

BEFORE THE STATE OF WEST VIRGINIA  
SUPREME COURT OF APPEALS

CHARLESTON

CHARLES W. BEVINS,

Petitioner,

SUPREME COURT NO: \_\_\_\_\_

BOR Appeal No.: 2042115  
BOR Order Date: 06/04/2009  
Claim No.: 2000063565  
D.O.I.: 05/30/2000

v.

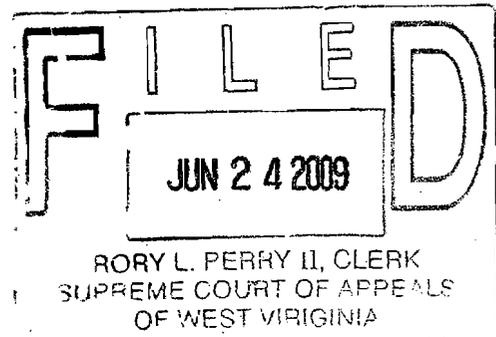
INSURANCE COMMISSIONER OF WEST VIRGINIA  
in its capacity as ADMINISTRATOR OF THE OLD FUND,

Respondent,

and

MOUNTAIN ENERGY, LLC,

Employer.



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**PETITION FOR REVIEW ON BEHALF OF  
CLAIMANT, CHARLES W. BEVINS**

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**I. ISSUE ON APPEAL**

Whether the claimant is entitled to temporary total disability benefits from November 27, 2007 through February 27, 2008, following surgery related to his occupational injury on May 30, 2000.

**II. STATEMENT OF THE CLAIM**

The claimant sustained serious injuries on May 30, 2000, in the course of and resulting from his employment. He herniated a disc in his low back and fractured his right ankle. The claimant underwent multiple surgeries.

The claimant's compensable ankle fracture resulted in a nonunion for which Dr. Jeffrey Shook installed an external fixation device. On November 27, 2007, Dr. Shook performed surgery to remove that device. (Exhibit A). On December 10, 2009, Dr. Shook completed a Claim Reopening Application indicating the claimant would be temporarily totally disabled post surgically from November 27, 2007 to February 27, 2008. (Exhibit B).

By order dated March 10, 2008, the Claims Administrator denied reopening citing a narrowly and strategically cropped excerpt from Section 85-1-5.2, which reads as follows: "If an individual retires he or she is disqualified from receiving temporary total disability benefits as a result of an injury received from the place of employment." The relevant uncited portion of Section 85-1-5.2 reads "This section ... shall not preclude payment of benefits if the compensable injury caused the individual to retire." The Claims Administrator also cited Workers' Compensation Rule 85-1-5.3 which limits the availability of temporary total disability benefits for seasonal workers to times of year when they actually would have worked had no injury been sustained. That section reads as follows: "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 employment, then temporary total disability indemnity benefits shall not be paid during that period. (Exhibit C).

The claimant protested the Claims Administrator's order dated March 10, 2008, denying reopening.

At a deposition on April 16, 2008, the claimant testified that he had not retired, but he is unable to work due to his injury on May 30, 2000, and related symptoms. But for this injury the claimant would still be working for Mountain Energy, LLC. The claimant also testified that he is

receiving Social Security Disability benefits but he has no guarantee they will continue because he will be periodically re-evaluated to determine whether he still qualifies. (Exhibit D).

By decision dated October 17, 2008, the Office of Judges reversed the Claims Administrator's order dated March 10, 2008, and granted the claimant temporary total disability benefits from November 27, 2007 through February 27, 2008. (Exhibit E). The Litigation Division appealed. By order dated June 4, 2009, the Board of Review reversed the Office of Judges' decision and reinstated the Claims Administrator's order denying reopening. It is from this order that the claimant petitions this Court for review.

