WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #1

FILED

JUL 26 8 45 AM '94

OFFICE OF WEST VIRGINIA SECRETARY OF STATE

NOTICE OF PUBLIC HEARING ON A PROPOSED RULE

AGENCY: Bureau of Employment Programs Workers' Compensation Division TITLE NUMBER: 85

RULE TYPE: Exempt Legislative ; CITE AUTHORITY §21A-3-7(c); §23-1-1

AMENDMENT TO AN EXISTING RULE: YES___ NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: 18

TITLE OF RULE BEING PROPOSED: Procedures and Standards for Requests for Permanent Total Disability Awards

DATE OF PUBLIC HEARING: Two (1) August 10, 1994 9:00 a.m. (2) Sept 8, 94 TIME: 10.00 a.m.

LOCATION OF PUBLIC HEARING: (1) Parlors A & B Charleston Civic Center, Charleston, WV

(2) Large Court Room, WVU College of Law Morgantown, WV

COMMENTS LIMITED TO: ORAL___, WRITTEN___, BOTH X

COMMENTS MAY ALSO BE MAILED TO THE FOLLOWING ADDRESS:

John H. Kozak
Director, Legal Services Div.
P. O. Box 3922
Charleston, WV 25339-3922

Comments may be filed until September 23, 1994

The Department requests that persons wishing to make comments at the hearing make an effort to submit written comments in order to facilitate the review of these comments.

The issues to be heard shall be limited to the proposed rule.

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

Andrew N. Richardson
Authorized Signature

6.80

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Procedure and Standards for Requests for Permanent Total Disability Awards

Type of Rule: __X__ Exempt Legislative ____ Interpretive ____ Procedural

Agency Workers' Compensation Division, Bureau of Employment Programs

Address Attn: John H. Kozak, Director
Legal Services Division
P. O. Box 3922, Charleston, WV 25339-3922

1. Effect of Proposed Rule

	ANNUAL		FISCAL YEAR		
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
ESTIMATED TOTAL COST	$ 0	$ 0	$ 0	$ 0	$ 0
PERSONAL SERVICES					
CURRENT EXPENSE					
REPAIRS & ALTERNATIONS					
EQUIPMENT					
OTHER					

2. Explanation of above estimates:

These proposed rules will not affect the administration, appropriated budget of the division.

3. Objectives of these rules:

To describe the procedure and some of the standard to be used by the division in deciding claims for permanent total disability awards pursuant to West Virginia Code, §23-4-25(c).

Rule Title: Procedures and Standards for Requests for Permanent Total Disability Awards

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

None - These rules are largely procedural in nature.

B. Economic Impact on Political Subdivisions; Specific Industries; Specific groups of Citizens.

The proposed rules are intended to speed up the process for handling requests for permanent total disability awards and to make outcome more equitable and predictable. Doing so should favorably impact on the participants in the Workers' Compensation system and on the public at large.

C. Economic Impact on Citizens/Public at Large.

See response to B. above.

Date: July 22, 1994

Signature of Agency Head or Authorized Reprensentative

Andrew N. Richardson

Andrew N. Richardson
Commissioner

Bureau of Employment Programs
Legal Services Division
Post Office Box 3922
Charleston, West Virginia 25339-3922

Gaston Caperton
Governor
Andrew N. Richardson
Commissioner

SUMMARY OF PROPOSED EXEMPT LEGISLATIVE RULE

85 CSR 18

PROCEDURES AND STANDARDS FOR REQUESTS FOR PERMANENT TOTAL DISABILITY AWARDS

An earlier version of these proposed rules was filed with the Supreme Court of Appeals as a policy statement as part of a consent order. The promulgation of these rules will complete the requirements of that consent order.

These rules are intended to describe the procedures for filing and processing requests for permanent total disability rules and they further establish guidelines to be used by the workers' compensation division in making decisions on some of the issues those requests raise. The proposed rules describe time limitations on the division for handling the requests at the various stages of review that such requests must follow. In addition, the proposed rules are intended to complement and interact with the recently adopted exempt legislative rules "Vocational and Physical Rehabilitation," 85 CSR 15 (July 1, 1994). It is suggested that the reader have that set of rules available while reviewing these proposed rules.

In putting these rules out for public comment, the Compensation Programs Performance Council anticipates the receipt of suggestions for improving the rules in general and to generate public input into the development of these important standards. Such information will greatly assist the Council in formulating the final contents for these rules.

The Council intends to hold two public hearings on the proposed rules - one in Morgantown and one in Charleston - and requests written comments from the public as well.

TITLE 85
EXEMPT LEGISLATIVE RULES
STATE OF WEST VIRGINIA
BUREAU OF EMPLOYMENT PROGRAMS
WORKERS' COMPENSATION DIVISION

SERIES 18

PROCEDURES AND STANDARDS FOR REQUESTS FOR PERMANENT TOTAL DISABILITY AWARDS

§85-18-1. General.

1.1. Scope. -- The purpose of these rules is to implement the provisions of West Virginia Code, §23-4-6(n); §23-4-8; §23-4-9; and, §23-4-24(c).

