

DO NOT REMOVE
FILE COPY FILE COPY



SUPREME COURT OF APPEALS
STATE OF WEST VIRGINIA



IN THE MATTER OF:

SUPREME COURT: 21-0944

CHARLES G. DELBERT

BOR: 2056410

Claimant-Respondent,

JCN: 2014014137-OP

and

DLE: May 19, 2009

MARSHALL COUNTY COAL
RESOURCES, INC.

ALJ: February 4, 2021

BOR: October 22, 2021

Self-Insured Employer-Petitioner

REPLY BRIEF OF THE CLAIMANT,

CHARLES G. DELBERT,

IN OPPOSITION TO EMPLOYER'S APPEAL

COUNSEL FOR CLAIMANT:
M. Jane Glauser, Esq. (WVSB#1397)
Schrader, Companion, Duff & Law, PLLC
401 Main Street, Wheeling, WV 26003
mjg@schraderlaw.com
Telephone: (304) 233-3390
FAX: (304) 233-2769

December 14, 2021

INDEX

No.	Description	Page Numbers
II	TABLE OF AUTHORITIES	iii
III.	ASSIGNMENTS OF ERRORS	1
IV.	STATEMENT OF THE CLAIM	2
	A. PROCEDURAL HISTORY	2
	B. STATEMENT OF THE IMPAIRMENT IN THE OP CLAIM	7
	C. STATEMENT OF THE FACTS IN THE PRIOR CLAIMS	7
	D. DETERMINATIONS OF PTD BY OTHER AGENCIES	8
	E. MEDICAL EVIDENCE FOLLOWING PRIOR PTD REMAND BY THE BOARD OF REVIEW ON NOVEMBER 16, 2016	8
	F. VOCATIONAL EVIDENCE	11
	1. Rehabilitation report by Michelle Moore, ORCI	11
	2. Report by Catherine Phillis Harvey, GENEX	12
V.	SUMMARY OF ARGUMENT	13
VI	STATEMENT REGARDING ORAL ARGUMENT AND DECISION	14
VII	ARGUMENT	14
	A. STANDARD OF REVIEW	14
	B. POINTS OF ARGUMENT	15
	C. OBJECTIVE EVIDENCE	16
	1. FUNCTIONAL CAPACITY REPORTS	16
	2. DR. BRUCE GUBERMAN	20
	D. VOCATIONAL EVIDENCE	22
	1. VOCATIONAL REPORT OF MS. MOORE	22
	2. VOCATIONAL REPORT OF MS. SANIGA	26
	3. VOCATIONAL REPORT OF MS. HARVEY	31
VIII.	CONCLUSION	34
IX.	CERTIFICATE OF SERVICE	35

II. TABLE OF AUTHORITIES

A. *West Virginia Code*

SECTION	PAGE NUMBER
<i>W. Va. Code</i> 23-4-6	1, 15
<i>W. Va. Code</i> 23-5-15	1, 14, 15

B. REGULATIONS

Rule 1, Section 85-1-5.2	29-30
Rule 20, Section 85-20-49	25-26
Rule 20, Section 85-20-50.3	26
Rule 20, Appendix 85-20-F	33

C. CASES

CASE	PAGE NUMBER
<i>Fenton Art Glass Co. v. WVIOC</i> , 222 W.Va. 420, 664 S.E.2d 761 (2008)	14
<i>Hicks v. Oilfield Trucking</i> , No. 15-1082 (October 26, 2016)	29
<i>Kamensky v. Comm'r</i> , 148 W. Va. 258, 134 S.E.2d 582 (1964)	16
<i>Perry v. Comm'r</i> , 152 W.Va. 602, 165 S.E.2d 609 (1969)	
<i>Murray American Energy, Inc. v. Charles G. Delbert</i> , No. 19-0040 (February 21, 2020)	5, 21
<i>Perry v. Comm'r</i> , 152 W.Va. 602, 165 S.E.2d 609 (1969)	16
<i>Posey v. Comm'r</i> , 157 W. Va. 285, 201 S.E.2d 102 (1973)	16
<i>Repass v. Workers' Compensation Division, et al</i> , 212 W. Va. 86, 569 S.E.2d 162, 180 (2002),	16
<i>Sisk v. Comm'r</i> , 153 WV 461, 170 S.E.2d 20 (1969)	16
<i>Stewart v. Comm'r</i> , 155 WV 633, 186 S.E.2d 700 (1972)	16

III. ASSIGNMENTS OF ERRORS:

On appeal by the Employer to the Board of Review, on October 22, 2021, ER A, the Board of Review affirmed the award of PTD granted by the Decision issued on February 4, 2021, ER B, by the Office of Judges REVERSING the order dated September 19, 2019, ER C, denying the PTD application, ER D. The Employer filed this appeal to the Supreme Court and identified the appellate issue at page 13 of the Petition: “The Board of Review erred in finding Ms. Phillis-Harvey’s report to be the most reliable evidence of Mr. Delbert’s vocational potential, and in granting him a PTD award based upon Ms. Phillis-Harvey’s recommendations.” The report dated December 27, 2019, ER R, by Ms. Harvey was filed after the protest to the order of September 19, 2019, ER C, during litigation before the Office of Judges, and was not considered by the PTDRB.

The Employer is requesting a re-weighing of the fact finding by the lower tribunals, contrary to the standards in *W. Va. Code 23-5-15*:

(c) In reviewing a decision of the Board of Review, the Supreme Court of Appeals shall consider the record provided by the board and give deference to the board’s findings, reasoning, and conclusions, in accordance with subsections (d) and (e) of this section.

(d)The court may not conduct a de novo reweighing of the evidentiary record....

The issue before the Supreme Court, as previously before the Office of Judges and the Board of Review, is whether the claimant can be substantially and gainfully employed under *W.Va. Code, 23-4-6*:

(n).

(2) For all awards made on or after the effective date of the amendment and reenactment of this section during the year 2003, ***disability which renders the injured employee 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 he or she has previously engaged with some regularity and over a substantial period of time shall be considered in determining the issue of total disability.*** The comparability of preinjury income to post-disability income will not be a factor in determining permanent total disability. Geographic availability of gainful employment within a driving distance of seventy-five miles from the residence of the employee or within the distance from the residence of the employee to his or her preinjury employment, whichever is greater, will be a factor in determining permanent total disability.....[Emphasis added.]

The claimant respectfully submits that the decisions of both the Office of Judges and the Board of Review are not in clear violation of any constitutional or statutory provision, nor clearly the result of an erroneous conclusion of law, nor based upon a material misstatement or mischaracterization of the evidentiary record.

IV. STATEMENT OF THE CLAIM:

A. PROCEDURAL HISTORY:

The claimant filed an OP application dated June 3, 2013, with a date of last exposure listed as May 20, 2009, with a history of dust exposure based upon 35 years of underground coal mine employment. Dr. Lenkey indicated there was insufficient evidence for the diagnosis of OP. Claimant 1, ALJ 6/14/2017, Finding 5, page 2.

The claim administrator ruled the claim compensable on a presumptive non-medical basis by order dated February 6, 2014. Claimant 2, ALJ 12/17/2019, Finding 4, page 2. On July 31, 2014, the claimant was granted a 10% PPD for his OP based upon the examination on June 3, 2014, by the OP Board. Claimant 2, ALJ 12/17/2019, Finding 6, page 2.

The claimant filed a PTD application dated August 13, 2014, ER D, which listed 6 claims, with a total of 59% in PPD awards. Claimant 3, ALJ 4/15/2016, Finding 26, page 7 and Claimant 2, ALJ 12/17/2019, Finding 7, page 2.

By order entered on November 13, 2015, the claim administrator denied the PTD based upon the Final Recommendations of the PTD Examining Board issued on November 9, 2015, finding that the claimant had not met the 50% filing threshold. The claimant protested. Claimant 3, ALJ 4/15/2016, Finding 1, page 1, and Claimant 2, ALJ 12/17/2019, Finding 8, page 2. On April 15, 2016, Claimant 3, the Office of Judges affirmed the order of November 13, 2015, denying PTD for failure to meet the 50% filing threshold; the claimant appealed. Claimant 2, ALJ 12/17/2019, Finding 8, page 2.

The claimant filed a petition to reopen the claim for additional PPD on October 13, 2016, based upon testing at EORH on August 15, 2016. Claimant 1, ALJ 6/14/2017, Finding 14, page 4, and Claimant 2, ALJ 12/17/2019, Finding 9, at page 2. The claimant protested.

The claimant protested the Order dated November 9, 2016 which denied oxygen services and stated that a claimant must have at least 15% awarded impairment to qualify for medical equipment and the claimant has been granted only 10% PPD. Claimant 2, ALJ 12/17/2019, Finding 10, page 2.

The Order dated November 9, 2016, by HealthSmart denied the request to reopen the claim for permanent partial disability on the basis that:

....The Claim Administrator stated that W. Va. Code §23-4-6(e) [sic, should be 23-4-16(e)] allows a Claimant only to have one active request for permanent partial disability award 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. Claimant 1, ALJ 6/14/2017, Finding 2, page 2.

On November 10, 2016, in Appeal No. 2051291, the Board of Review REVERSED the decision dated April 15, 2016 affirming the order of November 13, 2015, denying a PTD award for failure to meet the 50% threshold *and REMANDED the claim to the claim administrator with instructions to refer the claimant to the PTDRB for additional consideration*. Claimant 2, ALJ 12/17/2019, Finding 8, page 2, and Claimant 10.

On February 14, 2017, the Office of the Insurance Commissioner advised the claimant by letter that the PTDRB determined that additional medical information was needed to make a decision and the claim was being referred to the claim administrator for development. Claimant 1, ALJ 6/14/2017, Finding 16, page 4, and Claimant 2, ALJ 12/17/2019, Finding 11, page 3.

By Decision entered on June 14, 2017, Claimant 1, the Office of Judges affirmed the order dated November 9, 2016, denying a reopening of the claim and a second order dated November 9, 2016, denying treatment. Claimant 2, ALJ 12/17/2019, Finding 12, page 3. The claimant filed a timely appeal.

