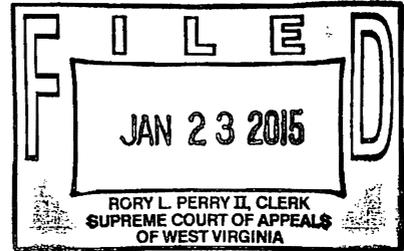


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET No. 14-0764



**JUDY VANNOY AKERS,**

Petitioner

v.)

Appeal from a final order  
of the Circuit Court of Kanawha  
County (10-C-746)

**PATRICIA JONES and  
WEST VIRGINIA PUBLIC  
EMPLOYEES RETIREMENT  
SYSTEM, a corporation, d/b/a  
WEST VIRGINIA CONSOLIDATED  
PUBLIC RETIREMENT BOARD,**

Respondents

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**Response of CPRB to Brief of Petitioner Judy Vannoy Akers**

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## Statement of the Case

In this appeal, Petitioner Judy Vannoy Akers (“Mrs. Akers”) argues that the West Virginia Consolidated Public Retirement Board (“CPRB”) should have awarded her survivor benefits in the form of a pre-retirement death benefit annuity after the death of her husband, Danny Akers (“Mr. Akers”), instead of the posthumous disability retirement award she was actually granted by the CPRB upon Mr. Akers’ death. The Statement of facts set forth by Petitioner Akers omits material facts and misrepresents testimony included in the record below; therefore, CPRB sets forth its Statement of Facts Below.

Mr. Akers began participating in the Public Employees Retirement System (PERS) as a state employee in 1979. (A.R. 107, 169).<sup>1</sup> At that time, Mr. Akers was married to Patricia Jones (Ms. Jones). (*Id.*) Ms. Jones and Mr. Akers separated on July 8, 2006, and divorced on June 30, 2008. (A.R. 107, 117). Mr. Akers continued to participate in PERS as an employee of the Division of Highways (DOH) after the separation and divorce, accruing 30 total years of PERS service credit. (A.R. 169-170).

By April 2009, Mr. Akers was experiencing significant medical problems and was not working but instead drawing on paid sick leave. (A.R. 127, 146). On September 5, 2009, Mr. Akers married Mrs. Akers. (A.R. 136). On September 15, 2009, CPRB received an Application for Disability Retirement Benefits from Mr. Akers, as well as a marriage license certifying his marriage to Mrs. Akers. (A.R. 136, 146). To qualify for PERS disability, a member must submit to medical examinations by two physicians, one named by the board and one named by the member. W. Va. Code § 5-10-25(a). A CPRB staff committee conducts an

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<sup>1</sup> References to the Joint Appendix Record, which relates to both this appeal and Docket No. 14-0734, are cited as “A.R. \_\_\_\_.”

initial review and determination of disability, and then reports that recommendation to a Committee of the Board of Trustees, which in turn makes a recommendation to the full CPRB Board of Trustees. W. Va. Code R. § 162-2-4.1. Mr. Akers died on December 16, 2009, while his disability application was still being processed by the CPRB. (A.R. 137, 156). During the month of December, he remained on his employer's payroll only due to the use of donated leave. (A.R. 168).

Initially, CPRB staff began processing Mr. Akers' death benefit as a pre-retirement death pursuant to W. Va. Code § 5-10-27(b)(1), in which case a benefit would have been payable to his surviving spouse, Mrs. Akers. (A.R. 132-133, 147-149). On or about January 19, 2010, CPRB staff sent Mrs. Akers a Survivor Benefit Estimate, which clearly and conspicuously stated that it was "merely advisory in nature and is not binding upon either The Retirement Board or the member." (A.R. 148). CPRB also sent Mrs. Akers an Application for Survivor's Benefits for a pre-retirement death benefit, which she completed and returned. (A.R. 149). Once CPRB staff realized that Mr. Akers' disability application was pending, they informed Mrs. Akers that she would receive a pre-retirement survivor benefit only if the disability retirement benefit was denied. (A.R. 156). This communication was sent on or about January 27, 2010. (*Id.*) The disability retirement application submitted by Mr. Akers was approved on March 3, 2010, and became effective as of January 1, 2010, the first day of the month following the date on which Mr. Akers last received payment from his employer. (A.R. 163, 171).

