampler Foods, Inc. v. Workers' Compensation Division, 216 W.Va. 129, 602 S.E.2d 805 (2004).

1. Reopening, modification, or adjustment of a claim more than five (5) years after the initial award of permanent disability benefits is prohibited by W. Va. Code § 23-4-16(a)(2).

Subject matter jurisdiction of the Claim Administrator over a claim is limited by W. Va. Code § 23-4-16 (2003, as amended) (Repl. Vol. 2010). Specifically applicable here, W. Va. Code § 23-4-16(a)(2), provides as follows:

§ 23-4-16. Jurisdiction over case continuous; modification of finding or order; time limitation on awards; reimbursement of claimant for expenses; reopening cases involving permanent total disability; promulgation of rules.

(a) The power and jurisdiction of the commission, successor to the commission, other private carrier or self-insured employer, whichever is applicable, over each case is continuing and the commission, successor to the commission, other private carrier or self-insured employer, whichever is applicable, may, in accordance with the provisions of this section and after due notice to the employer, make modifications or changes with respect to former findings or orders that are justified. Upon and after the second day of February, one thousand nine hundred ninety-five, the period in which a claimant may request a modification, change or reopening of a prior award that was entered either prior to or after that date shall be determined by the following subdivision of this subsection. Any request that is made beyond that period shall be refused.

* * *

(2) Except as stated below, in any claim in which an award of permanent disability was made, any request must be made within five years of the date of the initial award. During that time period, only two requests may be filed.

(Emphasis added.)

In addition to the above, W. Va. Code § 23-4-16(b) (2005), (Repl. Vol. 2010) specifically provides that,

In any case in which an injured employee makes application for a further award of permanent partial disability benefits..., if the application is in writing and filed within the applicable time limit as stated above, the commission, successor to the commission, other private carrier or self-insured employer, whichever is applicable, shall pass upon the request within thirty days of its receipt and, if the commission determines that the claimant may be entitled to an award, the commission, successor to the commission, other private carrier or self-insured employer, whichever is applicable, shall refer the claimant for further examinations that are necessary.

The statute is clear: an application or request to modify or change [adjust or reopen] a former order must be filed/received “within five years of the date of the initial award.” And, where the language of the statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation. Syl. pt. 1, Pugh v. Workers’ Compensation Commissioner, 188 W.Va. 414, 424 S.E.2d 759 (1992).

In award order dated January 21, 2000, the claimant was awarded PPD and her claim was closed for permanent disability, as follows:

Medical evidence has been received from Bruce Guberman, M.D., dated December 27, 1999, that indicates you have a 22% permanent partial disability. You are being granted this award for permanent impairment resulting from your injury.

* * *

The granting of this award closes your claim for permanent partial disability benefits.

Old Fund appendix, Exhibit 3, at 000003.

This award order was never protested. The claim was later reopened at the request of the claimant. Thereafter, by award order dated January 8, 2002, the claimant was granted 0% additional PPD based upon an IME report of Dr. Guberman dated December 10, 2001, and claimant's claim was closed for permanent disability. The claimant protested this order to the OOJ, but by decision dated January 8, 2002, the OOJ affirmed. The claimant did not appeal the OOJ decision and it is final.

The most recent request to reopen claimant's claim for further permanent disability benefits was dated July 5, 2011, and was received on July 22, 2011. The date of the request, July 5, 2011, is significantly more than five (5) years after the date of the award order making the initial award of PPD and closing the claimant's claim for permanent disability which is dated January 21, 2000 or even the subsequent award order dated January 8, 2002.

