

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

**Murray American Energy, Inc.,
Employer Below, Petitioner**

vs.) No. 21-0570 (BOR Appeal No. 2055832)
(Claim No. 2017018722)

**Francis E. Szalay,
Claimant Below, Respondent**

MEMORANDUM DECISION

Petitioner Murray American Energy, Inc., (“Murray American Energy”) appeals the West Virginia Workers’ Compensation Board of Review’s order dated June 23, 2021, in which the Board determined that Respondent Francis Szalay, met the second threshold for pursuing permanent total disability benefits: In doing so, the Board of Review reversed and vacated the September 24, 2020, decision of the Workers’ Compensation Office of Judges, which affirmed the November 25, 2019, claims administrator’s order finding that Mr. Szalay had not met the second threshold for pursuing permanent total disability benefits.¹ This case satisfies the “limited circumstances” requirement of Rule 21(d) of the Rules of Appellate Procedure. Upon our review, we determine that oral argument is unnecessary and that a memorandum decision reversing the Board of Review is appropriate. *See* W. Va. R. App. P. 21.

Mr. Szalay worked at Murray American Energy’s Ohio County Coal Company. On November 16, 2016, he completed a Retiree Enrollment Form, requesting to retire from the company effective November 16, 2016. He indicated on the Enrollment Form that he was sixty-five years old. He had completed 44.75 years of signatory service at the time of his retirement. The UMWA Health and Retirement Funds sent correspondence to Mr. Szalay on December 2, 2016, advising that his application for a retirement pension had been approved with an effective date of February 1, 2016.

On February 1, 2017, Mr. Szalay filed a workers’ compensation claim for occupational noise-induced hearing loss. He was examined by Ronald Wilkinson, M.D., on January 26, 2017. Dr. Wilkinson found 21.45% permanent impairment due to occupational noise-induced hearing loss, based upon audiology testing. By order dated April 10, 2017, the claims administrator granted Mr. Szalay a 10.65% permanent partial disability award, which represented the 21.45%

¹ Murray American Energy is represented by Denise D. Pentino and Aimee M. Stern, and Mr. Szalay is represented by M. Jane Glauser.

recommended by Dr. Wilkinson less the 10.80% permanent partial disability award previously awarded to him in Claim No. 2003043535.

Mr. Szalay filed an application for permanent total disability benefits on April 17, 2017. West Virginia Code § 23-4-6(n)(1) (2005) provides, in part, that,

in order to be eligible to apply for an award of permanent total disability benefits for all injuries incurred and all diseases, including occupational pneumoconiosis, regardless of the date of last exposure, . . . a claimant: (A) Must have been awarded the sum of fifty percent in prior permanent partial disability awards; (B) must have suffered a single occupational injury or disease which results in a finding by the commission that the claimant has suffered a medical impairment of fifty percent; or (C) has sustained a thirty-five percent statutory disability pursuant to the provisions of subdivision (f) of this section. Upon filing an application, the claim will be reevaluated by the examining board . . . to determine if the claimant has suffered a whole-body medical impairment of fifty percent or more resulting from either a single occupational injury or occupational disease or a combination of occupational injuries and occupational diseases[.]²

In his application, Mr. Szalay asserted that the permanent partial disability awards he received totaled 60.45%. He listed his prior permanent partial disability awards as follows: Claim No. 930034595, 19% for a low back injury; Claim No. 20030043535, 10.8% for hearing loss; Claim No. 2016017902, 20% for a right hip injury; and Claim No. 2017018722, 10.65% for hearing loss. However, the claims administrator issued an Order dated May 17, 2017, denying Mr. Szalay's application for permanent total disability benefits on the basis that (1) he retired with a regular service pension after 44.7 years of service, thus voluntarily removing himself from the labor market; and (2) he has not reached the required 50% threshold needed to file for a permanent total disability award. Mr. Szalay protested the claims administrator's decision.

On November 22, 2017, the Office of Judges reversed the claims administrator's order, finding that Mr. Szalay had met the first 50% statutory threshold for filing a permanent total disability application. The Office of Judges concluded that the consideration of whether Mr. Szalay's application for permanent total disability benefits was properly rejected on the basis of accepting a retirement pension was premature, as the claims administrator should have limited its reopening review to the issue of whether Mr. Szalay met the first 50% threshold of West Virginia Code § 23-4-6(n)(1).

