

21-0944

**STATE OF WEST VIRGINIA
WORKERS' COMPENSATION BOARD OF REVIEW**

MURRAY AMERICAN ENERGY, INC.,
Appellant

v.

CHARLES G. DELBERT,
Appellee

Appeal No. 2056410
JCN: 2014014137
DOI 05/19/2009

ORDER

The following case is an appeal by the employer from a final order of the Workers' Compensation Office of Judges dated February 4, 2021, which reversed the claims administrator's order dated September 19, 2019, denying a permanent total disability award, and the Administrative Law Judge granted a permanent total disability award with an onset date of August 19, 2014.

The Workers' Compensation Board of Review has completed a thorough review of the record, briefs, and arguments. As required, the Workers' Compensation Board of Review has evaluated the decision of the Office of Judges in light of the standard of review contained in West Virginia Code § 23-5-12, as well as the applicable statutory language as interpreted by the West Virginia Supreme Court of Appeals.

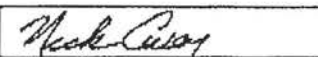
Upon our review of this case, we have determined to affirm the decision of the Office of Judges. The Board adopts the findings of fact and conclusions of law of the Administrative Law Judge's Decision dated February 4, 2021, which relate to the issue on appeal, and the same are incorporated herein by reference, made a part hereof, and are ratified, confirmed and approved with the following modifications:

1. In Finding of Fact No. 5, the orders were issued in JCN 2001056879.
2. In Finding of Fact No. 8, "non-specific Depressive Disorder" is modified to "Unspecified Depressive Disorder."
3. In Finding of Fact No. 17, "53%" is modified to "52%."
4. In Finding of Fact No. 21, "May 20, 1999" is modified to "May 20, 2009."

Accordingly, it is ORDERED that the final order of the Workers' Compensation Office of Judges dated February 4, 2021, is hereby AFFIRMED.

From any final decision of the Board, including any order of remand, an application for review may be prosecuted by any party to the Supreme Court of Appeals within thirty days from the date of this order. The appeal shall be filed with Edythe Nash Gaiser, Clerk of the West Virginia Supreme Court of Appeals, 1900 Kanawha Boulevard, East, Charleston, West Virginia 25305.

DATED: OCTOBER 22, 2021


Nick Casey, Chairperson

cc: MURRAY AMERICAN ENERGY, INC.
AIMEE M. STERN
SMARTCASUALTY CLAIMS SOLUTIONS
CHARLES G. DELBERT
M. JANE GLAUSER

**STATE OF WEST VIRGINIA
WORKERS' COMPENSATION OFFICE OF JUDGES**

IN THE MATTER OF:

Charles G. Delbert,
CLAIMANT

JCN: 2014014137

D.O.I.: May 19, 2009

and

Murray American Energy Inc.,
SELF-INSURED EMPLOYER

CORRECTED DECISION OF ADMINISTRATIVE LAW JUDGE

PARTIES:

Claimant, Charles G. Delbert, by counsel, M. Jane Glauser
Self-Insured Employer, Murray American Energy Inc. by counsel, **Aimee Stern**

ISSUE:

The claimant protested the Claim Administrator's Order of September 19, 2019, which denied claimant's application for permanent total disability award.

DECISION:

It is ORDERED that the claimant's protest to the Claim Administrator's Order of September 19, 2019 be REVERSED and the claimant GRANTED a permanent total disability award with an onset date of August 19, 2014.

FINDINGS OF FACT:

1. By Order dated September 19, 2019, the Claim Administrator, based on the September 9, 2019 Final Recommendations of the Permanent Total Disability Examining Board, denied claimant's application for permanent total disability award.

2. On March 31, 2009, the Social Security Administration issued a Notice of Decision – Fully Favorable. The claimant requested and was granted a closed period of disability from February 23, 2007 through April 22, 2008 due to severe impairments of degenerative disc disease of the lumbar and cervical spine.

3. By Notice dated December 19, 2009, the claimant was advised that he is entitled to monthly disability benefits beginning June 2009 through November 2009 in

the amount of \$12,186.00, and that his present workers' compensation payments of \$2,125.70 do not affect his Social Security benefits.

4. A copy of the 2009 West Virginia Schedule H and Schedule E for taxpayers who are disabled during 2009 regardless of age, was signed by Dr. Wack on March 11, 2010 and indicated the claimant was permanently and totally disabled on or before December 31, 2009.

5. By Administrative Law Judge Decision dated February 18, 2011, the Claim Administrator's Order of September 3, 2010, which denied the compensability of additional conditions, was reversed and the Adjudicator added depression, 309.1, and chronic pain syndrome, 338.4, as compensable components of the claim. Based on this Decision and by Order dated February 24, 2011, the Claim Administrator added depression, 309.1, and chronic pain syndrome, 338.4, as compensable components of the claim.

6. By correspondence dated August 19, 2014, the claimant filed a copy of the August 13, 2014 Application for Permanent Total Disability Benefits, which sets forth his work history, and listed medications he was taking. He listed his workers' compensation claims and impairment ratings as follows:

Claim Number	PPD%	Date of Injury	Body Part
950037058	3%	02-08-95	Arm
970022786	11%	10-03-96	Lumbar
970037946	1%	01-06-97	Finger
990051738	25%	02-13-99	Cervical
2001056879	9%	04-25-01	Thorax, Depression
2014014137	10%	05-19-09	Chest/OP

7. By Order dated September 15, 2014, the claimant's fully completed application for permanent total disability reopening dated August 19, 2014 was approved and the claim would be referred to the Permanent Total Disability Examining Board.

8. Dr. Law evaluated the claimant on January 23, 2015 for a Psychiatric Independent Medical Examination. After review of his histories, and interview and testing, the doctor opined that the claimant met the DSM-5 criteria for the compensable psychiatric diagnosis of non-specific Depressive Disorder. His current GAF is 65, and he is not disabled due to psychiatric illness. The degree of impact on pursuit of everyday living is mild. She deemed he has not yet reached MMI and has not received the standard treatment for his disorder which was previously due to lack of desire to seek further mental health treatment. He has now agreed he would be willing to see a psychiatrist and therapist in order to better address his symptoms of depression. She opined the claimant has not received adequate dosages of any antidepressants and has had low dosages of Cymbalta and Wellbutrin with minimal improvement, and would benefit from seeing a psychiatrist who could evaluate his symptoms and treat for

depression, including adequate dosages and treatment with antidepressants, as well as psychotherapy targeting his coping strategies to pain and somatic presentation. She did not give an impairment rating stating that he should be re-evaluated in approximately one year following treatment.

