

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

April 13, 2012

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

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER, Petitioner**

**vs.) No. 101569 (BOR Appeal No. 2044478)
(Claim No. 2001012925)**

**BILLY D. REED and ISLAND FORK CONSTRUCTION,
LTD., Respondent**

MEMORANDUM DECISION

Petitioner the West Virginia Office of Insurance Commissioner, by Gary Mazezka, its attorney, appeals the West Virginia Workers' Compensation Board of Review's Order granting a permanent total disability award. Billy D. Reed, by Reginald Henry, his attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated November 8, 2010, in which the Board affirmed a March 31, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's August 28, 2007, Order and granted the claimant a permanent total disability award. The Court has carefully reviewed the records, written arguments, and appendices contained in the petition, and the case is mature for consideration.

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 claimant was entitled to a permanent total disability award. The petitioner disagrees and asserts that the preponderance of the evidence establishes that Mr. Reed was not permanently and totally disabled by the compensable injuries and is able to return to substantial gainful activity at a sedentary level.

During prior proceedings, Mr. Reed was found to have met the statutory whole-person-impairment for a permanent total disability award. W. Va. Code § 23-4-6(n)(1) (2003). At issue in

this proceeding is whether Mr. Reed's disability renders him "unable to engage in substantial gainful activity requiring skills or abilities which can be acquired or which are comparable to those of any gainful activity in which he or she has previously engaged." W.Va. Code § 23-4-6(n)(2).

In its Order reversing the claims administrator's denial of a permanent total disability award, the Office of Judges noted several weaknesses in the Permanent Total Disability Review Board's Final Recommendations. First, the Office of Judges noted that functional capacity evidence demonstrated the claimant was capable of a maximum of part-time sedentary work with doubtful consistent performance possible. Additionally, the Office of Judges found that the orthopedic evidence, psychiatric evidence, and rehabilitation evidence supported a finding of permanent total disability. The Office of Judges held that the extensive evidence of record established that the claimant was unable to engage in substantial gainful activity. The Board of Review reached the same reasoned conclusions in affirming the Office of Judges in its decision of November 8, 2010.

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 Board of Review Order is affirmed.

Affirmed.

ISSUED: April 13, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Margaret L. Workman

Justice Thomas E. McHugh