Had Mr. Akers survived until the completion of this process, he could have chosen one of three annuity types: a straight life annuity (a monthly annuity paid to the retirant until his death, with no survivor benefits), a 100% joint and survivor annuity (a monthly annuity

paid to the retirant until his death, followed by a monthly annuity to the beneficiary in the same amount), or a 50% joint and survivor annuity (a monthly annuity paid to the retirant until his death, followed by a monthly annuity to the beneficiary that is 50% of the monthly amount paid to the retirant). (A.R. 215). CPRB paid the survivor benefits as a 100% joint and survivor annuity to Mr. Akers' surviving spouse, Mrs. Akers - the most generous option for survivors available under the plan. (A.R. 162, 171).

CPRB had two pre-retirement beneficiary designations by Mr. Akers on file. (A.R. 132-135, 277-279). One, dated August 2, 2007, provided for a 100% joint and survivor annuity to Mr. Akers' surviving spouse. (A.R. 132-133, 277-278). (Mr. Akers identified an alternate beneficiary to receive the benefits in the event his spouse predeceased him. Apparently misunderstanding the form, he listed his then-wife, Patricia Akers, as such alternate beneficiary). A second, dated May 7, 2009, on the form applicable only to non-married members, provided for a single lump sum payment in equal parts to Mrs. Akers, at the time Mr. Akers' fiancé, and Mr. Akers' grandson. (A.R. 134, 279). A third form, also applicable only to non-married members, was executed by Mr. Akers on June 4, 2009, and given to counsel for Ms. Jones, but never provided to CPRB. (A.R. 135, 350, *see* Answer to Interrogatories 11 and 12). This form was for PERS participants who were not married at the time of death, with ten or more years of service, and opted for a lump sum payment to named beneficiary Ms. Jones. (A.R. 135). Because Mr. Akers was married at the time of his death, had his benefits been paid as a pre-retirement death benefit, the only valid form on file with CPRB was the August 2, 2007 form, electing that the benefits be paid as a 100% joint and survivor annuity to Mr. Akers' surviving spouse, Mrs. Akers. (A.R. 132-133, 277-278).

On February 11, 2010, Ms. Jones filed a Complaint against Mrs. Akers in the Circuit Court of Mercer County, individually and in her capacity as Administratrix of the Estate of Mr. Akers, along with a Motion for Temporary and Permanent Injunction, in which Ms. Jones sought to enjoin Mrs. Akers from spending or disposing any of the benefits she was receiving because Ms. Jones claimed that she was entitled to some of those benefits pursuant to a DRO that had previously been submitted to the CPRB. (A.R. 435-438). A temporary injunction was granted on March 24, 2010, but dissolved on July 26, 2010, and the case was ultimately voluntarily dismissed by the parties. (A.R. 440-447).

CPRB was not a party to those proceedings, though its then-Executive Director Ann Lambright was called to testify at a hearing on March 29, 2010. (A.R. 440-447, 606-726). CPRB does not agree with Mrs. Akers' characterization of Ms. Lambright's testimony regarding the disability retirement benefit paid by CPRB. For much of the hearing, Ms. Lambright was explaining potential scenarios and hypotheticals to the Court and the attorneys for Ms. Jones and Mrs. Akers. At other times she was explaining what actually occurred and thus her statements must be read in context. CPRB responds to the specific mischaracterizations made by Mrs. Akers in more detail in the Argument portion of this brief.