1.2. Authority. -- West Virginia Code, §21A-3-7(c), §23-1-1, §23-1-13, §23-1-14, §23-1-15, §23-4-9, and §23-4-24(c). Pursuant to West Virginia Code, §21A-3-7(c), rules adopted by the compensation programs performance council and the commissioner are not subject to legislative approval as would otherwise be required under West Virginia Code, §29A-3-1 et seq. Public notice requirements of that chapter and article, however, must be followed. Pursuant to enrolled committee substitute for house bill 4030, regular session, 1994, the department of commerce, labor and environmental resources was abolished. Pursuant to that same bill and to executive order No. 5-94 by the governor, the commissioner of the bureau of employment programs is empowered to promulgate rules and regulations without the consent or approval of a departmental secretary.

1.3. Filing Date. --

1.4. Effective Date. --

1.5. The staff of the commissioner assigned to review and decide requests for permanent total disability awards must understand that their role is quasi-judicial in nature. They are not to be an advocate either for or against the request. They must not allow their own personal beliefs and standards to control their decision making processes. It is staff's individual duty and responsibility to apply in an objective fashion existing statutes, rules, and case law with regard to all aspects of a workers' compensation claim. An individual staff member's belief of what that law should be has no place in the handling of a claim.

1.6. These rules must be read in conjunction with the legislative rules "Vocational and Physical Rehabilitation," 85 CSR 15 (July 1, 1994).

1.6. These rules are applicable to requests for permanent total disability awards, including second injury life awards, that are made pursuant to the provisions of subdivision (c) of section twenty-four and of subdivisions (d) and (n) of section six all of article four of chapter 23 of the West Virginia Code of 1931, as amended. Claims and requests for permanent total disability awards not involving those two subdivisions are not controlled by these rules such as claims invoking the conclusive presumptions contained in subdivision (m) of the aforesaid section six. Such claims need not be processed under these provisions but should rather receive independent and expedited handling. In claims for occupational pneumoconiosis, proceedings are controlled by the procedures of the occupational pneumoconiosis board. Only those issues of an occupational pneumoconiosis claim that are not within the board's jurisdiction are to be handled as set forth herein. For example, in a request for a second injury life award, the previous injuries that are not for occupational pneumoconiosis are to be handled as required by these rules.

§85-18-2. Definitions.

As used in these rules, the following terms have the stated meanings unless the context of a specific use clearly indicates another meaning is intended.

2.1. "Commissioner" means the commissioner of the bureau of employment programs pursuant to West Virginia Code, §21A-2-1, and West Virginia Code, §23-1-1, and any deputies designated pursuant to West Virginia Code, §21A-2-12 & -13.

2.2. "Competent professional" means an individual who, by virtue of knowledge, skill, experience, training, or education, has scientific, technical, or other specialized knowledge that can be of assistance in making a decision. The individual must demonstrate his or her knowledge, skill, experience, training, or education specifically for the issue on which he or she will supply evidence. For example, if the individual has submitted a report and opinion on the state of a claimant's psychiatric condition, the individual must show his or her qualifications as a psychiatrist or psychologist in order for the report and opinion to be considered. It is expected that the Health Care Advisory Panel will issue guidelines for determining the qualifications of many of the professionals involved in reviewing a request for a permanent total disability award. As those guidelines are introduced, division staff will be required to follow them. Division staff must also consult the qualifications stated in the legislative rule "Vocational and Physical Rehabilitation," 85 CSR 15 (July 1, 1994).

2.3. "Days" when used to refer to a length of time in which to complete a task refers to state working days; that is calendar days but excluding Saturdays, Sundays, state holidays, and such other days as the governor may decree.

2.4. "Division" means the workers' compensation division within the bureau of employment programs as provided for by West Virginia Code, §21A-1-4, and West Virginia Code, §23-1-1 et seq.

2.5. "Filed" means actually received by the division.

2.6. "Rehabilitation services" means the same as that term is defined in the legislative rule "Vocational and Physical Rehabilitation," 85 CSR 15 (July 1, 1994). All services must be provided in a manner consistent with the standards adopted by the health care advisory panel and by the rule.

§85-18-3. Application form.

3.1. Attached to these rules is a form of application for use by claimants requesting consideration for a permanent total disability award including an award made under the second injury provisions of the statute. It is strongly urged that this form be used. The information solicited by the form must be provided as part of any request or during the review of the request. Failure to comply with this requirement will cause the filing of the request to be refused and the information provided will be returned to the sender.

3.2. The information requested by this form has been determined to be relevant and material for most instances. However, it is also anticipated that unusual circumstances will exist in individual claims. Hence, in addition to the information requested here, claimants are urged to file such other pertinent information as may exist.

3.3. The form is to be used in requesting awards for permanent total disability benefits and in requesting second injury life awards. These rules are written with the assumption that a second injury life award is a type of permanent total disability award. Wherever herein the term permanent total disability award, or a similarly phrased term, is used, the term shall be taken to include the concept of a second injury life award unless the context clearly indicates otherwise.

§85-18-4. Rulings upon requests.

4.1. West Virginia Code, §23-4-24(c), states, in part, as follows: "Any claim for permanent total disability benefits arising under said subdivisions shall first be presented to the commissioner as part of the initial claim filing or by way of an application for modification or adjustment pursuant to section sixteen" of article four and section one-a of article five of chapter twenty-three." The subdivisions referred to are subdivisions (d) and (n) of section six of article four of the chapter. West Virginia Code,

§23-4-24(c), applies to requests for both permanent total disability awards and for second injury life awards.

