

**STATE OF WEST VIRGINIA**

**SUPREME COURT OF APPEALS**

**FILED**

**JACQUELINE MCGRAW, Petitioner**

**July 20, 2012**  
**RORY L. PERRY II, CLERK**  
**SUPREME COURT OF APPEALS**  
**OF WEST VIRGINIA**

**vs.) No. 11-0116 (BOR Appeal No. 2044743)**  
**(Claim No. 990055710)**

**WEST VIRGINIA OFFICE OF**  
**INSURANCE COMMISSIONER and**  
**LOGAN MEDICAL FOUNDATION, Respondent**

**MEMORANDUM DECISION**

Petitioner, Jacqueline McGraw, by John C. Blair, her attorney, appeals the Board of Review Order denying permanent total disability benefits. The West Virginia Office of Insurance Commissioner, by Gary M. Mazezka, its attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated December 22, 2010, in which the Board affirmed a June 24, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's denial of permanent total disability benefits. 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, response, 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 held the preponderance of the evidence establishes that Ms. McGraw is not permanently and totally disabled and is capable of engaging in substantial employment. Ms. McGraw asserts that the relevant evidence establishes she is permanently and totally disabled. Further, the decision denying permanent total disability benefits resulted from an incorrect interpretation of the medical records. Since none of the medical records stated Ms. McGraw was permanently and totally disabled her request was denied.

During the course of her employment as a licensed practical nurse Ms. McGraw suffered carpal tunnel syndrome and several injuries to her lumbar spine, right hip, right knee, and left knee. Ms. McGraw was removed from employment following unrelated heart issues in 2000, for which she was awarded social security disability. After the cumulative impairments reached the requisite threshold according to West Virginia Code § 23-4-6(n)(1) (2005), Ms. McGraw petitioned for permanent total disability consideration. The Permanent Total Disability Review Board (hereinafter “PTD Review Board”) considered the independent medical evaluations from Dr. Anbu Nadar, Dr. Paul Bachwitt, Dr. Clifford H. Carlson, and Dr. Bruce A. Guberman, who previously evaluated Ms. McGraw for her various injuries. None of the reports indicated permanent total disability status resulting from Ms. McGraw’s injuries except Dr. Guberman who opined Ms. McGraw may be able to function in a sedentary position, but deferred the recommendation to a qualified vocational rehabilitation expert. Based on these medical reports the PTD Review Board assigned Ms. McGraw a whole person impairment of 52% and considered Ms. McGraw’s vocational capabilities.

On November 9, 2004, Don Pinckney conducted a functional capacity evaluation (hereinafter “FCE”), in which Ms. McGraw tested into the sedentary physical capacity level and would be incapable of returning to her previous employment. Mark Hileman conducted a FCE on April 29, 2005, and determined Ms. McGraw is limited to a sedentary physical capacity level. An additional FCE on May 12, 2005, by Errol Sadlon concluded Ms. McGraw’s physical injuries and resultant limitations render her permanently and totally disabled.

After reviewing the medical evidence and the results of the various records, the PTD Review Board issued its final recommendation and found Ms. McGraw is not permanently and totally disabled due to her compensable injuries. This holding was based on the findings of Mr. Pinckney and Mr. Hileman that Ms. McGraw is capable of sedentary physical level employment.

The Office of Judges held Ms. McGraw received a cumulative award of 91% permanent partial disability awards, however, Ms. McGraw ceased employment for an unrelated cardiac condition and not the work-related physical injuries. Mr. Errol’s report finding Ms. McGraw permanently and totally disabled was found unreliable by the Office of Judges since neither Mr. Pinckney nor Mr. Hileman found Ms. McGraw permanently and totally disabled. The Office of Judges further indicated neither Dr. Carlson nor Dr. Bachwitt opined Ms. McGraw is permanently and totally disabled. As a result, the Office of Judges held since Ms. McGraw ceased employment for her cardiac condition it is reasonable to assume her disability results from this condition and not the work-related injuries. Therefore, the Office of Judges affirmed the claims administrator’s Order denying permanent total disability benefits. The Board of Review reached the same reasoned conclusion in its Order of December 22, 2010. We agree with the Board’s decision.

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 Court affirms the order of the Board of Review.

Affirmed.

ISSUED: **July 20, 2012**

CONCURRED IN BY:

Chief Justice Menis E. Ketchum

Justice Robin J. Davis

Justice Margaret L. Workman

Justice Thomas E. McHugh

Justice Brent D. Benjamin not participating