After initiating her Mercer County lawsuit, on April 27, 2010, Ms. Jones brought a separate lawsuit against CPRB and Mrs. Akers in Kanawha County Circuit Court, filing a Petition for Writ of Mandamus and Complaint for Injunction and Damages. (A.R. 25). CPRB moved to dismiss Ms. Jones' Complaint, the Circuit Court granted the Motion and Ms. Jones appealed. (A.R. 20-25, 80-96). This Court reversed the Circuit Court by Memorandum Decision dated September 23, 2011. (A.R. 20-24). Once the case was remanded, Mrs. Akers filed a Crossclaim against CPRB, asserting that it should have awarded her a pre-retirement spousal

benefit rather than a disability retirement spousal benefit. (A.R. 97-99). CPRB filed a Crossclaim against Judy Akers, seeking repayment of the benefits paid to her in the event Ms. Jones' claims prevailed. (A.R. 101-105). CPRB's Crossclaim has since been stayed.

After discovery, and at the direction and request of the Court, each of the parties filed Proposed Orders and/or Motions for Summary Judgment, response and replies. (A.R. 351-434, 448-605). The Circuit Court granted CPRB's Motions for Summary Judgment against both Ms. Jones and Mrs. Akers. (A.R. 1-19). Ms. Jones has already appealed the Circuit Court's order via an appeal to this Court. *See* West Virginia Supreme Court of Appeals Docket No. 14-0734. In the present appeal, Mrs. Akers claims that the Circuit Court improperly granted summary judgment regarding her Crossclaim against the CPRB as well. However, for the reasons articulated in this brief and the Kanawha County Circuit Court's decision granting CPRB's request for summary judgment, summary judgment was appropriately granted by the Circuit Court, and Mrs. Akers' appeal must be denied.

### **Summary of Argument**

CPRB is paying Mrs. Akers as the survivor beneficiary of a joint and survivor disability retirement award, pursuant to W. Va. Code § 5-10-25, instead of as a pre-retirement benefit under W. Va. Code § 5-10-27. West Virginia law clearly mandates that once filed, the CPRB must continue processing a disability application and grant the application retroactive to the first of the month following the date of application or the date last on payroll, whichever is later. No exception to this requirement exists in the statutes and legislative rules governing disability determinations when the member dies while an application is pending but not yet formally approved. Since the result of the disability application process in this case was a determination that Mr. Akers had been entitled to a disability retirement at the time he applied,

CPRB properly paid Mrs. Akers' survivor benefits as a joint and survivor disability annuity under W. Va. Code § 5-10-25. Had Mr. Akers' been determined not disabled, the benefits would have then been paid as pre-retirement death benefits under W. Va. Code § 5-10-27.

CPRB's approach is a reasonable, prudent reconciliation of two statutes that do not expressly address how to award benefits when a disability retirement applicant dies before his application is approved. This approach ensures that the survivors of disabled members who die while their disability retirement applications are pending will receive more generous survivor benefits in the form of lifetime annuity whenever possible, rather than the lump sum return of employee contributions that is sometimes all that is payable under the pre-retirement death benefit statute. As the administrative body charged with interpreting both of these statutes, CPRB's interpretation should not be reversed.

### **Statement Regarding Oral Argument and Decision**

Mrs. Akers did not request oral argument in this matter because many of the issues are issues of statutory interpretation. CPRB agrees that a resolution of this case calls for statutory interpretation, but adds that the question of whether CPRB may pay benefits in these circumstances as a disability retirement benefit is a question of first impression for this Court, as CPRB's decision to award posthumous disabilities has never been challenged before. Within this context, the case presents a relatively narrow question of law; therefore, if the Court desires argument, CPRB believes Rule 19 argument would be appropriate.

### **Argument**

The Circuit Court's entry of summary judgment must be reviewed *de novo*. *Painter v. Peavy*, 192 W. Va. 189, 192, 451 S.E.2d 755, 758 (1994). "Summary judgment is

appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case..." *Belcher v. Wal-Mart Stores*, 211 W. Va. 712, 719, 568 S.E.2d 19, 26 (2002) (per curiam) (citation omitted).