4.2. If a request for a permanent total disability award is made as part of the initial filing of a claim for occupational injury or disease or is made at any time prior to the initial decision upon the degree of permanent disability resulting from that injury or disease, then such request shall be processed as a matter of right on behalf of the claimant by the commissioner. That is, the commissioner will not refuse to review the claim for purposes of determination of permanent total disability including a second injury life award. The commissioner shall proceed with the gathering of relevant and material evidence on that issue commensurate with the evidence of record as required by section 5 and section 6 of these rules.

4.3. If a request for a permanent total disability award is made later in a claim (that is, at any time after the period set forth in subsection 3.2 above), then the commissioner will handle the request as a special request to reopen. In order for the request to be ruled upon in favor of the claimant, the following determinations must be made.

4.3.1. The request must meet the timeliness requirements of West Virginia Code, §23-4-16. If the request does meet those requirements, then further review will continue as noted below. If a determination is made that the request does not meet the section sixteen timeliness requirements, then an appealable order will be entered pursuant to West Virginia Code, §23-5-4b, limited to that jurisdictional finding. This order must be entered within the time period required by subdivision 4.4.1 and subdivision 4.4.2. On and after July 1, 1994, the order will be made subject to objection rather than appeal. In requests for second injury life awards, the timeliness standards are to be applied to the claim in which the second injury is asserted. The timeliness requirements to be applied are as follows:

a. in a claim that was closed without a permanent partial disability award being made, the request must be filed within five (5) years after the date of injury or date of last exposure. There is no limit on the number of such requests which may be filed during the five (5) year period.

b. in any claim in which temporary total disability benefits were paid, then the request must be filed within (5) years of the date of last payment of temporary total disability benefits. There is no limit on the number of such requests which may be filed during the five (5) year period.

c. in any claim in which

A. an award of permanent partial disability benefits was made, or

B. in which a previous award of permanent partial disability was increased by a later award, or

C. in which a previous award of permanent partial disability benefits was not made in the original processing of the claim, but a later award of permanent partial disability benefits was made as a result of a reopening,

then the request must be filed within five (5) years of the date of the last payment on any such award. During any specific five (5) year period, the claimant may file only two requests. Any third or more requests that may be filed during the five (5) year period must be denied. An example of the application of subparagraph "C" would be a paragraph "a" claim which was initially closed with no award and later reopened and an award of permanent partial disability benefits was made within the paragraph "a" five (5) years period. Under subparagraph "C", that claimant would then be able to file another two reopening requests within five (5) years of the last payment on the award.

4.3.2. If the subdivision 4.3.1 determination is made in the claimant's favor, the evidence submitted with the request to reopen by the claimant must be reviewed.

a. A determination on the merits of the claimant's request is not to be made at this time. Rather, the evidence must be reviewed as if it is true and correct. Subject to the provisions of subdivision 4.3.3, 4.3.4, and 4.3.5, if the evidence indicates that the claimant is permanently and totally disabled, then the request to reopen shall be granted and further review on the merits of the request commenced.

b. If the claimant is basing his or her request for a permanent total disability award upon the provisions of subdivision (d) of section six of the statute (that is, he or she has aggregated permanent partial disability awards in the amount of eighty-five (85%) percent or more), then the reopening request is to be granted. Reference should also be made to paragraph 6.5.5.e below.

c. The granting of the request to reopen does not confer benefits to the claimant; instead, it begins the procedures to determine if, in fact, the claimant is permanently and totally disabled. Since this determination is procedural in nature, the order granting this type of reopening is interlocutory in nature and is not subject to either objection or appeal. If, however, the request to reopen is denied, then an appropriate order denying the request shall be entered and shall be subject to objection by the claimant.

4.3.3. In order to support the request for reopening, the evidence submitted must not have been previously reviewed by the commissioner for the purposes of making a determination on the

degree of disability the claimant may suffer. Rather, the evidence must bring something new and additional to the record. The new evidence can be reviewed in conjunction with the evidence already of record in order to make the reopening decision. However, such evidence which may already be in the record cannot be used to contradict factual assertions made with regard to the state of facts alleged to exist at the time of the request. Such new factual assertions are to be taken as true.

4.3.4. Opinion evidence submitted by the claimant as part of the request to reopen must be elicited from a competent professional. Evidence on the degree of impairment that a claimant may suffer must be elicited from a medical professional or someone otherwise qualified to testify to the degree of impairment a claimant may suffer. The report and opinion on the degree of impairment must meet the requirements established by the Health Care Advisory Panel and the Compensation Programs Performance Council in order to be credible and reliable. Reference should be made to subsection 6.6 of these rules. Evidence on the degree of disability that a claimant may suffer must be elicited from a professional competent to provide that testimony and must also be consistent with the requirements established by Health Care Advisory Panel and the Compensation Programs Performance Council in order to be credible and reliable.

4.3.5. Any report and/or opinion that is not consistent with those requirements must be disregarded and not considered when making the reopening decision. The facts presented and relied upon by the competent professional must be accepted as true and correct at this time and must not have been previously considered as required by subdivision 4.3.3.

