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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Charleston

CHARLES DELBERT,

Claimant/Petitioner,

v.

MARSHALL COUNTY COAL RESOURCES, INC.

Employer/Respondent

SUPREME COURT NO: 20-0537

JCN: 2014014137

BOR APPEAL NO: 2055031

FROM THE WORKERS' COMPENSATION BOARD OF REVIEW

**EMPLOYER'S RESPONSE TO CLAIMANT'S PETITION FOR APPEAL**

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**I. KIND OF PROCEEDING AND NATURE OF RULING**

This claim comes before this Honorable Court pursuant to the Claimant's Petition for Appeal from the Order of the Worker's Compensation Board of Review dated June 25, 2020 (Exhibit A), affirming the December 17, 2019 Order of the Administrative Law Judge (Exhibit B), which affirmed the Claims Administrator's order dated August 12, 2019, denying the Claimant's application to reopen this claim for consideration of additional permanent partial disability benefits (Exhibit C).

**III. STATEMENT OF FACTS**

The Claimant/Petitioner, Charles Delbert ("Claimant" or "Mr. Delbert"), worked at Consolidation Coal's McElroy Mine (now Marshall County Coal Resources, Inc.). He filed an application for occupational pneumoconiosis benefits on November 8, 2013, setting forth a date

of last exposure of May 19, 2009. (See Exhibit D, Claimant's Application for O.P. Benefits, filed by the Employer.) The non-medical order issued in this claim on February 6, 2014, found the claim to be presumptive. (See Exhibit E, Claims Administrator's 2/6/14 order, filed by the Employer.) Mr. Delbert was examined by the Occupational Pneumoconiosis Board on June 30, 2014. The Board found him to have a 10% pulmonary impairment attributable to O.P. (See Exhibit F, O.P. Board's 6/30/14 report, filed by the Employer.) By order dated July 31, 2014, Mr. Delbert was granted a 10% PPD award in this claim. (See Exhibit G, Claims Administrator's 7/31/14 order, filed by the Employer.)

Mr. Delbert filed a protest to the Claims Administrator's July 31, 2014 Order; however, he subsequently withdrew his protest. (See Exhibit H, Claimant's 9/15/14 protest and Exhibit I, 9/30/14 correspondence withdrawing protest, filed by the Employer.) The protest to the July 31, 2014 order was dismissed by the Office of Judges on October 2, 2014. (See Exhibit J, OOJ's 10/2/14 Order, filed by the Employer.)

On August 13, 2014, Mr. Delbert filed an Application for Permanent Total Disability Benefits in this claim. (See Exhibit K, 8/13/14 PTD Application, filed by the Employer.) The Claimant's PTD Application was denied by order of the Claims Administrator dated November 13, 2015. (See Exhibit L, Claims Administrator's 11/13/15 order, filed by the Employer.) The Claims Administrator's order was affirmed by the ALJ's Order dated April 15, 2016. (See Exhibit M, ALJ's 4/15/16 Order, filed by the Employer.)

The Claimant filed a Petition to re-open this claim for additional PPD benefits on October 13, 2016. (See Exhibit N, Claimant's 10/13/16 Petition, filed by the Employer.) By order dated November 9, 2016, the Claims Administrator denied the Petition, on the basis that the issue of the Claimant's permanent disability was currently pending before the Board of Review pursuant

to his appeal of the ALJ's Order affirming the Claims Administrator's denial of his PTD application in this claim, and pursuant to W. Va. Code §23-6-16(e), a claimant can only have one active request for a permanent partial disability award pending in a claim at any given time. (See Exhibit O, Claims Administrator's 11/9/16 Order, filed by the Employer.)

The Claimant appealed the ALJ's April 15, 2016 Order to the Worker's Compensation Board of Review, and by Order dated November 10, 2016, the Board of Review remanded this claim to the Permanent Total Disability Review Board for additional consideration. (See Exhibit P, 11/10/16 Board of Review Order, filed by the Employer.) The PTD Review Board subsequently referred the claim back to the Claims Administrator for the development of additional medical evidence. (See Exhibit Q, 2/14/17 correspondence from the Offices of the Insurance Commissioner.)