**I. The Circuit Court did not err in ruling that CPRB had authority to award a posthumous disability retirement because W. Va. Code § 5-10-25(a) and W. Va. Code R. § 162-5-19 require disability awards to be retroactive to a date on or after the date of application, with no exception when the applicant dies while the application is processing.**

The Circuit Court concluded that CPRB was entitled to Summary Judgment against Mrs. Akers regarding her Crossclaim because:

West Virginia Code § 5-10-25 require[d] the Board to grant a disability retirement request "upon application," retroactive to the later of the first day of the month following the date of application or the first day of the month following the last day the member appears on the employer's payroll. W. Va. Code § 5-10-25 and W. Va. Code R. § 162-5-19.2.

(A.R. 17). In her first and second Assignments of Error, Mrs. Akers disputes that W. Va. Code § 5-10-25 provides such authority in the event of a disability applicant's death, and claims CPRB was without authority to award the disability retirement benefit in this case. Mrs. Akers' appeal ignores express language in W. Va. Code § 5-10-25(a), as well as the legislative rules governing PERS and disability retirement applications, which gave CPRB authority to award the disability retirement notwithstanding Mr. Akers' death while CPRB processed his application.

W. Va. Code § 5-10-25(a) makes clear that CPRB was required to proceed with Mr. Akers' request for disability retirement "upon application." W. Va. Code § 5-10-25(a) states in relevant part that:

[u]pon the application of a member of the retirement system . . . any member who is in the employ of a participating public employer or was in the employ of a participating public employer on a date which is twelve months or less from the date upon which the member became incapacitated . . . who becomes totally and permanently incapacitated for employment, by reason of a personal injury or disease, may be retired by the board . . . .

(emphasis added). Further, W. Va. Code R. § 162-5-19.2 provides:

Disability annuity payments will commence for any member of a participating public employer who is approved for a disability retirement annuity pursuant to W. Va. Code § 5-10-25 effective the first day of the month following receipt of application or the first day of the month following termination of employment and benefits, whichever occurs last. Upon receipt of all properly executed forms submitted by the employer or former employer and the disability retiree as required pursuant to the Consolidated Public Retirement Board's rule, Benefit Determination and Appeal, 162CSR2, the Board shall process the disability retirement annuity as soon as administratively feasible.

The process of ensuring that an applicant is entitled to disability retirement, assigned to CPRB as plan administrator inherently includes a delay between when the disability retirement application is received by CPRB and when it is approved. W. Va. Code § 5-10-25(a) requires medical examinations be performed on the applicant by a medical committee consisting of one physician appointed by CPRB and another appointed by the applicant. *Id.* After the examinations, the medical committee must report their findings to the CPRB, which must assess whether the member applicant is physically/mentally totally incapacitated for employment, whether the incapacity will be permanent, and whether the member should be retired. *Id.* If the medical committee's findings are split and one physician recommends disability while the other physician does not, CPRB may, at its discretion, appoint a third physician, and then decide whether to award disability retirement based on the findings of all three physicians. *Id.* Once the required reports and applications are received, a CPRB staff committee conducts an initial

review and determination of disability, and then reports that recommendation to a Committee of the Board of Trustees, which in turn makes a recommendation to the full CPRB Board of Trustees. W. Va. Code R. § 162-2-4.1. Approval by the Board of Trustees is required. *Id.*

To address the inherent delay between the date an applicant submits his disability retirement application, and the date on which the Board of Trustees approves a disability application, by statute and rule, the Legislature has declared that once approved, disability retirement is retroactive to the first day of the month following the date of application or the date the applicant was last on the employer's payroll. W. Va. Code R. § 162-5-19.2. (As discussed below, although the language currently found in W. Va. Code R. § 162-5-19.2 was not effective until April 12, 2010, legislative rules governing PERS disabilities and retirement have provided for retroactivity of annuity payments back to a date of application or termination of employment since at least 1993. At the time of Mr. Akers' application for disability retirement and death, W. Va. Code R. § 162-5-19.1 (2009) provided for the same result). Mrs. Akers does not identify any provision making an exception to this requirement when the applicant dies during the processing, because no such exception exists. Thus, a disability retirement applicant may die after his application was filed but before it was formally approved by CPRB, in which case he nonetheless became entitled as of the first of the month following date of application or the date he was last on payroll.