4.3.6. If a request is made to reopen a claim for consideration of awarding permanent total disability benefits where that claim has been previously considered as part of the basis for an earlier request for the awarding of a permanent total disability award as a second injury life award and where that previous request is pending for a final decision before the commissioner, the office of judges, the appeals board, or the Supreme Court of Appeals shall be refused by entry of an interlocutory order. Multiple proceedings on the same issue are an inefficient use of administrative and judicial resources and serve only to confuse the record. In the workers' compensation system, the parties are entitled to submit new evidence while the claim is pending before the office of judges. At the appeal board level, the parties can also submit additional evidence for the board to consider and to decide whether to remand the claim to the office of judges or the commissioner for further evidentiary proceedings. Evidence that is sought to be filed in support of any such duplicate request must be filed with the tribunal before whom the first request is pending. That tribunal may then either consider the evidence or remand the entire matter to the office of judges or the commissioner for further development.

4.3.7. Upon completion of a review of a request for a permanent total disability award if the request is denied and if the evidence of record indicates that a claimant may have suffered additional permanent partial disability as a result of a compensable injury, then the division staff shall determine whether there is pending an objection before the office of judges or an appeal before the appeals board or the Supreme Court of Appeals on any prior decision on the degree, if any, of permanent partial disability for that same compensable injury. If there is no such pending objection or appeal, then the division's staff shall, as part of the order denying the permanent total disability award request, enter a ruling on any such additional permanent partial disability as may have been proven. However, if there is such a pending objection or appeal, then the order denying the the permanent total disability award request shall not address the issue of any such additional permanent partial disability. Rather, the claimant should file such evidence with the tribunal before whom the objection or appeal is pending. That tribunal may then either consider the evidence or remand the entire matter to the commissioner for further development. This procedure will serve to conserve administrative and judicial resources and to avoid confusion of the record. It will also discourage abuse of the request for reopening process by those claimants whose real objective is to obtain and evaluation and possible increase in permanent partial disability benefits while that issue remains in litigation elsewhere. In addition, this requirement will allow the employer an opportunity to contest the issue prior to any additional award being made.

4.4. In any claim in which the claimant and/or the employer are represented by an attorney, the attorney must be provided a copy of anything sent to the claimant or employer. Also, it is mandatory that any report or other evidence that the division receives from its own examiners or from any other source must be sent to the claimant and the employer and their attorneys, if any. The following time periods shall be adhered to by the division's staff.

4.4.1. The division's staff shall begin the review of the request to reopen immediately upon its receipt. A determination shall be made within fifteen (15) days from the date on which the request to reopen was filed whether the application form has been completed and all required information has been provided. If not, then a letter requesting the additional information shall be mailed to the claimant within the aforesaid fifteen (15) day period.

4.4.2. If the determination is made that the application form has been completed and all requested information has been provided, then the division's staff shall review the claimant's records and claims on file with the commissioner and the evidence submitted with the request to reopen. Within thirty (30) days from the date on which the request to reopen was filed, an order will be entered either granting or refusing the request to reopen.

4.4.3. If additional information is requested pursuant to subdivision 4.4.1, the letter shall state that the claimant must either file the requested information within fifteen (15) days of the claimant's receipt of the letter or by that same time inform the division's staff of when the information will be supplied or that the information will not be provided. Upon the filing of either the information or the claimant's statement that the information will not be provided, the division's staff shall complete its review. This review shall be completed and an order entered either granting or denying the request to reopen within thirty (30) days of the filing of the information or statement.

4.4.4. If the claimant has not responded to the letter within twenty-one (21) days of its mailing to the claimant, then the division's staff shall presume that the claimant has refused to provide the requested information and shall proceed in keeping with subdivision 4.4.3.

§85-18-5. Time periods for review.

5.1. Once the reopening is permitted, then the division's staff shall review the claims records of the claimant and the evidence presented. Additional evidence may then be necessary and shall be obtained from the claimant, the employer, or the by the division's staff. If at any time during the review process, the division's staff concludes that further evidence is not necessary in order to grant the permanent total disability award, then further review may be terminated and an appropriate order, subject to objection, shall be entered. No denial of the request for permanent and total disability will be made until the division's staff has completed its gathering of evidence.

5.2. Either the claimant or the employer may submit evidence at any time during the division staff's review of the request. However, such evidence must be submitted before the expiration of the time period set forth below for final decision by the division's staff. The claimant and the employer shall be permitted to file only one report and opinion on each issue pending in the claim. Once filed, a report may not be withdrawn and another substituted in its place. The division's staff shall not itself cause the claimant to undergo more than one testing on any one issue from the same type of professional unless the circumstances clearly indicate that such extraordinary examinations are required as an exception to this requirement. Such extraordinary circumstances shall not include a simple desire for a second opinion by the division's staff. Before any such additional examination is scheduled, division staff must obtain the approval of either the director of the office of benefits management or of the legal services division.

5.3. The division's staff shall complete its initial review of the claimant's evidence and records and shall schedule all necessary appointments for examinations of the claimant within thirty (30)

days of the entry of the order granting the reopening. All referrals must be made in keeping with the pertinent requirements of the legislative rule "Vocational and Physical Rehabilitation," 85 CSR 15 (July 1, 1994). Due to the lack of sufficient numbers of professionals in many of the relevant areas, no absolute time period can be set for when the examination itself is to be conducted or when the reports on those examinations are to be filed. The commissioner has other projects underway for the purpose of increasing the numbers of professionals available for these tasks. In the meantime, division staff shall endeavor to have appointments actually set and examinations conducted within one hundred and eighty (180) days of the entry of the order granting the reopening. Examiners shall be requested to file their reports within thirty (30) days of the date of the examination. For these two specific purposes only, the one hundred and eighty (180) day period and the thirty (30) day period shall be inclusive of Saturdays, Sundays, holidays, and other emergency leave days.