²Pursuant to W. Va. Code § 23-4-6(n)(1), a claimant must first meet the eligibility threshold by demonstrating that he or she has been awarded the sum of 50%, or 35% in statutory disability. Most often the eligibility threshold is determined by simply adding the claimant's prior permanent partial disability awards. Once the eligibility threshold has been satisfied, the claimant will be reevaluated for a determination as to whether he or she meets the whole-person medical impairment threshold by being assessed with at least 50% whole-person impairment from all compensable injuries/diseases, or a 35% statutory award. *Id.*

During litigation, Murray American Energy argued that West Virginia Code § 23-4-6(n)(4)(B) provides, in part, that “no medical impairment existing as the result of any occupational disease, the medical diagnosis of which is based solely upon symptoms rather than specific, objective, and measurable findings, . . . may be included in the aggregation of permanent disability[.]” The record indicates that 21.45% of Mr. Szalay’s prior permanent partial disability was attributable to occupational hearing loss. In reviewing Mr. Szalay’s protest of the claims administrator’s decision, the Office of Judges addressed the arguments made by the employer and concluded that a rating for a permanent partial disability award is not based solely on symptoms but is based on specific, objective, and measurable findings. The Office of Judges found that within the area of disability evaluation for occupational hearing loss there are validity tests to ensure reliability and uniformity for disability awards. The Office of Judges stated that West Virginia Code of State Rules § 85-20-47.1 provides, in part, that “only physicians who are qualified otologists or otolaryngologists may interpret the results of audiograms in assessing the degree of the injured worker’s noise-induced hearing loss impairment[.]” The Office of Judges also stated that only audiometric results obtained by an audiologist having a certificate of clinical competence in audiology are acceptable for purposes of awarding compensation. The Office of Judges further noted that an audiologist must adopt the American National Standards Institute (“ANSI”) guidelines and perform an annual exhaustive calibration of testing equipment and listening tests, as well as perform specific reliability and validity checks during the course of an audiogram. Also, an otologist or otolaryngologist must use specific step by step formulas when interpreting the test results to calculate a worker’s hearing loss impairment. The Office of Judges concluded that a rating of permanent partial disability in an occupational hearing loss claim is not based solely upon symptoms, but on specific, objective, and measurable medical findings ensured by statutory validity checks and other requirements. Accordingly, the Office of Judges concluded that the claims administrator erred as a matter of law in excluding Mr. Szalay’s hearing loss awards of 10.8% and 10.65% from its determination as to whether Mr. Szalay met the 50% threshold for permanent total disability consideration.

On May 15, 2018, the Board of Review adopted the findings and conclusions of the Office of Judges and modified the decision to reflect that Mr. Szalay may not produce additional evidence of his alleged permanent total disability after June 18, 2017, due to his receipt of regular, old-age Social Security benefits. *See* W. Va. Code § 23-4-24(a). The Board of Review affirmed the remainder of the Office of Judges’ decision, including the conclusion that Mr. Szalay met the first 50% threshold set forth in West Virginia Code § 23-4-6(n)(1).

Mr. Szalay underwent a functional capacity evaluation at Wheeling Hospital Physical Therapy on August 28, 2018, to assess his ability to return to work. His physical demand level was determined to be sedentary. Because there was no job for his return, a comparison could not be made for employment options. Mr. Szalay was found to be severely limited by low back pain, right hip pain, and poor balance. He was also limited by his previous neck and right shoulder issues.

In a November 2, 2018, memorandum to the Permanent Total Disability Review Board, the claims administrator advised that the claim had been referred for permanent total disability review. It was noted that the employer was of the opinion that an orthopedic evaluation was not necessary since the threshold issue was not being challenged. It was also noted that hearing loss

accounted for 21.45% of Mr. Szalay's 60.45% permanent partial disability award and could not be combined because hearing loss awards are not based upon the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993) ("AMA Guides"). It was further noted that the orthopedic awards were recently granted and likely would not change drastically enough upon re-evaluation to affect the threshold issue. The employer indicated that the issue was strictly vocational, and the primary issue was whether Mr. Szalay was disabled from performing gainful employment.