9. A psychological evaluation was performed by Dr. Moran on January 23, 2015, wherein she concluded the claimant is functioning in a high average range of overall intellect and his personality profile is consistent with significant emotional distress and frustration with his circumstances, as well as chronic pain and physical complaints. Comparison to the previous psychological evaluation from 2011, shows stability in his intellect and perhaps greater endorsement of mood disturbance, both on the personality profile and in the interview. She stated the claimant is no longer treated with antidepressant medication, and resumption of this treatment seems appropriate, noting the claimant also expressed an interest in psychotherapy given the distress he is currently experiencing.

10. The claimant underwent a Functional Capacity Evaluation by Dr. Mascio on February 19, 2015. The doctor stated that the overall test findings, in combination with clinical observations, suggest the presence of full maximal effort of the claimant's behalf and that he passed all the physical effort distraction-based testing. Based on the results of the FCE, the claimant did not demonstrate the ability to perform the majority of the psychical demands of his previous job description of Miner I; 939.281.010 Coal, Metal and Nonmetal Mining and Quarrying Industry, Very Heavy physical demand level more than 100 lbs. on occasional basis per the DOT ratings. The claimant tested into the light physical demand level of 15-20 lbs. on an occasional basis. The claimant was deemed to have reached his maximal medical improvement with rehabilitation at this time and, based on the results of testing and during clinical observation, the claimant's report of pain is reliable and consistent with his function demonstrated during this FCE. While not implying intent, he stated the claimant may be able to do more than he states or perceives as he did draw some question to reliability with 4 of the 5 reliability of pain and disability questionnaires. However, he passes all the placebo tests, and his verbal report of pain was consistent with his function demonstrated throughout today's testing. The doctor stated the claimant demonstrated the capacity to meet the Light Physical Demand Strength Rating per the DOT, which means he can lift up to 15-20 lbs. on an occasional basis, safely and dependably over the course of an 8-hour day. During the lifting test, the claimant demonstrated good body mechanics, good control of the load and reported an RMA Functional Pain Rating of 4 out of 10 with weights 20 lbs. or less. A 4 out of 10 on the RMA Functional pain scale is functionally disabling pain, which would start to affect your ability to perform the current activity. The 4/10 on pain scale was consistent with clinical observations. The doctor concluded that based on the results of this FCE the claimant was able to tolerate prolonged sitting for 15-20 minutes and standing for 10-15 minutes before needing to change position or off load to prevent increasing pain levels. The doctor recommended the claimant continue with or be instructed in a comprehensive home program of flexibility and strengthening exercises for his neck, mid and low back and legs as instructed, secondary to the limitation noted in this FCE.

11. By Administrative Law Judge Decision dated March 30, 2015, the Claim Administrator's Order of November 25, 2013, which granted no permanent partial disability award, was reversed and the claimant was referred for an independent medical evaluation with a new qualified medical professional.

12. The claimant underwent a PTD evaluation on May 15, 2015 performed by Erin Saniga with Associates in Rehabilitation. It was the consultant's opinion that the claimant is not permanently and totally disabled as a result of the compensable injuries/conditions. Review of the Labor Market Survey chart reveals that multiple positions located within a 75-mile radius from the claimant's home were identified as being open and available. She stated that while a majority of these positions are entry level and/or offer on the job training, it is possible that limited training focusing on computer basics and typing skills would be beneficial in enhancing the claimant's employment options, and vocational rehabilitation services would also likely be of benefit in assisting the claimant with identifying appropriate employment options if he is interested in pursuing return to work.

13. An Administrative Law Judge, by Decision dated April 15, 2016, affirmed the Claim Administrator's Order of November 13, 2015 which denied PTD consideration as the claimant had not met the threshold amount.

14. Dr. Bruce Guberman, in his January 19, 2017 IME (independent medical evaluation) Report found the claimant had 3% whole person impairment for the injury of February 8, 1995; 13% from the injury of October 3, 1996; 1% for the injury of January 6, 1997, 25% for the injury of February 13, 1999 and 8% for the injury of April 25, 2001. These combine for a total of 43% whole person impairment and then combined with the 10% for occupational pneumoconiosis and the 4% for psychiatric impairment for a total of 51% total whole-body impairment pursuant to Rule 20, Section VII. He was of opinion that the claimant was unable to return to his prior employment as a direct result of the combined effects of his compensable injuries. Furthermore, taking into consideration his age, education, training and work history, he is permanently and totally disabled to all types of employment as a direct result of the combined effects of the compensable injuries notwithstanding any non-compensable conditions. He was of opinion that a vocational rehabilitation assessment would be futile.

15. The WVU/WC Compensation/ Psychiatric IME dated April 26, 2017 by Dr. Christi Cooper-Lehki concluded the claimant had reached his maximum degree of medical improvement for his compensable depression from his injury on April 25, 2001. The doctor found the claimant had improved since the prior evaluation in 2011. His impairment was mild, 4%, from the compensable injury although he has other non-compensable factors contributing to his impairment.

16. Dr. Kirk Bryant, in his neuropsychological report on April 26, 2017, found the claimant's intellectual and psychological functioning to be consistent with the 2011

and 2015 evaluations. He had somatic complaints and irritability likely reflective of depression. He exhibited executive functioning weaknesses in the form of difficulty in problem solving. Pain, mood disturbance and anxiety are likely contributing to his cognitive weaknesses. While the claimant was bright, he may have difficulty in directing his cognitive resources due to his executive dysfunction.

16. Dr. Guberman supplemented his IME on August 28, 2017 regarding the impairment rating for the February 8, 1995 wrist injury. He noted that Dr. Wiley had evaluated the claimant and recommended 3% whole person impairment based on decreased grip strength in the right hand compared to the left. Dr. Guberman, likewise, found right hand grip weakness. He opined the claimant had 6% whole person impairment for the upper extremity of which he attributed 3% for radiculopathy and injury to the right ring finger and 3% to the 1995 injury. He concurred with the opinion of Dr. Wiley.