5.4. Within thirty (30) days of the receipt by the division's staff of all reports and other information from the professionals who examined and evaluated the claimant on behalf of the commissioner, the division's staff shall complete its review of all the evidence and shall submit a draft decision and copies of all pertinent evidence, records, and information to the legal services division of the bureau for its review. If the claimant, without good cause, fails to cooperate with the scheduling of the examinations or in the performance of the examinations, the division's staff may consider whether to recommend the denial or suspension of the request. If the division staff decides to recommend the denial or suspension of the request, then that recommendation shall be given either to the director of the office of benefits management or to the legal services division for a review of the recommendation and a final decision on the issue.

5.5. Within fifteen (15) days of the receipt of the draft decision, the legal services division shall complete its review and shall cause the decision to be made final and to be mailed to the claimant and the employer and their respective attorneys, if any. If the decision denies or grants the request, it shall be subject to objection by the parties. The order may encompass a decision on the request for a permanent total disability award and such additional matters as may have arisen or made themselves evident during the review. If the decision is that there is a reasonable possibility that the claimant may be assisted by rehabilitation services in obtaining gainful and suitable employment, then the decision shall stay the proceedings on the request and the claimant shall be provided services all pursuant to the provisions of the legislative rule "Vocational and Physical Rehabilitation," 85 CSR 15 (July 1, 1994).

§85-18-6. Standards of review.

6.1. Case law has indicated on many occasions that workers' compensation claims' decisions do not lend themselves to easily stated formulas or rules of decision. The complexity and wide range of circumstances that can and do present themselves during the course of claims review precludes any easy decision making rules. This is especially true in claims for permanent total disability where the Court has stated: "Each case will be considered on the peculiar facts for the reason that what may be totally disabling to one person would only be slightly disabling to another of a different background and experience." Cardwell vs. SWCC, 301 S.E.2d 790, 791 (W.Va. 1983) Syllabus Point 2.

6.2. During the review of the merits of the claimant's request for a permanent total disability award, the division's staff is not to presume the correctness and truth of the claimant's evidence as was done in determining whether to permit the reopening of the claim. A decision on the merits requires that the division's staff determine what the facts of a given claim actually are. Evidence submitted by either the employer or the claimant or obtained by the division's staff is not entitled to any greater weight simply as a result of who submitted or obtained the evidence. Rather, each item of evidence is to be reviewed and given such weight as the circumstances and the law requires.

6.3. While the division's staff is not subject to the formal rules of evidence that operate in circuit court, evidence cannot be reviewed in an arbitrary or capricious manner. The review must be internally consistent and logical.

6.3.1. As a remedial program, the evidence must be considered in the light most favorable to the claimant. This does not mean, however, that the claimant's evidence is to be automatically accepted. Especially with regard to professional opinion evidence, the evidence must be reviewed for thoroughness, relevance, credibility, and reliability. Opinions offered by a competent professional must be supported by facts developed either during examinations or from the record or both. Unsupported opinions must be disregarded whether submitted by the claimant, the employer, or obtained by the division's staff. Consideration should be given to the professional's knowledge of the individual claimant and the professional's opportunity to observe and evaluate the claimant.

6.3.2. Reports must reflect that the examination was performed in keeping with all applicable requirements adopted by the Health Care Advisory Panel and that the opinion is supported by the facts obtained during that examination. The opinion itself must be shown to have been developed in accordance with all applicable requirements of the Health Care Advisory Panel; for example, impairment ratings must be calculated as required by the applicable provisions of "Guides to the Evaluation of Permanent Impairment," (4th ed. 1993), as published by the American Medical Association.

6.3.3. If following this evaluation, it appears that the claimant's evidence and that of the employer (or that obtained by the division's staff if contrary to that of the claimant) are of equal weight, then the claimant's version is to be accepted. If the opinions of record from competent professionals differ as to the ultimate finding of total disability and if the opinion offered by the claimant is found to be credible, reliable, and in accordance with all applicable requirements, then the claimant's request is to be granted and an appropriate order entered.

6.4. The burden of proof on the various issues arising during a permanent total disability review shifts between the parties. However, whichever party does have the burden of proof bears the risk of the record supporting its view of the issue. If there is no acceptable evidence on a particular issue, then the party with the burden of proving that issue will have failed to carry that burden and will suffer a negative ruling on the point.

6.5. A typical review of a request for a permanent total disability award, including a second injury life award, will proceed as follows.

6.5.1. The initial decision to be made is whether the claimant's compensable injuries or disease has rendered him or her unable to perform his or her customary employment. If the answer is the claimant can perform his or her customary employment without further assistance, then the request for a permanent total disability award is to be denied. An affirmative answer can be made if through rehabilitation services the claimant could return to his or her customary employment either with or without job modification. In this event, an order staying the review of the request for a permanent total disability award must be entered and a referral made to the rehabilitation section. If the answer is that the claimant cannot perform his or her customary employment because of the compensable injury or disease even with help from rehabilitation services, then the review continues as set forth in subdivision 6.5.2.

