

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

July 6, 2012

**RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

DEBRA A. FISHER, Petitioner

**vs.) No. 11-0031 (BOR Appeal No. 2044498)
(Claim No. 2001002431)**

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
WHEELING HOSPITAL, INC., Respondent**

MEMORANDUM DECISION

Petitioner Debra A. Fisher, by M. Jane Glauser, her attorney, appeals the West Virginia Workers' Compensation Board of Review's Order denying a reopening of her claim for temporary total disability benefits. Wheeling Hospital, Inc., by Jennifer Hagedorn, its attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated December 10, 2010, in which the Board reversed an April 7, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's September 21, 2009, decision denying Ms. Fisher's request for a reopening of her claim for temporary total disability benefits. The Court has carefully reviewed the records, written arguments, and appendices contained in the petition, and the case is mature for consideration.

Having considered the petition and the relevant decision of the lower tribunal, the Court is of the opinion that the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the Court determines that there is no prejudicial error. This case does not present a new or significant question of law. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

Ms. Fisher suffered a compensable injury to her lumbar spine on May 19, 2000. On August 23, 2000, the claims administrator found there was no permanent partial disability resulting from the compensable injury. After a subsequent reopening, the claims administrator granted Ms. Fisher a 0% permanent partial disability award on July 8, 2003. This award was subsequently reversed by the Office of Judges on September 27, 2004, and Ms. Fisher was granted a 13% permanent partial

disability award. On September 8, 2009, Ms. Fisher filed an application to reopen her claim for temporary total disability benefits on the premise that she had suffered a progression of the compensable injury. The claims administrator, on September 21, 2009, denied the application on the basis that it was time barred by West Virginia Code § 23-4-16(a)(2) (2005).

The Office of Judges, in reversing the claims administrator's denial of the application for reopening, used the date of the previous Office of Judges Order, September 27, 2004, reversing the Claims Administrator's July 8, 2003, Order. The Office of Judges found that the September 27, 2004, date put Ms. Fisher within the five-year limitation for filing an application for reopening. The Board of Review reversed the Office of Judges April 7, 2010, Order and reinstated the claims administrator's September 21, 2009, Order denying the application for reopening.

Ms. Fisher, on appeal, argues that she received an initial award for rehabilitation temporary total disability benefits on May 21, 2008, and this is the date that the five-year limitation on reopening for temporary total disability benefits began. The Board of Review disagreed and found that the Office of Judges Order was affected by an error of law and was clearly wrong in view of the reliable, probative, and substantive evidence on the whole record. Under West Virginia Code § 23-4-16(a)(2), to reopen "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." A decision on impairment was made more than five years prior to the date of the application to reopen, September 8, 2009, qualifying as an initial award. *See Wampler Foods, Inc. v. Workers Compensation Div.*, 216 W.Va. 129, 602 S.E.2d 805 (2004).

For the foregoing reasons, we find that the decision of the Board of Review 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 of Review is affirmed.

Affirmed.

ISSUED: July 6, 2012

CONCURRED IN BY:

Justice Robin J. Davis
Justice Brent D. Benjamin
Justice Thomas E. McHugh

DISSENTING:

Chief Justice Menis E. Ketchum
Justice Margaret L. Workman