This Court addressed this precise issue in an authored opinion most recently in Bowers v. WVOIC, 224 W.Va. 398, 686 S.E.2d 49 (2009). In Bowers, the issue presented to this Court was whether a claimant must manifest symptoms of a "work injury-related psychiatric disorder within the six-month time frame established by W. Va. C.S.R. § 85-20-12.2.a in order to render such work injury-related psychiatric disorder a compensable component of the claimant's

underlying work-related injury claim.” Bowers, supra 686 S.E.2d at 54. In deciding the issue presented, this Court looked to the workers’ compensation statutes and stated:

The statutes authorizing injured workers to apply for an adjustment of their claims to add additional, compensable components of their initial work-related injury do not impose any such time periods [six (6) months] within which an additional symptom, condition, or aggravation of their initial work-related injury must appear to be held compensable.

Bowers, supra 686 S.E.2d at 55.

This Court then set out, in footnote 6 of Bowers, 686 S.E.2d at 55-56, an analysis particularly applicable to the protest in issue here, and stated:

That is not to say, however, that a claimant’s workers’ compensation claim remains open indefinitely. W. Va. Code § 23-4-16(a)(2) (2005) (Repl. Vol. 2005) very explicitly requires that requests for modification be made within five years of a claimant’s award of permanent disability benefits: “Except as stated below, in any claim in which an award of permanent disability was made, any request [to modify, change, or reopen a prior award] must be made within five years of the date of the initial award. During that time period, only two requests may be filed.” However, such time limits apply only to claims in which an order has been entered closing the claim. *See, e.g., Syl. Pt. 2, Pugh v. Workers’ Comp. Comm’r*, 188 W. Va. 414, 424 S.E.2d 759 (1992) (“*W. Va. Code, 23-4-6 [1983]*, in part, permits the power and jurisdiction of the Workers’ Compensation Commissioner to continue over cases before the Commissioner and to make modifications or changes with respect to former findings or orders as may be justified, provided that no further award may be made in the cases of nonfatal injuries more than two times within five years after the Commissioner shall have made the *last payment in the original award or any subsequent increase thereto* in any permanent disability case.” (emphasis added)); *Syl. Pt. 1, Craft v. State Comp. Dir.*, 149 W. Va. 28, 138 S.E.2d 422 (1964) (“The time limitations contained in Code, 23-4-16, as amended, are applicable only to the reopening of a claim for workmen’s compensation benefits *previously closed by a final order of the director.*” (emphasis added)). In conjunction with their receipt of permanent partial disability awards, both Mr. Bower’s and Mr. Dotson’s underlying compensable claim has been closed, and, thus, the time limits established by W. Va. Code § 23-4-16(a)(2) apply to their request to add a diagnosis of depression to their compensable claims.

Following its analysis of the applicable workers’ compensation statutes, and in particular W. Va. Code § 23-4-16, this Court held that W. Va. C.S.R. § 85-20-12.2.a. (2005) was an invalid

administrative rule. In doing so, our Court went on to hold, with respect to the two (2) workers' compensation claims consolidated in Bowers, that:

Pursuant to W. Va. Code § 23-4-16(a)(2) [2005], requests to modify, change, or reopen an existing claim "must be made within five years of the date of the initial award." Here, both Mr. Bowers and Mr. Dotson met this threshold requirement. Mr. Bowers requested the addition of a depression diagnosis on May 24, 2006, which dated was within five years of his initial 34% permanent partial disability award, which was granted on November 18, 2005, and the appeal of which was dismissed at Mr. Bowers's request. Likewise, Mr. Dotson requested the addition of a depression diagnosis on February 1, 2006, which date was within five years of his initial PPD award, which was granted on February 25, 2003, and ultimately affirmed, as modified by the OOJ, by the Board of Review's order entered December 29, 2004.

Bowers, supra 686 S.E.2d at 57.² (Emphasis added.)

Given this Court's holdings in Bowers, and the clear language of W. Va. Code § 23-4-16(a)(2), where an initial award of permanent disability benefits has been made, and the claim closed, which is the situation here, any request to modify, change, adjust or reopen the claim must be filed/received "within five years of the initial award."