6.5.2. The next step is determining whether the claimant can engage in substantial gainful activity requiring skills or abilities comparable to those of any gainful activity in which he or she has previously engaged with some regularity and over a substantial period of time.

a. In making this decision, division staff must bear in mind the use of rehabilitation services which can provide job modifications including those related to modifying the actual job tasks or how they are done. Also included is the possibility of modifying the work site or environment to accommodate the claimant's impairment and disability. If there appears to be a reasonable possibility in this area, the claim should be referred to the rehabilitation section for a determination.

b. As a very general rule in order to take into consideration past gainful activity, the claimant should have performed the other gainful activity during the past ten years. Anything older than that would generally not meet the "regularity" requirement nor be likely to represent skills and abilities that the claimant still possesses. The activity must also have been of a substantial nature in terms of the length of time the claimant performed that activity and the remuneration received.

c. Once the claimant's previous gainful activities are identified, then expert vocational assistance should be sought to determine the skills and abilities that were necessary to engage in the previous gainful activities. From that information, the vocational expert will be able to offer an opinion on the claimant's ability to engage in the other substantial gainful activities that utilize those same skills and abilities. A source of information on this topic that is often referred to is Dictionary of Occupational Titles.

d. If the determination is made that the claimant can engage in substantial gainful activity requiring skills or abilities comparable to those of any gainful activity in which he or she has previously engaged with some regularity and over a substantial period of time, then in most cases a referral should be made to the rehabilitation section as the claimant should be evaluated to determine what services he or she may be in need of to make this transition. Included would be job search assistance and the possibility of enlisting other division's of the bureau such as the job service or the joint training partnership act program. In this event, an order should be entered staying further review of the request for a permanent total disability award and a referral made to the rehabilitation section.

e. If the determination is made that the claimant cannot engage in substantial gainful activity requiring skills or abilities comparable to those of any gainful activity in which he or she has previously engaged with some regularity and over a substantial period of time, then the review continues as set forth in subdivision 6.5.3

6.5.3. The next step in the review is a determination whether the medical evidence in the file makes it obvious that the claimant cannot return to any work. Often the medical information in the claim will establish that the claimant has suffered a functional, physical, or anatomical loss to the body of a sufficient degree that further review is unnecessary. In this event, an order is to be entered granting the request for a permanent total disability award. If this determination cannot be made, then the review continues as set forth in subdivision 6.5.4.

6.5.4. If it is not obvious from the medical information alone that the claimant is totally disabled, then the review continues. Division staff should next look to the

combination of the claimants physical loss with nonmedical information and the effect that this combination has upon the claimant's loss of earnings or impairment of his or her earning capacity. Also to be considered is the impairment the combination causes to the claimant's efficiency at work and the impairment to his or her normal pursuit of everyday living. These factors require a consideration of the degree to which the injury has affected the claimant's capability to perform or obtain employment. The facts to be considered include the claimant's:

a. the medical evidence;

b. customary employment;

c. age;

d. training;

e. education;

f. intelligence or mental capacity; and

g. any other matter that can reasonably be expected to affect the earning power and regular employment in the labor market.

From these factors and facts an initial determination must be made whether the claimant falls into the odd-lot category.

6.5.5. The odd-lot doctrine has been defined in the following manner by the Supreme Court of Appeals: "this doctrine is that total disability for compensation purposes can be found when an employee has been so handicapped by his physical injury, though not utterly immobilized and bedridden, that he cannot be regularly employed in any well-known segment of the labor market." Cardwell v. SWCC, 301 S.E.2d 790, 796 (W.Va. 1983).

a. In order for a claimant to come under this doctrine, he or she must present facts and legal opinion that standing alone that meets the statement of the doctrine. Stated another way, the doctrine requires proof that the claimant cannot perform any services other than those which are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist. In establishing what is called the prima facie case, the claimant is not required to absolutely prove he or she falls under the doctrine. Rather, the claimant must present reliable and credible evidence to that effect. An example would be a vocational report from a competent professional who states an opinion that the claimant meets this standard. Division staff should note that this evidence can also be presented by a report and opinion obtained by staff through an examination that staff arranges.

b. Once this evidence is presented and the prima facie case is established, then the burden of proof switches to the employer to show that some kind of suitable work is regularly and continuously available to the claimant. In the usual claim, the employer is not actively participating at this point. Hence, division staff must request that any examiner who gives a report and offers opinions which result in the establishment of the prima facie case also evaluate the claimant and give his or her opinion as to whether there exists some kind of suitable work which is regularly and continuously available to the claimant. If the employer or the examiner does not establish this point in the affirmative, then the request for a permanent total disability award is to be granted.

c. If the employer or the examiner does establish that there does exist some kind of suitable work which is regularly and continuously available to the claimant, then the division staff must make doubly sure that the claimant and his or her attorney, if any, is furnished with a copy of the report. This will allow the claimant to present such additional evidence as he or she may choose. If no such evidence is presented or if the evidence that is presented does not rebut the employer's or the examiner's opinion, then an order should be entered staying the review of the request for a permanent total disability award and the claimant is to be referred to the rehabilitation section. If the claimant's additional evidence does rebut the employer's or the examiner's opinion, then the request for a permanent total disability award is to be granted.

d. Of the many types of evidence that can be submitted by the claimant to aid in establishing either the prima facie case under paragraph "a" or rebutting the employer's or the examiner's opinion in paragraph "c" is whether the employer has refused to reemploy an injured worker because of his or her medical condition in light work that the claimant can do. Also persuasive is whether the claimant has been unable to get work because of the compensable injury or disease. Similarly, the granting of a social security disability award and its continuation is persuasive.

e. Division staff is advised that it should treat a claim in which the claimant has established that he or she has received aggregate permanent partial disability awards in the amount of eighty-five (85%) percent or more as having met the prima facie test under paragraph "a". This is the result of the rebuttable presumption that subdivision (d) of section 6 of the statute gives to such a claimant. The employer or any examiner would then have to present evidence in keeping with paragraph "b" above and the review of the claim would proceed accordingly.

