

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

CHARLES G. DELBERT,  
Appellant

v.

MURRAY AMERICAN ENERGY, INC.,  
Appellee

Appeal No. 2055031  
JCN: 2014014137  
DLE 05/19/2009

**ORDER**

The following case is an appeal by the claimant from a final order of the Workers' Compensation Office of Judges dated December 17, 2019, which affirmed the claims administrator's order dated August 12, 2019, denying a reopening for additional permanent partial disability consideration.

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.

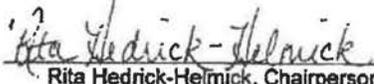
Upon our review of this case, we have determined to affirm the decision of the Office of Judges. The Board adopts the findings of fact and conclusions of law of the Administrative Law Judge's Decision dated December 17, 2019, which relate to the issue on appeal, and the same are incorporated herein by reference, made a part hereof, and are ratified, confirmed and approved with the following modification and addition:

1. In Finding of Fact No. 2, the evidence is located in the electronic claim file under the date of June 14, 2004.
2. On February 21, 2020, the Supreme Court of Appeals affirmed the Board's order dated December 21, 2018.

Accordingly, it is ORDERED that the final order of the Workers' Compensation Office of Judges dated December 17, 2019, 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: JUNE 25, 2020



Rita Hedrick-Helmick  
Rita Hedrick-Helmick, Chairperson

cc: CHARLES G. DELBERT  
M. JANE GLAUSER  
MURRAY AMERICAN ENERGY, INC.  
PHILIP J. "P.J." MURRAY, III  
SMARTCASUALTY CLAIMS SOLUTIONS

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

**DECISION OF ADMINISTRATIVE LAW JUDGE**

**PARTIES:**

Claimant, Charles G. Delbert, by counsel, M. Jane Glauser  
Self-Insured Employer, Murray American Energy Inc. by counsel, Philip Murray,  
III

**ISSUE:**

The claimant protested the Claim Administrator's Order of August 12, 2019, which denied reopening for permanent partial disability award.

**DECISION:**

It is ORDERED that the Claim Administrator's Order of August 12, 2019 be AFFIRMED.

**FINDINGS OF FACT:**

1. By Order dated August 12, 2019, the Claim Administrator, denied the claimant's request to reopen the claim for additional permanent partial disability consideration as the West Virginia Code specifies that a claimant may only have one permanent disability claim pending in a claim at any time. Claimant has a petition for permanent total disability pending before the Insurance Commissioner's Permanent Total Disability Review Board.

2. Submitted for review were copies of the following: Rule 20, pages 1, 3 and 77-80.

*Recd  
12/26/19*

3. The claimant signed a Report of Occupational Pneumoconiosis on June 2, 2013; his attorney signed the form on June 3, 2013. He indicated he was last exposed to hazardous dust on May 20, 2009. He was diagnosed with asthma in 2011. He was exposed to the hazards of occupational pneumoconiosis for 35 years in the state of West Virginia. He worked for Consol from 1975 to 2009 where he was exposed to coal dust and rock dust.

4. By Order dated February 6, 2014, the claim was ruled compensable on a presumptive non-medical basis.

5. In Findings dated June 3, 2014, the Occupational Pneumoconiosis Board found sufficient evidence to justify a diagnosis of occupational pneumoconiosis with 10% pulmonary function impairment attributable to this disease. Significant findings were due to blood gas studies, diffusion studies and pulmonary function studies made for the Board on June 3, 2014.

6. By Order dated July 31, 2014, the claimant was granted a 10% award for occupational pneumoconiosis. The claimant protested this Order on September 15, 2014 but withdrew the same on September 30, 2014. By Order dated October 2, 2014, the Office of Judges dismissed the claimant's protest.

7. On August 13, 2014, the claimant filed an Application for Permanent Total Disability Benefits. 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. By Order dated November 13, 2015, the claimant was denied a permanent total disability award because he had not met the threshold. This denial was affirmed by Administrative Law Judge Decision dated April 15, 2016. The claimant appealed this Decision on May 10, 2016. By Order dated November 10, 2016, the Board of Review reversed and vacated the April 15, 2016, Decision. The Board of Review further remanded the claim to the Claim Administrator with instructions to refer the claimant to the PTDRB for additional consideration.

9. On October 13, 2016, the claimant petitioned to reopen his claim for additional permanent impairment consideration.

10. By Order dated November 9, 2016, the Claim Administrator denied reopening of the claim for additional permanent partial disability consideration. The Claim Administrator stated that W. Va. Code §23-4-6(e) allows a claimant only to have one active request for permanent partial disability aware pending in a claim at any given time and that his claim is currently in litigation before the Board of Review regarding denial of a permanent total disability award.