On November 6, 2017, the Board of Review affirmed the decision of June 14, 2017. Claimant 2, ALJ 12/17/2019, Finding 13, page 3.

On August 14, 2017, the PTDRB issued the Modified Initial Recommendations finding that the claimant had a combined valued impairment of only 49% whole person impairment. Claimant 4, ALJ 7/6/2018, Finding 49, page 17. On February 12, 2018, the PTDRB issued Modified Final Recommendations, Claimant 4, ALJ 7/6/2018, Finding 51, pages 17-18, in which the PTDRB stated as follows at page 4:

Spine	40%
- Cervical (25%)	
- Lumbar (13%)	
- Thoracic (8%)	
Occupational Pneumoconiosis	10%
Psychiatric	4%
Right Ring Finger	1%
Forearm	0%
COMBINED VALUE	49% Whole Person Impairment

Accordingly, pursuant to W. Va. Code § 23-4-6(n)(1) and 23-4-6(j)(5), the Board finds that the claimant does not suffer from a medical impairment of at least fifty percent (50%) on a whole body basis and has not sustained a thirty-five percent (35%) or greater statutory disability.

Accordingly, the Board finds that the claimant has failed to meet the required level of whole body medical impairment for further consideration of an award of permanent total disability. Therefore, the claimant's application for permanent total disability should be DENIED.

The order dated February 14, 2018, denying the PTD threshold and protested by the claimant, determined:

On February 13, 2018, HealthSmart Casualty Claims Solutions received a final recommendation from the Permanent Total Disability Examining Board dated February 12, 2018 (copy enclosed). The Permanent Total Disability Examining Board recommended that you be denied a permanent total disability award for the following reason:

You have not met the threshold for pursuing permanent total disability benefits.
[Emphasis added.]

An Order dated March 27, 2018 by HealthSmart authorized testing and treatment, identified as spirometry, lung volumes, diffusion capacity testing, and arterial blood gas studies. Claimant 4, ALJ 7/6/2018, Finding 52, page 18 and Claimant 2, ALJ 12/17/2019, Finding 15, page 3.

By Decision entered on July 6, 2018, Claimant 4, the Office of Judges REVERSED the order dated February 14, 2018 finding that the claimant did not meet the 50% filing threshold to be considered for permanent total disability and found that the claimant ***did meet the 50% impairment for the filing threshold***. On December 21, 2018, the Board of Review affirmed that decision of July 6, 2018, following the Employer's appeal in BOR No. 2053111.

On the Employer's appeal, in Supreme Court No. 19-0040, the lower tribunal decisions finding that the claimant met the 50% for the filing threshold were affirmed by Decision filed on February 21, 2020, Claimant 5. In the Decision filed February 21, 2020, Claimant 5, in *Murray American Energy, Inc. v. Charles G. Delbert*, No. 19-0040, at pages 4-5 the Supreme Court reasoned:

After review, we agree with the reasoning and conclusions of the Office of Judges as affirmed by the Board of Review. Pursuant to West Virginia Code § 23-4-6(n)(1), in order to receive a permanent total disability award, a claimant must first show that he or she has received at least 50% in permanent partial disability awards. Next, the claimant must be evaluated by the reviewing Board and be found to have at least 50% whole body impairment. ***In this case, Mr. Delbert has shown that he has at least 50% in prior permanent partial disability awards. The issue is whether he has 50% whole person impairment. The Office of Judges, and by extension Board of Review, committed no reversible error in finding that he passed the second threshold for a permanent total disability award.*** Dr. Guberman's report was found to be reliable for everything but the 3% arm impairment and 4% shoulder impairment. The Office of Judges properly discarded the 4% shoulder impairment as the evidence failed to support the assessment. ***However, the 3% impairment for loss of grip strength was supported by Dr. Wiley's assessment.*** Mr. Delbert should be further considered for a permanent total disability award. [Emphasis added.]

Following the decision by the Office of Judges, on July 6, 2018, Claimant 4, the claimant was referred again to the PTDRB. ER B, ALJ 2/4/2021, Findings 18-19, page 5. The Initial Recommendations dated March 11, 2019, ER O, at page 7, were:

After reviewing all of the evidence in the file, the Board agrees with the vocational conclusions of Ms. Erin Saniga. The Board finds that, pursuant to W. Va. Code § 23-4-6(n) (2), the claimant has vocational rehabilitation potential, is able to return to work, and is not permanently and totally disabled. Accordingly, the claimant's application for permanent total disability benefits should be DENIED.

By Order dated May 28, 2019, SmartCasualty Claims granted authorization for the CT scan of the lungs without contrast. Claimant 2, ALJ 12/17/2019, Finding 17, page 3. On July 22, 2019, the claimant filed a petition for reopening, based upon the progression of his lung disease, as supported in part by the CT scan on May 29, 2019. Claimant 2, ALJ 12/17/2019, Finding 19, page 4.

The Order dated August 12, 2019, by SmartCasualty Claims denied reopening because the Claimant had filed for PTD. Claimant 2, ALJ 12/17/2019, Finding 1, page 1. [The Office of Judges affirmed the denial on December 17, 2019, and the Board of Review affirmed the decision in BOR No.2055031 on June 25, 2020. That issue is now pending before the Supreme Court on the petition for appeal filed by the Claimant in Supreme Court Docket No. 2055031 on July 22, 2020.]

Thereafter, on September 9, 2019, ER Q, the PTDRB issued its Final Recommendations. At page 8, the PTDRB concluded:

After reviewing the additional evidence, the Board notes that Mr. Delbert is a high school graduate. He completed approximately one year of college and received a Paralegal Certificate. Mr. Delbert received a Foreman Certification. Mr. Delbert never worked as a Paralegal or Mine Foreman. Mr. Delbert has a WAIS-IV Full Scale IQ of 123 (Superior). Indices compromising his Full-Scale IQ ranged from High Average to Superior with the exception of Processing Speed which was Average. The Board feels that Mr. Delbert can perform at a high level, and disagrees with the conclusions of Ms. Moore. Mr. Delbert's executive dysfunction in psychological test results would not prevent him from acquiring skills to perform sedentary semi-skilled work. Mr. Delbert's executive dysfunction would not prevent him from participating in job placement services for a sedentary position. Finally, Mr. Delbert's introversion is not as a result of a work-related injury.

The Order dated September 19, 2019, ER C, denied PTD on the basis that the claimant could be substantially and gainfully employed. The order stated:

On behalf of the employer, we acknowledge receipt of the West Virginia Offices of the Insurance Commission Permanent Total Disability Review Board's final recommendations dated September 9, 2019 (copy enclosed). The Permanent Total Disability Review Board has recommended you be denied a permanent total disability (PTD) award. The PTD Review Board has opined that you have vocational rehabilitation potential and are able to return to employment. Based upon these findings, you are hereby denied a permanent total disability award.

The claimant protested. Claimant 2, ALJ 12/17/2019, Finding 20, page 4.

On February 4, 2021, ER B, the Office of Judges REVERSED the order of September 19, 2019, ER C, and GRANTED the PTD award to the claimant, with an onset date of August 19, 2014, the date of the application for PTD. The employer appealed. On October 22, 2021, ER A, the Board of Review affirmed the decision granting PTD. The Employer filed this petition for review with the Supreme Court.

B. STATEMENT OF THE IMPAIRMENT IN THE OP CLAIM:

The claimant was examined by the OP Board on June 3, 2014. Claimant 2, ALJ 12/17/2019, Finding 5, page 2. The OP Board determined as follows:

.... Chest x-rays showed insufficient pleural or parenchymal changes to establish a diagnosis of occupational pneumoconiosis. *Significant findings* were due to blood gas studies, diffusion studies and pulmonary function studies made on June 3, 2014. FEV1/FVC ratio was 71, pre-bronchodilator and 73 post-bronchodilator. DLCO was 70% of predicted and DLA/A was 71%; pCO2 was 41 and pO2 was 67. The Board found sufficient evidence to justify a diagnosis of occupational pneumoconiosis with 10% pulmonary function impairment attributable to the disease. [Emphasis added.] Claimant 1, ALJ 6/14/2017, Finding 7, pages 2-3.

On July 31, 2014, the claimant was granted a 10% PPD award based upon the findings from the examination by the OP Board on June 3, 2014. Claimant 2, ALJ 12/17/2019, Finding 6, page 2.

C. STATEMENT OF 50% PTD THRESHOLD:

In the Memorandum Decision of February 20, 2020, Claimant 5, the Supreme Court held at pages 4-5:

After review, we agree with the reasoning and conclusions of the Office of Judges as affirmed by the Board of Review. Pursuant to West Virginia Code § 23-4-6(n)(1), in order to receive a permanent total disability award, a claimant must first show that he or she has received at least 50% in permanent

partial disability awards. Next, the claimant must be evaluated by the reviewing Board and be found to have at least 50% whole body impairment. In this case, Mr. Delbert has shown that he has at least 50% in prior permanent partial disability awards. The issue is whether he has 50% whole person impairment. The Office of Judges, and by extension Board of Review, committed no reversible error in finding that he passed the second threshold for a permanent total disability award. *Dr. Guberman's report was found to be reliable for everything but the 3% arm impairment and 4% shoulder impairment.* The Office of Judges properly discarded the 4% shoulder impairment as the evidence failed to support the assessment. *However, the 3% impairment for loss of grip strength was supported by Dr. Wiley's assessment.* Mr. Delbert should be further considered for a permanent total disability award. [Emphasis added.]

The discussion of the prior claims of the Claimant appear in the pleadings filed with the Supreme Court by the Claimant in a prior appeal, Claimant 5. Additionally, these claims are discussed also in the Claimant's 6, Closing Argument, pages 8 to 10; ER B, ALJ 2/4/21, Finding 30, page 9; Claimant's 7, Rebuttal Closing Argument, pages 4 to 6; and ER B, ALJ 2/4/21, Finding 32, page 10.