By Order dated June 14, 2017, the ALJ affirmed the Claims Administrator's Order denying the reopening of this claim for additional PPD benefits, finding that "the claimant has an application for a permanent total disability award pending at this time and until the final ruling is issued therein he cannot prosecute further permanent partial disability." (See Exhibit R, ALJ's 6/14/17 Order, filed by the Employer.) The ALJ's Order was affirmed by the Board of Review on November 6, 2017, which noted that "W. Va. Code §23-4-16(e) provides as follows: 'A claimant may have only one active request for a permanent disability award pending in a claim at any one time. Any new request that is made while another is pending shall be consolidated into the former request.' However, the Board finds the evidence does not establish that the claimant is entitled to a reopening of the claim for additional permanent partial disability benefit." (See Exhibit S, Board of Review's 11/6/17 Order, filed by the Employer.) The Claimant did not appeal the Board's Order.

By order dated February 14, 2018, the Claims Administrator again denied the Claimant's application for permanent total disability benefits based upon the report of the PTD Examining Board, which concluded that Mr. Delbert had not met the 50% whole person impairment threshold for pursuing PTD benefits. (See Exhibit T, Claims Administrator's 2/14/18 order, filed by the Employer.) The Claims Administrator's order was reversed the ALJ, who found that Mr. Delbert had met the 50% whole person threshold. Mr. Delbert's Petition for a PTD award was then referred back to the PTD Examining Board for consideration of vocational issues. (See Exhibit U, Claims Administrator's 8/1/18 Acknowledgment of ALJ's 7/6/18 Order, filed by the Employer.) The Board of Review affirmed the ALJ's Order on December 21, 2018, and the West Virginia Supreme Court of Appeals affirmed the Board's Order on February 21, 2020. (See Exhibit V, Board of Review's 12/21/18 Order and Exhibit W, 1/18/19 Statutory Notice of Filing Petition for Appeal, filed by the Employer.)

Mr. Delbert again filed a Petition to reopen this claim for additional PPD benefits on July 22, 2019. In support of his Petition, he submitted a May 29, 2019 chest CT scan report, which documented (1) mild right lower lobe bronchiectasis and mild reticular opacities at the bases, atelectasis versus scarring; and (2) coronary artery calcifications. The report notes a history of asthma. (See Exhibit X, 7/22/19 reopening petition, filed by the Claimant.)

On August 12, 2019, the Claims Administrator issued the order in litigation, denying the application to reopen this claim for additional PPD benefits on the basis that the Claimant's Petition for a permanent total disability award remains pending, and therefore, W. Va. Code §23-4-16(e) precludes the reopening of this claim at this time. (See Exhibit C, Claims Administrator's 8/12/19 order, filed by the Employer.)

By order dated September 19, 2019, the Claims Administrator denied Mr. Delbert's application for a PTD award based upon the PTD Review Board's conclusion that he has vocational rehabilitation potential and is able to return to work. (See Exhibit Y, Claims Administrator's 9/19/19 order, filed by the Employer.) The ALJ reversed the Claims Administrator's Order February 4, 2021, granting Mr. Delbert a permanent total disability award, and the issue is currently pending before the Board of Review pursuant to the Employer's appeal.

The Administrative Law Judge affirmed the Claims Administrator's August 12, 2019 order on December 17, 2019 (Exhibit B), concluding that pursuant to W. Va. Code §23-4-16, until the final ruling is issued regarding Mr. Delbert's PTD application, he cannot prosecute requests for further permanent partial disability.

On June 25, 2020, the Board of Review affirmed the ALJ's Order (Exhibit A), adopting the ALJ's Findings of Fact and Conclusions of Law.

#### **IV. SUMMARY OF ARGUMENT**

The Board of Review's Order is not in clear violation of constitutional or statutory provision, and is not based upon its material misstatement or mischaracterization of particular components of the evidentiary record, because a preponderance of the evidence demonstrates that W. Va. Code § 23-4-16(e) precludes the re-opening of this claim.