11. In a letter dated February 14, 2017, the Offices of the Insurance Commissioner advised the claimant that the Permanent Total Disability Reviewing Board met and determined that additional medical information was needed to make a decision. The claim was being referred to the claim administrator for development.

12. The Administrative Law Judge, by Decision dated June 14, 2017, affirmed the Claim Administrator's Orders dated November 9, 2016, finding:

The claimant can only have one permanent disability award in litigation at a time and his PTD application is presently before the Claim Administrator on remand from the Board of Review. Oxygen therapy can only be authorized for permanent pulmonary impairment in excess of 15% and in compliance with the guidelines of the American Thoracic Society. The claimant has only received a 10% permanent partial disability award for his pulmonary impairment and there is no evidence to refute the Claim Administrator's position that the request does not comport with the guidelines of the American Thoracic Society. Accordingly, it is hereby ORDERED that the Claim Administrator's Orders dated November 9, 2016, be AFFIRMED.

13. The West Virginia Workers' Compensation Board of Review, by Order dated November 6, 2017, affirmed the June 14, 2017 Administrative Law Judge Decision.

14. The Claim Administrator, by Order dated February 14, 2018, denied the claimant's request for a permanent total disability award as he had not met the threshold. This was reversed by the Administrative Law Judge Decision dated July 6, 2018. By Order dated December 21, 2018, the Workers' Compensation Board of Review affirmed the Administrative Law Judge Decision and a statutory Notice of Appeal to the West Virginia Supreme Court of Appeals was filed on January 18, 2019.

15. By Order dated March 27, 2018, the Claim Administrator approved Amy Rapp, FNP, request on March 16, 2018 for spirometry, lung volumes, diffusion capacity testing, arterial blood gas studies.

16. The Claim Administrator, on August 1, 2018, acknowledged receipt of the July 6, 2018 Administrative Law Judge Decision finding the claimant met the threshold and reopened the claim for permanent total disability consideration.

17. The Wheeling Hospital Ordered a CAT Scan of claimant's chest on May 22, 2019, noting the claimant's diagnosis of occupational pneumoconiosis. The Claim Administrator, by Order dated May 28, 2019, authorized the May 22, 2019 request from Wheeling Hospital for a chest CT scan.

18. The Wheeling Hospital CT Scan Report dated May 29, 2019 had the impression of lower lobe bronchiectasis and mild reticular opacities at the bases, atelectasis versus scarring; coronary artery calcifications.

19. On July 22, 2019, the claimant requested a reopening of his claim herein asserting a progression in his occupational pneumoconiosis. The May 29, 2019 Wheeling Hospital CT scan report was attached.

20. The Claim Administrator, by Order dated September 19, 2019, based on the September 9, 2019, Permanent Total Disability Review Board's final recommendations, denied the claimant a permanent total disability award. By letter dated November 4, 2019, the claimant, through counsel, protested the September 19, 2019 Order.

21. By closing argument dated November 5, 2019, the claimant, by counsel, argues that the denial of the petition to reopen in order for medical treatment and other benefits to be considered is contrary to the intent and the purpose of the statutory scheme of prompt benefits. The employer denies both the reopening for PPD and also continues to challenge the 50% filing threshold. Failure to reopen denies both medical treatment and claimant's ability to develop evidence of the filing threshold.

22. By closing argument dated November 22, 2019, the employer, by counsel, argues that the claimant can only have one application for permanent impairment pending at a time and the PTD application remains pending before the West Virginian Supreme Court of Appeals. Even if consideration of the reopening for further PPD were permitted, the claimant failed to establish that his condition has been aggravated or progressed since he was granted a 10% PPD award on July 31, 2014. The only evidence supporting the Reopening Application was the May 29, 2019 chest CT scan report which does not indicate the findings are the result of occupational pneumoconiosis. The employer requests that the Order denying the reopening should be affirmed.

### **DISCUSSION:**

For purposes of obtaining a reopening of a workers' compensation claim under the provisions of W.Va. Code §§23-5-2 and 23-5-3 the claimant must make application in writing showing a progression or aggravation of the compensable condition or some other fact or facts which were not previously considered which would entitle the claimant to greater benefits than he or she has already received.

