

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

ICA EFiled: Jul 21 2023  
02:48PM EDT  
Transaction ID 70455874

---

CHARLESTON

---

CONSOL OF KENTUCKY, INC.,

Petitioner,

and

Case No.:

JCN: 2014008949

CCN: 14868522

DOI: 09-15-2013

TERRY M. BENTLEY,

Respondent.

---

**BRIEF OF PETITIONER  
ALLIANCE COAL, LLC**

---

JAMES W. HESLEP

JENKINS FENSTERMAKER, PLLC  
215 S. THIRD ST., SUITE 400  
CLARKSBURG, WV 26301  
(304) 523-2100

ATTORNEY FOR PETITIONER  
CONSOL OF KENTUCKY, INC.

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES .....	3
ASSIGNMENT OF ERROR .....	4
STATEMENT OF THE CASE.....	5
SUMMARY OF ARGUMENT .....	7
STATEMENT REGARDING ORAL ARGUMENT.....	8
ARGUMENT .....	9
 THE WORKERS’ COMPENSATION BOARD OF REVIEW ERRED IN REMANDING THE CLAIMANT’S APPLICATION FOR PERMANENT TOTAL DISABILTY BENEFITS TO THE CLAIM ADMINISTRATOR FOR FURTHER EVALUATION.  	
CONCLUSION.....	14
CERTIFICATE OF SERVICE .....	15

TABLE OF AUTHORITIES

	<u>Page</u>
W. VA. CODE § 23-4-6 [2013] .....	12
W. VA. CODE § 23-5-12a [2022].....	12
WEST VIRGINIA INSURANCE BULLETIN NO. 21-06 (SEPTEMBER 7, 2021) .....	13

**IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA**

---

CHARLESTON

---

CONSOL OF KENTUCKY, INC.,

Petitioner,

and

Case No.:

JCN: 2014008949

CCN: 14868522

DOI: 09-15-2013

TERRY M. BENTLEY,

Respondent.

---

**BRIEF OF PETITIONER  
CONSOL OF KENTUCKY, INC.**

---

ASSIGNMENT OF ERROR

This workers' compensation claim is in litigation pursuant to the Respondent's protest to the claim administrator's order of November 15, 2022, which found that the claimant did not meet the statutory threshold for consideration of a permanent total disability award. By order dated June 22, 2023, the Workers' Compensation Board of Review remanded the claim for further evaluation of the claimant's application for permanent total disability benefits.

The Petitioner asserts that the Workers' Compensation Board of Review has exceeded its authority in remanding this claim for further evaluation of the claimant's application for permanent total disability benefits. The Petitioner further asserts that it satisfied the statutory requirements for review of permanent total disability benefits applications as required by W. VA. CODE § 23-4-6.

## STATEMENT OF THE CASE

The claimant is a 57-year old mining mechanic. On September 15, 2013, the claimant sustained compensable injuries to his right forearm when it became pinned between two pieces of mining equipment. This incident resulted in fractures of the forearm and soft tissue injury. The claims administrator ultimately ruled this claim compensable for (812) fracture of humerus, (881.20) open wound elbow/forearm/wrist with tendon involvement, (927.10) crushing injury of forearm, (813.32) fracture of shaft of ulna, (813.31) fracture of shaft of radius, and (309.81) post-traumatic stress disorder. The claimant underwent multiple surgical procedures to repair the injuries to his right forearm.

Subsequent to the compensable injury, the claimant underwent at least four medical evaluations with four different evaluators of various specializations. These evaluations set whole person impairment of the claimant's compensable orthopedic and psychiatric conditions.

The Offices of the Insurance Commissioner issued Bulletin No. 21-06 on September 7, 2021. This Bulletin announced the dissolution of the Permanent Total Disability Review Board.

On November 1, 2021, the claimant filed an application for permanent total disability benefits stating that he had received a total sum of 59% permanent partial disability benefits in this claim. The 59% sum in prior awards of 50% in orthopedic impairment and 9% in psychiatric impairment. The claimant did not identify any other prior workers' compensation claims in his application for benefits, but the claim administrator identified a prior noise-induced hearing loss claim in which the claimant had received a 1.65% permanent partial disability award.

As the claimant had a record of receiving more than 50% in prior permanent partial disability awards, the claim administrator referred the claimant for a medical evaluation with Dr. Prasadarao Mukkamala on September 30, 2022. Dr. Mukkamala is board-certified in physical medicine and rehabilitation. Dr. Mukkamala had twice evaluated the claimant with

regard to this claim previously in 2014 and 2017. Dr. Mukkamala reviewed the claimant's records, interviewed the claimant, and conducted a third physical examination of the claimant. As a result of this evaluation, Dr. Mukkamala opined that the claimant had a combined total whole person impairment of 45%.

