Welcome to the West Virginia Workers’ Compensation Webinars!

PERMANENT TOTAL DISABILITY

June 20, 2008
THE PTD APPLICATION

A Claimant cannot be considered for a permanent total disability award until a proper and fully completed PTD application is received by the Claims Administrator.
A proper and fully completed PTD application should provide, at a minimum, the following information.

- The Claimant’s name
- The Claimant’s Social Security number
- The Claimant’s injuries and dates of injuries.
- The Claimant’s date of birth
- The Claimant’s address
- The Claimant’s telephone number
- The Claimant’s current employment status
- Details regarding any efforts by the Claimant to apply for and/or receive Social Security benefits
- Details regarding any efforts by the Claimant to apply for and/or receive a retirement benefit of any type.
- A complete listing of all the Claimant’s workers’ compensation claims along with the claim number, date of injury, the injured body part, the impairment rating (if any) and the name of the Employer and the Employer’s insurer.
- All federal disability claims filed by the Claimant with any other state or federal agencies;
- Copies of all medical reports indicating that the Claimant has a permanent impairment.
- Information regarding any non-work related injuries or diseases.
- The Claimant’s prescription drug history
- The Claimant’s Employment history, including date of employment for each Employer
- The Claimant’s Military history
- The Claimant’s Education history
- The Claimant’s Medical history
THE PTD APPLICATION

As part of the application process, the Claimant must execute and update any and all Releases or Authorizations required by the Claims Administrator (i.e., releases or authorizations for medical records, federal tax records, social security records, etc. . . .)
The PTD Claim Process

Once a fully completed PTD application is received, there are a number of steps that must be taken in order to determine whether or not a Claimant is entitled to a PTD award. These steps can be described as follows:

Step 1  Can the Claim be reopened for PTD consideration?

Step 2  Does the Claimant meet the Eligibility Threshold?

Step 3  Does the Claimant meet the Whole Person Impairment Threshold?

Step 4  Is the Claimant entitled to a PTD award?
STEP 1: REOPENING A CLAIM FOR PTD CONSIDERATION

Once a properly completed PTD application is received, a determination must be made as to whether or not the Claimant’s PTD application has been timely filed within the meaning of W. Va. Code § 23-4-16.
STEP 1: REOPENING A CLAIM FOR PTD CONSIDERATION

A claim will not be reopened for PTD consideration unless the PTD application is filed within five years of the date of the initial permanent partial disability award in that claim.

*W. Va. Code § 23-4-16(a)(2).*
STEP 1: REOPENING A CLAIM FOR PTD CONSIDERATION

- Only **two** requests to reopen a claim for PTD consideration may be filed within 5 years of the date of the initial permanent partial disability award in the claim. *W. Va. Code § 23-4-16(a)(2).*

- If the request to reopen is in regard to an occupational disease or occupational pneumoconiosis claim, a new five year period begins upon the date of each subsequent permanent partial disability award. *W. Va. Code § 23-4-16(a)(2).*
STEP 1: REOPENING A CLAIM FOR PTD CONSIDERATION

- If it is determined that the Claimant’s PTD application was not filed within five years of the date of the initial permanent partial disability award in the claim, then a protestable decision should be issued denying reopening of the claim. *W. Va. Code § 23-4-16.*

- If, on the other hand, it is determined that the Claimant’s application has been timely filed within the meaning of *W. Va. Code § 23-4-16*, a protestable decision should be issued reopening the claim for PTD consideration.
STEP 2: THE ELIGIBILITY THRESHOLD

Once a claim has been reopened for PTD consideration, the next issue to be determined is whether the Claimant is eligible for a PTD award. In order to be eligible for a PTD award, the Claimant must pass the *Eligibility Threshold*. 
STEP 2: THE ELIGIBILITY THRESHOLD

In order for a Claimant to be eligible for a PTD award, he or she must meet one of the following three eligibility requirements as set forth in W. Va. Code § 23-4-6(n)(1):