17. Dr. Guberman, performed a follow-up IME on April 13, 2018 regarding the claimant's left shoulder injury on February 23, 1991 and the right arm injury on February 8, 1995. He disagreed with Dr. Wiley's recommendation regarding the left shoulder injury. He stated that Dr. Wiley did not document a careful examination of the left shoulder performed in accordance with the *AMA Guides*, Fourth Edition and Dr. Guberman's 4% impairment should not be disqualified. Dr. Guberman continued to recommend 3% for the right arm injury. Dr. Guberman concluded that the 40% for the spine injuries combined with 10% for occupational pneumoconiosis, 4% for psychiatric, 1% for the right finger, 3% for the right forearm and 4% for the left shoulder would be 53% total whole person impairment.

18. An Administrative Law Judge, by Decision dated July 6, 2018, reversed the Claim Administrator's February 14, 2018 Order which had found the claimant had not met the threshold for PTD consideration. The West Virginia Workers' Compensation Board of Review, by Order dated December 21, 2018 affirmed the Administrative Law Judge's Decision of July 6, 2018. A petition of Appeal with the West Virginia Supreme Court of Appeals was filed by the employer on January 18, 2019. By Supreme Court Memorandum Decision dated February 21, 2020, the Board of Review decision was affirmed.

19. The August 1, 2018 Claim Administrator's Notice acknowledged the Administrative Law Judge Decision of July 6, 2018 and reopened the claim for permanent partial disability consideration.

20. The October 23, 2018 Wheeling Hospital Physical Therapy Summary Report (FCE) noted the claimant gave maximal effort. The FCE was performed to assess the claimant's current physical capabilities to assist with a disability claim. Numbness/burning of the legs and arms was noted. The therapist, Aaron White, noted decreased gait sequence and speed; decreased neck ROM and strength; decreased trunk ROM and strength; decreased left shoulder ROM and strength; decreased left hip strength; decreased right ankle ROM and strength; decreased toe rises and squatting. Following various tests, the claimant was determined to be capable of sedentary physical demand level, 8 hours a day, forty hours a week.

21. The November 30, 2018 Allegiant Managed Care/PTD Vocational Rehabilitation Report by Erin Saniga, M.Ed., CRC,LPC, concluded that the claimant was not permanently and totally disabled as a result of the compensable injuries. Her Labor Market Survey chart found multiple positions available within a 75-mile radius of the claimant's home. She stated that vocational rehabilitation services would likely benefit the claimant in identifying appropriate employment options. She cited the claimant's 9 workers' compensation claims including his February 13, 1999 cervical injury that required surgery and yielded a 25% permanent partial disability award. He last worked on May 20, 1999. She reviewed his work experience in the mines and noted that he had training to be certified as a foreman. He had held skilled, semi-skilled and unskilled positions. He was awarded Social Security Disability for a closed period which was converted to regular Social Security when he turned 62. She identified his skills and determined they were transferable to multiple sedentary jobs that include: Manager, Traffic II, Classification Clerk, Letter-of-credit Clerk, Insurance Clerk, Reader, Referral Clerk Temp Agency, Charter, Matrix Inspector, Election Clerk, and Call-Out Operator. Her labor market analysis identified jobs within a 75-mile radius of Wheeling, West Virginia that included, among others, hospital receptionist, registration clerk, laboratory clerk.

22. In its March 11, 2019 Initial Recommendations, the PTD Review Board noted it convened on January 14, 2019 to re-consider the claimant's request for a permanent total disability award dated August 19, 2014. The Board recited the procedural history of the claim. Citing the Administrative law Judge's Decision dated July 6, 2018 and the Board of Review Order of December 21, 2018, it was acknowledged that the claimant had met the 50% whole person impairment threshold required by §23-4-6(n)(1). The Board must determine if the claimant is capable of engaging in substantial gainful activity and render Initial Recommendations, allow a comment period, then issue its Final Recommendation.

The Board considered multiple records including the IME by Dr. Yanchus who recommended a 1% whole person impairment for the 1997 right hand injury. Also considered was the June 4, 2014 physical therapy evaluation by Mark Macri, the functional capacity evaluation by Mark Mascio on February 19, 2015 and the December 19, 2016 IME by Dr. Sethi. The Board discussed the PTD evaluation by Dr. Guberman on January 17, 2017 as well as Dr. Guberman's April 13, 2018 medical evaluation regarding the claimant's left shoulder injury on February 23, 1991 and right arm injury on February 8, 1995. The PTD psychiatric IME was completed by Dr. Cooper-Lehki on April 26, 2017 who opined that the claimant had a 4% impairment for depressive disorder. A PTD psychological evaluation by Kirk Bryan, PhD on April 26, 2017 noted that the claimant had a full-scale IQ of 123 (superior). His verbal comprehension was 118 (high average); perceptual reasoning was 119 (high average); working memory was 139 (very superior); and his processing speed was 97 (average). The claimant was noted to have a high number of somatic and cognitive complaints and on the restructured scales, elevations reflective of somatic complaints as well as low experience of positive emotions. Dr. Bryan reported the claimant was socially avoidant and had a significant elevation on the introversion scale. The October 23, 2018 FCE indicated that the claimant demonstrated the ability to perform sedentary physical

demand level work for 40 hours a week/8 hours a day. His most limiting factor was his dominant hand shoulder pain.

A PTD Vocational Rehabilitation Report by Erin Saniga dated November 30, 2018 noted that the claimant completed a year of college majoring in chemistry. She noted his coal mine work ranged from light to heavy, unskilled to skilled. He was awarded a closed period of Social Security, from February 23, 2007 to April 22, 2008 in March of 2009, He started receiving Social Security at the age of 62. He had general skills such as typing, computer, cash register, office machine, and supervisor. Ms. Saniga identified job openings in the claimant's geographic location including: registration clerk; receptionist; administrative assistant; front office coordinator/receptionist. She noted the claimant would be an excellent candidate for a brief non-degree program focusing on computer/keyboarding skills and recommended Vocational Rehabilitation Services.

