

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS
CHARLESTON, WEST VIRGINIA

JOHN LOVAS,

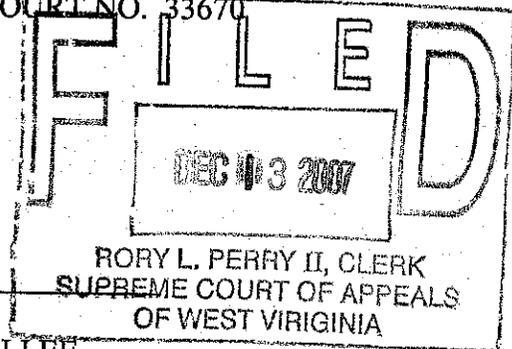
Appellant,

vs.

WEST VIRGINIA OFFICE OF
INSURANCE COMMISSION and
CONSOLIDATION COAL COMPANY,

Appellees.

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/ WORKERS' COMPENSATION
/ CLAIM NO. 2000-11537
/ BOARD OF REVIEW NO. 78056
/ DOI 8/13/99
/ OOJ CASE ID NO. OOJ-A200-011537
/
/ SUPREME COURT NO. 33670
/
/
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BRIEF ON BEHALF OF APPELLEE,
CONSOLIDATION COAL COMPANY,
ON APPEAL FROM AN ORDER OF THE
WORKERS' COMPENSATION BOARD OF REVIEW
CERTIFIED ON APRIL 11, 2007

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**THE KIND OF PROCEEDING AND NATURE OF
RULING OF LOWER TRIBUNAL**

This is an appeal by the claimant, "Appellant", John Lovas, from an Order of the Workers' Compensation Board of Review, certified on April 11, 2007. By that Order, the Board of Review affirmed the Administrative Law Judge's Decision dated August 24, 2006, which affirmed the prior Claims Administrator's ("CA") Order of February 22, 2006, administratively closing the claim for medical benefits. The Appellant appeals from the Board of Review's Order of April 11, 2007, asserting that W.Va. CSR § 85-1-14.1 and W.Va. Code § 23-4-16(a)(4) are in conflict with one another, and so the administrative closure permitted by W.Va. CSR § 85-1-14.1 is contrary to statute; therefore, the claim should remain open for medical treatment.

STATEMENT OF FACTS

At issue is whether the CA's administrative closure of the claim pursuant to W.Va. CSR § 85-1-14.1 was proper. The closure was based upon the fact that the Appellant had not received medical treatment in this claim since January 21, 2002, more than four (4) years prior to the CA's February 22, 2006 administrative closure Order. See, Appellee's Exhibit No. 1.

In support of the Appellant's protest to the administrative closure Order, he submitted a closing argument dated June 23, 2006, whereby he argued that W.Va. CSR §85-1-14.1 and W.Va. Code §23-4-16(a)(4) are in conflict with one another, and so the administrative closure permitted by W.Va. CSR §85-1-14.1 is contrary to statute.

The Office of Judges affirmed the CA's closure Order by Decision dated August 24, 2006. See, Appellee's Exhibit No. 2. The Decision addressed the common argument of conflict between W.Va. CSR §85-1-14.1 and W.Va. Code §23-4-16(a)(4), and held that the Code of State Rules is not contrary to the West Virginia Code.

Upon the Office of Judges' affirmation of the CA's Order, the Appellant filed his appeal to the Board of Review. The Board of Review by its Order dated April 11, 2007, affirmed the Administrative Law Judge's Decision dated August 24, 2006. See, Appellee's Exhibit No. 3. The Appellant filed his petition to the Supreme Court with regard to the April 11, 2007 Order of the Board of Review. By Order dated October 24, 2007, the Supreme Court of Appeals granted Appellant's said petition. See, Appellee's Exhibit No. 4.

THE RULINGS OF THE COMPENSATION COMMISSION

By Order dated February 22, 2006, the CA administratively closed the claim pursuant to W.Va. CSR § 85-1-14.1, as the Appellant had not received medical treatment in this claim within six (6) months prior to the CA's Order. The Appellant filed a timely protest.