1. The Claimant must have been awarded the sum of 50% in prior permanent partial disability awards;

2. The Claimant must have suffered a single occupational injury or disease which results in a finding that the Claimant has suffered a medical impairment of 50%;

3. The Claimant must have sustained a 35% statutory disability pursuant to the provisions of W. Va. Code § 23-4-6(f).

*Most often the eligibility threshold is determined by simply adding the Claimant’s prior PPD awards.*
STEP 2: THE ELIGIBILITY THRESHOLD

NOTE

- No percent of whole body medical impairment existing as the result of carpal tunnel syndrome may be included in determining whether a Claimant has satisfied the eligibility threshold. *W. Va. Code § 23-4-6(n)(4)(A).*

- No percent of whole body medical impairment existing as the result of any occupational disease, the diagnosis of which is based solely upon symptoms rather than specific, objective and measurable medical findings may be included in determining whether a Claimant has satisfied the eligibility threshold. *W. Va. Code § 23-4-6(n)(4)(B).*
STEP 2: THE ELIGIBILITY THRESHOLD

- If the Claimant is found to have at least 50% in prior permanent partial disability awards, then an protestable decision should be issued notifying the Claimant that he or she is eligible for consideration of a PTD award, and that further consideration will be given to their request for a PTD award.

- If, on the other hand, it is found that the Claimant does not have at least 50% in prior PPD awards, then a protestable decision should be issued denying the Claimant’s PTD application for failure to meet the eligibility requirements of W. Va. Code § 23-4-6(n)(1).
STEP 2: THE ELIGIBILITY THRESHOLD

NOTE
According to W. Va. Code § 23-4-16(b), the Claims Administrator should rule upon a timely and properly submitted PTD application within thirty days of receipt of the PTD application.
STEP 3: THE WHOLE PERSON IMPAIRMENT THRESHOLD

- If it is determined that a Claimant meets the Eligibility Threshold, the next issue to determine is whether or not the Claimant meets the Whole Body Medical Impairment Threshold.

- In order for a Claimant to be considered for a PTD award, he or she must be reevaluated by the PTD Reviewing Board or other reviewing body and found to have at least 50% in whole body medical impairment (or a 35% statutory award). This is called the whole body medical impairment threshold. *W. Va. Code § 23-4-6(n)(1).*
STEP 3: THE WHOLE PERSON IMPAIRMENT THRESHOLD

- To determine whether or not the Claimant satisfies the Whole Body Medical Impairment Threshold, the Claims Administrator must refer the claim to the PTD Reviewing Board or other reviewing body to reevaluate the Claimant’s whole person impairment.

- The Claims Administrator should conduct such examinations of the Claimant that he or she thinks is necessary and obtain all pertinent medical reports and examinations and forward them to the PTD Reviewing Board or other reviewing body for consideration. W. Va. Code § 23-4-6(j)(1).
STEP 3: THE WHOLE PERSON IMPAIRMENT THRESHOLD

- The PTD Reviewing Board or other reviewing body will reevaluate the Claimant’s whole body medical impairment to determine whether the Claimant has suffered a whole body medical impairment of 50% or more. W. Va. Code § 23-4-6(n)(1).

- In order for the Claimant to meet the whole body medical impairment threshold, the PTD Reviewing Board or other reviewing body must find that the Claimant has at least 50% in whole person impairment from all his compensable injuries/diseases (or a 35% statutory award).
STEP 3: THE WHOLE PERSON IMPAIRMENT THRESHOLD

What is the PTD Reviewing Board?

- Prior to privatization of the workers’ compensation system, the Workers’ Compensation Commission assembled the Interdisciplinary Examining Board (IEB) to review PTD applications and issue written recommendations as to whether a Claimant should be granted a PTD award. The Board was comprised of five experts; three medical experts and two vocational experts.