In summary, the Board found that the claimant, who is 64 years of age, completed high school and a year of college (chemistry major) and a year at a Community College. He has a paralegal certificate. He has been employed as in multiple jobs in the coal industry and completed mine foreman training. His jobs were from light to heavy, unskilled and skilled. When laid-off from the mines, the claimant worked as a kitchen helper and painter helper. The claimant's full-scale IQ is 123 (superior). He was noted to be on medication for a depressive disorder. After a review of the evidence, the Board agreed with the vocational evaluation of Ms. Saniga who completed a labor market information and identified sedentary job openings within the claimant's geographic location including: registration clerk, receptionist, administrative assistant and front office coordinator/receptionist. Ms. Saniga recommended that the claimant participate in a brief non-degree program focusing on computer/keyboarding skills.

23. The March 25, 2019 WebMD article by Dr. Smitha Bhandari entitled "Executive Function and Executive Function Disorder" was submitted by claimant's counsel. Executive functioning skills were noted to help get jobs done and include such functions as: managing time, focusing, switching focus, planning, remembering details, avoiding saying the wrong things or doing the wrong thing, doing things based on your experience and multitasking.

24. In her Rehabilitation Report dated June 10, 2019, Michelle Moore, with ORCI, reviewed multiple records pertaining to the claimant, including medical reports, and outlined the same. She reviewed his past employment and performed a transferable skills analysis. She also reviewed Allegiant's labor market survey and commented on each position listed. Ms. Moore concluded that the claimant was not capable of current employment nor did he have the ability to develop or acquire the skills or training to obtain employment. His treating surgeon, Dr. Hargraves, in his report on May 19, 2015, stated that the claimant had a cervical spine condition that would prevent him from working. Dr. Guberman, in his January 19, 2017 independent medical evaluation, opined that the claimant was permanently and totally disabled from all types

of employment due to his compensable injuries. The FCE by Mr. Mascio dated February 19, 2015 noted that the claimant provided full physical effort. The claimant did not demonstrate the ability to perform most of the physical demands of his previous job in the coal mine. He tested in the light physical demand level, but his pain was rated at 4/10 which would be functionally disabling and limit his work activity. The FCE on October 23, 2018 indicated that the claimant tested at the sedentary physical demand level. He had decreased gait sequence and speed, neck range of motion, neck strength, trunk range of motion, trunk strength, left shoulder strength and range of motion, left hip strength, right ankle strength and range of motion and decreased toe rises and squatting. Psychological testing by Kirk Bryant, PhD on April 26, 2017, revealed that the claimant's pain, mood, disturbance and anxiety would likely contributing to his cognitive weaknesses. Dr. Cooper-Lehki noted the claimant's depressive disorder and recommended ongoing psychotropic medications and psychotherapy or deterioration could be expected. Dick Coburn referenced the claimant's memory deficits, chronic pain, irritability and hopelessness and, in his August 4, 2015 note, reported that the claimant was unable to work five days a week.

Ms. Moore concluded that the claimant did not have transferable skills as outlined in the Allegiant Managed Care Report and did not have the ability to obtain or perform the positions cited in the labor market survey. She noted that not only were some of the claimant's physical limitations ignored, but there was also no consideration given to his cognitive limitations. His limitations with executive functioning would impede paying attention, organizing, planning, prioritizing, starting tasks, and staying focused. Executive functioning is also pertinent for regulating emotions. Such limitations would inhibit working in the work environments cited by Allegiant. Ms. Moore opined that the claimant could not perform remunerative work within 75 miles of his home or previous employer.

25. The Permanent Total Disability Review Board convened on July 8, 2019 to reconsider the claimant's request for a permanent total disability award dated August 19, 2014 following the entry of a Decision from the Office of Judges dated July 6, 2018. In its Final Recommendations dated September 9, 2019, the Board considered the claimant's counsel's April 4, 2019 and June 12, 2019 responses to the Initial Recommendations. Counsel submitted the June 10, 2019 vocational report of Michelle Moore who concluded that the claimant did not have any transferable skills to other employment. The Board disagreed with Ms. Moore's conclusion. The claimant's executive dysfunction in psychological tests results would not prevent him from acquiring skills to perform sedentary semi-skilled work. His executive dysfunction would not prevent him from participating in job placement services for a sedentary position. Further, his introversion was unrelated to a work-related injury. The Board determined that pursuant to W.Va. Code §23-4-6(n)(2), the claimant had vocational potential, is able to return to work, and is not permanently and totally disabled. Therefore, the claimant's request for a permanent total disability award was denied.

26. By correspondence dated November 22, 2019, Jane Glauser requested authorization for TMS Therapy with Dr. Ryan Wakim.

29. In her December 27, 2019 report, Catherine Phillis-Harvey, M.S., CRC, CVE, LPC-PA, QRP-WV, a case manager with Genex, indicated a review of 22 documents and summarized the same. Her conclusion was that the claimant was permanently and totally disabled as a result of his compensable injuries. The claimant's employment was primarily in the coal industry with only brief periods of employment as a kitchen helper and painter while laid off. He did graduate from high school and had a year of college. He had foreman and paralegal certificates, though he never was designated as a foreman or worked as a paralegal. He does not have any significant sedentary work experience. He has limited typing ability. He has not worked since 2009. The most recent FCE found he could perform sedentary work but noted his bilateral burning/numbness in his legs and arms. ability. His neck and trunk muscle strength were noted to be weak. There was no indication whether he could reach in all directions or what frequency. The April 19, 2015 MRI indicated severe stenosis in his cervical spine. Ms. Phillis-Harvey was concerned that he could not perform frequent movements like reaching, grasping. He was noted to have executive functioning skills which were stated to be compromised in the psychiatric report and the vocational evaluation by Ms. Moore. Ms. Saniga neglected to mention this in her report. The vocations cited by Ms. Saniga were jobs that included frequent to constant reaching and constant computer usage which Ms. Phillis-Harvey did not think the claimant could perform. Ms. Phillis-Harvey noted that neither Dr. Hargraves nor Dr. Guberman were of opinion that the claimant would be able to work in any capacity. Accordingly, Ms. Phillis-Harvey concluded that the claimant is not suited for sedentary work as he lacks the transferable skills, does not have the executive skills and has cervical issues. He is, therefore, permanently and totally disabled.

