

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

FILED

November 16, 2012

CYNTHIA S. LEWIS, Petitioner

**vs.) No. 11-1689 (BOR Appeal No. 2045770)
(Claim No. 960022062)**

released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

WEST VIRGINIA OFFICE INSURANCE COMMISSION, Respondent

AND

WEST VIRGINIA OFFICE INSURANCE COMMISSION, Petitioner

**vs.) No. 11-1722 (BOR Appeal No. 2045919)
(Claim No. 960022062)**

CYNTHIA S. LEWIS, Respondent

MEMORANDUM DECISION

These consolidated appeals arise out of a workers' compensation claim that resulted from work-related injuries suffered by Cynthia S. Lewis on November 21, 1995.¹ The claim has been held compensable for several conditions including spinal stenosis; acquired spondylolisthesis; lumbosacral radiculitis; degenerative intervertebral disc, lumbar; post-laminectomy syndrome, lumbar region; sprains of the sacroiliac region; and a depressive disorder. On October 25, 2001, Ms. Lewis was granted a 32% permanent partial disability award.

In Case No. 11-1689, Ms. Lewis, the petitioner therein, by J. Marty Mazezka, her attorney, appeals a November 14, 2011, order entered by the Worker's Compensation Board

¹Ms. Lewis was employed by Trinity Medical Center West, Inc.

of Review (“Board”) affirming a final order of the Workers’ Compensation Office of Judges (“OOJ”) dated March 16, 2011, that upheld the January 25, 2010, order of the claims administrator denying Ms. Lewis’s request for a permanent partial disability rating for her compensable diagnosis of disturbance of salivary secretion. In Case No. 11-1722, the West Virginia Office of the Insurance Commission (“WVOIC”), the petitioner therein, by David L. Stuart, its attorney, appeals an order also entered by the Board on November 14, 2011, affirming an April 14, 2011, order of the OOJ that reversed the claims administrator’s January 25, 2010, order that had denied Ms. Lewis’s request to add carpal tunnel syndrome as a compensable condition in the claim. The OOJ held the claim compensable for carpal tunnel syndrome and stated that Ms. Lewis is entitled to medically necessary treatment in relation to her carpal tunnel syndrome, but noted that any request for permanent partial disability benefits would be time barred.

Upon consideration of the standard of review, the briefs and oral argument of counsel, as well as the submitted record, this Court finds no prejudicial error. These cases do not present a new or significant question of law. Therefore, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

As set forth above, in Case No. 11-1689, the Board denied Ms. Lewis’s request for a permanent partial disability rating for her compensable condition of disturbance of salivary secretion,² which was added as a component of the claim on January 6, 2009. The Board determined that the request was time barred because it was filed outside the five-year statute of limitations set forth in W. Va. Code § 23-4-16(a)(2).³ The Board found that the five-year

²Ms. Lewis’s condition of disturbance of salivary secretion, i.e., dry mouth, was caused by the prescription medication she has taken for her other injuries.

³W. Va. Code § 23-4-16 provides, in pertinent part:

- (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

statute of limitations was triggered in Ms. Lewis's claim on October 25, 2001, the date she was granted her initial permanent partial disability award, and therefore, her January 15, 2009, request for a permanent partial disability rating for her compensable condition of disturbance of salivary secretion was clearly time barred.

In this appeal, Ms. Lewis contends that her request for a permanent partial disability rating is simply a request to be evaluated for a medical condition that was approved by prior reopening litigation. In other words, she argues that because her claim was held compensable for disturbance of salivary secretion after she was granted her 32% permanent partial disability award, she is entitled to a permanent partial disability rating for this condition.