- The Board’s medical experts reevaluate the Claimant’s medical impairment to determine whether or not the Claimant has the requisite 50% in whole body medical impairment necessary for further consideration of a PTD award. If the medical experts determine that the Claimant does in fact have 50% or more in whole person impairment, then the Board’s vocational experts will determine whether or not the Claimant is capable of returning to work.
STEP 3: THE WHOLE PERSON IMPAIRMENT THRESHOLD

NOTE

The West Virginia Office of the Insurance Commissioner, private carriers and self insured employers may form their own reviewing bodies to conduct reviews of permanent total disability applications. *W. Va. Code § 23-4-6(j).*

Currently, BrickStreet Mutual Insurance offers use of their internal Reviewing Body to the OIC and Self-Insured Employers for a fee. This Reviewing Board is comprised of members of the former Interdisciplinary Examining Board, which terminated with the Workers’ Compensation Commission on December 31, 2005. The Reviewing Body at BrickStreet Mutual Board is made up of three physicians with specialties and expertise in evaluating medical impairment, and two vocational rehabilitation specialists who are qualified to evaluate the ability of a Claimant to perform gainful employment with or without retraining.

The OIC is currently in the process of assembling a Reviewing Body to be utilized by Insurance Carriers in the private workers’ compensation market for a fee.
STEP 3: THE WHOLE PERSON IMPAIRMENT THRESHOLD

The Initial Recommendations

- If the Board or other reviewing body determines that the Claimant does not have at least 50% in whole body medical impairment, then the Board or other reviewing body will issue a written Initial Recommendation recommending that the Claimant’s request for a PTD award be denied for failure to meet the 50% whole body medical impairment threshold (or failure to have a 35% statutory award). *W. Va. Code § 23-4-6(j)(5).*

- *All parties must be given 30 days to respond in writing to the Board’s or reviewing body’s Initial Recommendations.* *W. Va. Code § 23-4-6(j)(5).*
STEP 3: THE WHOLE PERSON IMPAIRMENT THRESHOLD

The Final Recommendations

After the 30 day response period to the Initial Recommendations has expired, the Reviewing Board of other reviewing body will reconvene to reconsider the Claimant’s request for a PTD award. If the Reviewing Board or other reviewing body again concludes that the Claimant does not have at least 50% in whole body medical impairment, then the Board or other reviewing body will issue Final Recommendations recommending that the Claimant’s request for a PTD award be denied for failure to meet the 50% whole body medical impairment threshold. W. Va. Code § 23-4-6(j)(5).
STEP 3: THE WHOLE PERSON IMPAIRMENT THRESHOLD

The PTD Reviewing Board’s Final Recommendations will be effectuated by the entry of a protestable decision from the Claims Administrator. *W. Va. Code § 23-4-6(j)(5).*
STEP 3: THE WHOLE PERSON IMPAIRMENT THRESHOLD

NOTE
A claim determined to be eligible for consideration of a PTD award must be ruled upon by the Permanent Total Disability Reviewing Board or other reviewing body within one year from the date such eligibility was determined. W. Va. Code R. § 85-5-3.9.

This period may be extended at the request of the Employer or Claimant.
STEP 4: ENTITLEMENT TO A PTD AWARD

If the PTD Reviewing Board or other reviewing body determines that the Claimant has sustained at least 50% or more in whole body medical impairment, then the Reviewing Board’s or other reviewing body’s vocational experts will review the vocational evidence to determine whether the Claimant is entitled to a PTD award within the meaning of W. Va. Code § 23-4-6(n)(2).
In order for a Claimant to be entitled to a PTD award, the Claimant must be unable to engage in substantial gainful activity requiring skills or abilities which can be acquired or which are comparable to those of any gainful activity in which the Claimant has previously engaged with some regularity. *W. Va. Code § 23-4-6(n)(2).*
STEP 4: ENTITLEMENT TO A PTD AWARD

- The comparability of pre-injury income and post-disability income will not be a factor in determining permanent total disability. *W. Va. Code § 23-4-6(n)(2).*

- Gainful activity must be available within a 75 mile driving distance of the Claimant’s residence, or within the distance from the Claimant’s residence to his or her pre-injury employment, whichever is greater. *W. Va. Code § 23-4-6(n)(2).*
STEP 4: ENTITLEMENT TO A PTD AWARD

- If the Reviewing Board or other reviewing body determines that the Claimant is entitled to a PTD award, then the Board or reviewing body will issue written Final Recommendations recommending that the Claimant be granted a PTD award.