Based upon Dr. Mukkamala's finding that the claimant currently has 45% whole person impairment as a result of combined orthopedic, psychiatric, and hearing loss impairment, the claim administrator issued a November 15, 2022 order finding that the claimant had insufficient whole person impairment for further consideration of a permanent total disability award. The claimant protested this order.

Pursuant to Dr. Mukkamala's finding that the claimant currently has 45% whole person impairment as a result of combined orthopedic, psychiatric, and hearing loss impairment, the claim administrator issued a November 15, 2022 order finding that the claimant had insufficient whole person impairment for further consideration of a permanent total disability award. The claimant protested this order.

In support of his protest, the claimant offered numerous prior medical evaluation reports from this claim. The claimant's evidence included reports from Dr. Mukkamala, Dr. Bobby Miller, a psychiatrist, Dr. Bruce Guberman, an internist, and Dr. David Jenkinson, an orthopedic surgeon. These reports occurred over a course of several years prior to the claimant's application for permanent total disability benefits.

By decision dated June 22, 2023, the Workers' Compensation Board of Review remanded the claim to the claim administrator for further evaluation of the claimant's application for permanent total disability benefits. The Workers' Compensation Board of Review ordered the claim administrator to constitute a reviewing body that will evaluate the claimant's condition, issue initial recommendations, consider additional evidence, and issue final recommendations on the application. The employer now appeals the underlying decision on the basis that it wrongly interprets statute and imposes duties upon the claim administrator and employer that are not statutorily mandated after the dissolution of the PTDRB.

### SUMMARY OF ARGUMENT

The Workers' Compensation Board of Review has ordered the Petitioner to further evaluate the claimant's application for permanent total disability benefits in a manner that is inconsistent with W. VA. CODE § 23-4-6 following the issuance of Insurance Bulletin No. 21-06.

STATEMENT REGARDING ORAL ARGUMENT

The Petitioner, CONSOL of Kentucky, Inc., respectfully requests oral argument regarding the issues raised in this appeal.



## ARGUMENT

The Workers' Compensation Board of Review committed reversible error in the underlying decision. Pursuant to W. VA. CODE § 23-5-12a(b), the Intermediate Court of Appeals must affirm the decision of the Workers' Compensation Board of Review unless the Petitioner shows that the findings and conclusions of the Workers' Compensation Board of Review are:

- (1) In violation of statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the Board of Review; or
- (3) Made upon unlawful procedures; or
- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

The Workers' Compensation Board of Review's decision in the underlying protest is not in compliance with W. VA. CODE § 23-4-6 following dissolution of the Permanent Total Disability Review Board (PTDRB) by Insurance Bulletin No. 21-06. Accordingly, the underlying order should be reversed.

In order to qualify for permanent total disability benefits, a claimant must be "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 the claimant has previously engaged. W. VA. CODE § 23-4-6(n)(2). To pursue an application for permanent total disability benefits, a claimant must show that he suffers from whole person medical impairment in the amount of at least 50% as a result of prior occupational injury and/or disease. W. VA. CODE § 23-4-6(n)(1). While the claimant established the requisite sum of prior awards to file an

application for permanent total disability benefits, he did not show current whole person impairment meeting or exceeding the 50% threshold, as established by Dr. Mukkamala.

The claimant has failed to present sufficient evidence to establish that he currently suffers from 50% or greater whole person impairment. The only evidence of the claimant's current whole person impairment comes from Dr. Mukkamala's September 30, 2022 report. In that report, Dr. Mukkamala found 45% whole person impairment. The claim administrator, therefore, ordered that the claimant's application for permanent total disability benefits failed.

The Workers' Compensation Board of Review, however, concluded that the claim administrator is required to constitute its own reviewing body and undergo a process of developing initial recommendations, reviewing additional information related to the application, evaluating the claimant's medical and vocational capabilities, and issuing final recommendations on the application. This is the process that was followed by the PTDRB prior to its dissolution.

Following dissolution of the PTDRB, the claim administrator received no further regulatory guidance as to the handling of permanent total disability benefit applications. In the absence of such guidance, the claim administrator processed the claimant's application for permanent total disability benefits in a manner that provided for medical review of the claimant's records and provided the claimant with an opportunity to administratively protest its findings. The Petitioner believes that these actions complied with the statutory requirements of the application process in a system in which the PTDRB no longer exists.