In arriving at its holding in Bowers, supra, this Court cited to and placed substantial reliance upon Bowman v. Workers' Comp. Comm'r, 150 W.Va. 592, 148 S.E.2d 708 (1966), and its sole syllabus which held, in part, as follows:

A workmen's compensation claim must be considered in its entirety and cannot be regarded as divisible in the sense of being barred ... in relation to a disability of one character, or a disability affecting one part of the claimant's body, but, at the same time, alive and litigable in relation to another disability arising from the same injury but of a different character or one affecting a different part of the claimant's body.

The opinion of this Court in Bowman hits precisely on the question at hand. The specific and pertinent portions of this Court's holding in Bowman are as follows:

² It is noted that W. Va. Code § 23-4-16(a)(2) was amended in 1995 to require requests to modify, change or reopen an existing closed claim "must be made within five years of the initial award" and it remains the same today, whereas the language of W. Va. Code § 23-4-16(a)(2) considered by our Court in Pugh v. Workers' Compensation Commissioner, 188 W.Va. 414, 424 S.E.2d 759 (1992) provided that the statutory five (5) year time limit set forth in W. Va. Code § 23-4-16(a)(2) immediately prior to the 1995 change began to run from "the last payment on the original award or any subsequent increase thereto."

We believe the precise question presented for decision in this case is whether a claim for workmen's compensable benefits can be regarded as divisible in the sense that, on one hand, it may be regarded as alive and litigable in relation to a disability of one character or a disability affecting one part of the body of the claimant; and, on the other hand, whether at the same time the claim may be regarded as dead, unalterably closed and not litigable in relation to a disability of a different character, or one affecting a different part of the claimant's body, notwithstanding the fact that both types of disability arose from a single injury. We are of the opinion that a claim for workmen's compensation benefits cannot be regarded as divisible in that sense; and that, under the provision of Code, 1931, 23-4-16, as amended, a claim arising from a single injury cannot be regarded as alive and litigable as to a disability of one character, affecting one part of the body and, at the same time, barred by statutory limitation as to a disability of another character or one affecting a different part of the body.

Bowman, *supra* 150 W.Va. at 595-596, 148 S.E.2d at 711.

In addition to the above signed opinions, this Court has issued many memorandum decisions over the past couple of years re-affirming that any request to reopen, modify, adjust or change a claim not made within five (5) years of the initial award of permanent disability benefits is time barred by W. Va. Code § 23-4-16(a)(2).³ See also Littleton v. West Virginia Office of Insurance Commissioner, No. 11-0540 (W. Va. Supreme Court, February 14, 2013) (Memorandum Decision) (application of March 8, 2010, for permanent total disability award is barred where initial award of permanent disability benefits made September 19, 2003 pursuant to W. Va. Code § 23-4-16(a)(2) which provides "in any claim in which an award of permanent disability was made, any request [for permanent total disability] must be made within five years of the date of the initial award."); Lewis v. West Virginia Office of Insurance Commissioner, Nos. 11-1689 and 11-1722 (W. Va. Supreme Court, November 16, 2012) (Memorandum Decision) (Request to reopen for further PPD made on January 15, 2009, was time barred where initial award of permanent disability benefits made on October 25, 2001); Lovas v. West Virginia Office of Insurance Commissioner, No. 11-0288, (W. Va. Supreme Court, September

³ In accordance with Rule 21(e), West Virginia Revised Rules of Appellate Procedure (2010), Memorandum Decisions of the Supreme Court may now be cited in any court or administrative tribunal in the State of West Virginia. As a result, they are also a public record.