30. The claimant, by counsel, submitted a closing argument on November 12, 2020 and asserted that the preponderance of the evidence supports an award of permanent total disability. The claimant's receipt of a Social Security Disability award and the vocational reports of Ms. Moore and Ms. Harvey outweigh the report of Ms. Saniga, who failed to consider all of the facts. The claimant is entitled to a permanent total disability award with the onset the date he completed his application on August 13, 2014.

31. The employer, by Closing Argument dated November 13, 2020, argued that the Claim Administrator properly denied the claimant's application for a permanent total disability award by Order dated September 19, 2019. A preponderance of the evidence demonstrates that the claimant is able to engage in substantial, gainful employment. Ms. Saniga, who met with the claimant on two occasions, provided the most credible evidence of the claimant's vocational potential. The claimant has a superior IQ, and he utilized a linear and well-organized thought process. The assertion that Ms. Saniga did not consider cognitive issues is without merit. The claimant's assertion that he has cognitive limitations has not been proven and was specifically refuted by Dr. Cooper-Lehki. Ms. Moore did not explain why the claimant could not acquire the necessary skills to perform the jobs Ms. Saniga identified. Ms. Phillis-Harvey's report is not credible as she did not interview the claimant, conduct a labor market survey or a transferable skill analysis. Neither Ms. Moore nor Ms. Phillis-Harvey considered the claimant's ability to engage in substantial gainful activity requiring skills or abilities which the claimant could

acquire as required by §23-4-6(n)(2). Ms. Saniga met with the claimant on two occasions and took a detailed history of his compensable injuries, current symptoms, non-compensable medical conditions, education, vocational history, and general skills and abilities. She identified multiple jobs within the claimant's geographic area for which he would qualify with on-the-job training or brief training program to enhance his computer skills.

32. The claimant's counsel submitted a closing argument dated November 18, 2020 noting that, if the argument that Ms. Phyllis-Harvey did not see the claimant and only performed a file review and therefore lacks credibility had merit, that would also be the case with the PTD Review Board. Further, the criticism is unwarranted as Ms. Phyllis-Harvey did consider the claimant's ability to acquire skills and abilities. To conclude that the claimant, with his restricted executive functioning and compensable chronic pain coupled with depression and the factors of frustration and anger arising from the compensable chronic pain syndrome, is capable of substantial gainful work is without any basis in the record. The Social Security Administration determined that the claimant was not able to work in the national economy as of the date he last worked in 2009.

33. A hearing was conducted on January 25, 2021 wherein counsel for the claimant and employer presented oral argument on their respective positions regarding the Claim Administrator's September 19, 2019 Order. Counsel highlighted the key points in their closing arguments. The claimant's counsel asserted that the vocational report of Ms. Saniga presented by the employer contains misrepresentations and generalizations. For example, Ms. Saniga indicated that the claimant retired when he actually was unable to work because of his work injuries. Further, she did not take into account that the claimant was unable to remain in a prolonged sitting position and needed to change positions every 15 to 20 minutes. Ms. Saniga did not address the claimant's compensable chronic pain syndrome. The claimant also has cervical spine and grip strength limitations. Contrary to Ms. Saniga's analysis, Ms. Moore and Ms. Phyllis-Harvey, both qualified vocational professionals, reviewed all of the factors and concluded the claimant could not perform substantial employment. The claimant received Social Security Disability and no doctor has released him to return to work. The claimant should be awarded a PTD with an onset date as of the date on the application, August 13, 2014.

Counsel for the employer asserted that Ms. Saniga's report is the most reliable vocational report of record. Ms. Moore inappropriately concluded that the claimant lacked verbal skills and learning ability for the jobs identified by Ms. Saniga. The claimant has a high IQ and was found by Dr. Law to have above average verbal skills. Counsel further argued that the claimant does not have cognitive impairment as this was refuted by Dr. Cooper-Lehki. Ms. Phyllis-Harvey did not interview the claimant or conduct a labor market survey. The FCE by Mr. Weiss, placed no limitations on the claimant's ability to perform sedentary work. The PTD Review Board appropriately concluded that the claimant was capable of performing substantial employment.

DISCUSSION:

Permanent total disability cases are decided pursuant to W.Va. Code §23-4-6. W. Va. Code, §23-4-6(j)(5) and (6) provide, in pertinent part:

(5) The board or other reviewing body shall state its initial recommendations to the commission in writing with an explanation with an explanation for each recommendation setting forth the reasons for each. The recommendations shall be served upon the parties and the commission and each shall be afforded a thirty-day opportunity to respond in writing to the board or other reviewing body regarding its recommendations. The board or other reviewing body shall review any responses and issue its final recommendations. The final recommendations shall be effectuated by the entry of an appropriate order by the commission, or, upon its termination, the private carrier or self-insured employer.

(6) Except as noted below, objections pursuant to section one, article five of this chapter to any order shall be limited in scope to matters within the record developed before the Workers' Compensation Commission and the board or other reviewing body and shall further be limited to the issue of whether the board or other reviewing body properly applied the standards for determining medical impairment, if applicable, and the issue of whether the board's findings are clearly wrong in view of the reliable, probative and substantial evidence on the whole record. The preponderance of the evidence set forth in article one of this chapter shall apply to decisions made by reviewing bodies other than the commission instead of the clearly wrong standard.

W. Va. Code §23-4-1g provides that, for all awards made on and after July 1, 2003, the resolution of any issue shall be based upon a weighing of all evidence pertaining to the issue and a finding that a preponderance of the evidence supports the chosen manner of resolution. The process of weighing evidence shall include, but not be limited to, an assessment of the relevance, credibility, materiality and reliability that the evidence possesses in the context of the issue presented. No issue may be resolved by allowing certain evidence to be dispositive simply because it is reliable and is most favorable to a party's interests or position. The resolution of issues in claims for compensation must be decided on the merits and not according to any principle that requires statutes governing workers' compensation to be liberally construed because they are remedial in nature. If, after weighing all of the evidence regarding an issue, there is a finding that an equal amount of evidentiary weight exists for each side, the resolution that is most consistent with the claimant's position will be adopted.

Preponderance of the evidence means proof that something is more likely so than not so. In other words, a preponderance of the evidence means such evidence, when considered and compared with opposing evidence, is more persuasive or

convincing. Preponderance of the evidence may not be determined by merely counting the number of witnesses, reports, evaluations, or other items of evidence. Rather, it is determined by assessing the persuasiveness of the evidence including the opportunity for knowledge, information possessed, and manner of testifying or reporting.