D. DETERMINATIONS OF PTD BY OTHER AGENCIES:

The claimant introduced several findings by other agencies and providers that determined his total disability, such as:

1. Notice of Decision, March 31, 2009 – Fully Favorable from the Social Security Administration, with closed period of disability from February 23, 2007 until April 22, 2008. ER B, ALJ 2/4/2021, Finding 2, page 1 and Claimant 8.
2. Award notice dated December 19, 2009, from the Social Security Administration with onset of June 2009. ER B, ALJ 2/4/2021, Finding 3, pages 1-2, and Claimant 9.
3. Schedule H, West Virginia Income Tax Year 2009, signed by Dr. Thomas Wack certifying total disability as of March 3, 2010. ER B, ALJ 2/4/2021, Finding 4, page 2.

E. MEDICAL EVIDENCE FOLLOWING PRIOR PTD REMAND BY THE BOARD OF REVIEW ON NOVEMBER 16, 2016 (Claimant 10):

The claimant participated in an IME by Dr. Guberman, who filed a report dated January 19, 2017, Claimant 11, setting forth a 51% combined impairment at page 12. Claimant 4, ALJ 7/6/2018, Finding 47, pages 16-17 and ER B, ALJ 2/4/2021, Finding 14, page 4.

A Neuropsychological Evaluation Report dated April 26, 2017, ER K, by Dr. Kirk Bryant at

page 2, discussed in Finding 48, page 17 of the decision dated July 6, 2018, Claimant 4, and in the Decision set forth in ER B, ALJ 2/4/2021, Finding 16, pages 4-5 included:

.... The patient's responses on the MMPI-2-RF are consistent with his reported difficulties in everyday life. ***He has somatic complaints and irritability likely reflective of depression.*** His verbal and visual memory were in the average range, though he is somewhat ***susceptible to interference.*** He ***exhibited executive functioning weaknesses*** in the form of difficulty problem solving. It is possible that his executive function weakness interferes with his encoding of new information and makes him susceptible to interference and perceived lapses of memory in everyday life. ***Pain, mood disturbance and anxiety are likely contributing to his cognitive weaknesses.*** This clearly is a bright individual that ***may have difficulty directing his cognitive resources due to some executive dysfunction***..... [Emphasis added.]

The Psychiatric Evaluation IME Report dated April 26, 2017, ER J, by Dr. Christi Cooper-Lehki at page 6 finds a 4% psychiatric permanent impairment. Claimant 4, ALJ 7/6/2018, Finding 48, page 17 and ER B, ALJ 2/4/2021, Finding 15, page 4.

The Supplemental IME report dated August 28, 2017, Claimant 12, by Dr. Guberman at page 1 finds, "...at the time of my initial report of January 19, 2017, I recommended a 3% impairment of the whole person based on the palpable subcutaneous callus at the old fracture site causing him persistent pain," and he noted that Dr. Wiley had also recommended a 3% impairment on July 8, 1998 based upon decreased grip strength. Dr. Guberman noted that he had also found decreased weakness of the right hand and arm at grade 4/5; a 1 cm atrophy of the right forearm and of the upper forearm when compared to the left upper extremity; found the decreased grip strength of the right arm when compared to the left arm, based upon three (3) measurements of each upper extremity, based upon the formula at page 65 of the 4th Edition of the *AMA Guides*. Dr. Guberman also specifically referenced his calculations based upon Table 3, page 20 of the *Guides*. Dr. Guberman carefully and thoroughly explained that he believed part of the right upper extremity weakness was related to the cervical radiculopathy and the separate injury to the right ring finger. He concluded at page 1: "However, ***there is evidence of persistent weakness in the right hand and right forearm ever since Dr. Wiley's***

examination.” [Emphasis added.] While finding an overall 6% whole person impairment for the right upper extremity, due to other contributory factors, Dr. Guberman assigned only ½ half (or 3%) of the impairment to the injury in Claim No. 950037058. Claimant 4, ALJ 7/6/2018, Finding 50, page 17 and ER B, ALJ 2/4/2021, Finding 16, page 5.

Another IME report dated April 13, 2018, Claimant 13, by Dr. Guberman addresses the right arm fracture injury occurring on February 8, 1995 in Claim No. 950037058. See Claimant 4, ALJ 7/6/2018, Finding 53, page 18 and ER B, ALJ 2/4/2021, Finding 17, page 5. For the injury to the right upper extremity on February 8, 1995, Dr. Guberman described at page 2 that the claimant explained increased pain with use of the right arm and hand for lifting, carrying, pushing, or pulling. Dr. Guberman reported at page 2, that Dr. Wiley on July 8, 1998 took an xray of the right forearm which revealed “ ‘massive callus formation with bridging bone but a central area where cartilaginous formation had not been replaced by bone even at this late date’.” At page 2 Dr. Guberman noted that this callus was “easily palpable.” At page 6 the combined rating is 52% PPD as calculated by Dr. Guberman.

At page 2 of this IME report, Dr. Guberman reasoned:

The claimant has had multiple other injuries occurring at work which have been described in my prior Independent Medical Evaluations. He has received a total of a 40 percent impairment of the whole person for prior cervical, lumbar and thoracic spine injuries. He also has a 10 percent impairment of the whole person for occupational pneumoconiosis, a 1 percent impairment of the whole person for an injury to the right ring finger, and a 4 percent impairment of the whole person for psychiatric problems related to his injuries.

At page 4 of the report, Dr. Guberman gives his Impression:

Impression:

1. Chronic posttraumatic strain of the left shoulder with bicipital tendinitis due to injury occurring at work on February 23, 1991 (Claim #910052032)
 - a. persistent range of motion abnormalities
2. History of fracture of the right ulna occurring at work on February 8, 1995 (Claim #950037058)
 - a. persistent pain and tenderness
 - b. persistent subcutaneous nodule due to callus formation, and a subcutaneous skin, soft tissue and muscle depression

For his opinion of the impairment rating of the right ulna, Dr. Guberman sets forth a detailed narrative explanation, at pages 5-6:

02/08/1995(Claim #950037058)

The claimant has had a significant injury to his right ulna which had not yet been healed at the time of Dr. Wiley's report in 1998. He has continued objective evidence of abnormalities, including the palpable callus formation which is tender and also the above-described depression in the subcutaneous tissue and muscle near the callus. In my opinion, the most appropriate method for calculating an impairment rating is still Table 2 on page 280 of the Guides for "Impairment Classes and Percents for Skin Disorders" as I have done in the past

However, an alternate method would be based on the text beginning in the last paragraph of the first column of page 9 of the Guides in which an impairment rating is allowed for the requirement of taking ongoing medication. The claimant does take ongoing medication for the right forearm injury in the form of analgesia and nonsteroidal anti-inflammatory medication. Therefore, alternatively to Table 2 of page 280 of the Guides, I recommend the same 3 percent impairment of the whole person from the text on page 9 of the AMA Guides since he requires ongoing medication for the injury which is associated with objective findings. *Therefore, I still agree with the 3 percent impairment of the whole person for this right arm injury.* [Emphasis added.]

An FCE Summary and Report dated October 23, 2018, ER L, from Wheeling Hospital determined that the claimant was functioning at a sedentary physical level. ER B, ALJ 2/4/2021, Finding 20, page 5. [A prior FCE by Dr. Mascio on February 19, 2015, ER H and Claimant 17, revealed a light physical demand capacity strength "and his verbal report of pain was consistent with his function demonstrated throughout today's testing." ER B, ALJ 2/4/2021, Finding 10, page 3.]

F. VOCATIONAL EVIDENCE:

1. Rehabilitation report by Michelle Moore, ORCI

At pages 21-22, of the report dated June 10, 2019, ER P, Ms. Moore reported:

Mr. Delbert also had a Psychiatric Independent Medical Evaluation performed by WVU on 04/26/2017. Psychological testing conducted by Kirk Bryant, Ph.D reported the patient's responses on the MMI-2-RF are consistent with his reported difficulties in everyday life. He has somatic complaints in irritability, likely reflective of depression. He exhibited executive functioning weakness in the form of difficulty with problem-solving. He noted it is possible Mr. Delbert's executive functioning weakness interferes with his encoding of new information and makes him susceptible to interference and perceived lapses of memory in everyday life. Dr. Bryant reported pain, mood, disturbance, and anxiety are all likely contributing to his cognitive weaknesses.

Dr. Christi Cooper-Lehki indicated Mr. Delbert had unspecified depressive disorder that had reached maximum medical improvement. She noted he had been treated with appropriate doses of psychotropic medications and received psychotherapy. She also indicated it was unlikely the condition would significantly improve with additional or different treatment but could be expected to remain stable with his current treatment. Dr. Cooper-Lehki reported ongoing treatment in the form of psychotropic medications and psychotherapy was recommended or deterioration could be expected if treatment was discontinued.

Dick Coburn of Advanced Professional Counseling makes several references in his notes to Mr. Delbert's memory deficits, chronic pain, irritability and hopelessness. He encourages Mr. Delbert to work on daily activities at a slower pace to manage his condition. He reported in his 8/4/2015 note that Mr. Delbert is not able to persistently work five days a week or keep up with the expected pace that most employers would expect from their employees.

Mr. Delbert does not have transferable skills as outlined in Allegiant Managed Care's report. He does not have the ability to obtain or perform the positions in the labor market survey which are outlined in Allegiant Managed Care's Report. I have analyzed each position individually and they are not appropriate for Mr. Delbert as detailed in this report.

