

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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CHARLESTON

ALLIANCE COAL, LLC,

Petitioner,

and

Case No.:

JCN: 2016011244

CCN: WCTR20160711

DOI: 10-25-2015

RICHARD E. HEATH,

Respondent.

**BRIEF OF PETITIONER
ALLIANCE COAL, LLC**

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ASSIGNMENT OF ERROR

This workers' compensation claim is in litigation pursuant to the Respondent's protests to the claim administrator's orders of (1) February 7, 2022, which denied an award of vocational rehabilitation benefits related to the claimant's planned surgical procedure, (2) May 13, 2022, which closed this claim for the payment of vocational rehabilitation benefits, and (3) August 18, 2022, granting the claimant rehabilitation temporary total disability benefits up to the 52-week statutory maximum found at W. VA. CODE § 23-4-9(d). By order dated June 29, 2023, the Workers' Compensation Board of Review ordered that the claim administrator pay rehabilitation temporary total disability benefits in excess of the statutory maximum set forth at W. VA. CODE § 23-4-9(d).

The Petitioner asserts that the Workers' Compensation Board of Review has exceeded its authority in order payment of rehabilitation temporary total disability benefits beyond the statutory maximum set forth at W. VA. CODE § 23-4-9(d).

STATEMENT OF THE CASE

The claimant, Richard E. Heath, is a 51-year old underground coal miner. He sustained a compensable crush injury to his left leg when a rail car pinned his leg against the mine wall on October 25, 2015. The claimant underwent two surgical procedures to repair fractures in his left leg.

The claim administrator referred the claimant for an independent medical evaluation with Dr. Jeffrey N. Kann on July 26, 2016. Dr. Kann is board-certified in orthopedic surgery. Dr. Kann reviewed the claimant's medical records, interviewed the claimant, and conducted a physical examination of the claimant. At the time of this evaluation, Dr. Kann concluded that the claimant had not yet achieved maximum medical improvement with regard to the compensable injury. Dr. Kann recommended additional diagnostic studies and therapeutic treatments that the claimant underwent through this claim.

Dr. Kann evaluated the claimant for a second time on December 15, 2016. At the time of the second evaluation, Dr. Kann found that the claimant had achieved maximum medical improvement with regard to the injuries of the left leg.

Based upon the findings of Dr. Kann, the claim administrator closed this claim for the payment of temporary total disability benefits and processed an award for permanent partial disability benefits.

On March 23, 2017, the claimant underwent an independent medical evaluation with Dr. Bruce Guberman at the request of his legal counsel. At the time of that evaluation, Dr. Guberman also concluded that the claimant had reached maximum medical improvement in regard to the October 25, 2015 injury.

On November 27, 2017, Dr. Christopher Martin evaluated the claimant at the request of the employer. Dr. Martin is board-certified in occupational medicine. Dr. Martin reviewed all medical records available from his treatment in the West Virginia University Medicine electronic health records system. In addition, he reviewed the medical evaluation reports of Dr. Kann and the report of Dr. Guberman. Dr. Martin interviewed the claimant and

conducted a physical examination of the claimant. Dr. Martin opined that the claimant had achieved maximum medical improvement with regard to the compensable injuries.

Following resolution of the claimant's entitlement to temporary total disability benefits and permanent partial disability benefits, the claim administrator determined that the claimant would likely benefit from engagement in vocational rehabilitation services. On November 8, 2018, the claimant underwent an initial vocational assessment with a rehabilitation counselor, Erin Saniga. The claimant received information regarding the vocational rehabilitation hierarchy and acknowledged his understanding of the vocational rehabilitation process. The vocational rehabilitation hierarchy plainly states that the seventh and final attempt at vocational rehabilitation is engagement in a formal retraining program. As a result of this initial assessment, the claimant entered into an agreed-to vocational rehabilitation plan.

Thereafter, the claimant received authorization to undergo the trial implantation of a spinal cord stimulator. This medical procedure initiated a process through which the claimant underwent a trial implantation of the device and, ultimately, the permanent implantation of the device. On April 30, 2019, Ms. Saniga documented the claimant's participation in the spinal cord stimulator procedure and noted that the vocational rehabilitation effort under this claim would need to be postponed while the claimant received this medical treatment.

