

No. 24745 -- Anne Remick Black v. State of West Virginia Consolidated Public Retirement Board

Starcher, Justice, concurring:

While the Consolidated Public Retirement Board clearly erred in this case by not giving the claimant a hearing for two years, I do not believe that this fact was dispositive to the Court's decision. The dispositive question for the Board in awarding disability retirement benefits should simply be this: on what date, in the opinion of the Board, does the evidence reasonably show that an applicant for disability retirement benefits was permanently, totally disabled? Our analogous decisions concerning the "onset" date for permanent total disability under our workers' compensation statutes provide ample guidance for how the Board can answer this question.

W.Va. Code, 15-2-30 [1994] states that a member of the Division of Public Safety becomes eligible for non-service-related disability retirement benefits when the member "become[s] permanently disabled to the extent that such member cannot adequately perform the duties required. . . ." In the context of workers' compensation, we have defined the date a claimant becomes permanently disabled as "the first date on which medical or other expert evidence indicated that such permanent total disability existed." Syllabus, in part, *Miracle v. Workers' Compensation Comm'r*, 181 W.Va. 443, 383 S.E.2d 75 (1989). When a claimant has several expert reports indicating permanent total disability status, the Workers' Compensation Division has reasonable discretion to select the beginning date for the payment of the award of permanent total disability

benefits. “The selection should be based on the dates upon which the experts found the claimant to have been permanently and totally disabled.” Syllabus Point 2, in part, *Young v. Workers’ Compensation Comm’r*, 181 W.Va. 440, 383 S.E.2d 72 (1989).

The Consolidated Public Retirement Board's opinion as to whether an applicant is disabled should similarly be based on the reliable expert evidence in the record, and the Board should determine that disability begins on the first date on which medical or other expert evidence indicates that permanent total disability existed. In this case, on December 23, 1994, the appellant's treating physician first gave his opinion that the appellant was permanently and totally disabled. I would therefore find that the appellant became firmly entitled to disability benefits on that date.

The Court concluded that the appellant's benefits should be paid from September 11, 1994, sixty days after she filed her appeal of the Board's rejection of her application for disability retirement benefits. On the facts of this case, I believe that this remedy is equitable. I am uncomfortable, however, with the majority opinion's analysis of the constitutional and statutory authority for this award, and agree that this part of the opinion is limited to those facts.

The Board's ability to award disability retirement benefits appears from the majority opinion to be a complex multi-step analysis of constitutional provisions, statutes and regulations. In fact it boils down to a simple, fair, common-sense rule: disability benefits can and should be awarded by the Board from the date that the reliable expert evidence in the record establishes that the applicant is permanently and totally disabled.

I therefore concur.