As defined in *Harper v. State Workmen's Compensation Commissioner*, 160 W.Va. 364, 234 S.E.2d 779 (1977), "cause" for further adjustment of an award has been interpreted as a showing of a prima facie cause which means nothing more than any evidence which would tend to justify, but not compel, the inference that there has been a progression or aggravation of the former injury.

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 August 12, 2019, the Claim Administrator denied claimant's request to reopen the claim for additional permanent partial disability consideration as the West Virginia Code specifies that a claimant may only have one permanent disability claim pending in a claim at any time. Claimant has a petition for permanent total disability pending before the West Virginia Supreme Court of Appeals.

West Virginia Code §23-4-16(e) provides: "A claimant may only have 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."

This issue has been addressed before in this claim. By Decision dated June 14, 2017, this tribunal denied the claimant's request to reopen the claim for additional permanent partial disability consideration based on his pending application for PTD. This Decision was affirmed by the Board of Review.

There are currently two matters regarding permanent disability pending before the Office of Judges, the instant protest to the Claim Administrator's Order dated August 12, 2019 and the protest filed by claimant on November 4, 2019 regarding the Claim Administrator's denial of PTD by Order dated September 19, 2019. Additionally, on January 18, 2019, the employer filed a statutory Notice of Appeal of the Board of Review Order dated December 21, 2018 affirming the finding that the claimant had met the threshold for PTD consideration.

The West Virginia Supreme Court of Appeals, in *Pintarich v W.Va. Office of the Ins. Comm'r.*, No. 15-0081, (W.Va. Supreme Court, November 19, 2015) (Memorandum Decision), determined that the language of West Virginia Code §23-4-16(e) is clear, and, under the facts of that case, prevents two applications for permanent total

disability benefits from being considered at the same time. The matter herein cannot proceed with multiple requests for permanent impairment pending.

While consolidation of dual protests is cited in the statute, the protest regarding the PTD denial cannot logistically be consolidated with the request for additional occupational pneumoconiosis permanent partial disability. Doing so will create an absurd result which could cause an endless cycle of remanding a finding of additional PPD to the Claim Administrator to review in the context of the PTD. Until the final ruling is issued regarding his PTD the claimant cannot prosecute requests for further permanent partial disability. The Order dated August 12, 2019 denying a reopening for further permanent partial disability consideration should be affirmed.

**CONCLUSION OF LAW:**

The claimant can only have one permanent disability award in litigation at a time; his PTD denial is presently before the Office of Judges and the appeal of the threshold issue is before the West Virginia Supreme Court of Appeals. The denial of reopening for further permanent partial disability was appropriate.

It is therefore ORDERED that the Claim Administrator's Order of August 12, 2019 be AFFIRMED.

**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: December 17, 2019

  
Martha Hill  
Administrative Law Judge

MJH:lkc

cc: CHARLES DELBERT  
M. JANE GLAUSER - COUNSEL FOR CLAIMANT  
MURRAY AMERICAN ENERGY INC  
PHILIP J. "P.J." MURRAY, III - COUNSEL FOR EMPLOYER  
SMARTCASUALTYCLAIMS

JCN: 2014014137  
Date: December 17, 2019

Record Considered

Issue:

The Claimant's protest to the Claims Administrator's order of August 12, 2019, regarding REOPENING FOR PERMANENT PARTIAL AWARD.

EVIDENCE SUBMITTED:

Claimant Evidence

Document Type: Not Specified  
Document Date: 6/14/2004  
Submit Date: 9/5/2019  
Author: Rule 20, pages 1. 3 and 77-80

Document Type: Not Specified  
Document Date: 6/14/2004  
Submit Date: 10/31/2019  
Author: Rule 20, pages 1. and 77-78

Document Type: Not Specified  
Document Date: 7/31/2014  
Submit Date: 10/31/2019  
Author: Claim Admin. Order

Document Type: Not Specified  
Document Date: 3/27/2018  
Submit Date: 10/31/2019  
Author: Claim Admin. Order

Document Type: Not Specified  
Document Date: 7/6/2018  
Submit Date: 10/31/2019  
Author: ALJ Decision

Document Type: Not Specified  
Document Date: 12/21/2018  
Submit Date: 10/31/2019  
Author: Board of Review Order

Document Type: Not Specified  
Document Date: 1/18/2019  
Submit Date: 10/31/2019  
Author: Supreme Court of Appeals/Notice

Document Type: Not Specified

Document Date: 5/22/2019  
Submit Date: 10/31/2019  
Author: Wheeling Hospital/Order for CAT Scan of Chest

Document Type: Not Specified  
Document Date: 5/28/2019  
Submit Date: 10/31/2019  
Author: Claim Admin. Order