- If the Reviewing Board or other reviewing body determines that the Claimant is not entitled to a PTD award, then the Board or reviewing body will issue written Final Recommendations recommending that the Claimant be denied a PTD award.

- Regardless of the outcome, the Board’s or reviewing body’s Final Recommendations must be effectuated by the entry of a protestable decision from the Claims Administrator.
ONSET DATE OF PERMANENT TOTAL DISABILITY

Once a Claimant has been found to be PTD, a determination must be made as to when the Claimant became disabled. The onset date of disability will be the date that a properly completed and supported application for PTD benefits was filed with the Claims Administrator. W. Va. Code § 23-4-6(j)(5).

However, the onset date may not be sooner than the date upon which the Claimant meets the 50% eligibility threshold. W. Va. Code § 23-4-6(j)(5).
STATUTORY PRESUMPTION

- A single or aggregate permanent disability of 85% or more entitles the Claimant to a rebuttable presumption of permanent total disability. *W. Va. Code § 23-4-6(d)*

- In order to achieve the statutory presumption, the Claimant must have at least 50% in whole body medical impairment or have sustained a thirty-five percent (35%) statutory disability. *W. Va. Code § 23-4-6(d)*.

- The presumption may be rebutted if the evidence establishes that the Claimant is not permanently and totally disabled. *W. Va. Code § 23-4-6(d).*

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STATUTORY DISABILITIES CONCLUSIVELY PRESUMED TO RESULT IN PTD

- Loss of both eyes or sight in both eyes
- Loss of both hands or the use of both hands
- Loss of both feet or the use of both feet
- Loss of one hand and one foot or the use of one hand and one foot.

W. Va. Code § 23-4-6(m)
STATUTORY BAR FOR RECIPIENT’S OF OLD-AGE RETIREMENT BENEFITS

- No Claimant shall be awarded PTD benefits who terminates active employment and is receiving full old-age retirement benefits under the Social Security Act. *W. Va. Code § 23-4-24.*

- This statutory provision is not applicable in any claim in which the Claimant has completed the submission of his or her evidence on the issue of PTD prior to terminating active employment or the initial receipt of full old-age retirement benefits. *W. Va. Code § 23-4-24.*
BENEFITS

- Maximum weekly PTD benefits are computed based on 66 and 2/3% of the average weekly wage earnings, not to exceed 100% of the average weekly wage in West Virginia. *W. Va. Code § 23-4-6(b).*

- Minimum weekly PTD benefits shall not be less than 33 and 1/3% of the average weekly wage in West Virginia (not to exceed federal minimum hourly wage). *W. Va. Code § 23-4-6(b).*

- PTD benefits terminate once the Claimant attains age 70. *W. Va. Code § 23-4-6(n)(2).*
BENEFITS

- If the Claims Administrator grants an award of PTD, those benefits must be mailed or delivered to the Claimant within fifteen (15) working days from the date of the award. *W. Va. Code § 23-4-1d.*

- *PTD Benefits cannot be stayed.* 85 W.Va. CSR 1-17.5.
If any decision is made granting PTD benefits, and a protest or petition for appeal is filed, payment of monthly benefits must begin. However, any payment for a back period of benefits from the onset date of disability to the date of the award shall be limited to a period of twelve months. *W. Va. Code § 23-4-1d.*

If after the completion of litigation the PTD award is upheld, the Claimant shall receive the remainder of the benefits due him or her. *W. Va. Code § 23-4-1d.*