### **III. LEGAL AUTHORITIES**

Allen v. State Workers' Compensation Commissioner,  
173 W.Va. 238, 314 S.E.2d 401 (1984)

Conley v. Workers' Compensation Division,  
199 W.Va. 196, 483 S.E.2d 542 (1997)

Frymier-Halloran v. Paige,  
193 W.Va. 687, 695, 458 S.E.2d 780, 788 (1995)

Harper v. State Workmen's Compensation Commissioner,  
160 W.Va. 364, 235 S.E.2d 779 (1977)

In re Queen,  
196 W.Va. 442, 473 S.E.2d 483 (1996)

Martin v. Randolph County Board of Education,  
195 W.Va. 295, 465 S.E.2d 399 (1995)

West Virginia Code §23-4-1g

West Virginia Code §23-4-1c

West Virginia Code §23-4-7a

West Virginia Code §23-5-12(b)

20 CFR § 404.310(a)

20 CFR § 404.409

20 CFR § 404.1505(a)

#### IV. ARGUMENT

The standard of review applicable to appeal from a decision of the OOJ is set out in West Virginia Code § 23-5-12(b). That section provides, in pertinent part, as follows:

[The Board of Review] shall reverse, vacate or modify [an] order or decision of the Administrative Law Judge if the substantial rights of the petitioner or petitioners 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.

The findings and conclusions of the Administrative Law Judge are to be treated with deference by the Appeal Board. Conley v. Workers' Compensation Division, 199 W.Va. 196, 483 S.E.2d 542 (1997). In addition, the "clearly wrong" standard which is sometimes referred to as the "plainly wrong" standard of review set out in West Virginia Code § 23-5-12(b) is a deferential one, which assumes an administrative tribunal's actions are valid as long as supported by substantial evidence. Syl. Pt. 3. In re Queen, 196 W.Va. 442, 473 S.E.2d 483 (1996). Frymier-Halloran v. Paige, 193 W.Va. 687, 695, 458 S.E.2d 780, 788 (1995). Conley v.

Workers' Compensation Division, 199 W.Va. 196, 483 S.E.2d 542 (1997). Rhodes supra.

Furthermore, determinations regarding credibility and reliability by an Administrative Law Judge were addressed by the Supreme Court in Martin v. Randolph County Board of Education, 195 W.Va. 297, 465 S.E.2d 399 (1995) wherein the Court stated that as a general rule, "we uphold the factual determinations, a matter reserved exclusively for the trier of fact." Accordingly, the Supreme Court noted that deference should also be given to an Administrative Law Judge's credibility determinations and inferences drawn from the evidence, despite what the Court [or Board] may perceive as other, more reasonable conclusions from the evidence. *Id.*

West Virginia Code §23-4-1g provides that the resolution of any issue shall be based on a weighing of all evidence pertaining to the issue and a finding that a preponderance of the evidence supports the chosen manner of resolution. The process of weighing evidence shall include, but not be limited to, an assessment of the relevance, credibility, materiality and reliability that the evidence possesses in the context of the issue presented. No issue may be resolved by allowing certain evidence to be dispositive simply because it is reliable and is most favorable to a party's interests or position. The resolution of issues in claims for compensation must be decided on the merits and not according to any principle that requires statutes governing workers' compensation to be liberally construed because they are remedial in nature. If, after weighing all of the evidence regarding an issue, there is a finding that an equal amount of evidentiary weight exists for each side, the resolution that is most consistent with the claimant's position will be adopted.

Preponderance of the evidence means proof that something is more likely so than not so. In other words, a preponderance of the evidence means such evidence, when considered and compared with opposing evidence, is more persuasive or convincing. Preponderance of the

evidence may not be determined by merely counting the number of witnesses, reports, evaluations, or other items of evidence. Rather, it is determined by assessing the persuasiveness of the evidence including the opportunity for knowledge, information possessed, and manner of testifying or reporting.

In order to reopen the claim the claimant is required to make a prima facie showing of a worsening of his condition. Harper v. Workers' Compensation Commissioner, 160 W.Va. 364, 235 S.E.2d 779 (1977).

West Virginia Code §23-4-1c provides for the payment of temporary total disability benefits during the healing or recovery period after an injury. Allen v. State Workers' Compensation Commissioner, 173 W.Va. 238, 314 S.E.2d 401 (1984). The claimant must submit medical evidence that he is unable to return to employment because of the compensable injury or disease. No temporary total disability benefits will be paid after the claimant has reached his or her maximum medical improvement, is released to return to work, or has returned to work, whichever first occurs. West Virginia Code § 23-4-7a.

