

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

July 26, 2012

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

**DONNA FLUHARTY, WIDOW OF
ALAN R. FLUHARTY, deceased, Petitioner**

**vs.) No. 11-0027 (BOR Appeal No. 2044639)
(Claim No. 2000026602)**

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
RAUER COAL CORPORATION, Respondent**

MEMORANDUM DECISION

Petitioner, Donna Fluharty, by Robert L. Stultz, her attorney, appeals the Board of Review Order denying dependent's death benefits. The West Virginia Office of Insurance Commissioner, by Jon H. Snyder, its attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated December 7, 2010, in which the Board affirmed a May 27, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's denial of dependents 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.

During his lifetime, Mr. Fluharty was evaluated and awarded 40% permanent partial disability benefits for occupational pneumoconiosis. The last chest x-ray evidence taken prior to Mr. Fluharty's death revealed occupational pneumoconiosis classification of p/q, 1/1, lower lung zones, and negative pleura. The November 16, 2006, certificate of death lists Mr. Fluharty's primary causes of death as septic shock, post obstructive pneumonia with respiratory failure, and advanced lung cancer. Additional contributing causes of death for Mr. Fluharty included chronic obstructive pulmonary disease, emphysema, and coronary artery disease.

On July 14, 2008, the claims administrator found sufficient evidence to accept Mrs. Fluharty's application for dependent's benefits and found Pehem Industries, Inc. the chargeable employer. The matter was further referred to the Occupational Pneumoconiosis Review Board (hereinafter "Board") for determination of a cause of death for Mr. Fluharty. On review, the Board found Mr. Fluharty's death was not materially contributed to by his prior diagnosis of occupational pneumoconiosis since x-ray evidence showed minimal evidence of occupational pneumoconiosis. Based upon the Board's recommendation the claims administrator denied Mrs. Fluharty's application for dependent's benefits.

Thereafter, Mrs. Fluharty sought the opinion of Dr. Frank A. Scatteregia who reviewed Mr. Fluharty's medical evidence and opined the occupational pneumoconiosis materially contributed to Mr. Fluharty's death by accelerating Mr. Fluharty's death and preventing aggressive treatment of the advanced lung cancer. Dr. Gregory J. Fino also reviewed Mr. Fluharty's medical records and found the occupational pneumoconiosis did not materially contribute to Mr. Fluharty's death. It was Dr. Fino's considered opinion that Mr. Fluharty's cigarette smoking history was the primary contributor to the development of advanced lung cancer since studies have failed to establish that coal mine dust is a carcinogen, therefore, the lung cancer was not caused by the coal mine dust exposure.

The Office of Judges found the preponderance of the evidence establishes that occupational pneumoconiosis was not a material contributing factor of Mr. Fluharty's death. "Dr. Jack Kinder's testimony that the occupational pneumoconiosis did not contribute to Mr. Fluharty's death was found persuasive." Dr. Scatteregia's opinion that occupational pneumoconiosis prevented effective treatment of the lung cancer was found unpersuasive. The Office of Judges found no basis for awarding dependent's benefits, nor for disputing the claims administrator's findings. The Board of Review reached the same reasoned conclusion in affirming the Office of Judges in its decision of December 7, 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 Court affirms the Board of Review Order denying dependent's benefits.

Affirmed.

ISSUED:

CONCURRED IN BY:

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Margaret L. Workman

Justice Thomas E. McHugh

DISSENTING:

Chief Justice Menis E. Ketchum