Moreover, if the Claimant is owed any additional payment of back permanent total disability benefits, the Claims Administrator shall pay not only the sum owed the Claimant, but shall also add 6% interest from the date of the initial award granting PTD to the date of the final Order upholding the award. *W. Va. Code § 23-4-1d.*
REDUCTION OF BENEFITS

If a Claimant earns wages while receiving PTD benefits, the Claimant’s benefits should be reduced one dollar for each two dollars that the sum of the Claimant’s current monthly benefits and net wages exceed 120% of the monthly net wages earned by the Claimant during his or her last pre-disability employment.  *W. Va. Code § 23-4-25(b).*
REDUCTION OF BENEFITS

- If a Claimant receiving PTD benefits is also receiving payments under a self-insurance plan, a wage continuation plan or a disability insurance policy provided by an employer, the Claimant’s PTD benefits should be reduced by:

  - The after-tax amount of the payments received or being received under a self-insurance plan, a wage continuation plan or under a disability insurance policy provided by an employer if the employee did not contribute directly to the plan or the payment of premiums regarding the disability insurance policy; or

  - The proportional amount, based on the ratio of the employer’s contributions to the total insurance premiums for the policy period involved, of the after-tax amount of the payments received or being received by the employee pursuant to a disability insurance policy provided by an employer if the employee did not contribute directly to the payment of premiums regarding the disability insurance policy.

  However, in no event, will the benefits be reduced below the minimum weekly benefits (33 and 1/3% of the average weekly wage in West Virginia.)

A Claims Administrator may elect to have any recipient of a PTD award undergo one independent medical examination during each of the first five years that a PTD award is paid, and one independent medical examination during each three year period thereafter until the Claimant reaches age 70. *W. Va. Code § 23-4-6(o).*
MONITORING PTD AWARDS

- A Claims Administrator should continuously monitor PTD awards and may, after due notice to the Claimant, reopen a claim for reevaluation of the continuing nature of the disability and possible modification of the award. W. Va. Code § 23-4-16(d)(1).

- However, any PTD award granted as a result of a statutory disability conclusively presumed to be totally disabling (i.e., loss of both eyes, both hands, both feet) shall not be reopened for reevaluation. W. Va. Code § 23-4-16(d)(3).
A Claims Administrator may reopen a claim for reevaluation whenever it is determined that good cause exists to believe that the Claimant no longer meets the eligibility requirements for a PTD award. *W. Va. Code § 23-4-16(d)(1).*

Upon reopening such a claim, the Claims Administrator may take evidence, have the Claimant evaluated, or make findings of fact and conclusions of law. *W. Va. Code § 23-4-16(d)(2).*

The Claims Administrator may vacate, modify or affirm the original PTD award as the record requires. *W. Va. Code § 23-4-16(d)(2).*
MONITORING PTD AWARDS

- If a previously awarded PTD is reopened for reevaluation and the Claimant retains the PTD award, the Claimant’s attorney fees will be paid by the Claims Administrator. *W. Va. Code § 23-4-16(d)(2).*

- Additionally, the Claims Administrator shall reimburse a prevailing Claimant for his or her costs in obtaining one evaluation on each issue during the course of the reevaluation. *W. Va. Code § 23-4-16(d)(2).*
A Claimant may have only one active request for a permanent disability award pending in a claim at any one time. Any new request for a permanent disability award that is made while another request is pending should be consolidated into the first request.  

*W. Va. Code § 23-4-16(e).*
If a Claimant receiving PTD benefits dies from a cause other than the disabling injury, an award shall be made to any dependents of the decedent worker in an amount equal to 104 times the weekly benefit the decedent worker was receiving at the time of his or her death.