6.5.6. If it is determined under subdivision 6.5.4 that the claimant has not established a prima facie case that he or she is in the odd-lot category, then the burden of proof remains with the claimant to establish unavailability of work to a person in his or her circumstances. Some evidence that the claimant has made

reasonable efforts to secure suitable employment would then ordinarily be made by the claimant.

6.6. Generally speaking, a medical professionals' opinion evidence should be limited to the degree of impairment that a claimant suffers. In addition, a medical professional can express an opinion whether or not a claimant can perform a specific task that is required by a job. The task's required movements and the strength required should be specified and addressed by the professional. A medical professional may have gained through experience the knowledge necessary to know whether a claimant can perform the tasks of a specific job. Such an expert could then offer reliable evidence on a claimant's disability from performing that job. A proper evidentiary basis would have to be shown to support this opinion. Generally speaking, medical professionals are not competent to testify to the degree of disability that a claimant suffers. Disability is social and vocational in nature and not medical. The reviewer should review all medical evidence with this distinction in mind. Division staff must utilize the guidelines adopted by the Health Care Advisory Panel in the fields of psychiatric and emotional losses and noise induced hearing loss the latter of which has also been adopted through the issuance of a regulation. The Health Care Advisory Panel has also adopted the "Guides to the Evaluation of Permanent Impairment," (4th ed. 1993), as published by the American Medical Association which is to be referred to for all other types of impairments except occupational pneumoconiosis. Reference should be made to the proposed rule for determining impairments.

6.7. Disability evidence, including the feasibility of rehabilitation efforts, must be presented by competent professionals with special training in the field. Properly trained vocational evaluators, physical and medical rehabilitation professionals, and functional capacities evaluators must be consulted. When such evidence is presented by others, it must be scrutinized closely in order to determine the witness' competency to offer the evidence.

6.8. Many requests for permanent total disability awards will be presented as second injury claims or in conjunction with a preexisting noncompensable impairment which it is asserted was aggravated by the compensable injury. The statutes and case law require that the impairments suffered by a claimant in one of these types of claims must be considered in combination. That is, what are the combined effects of the various impairments? The requirements of these rules are to be applied in these types of claims based upon the combined effects of the impairments. Hence, the effects of the injury or disease that is labeled the second injury or that aggravates a preexisting condition are not to be separated from the effects of all of the other impairments or the preexisting condition.

6.9. In any claim where the claimant is referred for rehabilitation services, the time requirements of the legislative

rule "Vocational and Physical Rehabilitation," 85 CSR 15 (July 1, 1994), must be met. In addition, a request for a permanent total disability award must not be stayed indefinitely. Time requirements for lifting the stay must be met and, in any claim where it is concluded that rehabilitation services are not appropriate, the stay must be lifted and the review proceed according to these rules.

§85-18-7. Examples of guideline applications.

7.1. The following guidelines should be followed by the division's staff in reviewing and evaluating requests for permanent and total disability awards. However, they should not be seen as strict requirements in each and every claim. Individual claims can be expected to differ from any supposed standard claim and such differences must be included in the evaluator's decision making process.

7.2. In any claim where there are:

7.2.1. A social security disability decision concluding that a claimant is totally and permanently disabled due to the same compensable injury or disease as is present in the workers' compensation claim which decision is still in effect at the time division staff is conducting its review; and

7.2.2. the division's staff's vocational evaluator's bottom line conclusion, based upon competent vocational and functional capacities testing, is that the claimant is permanently and totally disabled; and

7.2.3. the bottom line opinions of other medical and vocational referrals are that the claimant is permanently and totally impaired or disabled; and

7.2.4. there is no compelling evidence directing a different result;

7.2.5. then the division's staff should prepare a draft decision granting a permanent total disability award. Staff should attach to that draft such notes as are believed warranted directing the reviewer's attention to conflicting evidence in the file.

7.3. In any claim where there are:

7.3.1. a social security disability decision concluding that a claimant is totally disabled due to the same compensable injury or disease as is present in the workers' compensation claim which decision is still in effect at the time division staff is conducting its review;

7.3.2. the credible vocational evaluation reports' bottom line conclusions are that the claimant is permanently and totally disabled; and

7.3.3. there is no medical opinion evidence on the issue of impairment to contradict the vocational evaluator's conclusions or that significantly differs from the evidence that was presented to the social security administrative law judge,

7.3.4. then the division's staff should prepare a draft decision granting a permanent total disability award. Staff should attach to that draft such notes as are believed warranted directing the reviewer's attention to conflicting evidence in the file.