#### **V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Respondent does not request oral argument and does not believe that oral argument would assist this Court in the adjudication of this matter. The issues on appeal may be fully addressed by reviewing the facts and legal arguments presented in the briefs and the record on appeal, including the Appendix. There are no principles of law to be established or modified that would require oral presentation to the Court.



## VI. ARGUMENT

### A. Standard of Review

1. If the decision of the Worker's Compensation Board of Review effectively represents an affirmation of a prior ruling of either the Commission or the Office of Judges that was entered on the same issue in the same claim, the decision of the Board may be reversed or modified by the Supreme Court of Appeals only if the decision is in clear violation of constitutional or statutory provision, is clearly the result of erroneous conclusion of law, or is based upon the Board's material misstatement or mischaracterization of particular components of the evidentiary record. W. Va. Code § 23-5-15(c).

2. The Worker's Compensation Board of Review shall reverse, vacate, or modify the order or decision of the Administrative Law Judge only if the substantial rights of the petitioner or petitioners have been prejudiced because the Administrative Law Judge's findings are:

- (1) In violation of statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the Administrative Law Judge; or
- (3) Made upon unlawful procedure; 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 or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

W. Va. Code §23-5-12(b).

3. The resolution of any issue shall be based on a weighing of all evidence pertaining to the issue, and a finding that a preponderance of the evidence supports the chosen manner of resolution. W. Va. Code §23-4-1(g).
4. A claimant bears the burden of establishing his or her claim. *Bilchak v. State Worker's Compensation Commissioner*, 153 W. Va. 288, 168 S.E.2d 723 (1969).
5. A claimant may have only one active request for a permanent disability award pending at any one time. W. Va. Code §23-4-16(e).
6. So long as an award of a claimant falls short of total permanent disability, he has a right under law to petition for a further adjustment of his claim, if he does so in compliance with the law. *Bragg v. State Workmen's Compensation Commission*, 152 W. Va. 706, 166 S.E.2d 162 (1969).

#### **B. Points of Argument**

The Board of Review's Order is not in clear violation of statutory provision, and is not based upon its material misstatement or mischaracterization of particular components of the evidentiary record. Therefore, the Order should be affirmed by this Honorable Court.

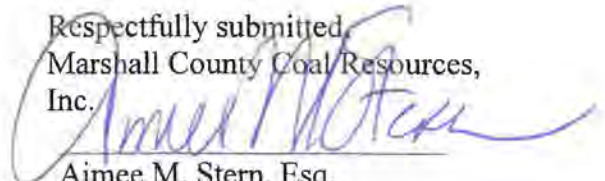
Pursuant to W. Va. Code §23-4-16(e), claimant may have only one active request for a permanent disability award pending at any one time. As set forth above, Mr. Delbert has filed an application for a permanent total disability award in this claim, and that application remains pending before the Board of Review pursuant to the Employer's appeal of the order granting Mr. Delbert a PTD award. As the Office of Judges correctly noted, until a final ruling is issued on Mr. Delbert's PTD application, W. Va. Code §23-4-16(e) prohibits the re-opening of this claim for additional PPD benefits. In addition, even if W. Va. Code §23-4-16(e) did not prohibit the reopening of this claim for additional PPD benefits, Mr. Delbert has failed to make a showing

that his condition has been aggravated or progressed since he was granted a 10% PPD award on July 31, 2014. The only medical evidence the Claimant submitted in support of his July 22, 2019 Reopening Application was the May 29, 2019 chest CT scan report, and the report does not indicate that any of the CT findings are the result of occupational pneumoconiosis. Finally, as set forth above, Mr. Delbert was granted a permanent total disability award in this claim by the ALJ on February 4, 2021, thus precluding the re-opening of this claim for additional permanent partial disability benefits.

## VII. CONCLUSION

For the reasons set forth above, the Petitioner respectfully requests that this Honorable Court affirm the Board of Review's June 25, 2020 Order.

Respectfully submitted,  
Marshall County Coal Resources,  
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**CERTIFICATE OF SERVICE**

I hereby certify that I have, this 22<sup>nd</sup> day of June, 2021, served a copy of the within and foregoing **Employer's Response to Claimant's Petition for Appeal**, upon all parties to this matter via U.S. Mail to the following:

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