CPRB's consideration of disability applications is not permissive or discretionary, as Mrs. Akers claims. The "may" on which Mrs. Akers relies in W. Va. Code § 5-10-25(a) refers to the fact that the Board has the discretion to determine whether an applicant is disabled - the Board does not have the discretion not to rule on the disability application at all.

*See State ex rel. Young v. Sims*, 192 W. Va. 3, 449, S.E.2d 64 (1994). If, at the time of the application, the applicant is disabled, then CPRB must award him disability retirement.

Mrs. Akers argues that various excerpts from W. Va. Code R. § 162-2-4.2 and W. Va. Code R. § 162-5-19.2 suggest that an applicant must be alive in order to receive disability retirement benefits. Both of these provisions merely contemplate that once the Board of Trustees approves a disability retirement application, additional paperwork is necessary; they do not prohibit an award to an applicant who died while the application was being processed.

CPRB received Mr. Akers' disability retirement application on September 15, 2009, three months before his death on December 16, 2009. (A.R. 136-137, 146, 156). It was not until January 21, 2010 that CPRB received information from Mr. Akers' employer indicating his last day of paid leave. (A.R. 168). The Board of Trustees thereafter considered the disability application and granted it on March 3, 2010. (A.R. 163, 171). Pursuant to W. Va. Code R. § 162-5-19.1 (2009), the application was granted retroactive to the first day of the month following Mr. Akers' last day of paid leave, January 1, 2010. *Id.* Moreover, to benefit Mrs. Akers, CPRB began paying the benefit as if Mr. Akers had selected a 100% Joint and Survivor Annuity; any other option would have significantly reduced or eliminated the benefits Mrs. Akers received.

Mr. Akers was alive at the time of his application, and CPRB had an obligation to continue processing his request for a disability retirement benefit. It was only due to the various requirements imposed on CPRB and disability retirement applicants by statute and legislative rule that his application was not approved until March. CPRB appropriately granted the disability retirement benefit retroactively despite Mr. Akers' death while the application was pending, paying pursuant to the most generous option available to the Petitioner, Mrs. Akers.

Accordingly, CPRB respectfully requests this Court deny Petitioner's appeal and affirm CPRB's award.

**II. The Circuit Court did not err in relying on W. Va. Code R. § 162-5-19.2 because the requirements of the rule were in effect at the time of Mr. Akers' disability retirement application and death.**

In her third Assignment of Error, Mrs. Akers claims that the Court improperly relied on W. Va. Code R. § 162-5-19.2. As noted previously, this rule provides that:

Disability Retirement Annuity. Disability annuity payments will commence for any member of a participating public employer who is approved for a disability retirement annuity pursuant to W. Va. Code § 5-10-25 effective the first day of the month following receipt of application or the first day of the month following termination of employment and benefits, whichever occurs last. Upon receipt of all properly executed forms submitted by the employer or former employer and the disability retiree as required pursuant to the Consolidated Public Retirement Board's rule, Benefit Determination and Appeal, 162CSR2, the Board shall process the disability retirement annuity as soon as administratively feasible.

Although W. Va. Code R. § 162-5-19.2 did not become effective until April 12, 2010, prior PERS legislative rules specified this as well. For example, at the time of Mr. Akers' death, W. Va. Code R. § 162-5-19.1 (2009) provided that:

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 W. Va. Code § 5-10 et seq., commencing the end of the month following the month after he or she was last on the payroll of a participating public employee...

This principle has been required by PERS legislative rules since at least 1993.

*See* W. Va. Code R. § 162-5-23 (effective August 4, 1993).

