

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA
CHARLESTON, WEST VIRGINIA

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JOSEPH CRAIG DORSEY, Claimant,

Petitioner,

v.

Docket No.: 24-ICA-254

BLACKHAWK MINING, LLC, Employer,
ROCKWOOD CASUALTY INSURANCE COMPANY, Third Party Administrator,

Respondents,

JOHN ADKINS, Claimant,

Petitioner,

v.

Docket No.: 24-ICA-256

MARFORK COAL COMPANY, LLC, Employer,
SMARTCASUALTY CLAIMS, Third Party Administrator,

Respondents.

PETITIONERS' OPENING BRIEF

Appeal from the Workers' Compensation Board of Review
Claim Numbers 2023006378 (Dorsey); 2023023264 (Adkins)

Respectfully Submitted By:

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I. ASSIGNMENTS OF ERROR

1. The Workers' Compensation Board of Review erred below, violating the workers' compensation statute, by failing to require that "the amount of compensation shall be calculated and paid from the date of disability" which shall be the first date on which medical or other expert evidence indicated that such permanent total disability existed, as required by West Virginia Code Section 23-4-18.

II. STATEMENT OF THE CASE

This appeal consolidates two matters involving coal miners who receive workers' compensation benefits for occupational pneumoconiosis. The facts relevant to the assignment of error are set forth here.

a. John Adkins.

On June 21, 2023, Mr. Adkins filed his application for benefits based on occupational pneumoconiosis or black lung. JA 037 (noting "date of filing"). Mr. Adkins' application was accompanied and supported by a Report of Injury completed by Dr. Spencer in May 2023. JA 040, 047. The pulmonary function testing that Dr. Spencer cited and relied upon in reaching his finding of impairment due to black lung was conducted on April 2, 2023. JA040, 047.

On November 2, 2023, the Occupational Pneumoconiosis ("OP") Board issued findings of 15% pulmonary impairment due to black lung, relying on the May 22, 2023 report by Dr. Richard Spencer, the previous April 2, 2023 pulmonary function study from New River Breathing Clinic, and the Board's own testing conducted on November 2, 2023. JA 040, 068.

On December 12, 2023, the Offices of the Insurance Commissioner ("O.I.C.") forwarded the findings of the O.P. Board to the carrier / responsible administrator for the claim, with a

finding that June 21, 2023 was the date of injury (“D.O.I.”). JA 039. On December 27, 2023, relying on the December 12, 2023 correspondence from the O.I.C., the Self-Employer through Smart Casualty Claims issued a 15% award (the “Award”) of permanent partial disability based on occupational pneumoconiosis. JA 037. The Award provided for payments in the amount of \$2912.09 to be paid out on a monthly basis from January 2024 through February 2025, for a total award of \$40,210.80. *Id.* The Award only provided for prospective payments and did not compute any back-payment. *Id.* In January 2024, the Employer issued its first periodic payment of \$2912.09 pursuant to the Award. JA 045.

b. Joseph Craig Dorsey.

On September 9, 2022, the Claimant Joseph Craig Dorsey filed the application for benefits in this matter. On August 1, 2023, the OP Board issued findings of 65% pulmonary impairment due to black lung. JA 008. The findings were based on the Board’s pulmonary Examination that occurred on August 1, 2023. *Id.* The findings were supported by a finding of impairment by a physician Dr. Richard Spencer, due to occupational pneumoconiosis, dated September 8, 2022, and by pulmonary function testing July 13, 2022. *Id.*

On October 3, 2023, the Employer issued a 65% award (the “Award”) of permanent partial disability based on occupational pneumoconiosis. JA 006. The Award provided for 260 weeks of payments in the amount of \$670.18 to be paid out on a biweekly basis (every two weeks) until the 260 weeks have been paid or changed by order, for a total award of \$174,246.80. *Id.*

The Award acknowledged that the date of injury was July 12, 2022. *Id.* The Award only provided for prospective payments and did not compute any back-payment. *Id.* On October 18, 2023, the Employer issued its first periodic payment of \$1,340.36 pursuant to the Award. JA 018.