By Order dated September 19, 2019, the Claim Administrator, based on the September 9, 2019 Final Recommendations of the Permanent Total Disability Examining Board, denied claimant's application for a permanent total disability award. The claimant timely protested, and the parties submitted evidence in support of their respective positions.

The procedural history of the claimant's request for a permanent total disability award will be briefly stated. The claimant requested a permanent total disability award by form signed on August 13, 2014 and mailed by his counsel to the Claim Administrator on August 19, 2014. The request was denied by Claim Administrator's Order dated November 13, 2015 as the claimant had not met the 50% threshold amount. An Administrative Law Judge, by Decision dated April 15, 2015, affirmed the Claim Administrator's Order of November 13, 2015. The West Virginia Workers' Compensation Board of Review, by Order dated November 10, 2016, reversed the April 15, 2015 Administrative Law Judge Decision and remanded the claim for further development by the Claim Administrator. Thereafter, the Claim Administrator, by Order dated February 14, 2018, again determined the claimant had not met the 50% threshold for permanent total disability consideration. An Administrative Law Judge, by Decision dated July 6, 2018, reversed the Claim Administrator's February 14, 2018 Order. The West Virginia Workers' Compensation Board of Review, by Order dated December 21, 2018 affirmed the Administrative Law Judge's Decision of July 6, 2018. A petition of Appeal with the West Virginia Supreme Court of Appeals was filed by the employer on January 18, 2019. By Supreme Court Memorandum Decision dated February 21, 2020, the Board of Review decision was affirmed. The 50% threshold has been adjudicated and found to have been met and the present matter is now ripe for a decision on the denial of a permanent total disability pursuant to the provisions of §23-4-6(n)(2) which provides as follows:

For all awards made on or after the effective date of the amendment and reenactment of this section during the year 2003, disability which renders the injured employee unable to engage in substantial gainful activity requiring skills or abilities which can be acquired or which are comparable to those of any gainful activity in which he or she has previously engaged with some regularity and over a substantial period of time shall be considered in determining the issue of total disability. The comparability of preinjury income to post-disability income will not be a factor in determining permanent total disability. Geographic availability of gainful employment within a driving distance of seventy-five miles from the residence of the employee or within the distance from the residence of the employee to his or her preinjury employment, whichever is greater, will be a factor in determining permanent total disability. For any permanent total

disability award made after the amendment and reenactment of this section in the year 2003, permanent total disability benefits shall cease at age seventy years. In addition, the vocational standards adopted pursuant to subsection (m), section seven, article three of this chapter shall be considered once they are effective.

The November 30, 2018 Allegiant Managed Care/PTD Vocational Rehabilitation Report by Erin Saniga, M.Ed., CRC,LPC, concluded that the claimant was not permanently and totally disabled as a result of the compensable injuries. Her Labor Market Survey chart found multiple positions available within a 75-mile radius of the claimant's home. She stated that vocational rehabilitation services would likely benefit the claimant in identifying appropriate employment options. She cited the claimant's 9 workers' compensation claims including his February 13, 1999 cervical injury that required surgery and yielded a 25% permanent partial disability award. He last worked on May 20, 1999. She reviewed his work experience in the mines and noted that he had training to be certified as a foreman. He had held skilled, semi-skilled and unskilled positions. He was awarded Social Security Disability for a closed period which was converted to regular Social Security when he turned 62. She identified his skills and determined they were transferable to multiple sedentary jobs that include: Manager, Traffic II, Classification Clerk, Letter-of-credit Clerk, Insurance Clerk, Reader, Referral Clerk Temp Agency, Charter, Matrix Inspector, Election Clerk, and Call-Out Operator. Her labor market analysis identified jobs within a 75-mile radius of Wheeling, West Virginia that included, among others, hospital receptionist, registration clerk, laboratory clerk.

In her Rehabilitation Report dated June 10, 2019, Michelle Moore, M.Ed., CRC,CLCP, QRP, reviewed multiple records pertaining to the claimant, including medical reports, and outlined the same. She reviewed his past employment and performed a transferable skills analysis. She also reviewed Allegiant's labor market survey and commented on each position listed. Ms. Moore concluded that the claimant was not capable of current employment nor did he have the ability to develop or acquire the skills or training to obtain employment. His treating surgeon, Dr. Hargraves, in his report on May 19, 2015, stated that the claimant had a cervical spine condition that would prevent him from working. Dr. Guberman, in his January 19, 2017 independent medical evaluation, opined that the claimant was permanently and totally disabled from all types of employment due to his compensable injuries. The FCE by Mr. Mascio dated February 19, 2015 noted that the claimant provided full physical effort. The claimant did not demonstrate the ability to perform most of the physical demands of his previous job in the coal mine. He tested in the light physical demand level, but his pain was rated at 4/10 which would be functionally disabling and limit his work activity. The FCE on October 23, 2018 indicated that the claimant tested at the sedentary physical demand level. He had decreased gait sequence and speed, neck range of motion, neck strength, trunk range of motion, trunk strength, left shoulder strength and range of motion, left hip strength, right ankle strength and range of motion and decreased toe rises and squatting. Psychological testing by Kirk Bryant, PhD, on April 26, 2017, revealed that the claimant's pain, mood, disturbance and anxiety would likely contributing to his cognitive weaknesses. Dr. Cooper-Lehki noted the claimant's depressive disorder and

recommended ongoing psychotropic medications and psychotherapy or deterioration could be expected. Dick Coburn referenced the claimant's memory deficits, chronic pain, irritability and hopelessness and, in his August 4, 2015 note, reported that the claimant was unable to work five days a week.

Ms. Moore concluded that the claimant did not have transferable skills as outlined in the Allegiant Managed Care Report and did not have the ability to obtain or perform the positions cited in the labor market survey. She noted that not only were some of the claimant's physical limitations ignored, but there was also no consideration given to his cognitive limitations. His limitations with executive functioning would impede paying attention, organizing, planning, prioritizing, starting tasks, and staying focused. Executive functioning is also pertinent for regulating emotions. Such limitations would inhibit working in the work environments cited by Allegiant. Ms. Moore opined that the claimant could not perform remunerative work within 75 miles of his home or previous employer.

