

**STATE OF WEST VIRGINIA**

**SUPREME COURT OF APPEALS**

**FILED**

June 12, 2013

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

**JOHN P. BROWN,**  
**Claimant Below, Petitioner**

**vs.) No. 12-0061** (BOR Appeal No. 2046134)  
(Claim No. 2001002973)

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

**and**

**INDEPENDENCE COAL CO., INC.,**  
**Employer Below, Respondent**

**MEMORANDUM DECISION**

Petitioner John P. Brown, by John C. Blair, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. The West Virginia Office of Insurance Commissioner, by Jack M. Rife, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated December 22, 2011, in which the Board affirmed a June 27, 2011, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's December 21, 2009, denial of Mr. Brown's application 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. Brown received various injuries to his neck, thoracic spine, and lumbosacral spine throughout the course of his employment in mining-industry related work. He has also developed bilateral carpal tunnel syndrome, nerve entrapment, occupational pneumoconiosis, and hearing loss in the course of his employment. He has received various permanent partial disability awards for each of these injuries. On May 25, 2006, the Office of Judges reversed a denial of Mr. Brown's application for permanent total disability benefits and determined that Mr. Brown's prior permanent partial disability awards placed him above the aggregate requisite percentage. The Office of Judges directed the claims administrator to evaluate Mr. Brown for his rehabilitation potential in order to make a final determination concerning his request for permanent total disability. On December 10, 2009, the Permanent Total Disability Review Board recommended that Mr. Brown's request be denied, based on the opinions of vocational evaluations of Mark Hileman and Catherine L. Phillis-Harvey. Both vocational evaluators opined that Mr. Brown could perform light work in which he alternated between sitting and standing. The claims administrator denied Mr. Brown's request for permanent total disability benefits on December 21, 2009. The decision was affirmed by the Office of Judges and the Board of Review, leading to this appeal.

Once a claimant is determined to have been awarded a sum of prior permanent partial disability awards above the requisite amount provided for in West Virginia Code § 23-4-6(n)(1) (2005), the claimant must show that he is "unable to engage in substantial gainful activity," for which he either already possesses or is capable of acquiring the necessary skills. West Virginia Code § 23-4-6(n)(2) (2005). The determination must be made in light of the "[g]eographic availability of gainful employment within a driving distance of seventy-five miles from the residence of the employee." *Id.*

The Office of Judges determined that, although Mr. Brown had numerous occupational injuries, he did not meet the criteria for a permanent total disability award. The Office of Judges was persuaded by the evaluations of Mr. Hileman and Ms. Phillis-Harvey, who both agreed that Mr. Brown could perform light work in which he alternated between sitting and standing. Although the Office of Judges considered the evaluation of Errol Sadlon, who found that Mr. Brown was unable to perform any consistent work, it was not persuaded by Mr. Sadlon's evaluation because he placed substantial weight on conditions which were either not compensable or insignificant, such as Mr. Brown's 1.47% hearing loss. The Office of Judges was also persuaded that employment was available in Mr. Brown's geographic area because Ms. Phillis-Harvey included in her evaluation three current job openings in the area for which she believed Mr. Brown possessed the requisite capacity and skill. According to the Office of Judges, the preponderance of the evidence weighed in favor of a finding that Mr. Brown did not meet the criteria for permanent total disability. The Board of Review adopted the findings of the Office of Judges and affirmed its Order.

We agree with the conclusion of the Board of Review and the findings and reasoning of the Office of Judges. Mr. Brown did not meet the criteria for a permanent total disability award. The evidence in the record indicates that Mr. Brown was capable of performing light work in which he alternated between sitting and standing. The evidence also indicates that there were

available positions in Mr. Brown's geographic area that he would be capable of performing. The Board of Review was correct to affirm the June 27, 2011, Order of the Office of Judges.

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: June 12, 2013**

**CONCURRED IN BY:**

Justice Robin J. Davis

Justice Margaret L. Workman

Justice Menis E. Ketchum

Justice Allen H. Loughry II

Justice Thomas E. McHugh, Senior Status Justice sitting by special assignment  
(Chief Justice Brent D. Benjamin, disqualified)