III. SUMMARY OF ARGUMENT

When workers apply for workers' compensation benefits---which include both medical coverage and indemnity benefits---based on occupational disease, West Virginia Code Section 23-4-18 plainly and very reasonably provides that the benefits must be "calculated and paid from the date of disability." The "date of disability" must be determined by the factfinder. *See Carter v. Spieler*, 183 W. Va. 126, 130 (W. Va. 1990). The Court has long held the "date of disability," from which a permanent total disability award will be calculated and paid within the meaning of W. Va. Code § 23-4-18, is the "first date on which medical or other expert evidence indicated that such permanent total disability existed." Syllabus, *Miracle v. Workers' Compensation Comm'r*, 181 W. Va. 443, 383 S.E.2d 75 (1989). The Employer or its Third-Party Administrator typically issues a "backpayment" comprising a lump sum of each periodic payment between the date of disability and the date of the award. Thereafter, the Employer continues periodic payments until the award is fully paid.

In occupational pneumoconiosis cases, the medical factfinder is the Occupational Pneumoconiosis Board. While the date of disability determined by the OP Board in these cases was not clearly stated in their findings, the Employer did not commence making payments until after it issued its award of benefits---substantially later in time from any of the potential dates of disability as determined by the OP Board. In the case of Mr. Dorsey, the beginning of payments occurred over a year after he filed his application for benefits. This represents a substantial delay in the provision of medical care and indemnity benefits, undermining the plain language of the workers' compensation statute and depriving sick and injured workers of timely benefits. The

Occupational Pneumoconiosis Board identifies a “date of disability” which represents the onset of the worker’s entitlement to benefits.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioners request oral argument pursuant to Rule 19 of the Revised Rules of Appellate Procedure, as this appeal involves an unsustainable exercise of discretion where the law governing that discretion is settled, as well as a result against the weight of the evidence because the evidence established a date of disability substantially earlier in time than the date upon which the Employer commenced payment of benefits; and Petitioners further request that this Court issue a full opinion, not merely a memorandum opinion, so as to provide guidance to the Occupational Pneumoconiosis Board and the Board of Review to be applied in the run of OP cases.

V. ARGUMENT

Benefits must be paid from the “date of disability” in cases of permanent partial disability awards of workers’ compensation in West Virginia is governed by W. Va. Code § 23-4-18.

Payments may be made in the periodic installments determined by the commission in each case, but in no event less frequently than semimonthly for any temporary award and monthly for any permanent award. . . . In all cases where compensation is awarded or increased, the amount of compensation shall be calculated and paid from the date of disability.

Benefits for occupational diseases such as pneumoconiosis are typically paid based on findings of permanent partial disability by the Occupational Pneumoconiosis Board. The process is generally set forth in the code:

If an employee is found to be permanently disabled due to occupational pneumoconiosis, as defined in section one of this article, the percentage of permanent disability is determined by the degree of medical impairment that is found by the occupational pneumoconiosis board. The commission, successor to the commission, other private carrier or self-insured employer, whichever is applicable, shall enter an order setting forth the findings of the occupational pneumoconiosis board with regard to whether the

claimant has occupational pneumoconiosis and the degree of medical impairment, if any, resulting therefrom.

W. Va. Code § 23-4-18.

In cases of permanent partial disability, especially those such as black lung cases involving a latent and progressive injury, the Court has long held the “date of disability,” from which a permanent total disability award will be calculated and paid within the meaning of W. Va. Code, 23-4-18, is the “first date on which medical or other expert evidence indicated that such permanent total disability existed.”

A compensable injury which does not initially or of itself produce a permanent total disability may become progressively worse over time or combine with prior impairments under the second injury statute, W. Va. Code, 23-3-1, so as to result in a permanent total disability. In such circumstances, the “date of disability,” from which a permanent total disability award will be calculated and paid within the meaning of W. Va. Code, 23-4-18, is the first date on which medical or other expert evidence indicated that such permanent total disability existed.

