

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

**JAMES T. GILLILAND, Petitioner**

**vs.) No. 101118 (BOR Appeal No. 2044049)**  
**(Claim No. 2004002294)**

**FILED**

**December 7, 2011**  
**RORY L. PERRY II, CLERK**  
**SUPREME COURT OF APPEALS**  
**OF WEST VIRGINIA**

**WEST VIRGINIA OFFICE OF**  
**INSURANCE COMMISSIONER and**  
**LITTLE BOYD COAL COMPANY, INC.,**  
**Respondent**

**MEMORANDUM DECISION**

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated August 9, 2010, in which the Board affirmed a December 29, 2009, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's May 27, 2009, Order, which held that Mr. Gilliland has not met the statutory threshold for permanent total disability consideration. The appeal was timely filed by the petitioner, and the West Virginia Office of Insurance Commissioner filed a response. 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 parties' submissions 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 Office of Judge's Order, which held that Mr. Gilliland has not satisfied the statutory threshold for permanent total disability consideration. Mr. Gilliland points out that his treating physician has opined that he is unable to sustain gainful employment and is permanently and totally disabled as a result of his compensable injury. Additionally, David C. Blair, PhD performed a neuropsychological examination in which Dr. Blair concluded that Mr. Gilliland's prognosis for recovery to his pre-injury ability

and work skills is unlikely due to the extent of his injuries and passage of time since his injury. Finally, Mr. Gilliland argues that his receipt of social security disability benefits is persuasive evidence that he is permanently and totally disabled for workers' compensation purposes.

The Office of Judges, however, cited the requirements of West Virginia Code § 23-4-6(n)(1): "[I]n order to be eligible to apply for an award of permanent total disability benefits . . . a claimant must: (A) Must have been awarded the sum of fifty percent in prior permanent partial disability awards; (B) must have suffered a single occupational injury or disease which results in a finding by the commission that the claimant has suffered a medical impairment of fifty percent; or (C) has sustained a thirty-five percent statutory disability pursuant to the provisions of subdivision (f) of this section." (Dec. 29, 2009, Office of Judges Order, p. 4.) Mr. Gilliland's October 2006 application for a permanent total disability award simply failed to satisfy the statutory impairment threshold. *Id.* at p. 5. Mr. Gilliland's prior permanent partial disability award history totaled only 31%, the commission had not found a 50% impairment as a result of a single occupational injury or disease, and Mr. Gilliland had not incurred a 35% statutory disability. Accordingly, the Office of Judges affirmed the denial of Mr. Gilliland's application for a permanent total disability award at this juncture, and the Board of Review reached the same reasoned conclusion in affirming the Office of Judges in its August 9, 2010, decision.

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 based upon the Board's material misstatement or mischaracterization of particular components of the evidentiary record. Therefore, the denial of Mr. Gilliland's application for a permanent total disability award is affirmed.

Affirmed.

ISSUED: December 7, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Menis E. Ketchum

Justice Thomas E. McHugh