

**STATE OF WEST VIRGINIA**  
**SUPREME COURT OF APPEALS**

**FILED**  
June 10, 2014  
RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

**TIMMY D. ELLIS,**  
**Claimant Below, Petitioner**

vs.) **No. 13-0014** (BOR Appeal No. 2047476)  
(Claim No. 960027166)

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

**and**

**OLD BEN COAL COMPANY,**  
**Employer Below, Respondent**

**MEMORANDUM DECISION**

Petitioner Timmy D. Ellis, by John C. Blair, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. The West Virginia Office of Insurance Commissioner, by David L. Stuart, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated December 17, 2012, in which the Board affirmed a July 19, 2012, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's April 15, 2008, decision denying Mr. Ellis's application for permanent total disability benefits. The Court has carefully reviewed the records, written arguments, and appendices contained in the briefs, and the case is mature for consideration.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Rules of Appellate Procedure.

Mr. Ellis worked as a miner for Old Ben Coal Company. Mr. Ellis received several work-related injuries throughout the course of his career and received permanent partial disability awards based on these injuries. On December 8, 1995, he injured his neck during a rock fall. On March 14, 1997, the claims administrator granted Mr. Ellis a 28% permanent partial disability award. Based on this injury, Mr. Ellis filed an application for permanent total disability benefits on August 29, 2002. His application was submitted to the Permanent Total Disability Review Board, who found that Mr. Ellis was unable to return to coal mining. The Board, however, found that Mr. Ellis was not permanently and totally disabled because he had residual employment potential at the sedentary to light physical demand level. On April 15, 2008, the claims administrator denied Mr. Ellis's request for permanent total disability benefits. On July 19, 2012, the Office of Judges affirmed the claims administrator's decision. The Board of Review affirmed the Order of the Office of Judges on December 17, 2012, leading Mr. Ellis to appeal.

The Office of Judges concluded that the claims administrator did not have jurisdiction to grant Mr. Ellis permanent total disability benefits. The Office of Judges determined that Mr. Ellis did not file his application for permanent total disability benefits within the five-year statute of limitation from the date he was granted an initial permanent partial disability award. It determined that the initial permanent partial disability award was granted in this claim on March 14, 1997. It found that Mr. Ellis did not file his application for permanent total disability benefits until August 29, 2002. The Office of Judges found that this failure deprived the claims administrator of authority to consider the merits of the case and required that the application be refused under West Virginia Code § 23-4-16(a)(2) (2005). The Board of Review adopted the findings of the Office of Judges and affirmed its Order.

We agree with the conclusions of the Board of Review and the findings of the Office of Judges. Mr. Ellis did not file his application for permanent total disability benefits within five years of March 14, 1997, when he was initially granted a permanent partial disability award. Mr. Ellis did not meet the statutory time limits for filing his application, and under West Virginia Code § 23-4-16(a) his request for a permanent total disability award was properly refused.

For the foregoing reasons, we find that the decision of the Board of Review is not in clear violation of any constitutional or statutory provision, nor is it clearly the result of erroneous conclusions of law, nor is it based upon a material misstatement or mischaracterization of the evidentiary record. Therefore, the decision of the Board of Review is affirmed.

Affirmed.

**ISSUED: June 10, 2014**

**CONCURRED IN BY:**

Chief Justice Robin J. Davis  
Justice Brent D. Benjamin  
Justice Margaret L. Workman  
Justice Menis E. Ketchum  
Justice Allen H. Loughry II