On November 27, 2007, the claimant underwent surgical intervention as a direct result of injuries related to his occupational injury on May 30, 2000. Not even the Litigation Division has taken the position that the claimant was not temporarily disabled following his surgery. Instead, the Litigation Division argued that receipt of Social Security Disability benefits is tantamount to voluntary retirement from the work force and the claimant should be precluded from receiving temporary total disability benefits as a result of that "retirement" based upon Workers' Compensation rule 85-1-5.2 which denies temporary total disability benefits to claimants who retire unless retirement is caused by the compensable injury.

The Litigation Division's assumption that Social Security Disability and Social Security Retirement are one in the same is incorrect. Receipt of Social Security Disability benefits does not disqualify a claimant from receiving temporary total disability benefits. This claimant is receiving Social Security Disability benefits as a result of his occupational injury on May 30, 2000. He did not voluntarily retire from work and he is not receiving Social Security Retirement benefits.

The Social Security Administration makes a clear distinction between Social Security Disability and Social Security Retirement. Social Security Disability benefits are available to claimants who satisfy the requirements of CFR 404.1505(a) which defines disability as "the inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to last for a continuous period of not less than 12 months." Social Security Retirement benefits are entirely age based irrespective of a claimant's physical ability to work. To receive early Social Security Retirement benefits a claimant must be at least 62 years old. (CFR 404.310(a)). To receive full Social Security Retirement benefits a claimant must be at least 65 years and 2 months old and as old as 67 depending upon birth year. (CFR 404.409). This claimant is presently 53 years old. He does not qualify for retirement benefits which are age based. He did qualify for Social Security Disability benefits which are based upon inability to work. Social Security Retirement benefits and Social Security Disability benefits are distinctly different and should not be treated as though the terms of retirement and disability are interchangeable. They clearly are not.

§ 85-1-5.2 does not deny temporary total disability benefits to claimants who are receiving Social Security Disability benefits. It only denies temporary total disability benefits to some claimants who are receive Social Security Retirement benefits. Even if this claimant was 12

years older, which he is not, and if he were receiving Social Security Retirement benefits, which he is not, § 85-1-5.2 still would not preclude this claimant from receiving temporary total disability benefits.

West Virginia Workers' Compensation Rules recognize that workers may continue employment beyond the age eligible to receive Social Security Retirement benefits. Those workers who work beyond retirement age and sustain an injury may elect to accept Social Security Retirement benefits without sacrificing entitlement to workers' compensation temporary total disability benefits if that retirement is caused by the claimant's compensable injury. This claimant testified that he filed for and received social security disability benefits as a direct result of his occupational injury on May 30, 2000. As a result § 85-1-5.2 would not preclude this claimant from receiving temporary total disability benefits even if he had qualified and received Social Security Retirement benefits.

Although the Claims Administrator cited § 85-1-5.3 in its original order that rule merely limits seasonal workers (school teachers, fruit pickers, etc.) to temporary total disability benefits during the time of year they actually would have worked had they not sustained a compensable injury. This claimant worked in a coal mine year round. He was not a seasonal employee. As such § 85-1-5.3 does not apply to this claim and any argument based upon the language of this section should be disregarded as frivolous.

Dr. Shook and Dr. Ignatiadis reported that the claimant was temporarily and totally disabled post surgically due to his occupational injury and neither rule 85-1-5.2 nor rule 85-1-5.3 poses an obstacle to the claimant's entitlement to temporary total disability benefits. The Office of Judges was absolutely correct to grant the claimant temporary total disability benefits from November 27, 2007 through February 27, 2008, and by no fair interpretation of the facts or law

could any reasonable person conclude that the Office of Judges' decision to grant those benefits was somehow clearly wrong.

**V. CONCLUSION**

Please accept the claimant's petition for review and reinstate the Office of Judges' decision dated October 27, 2008, granting the claimant temporary total disability benefits from November 27, 2007 through February 27, 2008.

Respectfully submitted,

**CHARLES W. BEVINS**

By counsel

  
\_\_\_\_\_  
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**CERTIFICATE OF SERVICE**

I, William B. Gerwig, III, do hereby certify that the foregoing "*Petition for Review on Behalf of the Claimant, Charles W. Bevins*" has been served upon all parties of record by depositing a true and exact copy thereof, via the United States mail, postage prepaid and properly addressed on this 23rd day of JUNE 2009, as follows:

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