

BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLES W. BEVINS,

APPELLANT,

APPEAL NO.:35548

CLAIM NO.: 2000063565

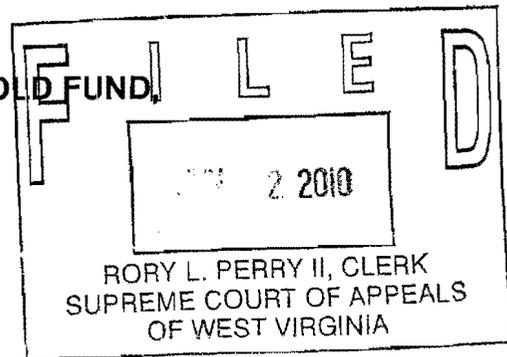
V.

**INSURANCE COMMISSIONER OF WV
IN ITS CAPACITY AS ADMINISTRATOR OF THE OLD FUND,**

AND

MOUNTAIN ENERGY LLC,

APPELLEES.



**APPELLEE'S BRIEF ON BEHALF OF
THE INSURANCE COMMISSIONER**

**OFFICE OF INSURANCE
COMMISSION OLD FUND,**

By Counsel,

**Anna L. Faulkner
State Bar No. 9480**

**Workers' Compensation Defense Division
Post Office Box 4318
Charleston, West Virginia 25364
(304) 558-0708**

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I. PROCEDURAL HISTORY

This case comes to this Honorable Court on appeal from an Order of the Workers' Compensation Board of Review dated June 4, 2009. That Order affirmed the Decision of the Workers' Compensation Office of Judges dated

¹ On December 31, 2005 at 11:59 p.m., pursuant to West Virginia Code §§ 23-2C *et. seq.*, and a proclamation of the Governor, the Workers' Compensation Commission was terminated. West Virginia Employers' Mutual Insurance Company, d/b/a BrickStreet Mutual Insurance Company, a private employer mutual insurance company, for claims with a date of injury of July 1, 2005 and thereafter. All earlier claims, such as the claim in issue here, remain a State of West Virginia obligation in what is statutorily referred to as the "Old Fund." The Old Fund is administered by the Insurance Commissioner. The Insurance Commissioner in its capacity as Administrator of the Old Fund is the real party-in-interest here. This pleading will refer to the Insurance Commissioner as Administrator of the Old Fund as the "Commissioner" when referring to events before and after January 1, 2006. The term "WCC" refers to the predecessor Workers' Compensation Commission and/or Division. This response is that of the "Commissioner."

October 27, 2008 which reversed an order of the claims administrator dated March 10, 2008 which denied reopening of the claim for temporary total disability benefits and granted temporary total disability benefits from November 27, 2007 through February 27, 2008. The Board of Review's Order should be affirmed because no reversible error was committed.

II. STATEMENT OF FACTS

The claimant herein sustained a compensable injury on May 30, 2000 to his back and ankle. The issue at hand arose pursuant to an application to reopen the claim for temporary total disability benefits signed by the claimant on December 10, 2007. On this application, in answer to the question "Have you retired?" the claimant answered, "I'm receiving Social Security Disability Insurance. I no longer work due to this injury." The claims administrator denied the reopening request by order of March 10, 2008. The claimant appealed.

In support of his protest, the claimant, by counsel, submitted his testimony by deposition dated April 16, 2008. The claimant testified about his injury and the treatment he has had. He testified about the complications he has had, including foot drop and surgery on his ankle as a result of the back injury. The claimant testified that he is no longer working because of this injury.

The claimant also submitted a report dated December 10, 2007 by Dr. Panos Ignatiadis who reported that the claimant is totally and permanently disabled due to the back injury and resulting foot drop.

The record also contains treatment records from Dr. Jeffrey Shook which document the claimant's condition following his ankle surgery.

The record shows that the claimant was receiving Social Security benefits, at least through February 1, 2008 at which time his case was to be reevaluated. This continuation of his benefits was based on an award letter dated March 28, 2005.

The Office of Judges reversed the claims administrator and granted the claimant temporary total disability benefits from November 27, 2007 through February 27, 2008.

The Board of Review reversed the Office of Judges and reinstated the claims administrator's order denying reopening for temporary total disability benefits.

III. ISSUE PRESENTED

Whether the Board of Review committed reversible error in its Order of June 4, 2009 finding that the claimant had no wages to replace and is therefore ineligible for temporary total disability benefits.

IV. STANDARD OF REVIEW

W.Va. Code §23-5-15 sets forth the standard of review of an appeal before this Court.

(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. If the court reverses or modifies a decision of the board pursuant to this subsection, it shall state with specificity the basis for the reversal or modification and the manner in which the decision of the board clearly violated constitutional or statutory provisions, resulted from erroneous conclusions of law, or was based upon the board's material misstatement or mischaracterization of particular components of the evidentiary record.