At the option of the dependent, these awards may be paid in either a lump sum or in periodic payments.
Functional Capacity Evaluation

A Functional Capacity Evaluation assesses the Claimant’s residual functional capabilities and establishes whether or not the Claimant can return to gainful activity in light of his functional limitations. Typically, FCEs measure both a Claimant’s material handling abilities (lifting, carrying, pulling, pushing), and a Claimant’s positional tolerances (sitting, standing and walking.)
Based upon the Claimant’s performance during the FCE, the FCE evaluator will typically place the Claimant into one of the following five physical demand classifications:

- Very Heavy Work
- Heavy Work
- Medium Work
- Light Work
- Sedentary Work
Once an FCE has accurately identified the Claimant’s physical demand level, a vocational expert is typically retained to offer an opinion as to whether or not the Claimant can return to gainful activity. The vocational expert will perform a labor market survey to objectively determine whether suitable employment is available within a 75 mile driving distance of the Claimant’s home.
EVIDENCE

THE LABOR MARKET SURVEY

- A good labor market survey will identify jobs which are both functionally and vocationally appropriate for the Claimant.

- A job is functionally appropriate if it is compatible with the Claimant’s physical demand level as defined by the FCE of record.

- For example, if the job in question is performed at the medium physical demand level, and the FCE indicates the Claimant can only perform sedentary level work, then that particular job is not functionally appropriate for the Claimant.
THE LABOR MARKET SURVEY

- A job is vocationally appropriate for the Claimant if it is compatible with the Claimant’s education, general intelligence, and transferable skills.

- For example, if the job in question requires a college degree, and the Claimant has only a high school education, then that particular job would not be vocationally appropriate for the Claimant.
OVERVIEW OF THE PTD CLAIMS PROCESS

Step 1: Has the Claimant’s application been submitted within five years of the date of the Claimant’s initial award of PPD in the claim?

*If yes*, then a protestable decision should be issued reopening the Claimant for PTD consideration, and the Claims Administrator should proceed to Step 2.

*If no*, then a protestable decision should be issued denying the Claimant’s request to reopen his claim for PTD consideration for failure to file the application within five years of the date of the initial permanent award in the claim.
OVERVIEW OF THE PTD CLAIMS PROCESS

Step 2: Does the Claimant have at least 50% in prior PPD awards?

If yes, then a protestable decision should be issued notifying the Claimant that he is eligible for a PTD award and that further consideration will be given to the Claimant’s request for a PTD award. Additionally, the Claims Administrator should conduct such examinations of the Claimant as he or she finds necessary and obtain all pertinent records concerning the Claimant’s medical history and reports of examinations and forward them to the PTD Reviewing Board or other reviewing body for consideration.

If no, then a protestable decision should be issued denying the Claimant’s PTD application for failure to meet the 50% eligibility threshold.
OVERVIEW OF THE PTD CLAIMS PROCESS

Step 3: Has the PTD Reviewing Board or other reviewing body determined that the Claimant has at least 50% in whole body medical impairment (or a 35% statutory award)?

If yes, then the PTD Reviewing Board’s or other reviewing body’s vocational experts will determine whether the Claimant can return to work within the meaning of W. Va. Code § 23-4-6(n)(2).

If no, then the PTD Reviewing Board or other reviewing body’s recommendations will be effectuated by a protestable decision denying the Claimant’s request for a PTD award for failure to meet the 50% whole body medical impairment threshold.
OVERVIEW OF THE PTD CLAIMS PROCESS

Step 4: Has the PTD Reviewing Board or other reviewing body determined that the Claimant is unable to return to work within the meaning of W.Va. Code § 23-4-6(n)(2) (2003)?

If yes, then the Board’s recommendation should be effectuated by a protestable decision granting the Claimant a PTD award.

If no, then the Board’s recommendation should be effectuated by a protestable decision denying the Claimant’s request for a PTD award.
CONTACT INFORMATION

West Virginia Offices of the
Insurance Commissioner

1-888-TRY-WVIC
1-888-879-9842

legal @wvinsurance.gov

www.wvinsurance.gov