Despite the claimant's inability to engage in the vocational rehabilitation process, he repeatedly requested authorization of rehabilitation temporary total disability benefits through the summer of 2019. On each occasion, the claim administrator denied the claimant's request for rehabilitation temporary total disability benefits on the basis that the claimant was undergoing active medical treatment that precluded his participation in vocational rehabilitation and was not engaged in an agreed-to vocational rehabilitation plan.

Ms. Saniga met with the claimant again on September 18, 2019. She noted that he had successfully undergone the implantation of a permanent spinal cord stimulator. Ms. Saniga stated that vocational rehabilitation could proceed upon completion of a functional capacity evaluation. That functional capacity evaluation was completed on September 30, 2019.

The claimant again entered into an agreed-to vocational rehabilitation plan with Ms. Saniga on October 23, 2019. The agreed-to vocational rehabilitation plan continued with regular meetings between Ms. Saniga and the claimant regarding his ongoing job search. On January 20, 2020, Ms. Saniga met with the claimant and informed him that his vocational rehabilitation services would be approved for an additional 30 days, at which time they would end. The vocational report generated from that meeting specifically stated that services would cease on February 19, 2020. By order dated February 28, 2020, the claim administrator terminated vocational rehabilitation services.

By report dated March 17, 2020, Ms. Saniga noted that the claimant had undergone interviews for two jobs. She advised that she would keep the claimant's file open to follow up on the results of these interviews and for consideration of potential temporary partial rehabilitation benefits related to the potential jobs.

The claimant underwent yet another medical evaluation with Dr. Jennifer Lultschik on August 12, 2020. Dr. Lultschik is board-certified in occupational medicine. Dr. Lultschik reviewed the claimant's records, interviewed the claimant, and conducted a physical examination of the claimant. She found the claimant to have achieved maximum medical improvement with regard to the compensable injury.

On February 7, 2022, the claim administrator denied an award of vocational rehabilitation benefits related to a planned surgical procedure under this claim. Then, on May 13, 2022, the claim administrator closed this claim for the payment of vocational rehabilitation benefits in conjunction with a closure report from Ms. Saniga that noted that the claimant had accepted work as a FEMA inspector and had filed corporate organization forms with the State of West Virginia to establish a for-profit corporation in December 2021. At no time during the claimant's engagement with a vocational rehabilitation counselor did the claimant ever receive authorization to undergo a formal retraining program.

On July 13, 2022, the Workers' Compensation Board of Review ruled that the claimant was entitled to rehabilitation temporary total disability benefits from February 19, 2020,

through March 16, 2021, less any benefits previously paid. By order dated August 18, 2022, the claim administrator granted the claimant additional rehabilitation temporary total disability benefits up to the 52-week maximum allowed under W. VA. CODE § 23-4-9(d).

Dr. Lultschik again evaluated the claimant on October 11, 2022. As a result of this evaluation, she maintained that the claimant remained at maximum medical improvement and concluded that the claimant had no additional whole person impairment beyond that which she had already recommended.

By order dated June 29, 2023, the Workers' Compensation Board of Review ordered that the claimant be awarded rehabilitation temporary total disability benefits up to a maximum of 104 weeks. This award exceeds the 52-week limit set at W. VA. CODE § 23-4-9(d). Under that statute, an award of 104 weeks of benefits is only permitted to claimants who are participating in an approved retraining program under Step Seven of the rehabilitation hierarchy. The claimant has never been approved to undergo such a retraining program, therefore, the award of 104 weeks of benefits is impermissible under W. VA. CODE § 23-4-9(d). The Petitioner respectfully requests that the underlying order of the Workers' Compensation Board of Review be reversed as it is a blatant violation of W. VA. CODE § 23-4-9(d).