14, 2012) (Memorandum Decision) (where initial award of permanent partial disability benefits was entered on November 22, 1999, petitioner's request for additional permanent partial disability benefits filed February 9, 2010 was time barred by W.Va. Code § 23-4-16(a)(2), as any request must be made within five years of the date of the initial award.); Kuhns v. West Virginia Office of Insurance Commissioner, No. 11-0026, (W. Va. Supreme Court, July 26, 2012) (Memorandum Decision) (denying September 11, 2009, request to reopen claim for additional psychiatric permanent partial disability benefits where initial award of permanent disability was made on April 11, 2001); Fisher v. West Virginia Office of Insurance Commissioner, No. 11-0031, (W. Va. Supreme Court, July 6, 2012) (Memorandum Decision) (denying September 8, 2009, request to reopen claim for temporary total disability benefits where the initial decision on permanent impairment was made on August 23, 2000); Buzzard v. West Virginia Office of Insurance Commissioner, No. 101433, (W. Va. Supreme Court, March 29, 2012) (Memorandum Decision) (denying January 25, 2010 request to reopen for permanent partial disability which was "after the five (5) year statute of limitations expired"); Puher v. West Virginia Office of Insurance Commissioner, No. 101483 (W. Va. Supreme Court, March 26, 2012) (Memorandum Decision) (denying November 3, 2008, request to reopen for permanent partial disability benefits where permanent benefits were initially granted on March 18, 1994); Stover v. West Virginia Office of Insurance Commissioner, No. 11-0097 (W. Va. Supreme Court, Dec., 2011) (Memorandum Decision) (denying February 18, 2009, request to reopen claim for permanent partial disability benefits where initial award of permanent benefits was made on April 25, 2003); Speights v. West Virginia Office of Insurance Commissioner, No. 101173 (W. Va. Supreme Court, Nov. 10, 2011) (Memorandum Decision) (denying request to reopen claim for permanent total disability benefits where application was made beyond "the five year time limit" from the date of the initial permanent disability award); Fox v. WVOIC, No. 100806, (W. Va.

Supreme Court, July 21, 2011) (Memorandum Decision) (May 13, 2009, request to reopen for permanent partial disability benefits time barred by W. Va. Code § 23-4-16(a)(2) where initial award entered on April 9, 2004.)

2. Claimant's argument that the applicable statute of limitations should be tolled is contrary to law and the facts, and is otherwise not applicable here.

The major thrust of claimant's argument in her appeal petition is that in some fashion the statute of limitations provided for in W. Va. Code § 23-4-16(a)(2) should be tolled. The reasoning of claimant is that the award order of the former Workers' Compensation Commission dated August 30, 2005, denying surgery was somehow inappropriate. However, that denial was affirmed by the OOJ in its decision dated April 27, 2006. Moreover, on appeal to the Board of Review, by its final order dated April 17, 2007, it affirmed the OOJ decision. It was only substantially thereafter, following appeal to this Court, that this Court, by Mandate dated July 29, 2009, reversed and the surgery was authorized. Thereafter, it then took until sometime in 2010 for the surgery to be performed.

Notwithstanding all the above, the claimant's "tolling" argument with respect to the facts of this claim has no support in the law. Moreover, and most importantly, any such "tolling" argument just simply does not fit the facts. This is because the initial award of permanent disability benefits in this claim is dated January 21, 2000. As a result, the five (5) year period prescribed by W. Va. Code § 23-4-16(a)(2) expired on January 21, 2005; which was substantially before the date authorization for surgery was even requested. As a result, the claimant's reliance upon Harris v West Virginia Office Of Insurance Commissioner, No. 101060 (W. Va. Supreme Court, January 19, 2012) (Memorandum Decision) is misplaced.

In Harris, the claimant attempted on numerous occasions requested a referral to be rated for PPD for his compensable lung scarring but his requests were not acted upon until the Office of Judges eventually ordered it done. Had the Claim Administrator timely acted upon claimant's

request for a PPD rating, it could have been completed and claimant's PPD award issued well before claimant's time period for requesting consideration for PTD was time barred. Indeed, had the PPD rating been provided as required by law, the claimant would have attained the eligibility threshold required in order to apply for PTD well before the expiration of five years after the initial award of permanent disability benefits. Thus, the failure of the Claim Administrator (the former Workers' Compensation Commissioner) to do that which it was legally required to do resulted in claimant's application for PTD to otherwise be time barred. This result was not countenanced by this Court. But, that is not the case here as the request herein to authorize surgery came well after the claim was time barred for further PPD consideration.