In addition to the fact not all of his physical limitations were considered as outlined in the FCE, no consideration was given to his cognitive limitations. It is outlined he has limitations with executive functioning. Executive functioning is responsible for a number of skills which include: paying attention, organizing, planning, prioritizing, starting tasks and staying focused on them to completion. Executive functioning is also pertinent for regulating emotions. If there are limitations in executive functioning skills, it can create problems with difficulty organizing, planning, paying attention, and switching focus, shifting between activities and the ability to remember details. These limitations do not lend itself to working successfully in the environments which were suggested by Allegiant Managed Care. He does not have the ability to currently perform or acquire the ability to work in the current labor market. It is the opinion of this evaluator that Mr. Delbert is not able to perform any remunerative employment within 75 miles of his residence and/or the former employer. [Emphasis added.] ALJ 2/4/2021, Finding 24, pages 7-8.

2. Rehabilitation Report by Catherine Phillis Harvey, Genex:

At pages 4-5, of the report dated December 27, 2019, ER R, Ms. Harvey reasons that the claimant is totally disabled:

The latest Functional Capacity Evaluation on file notes that he was able to perform sedentary work. This noted that he has bilateral burning/numbness in arms and legs. The muscle strength in his neck and trunk were noted to be weak. There was no indication of whether or not he could reach in all directions overhead, to shoulder level, at desk level or below waist level and there were no indications if he could perform these activities never, occasionally, frequently or constantly. But, as noted, it was reported that he has

weakness in his neck and experiences numbness and burning in his arms and legs. The MR on 4/19/2015 indicated severe stenosis in the cervical spine. Given this information, this case manager would be concerned about his abilities to perform frequent to constant reaching and hand movements such as simple/firm grasping and fine manipulation for work activities.

Mr. Delbert has been noted to have executive functioning skills which have been indicated to be compromised. This was noted in the psychiatric report and noted by Ms. Moore in her vocational evaluation report. This was not noted in Ms. Saniga's vocational report. It also does not appear that consideration was given to Mr. Delbert's neck issues that may inhibit his ability to perform the full range of sedentary work. *The report by Ms. Saniga does mention that he has these issues but when she researched the labor market, occupations that were chosen would include frequent to constant reaching at desk level and frequent to constant computer usage. And, as indicated, this case manager would be concerned about his abilities to perform frequent to constant reaching and hand movements such as simple/firm grasping and fine manipulation for work activities.*

It should also be noted that this case manager noted that Dr. Hargraves and Dr. Guberman noted that they did not feel Mr. Delbert would be able to work in any capacity.

Thus, if Mr. Delbert is able to perform sedentary work according to the latest FCE and has executive functioning skills that have been compromised and has cervical problems, then his ability to fully perform sedentary work is in question. As, stated, this case manager has concerns about his ability to use his bilateral upper extremities for the full range of sedentary work and his executive functioning was noted to be comprised. Thus, it this case manager's opinion that Mr. Delbert is not suited to sedentary work as he does not have transferable skills to this type of work, does not have the executive skills for this work and has cervical issues as noted by the MR in 2015 and in the latest FCE.

Given the file information reviewed, *it is this case manager's vocational expert opinion that Mr. Delbert is permanently and totally disabled as a result of the compensable injuries/conditions. This opinion is given within a reasonable degree of professional certainty based upon the information reviewed, my educational background, and professional experience as a Rehabilitation Counselor.* [Emphasis added.] ER B, ALJ 2/4/2021, Finding 29, page 9.

V. SUMMARY OF ARGUMENT:

The 50% PTD threshold was affirmed the Supreme Court in the Memorandum Opinion, filed on February 21, 2020, in Docket No. 19-0040, which affirmed the ALJ Decision issued on July 6, 2018 finding that the claimant had met the 50% filing threshold, after extensive litigation on this issue, and finding that the claimant should be considered for PTD. The claimant cannot be substantially and gainfully employed based upon the preponderance of the evidence and specific findings in the record,

given the combined nature of his multiple compensable physical injuries some of which required authorized surgeries, his chronic pain and the associated depression, all of which negatively impact his activities of daily living and functioning and prevented his return to work at his long time employment in heavy underground coal mine employment.

VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The claimant waives oral argument herein, in that the facts are set forth in the documents under review in the Appendix and the error occurred in the review of the facts and the application of the law to the facts. The claimant submits that pursuant to Rule 18 of the Rules of the Revised Rules of Appellate Procedure, oral argument is not necessary because the facts and the legal arguments are adequately presented in the briefs and the record on appeal, including the Appendix, and the decisional process would not be significantly aided by oral argument. [See Claimant 14, the hearing transcript on January 25, 2021 before the Office of Judges and as summarized by the ALJ in the Decision dated February 4, 2021, Finding 33, at page 10, in ER B.]

VII. ARGUMENT:

A. STANDARD OF REVIEW:

The standard of review for workers' compensation appeals to the Supreme Court from the Board of Review is set forth in *W.Va. Code* §§ 23-5-15(b-c) (2005) (Repl. Vol. 2010):

(b) In reviewing a decision of the board of review, the Supreme Court of Appeals shall consider the record provided by the board and give deference to the board's findings, reasoning and conclusions, in accordance with subsections (c) and (d) of this section.

(c) If the decision of the board represents an affirmation of a prior ruling by both the commission and 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 conclusions of law, or is based upon the board's material misstatement or mischaracterization of particular components of the evidentiary record. The court may not conduct a de novo re-weighing of the evidentiary record....*[Emphasis added.]

In *Fenton Art Glass Co. v. WVIOC*, 222 W.Va. 420, 664 S.E.2d 761 (2008), the Supreme Court

acknowledged that the statute permits the Court only to reverse or to modify the Board of Review, where the Board's decision is an affirmation of prior rulings reached by both the Office of Judges and the original factfinder, "if the decision is in clear violation of constitutional or statutory provision, is clearly the result of erroneous conclusions of law, or is based upon the board's material misstatement or mischaracterization of particular components of the evidentiary record." Id. at 427, 664 S.E.2d at 768 (quoting W. Va. Code § 23-5-15(0)).

B. POINTS OF ARGUMENT: THE FINDINGS IN THE ENTIRE RECORD WERE CONSIDERED BY THE LOWER TRIBUNALS AND THE PTD AWARD SHOULD BE AFFIRMED.

The thrust of the Employer's appellate argument appears at pages 15-16 of the Petition:

The conclusion of the Board and the ALJ that Mr. Delbert is not able to engage in substantial, gainful employment was clearly wrong. The Board and ALJ erred in finding Ms. Phyllis-Harvey's report to be "compelling evidence" of Mr. Delbert's occupational potential, because Ms. Phyllis-Harvey did not interview Mr. Delbert, nor did she conduct either a transferrable skills analysis or a labor market survey. Furthermore, her conclusion that Mr. Delbert is unable to fully perform sedentary work is contradicted by the results of his 2018 FCE, which identified no limitations on his ability to perform work at the sedentary physical demand level for eight hours per day.

Both Ms. Phyllis-Harvey and Ms. Moore appeared to focus solely on Mr. Delbert's ability to engage in substantial gainful activity using skills or abilities in which he has previously engaged. They failed to consider his ability to engage in substantial gainful activity requiring skills or abilities *which can be acquired* as required by W. Va. Code §23-4-6(n) (2). [Emphasis supplied.]

Omitted from the Employer's reliance upon *W.Va. Code*, 23-4-6 (n) is the complete definition and fails to discuss the word "comparable:"

...disability which renders the injured employee 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 he or she has previously engaged with some regularity and over a substantial period of time* shall be considered in determining the issue of total disability. The comparability of preinjury income to post-disability income will not be a factor in determining permanent total disability..... [Emphasis added]

The argument by the Employer lacks merit because the findings in the record, as determined on multiple occasions by providers and independent examiners, as well as judicial and appellate bodies,

were not considered by Erin Saniga, the Employer's sole vocational expert. The PTDRB similarly failed to address adequately the interference of the depression and the chronic pain with the concentration and the activities of daily living, factors of "executive functioning," which opinions have been provided by both treating providers and IME providers as well as the claimant's two vocational experts.

However, the fact finder, ALJ Martha Hill, has issued multiple decisions, not only in the claim *sub judice* but in his other claims as well, as evidenced in the Claimant's Appendix, which substantiates and corroborates her understanding of the evidentiary record(s) from multiple reviews of the various records.

Well known principles of the case law in our state are that the findings in the reports must be considered by the adjudicator and not the conclusions alone:

1. The Commissioner is required to look at the physical findings of the physicians and to determine therefrom, and from all other evidence in the claim, what award, if any, the claimant should receive. *Sisk v. Comm'r.*, 153 W.Va., 461, 170 S.E.2d 20 (1969).
2. In evaluating the disability of a claimant, the Division must consider the physical findings by the examiners and determine from all the evidence what award, if any, the claimant should receive. [Emphasis added.] *Sisk v. Comm'r.*, 153 WV 461, 170 S.E.2d 20 (1969); *Stewart v. Comm'r.*, 155 WV 633, 186 S.E.2d 700 (1972).
3. An order dealing with an award of compensation based on percentage or otherwise which does not take into consideration all the factors to be considered in making an award is plainly wrong and will be reversed with direction to enter a proper order as indicated by the evidence. *Kamensky v. Comm'r.*, 148 W. Va. 258, 134 S.E.2d 582 (1964); *Posey v. Comm'r.*, 157 W. Va. 285, 201 S.E.2d 102 (1973).
4. The Commissioner is required to look not the conclusions or percentage ratings of the physicians but to the physical findings in their testimony and in their reports. *Perry v. Comm'r.*, 152 W.Va. 602, 165 S.E.2d 609 (1969).
5. In *Repass v. Workers' Compensation Division, et al.*, 212 W. Va. 86, 104, 569 S.E.2d 162, 180 (2002), the Supreme Court stated: "Instead, the Division should look at the record as a whole and give due consideration to the actual content of medical reports to determine whether they support a finding..." [Emphasis added.]

C. OBJECTIVE EVIDENCE:

1. FUNCTIONAL CAPACITY REPORTS:

The two (2) FCE reports, dated February 19, 2015, ER H and Claimant 17, and dated October

23, 2018, ER L, confirm the validity and the maximum full efforts of physical demand capacity by the claimant.