Syllabus, *Miracle*, 181 W. Va. 443, 383 S.E.2d 75 (partially modified on grounds applicable to cases of permanent total disability (PTD) by *Lambert v. Workers Compensation Division*, 211 W. Va. 436, 446, 566 S.E.2d 573 (W. Va. 2002). The Supreme Court has adopted a more detailed test for the “date of disability” in permanent total disability cases, but the *Miracle* holding should still control for PPD cases including OP.

The date of disability must be determined by the factfinder, which is the OP Board in cases involving occupational pneumoconiosis. *See Carter*, 183 W. Va. at 130 (“As with any compensation award, the Commissioner [or successor] must determine the onset date of disability[.]”). The Supreme Court of Appeals has long recognized that “[t]he rating of disabilities, regardless of legislative precision or medical expertise, remains an inexact science.” *Miracle*, 181 W. Va. at 446, 383 S.E.2d at 78 (quoting *Griffith v. State Workmen's Comp. Comm'r*, 157 W. Va. 837, 843, 205 S.E.2d 157, 161 (1974)).

Because our courts have long recognized that OP or Black Lung is a latent and progressive disease, the initial date that permanent partial disability exists due to OP is logically the date from which medical or other expert evidence first indicated that such permanent partial disability existed. *See Pennington v. W. Va. Office of the Ins. Comm'r*, 241 W. Va. 180, 820 S.E.2d 626, 632 n.6 (W. Va. 2018) (citing W.Va. Code § 23-4-16(a)(2) [2005] (Occupational pneumoconiosis is medically recognized as progressive in nature). *See also Lester v. State Workmen's Comp. Comm'r*, 161 W.Va. 299, 303, 242 S.E.2d 443, 445 (1978) (Occupational pneumoconiosis “often does not become manifest until years after the victim was last exposed to the causes of the disease.”). It is from that initial date of disability that benefits shall be calculated and paid in PPD cases of OP under West Virginia Code Section 23-4-18.¹

In these cases, the OP Board did not clearly determine the miners’ date of disability, and the Employers did not commence payment of benefits until following the issuance of their order setting forth the findings of the OP Board. The Petitioners urge that, in the absence of a clearing date of disability being determined by the OP Board, the date of disability for commencement of payments should be the first date on which the OP Board credited pulmonary function testing that supported the impairment rating assigned by the OP Board.

a. Standard of Review

The standard of review of the Board’s decisions by the forth in West Virginia Code § 23-5-12a(b) (2022), in part, as follows:

The Intermediate Court of Appeals may affirm the order or decision of the Workers’ Compensation Board of Review or remand the case for further proceedings. It shall

¹ Further procedures for management of OP claims do not shed additional light on where or how the date of disability is to be calculated, as set forth in the rules for the Medical Management of Claims pertaining to OP (W. Va. Code of St. R. § 85-20-52) or the Procedural Rule of the Board of Review (W. Va. Code of St. R. § 102-1-11).

reverse, vacate, or modify the order or decision of the Workers' Compensation Board of Review, if the substantial rights of the petitioner or petitioners have been prejudiced because the Board of Review's findings are:

- (1) In violation of statutory provisions;
- (2) In excess of the statutory authority or jurisdiction of the Board of Review;
- (3) Made upon unlawful procedures;
- (4) Affected by other error of law;
- (5) Clearly wrong in view of the reliable, probative, and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Duff v. Kanawha Cnty. Comm'n, 247 W. Va. 550, 555, 882 S.E.2d 916, 921 (Ct. App.

2022).

The instant appeal is taken based on the Board's decisions below being in violation of statutory provisions of West Virginia Code Section 23-4-18.

b. Applying the Date of Disability in Dorsey's Case, Benefits Should Have Been Paid from September 2022 Because the OP Board Credited the Evidence that the Claimant was Permanently Partially Disabled Since that Date.