Document Type: Not Specified  
Document Date: 5/29/2019  
Submit Date: 10/31/2019  
Author: Wheeling Hospital/CT Scan Report Chest

Document Type: Not Specified  
Document Date: 7/22/2019  
Submit Date: 10/31/2019  
Author: Claimant's Petition to Reopen filed by M. J. Glauser

Document Type: Not Specified  
Document Date: 8/12/2019  
Submit Date: 9/5/2019  
Author: Claim Admin. Order w/Attachments

Document Type: Not Specified  
Document Date: 8/12/2019  
Submit Date: 10/31/2019  
Author: Claim Admin. Order

Document Type: Not Specified  
Document Date: 9/19/2019  
Submit Date: 10/31/2019  
Author: Claim Admin. Order

Employer Evidence

Document Type: Not Specified  
Document Date: 6/2/2013  
Submit Date: 11/5/2019  
Author: Employees Report of Occupational Pneuconiosis

Document Type: Not Specified  
Document Date: 2/6/2014  
Submit Date: 11/5/2019

Author: Claim Admin. Order

Document Type: Not Specified  
Document Date: 6/3/2014  
Submit Date: 11/5/2019  
Author: OP Board Findings

Document Type: Not Specified  
Document Date: 7/31/2014  
Submit Date: 11/5/2019  
Author: OP Board Findings

Document Type: Not Specified  
Document Date: 8/13/2014  
Submit Date: 11/5/2019  
Author: Application For PTD Benefits

Document Type: Not Specified  
Document Date: 9/15/2014  
Submit Date: 11/5/2019  
Author: Claimant's Protest/CAO 07-31-14

Document Type: Not Specified  
Document Date: 9/30/2014  
Submit Date: 11/5/2019  
Author: Claimant's Motion to Withdraw Protest

Document Type: Not Specified  
Document Date: 10/2/2014  
Submit Date: 11/5/2019  
Author: Order Dismissing Protest

Document Type: Not Specified  
Document Date: 11/13/2015  
Submit Date: 11/5/2019  
Author: Claim Admin. Order

Document Type: Not Specified  
Document Date: 4/15/2016  
Submit Date: 11/5/2019  
Author: ALJ Decision

Document Type: Not Specified  
Document Date: 10/13/2016  
Submit Date: 11/5/2019  
Author: Claimant's Petition to Reopen filed by M. J. Glauser

Document Type: Not Specified  
Document Date: 11/9/2016  
Submit Date: 11/5/2019  
Author: Claim Admin. Order

Document Type: Not Specified  
Document Date: 11/10/2016  
Submit Date: 11/5/2019  
Author: Board of Review Order

Document Type: Not Specified  
Document Date: 2/14/2017  
Submit Date: 11/5/2019  
Author: OIC Letter/Deborah Bryant/WC District Claims  
Manager

Document Type: Not Specified  
Document Date: 6/14/2017  
Submit Date: 11/5/2019  
Author: ALJ Decision/Affirming CAO 11-9-16 Order

Document Type: Not Specified  
Document Date: 11/6/2017  
Submit Date: 11/5/2019  
Author: Board of Review Order

Document Type: Not Specified  
Document Date: 2/14/2018  
Submit Date: 11/5/2019  
Author: Claim Admin. Order

Document Type: Not Specified  
Document Date: 8/1/2018  
Submit Date: 11/5/2019  
Author: Acknowledge Receipt of ALJ Order/PTD  
Granted

Document Type: Not Specified  
Document Date: 12/21/2018  
Submit Date: 11/5/2019  
Author: Board of Review Order

Document Type: Not Specified  
Document Date: 1/18/2019  
Submit Date: 11/5/2019  
Author: Supreme Court of Appeals/Notice

Document Type: Not Specified  
Document Date: 7/22/2019  
Submit Date: 11/5/2019  
Author: Claimant's Petition to Reopen filed by M.  
J. Glauser

Document Type: Not Specified  
Document Date: 8/12/2019  
Submit Date: 11/5/2019

Author: Claim Admin. Order

Document Type: Not Specified

Document Date: 9/19/2019

Submit Date: 11/5/2019

Author: Claim Admin. Order

Document Type: Not Specified

Document Date: 11/4/2019

Submit Date: 11/4/2019

Author: Protest Denying PTD Award

**CLOSING ARGUMENTS:**

Party Submitted: Claimant

Letter Date: 11/5/2019

Party Submitted: Employer

Letter Date: 11/22/2019