SUMMARY OF ARGUMENT

The Workers' Compensation Board of Review has ordered the Petitioner to pay rehabilitation temporary total disability benefits in excess of the statutory maximum set forth at W. VA. CODE § 23-4-9(d). The Respondent has been paid rehabilitation temporary total disability benefits up to the 52-week maximum set forth at W. VA. CODE § 23-4-9(d). An additional 52-week is available to claimants who are enrolled in a formal retraining program (*i.e.*, the seventh tier of the rehabilitation hierarchy). The claimant has never been enrolled in a formal retraining program through his vocational rehabilitation services and is, therefore, not eligible to receive the additional 52-week period of rehabilitation temporary total disability benefits under W. VA. CODE § 23-4-9(d).

STATEMENT REGARDING ORAL ARGUMENT

The Petitioner, Alliance Coal, LLC, 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 Workers' Compensation Board of Review's findings and conclusions 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 violates statutory provisions, specifically W. VA. CODE § 23-4-9(d). Accordingly, the underlying order must be reversed.

The underlying order of the Workers' Compensation Board of Review provides that the claimant be awarded rehabilitation temporary total disability benefits in excess of the statutory limit. It is the stated goal of the Workers' Compensation Act to return injured workers to gainful employment. *See* W. VA. CODE § 23-4-9(a). The accomplishment of vocational rehabilitation is a shared responsibility the employer, the employee, and the treating physician. *Id.* W. VA. CODE § 23-4-9(d) permits the payment of rehabilitation temporary total disability benefits during the execution of a valid rehabilitation program for a period up to 52 weeks. That period might be extended for an additional 52-week period if the claimant engages in an

approved re-training program. Here, the claimant received the statutory maximum benefit of 52 weeks, as plainly explained in the protested order. The claimant never engaged in an approved re-training program. The claimant achieved re-employment as a FEMA inspector and as a self-employed entrepreneur without the need of a formal retraining program. His entitlement to rehabilitation temporary total disability benefits, therefore, expired upon payment of the statutory maximum benefit of 52 weeks.

The implementation and closure of the vocational rehabilitation plan is governed by W. VA. C.S.R. §§ 85-15-1 *et seq.* Under these rules, a self-insured employer may—*in its sole discretion*—determine whether vocational rehabilitation services are appropriate for an injured worker. W. VA. C.S.R. § 85-15-5.2. The execution of an agreed-to plan clearly contemplates an ultimate end to such a plan. The vocational rehabilitation counselor provided documentation of her regular meetings with the claimant regarding his progress as to the agreed-to vocational rehabilitation plan. She clearly documented the goals of the plan, as well as its conclusion. Formal retraining was never provided pursuant to the agreed-to litigation plan. As the claimant had achieved re-employment, formal retraining was never made part of the agreed-to rehabilitation plan.

The claimant underwent an initial vocational rehabilitation assessment on November 8, 2018. Subsequent to that assessment, the claimant received rehabilitation temporary total disability benefits up to the 52-week maximum permitted under W. VA. CODE § 23-4-9(d). At no time was the claimant ever authorized to enter a retraining program as part of his vocational rehabilitation plan. Participation in a retraining program is a prerequisite for extension of rehabilitation temporary total disability benefits to 104 weeks under W. VA. CODE § 23-4-9(d). Retraining is Step Seven of the vocational rehabilitation hierarchy set forth in W. VA.

C.S.R. § 85-15-4.1. The claimant never received authorization to undergo retraining because he secured alternate employment before his vocational rehabilitation progressed to Step Seven retraining. As the claimant never progressed to Step Seven retraining, he may not receive 104 weeks of benefits under W. VA. CODE § 23-4-9(d).

In light of the governing statutes and relevant evidence, the claim administrator paid the claimant the statutory maximum rehabilitation temporary total disability benefit of 52 weeks. The claimant never engaged in a formal retraining program, therefore, he was not entitled to the 104-week benefit period. The Workers' Compensation Board of Review erred in ordering the claim administrator to pay the claimant an additional 52 weeks of rehabilitation temporary total disability benefits in violation of statute, and its underlying order should be reversed.

CONCLUSION

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

/s/ James W. Heslep
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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of July, 2023, I served the foregoing “Brief of Respondent” upon all counsel of record through File and Serve Xpress:

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