Thus, while the language of the rule has changed, this change did not impact Mrs. Akers' receipt of Mr. Akers' survivors benefits. Under both the rule that became effective in 2010, and the rule in effect before that date, Mrs. Akers was entitled to those benefits during the month following Mr. Akers' last month of employment. Under both regulations, Mrs. Akers was entitled to payments as of January 2010, the same month that she actually started to receive payments. Moreover, it is unclear why Mrs. Akers takes issue with this particular provision, when she does not challenge the date on which annuity payments began, but rather the statute under which the annuity payments were calculated. Pursuant to W. Va. Code § 5-10-27(b)(1), pre-retirement death benefits would have been payable "as if the member had ... [r]etired the day preceding the date of his or her death." Thus, W. Va. Code R. § 162-5-19.1 (2009) would have governed in any event. Moreover, neither the current nor the 2009 version of this regulation impacts the language of W. Va. Code § 5-10-25(a), which demands that CPRB process disability retirement applications, without exception for the death of a member while the application is being considered.

Similarly, neither *Hudkins v. W. Va. Consol. Pub. Ret. Bd.*, 220 W. Va. 275, 647 S.E.2d 711 (2007) (per curiam) nor *W. Va. Consol. Pub. Ret. Bd. v. Jones*, 223 W. Va. 681, 760 S.E.2d 495 (2014) (per curiam) impacts how W. Va. Code § 5-10-25 should be interpreted. In *Hudkins*, this Court ruled that CPRB was equitably estopped from prohibiting a PERS member from converting sick leave to retirement service credit when the member terminated employment before becoming eligible to retire. The Court's decision turned on several key facts, including that CPRB specifically advised the member that she could convert sick leave to service credit even though she would not be immediately eligible to retire, and that she acted in reliance on that advice to her detriment, because she would not have terminated employment had she

been told she would lose her sick leave. *Hudkins*, 220 W. Va. at 281. In *Jones*, this Court ruled that CPRB was not equitably estopped from denying an individual participation in PERS, because in that case CPRB made no false representation on which the individual relied related to eligibility to receive retirement benefits. 233 W. Va. at 687.

Mrs. Akers Crossclaim did not assert estoppel, nor did her Proposed Order or response to CPRB's Motion for Summary Judgment, submitted to the Circuit Court below. Mrs. Akers' argument has always been that CPRB lacked statutory authority to issue the disability retirement award, not that CPRB was prohibited from issuing the award by estoppel. Moreover, Mrs. Akers' admits that equitable estoppel does not apply to this matter. *See* Pet'r Brief, p. 15. Finally, there is no evidence of any reliance on the part of Mrs. Akers, detrimental or otherwise, on any advice by CPRB. Estoppel cases have no relevance to her claims.

The Circuit Court's Final Order did not, as Mrs. Akers alleges, rely incorrectly on provisions not in effect at the time of Mr. Akers' disability application and death, nor does estoppel apply to this claim. CPRB respectfully requests the Court to deny Mrs. Akers' appeal.

**III. The Circuit Court did not err in declining to apply W. Va. Code § 5-10-27(b)(1), the pre-retirement death benefit statute.**

In her fourth Assignment of Error, Mrs. Akers claims that the Circuit Court should have determined that W. Va. Code § 5-10-27(b)(1) applied to the payment of death benefits, rather than W. Va. Code § 5-10-25(a), despite the requirement in such provision that disability retirement applications be processed "upon application."

Mr. Akers' death forced the CPRB to reconcile the provisions of W. Va. Code § 5-10-25(a) with W. Va. Code § 5-10-27(b)(1), which reads in relevant part that

[i]n 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.