The full prior FCE report from February 19, 2015, was not included in the Employer's H but the full report is included in Claimant 17. The initial Functional Capacity Evaluation on February 19, 2015, ER H, by Dr. Mascio revealed that the claimant performed at the "full physical effort" and that he was functioning at the "Light physical demand level 15-20 lbs. on occasional basis." The therapist in this FCE for PTD assessment reported the same at page 1 of the Summary dated February 19, 2015, ER H, and Claimant 3, ALJ 4/15/16, Finding 32, pages 9-10. The therapist provided more details in his narrative report, concluded that the claimant could not perform the pre-injury job as a miner, and found that he had reached his MMI with rehabilitation. The prolonged sitting is estimated at 15-20 minutes and the standing for 10-15 minutes before the claimant needs to change positions. See ER B, ALJ 2/4/2021, Finding 10, page 3, and ER H as well as Claimant 17.

Finding 33 in the prior Decision of July 6, 2018, Claimant 4, by the Office of Judges at pages 9-10 [and noted by the ALJ in the Decision of February 4, 2021, ER B, Finding 20, page 5], set forth:

33. The claimant underwent a Functional Capacity Evaluation by Dr. Mascio on February 19, 2015. The doctor stated that the overall test findings in combination with clinical observations, suggest the presence of full maximal effort of the claimant's behalf and that he pass all the physical effort distraction based testing. Based on the results of the FCE, the claimant did not demonstrate the ability to perform the majority of the psychical [sic] demands of his previous job description of Miner I; 939.281.010 Coal, Metal and Nonmetal Mining and Quarrying Industry, Very Heavy physical demand level more than 100 lbs. on occasional basis per the DOT ratings. The claimant tested into the light physical demand level 15-20 lbs. on occasional basis. The claimant was deemed to have reached his maximal medical improvement with rehabilitation at this time, ***and based on the results of testing and during clinical observation, the claimant's report of pain is reliable and consistent with his function demonstrated during this FCE.*** While not implying intent, he stated the claimant may be able to do more than he states or perceives as he did draw some question to reliability with 4 of the 5 reliability of pain and disability questionnaires. However, he passes all he placebo tests and his verbal report of pain was consistent with his function demonstrated throughout todays testing. The doctor stated the claimant demonstrated the capacity to meet the Light Physical Demand Strength Rating per the DOT, which means he can lift up to 15-20 lbs. on an occasional basis, safely and dependably over the course of an 8-hour day. During

lifting test the claimant demonstrated good body mechanics, good control of the load and *reported a RMA Functional Pain Rating of 4 out of 10 with weights 20 lbs. or less. A 4 out of 10 on the RMA Functional pain scale is functionally disabling pain, which would start to affect your ability to perform the current activity. The 4/10 on pain scale was consistent with clinical observations.* The doctor concluded that based on the results of this FCE *the claimant was able to tolerate prolonged sitting for 15-20 minutes and standing for 10-15 minutes before needing to change position or off load to prevent increasing pain levels. The doctor recommended the claimant continue with or be instructed in a comprehensive home program of flexibility and strengthening exercises for his neck, mid and low back and legs as instructed, secondary to the limitation noted in this FCE.* [Emphasis added.]

At page 6, omitted from Employer’s Exhibit H but see Claimant 17, the therapist tested and reported on the FCE of February 19, 2015:

Strength	Job Demand	Demonstrated Ability	Match
Above-Shoulder Work	Frequent (1/3 to 2/3 Day).	Unable to tolerate secondary to increase in neck pain and limited cervical extension	No
Low-Level Work	Frequent (1/3 to 2/3 Day).	Unable to tolerate secondary to increase in low back pain	No
Dexterity			
***	***	***	***
Grasping - Firm	Frequent (1/3 to 2/3 Day)	Occasional (Up to 1/3 Day).	No
***	***	***	***
Reaching Forward	Frequent (1/3 to 2/3 Day).	Occasional (Up to 1/3 Day).	No
Writing	Frequent (1/3 to 2/3 Day).	Occasional (Up to 1/3 Day).	No

At page 6, the therapist found that the claimant could not perform occasional crawling and frequent above shoulder work or low level work. The therapist concluded that the claimant could not perform frequent grasping-firm. The therapist determined that the claimant could not do frequent reaching forward or writing. [Emphasis added.] Such findings certainly limit the ability to perform the sedentary work as well as the jobs in the labor market survey by Ms. Saniga and as more accurately observed by the claimant’s vocational experts, Ms. Moore (ER P) and Ms. Harvey (ER R).

Significantly, following this prior FCE on February 19, 2015, ER H and Claimant 17, the claimant experienced pain for several days following the FCE. As determined by the ALJ in the Decision dated July 6, 2018, Claimant 4, at page 10:

34. In a General Adult Clinic Note dated February 26, 2015, Dr. Wack, noted *the claimant had a recent FCE which caused increase in pain and increase in great toe spasm*. After examination the doctor assessed lumbar sprain 847.2, and recommended he continue current medication therapy, continue exercise, inversion table and follow up in 4-6 months. *The claimant returned on July 28, 2015, with worsening, more painful days, more numbness now in front of left thigh, and more pain with activity with sleep disturbance because of back pain*. The doctor would refer him back to Dr. Hargraves for evaluation of known stenosis and worsening pain, stating he would likely need an up to date MRI of the low back to fully evaluate prior to consult. [Emphasis added.]

On October 23, 2018, a second Functional Capacity Evaluation (FCE), ER L, reported that the claimant could physically perform at a sedentary level of employment and again he had performed at maximum effort. At page 2 under Pain Report, the therapist states: *“Reported discomfort in the neck, arms, back and legs was part of the reason for limitations with all test items. Objective signs coincided with the client's reports of discomfort.”* [Emphasis added.] Also at page 2 the therapist reported that, “Return to work not explored.” Such evaluation therefore did not address specific jobs, with variances in physical demands, nor did the FCE evaluate the various tasks of above shoulder, reaching, grasping or writing as tested in the 2015 FCE.

This FCE report revealed at page 6 that the lifting and strength were limited by pain and radicular symptoms as were the pushing and pulling and the posture. The grip of the right hand was 50 pounds and the grip of the left hand, which is non dominant, was 90 pounds. There was weak muscle strength in the trunk, in the neck, and in the left shoulder.

The FCE reports, of course, do not measure any residuals from the compensable depression and chronic pain syndrome, although the therapists did find pain itself to be a factor impacting functioning. The FCE therapist reported that the claimant “requires a railing and slow pace to complete stairs.” The therapist on October 23, 2018, found at page 5 that the claimant could not do frequent bending or stooping, and could not do frequent crouching or squatting. At page 5 the therapist noted that the claimant had “some” limitations with sitting. Pain was a limiting factor in almost all of these

measurements, with a low or average rating.

2. DR. BRUCE GUBERMAN:

Also demonstrating restrictions are the evaluations by Dr. Guberman who supported his opinions with detailed findings of the grip strength of the right dominant hand as follow:

1. January 19, 2017 IME report Claimant 11):

- a. Page 2: “continues to have weakness of his right arm and hand.”
- b. Page 6: “He is right handed.”
- c. Page 7: “There is tenderness of the right hand, especially the right ring finger, with mild bony prominence and swelling, no redness or warmth. There is no redness, warmth, swelling or tenderness of the left hand. The proximal interphalangeal joint of the right ring finger cannot be extended beyond 10 degrees of flexion and be flexed at 90 degrees.”
- d. Page 7: Grip Strength comparison

FACTOR	Right hand	Left hand
Measurement 1	40 kg of force	50 kg of force
Measurement 2	42 kg of force	50 kg of force
Measurement 3	40 kg of force	50 kg of force
Rapid exchange method	40 kg of force	48 kg of force

- e. Page 7: “On neurological examination there is weakness of the right hand and right arm being graded 4/5.”
- f. Page 8: “he continues to have decreased grip strength of the right hand compared to the left.”

2. Supplemental IME report dated August 28, 2017 (Claimant 12):

- a. Page 1: “I found weakness of the right hand and right arm being graded 4/5, as discussed in the fourth paragraph on page 7 of my report. Furthermore, there was 1 cm atrophy of the right forearm and also of the upper arm compared to the left arm. On grip strength testing, as described in the second paragraph on page 7 of my report, grip strength measured ...[see above chart]. In accordance with page 65 of the Guides, the claimant has an average grip strength of 40.7 kg of force on the right and 50 kg of force on the left. That results in a percent strength loss index of 18.6 percent using the formula in the second-to-last paragraph of the first column on page 65 of the Guides. Furthermore, from Table 34 on page 65 of the Guides, the 18.6 percent strength loss index equals a 10 percent impairment of the upper extremity. From Table 3 on page 20 of the Guides, the 10 percent impairment of the upper extremity equals a 6 percent impairment of the whole person. However, in my opinion, the claimant’s radiculopathy and injury to the right ring finger may contribute to the weakness. However, there is evidence of persistent weakness in the right hand and right forearm ever since Dr. Wiley’s examination. Therefore, of the 6 percent impairment of the whole person calculated for decreased grip strength in the right hand compared to the left hand, I recommend that 3 percent impairment be

apportioned for his radiculopathy and injury to the right ring finger and the remaining 3 percent impairment of the whole person be apportioned for this injury. Again, this is consistent with the same assessment of Dr. Wiley based on decreased grip in his Independent Medical Evaluation performed on July 8, 1998.”

