

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

**BETTY ESTEP, WIDOW OF LEON ESTEP,
Petitioner**

February 15, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) **No. 101258 (BOR Appeal No. 2044105)
(Claim No. 2006052573)**

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
PLOTT & HOLBOOK, INC., Respondent**

MEMORANDUM DECISION

The Petitioner, Betty Estep, by Robert M. Williams, appeals the Board of Review order denying Mrs. Estep's application for occupational pneumoconiosis death benefits. The Office of Insurance Commissioner, by its attorney, Mary Rich Maloy, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated August 31, 2010, in which the Board affirmed a January 28, 2010, order of the Workers' Compensation Office of Judges. In its order, the Office of Judges affirmed the claims administrator's denial of Ms. Estep's request for occupational pneumoconiosis death benefits. 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 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 Ms. Estep was not entitled to an award of occupational pneumoconiosis death benefits since the medical records fail to establish the decedent, Leon

Estep's, death was materially contributed to by occupational pneumoconiosis. Prior to his death, Mr. Estep was awarded a 15% permanent partial disability award for occupational pneumoconiosis. Ms. Estep asserts the Board of Review failed to properly consider the opinions of Dr. Dominic Gaziano and Dr. D. L. Rasmussen finding Mr. Estep's death was materially contributed to by occupational pneumoconiosis. Further, Dr. Kinder acknowledged this was a case in which physicians could offer differing opinions regarding the cause of Mr. Estep's death. The Occupational Pneumoconiosis Board (hereinafter "OP Board") considered Mr. Estep's medical records and determined the cause of death related to an unrelated infectious process with no contribution from the occupational pneumoconiosis.

The Office of Judges found the findings of the OP Board persuasive in determining Ms. Estep's entitlement to the requested occupational pneumoconiosis death benefits. The OP Board considered Mr. Estep's extensive medical records and found Dr. Gaziano's finding that Mr. Estep suffered from occupational pneumoconiosis was based upon the statutory presumption and no x-ray evidence established occupational pneumoconiosis. (January 28, 2010, Office of Judges Order, p. 10). "At the time of the hearing in this matter, the [OP Board] again reviewed the decedent's x-rays and found no evidence of asbestosis. The [OP Board] also did not find any pathology that the decedent had asbestosis in the medical records." *Id.*

Both Dr. Gaziano and Dr. Rasmussen surmised Mr. Estep suffered from lung cancer which caused, or contributed, to Mr. Estep's GI bleed, which was identified as the immediate cause of Mr. Estep's death. *Id.* Further, the Office of Judges noted Mr. Estep was bronchoscoped multiple times to ascertain the etiology of his lung lesions with all studies being negative of malignancy of the lungs. *Id.* The OP Board further found Mr. Estep suffered from a cavity lesion, which is more consistent with an infectious process rather than malignancy, and this infectious process could have caused Mr. Estep's GI bleed. *Id.*, at p. 11. As a result, the Office of Judges found the preponderance of the evidence does not support a finding that Mr. Estep's death was materially contributed to by occupational pneumoconiosis. *Id.* The Office of Judges, too, found no basis for granting Ms. Estep's request for occupational pneumoconiosis death benefits or for disputing the Claims Administrator's Order. The Board of Review reached the same reasoned conclusion in affirming the Office of Judges in its decision of August 31, 2010.

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 is based upon the Board's material misstatement or mischaracterization of particular components of the evidentiary record. Therefore, the Court affirms the Board of Review order denying Ms. Estep's request for occupational pneumoconiosis death benefits.

Affirmed.

ISSUED: : February 15, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum

Justice Robin J. Davis

Justice Brent D. Benjamin

DISSENTING:

Justice Margaret L. Workman

Justice Thomas E. McHugh