By Administrative Law Judge Decision dated August 24, 2006, the Office of Judges affirmed the CA's Order of February 22, 2006. The Appellant filed a timely appeal.

On April 11, 2007, the Board of Review affirmed the Administrative Law Judge's Decision of August 24, 2006, which affirmed the prior Order of February 22, 2006, administratively closing the claim for medical benefits. The Appellant filed an appeal to the Supreme Court asserting that W.Va. CSR § 85-1-14.1 and W.Va. Code § 23-4-16(a)(4) are in conflict with one another, and so the administrative closure permitted by W.Va. CSR § 85-1-14.1 is contrary to statute; therefore, the claim should remain open for medical treatment.

By Order dated October 24, 2007, the Supreme Court of Appeals granted the Appellant's petition for appeal.

ASSIGNMENT OF ERROR

The West Virginia Workers' Compensation Board of Review affirmed the final Order of the Workers' Compensation Office of Judges dated August 24, 2006, which affirmed the prior

Order of February 22, 2006, administratively closing the claim for medical benefits. The Board of Review held that:

The Workers' Compensation Board of Review has completed a thorough review of the record, briefs, and arguments. As required, the Workers' Compensation Board of Review has evaluated the decision of the Office of Judges in light of the standard of review contained in West Virginia Code § 23-5-12, as well as the applicable statutory language as interpreted by the West Virginia Supreme Court of Appeals.

Upon our review of this case, we have determined to affirm the decision of the Office of Judges. The Board adopts the findings of fact and conclusions of law of the Administrative Law Judge's Decision of August 24, 2006, which relate to the issue on appeal, and the same are incorporated herein by reference, made a part hereof, and are ratified, confirmed and approved.

POINTS OF LAW AND CITATION OF AUTHORITIES

Statutory Closure of Claims

Pursuant to W.Va. CSR §85-1-14.1, Special Rules on Closure of Claims:

Medical benefits in all no lost time claims and claims for temporary total disability benefits shall cease and the claim administratively closed six (6) months after the last date of service in the claim. A protestable order shall be issued by the Commission or private carrier upon said administrative closure. Nothing in this provision shall be deemed to abridge an injured worker's right to attempt to reopen the claim at a later date under applicable law.

Pursuant to W.Va. Code §23-4-16(a)(4):

With the exception of the items set forth in subsection (d), section three [§23-4-3] of this article, in any claim in which medical or any type of rehabilitation service has not been rendered or durable medical goods or other supplies have not been received for a period of five years, no request for additional medical or any type of rehabilitation benefits shall be granted nor shall any medical or any type of rehabilitation benefits or any type of goods or supplies be paid for by the commission if they were provided without a prior request. For the exclusive purposes of this subdivision, medical services and rehabilitation services shall not include any encounter in which significant treatment was not performed.

Standard of Review

According to W. Va. Code § 23-5-12(b), the Board may affirm the Order or Decision of the Administrative Law Judge or remand the case for further proceedings. It shall reverse, vacate or modify the Order or Decision of the Administrative Law Judge if the substantial rights of the appellant or appellants have been prejudiced because the Administrative Law Judge's Findings are:

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

ARGUMENT

The Board of Review's Order dated April 11, 2007, which affirmed the Administrative Law Judge's Decision of August 24, 2006 affirming the CA's February 22, 2006 administrative closure of the claim pursuant to W.Va. CSR §85-1-14.1 was correct and so should stand, as the Appellant has not received medical treatment in this claim since January 21, 2002.

The Appellant's argument in his Petition is that W.Va. Code §23-4-16(a)(4) is in conflict with W.Va. CSR §85-1-14.

The Co-Existence of W.Va. Code §23-4-16(a)(4) and W.Va. CSR §85-1-14

The Appellee now argues that W.Va. Code §23-4-16(a)(4) and W.Va. CSR §85-1-14 are not in conflict with one another and claimants suffer no prejudice when their employer's claims administrator chooses to invoke W.Va. CSR §85-1-14 and administratively close the claim after

six (6) months of medical treatment inactivity. W.Va. CSR §85-1-14 contains the following language: “Nothing in this provision shall be deemed to abridge an injured worker’s right to attempt to reopen the claim at a later date under applicable law.” West Virginia law, specifically W.Va. Code §23-4-16(a)(4), clearly confers upon claimants the right to reopen a claim for up to five (5) years after the last date of service and W.Va. CSR §85-1-14 does nothing to abridge that right.