Mr. Szalay was evaluated by David Soulsby, M.D., on January 10, 2019. Dr. Soulsby's assessment included chronic lumbar sprain/strain with a probable degree of degenerative disc disease; right hip strain; and severe right hip osteoarthritis with a labral tear. Mr. Szalay was found to have reached maximum medical improvement for both the lumbar spine and right hip injuries. Using the AMA *Guides*, Dr. Soulsby found 13% whole person impairment of the lumbar spine based upon the Range of Motion model. Applying West Virginia Code of State Rules § 85-20-C, Mr. Szalay was classified under Lumbar Category II, which had an acceptable impairment range of 5-8%. Therefore, the whole person impairment for the lumbar spine was adjusted to 8%. Dr. Soulsby attributed 100% of the impairment to the compensable injury as there was no proof of pre-existing degenerative disc disease in 1993. Regarding Mr. Szalay's right hip, Dr. Soulsby determined the rate of impairment by examining his gait derangement. Under Table 36, page 76, of the AMA *Guides*, Dr. Soulsby placed Mr. Szalay under Category C for a total of 15% impairment. Because there was clear evidence of pre-existing osteoarthritis in the right hip, Dr. Soulsby apportioned 50% of the 15% impairment, and rounded up to 8% whole person impairment for the right hip work-related injury. Finally, Dr. Soulsby combined the 8% for the lumbar spine with the 8% for the right hip to equal a 15% whole person impairment.

William Grubbs, D.C., reviewed Dr. Soulsby's January 10, 2019, report, and drafted a letter dated February 7, 2019, opining that Mr. Szalay's work-related injury substantially aggravated a pre-existing, mild degenerative arthritis. He compared x-rays from January 12, 2016, with those taken in May of 2018, and stated that the x-rays revealed severe joint space narrowing with sclerosis and osteophyte formation. Dr. Grubbs further stated that he believed that the femoral acetabular impingement and labral tear were subsequent to the trauma to the right hip and accelerated degenerative changes. It was noted that Mr. Szalay had not been able to return to gainful employment because of his injury, and he had not reached maximum medical improvement. Regarding Dr. Soulsby's issue with Mr. Szalay's antalgic gait, Dr. Grubbs stated that the back condition may have been aggravated on the three and a half hour drive to the examination.

Bruce Guberman, M.D., reviewed Dr. Soulsby's functional capacity evaluation of August 28, 2018, and stated that, in his opinion, to a reasonable degree of medical probability, Mr. Szalay more properly falls under Category E from Table 36, page 76, of the AMA *Guides* regarding gait derangement. To qualify for Category E, there was no requirement of constant use of a cane or crutch, but rather "routine use." Dr. Guberman stated that Mr. Szalay falls under Category E because there was more than just occasional use of a cane with long walking because it was reported that a cane or crutch was used whenever he left his home. Dr. Guberman opined that there was 20% whole person impairment, as opposed to the 15% found by Dr. Soulsby. However, Dr.

Guberman found that Dr. Soulsby's apportionment of impairment for the right hip was not consistent with the available history, medical records, physical examination, and radiographic studies, and was not an appropriate interpretation of the AMA *Guides*. Dr. Guberman stated that there was no history or records indicating any prior injuries, symptoms, loss of motion, interference with activities of daily living, or impairment of the right hip prior to the injury of January 12, 2016. Dr. Guberman opined that there was no evidence that Mr. Szalay would have received an impairment rating for his right hip before the injury. It was Dr. Guberman's opinion that Mr. Szalay has 20% whole person impairment of the right hip due to the compensable injury.