3. April 13, 2018 IME Report (Claimant 13):

- a. Page 3: “He is right handed.”
- b. Page 3: “Examination of the right hand reveals there is mild tenderness.
- c. Page 3: Grip Strength comparison

FACTOR	Right hand	Left hand
Measurement 1	42 kg of force	48 kg of force
Measurement 2	42 kg of force	48 kg of force
Measurement 3	42 kg of force	48 kg of force
Rapid exchange method	40 kg of force	46 kg of force

- d. Page 4: “On neurological examination there is weakness of the right hand being graded 4/5.”
- e. Pages 5-6: “In my opinion, the most appropriate method for calculating an impairment rating is still Table 2 on page 280 of the Guides... The claimant does take ongoing medication for the right forearm injury in the form of analgesia and nonsteroidal anti-inflammatory medication. Therefore, alternatively to Table 2 of page 280 of the Guides, I recommend the same 3 percent impairment of the whole person from the text on page 9 of the AMA Guides since he requires ongoing medication for the injury which is associated with objective findings. Therefore, I still agree with the 3 percent impairment of the whole person for this right arm injury.
- f. Page 6: “...by the Combined Values Chart for a total of a 52 percent impairment of the whole person.”

Significantly the Supreme Court in the Decision filed February 21, 2020, Claimant 5, in *Murray*

American Energy, Inc. v. Charles G. Delbert, No. 19-0040, at pages 4-5, reasoned:

After review, we agree with the reasoning and conclusions of the Office of Judges as affirmed by the Board of Review.... ***In this case, Mr. Delbert has shown that he has at least 50% in prior permanent partial disability awards. The issue is whether he has 50% whole person impairment. The Office of Judges, and by extension Board of Review, committed no reversible error in finding that he passed the second threshold for a permanent total disability award. Dr. Guberman’s report was found to be reliable*** for everything but the 3% arm impairment and 4% shoulder impairment. The Office of Judges properly discarded the 4% shoulder impairment as the evidence failed to support the assessment. ***However, the 3% impairment for loss of grip strength was supported by Dr. Wiley’s assessment.*** Mr. Delbert should be further considered for a permanent total disability award. [Emphasis added.]

C. VOCATIONAL EVIDENCE:

1. VOCATIONAL REPORT OF MS. MOORE (ER P):

At page 16 of the Petition, the Employer criticizes the report, ER P, by Michelle Moore, one of the claimant's vocational experts, as follows: (1). "Ms. Moore's conclusion that Mr. Delbert lacks the verbal skills and general learning ability to perform any of the jobs identified by Ms. Saniga is contradicted by the results of his psychological testing..."; (2). "Ms. Moore's criticism of Ms. Saniga's vocational evaluation, that 'Allegiant Managed Care also did not consider any cognitive limitations or temperaments when completing the transferrable skills' is without merit; as Mr. Delbert's repeated claim that he suffers from cognitive impairment has not only never been proven, it has been specifically refuted by Dr. Cooper-Lehki;" and (3). "Ms. Moore failed to explain her opinion that Mr. Delbert does not have the ability to acquire the skills necessary for any of the jobs identified by Ms. Saniga; which conclusion is contradicted by his documented superior IQ and by Ms. Saniga's observation that Mr. Delbert would be an excellent candidate for positions"

Such argument ignores the specific findings in the lengthy evidentiary record from multiple claims.

First, the claimant introduced an article, "Executive Function and Executive Function Disorder," WebMD, reviewed on March 25, 2019 by Smitha Bhandari, MD and printed October 31, 2019. Claimant 15, and ER B, ALJ 2/4/2021, Finding 23, page 7. At page 1, the author states, "When executive function isn't working as it should, your behavior is less controlled. This can affect your ability to:

- Work or go to school
- Do things independently
- Maintain relationships

The ALJ in the Decision of February 4, 2021, ER B, at page 7, issued the finding of fact:

23. The March 25, 2019 WebMD article by Dr. Smitha Bhandari entitled "Executive Function and Executive Function Disorder" was submitted by claimant's counsel. Executive functioning skills were noted to help get jobs done and include such functions as: managing time, focusing, switching focus, planning, remembering details, avoiding saying the wrong things or doing the wrong thing, doing things based on your experience and multitasking.

Second, the Neuropsychological Evaluation Report dated April 26, 2017, ER K, by Dr. Kirk Bryant at page 2, discussed in Finding 48, page 17 of the decision dated July 6, 2018, Claimant 4, and in the Decision set forth in ER B, ALJ 2/4/2021, Finding 16, pages 4-5 included:

.... The patient's responses on the MMPI-2-RF are consistent with his reported difficulties in everyday life. ***He has somatic complaints and irritability likely reflective of depression.*** His verbal and visual memory were in the average range, though he is somewhat ***susceptible to interference.*** He ***exhibited executive functioning weaknesses*** in the form of difficulty problem solving. It is possible that his executive function weakness interferes with his encoding of new information and makes him susceptible to interference and perceived lapses of memory in everyday life. ***Pain, mood disturbance and anxiety are likely contributing to his cognitive weaknesses.*** This clearly is a bright individual that ***may have difficulty directing his cognitive resources due to some executive dysfunction.***..... [Emphasis added.]

Ignored by the Employer in its arguments are the consistency by Dr. Cooper-Lehki, who cited the above report by Dr. Bryant at pages 5-6 of her own report dated April 26, 2017, ER J, and she did not disagree with these statements. At page 6, Dr. Cooper-Lehki recommended "Ongoing treatment in the form of psychotropic medications and psychotherapy....deterioration can be expected if treatment is discontinued." Such ongoing treatment and medications had also been recommended by Dr. Moran in ER G and Dr. Beth-Law in ER F.

Third, the Decision dated February 18, 2011, ER B, ALJ 2/4/2021, Finding 5, page 2, and Claimant 16, by the Office of Judges in JCN No. 2001056879, ruling depression (309.1) and chronic pain syndrome (338.4) as compensable components in a prior injury of June 12, 2001, were not appropriately considered by the PTDRB nor Ms. Saniga. Included among the findings of fact, are the following:

7. In his report of April 16, 2010, Dr. Wack noted that the claimant was continuing to have back pain in his neck and thoracic region. The claimant ***held himself rigid*** in the thoracic region and neck region, but no other findings were noted. ***The doctor diagnosed claimant***

with cervical and thoracic chronic disc disease with radicular pain. His Diagnosis Update of May 14, 2010, noted a thoracic sprain, chronic, diagnosis code 847.1. The claimant had ongoing subjective pain with minimum activity, stiffness and loss of range of motion. In his medical statement of May 14, 2010, Dr. Wack requested Cymbalta, 30 mg daily, based on his April 10, 2010 evaluation of the claimant. ***The doctor noted he was claimant's treating physician, and that the claimant had ongoing chronic pain and mild depression due to loss of function.*** By request of the same date, Cymbalta for the claimant's chronic thoracic back pain was sought.

8. In correspondence of July 16, 2010, Dr. Wack explained the basis for the prescription Cymbalta for claimant. ***This medication had been prescribed continually for the claimant to alleviate depressive symptoms that have developed from the compensable injury and chronic pain in the cervical and thoracic regions. The claimant had long experienced mild depressive symptoms as a result of the injury, as well as the loss of ability to perform functions of daily life.*** Cymbalta is also recognized in the *treatment of chronic pain syndrome* and is a good match for the conditions experienced by the claimant because he has both depressive and chronic pain issues....

10. An Administrative Law Judge, by Decision of September 20, 2010, reversed two Orders denying Cymbalta and found that it was medically necessary and reasonable for the claimant's depression and chronic back pain attributable to the compensable injury. [Emphasis added.]

The ALJ further reasoned at pages 4-5, Claimant 16, in this decision, when granting the diagnoses of depression and chronic pain:

....It is apparent from the evidence presented that claimant's treating physician, Dr. Wack, was treating the claimant's depression and chronic pain which he opined resulted from the compensable injury. ***Dr. Wack has been treating the claimant several years for his compensable condition and is aware of the claimant's medical issues.*** The displacement of thoracic intervertebral disc without myelopathy was added as a component by an Administrative Law Judge Decision of February 11, 2009 and Dr. Grady found the claimant had 5% impairment for his back injury in his report of April 2, 2009, considering the additional component. An Administrative Law Judge by Decision of September 20, 2010 reversed the Claim Administrator's Orders of April 20, 2010 and May 25, 2010 thereby authorizing Cymbalta as medically necessary and reasonable to treat the claimant's depression and chronic pain resulting from the compensable injury. ***The employer did not submit any evidence to contradict the records submitted by the claimant.*** The preponderance of the evidence supports the addition of the components, depression and chronic pain syndrome, to the claim as requested by his treating physician. Dr. Wack....[Emphasis added.]

The ALJ in the Decision of February 4, 2021, ER B, in Finding 9, page 3 determined:

9. A psychological evaluation was performed by Dr. Moran on January 23, 2015, wherein she concluded...his personality profile is ***consistent with significant emotional distress and frustration with his circumstances, as well as chronic pain and physical complaints.*** Comparison to the previous psychological evaluation from 2011, shows

...perhaps greater endorsement of mood disturbance, both on the personality profile and in the interview. She stated the claimant is no longer treated with antidepressant medication, *and resumption of this treatment seems appropriate*, noting the claimant also expressed an interest in psychotherapy *given the distress he is currently experiencing*. [Emphasis added.]

The evidentiary record, including the findings by the Office of Judges in prior decisions, in the reports of the treating physician, IME providers, and FCEs, establishes and corroborates that the claimant was having depression and chronic pain from his work injuries, for a very extended time prior to the filing of the application for PTD in August, 2014. Dr. Wack, a long time treating physician, stated that these diagnoses had interfered with the claimant's activities of daily living. These same findings of pain interference are found in the IME report in April 26, 2017, ER J, by the psychiatrist, Dr. Christi Cooper-Lehki, and the neuropsychological report dated April 26, 2017, ER K, by IME evaluator, Dr. Bryant.

Rule 20, Section 85-20-49, provides the guidelines for treatment of chronic pain. It is noted at Section 85-20-49.1:

It is *now well accepted* that chronic pain treatment is a complex problem that involves physical, emotional and behavioral components. Chronic pain and treatment therefore, including multi-disciplinary interventions, is only compensable if specifically diagnosed as caused by the injury received in the course of and resulting from employment. [Emphasis added.]