The pertinent statutes address "reviewing bodies" that previously included the Interdisciplinary Examining Board (IEB) and its successor, the PTDRB. W. VA. CODE § 23-4-6(j) defines the composition of a reviewing body as "three qualified physicians with specialties and expertise qualifying them to evaluate medical impairment and two vocational rehabilitation

specialists who are qualified to evaluate the ability of a claimant to perform gainful employment with or without retraining.” W. VA. CODE §§ 23-4-6(j)(1) and (2) further provides that a reviewing body will obtain a claimant’s medical history—inclusive of reports furnished by the claimant or employer—for review and that the reviewing body may request additional specialists to evaluate the claimant at its discretion. W. VA. CODE § 23-4-6(j)(3) noted that referrals by the reviewing body should consider medical cost containment, utilization review, and management of care. Reports of such referrals are to be made available to the claimant under W. VA. CODE § 23-4-6(j)(4). The reviewing body is then to state its recommendations in writing so that those recommendations may be effectuated by the private carrier or self-insured employer. W. VA. CODE § 23-4-6(j)(5).

In this instance, the claim administrator gathered the claimant’s medical records, inclusive of medical reports obtained by the claimant, and referred the matter for review by Dr. Mukkamala, a physician with board-certification in physical medicine and rehabilitation. Dr. Mukkamala reviewed the claimant’s medical history, interviewed the claimant, and conducted a physical examination of the claimant. Following these investigative steps, Dr. Mukkamala issued a written report concluding that the claimant had 45% whole person impairment related to his occupational injuries and diseases. The claimant received Dr. Mukkamala’s report along with a written order denying the claimant’s application for permanent total disability benefits. That order provided the claimant with an opportunity to challenge the denial of the application which the claimant exercised. In light of these facts, it is unclear what procedural protections the process employed by the claim administrator lacks.

W. VA. CODE § 23-4-6(j) states that the “adjudicatory functions of the Interdisciplinary Examining Board shall be performed” by the Commissioner, self-insured

employer, or private carrier. These entities are to “employ or otherwise engage adequate resources” to perform the necessary functions of evaluating applications for permanent total disability benefits. The claim administrator for a self-insured employer did so here and took appropriate action when the experienced physician it engaged to evaluate the claimant found that the claimant did not have 50% whole person impairment. The claimant then exercised his right to protest that determination.

The Workers’ Compensation Board of Review remanded the claimant’s application for benefits to the claim administrator “with instructions to process the application in conformity with W. VA. CODE § 23-4-6.” The claim administrator believed its actions to be in conformity with that statute, and the order contains no further specification as to how the claim administrator is to bring itself into compliance with that statute. Is the claim administrator to constitute a five-member reviewing body to evaluate this application? If it is to do so, who determines the chair of that body? If it is to do so, may the reviewing body function under a quorum of two physicians and a vocational specialist? Is the claim administrator permitted to refer the claimant for additional evaluation if it is the entity constituting the reviewing body?

Regulatory guidance on this procedure has not been issued. The order remanding the claim for further review is silent as to the appropriate procedure. The interpretation of W. VA. CODE § 23-4-6 contemplates a scenario that is administratively impracticable for any self-insured employer and most private carriers conducting business in West Virginia. A requirement that all self-insured employers and private carriers retain a reviewing body consisting of three physicians and two vocational rehabilitation counselors to evaluate permanent total disability applications is cost-prohibitive, particularly when such applications occur at a rate so low as to force the Insurance Commissioner to disband the PTDRB. Imposing such a requirement on all

individual carriers and self-insured employers is nonsensical given that the Insurance Commissioner concluded that he could not maintain the PTDRB given the “dwindling number of applications” across the entire State.

Beyond the high cost and inefficiency associated with such an interpretation of W. VA. CODE § 23-4-6, this position neglects the lack of qualified physicians and vocational counselors available to provide services in West Virginia. Given the lack of availability of such specialists, the requirement that such a reviewing body be constituted on an *ad hoc* basis by each carrier and self-insured employer flirts with the line between impracticability and impossibility. The suggestion that every self-insured employer and private carrier develop its own review board ignores the realities of the costs of such a system and the practical constraints of a shortage of providers of such services.

In light of the governing statutes and relevant evidence, the claim administrator believes that the process it afforded to the claimant in this matter meets with the spirit of W. VA. CODE § 23-4-6 in terms of evaluation of his application for permanent total disability benefits. The order set forth by the Workers’ Compensation Board of Review is not consistent with the law or the practical administrative realities of these claims, and it should be reversed.

CONCLUSION

Based upon the foregoing, the employer respectfully requests that this Court reverse the underlying order of the Workers' Compensation Board of Review.

/s/ James W. Heslep  
James W. Heslep (W. Va. Bar No. 9671)

Jenkins Fenstermaker, PLLC  
215 S. Third Street, Suite 400  
Clarksburg, WV 26301

Attorney for Petitioner  
CONSOL of Kentucky, Inc.

004648.000001

CERTIFICATE OF SERVICE

I hereby certify that on the 21<sup>st</sup> day of July, 2023, I served the foregoing “Brief of Respondent” upon all counsel of record through File and Serve Xpress:

Donald C. Wandling, Esq.  
229 Stratton Street  
Logan, WV 25601

/s/ James W. Heslep