In Dorsey's case, the date of disability fell within the month of September 2022. The Employer did not commence benefits until October 2023 when it issued the 65% award. Typically, when a period of months elapses between the award of benefits and the date of disability indicated in the application, the Employer issues a back-payment making up for those intervening months. Despite the Claimant's repeated attempts to confer with the Employer in this matter, no such back-payment was issued.

The Employer failed to make payment monthly from the date of disability for this award of permanent partial disability. Accordingly, this Court should order the Employer to issue an appropriate back-payment for the thirteen (13) months from the date of disability in September 2022 through the date the Employer commenced making monthly payments in October 2023. At the rate of \$670.18 every two weeks, this thirteen-month back-payment amounts to 26 x \$670.18

= \$17,424.68. The total number of periodic payments under the Award would be coordinately reduced by twenty-six periods. The adjustment to the Award sought by the Claimant here would yield a total award of 234 payments of \$670.18 (totaling \$156,822.12 in periodic payments) and one back-payment of \$17,424.68. The sum of these 234 periodic payments (\$156,822.12) and back-payment (\$17,424.68) equals the same total Award as originally computed: \$174,246.80.

As to the appropriate rate of interest to assess on the unpaid arrearage, Petitioner urges that the Court should assess a rate of six percent (6%) that is customary under the workers' compensation statute. W. Va. Code 23-4-16A ("Interest on Benefits"). Six percent simple interest on the untimely-paid sum of \$17,424.68 equals \$1,045.48, for a total back-payment of \$18,470.16.

b. Applying the Date of Disability in Adkins' Case, Benefits Should Have Been Paid from April 2023 Because the OP Board Credited the Evidence that the Claimant was Permanently Partially Disabled Since that Date.

In Adkins' case, the date of disability fell within the month of April 2023 as indicated by Dr. Richard Spencer, and as relied upon by the OP Board. JA 040. The Employer did not commence benefits until January 2024 after issuing a 15% Award in December 2023.

The date of disability based on the examination by Dr. Spencer was April 2, 2023. JA 040. This is the same testing that the O.P. Board relied upon in reaching their finding of 15% impairment. The O.I.C. noted a date of injury on June 21, 2023 when they docketed their receipt of the application.

Typically, when a period of months elapses between the award of benefits and the date of disability, the Employer issues a back-payment making up for those intervening months. However, the Employer did not do so in this case.

The Employer failed to make payment monthly from the date of disability for this award of permanent partial disability. Accordingly, this Court should order the Employer to issue an appropriate back-payment for the nine (9) months from the date of disability in April 2023 through the date the Employer commenced making monthly payments in January 2024. At the rate of \$2912.09 every month, this nine-month back-payment amounts to $9 \times \$2912.09 = \$26,208.81$. The total number of periodic payments under the Award would be coordinately reduced by nine periods. The adjustment to the Award sought by the Claimant here would yield a total award of fifteen payments -- six payments of \$2912.09 (totaling \$17,472.54 in periodic payments) and one cumulative back-payment of \$26,208.81 for the nine-month arrearage. The sum of these six periodic payments (\$17,472.54) and back-payment (\$26,208.81) equals the following modified Award: \$43,681.35.

As to the appropriate rate of interest to assess on the unpaid arrearage, the Claimant urges that the Court should assess a rate of six percent (6%) that is customary under the workers' compensation statute. W. Va. Code 23-4-16A ("Interest on Benefits"). Six percent simple interest on the untimely-paid sum of \$26,208.81 equals \$1,572.52, for a total back-payment of \$27,781.33.

VI. CONCLUSION

For the foregoing reasons, and any others appearing to the Court, the Petitioners urge that the Court hold that the Occupational Pneumoconiosis Board is directed to specifically set forth the "date of disability" in its findings, and that Employers are required to issue a backpayment at the time they issue an order setting forth the findings of the OP Board, so that the periodic payments for such award of benefits are actually "paid from the date of disability" in accordance with the plain meaning of West Virginia Code Section 23-4-18.

**Petitioners,
Joseph Craig Dorsey and
John Adkins,
By counsel,**

/s/ Samuel B. Petsonk

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