

**STATE OF WEST VIRGINIA**

**SUPREME COURT OF APPEALS**

**FILED**

February 7, 2013  
RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

**HASSEL R. FILLINGER,  
Claimant Below, Petitioner**

vs.) **No. 11-0676** (BOR Appeal No. 2045031)  
(Claim No. 2000008980)

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

**and**

**KINGSTON MINING, INC.,  
Employer Below, Respondent**

**MEMORANDUM DECISION**

Petitioner Hassel R. Fillinger, by John Blair, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Kingston Mining, Inc., by Marion Ray, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated March 24, 2011, in which the Board affirmed a September 3, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's June 17, 2009, decision denying Mr. Fillinger's request 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. Fillinger was working for Kingston Mining, Inc. when he was injured on July 30, 1999. Mr. Fillinger filed an application for permanent total disability benefits on July 9, 2003. The claims administrator opened the claim for permanent total disability consideration because at the time Mr. Fillinger had been awarded a 43% permanent partial disability award. Subsequently the Office of Judges reduced the 43% permanent partial disability award to 29% because the original award included impairment for non-compensable conditions. On appeal, the Board of Review affirmed the 29% permanent partial disability award. This Court refused the issue on appeal. On June 17, 2009, the claims administrator denied the application for permanent total disability benefits.

The Office of Judges held that the preponderance of the evidence establishes that the statutory threshold for permanent total disability benefits has not been met. It noted that Mr. Fillinger has received a 29% permanent partial disability award, which is well below the statutory threshold. The Board of Review reached the same reasoned conclusions in its decision of March 24, 2011. We agree with the reasoning and conclusions of the Board of Review.

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: February 7, 2013**

**CONCURRED IN BY:**

Chief Justice Brent D. Benjamin

Justice Robin J. Davis

Justice Margaret L. Workman

Justice Menis E. Ketchum

Justice Allen H. Loughry II