Because Mr. Szalay met the first threshold of establishing that he had been awarded more than 50% in prior permanent partial disability awards, he was reevaluated by the Permanent Total Disability Review Board to determine if he has suffered whole-body medical impairment greater than 50% in order to meet the second threshold of West Virginia Code § 23-4-6(n)(1). On May 13, 2019, the PTD Review Board ("PTD Review Board") provided its Initial Recommendations that based upon the AMA *Guides*, West Virginia Code § 23-4-6b, and West Virginia Code of State Rules § 85-20-47.10, Mr. Szalay sustained a total of 35% whole person impairment for his occupational injuries and/or diseases. The rating included 21.45% for hearing loss; 10% for the right hip; and 8% for the lumbar spine. The PTD Review Board found that Mr. Szalay did not suffer from a medical impairment of at least 50% on a whole-body basis and had not sustained a 35% or greater statutory disability. The PTD Review Board opined that Mr. Szalay failed to meet the required level of whole-body medical impairment necessary to satisfy the second threshold for further consideration of an award of permanent total disability. The recommendation was for Mr. Szalay's application for permanent total disability benefits to be denied.

In *Szalay v. Murray American Energy*, No. 18-0506, 2019 WL 2404819 (W. Va. May 30, 2019) (memorandum decision), this Court affirmed the May 15, 2018, order of the Board of Review, finding that a preponderance of the evidence demonstrated that Mr. Szalay retired with a service pension on November 16, 2016, and began receiving old-age Social Security benefits on June 16, 2017. Because he was receiving old-age benefits, the Board of Review was required to prohibit him from submitting evidence of his alleged permanent total disability after that date pursuant to West Virginia Code § 23-4-24(a).

In a second decision, *Murray American Energy, Inc. v. Szalay*, No. 18-0539, 2019 WL 2404585 (W. Va. May 30, 2019) (memorandum decision), the Court found that the Office of Judges did not err in concluding that hearing loss has a definite, structured calculation for determining impairment which meets the statutory test of specific, objective, and measurable findings. This Court opined that the record supported the finding that Mr. Szalay had received the sum of 60.45% in permanent partial disability awards for being considered for the first permanent total disability threshold found in West Virginia Code § 23-4-6(n)(1).

The PTD Review Board issued its Final Recommendations on November 18, 2019. It found that the reports of Drs. Soulsby and Guberman were the most current and accurate representations of Mr. Szalay's whole-body medical impairment from his orthopedic occupational injuries. The PTD Review Board accepted Dr. Soulsby's recommendation of 8% impairment for the lumbar spine, and Dr. Guberman's recommendation of 20% for the right hip. However, the PTD Review

Board also accepted Dr. Soulsby's finding of 50% of the impairment for the right hip as being related to pre-existing osteoarthritis. Thus, the PTD Review Board found 10% impairment for the right hip. It was concluded that Mr. Szalay sustained a total of 35% whole person impairment from all of his occupational injuries and/or diseases: 21.45% for hearing loss; 10% for the right hip; and 8% for the lumbar spine. Therefore, it found that Mr. Szalay did not suffer from a medical impairment of at least 50% on a whole-body basis and had not sustained a 35% or greater statutory disability, as required by statute. The PTD Review Board opined that he failed to meet the required level of whole-body medical impairment necessary for further consideration of an award of permanent total disability.

On November 25, 2019, Mr. Szalay's application for permanent total disability benefits was denied by the claims administrator because he failed to meet the second 50% threshold found in West Virginia Code § 23-4-6(n)(1). The decision was based upon the final recommendations of the PTD Review Board. Mr. Szalay protested the claims administrator's Order by arguing that the preponderance of the evidence supports that he has in excess of 50% impairment to meet the filing threshold, and that he should be eligible for consideration for a permanent total disability award. He further argued that Murray American Energy's decision to bypass the referral to the PTD Review Board in the first appeal, and not to challenge all medical impairments, precludes the employer from raising those arguments in this second appeal.

The Office of Judges affirmed the claims administrator's order on September 24, 2020, finding that a preponderance of the evidence demonstrates that Mr. Szalay does not have the requisite 50% whole person impairment required for further consideration of a permanent total disability award. The Office of Judges referenced the findings of the PTD Review Board and accepted their opinion that Mr. Szalay sustained a combined 35% whole person impairment. The Office of Judges found that Mr. Szalay has not established that he has met the second threshold of West Virginia Code § 23-4-6(n)(1). In an order dated June 23, 2021, the Board of Review found that the conclusion of the Office of Judges was clearly wrong in view of the reliable, probative, and substantial evidence of the whole record.

