

**STATE OF WEST VIRGINIA**

**SUPREME COURT OF APPEALS**

**FILED**

December 13, 2012  
RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

**JOHNNY W. LILLY, Petitioner**

**vs.) No. 11-0476** (BOR Appeal No. 2044742)  
(Claim No. 970046871)

**WEST VIRGINIA OFFICE OF  
INSURANCE COMMISSIONER and  
WILSON TREE COMPANY, INC., Respondent**

**MEMORANDUM DECISION**

Petitioner Johnny W. Lilly, by Gregory Prudich, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Wilson Tree Company, by Melissa Robinson, its attorney, and the West Virginia Office of Insurance Commissioner, by Anna Faulkner, its attorney, filed timely responses.

This appeal arises from the Board of Review's Final Order dated February 15, 2011, in which the Board reversed a June 24, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's March 26, 2008, decision denying Mr. Lilly's request for permanent total disability benefits based on a finding that he is capable of engaging in gainful employment. 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.

On February 3, 1997, Mr. Lilly sustained a herniated L5-S1 disc while employed as a foreman with Wilson Tree Company. Following a L5-S1 laminectomy and discectomy, Mr. Lilly filed an application for permanent total disability benefits. Mr. Lilly has undergone numerous evaluations to determine the extent of his disability, and the record before this Court is voluminous.

On July 28, 1999, Mr. Brezinski performed a psychiatric evaluation and found that Mr. Lilly was disabled from gainful employment due to anxiety disorder, depressive disorder, intermittent explosive disorder, and borderline intellectual function. On August 31, 1999, vocational consultant Casey Vass performed a vocational evaluation and found that Mr. Lilly could return to gainful employment at least at the light physical demand level. It was noted that Mr. Lilly's intellectual skills were sufficient for him to obtain multiple work-related certifications, and that his academic skills have not prevented him from engaging in gainful employment in the past. It was further noted that Mr. Lilly declined job placement services. Dr. Bachwitt performed an independent medical evaluation on September 10, 1999, and found that Mr. Lilly is not permanently and totally disabled from an orthopedic standpoint, and is employable at least at the sedentary to light physical demand level. On February 15, 2000, Dr. Faheem found that Mr. Lilly's psychiatric problems alone are not disabling. On June 7, 2001, Dr. Ovington performed a psychiatric independent medical evaluation and found that Mr. Lilly could return to some type of gainful employment if he was inclined to do so. On May 21, 2002, Mr. Dotson conducted a functional capacity evaluation and found that Mr. Lilly was employable at the light to sedentary physical demand level. Mr. Hileman performed a permanent total disability rehabilitation evaluation on December 3, 2003, and found that Mr. Lilly should be able to perform at least at the light physical demand level, and that rehabilitation services were not being recommended because Mr. Lilly refused them based on his belief that he cannot sustain full-time employment. On March 15, 2005, Ms. Moore completed a rehabilitation evaluation report and found that Mr. Lilly is capable of engaging in gainful employment at the medium physical demand level. She further found that he is not permanently and totally disabled from a vocational, orthopedic, or psychiatric standpoint. She noted that Mr. Lilly is not interested in vocational rehabilitation and therefore would not benefit from it. Dr. Carlson found that Mr. Lilly is permanently and totally disabled on July 21, 2008, based on his age, education, work history, residual functioning capacity, and impairments. In a September 25, 2008, vocational assessment, Ms. Goudy stated that Mr. Lilly is permanently and totally disabled and cannot be successfully rehabilitated. In its November 26, 2007, final recommendations, the Permanent Total Disability Review Board found that Mr. Lilly is capable of engaging in substantial gainful employment at the light physical demand level.

In its decision reversing the June 24, 2010, Office of Judges Order and reinstating the March 26, 2008, claims administrator's decision, the Board of Review held that Mr. Lilly is capable of engaging in substantial gainful employment. Mr. Lilly disputes this finding and asserts that the evidence of record demonstrates that he is permanently and totally disabled.

In an October 21, 2005, decision the Office of Judges found that Mr. Lilly met the whole person impairment threshold for further consideration of a permanent total disability award. Therefore, the issue on appeal is whether Mr. Lilly is capable of engaging in substantial gainful employment. Pursuant to West Virginia Code § 23-4-6(n)(2) (2005), in order to receive a permanent total disability award, a claimant must be unable to engage in substantial gainful employment.

The Office of Judges held that the preponderance of the evidence demonstrates that Mr. Lilly is permanently and totally disabled based on a finding that none of the jobs identified in the vocational assessments of record are viable options given his chronic pain and neurogenic bladder, limited academic skills, lack of transferable skills, lack of experience working with the public on a prolonged basis, psychological disabilities, and use of narcotics to control his pain. The Office of Judges also noted that Mr. Lilly has been awarded Social Security Disability benefits. In its Order, the Board of Review held that the substantial rights of both the employer and the Office of Insurance Commissioner had been prejudiced. The Board of Review noted that in its final recommendations, the Permanent Total Disability Review Board found that Mr. Lilly's pre-injury employer was willing to make accommodations to assist him in returning to work, but that Mr. Lilly declined vocational rehabilitation services and instead sought to obtain Social Security Disability benefits. The Board of Review further noted that Mr. Lilly possessed many work-related certifications, which could be useful in obtaining alternative employment. After considering the medical, psychiatric, and vocational evidence of record, as well as the recommendations of the Permanent Total Disability Review Board, the Board of Review found that Mr. Lilly did not attempt to participate in vocational rehabilitation. Despite evidence that he could engage in gainful employment at the light physical demand level, Mr. Lilly refused to make any attempt at vocational rehabilitation in order to facilitate his return to the workforce. Therefore, the Board of Review found that Mr. Lilly is not permanently and totally disabled. 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: December 13, 2012**

**CONCURRED IN BY:**

Chief Justice Menis E. Ketchum

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Thomas E. McHugh

**DISSENTING:**

Justice Margaret L. Workman