Neither W. Va. Code § 5-10-25(a) nor W. Va. Code § 5-10-27(b)(1) expressly addresses what to do when a disability retirement applicant dies before his application is approved. Interestingly, while Mrs. Akers argues that neither W. Va. Code § 5-10-25(a) nor W. Va. Code § 5-10-27(b)(1) are ambiguous, she devotes an entire section of her brief to explaining that neither statute has ever addressed posthumous disability retirements. *See* Pet'r Akers' Brief, pg. 13. By definition, these provisions' failure to address posthumous disability retirement makes them ambiguous as to that issue, as statutes are not categorically defined as being "ambiguous" or "unambiguous," but rather, a statute's ambiguity, or lack thereof, is based on whether or how it addresses the specific issue at hand. *See* Syl. Pts. 3 and 4, *Appalachian Power Co. v. State Tax Dept. of W. Va.*, 195 W. Va. 573, 466 S.E.2d 424 (1995) (recognizing that if a statute makes the intent of the Legislature clear, then an agency's position must be consistent with that intent, but recognizing that if a statute is silent with respect to an issue, statutory construction then becomes necessary).

Ultimately, W. Va. Code § 5-10-25(a) and W. Va. Code § 5-10-27(b)(1) must be read in concert with one another. *See* Syl. pt. 7, *Vest v. Cobb*, 138 W. Va. 660, 76 S.E.2d 885 (1953) ("Statutes which deal with the same subject matter should be read *in pari materia*, unless the statutes exhibit an intent on the part of the Legislature that they should be

separately construed.”). This Court must not limit its consideration of the statutes at issue to any single provision or section, but rather must review them in their entirety and with an eye towards coordination to properly ascertain legislative intent.

Continuing to process posthumous disability applications even after the death of the applicant protects the surviving spouses of applicants who might otherwise receive no benefit at all, furthering the intent of the Legislature that the plan be operated for the benefit of its members and beneficiaries. *See* W. Va. Code § 5-10-3a(c). For example, the surviving spouse of a deceased member with too few years of service to qualify for a pre-retirement death annuity under W. Va. Code § 5-10-27(b)(1) would receive no benefit whatsoever from the plan. W. Va. Code § 5-10-25 was designed to protect those members who are so disabled that they are precluded from working. Logically, individuals who suffer from such debilitating conditions may suffer a higher risk of death when compared to other members, and such death could occur while a member’s disability retirement application is being evaluated. If as a result of this appeal, this Court concludes that W. Va. Code § 5-10-27(b)(1) trumps W. Va. Code § 5-10-25(a) where an individual dies while an application for disability retirement is pending, there will be surviving spouses or beneficiaries of members who receive substantially fewer benefits, if any.

Further, as Ms. Lambright explained via her testimony in the underlying case between Petitioner Jones and Petitioner Akers, CPRB’s current approach will normally be more beneficial to the survivor of a disability retirement applicant who dies before his application is approved. (A.R. 652-653). As Ms. Lambright explained, calculating an individual’s “regular” retirement annuity payment requires multiplying two percent of the member’s final average salary with his years of service credit. *See* W. Va. Code § 5-10-21. This formula also applies to pre-retirement death benefits, even if the member dies before reaching age sixty-five. W. Va.

Code § 5-10-27(b)(1). Disability retirement recipients, on the other hand, are guaranteed an annuity payment that is no less than 50% of their pre-retirement salary. W. Va. Code § 5-10-25(c). Thus, for at least some surviving spouses or beneficiaries of members who die while a disability application is pending, paying the benefit as a disability retirement benefit rather than a pre-retirement death benefit is more favorable. (A.R. 652-653).

This Court has previously recognized that “construction given a statute by the officers charged with the duty of executing it ought not to be discarded without cogent reason.” *State ex rel. Daily Gazette Co. v. County Court, Kanawha Cnty.*, 137 W. Va. 127, 132, 70 S.E.2d 260, 262 (1952) (citations omitted). Not only does CPRB’s construction protect many families, but it is most consistent with W. Va. Code § 5-10-25(a)’s demand that a disability retirement application be processed “upon application.”

Mrs. Akers’ brief also asserts that as a surviving spouse she has a right to receive death benefits. CPRB agrees that PERS in many cases provides for a surviving spouse or other beneficiary to receive benefits upon a member’s death, and indeed, Mrs. Akers is receiving them. Each month she receives an annuity payment and she will continue to do so until her death. This is not a case in which a widow has been denied benefits. Mrs. Akers was awarded the most favorable annuity available to her under the disability retirement statute.