7.4. In any claim where there is:

7.4.1. a social security disability decision granting total disability on the basis of the same compensable injury or disease as presented in the workers' compensation claim which decision is still in effect at the time division staff is conducting its review;

7.4.2. but the credible vocational evaluation evidence bottom line opinion is that the claimant is not permanently and totally disabled either because retraining is a possibility or for some other reason - especially if based upon facts not presented to the social security administrative law judge; and

7.4.3. there is no credible evidence to contradict the vocational evaluation evidence;

7.4.4. then the division's staff should prepare a draft decision denying a permanent total disability award or staying the request. Staff should attach to that draft such notes as are believed warranted directing the reviewer's attention to conflicting evidence in the file.

7.5. In any claim where there is a negative social security disability decision or one that finds the claimant totally disabled due to some reason other than the compensable injury or disease that is presented in the workers' compensation claim or there is no disability decision, then the division's staff shall evaluate the remaining evidence of record in the manner described above. If the social security disability decision was negative, division's staff staff is to recall that the standards for granting such a decision are more strict than those in workers' compensation claims.

7.6. Division staff is also reminded that the workers' compensation standards for total disability do not require that the claimant be unable to perform any job. In addition, division staff is directed to note that the standard for deciding whether rehabilitation efforts might be successful encompasses those claimants who can reasonably be expected to actually benefit from

those efforts. The appearance that a claimant has some slight, outside chance of being successfully rehabilitated is not an acceptable instance for making a rehabilitation referral in lieu of granting a permanent total disability award. For further guidance on this issue, please see the rehabilitation rules.

WC-115
1-94

APPLICATION FOR PERMANENT TOTAL DISABILITY AWARD

Return completed form to: **Workers' Compensation Division**
Post Office Box 3151
Charleston, WV 25332-3151

(Please type or print)

(1) NAME: _____
Last First Middle

(2) ADDRESS: _____
Street City State Zip Code

(3) DATE OF BIRTH: _____ (4) AGE: _____ (5) SSN: _____

(6) CLAIM NUMBER in which claimant is making PTD application: _____

(7) **MEDICAL/VOCATIONAL EVIDENCE: You MUST ATTACH copies of all medical, vocational and other evidence upon which you rely in making this application.**

(8) PRESENT EMPLOYMENT STATUS: _____ EMPLOYED _____ UNEMPLOYED _____ RETIRED

(9) If retired, effective date of retirement: _____/_____/_____

(10) Are you receiving Social Security retirement benefits? _____ Yes _____ No

(11) If yes, please provide the following information.

TYPE OF BENEFIT: _____

AMOUNT RECEIVED MONTHLY: _____

YOUR AGE WHEN YOU BEGAN RECEIVING THIS BENEFIT: _____

(12) List claim numbers for all your prior West Virginia Workers' Compensation claims:

_____

_____

(13) List all disability claims you have previously filed or have pending with **other** federal or state agencies (including federal black lung, Social Security Disability, Jones Act, Longshore Harbor Workers', Military, other states' workers' compensation programs, etc.):

_____

_____

Please attach a copy of every decision which granted you benefits and all decisions which extended or terminated those benefits.

(14) List all medical conditions (work and non-work related) for which you have received treatment during the past ten (10) years and the name, address, and telephone number of the physicians, clinics, and hospitals who treated or examined you. (Use additional page if necessary.):

(a) _____
Condition Treated by (Name of Hospital, Clinic, or Physician)

_____
Hospital, Clinic, or Physician's Address & Telephone Number

(b) _____
Condition Treated by (Name of Hospital, Clinic, or Physician)

_____
Hospital, Clinic, or Physician's Address & Telephone Number

(c) _____
Condition Treated by (Name of Hospital, Clinic, or Physician)

_____
Hospital, Clinic, or Physician's Address & Telephone Number

(d) _____
Condition Treated by (Name of Hospital, Clinic, or Physician)

_____
Hospital, Clinic, or Physician's Address & Telephone Number

(e) _____
Condition Treated by (Name of Hospital, Clinic, or Physician)

_____
Hospital, Clinic, or Physician's Address & Telephone Number

(f) _____
Condition Treated by (Name of Hospital, Clinic, or Physician)

EMPLOYMENT HISTORY

(15) LIST YOUR LAST FIVE EMPLOYERS:

Dates of Employment From	To	*Employer's Name*	*Address*	*Job Title*

(16) List duties for each job title and special training you received to perform the jobs you did for last ten (10) years: (Use additional page if necessary)

Job Title *Duties/ Special Training Required*

MILITARY HISTORY

(17) Have you served in the military? _____Yes _____No

(18) If yes, specify branch and highest rank obtained and what your duties were: _____

EDUCATION HISTORY

Complete all that apply:

(19) Highest grade completed: _____ (20) GED? _____Yes _____ No

(21) Name and address of last school attended: _____

(22) Have you received vocational school training: _____Yes_____ No

(23) If yes, list name and address of each school and subject you were trained in: _____

* * *

I certify the statements contained in this application are true and correct to the best of my knowledge and belief. I am aware that the law provides for severe penalties if I knowingly and with fraudulent intent withhold a material fact or make a false statement in order to obtain or increase a benefit that I am not entitled to. By signing this application, I authorize the West Virginia Workers' Compensation Division to obtain and examine any medical, health, hospital, vocational, employment or other records pertaining to this application and any condition for which I have previously received medical attention as well as all social security retirement and disability records, and, I acknowledge the provisions of Code 23-4-7 providing for release of medical information by a health care provider to my employer or employer representative.

_____ _____

Claimant's Signature (DO NOT PRINT) Date

_____

Claimant's Attorney, If Any Attorney's Address & Telephone