In denying Ms. Lewis's request, the Board relied upon this Court's decision in *Fox v. West Virginia of Office Insurance Comm'r*, No. 100806 (July 21, 2011). In that case, this Court affirmed a decision of the Board which found a request for a permanent partial disability evaluation time barred where the claimant was initially granted a permanent partial disability award on April 9, 2004. The condition for which the claimant sought a permanent partial disability evaluation was held compensable on April 26, 2006, after the permanent benefits were initially granted. This Court upheld the Board's decision that the claimant's

entered either prior to or after that date shall be determined by the following subdivisions 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. With regard to those occupational diseases, including occupational pneumoconiosis, which are medically recognized as progressive in nature, if any such request is granted by the commission, successor to the commission, other private carrier or self-insured employer, whichever is applicable, a new five-year period begins upon the date of the subsequent award.

May 13, 2009, request for a permanent partial disability evaluation for the added condition was time barred pursuant to W. Va. Code § 23-4-16(a)(2).⁴

Given the above, the decision of the Board in this instance is not in clear violation of any constitutional or statutory provision, nor is it clearly the result of erroneous conclusions of law, nor is it based upon a material misstatement or mischaracterization of the evidentiary record. Therefore, the decision of the Board in Case No. 11-1689 is affirmed.

In Case No. 11-1722, the WVOIC appeals the Board's decision which held Ms. Lewis's claim compensable for the additional diagnosis of carpal tunnel syndrome which she developed as a result of her repeated use of a walker as an assistive device as her back condition progressed.⁵ The Board further ruled that Ms. Lewis is entitled to medically necessary treatment in relation to her carpal tunnel syndrome but that any request for permanent partial disability benefits would be time barred.

In this appeal, the WVOIC asserts that the Board erred by not ruling that Ms. Lewis's request to add carpal tunnel syndrome as a compensable condition was also time barred. In reaching its decision, the Board adopted the reasoning of the OOJ. The OOJ stated that Ms. Lewis "can seek medical treatment since her request for medical treatment is not time barred

⁴See also *Kuhns v. West Virginia Office Insurance Comm'n*, No. 11-0026 (July 26, 2012) (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 Comm'r*, No. 11-0031 (July 6, 2012) (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 Insurance Comm'r*, No. 101433 (March 29, 2012) (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 Comm'r*, No. 101483 (March 26, 2012) (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 Comm'r*, No. 11-0097 (December 7, 2011) (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); and *Speights v. West Virginia Office of Insurance Comm'r*, No. 101173 (November 10, 2011) (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).

⁵As a result of her poor recovery from her back surgeries, Ms. Lewis has developed a leg length discrepancy and, thus, requires the use of a walker.

under the provisions of this statute.”⁶ (Footnote added). The OOJ further explained that “[i]n order for [Ms. Lewis] to receive treatment, [her] carpal tunnel syndrome must be a compensable condition. [Ms. Lewis] has provided compelling evidence to establish that she has developed bilateral carpal tunnel syndrome as a direct result of her injury of 1995 and thus, under the provisions of W. Va. Code § 23-4-16(a)(4), [Ms. Lewis] would be entitled to receive additional treatment.”

Given the above, the decision of the Board in this instance is not in clear violation of any constitutional or statutory provision, nor is it clearly the result of erroneous conclusions of law, nor is it based upon a material misstatement or mischaracterization of the evidentiary record. Therefore, the decision of the Board in Case No. 11-1722 is affirmed.

In conclusion, the decisions of the Board of Review entered on November 14, 2011, in this claim are affirmed.

Affirmed.

⁶The OOJ was referring to W. Va. Code § 23-4-16(a)(4), which states:

With the exception of the items set forth in subsection (d), section three of this article, in any claim in which medical or any type of rehabilitation service has not been rendered or durable medical goods or other supplies have not been received for a period of five years, no request for additional medical or any type of rehabilitation benefits shall be granted nor shall any medical or any type of rehabilitation benefits or any type of goods or supplies be paid for by the commission, successor to the commission, other private carrier or self-insured employer, whichever is applicable, if they were provided without a prior request. For the exclusive purposes of this subdivision, medical services and rehabilitation services shall not include any encounter in which significant treatment was not performed.

The record indicates that Ms. Lewis has continually received medical treatment since her claim was filed in 1995.

ISSUED: November 16, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Margaret L. Workman

Justice Thomas E. McHugh