The Board of Review in regard to the November 2, 2018, Memorandum to the PTD Review Board prepared by the claims administrator, stated that:

The Memorandum reflects that the employer is of the opinion that an orthopedic evaluation is not necessary since the threshold issue is not being challenged. It states that the orthopedic awards were entered fairly recently and likely would not change enough upon reevaluation to affect the threshold issue. Further, it is stated in the Memorandum that the employer is of the opinion the current issue is strictly vocational in nature and the primary issue is whether or not the claimant is disabled from performing gainful employment.

Based upon the PTD Review Board's Memorandum, the Board of Review reversed and vacated the decision of the Office of Judges and found that Mr. Szalay has suffered a whole-body medical impairment of 50% or more and has met the second threshold for consideration of a permanent total disability award. Because the Board of Review determined that he met the first and second

thresholds for consideration for a permanent total disability award, the claim was remanded to the claims administrator for consideration of the factors in West Virginia Code § 23-4-6(n)(2).

This Court may not reweigh the evidentiary record, but must give deference to the findings, reasoning, and conclusions of the Board of Review, and when the Board's decision effectively represents a reversal of a prior ruling of either the Workers' Compensation Commission or the Office of Judges, we may reverse or modify that decision only if it is in clear violation of constitutional or statutory provisions, is clearly the result of erroneous conclusions of law, or is so clearly wrong based upon the evidentiary record that even when all inferences are resolved in favor of the Board's findings, reasoning, and conclusions, there is insufficient support to sustain the decision. *See* W. Va. Code § 23-5-15(c) & (e). We apply a de novo standard of review to questions of law. *See Justice v. W. Va. Off. of Ins. Comm'r*, 230 W. Va. 80, 83, 736 S.E.2d 80, 83 (2012).

This case is before this Court to determine whether or not Mr. Szalay has met the second threshold to entitle him for further consideration for a permanent total disability award. After review, it is clear that the evidence of record indicates that Mr. Szalay does not suffer from more than 50% whole person impairment, as required to meet the second threshold found in West Virginia Code § 23-4-6(n)(2). Based upon the PTD Review Board's conclusion that Mr. Szalay has a combined whole person impairment of 35% for all of his injuries and diseases incurred in the course of his employment, it was determined by the claims administrator and Office of Judges that he has not met the second threshold for consideration of a permanent total disability award.

After review, we find that the Board of Review's decision is a clear violation of a statutory provision because it erroneously found that Mr. Szalay met the second threshold based upon the claims administrator's opinion conveyed to the PTD Review Board in a November 2, 2018, Memorandum. Although Mr. Szalay tacitly argues that Murray American Energy, "waived" the second threshold criteria through its communications reflected within the Memorandum, the PTD Review Board ultimately concluded that Mr. Szalay's total whole person impairment resulting from his compensable injuries is 35%, and that he failed to meet the required level of medical impairment necessary for further consideration of a permanent total disability award. The Memorandum is nothing more than a document submitted by the claims administrator to assist the PTD Review Board in its duty of reevaluating the claimant – it is not the PTD Review Board's findings based on the evidence. The Board of Review incorrectly allowed the Memorandum to circumvent the mandate of the statute regarding the second threshold. West Virginia Code § 23-4-6(n)(1) does not provide for such a discretionary interpretation. Instead, the statute says, "[i]f the claimant has not suffered whole body medical impairment of at least fifty percent or has sustained a thirty-five percent statutory disability pursuant to the provisions of subdivision (f) of this section, the request shall be denied."³

The Board of Review's decision is in clear violation of statutory provisions, and we find that there is insufficient evidence to sustain the Order. Therefore, the Board of Review's Order dated June 23, 2021, is reversed and remanded. Because the evidentiary record supports the Order

³ Subdivision (f) of West Virginia Code § 23-4-6 provides the percentages of disability for injuries resulting in a total loss by severance of certain body parts specified in the statute.

of the Office of Judges dated September 24, 2020, this case is remanded to the Board of Review for entry of an Order finding that Mr. Szalay has not established that he has met the second threshold for further consideration of a permanent total disability award.

Reversed and Remanded, with directions.

ISSUED: June 13, 2023

CONCURRED IN BY:

Chief Justice Elizabeth D. Walker
Justice Tim Armstead
Justice John A. Hutchison
Justice William R. Wooton
Justice C. Haley Bunn