Significantly, Rule 20 at 49.4 identifies the factors in the chronic pain syndrome which impact functioning, and which is a compensable condition in **Claim No. 2001056879**, as follows:

Chronic Pain Syndrome patients are defined by the following criteria:

- a). Reports of persistent (i.e., at least four months duration) pain, which may be consistent with or significantly out of proportion to physical findings;
- b). Demonstrates or has demonstrated *a progressive deterioration in ability to function at home, socially and at work*; c). Shows or has shown a progressive increase in health care utilization (such as repeated physical evaluations, diagnostic tests, requests for pain medications and/or invasive medical procedures); d). Demonstrates *mood disturbance*; and e). May *exhibit clinically significant anger, frustration, and/or hostility*. [Emphasis added.]

Rule 20 defines chronic pain syndrome, resulting in behaviors to include irritability and anger, among others. Rule 20, pages 56-68. Section 85-20-49.2, states: "There is strong evidence for the

importance of the behavioral/ psychological component of treatment in making meaningful changes in pain intensity, *functional status* and emotional distress.” At Rule 20, 85-20-50.3, it is also observed that “Chronic pain complaints are usually accompanied by other psychophysiological disorders such as **depression**, weight gain or loss, **sleep disorder** and digestive disorder.” [Emphasis added throughout.]

Ms. Moore at page 12 of her report found:

The Transferable Skills Analysis was completed based on sedentary work capacity as outlined by the Functional Capacity Evaluation. ***Zero occupations were identified to be alternatives or transferable for Mr. Delbert.***

The report submitted by Allegiant Managed Care dated 11/30/2018 was evaluated. Allegiant Managed Care used the OASYS Program to identify transferable skills and residual employment options for Mr. Delbert. In completing the TSA, they only evaluated his past work history and physical capabilities of a sedentary physical demand level. The other limitations in the FCE were not considered. [Emphasis added.]

Further she stated at page 12 that Ms. Saniga identified additional occupations utilizing OASYS for transferable skills, all of which were labeled as only “potential” and which are not described as matches. She then states:

.... Potential match finds job that the seeker has the potential to perform based on education, abilities and interest. These jobs require a career change. Only potential match types were identified in Allegiant’s report. ***Potential is not indicative that Mr. Delbert has skills which transfer to these positions. Potential matches are intended to be used for career exploration. Mr. Delbert does not have skills which transfer to these 10 occupations identified in Allegiant’s report. Mr. Delbert does not have transferable skills.*** [Emphasis added.]

2. **VOCATIONAL REPORT OF MS. SANIGA (ER M):**

At page 17 of the Petition the Employer summarily concludes that the earlier reports of Ms. Saniga are “more credible” but the Employer does not address the findings in the underlying records to support the reliability nor the conclusions in the report. The Employer argued that,

As the PTD Review Board correctly concluded, Ms. Saniga's two reports are the most credible evidence of Mr. Delbert's vocational potential. Ms. Saniga met with Mr. Delbert on two occasions, and took a detailed history of his compensable injuries, current symptoms, non-compensable medical conditions, education, vocational history, and general skills and abilities. Her transferrable skills analysis and identification of residual employment options through the OASYS program yielded numerous results, and her

labor market survey identified multiple positions in Mr. Delbert's geographic region for which he would be considered qualified with either on the job training or a brief formal training program focused on enhancing his existing computer skills. The Board and ALJ were clearly wrong in not finding Ms. Saniga's reports to be the most credible evidence of Mr. Delbert's vocational potential, and in granting him a permanent total disability award."

In her initial report dated May 15, 2015, ER I and Claimant 3, ALJ 4/15/2016, Finding 36, page 11, Erin Saniga states at page 9, that she found one job with a match of "good;" at page 9 three jobs which had a "fair" match; and at page 10, 8 jobs with "potential." Ms. Saniga at page 10 indicated, "there are positions available within Mr. Delbert's geographic region for which he would be considered qualified or could become qualified upon completion of on the job training or a short term training program designed to enhance his computer and typing skills." Further at page 11 Ms. Saniga stated, "When considering return to work options for Mr. Delbert, one must take into consideration the fact that many of the positions identified via the Labor Market Survey would require some level of on the job training and/or computer skills." Lacking in this report of Ms. Saniga is the impact on the work efficiency, concentration, and other associated residuals from the compensable depression and compensable chronic pain syndrome.

This is a claimant with an excellent work history who simply was unable to continue working, due to the combined effects from compensable physical injuries with associated compensable chronic pain and compensable depression. The claimant has filed multiple injury claims from his long term heavy coalmine employment, for which he has had authorized surgeries for both his cervical and his lumbar spines. He was motivated and returned many times to the coal mine following several significant injuries, some of which required surgeries. He even returned to the coal mine employment following a period of Social Security disability, which was reinstated *after the failed work attempt in 2009 and he was placed on medical TTD*. See ER B, Finding 3, pages 1-2, and Claimant 8, 9, and 18.

Ms. Saniga also conducted a limited review of records. The most recent report lists evidence

reviewed at page 5 for “PTD IME/FCE Review” which consisted of a review of the IME report by Dr. Sethi on November 17, 2014, and the two FCE reports from February 19, 2015 and October 23, 2018, as discussed herein. The IME report by Dr. Sethi was found to be unreliable as determined by the Board of Review on November 10, 2016, in Appeal No. 2051291, in which the Board of Review REVERSED the decision dated April 15, 2016 affirming the order of November 13, 2015, denying a PTD award ***and REMANDED the claim to the claim administrator with instructions to refer the claimant to the PTDRB for additional consideration.*** Claimant 2, ALJ 12/17/2019, Finding 8, page 2, and Claimant 10. Therein, at page 2: “The Board finds that Dr. Sethi’s ratings for the thoracic and lumbar spine injuries are not reliable.”

In the Decision dated March 30, 2015, Claimant 19, as noted in ER B, ALJ 2/4/2021, Finding 11, page 4, the Office of Judges had ordered a new IME in Claim No.990051738 for the cervical spine. The evidentiary record for this cervical injury claim establishes that ***on September 8, 2009, the claims administrator approved the reopening of the claim for medical TTD benefits and by separate letter on September 8, 2009, Wells Fargo approved TTD from May 22, 2009 through June 20, 2009.*** See Claimant 18, Findings 5-6, pages 2-3.

The record substantiates that by the decision dated June 3, 2010, Claimant 18, the Office of Judges affirmed the order dated October 9, 2009 closing the claim for TTD. The record included the Claim Reopening Application dated August 4, 2009 by the claimant and dated August 11, 2009 by Dr. Wack, who diagnosed acute and chronic neck pain, stiffness and headache. Dr. Wack prescribed therapy, analgesics, anti-inflammatory treatment, and pain modalities. Dr. Wack advised that continued treatment is necessary and he diagnosed acute and chronic neck pain, stiffness and headache. On page 1 of the reopening application, the claimant requested TTD benefits as of May 21, 2009 and provided no ending date. On page 2, Dr. Wack stated in response to Question 13, that the claimant had “**retired [secondary]**”

to injury re-occurrence.” In response to Question 15, Dr. Wack stated that the claimant was temporarily disabled from “**5-21-09 to current**” which was the date of the application dated August 11, 2009. See Claimant 18, and Claimant 19, Findings 5-6, pages 2-3.

The erroneous statements on motivation and “retirement,” by Ms. Saniga are misplaced and misleading on the issue of the claimant’s work stoppage as a voluntary or planned “retirement” and not for the compensable medical reasons as established in the record, Claimant 8, Claimant 15, and Claimant 16. At page 12, Ms. Saniga erroneously stated: “Given that Mr. Delbert did return to work in 2008 and *retired* in 2009, it would appear that he achieved his goal.” [Emphasis added]. The ALJ previously held in the Decision of June 3, 2010, at pages 2-3, Claimant 18:

5. ...the claim reopening application signed by Dr. Wack on August 11, 2009. This document indicates the claimant had experienced a reoccurrence of his injury and as a result, would be unable to work from May 21, 2009 to the present. Specifically, the claimant was suffering from neck pain rendering him unable to look up, lift or strain. The claimant was being treated with physical therapy, analgesics, and anti-inflammatories. Dr. Wack noted the claimant had retired secondary to the injuries.
6. ...the Claim Administrator's Order dated September 8, 2009 which approved the claimant's reopening request for temporary total disability benefits and granted the claimant benefits from May 22, 2009 through June 20, 2009....

The evidentiary record clearly shows that the claimant did not voluntarily retire and that he was found to be disabled in June 2009 by the Social Security Administration, Claimant 8. His compensation claim records reflects that his claim was reopened and that he was granted workers’ compensation TTD benefits in May –June 2009 due to the compensable injury and stopped working thereafter.

The regulations address this issue, as noted in the Memorandum Decision, *Hicks v. Oilfield Trucking*, No. 15-1082 (October 26, 2016), at page 2:

....§ 85-1-5.2 (2009) which provides:
If an individual retires, as long as the individual remains retired, he or she is disqualified from receiving temporary total disability indemnity benefits as a result of an injury received from the place of employment from which he or she retired, unless the application for benefits was received prior to his or her retirement...

Further, such regulation §85-1-5.2, also provides as follows:

5.2An individual who has retired is also barred from reopening for temporary total disability indemnity benefits an earlier claim filed in connection with an injury received at the place of employment from which he or she is retired. ***This section does not preclude payments of benefits otherwise due a claimant if the retiree has returned to employment and suffers a compensable injury or payment of benefits if the compensable injury causes the individual to retire.*** [Emphasis added.]

At page 9, Ms. Saniga reported on the status of his Social Security:

Mr. Delbert was awarded Social Security Disability (for the closed period of 2/23/07 - 4/22/08) in March 2009. He was subsequently awarded SSDI again in December 2009; this reverted to regular social security when he reached the age of 62....

At page 11 of her report Ms. Saniga admitted that she considered physical factors, but she did not consider the mental factors of depression or chronic pain syndrome, which are compensable diagnoses in the claims:

It should be noted that positions were considered based upon their compatibility with Mr. Delbert's preinjury employment or the availability of training ***as well as the physical nature of the position.*** Entry level positions in industries outside Mr. Delbert's specific work experience were considered. [Emphasis added.]

