

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

ICA EFiled: Sep 10 2024
11:56PM EDT
Transaction ID 74285409

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' REPLY BRIEF

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

Respectfully Submitted By:

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I. REPLY AS TO FACTS

There is no factual dispute as to the central material facts pertinent to the relief requested in this appeal. There is no factual dispute that the Occupational Pneumoconiosis Board did not identify the “date of disability” in its findings. There is no factual dispute that the Employers did not make periodic payments from the date of the O.P. Board’s examination of the Claimant-Petitioners.

a. John Adkins.

Respondent Blackhawk’s Response Brief did not contest or refute the factual assertions contained in the Petitioner’s Brief. To reiterate the most significant dates for this appeal:

- 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.
- The OP Board did not expressly identify the “date of disability” in its findings.
- Respondent Blackhawk did not calculate and pay benefits from any of the potential “dates of disability” identified in Petitioners’ Brief.
- Respondent Blackhawk instead calculated and paid benefits beginning after Blackhawk issued its award of benefits.

b. Joseph Craig Dorsey.

Respondent Blackhawk’s Response Brief did not contest or refute the factual assertions contained in the Petitioner’s Brief. To reiterate the most significant dates for this appeal:

- 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.*
- The OP Board did not expressly identify the “date of disability” in its findings.
- Respondent Marfork represented factually in its Response Brief: “For whatever the reason, the O.P. Board’s findings are not often forwarded to the claims administrator promptly and were not so in the instant claim, either.” Resp. Br. at 8.
- Respondent Marfork did not calculate and pay benefits from any of the potential “dates of disability” identified in Petitioners’ Brief.
- Respondent Marfork instead calculated and paid benefits beginning after Marfork issued its award of benefits.

II. REPLY TO RESPONDENTS’ ARGUMENTS

No matter which date the O.P. Board identifies as the “date of disability” upon remand, this Court should order that Employers must comply with the statutory mandate of West Virginia Code Section 23-4-18 to make periodic payments from that date of disability---which they failed to do. There is no factual dispute as to the central material facts pertinent to the relief requested in this appeal. There is no factual dispute that the Occupational Pneumoconiosis Board did not identify the “date of disability” in its findings. There is no factual dispute that the Employers did

not make periodic payments from the date of the O.P. Board's examination of the Claimant-Petitioners.

Respondents Marfork and Blackhawk make much ado of the fact that the cases addressing the "date of disability" under the workers' compensation statute relate to permanent total disability, rather than permanent partial disability. However, these arguments entirely miss the point that Petitioners' arguments are based on the plain meaning of those words in the statute (which are directly pertinent to the question at issue in the instant appeals regarding the date for commencement of payments), and that the "date of disability" must be determined by the factfinder.

In the cases below of Messrs. Adkins and Dorsey, the factfinder failed to identify the "date of disability" in their findings. That is why these cases should be remanded so that the OP Board can identify the "date of disability" and thereby put the Respondent-Employers on notice of the date from which their periodic payments must be made in accordance with the plain meaning of W. Va. Code § 23-4-18.

Once the "date of disability" is identified by the factfinder, the Employer or its Third-Party Administrator is on notice to issue an appropriate backpayment comprising a lump sum of all periodic payments that were due between the date of disability and the date on which they began making periodic forward-going payments in these cases. In these cases of Messrs. Adkins and Dorsey, the Respondents did not commence any such payment until after issuing their awards, many months following the OP Board's exam, and also months after the issuance of the OP Board's findings.

The reason why Employers should be held to the plain meaning of the statute and commence benefits from the date of disability (rather than whatever later date they please) is

highlighted when Respondent Marfork states “For whatever the reason, the O.P. Board’s findings are not often forwarded to the claims administrator promptly and were not so in the instant claim, either.” Substantial delays occur in the administrative processing of workers’ compensation payments. The Legislature did not intend for workers’ to bear the risk of deferred payment due to administrative delay. The statute is clear that the date from which payments are to be computed and paid is the date of disability. The OP Board must expressly ascertain and state the “date of disability” in its findings so that third-party administrators and employers are clearly on notice to compute and pay benefits from that date, which Respondents failed to do here.

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. However, this Court should remand these cases and direct the OP Board to make that determination expressly in its findings.

III. CONCLUSION

For the foregoing reasons, and any others appearing to the Court, the Petitioners urge that the Court hold that the OP Board is directed to expressly set forth the “date of disability” in its findings, and that Employers are required to compute and pay benefits beginning on that date (including any necessary backpayment to catch up on the periodic payments at the time the Employers issue an award and begin making forward-going periodic payments pursuant to that award), 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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