Mrs. Akers also argues CPRB was mandated to award a pre-retirement death benefit claiming that W. Va. Code R. § 162-5-19.4 provides that a survivor annuity “shall” commence after the death of a member. This argument is without merit because this rule applies not to mandate a pre-retirement death benefit when a disability retirement benefit is otherwise available, but rather to require CPRB to commence a pre-retirement death benefit by a particular date when one is otherwise payable. If W. Va. Code § 5-10-25(a) continues to be applicable

after an applicant's death, as CPRB believes, W. Va. Code R. § 162-5-19.4 is irrelevant. Similarly, the pre-retirement beneficiary forms submitted by Mr. Akers did not apply to this action, and have no bearing upon the outcome of this matter, because pre-retirement benefits were not awarded. (Although had they been, Mrs. Akers would have been the recipient of the benefits regardless).

Lastly, Mrs. Akers cites testimony given by Ms. Lambright to support her argument that pre-retirement death benefits were payable, but mischaracterizes and misrepresents those statements in her brief to this Court. For most of the hearing, Ms. Lambright was speaking in terms of hypothetical situations posed by the attorney's for Mrs. Akers and Ms. Jones, so her testimony must be read in the context in which it was presented.

For example, Mrs. Akers' Brief states that Ms. Lambright testified that Mr. Akers was an active employee and not a retirant, therefore giving him the ability to leave a benefit to his surviving spouse. Pet'r Brief, p. 4. The testimony quoted does not establish that Mr. Akers was an active employee and not a retirant at the time of his death - in fact, Ms. Lambright emphasizes later in the hearing that Mr. Akers' death occurred after his disability application was filed. (A.R. 651-654). In the testimony cited by Mrs. Akers, Ms. Lambright was referring to Mr. Akers' eligibility to leave a surviving spouse benefits; she was not testifying that Mr. Akers could only leave a pre-retirement death benefit to his surviving spouse. *Id.*

As an additional example, Mrs. Akers claims in her statement of the case that Ms. Lambright testified "that the law trumps any beneficiary forms entered prior to [Mr. Akers'] marriage." (A.R. 606, 623). Ms. Lambright was referring to the fact that under the pre-retirement statute generally, a surviving spouse must receive the benefit unless it is waived. *Id.* Thus, a pre-retirement beneficiary form for an unmarried PERS member who dies after marriage

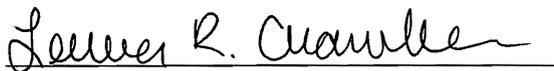
will be trumped by the existence of the marriage. However, there are different forms for married PERS members, and if those forms are filled out after marriage, those forms will determine the applicable survival benefits. This is what Ms. Lambright was referring to. Ms. Lambright's testimony does not support Mrs. Akers' claim that a pre-retirement death benefit should have been paid.

### **Conclusion**

The approach taken by the CPRB provided both Mrs. Akers with appropriate survivor's benefits, and follows the express language and spirit of W. Va. Code § 5-10-25(a). As such, this Honorable Court should deny all of the Assignments of Error alleged in Petitioner's Brief, and hold that the Kanawha County Circuit Court correctly granted the West Virginia Consolidated Public Retirement Board's Motion for Summary Judgment ruling in its favor on Mrs. Akers' Crossclaim.

West Virginia Consolidated Public  
Retirement Board

By Counsel



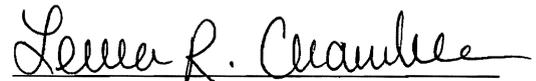
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## Certificate of Service

I hereby certify that on this 23rd day of January, 2015, a true and accurate copy of the foregoing **Response of CPRB to Petitioner Judy Akers** was deposited in the U.S. Mail, contained in a postage-paid envelope, addressed to counsel for all other parties to this appeal as follows:

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