

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

May 7, 2012

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

**DOROTHY GILKERSON,
WIDOW OF LANDO GILKERSON
deceased, Petitioner**

**vs.) No. 101468 (BOR Appeal No. 2044702)
(Claim No. 2009077862)**

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
SWVA, INC., Respondent**

MEMORANDUM DECISION

Petitioner Dorothy Gilkerson, pro se, appeals the West Virginia Workers' Compensation Board of Review's Order dismissing the claim for death benefits. SWVA, Inc., by H. Toney Stroud, its attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated October 26, 2010, in which the Board affirmed a May 18, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's May 8, 2009, Order dismissing the claim for failure to cooperate. 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 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 5, 2009, Ms. Gilkerson filed a claim for death benefits after the death of her husband Lando. Respondent made numerous unsuccessful attempts to secure a validly executed

medical release from the petitioner. The claims administrator on May 8, 2009, dismissed the claim for failure to cooperate.

In holding that the petitioner was not entitled to a final decision, the Board of Review affirmed the holding that the petitioner failed to cooperate. Petitioner disagrees and argues that it was incorrect for the Office of Judges to not consider all the evidence and dismiss her claim.

Under West Virginia Code § 23-4-7(b)(2005), “[a] claimant irrevocably agrees by the filing of his or her application for benefits that any physician may release to and orally discuss with the claimant’s employer, or its representative, or with a representative of the commission, successor to the commission, other private carrier or self-insured employer, whichever is applicable, from time to time, the claimant’s medical history and any medical reports pertaining to the occupational injury or disease[.]” The Office of Judges in dismissing the claim, held that by failing to provide a validly executed medical release, the petitioner was not entitled to a final decision. The Board of Review reached the same reasoned conclusion in affirming the Office of Judges in its decision of October 26, 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: May 7, 2012

CONCURRED IN BY:

Justice Robin J. Davis

Justice Margaret L. Workman

Justice Thomas E. McHugh

DISSENTING:

Chief Justice Menis E. Ketchum

Justice Brent D. Benjamin, Not Participating