

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

**Robert A. Payne,
Claimant Below, Petitioner**

**August 3, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

**vs.) No. 101088 (BOR Appeal No. 2044095)
(Claim No. 2004022949)**

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER
Commissioner Below, Respondent**

and

**Pinnacle Mining Co., LLC,
Employer Below, Respondent**

MEMORANDUM DECISION

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated August 10, 2010, in which the Board affirmed a January 12, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's August 11, 2009 denial of Mr. Payne's petition to reopen his claim for a permanent total disability evaluation. The appeal was timely filed by the petitioner. The Court has carefully reviewed the records, written arguments, and appendices contained in the petition, and the case is mature for consideration.

Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this matter is appropriate for consideration under the Revised Rules. Having considered the petition and the relevant decision of the lower tribunal, the Court is of the opinion that the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the Court determines that there is no prejudicial error. This case does not present a new or significant question of law. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

In its Order, the Office of Judges held that Mr. Payne failed to demonstrate that, pursuant to W. Va. Code § 23-4-6(n)(1), he was neither awarded a 50% permanent partial disability rating in all his claims, nor has the claims administrator found that he was at 50% permanent partial disability in the instant claim. On appeal to the Board of Review, Mr. Payne argued that the Office of Judges did not consider evidence submitted by him regarding his entitlement to a permanent total disability award. The Board of Review held that there is no evidence in the record to indicate that Mr. Payne has met any of the requirements set forth in W. Va. Code § 23-4-6(n)(1). The record clearly indicates that Mr. Payne has been granted an award of 23% permanent partial disability by the claims administrator, with 18% of this award arising from the instant claim and 5% arising from a prior knee injury, and that no physician recommended an impairment rating greater than 23% encompassing all Mr. Payne's work-related injuries.

For the foregoing reasons, we find that the decision of the Board of Review is not in clear violation of constitutional or statutory provision, clearly the result of erroneous conclusions of law, or is based upon the Board's material misstatement or mischaracterization of particular components of the evidentiary record. Therefore, the denial of the petitioner's request for a permanent total disability award is affirmed.

Affirmed.

ISSUED: August 3, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Menis E. Ketchum

Justice Thomas E. McHugh