

**STATE OF WEST VIRGINIA**

**SUPREME COURT OF APPEALS**

**FILED**

**JAMES L. DICKENS, Petitioner**

**December 9, 2011**  
**RORY L. PERRY II, CLERK**  
**SUPREME COURT OF APPEALS**  
**OF WEST VIRGINIA**

**vs.) No. 101281 (BOR Appeal No. 2044272)**  
**(Claim No. 2006208394)**

**WEST VIRGINIA OFFICE OF**  
**INSURANCE COMMISSIONER and**  
**PERFORMANCE COAL COMPANY, Respondent**

**MEMORANDUM DECISION**

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated September 2, 2010, in which the Board affirmed a March 15, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the Claims Administrator's October 2, 2008, Order which held the claimant did not meet the whole body impairment threshold required for permanent total disability. The appeal was timely filed by the petitioner and a response was filed by Performance Coal Company. 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.

The Board of Review affirmed the holding that the petitioner had failed to meet the 50% whole body impairment threshold in W. Va. Code § 23-4-6(n)(1). Petitioner argues that Dr. Kominsky's report, recommending 40% for the right lower extremity, was the most accurate assessment and he had met the 50% threshold according to that report. Respondent notes that Dr. Kominsky's impairment for the right lower extremity was the equivalent of an

amputation at the hip and even with the higher impairment found by the Office of Judges, the petitioner still did not meet the threshold.

In holding the petitioner was not entitled to permanent total disability, the Office of Judges found that although the preponderance of the evidence demonstrated the petitioner had a greater impairment than found by the Permanent Total Disability Review Board, the impairment did not meet the 50% threshold. The Office of Judges noted several differences in impairment ratings than those by the Review Board. First, they found the petitioner suffered from 28% impairment for the right lower extremity, equivalent to a below the knee amputation, rather than 16% from the Review Board. (March 15, 2010, Office of Judges Order, p. 6). The Office of Judges also found higher impairment for both the lumbar and cervical spine, but still found the petitioner failed to meet the 50% threshold. *Id.* at p. 8. The Board of Review reached the same reasoned conclusion in affirming the Office of Judges in its decision of September 2, 2010.

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 Board of Review's September 2, 2010, Order is affirmed.

Affirmed.

**ISSUED: December 9, 2011**

**CONCURRED IN BY:**

Chief Justice Margaret L. Workman

Justice Robin J. Davis

Justice Thomas E. McHugh

**DISSENTING:**

Justice Menis E. Ketchum

Justice Brent D. Benjamin disqualified.