(d) If the decision of the board effectively represents a reversal of a prior ruling of either the commission or 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 provisions, is clearly the result of erroneous conclusions of law, or is so clearly wrong based upon the evidentiary record that even when all inferences are resolved in favor of the board's findings, reasoning and conclusions, there is insufficient support to sustain the decision. The court may not conduct a de novo re-weighing of the evidentiary record. If the court reverses or modifies a decision of the board pursuant to this subsection, it shall state with specificity the basis for the reversal or modification and the manner in which the decision of the board clearly violated constitutional or statutory provisions, resulted from erroneous conclusions of law, or was so clearly wrong based upon the evidentiary record that even when all inferences are resolved in favor of the board's findings, reasoning and conclusions, there is insufficient support to sustain the decision.

W. Va. Code, § 23-5-15 (2005).

Subsection (d) above applies to the case at bar. Therefore, the Board of Review can only be reversed if “the decision is in clear violation of constitutional or statutory provisions, is clearly the result of erroneous conclusions of law, or is so clearly wrong based upon the evidentiary record that even when all inferences are resolved in favor of the board's findings, reasoning and conclusions, there is insufficient support to sustain the decision.”

V. ARGUMENT

This Court has defined temporary total disability (hereinafter “TTD”) benefits as the “inability to return to substantial gainful employment requiring skills or activities comparable to those of one’s previous gainful employment during the healing or recovery period after injury.” Syl. Pt. 1, Allen v. Workers’ Comp. Com’r, 173 W.Va. 238, 314 S.E.2d 401 (1984). TTD benefits are “wage replacement” benefits. Canfield v. WV Division of Corrections, 217 W.Va. 340, 617 S.E.2d 887 (2005).

The claimant herein is receiving Social Security Disability benefits, or at least was receiving them at the time he applied for a reopening of this claim for TTD benefits. By receiving Social Security Disability benefits, the claimant has voluntarily removed himself from the workforce and therefore has no wages to replace.

85 C.S.R. 1 § 5.3 states:

5.3. If a period of disability includes a reasonably ascertainable period of time during which the injured worker would not have been compensated from his or her employer, then temporary total disability indemnity benefits shall not be paid during that period. This Section shall not apply to periods of

time caused by a reduction in force, lay-off, or time-off provided in connection with an employee benefit.

If the claimant has applied for and is receiving Social Security Disability benefits, he could not be working for the employer, or any employer, and he therefore would not receive compensation. He would not be receiving any wages. As a result, the receipt of Social Security Disability benefits is tantamount to ineligibility for TTD benefits.

The claimant has been receiving Social Security Disability benefits since at least March of 2005. He was not receiving TTD benefits at that time he began receiving Social Security Disability benefits nor any time thereafter. So the claimant was receiving Social Security Disability benefits, and not working, for over two years prior to requesting a reopening of this claim for temporary total disability benefits.

The claimant had removed himself from the workforce and therefore had no wages to replace and is therefore ineligible for TTD benefits.

The Board of Review was correct to reverse the Office of Judges because the Office of Judges violated the law in granting the claimant temporary total disability benefits when he was not entitled to receive them.

VI. CONCLUSION

The Commissioner respectfully requests that this Honorable Court affirm the Board of Review's order of June 4, 2009 because the claimant is not entitled to additional temporary total disability benefits as he had no wages to replace.

INSURANCE COMMISSIONER OF WV
IN ITS CAPACITY AS ADMINISTRATOR
OF THE OLD FUND

By counsel,

A handwritten signature in black ink, appearing to read 'Anna L. Faulkner', written over a horizontal line.

Anna L. Faulkner
State Bar No. 9480
Workers' Compensation Litigation Division
Post Office Box 4318
Charleston, West Virginia 25364
(304) 558-0708

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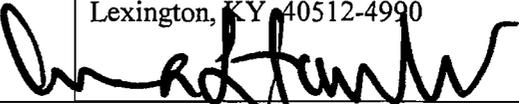
AND

MOUNTAIN ENERGY LLC,

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CERTIFICATE OF SERVICE

I, Anna L. Faulkner, Legal Counsel to the Office of Insurance Commission Old Fund, do hereby certify that copies of the foregoing "APPELLEE'S BRIEF ON BEHALF OF THE INSURANCE COMMISSIONER" was served upon the parties of record this 1ST day of June, 2010, by United States Mail, to the following persons properly addressed as follows:

<u>HAND DELIVERY</u> The Honorable Rory L. Perry, II, Clerk West Virginia Supreme Court of Appeals Capitol Complex, Building 1, Room E-317 1900 Kanawha Boulevard, East Charleston, WV 25305-0831	<u>U.S. MAIL</u> William Gerwig, III, Esquire PO Box 3027 Charleston, WV 25331
<u>U.S. MAIL</u> Mountain Energy, LLC 623 Industrial Park Road Beaver, WV 25813	<u>U.S. MAIL</u> Sedgwick CMS – Charleston PO Box 14490 Lexington, KY 40512-4990 

Anna L. Faulkner (WV State Bar No. 9480)