Likewise, Coulter v. West Virginia Office of Insurance Commissioner, No. 100836 (W. Va. Supreme Court, June 9, 2011) (Memorandum Decision) does not offer petitioner any support. Coulter, presented a unique factual situation. Initially, the claimant sustained a compensable shoulder injury for which she received her initial award of permanent disability benefits on August 8, 2003. However, in the course of receiving therapy for her compensable injury, Ms. Coulter fell and suffered a separate new injury to her knee sometime in 2007 and which injury resulted in a total left knee replacement.⁴

This Court, by referring to the Office of Judges' decision and rationale, reversed the Board of Review final order and reinstated the Office of Judges decision holding the claimant could reopen her claim for temporary total disability benefits even though her petition to reopen was filed beyond the five year period set out in W. Va. Code § 23-4-16(a)(2) because claimant suffered a new injury. While not specifically stated, but certainly inferred, in this Court's

⁴ Actually, claimant should have filed a new claim for workers' compensation benefits. In any event, during litigation of the claim at the Office of Judges, the New Fund employer, as insured by its private workers' compensation insurer, should have been brought into the claim as a chargeable party for the new injury. See, W. Va. Code § 23-5-1(b)(2)(A).

memorandum decision is the fact that claimant suffered a new injury when she fell during her physical therapy and had a new claim. The claimant here does not assert a new injury.

Petitioner also cites to Bailey v. State Workmen's Compensation Comm'r., 170 W. Va. 771, 296 S.E.2d 901 (1982) for support. However, Bailey simply does not apply. Moreover, in Fucillo v. Workers' Compensation Commissioner 180 W. Va. 585, 378 S.E.2d 637 (1988) this Court held, at syl. pt.1, that:

Time limitations for objections, protests or appeals by either party under the Workers' Compensation Act are now jurisdictional by virtue of recent amendments to the West Virginia Code and our contrary holding in Bailey v. State Workmen's Compensation Comm'r., 170 W. Va. 771, 296 S.E.2d 901 (1982), is expressly limited to cases occurring before 7 March 1986.

Thus, Bailey is effectively over-ruled, and it never was applicable to W. Va. Code §23-4-16 as these provisions are limitations on the jurisdiction of the Claim Administrator, not a jurisdiction giving statute.

V.

CONCLUSION

WHEREFORE, it is respectfully asserted that the reasoned conclusions of the Board of Review's final order dated February 25, 2013 should be affirmed as the Board applied the proper standard of review to the Office of Judges decision and the final order of the Board is not in clear violation of constitutional or statutory provision, is not clearly the result of erroneous conclusions of law and is not based upon the Boards material misstatement or mischaracterization of particular components of the evidentiary record.

Respectfully submitted,

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No. 13-0312
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CLARA L. STINNETT,
PETITIONER,

V.

BOR APPEAL NO.: 2047625
JCN: 990024403
DOI: 08/31/1998

WV DEPT. OF CORRECTIONS,
EMPLOYER,

and

WEST VIRGINIA OFFICE OF INSURANCE
COMMISSIONER IN ITS CAPACITY AS
ADMINISTRATOR OF THE WORKERS'
COMPENSATION OLD FUND,

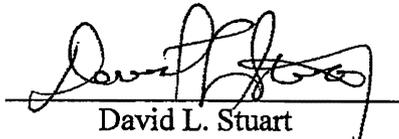
RESPONDENTS.

CERTIFICATE OF SERVICE

I, David L. Stuart, counsel to the Commissioner, do hereby certify that a true copy of the foregoing "Brief of Old Fund in Opposition to Appeal and In Support of Board of Review Final Order" and "Old Fund Appendix" were served upon all parties of record by depositing same in the United States Mail, first-class postage prepaid, the 19th day of April, 2013 and addressed as follows:

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