Absent from the vocational analysis and reasoning by Ms. Saniga is any consideration of the impact of psychological, psychiatric, or mental restrictions from the claimant's compensable depression and/or his compensable chronic pain as factors which would negatively impact his ability to engage in ***comparable and substantial gainful employment*** at a sedentary level which would involve prolonged sitting, and which prolonged sitting the claimant could not perform according to the two FCE reports, ER H and ER L and Claimant 17, and opinions of medical providers, including psychologists and psychiatrists. The claimant's ability to function with his compensable chronic pain, Claimant 16, with factors of anger, irritability or frustration, are not addressed by the vocational consultant. His ability to concentrate or even to work with co-employees or the public is not evaluated nor considered by Ms. Saniga. His ability to extend his arms bilaterally to work, including pushing and pulling, is not

discussed, even though both FCEs on February 19 2015, Claimant 17, and October 23, 2018, ER L, contained restrictions.

There is no release in the record for the claimant to return to work. It does not appear that Ms. Saniga contacted any of the providers of health services to the claimant in order to determine his ability to work or whether he could be released to return to work, even if a sedentary position. The compensable chronic pain and depression are both long standing problems which have interfered with his daily functioning and activities according to the evidentiary record. Claimant 16.

Ms. Saniga at page 10 of her report identified jobs utilizing transferable skills, all of which were labeled as only “potential” and which are therefore speculative at best. Ms. Moore responded at page 12, ER P, of her report as to this inaccurate analysis by Ms. Saniga. There is no indication that the claimant could perform the *full range* of sedentary activity, when the FCE report, page 10, of October 23, 2018, ER L, demonstrated the limitations as determined by the ALJ on February 4, 2021, Finding 20, page 5:

Summary of Physical Assessment:

- 1) Decreased gait sequence and speed.
- 2) Decreased neck ROM.
- 3) Decreased neck strength,
- 4) Decreased trunk ROM.
- 5) Decreased trunk strength.
- 6) Decreased left shoulder ROM.
- 7) Decreased left shoulder strength.
- 8) Decreased left hip strength.
- 9) Decreased right ankle ROM.
- 10) Decreased right ankle strength.
- 11) Decreased toe rises and squatting.

3. VOCATIONAL REPORT OF MS. HARVEY (ER R):

The Employer argues at page 15 of the Petition that, “The Board and ALJ erred in finding Ms. Phillis-Harvey’s report to be ‘compelling evidence’ of Mr. Delbert’s occupational potential, because Ms. Phillis-Harvey did not interview Mr. Delbert, nor did she conduct either a transferrable skills analysis or a labor market survey. Furthermore, her conclusion that Mr. Delbert is unable to fully perform sedentary

work is contradicted by the results of his 2018 FCE, which identified no limitations on his ability to perform work at the sedentary physical demand level for eight hours per day.”

Despite this criticism by the Employer, “record reviews” by providers, independent examiners and reviewing authorities are common practice in the administration of workers’ compensation claims. Additionally, the report dated December 27, 2019, ER R, by Ms. Harvey was filed after the protest to the order of September 19, 2019, ER C, during litigation before the Office of Judges, and was not considered by the PTDRB. Therefore, the ALJ had the Harvey report to consider in reaching a decision.

Similarly, the Employer adopts the conclusion of the sedentary physical level of the FCE report of October 23, 2018, ER L, and fails to look at the specific details in both FCE reports. The objective findings about reaching, pushing, pulling, prolonged sitting, writing, and similar activities, by the FCE therapists in both the 2015 and the 2018 FCE reports, corroborate and substantiate the conclusions of the vocational expert, Catherine Phillis Harvey, of Genex, in her report in December 27, 2019, ER R. Ms. Harvey stated at the final pages:

Thus, if Mr. Delbert is able to perform sedentary work according to the latest FCE and has executive functioning skills that have been compromised and has cervical problems, then his ability to fully perform sedentary work is in question. As, stated, this case manager has concerns about his ability to use his bilateral upper extremities for the full range of sedentary work and his executive functioning was noted to be comprised. Thus, it this case manager’s opinion that Mr. Delbert is not suited to sedentary work as he does not have transferable skills to this type of work, does not have the executive skills for this work and has cervical issues as noted by the MR in 2015 and in the latest FCE. [Emphasis added.]

Again, a careful reading of the FCE from February 19, 2015, ER H, and the *full report* in Claimant 17, reveals the therapist found valid and demonstrated good efforts, but also found that the claimant does have physical restrictions and limitations with activity, to include the cervical and lumbar spine as well as the shoulders and upper extremities. *He had difficulty with prolonged sitting or standing and needed to change his position. The therapist found no Waddell’s signs.* Clearly the

claimant put forth maximum effort but there are limitations on the full range of sedentary activity and whether the claimant can maintain a full range of such activity during a 40 hour work week. ***In other words, the impact of prolonged sitting or standing, or even holding his neck in a prolonged position, are very valid concerns, also given the 10% impairment of the pulmonary condition which would affect outside activity especially and also given the impact of the depression and chronic pain syndrome.*** No recommendation appears in the FCE report for work conditioning or work hardening for a return for work.

Sedentary physical demand capacity is defined under Rule 20 at 85-20-F, which does not include nor address the issues of compensable depression and compensable chronic pain. The physical demand categories are described as follows in Rule 20, Appendix §85-20-F, set forth in full at Claimant 20, with the emphasis added:

The Physical Demands Strength Rating, as defined in the Dictionary of Occupational Titles, is expressed by one of five terms: Sedentary, Light, Medium, Heavy and Very Heavy. In order to determine the overall rating, the injured worker's abilities in the following activities must be considered: Standing, Walking, Sitting, Lifting, Carrying, Pushing, Pulling and Controls operation.

Sitting means remaining in a seated position.

Controls entail the use of one or both arms or hands (hand/arm) and/or one or both feet or legs (foot/leg) to move controls on machinery or equipment. Controls include but are not limited to buttons, knobs, pedals, levers and cranks.

Sedentary Work - Exerting up to 10 pounds of force occasionally and/or a negligible amount of force frequently to lift, carry, push, pull, or otherwise move objects, including the human body. Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. Jobs are sedentary if walking and standing are required only occasionally and all other sedentary criteria are met.

The most current FCE report on October 23, 2018, ER L, has placed the claimant in a sedentary category, requiring more skills in clerical work, with associated concentration and focus, as well as requiring more ability to sit for prolonged times. The FCEs demonstrated that the ***claimant could not engage in prolonged sitting or standing***, without an increase in pain, and a need to change positions

frequently. Higher requirements are needed for dexterity of the upper extremities and manipulation of the hands and fingers which have also been compromised by compensable injuries. The neck restrictions and upper arm restrictions are also negative factors for the pushing, pulling, and lifting as well as the bent cervical position required of telephone use or computer screens.

VIII. CONCLUSION:

The ALJ in the Decision of February 4, 2021, ER B, affirmed by the Board of Review on October 22, 2021, ER A, clearly analyzed and reasoned from specific facts in the entire record and not the generalized conclusions of Ms. Saniga. As correctly reasoned by the ALJ, at page 15, Exhibit B:

Based on the evidence presented it is more likely than not that the claimant, who has not worked since 2009 and was granted a Social Security Disability award, meets the statutory requirements of permanent total disability. The claimant was limited to sedentary jobs and has limited strength and cervical issues. He had surgery for his compensable cervical injury and received a 25% permanent partial disability award for the same. Two physicians found him totally disabled from working ***and even his FCE cited bilateral burning/numbness in his arms and legs. The FCE also noted 15-20 minutes limitation for sitting and 10-15 minutes standing before needing to change positions. Ms. Phillis-Harvey opined that the jobs cited by Ms. Saniga would require frequent to constant reaching and constant computer usage which the claimant could not perform. Ms. Phillis-Harvey also noted the claimant's cognitive and temperament limitations that would interfere with his job performance.*** Kirk Bryant, PhD, in his neuropsychological evaluation report, stated that the claimant, though bright, ***could have difficulties directing his cognitive resources due to executive dysfunction.*** The claimant also suffers from psychological problems including depression and compensable chronic pain as noted by psychiatrist. Dr. Cooper-Lehki, and neuropsychologist. Kirk Bryant.

The report of Ms. Phyllis-Harvey is compelling and when considered with the entire record, leads to the decision that the claimant is permanently and totally disabled....[Emphasis added]

The claimant submits that the Supreme Court should affirm the Decision of October 22, 2021, by the Board of Review affirming the Office of Judges, both of which thoroughly reviewed the evidentiary record; that the claimant requests that the Supreme Court AFFIRM the Decision dated October 22, 2021 by the Board of Review affirming the Decision issued on February 4, 2021, by the Office of Judges granting permanent total disability; and for such further relief as may seem just and proper.

CHARLES G. DELBERT, Claimant

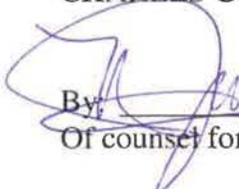
By: _____

IX. CERTIFICATE OF SERVICE:

Service of the foregoing Reply Brief of the Claimant, CHARLES G. DELBERT, in Opposition to the Employer's Appeal was had upon the parties herein by hand delivery/ mailing true and correct copies thereof by regular United States mail, postage prepaid and properly addressed this 14th day of December, 2021, as follows:

Aimee M. Stern, Esq.
Dinsmore & Shohl, LLP,
Bennett Square
2100 Market Street
Wheeling, WV 26003.

CHARLES G. DELBERT, Claimant

By: 

Of counsel for claimant

M. Jane Glauser, Esq. WWSB 1397
Schrader, Companion, Duff & Law, PLLC
401 Main Street, Wheeling, WV 26003
Telephone: (304)233-3390
Fax: (304) 233-2769
mjg@schraderlaw.com