The Permanent Total Disability Review Board convened on July 8, 2019 to reconsider the claimant's request for a permanent total disability award submitted on August 19, 2014 following the entry of a Decision from the Office of Judges dated July 6, 2018. The Board considered the claimant's counsel's April 4, 2019 and June 12, 2019 responses to the Initial Recommendations. Counsel submitted the June 10, 2019 vocational report of Michelle Moore who concluded that the claimant did not have any transferable skills to other employment. The Board disagreed with Ms. Moore's conclusion. The claimant's executive dysfunction in psychological tests results would not prevent him from acquiring skills to perform sedentary semi-skilled work. His executive dysfunction would not prevent him from participating in job placement services for a sedentary position. Further, his introversion was unrelated to a work-related injury. The Board determined that pursuant to W.Va. Code §23-4-6(n)(2), the claimant had vocational potential, is able to return to work, and is not permanently and totally disabled. Therefore, the claimant's request for a permanent total disability award was denied.

The W. Va. Code, §23-4-6(n)(6), provides that additional evidence on appeal may be submitted as follows:

No additional evidence may be introduced during the review of the objection before the office of judges or elsewhere on appeal: *Provided*, That each party and the commission may submit one written opinion on each issue pertinent to a given claim based upon a review of the evidence of record either challenging or defending the board's or other reviewing body's findings and conclusions. Thereafter, based upon the evidence of record, the administrative law judge shall issue a written decision containing his or her findings of fact and conclusions of law regarding each issue involved in the objection. The limitation of the scope of review otherwise provided in this subsection is not applicable upon termination of the commission and any objections shall be subject to article five of this chapter in its entirety.

Submitted to the Office of Judges was the December 27, 2019 report of Catherine Phillis-Harvey, M.S., CRC, CVE, LPC-PA, QRP-WV. Ms. Phyllis-Harvey concluded that the claimant was permanently and totally disabled as a result of his compensable injuries. The claimant's employment had been primarily in the coal industry with only brief periods of employment as a kitchen helper and painter while laid off. He did graduate from high school and had a year of college. He had foreman and paralegal certificates, although he never was designated as a foreman and never worked as a paralegal. He did not have any significant sedentary work experience and had limited typing ability. He has not worked since 2009. The most recent FCE found he could perform sedentary work but noted his bilateral burning/numbness in his legs and arms. His neck and trunk muscle strength were noted to be weak. There was no indication whether he could reach in all directions or what frequency. The April 19, 2015 MRI indicated severe stenosis in his cervical spine. Ms. Phillis-Harvey was concerned that he could not perform frequent movements like reaching, grasping. He was noted to have executive functioning skills which were stated to be compromised in the psychiatric report and the vocational evaluation by Ms. Moore. Ms. Saniga neglected to mention this in her report. The vocations cited by Ms. Saniga were jobs that included frequent to constant reaching and constant computer usage which Ms. Phillis-Harvey did not think the claimant could perform. Ms. Phillis-Harvey noted that neither Dr. Hargraves nor Dr. Guberman were of opinion that the claimant would be able to work in any capacity. Accordingly, Ms. Phillis-Harvey concluded that the claimant is not suited for sedentary work as he lacks the transferable skills, does not have the executive skills and has cervical issues. He is, therefore, permanently and totally disabled.

Based on the evidence presented it is more likely than not that the claimant, who has not worked since 2009 and was granted a Social Security Disability award, meets the statutory requirements of permanent total disability. The claimant was limited to sedentary jobs and has limited strength and cervical issues. He had surgery for his compensable cervical injury and received a 25% permanent partial disability award for the same. Two physicians found him totally disabled from working and even his FCE cited bilateral burning/numbness in his arms and legs. The FCE also noted 15-20 minutes limitation for sitting and 10-15 minutes standing before needing to change positions. Ms. Phillis-Harvey opined that the jobs cited by Ms. Saniga would require frequent to constant reaching and constant computer usage which the claimant could not perform. Ms. Phillis-Harvey also noted the claimant's cognitive and temperament limitations that would interfere with his job performance. Kirk Bryant, PhD, in his neuropsychological evaluation report, stated that the claimant, though bright, could have difficulties directing his cognitive resources due to executive dysfunction. The claimant also suffers from psychological problems including depression and compensable chronic pain as noted by psychiatrist, Dr. Cooper-Lehki, and neuropsychologist, Kirk Bryant.

The report of Ms. Phyllis-Harvey is compelling and when considered with the entire record, leads to the decision that the claimant is permanently and totally disabled. It is found that the claimant is not able to engage in substantial gainful activity that requires skills or abilities which he could acquire, or which are comparable to those of

any gainful activity in which he was previously engaged with some regularity and over a substantial period of time.

In cases where the application for permanent total disability was filed on or after July 1, 2003, the effective date of the amendment and reenactment of W.Va. Code § 23-4-6, pursuant to W.Va. Code § 23-4-6(j)(5) and W.Va. C.S.R. §85-5-3.6, the date of disability from which a permanent total disability award will be calculated and paid is the date a properly completed and supported application was filed with the commission or other reviewing body. Counsel for the claimant in the instant matter filed his completed permanent total disability application on August 19, 2014.

Accordingly, due to the combined effects of the claimant's compensable injuries, he is permanently and totally disabled as of August 19, 2014, when the completed application was submitted.

CONCLUSION OF LAW:

The claimant is more likely than not permanently and totally disabled with the onset date of August 19, 2014, the date he submitted his application.

Accordingly, it is ORDERED that the claimant's protest to the Claim Administrator's Order of September 19, 2019 be REVERSED and the claimant GRANTED a permanent total disability award with an onset date of August 19, 2014.

APPEAL RIGHTS:

Under the provisions of W.Va. Code §23-5-12, any aggrieved party may file a written appeal within thirty (30) days after receipt of any decision or action of the Administrative Law Judge. **The appeal shall be filed directly with the Workers' Compensation Board of Review at P.O. Box 2628, Charleston, WV, 25329.**

Date: February 4, 2021


Martha Hill
Administrative Law Judge

cc: CHARLES DELBERT
M. JANE GLAUSER - COUNSEL FOR CLAIMANT
MURRAY AMERICAN ENERGY INC
AIMEE M STERN - COUNSEL FOR EMPLOYER
SMARTCASUALTYCLAIMS

JCN: 2014014137

Date: February 4, 2021

Record Considered

Issue:

The Claimant's protest to the Claims Administrator's order of September 19, 2019, regarding ENTITLEMENT TO PERMANENT TOTAL DISABILITY AWARD.

