

**STATE OF WEST VIRGINIA**

**SUPREME COURT OF APPEALS**

**FILED**

**RICKY D. THOMAS, Petitioner**

**February 17, 2012**  
RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

**vs.) No. 101390 (BOR Appeal No. 2044393)**  
**(Claim No. 2004044323)**

**WEST VIRGINIA OFFICE OF  
INSURANCE COMMISSIONER and  
CENTURY ALUMINUM OF WV, INC., Respondent**

**MEMORANDUM DECISION**

Petitioner Ricky D. Thomas, by Edwin Pancake, his attorney, appeals the decision of the Board of Review. Respondent Century Aluminum of WV, Inc. is represented by its attorney, Marion Ray, and did not file a response.

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated October 4, 2010, in which the Board reversed a March 17, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's September 28, 2009, decision to discontinue authorization of the medication Provigil and to discontinue visits with Dr. Mysiw. 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 Board of Review held that authorization for the medication Provigil ended on October 31, 2009, that Mr. Thomas is entitled to two to six office visits with Dr. Mysiw over the period of one year, to end on October 31, 2009, if he has continued to attend

his regular appointments, and that if he has not attended his regular appointments, the one year period will begin on October 4, 2010; if after one year of appointments Dr. Mysiw recommended additional appointments, a new request for authorization will need to be submitted. Mr. Thomas disputes this finding and asserts, per the opinion of Dr. Mysiw, that he suffers from cognitive deficits, fatigue, hypersomnia, executive dysfunction, and mood changes due to his traumatic injury, and that Provigil improved his symptoms and is necessary to maintain that level of improvement.

The Board of Review found that Mr. Thomas suffered a closed traumatic head injury in 2004, and that on October 28, 2008, Dr. Guberman found that he was at maximum medical improvement and working full time without any limitations. The Board of Review further found that Dr. Guberman concluded that no further specific treatment was recommended. The Board of Review found that Dr. Sethi examined Mr. Thomas on August 18, 2009, and that Mr. Thomas reported that he has no problems with his daily life activities, did not report excessive daytime sleepiness, and stated that he generally felt good. The Board of Review found that Dr. Sethi stated that Mr. Thomas's compensable injury had been well stabilized, that Mr. Thomas was continuing to see Dr. Mysiw only for the purpose of obtaining a prescription for Provigil, that Provigil is FDA-approved for the treatment of excessive daytime sleepiness only, that Mr. Thomas has no findings of a neurological disorder, that Dr. Mysiw is prescribing Provigil in an off-label use, and that the continued use of Provigil is unnecessary. The Board of Review held that limited visits with Dr. Mysiw should be authorized given the nature of Mr. Thomas's injury.

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 decision of the Board of Review is affirmed.

Affirmed.

**ISSUED: February 17, 2012**

**CONCURRED IN BY:**

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Margaret L. Workman

Justice Thomas E. McHugh

**DISSENTING:**

Chief Justice Menis E. Ketchum