

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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CHARLESTON

TERRY M. BENTLEY,

CLAIMANT/RESPONDENT

and

Case No.:

JCN: 2014008949

CCN" 14868522

DOI: 09-15-2013

ICN: 23-ICA-321

CONSOL OF KENTUCKY, INC.,

EMPLOYER/PETITIONER

RESPONSE BRIEF OF CLAIMANT,
TERRY BENTLEY

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STATEMENT OF THE CASE

The Claimant suffered a severe injury to his right arm at work on September 15, 2013. Claimant underwent numerous surgical procedures to his right arm as a result of this injury.

The Office of Judges issued a decision dated October 18, 2021, which ordered that the Claimant be granted a 50% permanent partial disability in this claim for his physical injury.

The Office of Judges found that the most credible evidence of the Claimant's physical impairment was the report of Dr. David Jenkinson dated March 23, 2021 who recommended a 50% permanent impairment.

Dr. Jenkinson was the employer's evaluating physician.

The employer had also submitted the December 9, 2019 report of Dr. Mukkamala wherein he recommended a 40% permanent impairment. The Office of Judges found this report to be reliable but found the report of Dr. Jenkinson to be the most credible evidence of record concerning the Claimant's physical permanent impairment.

On November 1, 2021, the Claimant filed an application for permanent total disability benefits. In addition to the 50% award for physical impairment, the claimant had also received a 9% award for psychiatric impairment in this claim and a 1.65% award for hearing loss in a separate claim.

The claims administrator initially denied the application on the basis that it was not timely filed but the Office of Judges by decision dated June 21, 2022 ordered that the claim

be reopened and that the Claimant be referred for further consideration of his request for

a permanent total disability award.

In response to this decision, the employer referred the Claimant to Dr. Mukkamala for an additional impairment evaluation. Dr. Mukkamala found based on this evaluation that the Claimant's physical impairment had actually improved since his last examination. Taking into consideration his current impairment findings and the previous awards for psychiatric impairment and hearing impairment, his total recommended impairment was 45%. He, therefore, found that the Claimant did not have 50% impairment.

Dr. Mukkamala's report is the only evidence introduced by employer in response to the June 21, 2022 order that the employer evaluate the claimant's request for a permanent total disability award.

The Board of Review entered an Order dated June 22, 2023 which remanded the case to the claim administrator with instructions to process the claim in conformity with WV Code § 23-4-6.

It is from that order that the employer appeals.

SUMMARY OF ARGUMENT

The Board of Review in the June 22, 2023 order correctly stated the law in regards to the processing of an application for permanent total disability. The Board of Review correctly found that the claims administrator had not complied with the provisions of WV Code §23-4-6 and Insurance Bulletin No. 21-06.

STATEMENT REGARDING ORAL ARGUMENT

The Claimant/Respondent, Terry M. Bentley, respectfully requests oral argument regarding the issues raised in the appeal.

ARGUMENT

WV Code §23-4-6(j) provides in detail how an application for permanent total disability benefits shall be processed.

That Code provision initially provided for the Workers' Compensation Commission to establish an interdisciplinary board to evaluate and to take whatever steps necessary to evaluate the application for permanent total disability and to make recommendations concerning the application.

The Commission was abolished in 2006 and pursuant to the statute the Insurance Commission caused to be established a Permanent Total Disability Reviewing Board which complied with and performed the functions set forth in WV Code §23-4-6.

In West Virginia Insurance Bulletin dated September 7, 2021, the Insurance Commission abolished the Permanent Total Disability Reviewing Board and directed that the functions of the Board would in the future be carried out by private carriers or self-insured employers pursuant to WV Code §23-4-6.

The September 7, 2021 Bulletin further provided that private carriers or self-insured employers must comply with the provisions of WV Code §23-4-6.

The facts in this claim clearly show that the self-insured employer or private carrier has not complied with the provisions of WV Code §23-4-6. The only action taken by the employer or carrier was to refer the Claimant to Dr. Mukkamala for an additional medical evaluation. The statute requires additional evaluations before a decision may be issued in regards to the application. The facts in this claim show that those additional steps have not been performed by the employer or carrier in processing this application.

The employer or carrier has not established a “reviewing board” as required by statute.

The employer’s argument that “regulatory guidance” has not been issued concerning how employers or carriers are to process these claims is without merit. WV Code §23-4-6 clearly states in detail how employers or carriers are to process an application for permanent total disability. No further guidance or explanation is necessary. The statute is not ambiguous or unclear. The statute clearly provides for how the application is to be processed, whether it is to be processed by the Insurance Commission, a private carrier or a self-insured employer.

The employer’s assertion that qualified experts are not available in West Virginia to be appointed to a reviewing board is without merit. Up until the Insurance Commission in 2021 disbanded the Permanent Total Disability Reviewing Board, there is no evidence that the Insurance Commission could not find qualified experts to fill the positions on the Board. There is no evidence that West Virginia lacks qualified experts to serve on a reviewing board.

The Insurance commission has authority over private carriers and self-insured employers. The Insurance Commission has the authority to require employers and carriers to comply with the provisions of the WV Code.

Therefore, the Board of Review has correctly applied WV Code §23-4-6 to this case and its decision should be affirmed.

CONCLUSION

**Based upon the foregoing, Claimant respectfully requests that the June 22, 2023
Order of the Board of review be affirmed.**

Respectfully Submitted,

Terry M. Bentley,

By Counsel

/s/ Donald C. Wanding

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Certificate of Service

The undersigned hereby certifies that he has served a true copy of the foregoing document by First Class United States Mail, postage prepaid, upon all counsel of record through and by File and Serve X-press on the following person at the address listed below on the 15th day of August, 2022:

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