EVIDENCE SUBMITTED:

Claimant Evidence

Document Type: Not Specified
Document Date: 3/31/2009
Submit Date: 4/14/2020
Author: Social Security Disability Award
Decision

Document Type: Not Specified
Document Date: 12/19/2009
Submit Date: 4/14/2020
Author: Social Security Disability Notice of
Award

Document Type: Not Specified
Document Date: 3/3/2010
Submit Date: 4/14/2020
Author: WV Income Tax Year 2009 Schedule H/Dr. Thomas
Wack

Document Type: Not Specified
Document Date: 2/18/2011
Submit Date: 1/22/2020
Author: ALJ Decision (CL 2001056879)

Document Type: Not Specified

Document Date: 8/13/2014
Submit Date: 4/14/2020
Author: Application For PTD Benefits

Document Type: Not Specified
Document Date: 2/19/2015
Submit Date: 4/14/2020
Author: FCE Report/Mark Mascio

Document Type: Not Specified
Document Date: 3/30/2015
Submit Date: 4/14/2020
Author: ALJ Decision/Authorizing New IME (CI 990051738

Document Type: Not Specified
Document Date: 4/15/2016
Submit Date: 4/14/2020
Author: ALJ Decision/(CI 2014014137)

Document Type: Not Specified
Document Date: 1/19/2017
Submit Date: 4/14/2020
Author: Dr. Bruce Guberman/IME Report

Document Type: Not Specified
Document Date: 4/26/2017
Submit Date: 4/14/2020
Author: Dr. Kirk Bryan/Neuropsychological Report

Document Type: Not Specified
Document Date: 4/26/2017
Submit Date: 4/14/2020
Author: WVU/WC Compensation/Psychiatric IME Report

Document Type: Not Specified
Document Date: 8/28/2017
Submit Date: 4/14/2020
Author: Dr. Bruce Guberman/Supplemental IME Report

Document Type: Not Specified
Document Date: 4/13/2018
Submit Date: 4/14/2020
Author: Dr. Bruce Guberman/IME Report

Document Type: Not Specified

Document Date: 7/6/2018
Submit Date: 1/22/2020
Author: ALJ Decision

Document Type: Not Specified
Document Date: 12/21/2018
Submit Date: 1/22/2020
Author: Board of Review Order

Document Type: Not Specified
Document Date: 1/18/2019
Submit Date: 1/22/2020
Author: Supreme Court of Appeals/Notice

Document Type: Not Specified
Document Date: 3/25/2019
Submit Date: 4/14/2020
Author: Dr. Smitha Bhandari/WebMD/Executive Function &
Executive Function Disorder

Document Type: Not Specified
Document Date: 6/10/2019
Submit Date: 4/14/2020
Author: Michelle Moore ORCI/Rehabilitation Report
at pgs. 21-22

Document Type: Not Specified
Document Date: 9/9/2019
Submit Date: 11/4/2019
Author: PTD Review Board/Final Recommendations

Document Type: Not Specified
Document Date: 9/19/2019
Submit Date: 11/4/2019
Author: Claim Admin. Order

Document Type: Not Specified
Document Date: 11/22/2019
Submit Date: 4/14/2020
Author: Letter Requesting Authorization/Jane
Glauser

Document Type: Not Specified
Document Date: 12/27/2019
Submit Date: 4/14/2020
Author: Genex Vocational Report/Catherine Phillips
Harvey

Document Type: Not Specified
Document Date: 2/21/2020
Submit Date: 2/26/2020
Author: WV Supreme Court/Memorandum Decision/Murray
v. Delbert

Employer Evidence

Document Type: Not Specified
Document Date: 8/13/2014
Submit Date: 11/4/2020
Author: Application For PTD Benefits

Document Type: Not Specified
Document Date: 9/15/2014
Submit Date: 11/4/2020
Author: Claim Admin. Order

Document Type: Not Specified
Document Date: 1/23/2015
Submit Date: 11/4/2020
Author: Dr. Maria Moran/Psychological IME

Document Type: Not Specified
Document Date: 1/23/2015
Submit Date: 11/4/2020
Author: Dr. Kari Beth Law/Psychiatric IME

Document Type: Not Specified
Document Date: 2/19/2015
Submit Date: 11/4/2020
Author: Summit Physical Therapy/FCE Evaluation

Document Type: Not Specified
Document Date: 5/15/2015
Submit Date: 11/4/2020
Author: Associates in Rehabilitation/PTD Voc Rehab
Report

Document Type: Not Specified

Document Date: 4/26/2017
Submit Date: 11/4/2020
Author: Dr. Christi Cooper - Lehigh/Neuropsychiatric
Report

Document Type: Not Specified
Document Date: 4/28/2017
Submit Date: 11/4/2020
Author: Dr. Kirk Bryant/Neuropsychological
Report

Document Type: Not Specified
Document Date: 8/1/2018
Submit Date: 11/4/2020
Author: Acknowledge Receipt of ALJ Order/PTD
Granted

Document Type: Not Specified
Document Date: 10/23/2018
Submit Date: 11/4/2020
Author: Wheeling Hospital/Physical Therapy Summary
Report

Document Type: Not Specified
Document Date: 11/30/2018
Submit Date: 11/4/2020
Author: Allegiant Managed Care/PTD Vocational Rehabilitation
Report

Document Type: Not Specified
Document Date: 3/11/2019
Submit Date: 11/4/2020
Author: PTD Review Board/Initial
Recommendations

Document Type: Not Specified
Document Date: 9/9/2019
Submit Date: 11/4/2020
Author: PTD Review Board/Final Recommendations

Document Type: Not Specified
Document Date: 9/19/2019
Submit Date: 11/4/2020
Author: Claim Admin. Order

CLOSING ARGUMENTS:

Party Submitted:	Claimant
Letter Date:	11/18/2020
Party Submitted:	Employer
Letter Date:	11/13/2020
Party Submitted:	Claimant
Letter Date:	11/12/2020

HEARING TRANSCRIPTS:

Hearing Date: 1/25/2021