Furthermore, W.Va. CSR §85-1-14 provides claims administrators with a valuable bookkeeping tool. Claims administrators, including both BrickStreet Administrative Services and other third-party administrators, manage thousands of claim files. Many of those files are simple, uncontested injuries from which claimants quickly recover and return to full, unmodified employment. To keep these files open for a full five (5) years does not make economical bookkeeping sense. Read together, W.Va. CSR §85-1-14 and W.Va. Code §23-4-16(a)(4) provide claims administrators with an avenue for creating a “holding area” for files during the period of six (6) months to five (5) years of inactivity. Allowing such inactive files to be placed on the back burner for a four-and-a-half year period permits claim administrators more time to deal with the complex, active files that rightfully demand most of the administrators’ attention.

Finally, it must be noted that claimants suffer no prejudice from the two (2) closure periods set forth in W.Va. CSR §85-1-14 and W.Va. Code §23-4-16(a)(4); indeed, *the Appellant herein has failed to allege that he has suffered from any prejudice.*

Lack of Continuing Medical Treatment

The fact remains that, as of the issuance of the CA’s February 22, 2006 administrative closure Order, the Appellant had last received medical treatment on January 21, 2002. Therefore, as the Appellant had not received medical treatment within six (6) months *as of the time of the*

CA's closure order, the administrative closure of the claim pursuant to W.Va. CSR §85-1-14.1 was correct. Should the Appellant warrant continued medical treatment in the future, he may follow the properly promulgated rules and procedures, and reopen the claim as necessary.

Accordingly, the Appellee asserts that the Board of Review's Order dated April 11, 2007, properly affirmed the Administrative Law Judge's Decision dated August 24, 2006, affirming the CA's administrative closure of this claim pursuant to W.Va. CSR §85-1-14.

CONCLUSION

The CA's Order administratively closing the claim was proper, as was the Administrative Law Judge's and the Board of Review's affirmation thereof, as the Petitioner had not received approved medical treatment in this claim within six (6) months prior to the CA's Order.

WHEREFORE, in light of the foregoing facts and law, it is the Appellant's position that the Board of Review, by its Order of April 11, 2007, properly affirmed the aforesaid Order of the Office of Judges dated August 24, 2006.

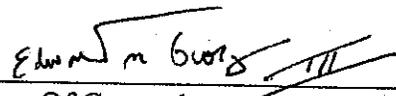
PRAYER FOR RELIEF

For the foregoing reasons, Consolidation Coal Company, respectfully prays that this Honorable Court affirm the Order of the Workers' Compensation Board of Review dated April 11, 2007, which affirmed the final Order of the Office of Judges dated August 24, 2006, which affirmed the prior Order of February 22, 2006, administratively closing the claim for medical benefits.

Respectfully submitted,

CONSOLIDATION COAL COMPANY

By

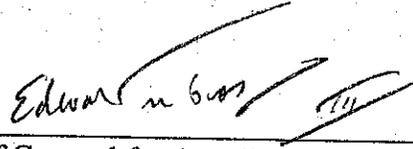


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CERTIFICATE OF SERVICE

Edward M. George, III, counsel for Appellee, Consolidation Coal Company, hereby certifies that the foregoing Brief on Behalf of Appellee was served upon Appellant by sending a true copy thereof, postage prepaid to M. Jane Glauser, Esq., Schrader, Byrd & Companion, PLLC, The Maxwell Centre, 32-20th Street, Suite 500, Wheeling, WV 26003, and also upon BrickStreet Administrative Services, addressed to the Supervisor, Workers' Compensation Defense Division, P.O. Box 4318, Charleston, WV 25364-4318, this ¹¹ 11 day of December, 2007.


Edward M. George, III

Of Counsel for Appellee