

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

May 24, 2013

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

**CAROLYN THOMPSON, WIDOW OF
DAVID RAY THOMPSON SR.,
Claimant Below, Petitioner**

vs.) **No. 11-0517** (BOR Appeal No. 2045061)
(Claim No. 890069589)

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

and

**NEW BECKLEY MINING CORPORATION,
Employer Below, Respondent**

MEMORANDUM DECISION

Petitioner Carolyn Thompson, by Reginald Henry, her attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. The West Virginia Office of Insurance Commissioner, by Jon Snyder, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated February 24, 2011, in which the Board affirmed a September 20, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's January 22, 2009, decision denying Ms. Thompson's request for dependent's 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.

Ms. Thompson filed a claim for dependent's benefits following the June 10, 2008, death of her husband, David. The decedent's death certificate listed the cause of death as pneumoconiosis and chronic obstructive pulmonary disease. On November 11, 2008, the Occupational Pneumoconiosis Board found that occupational pneumoconiosis did not materially contribute to the decedent's death. The Occupational Pneumoconiosis Board further found that there was no radiographic evidence of occupational pneumoconiosis in the record, but that there was radiographic evidence of chronic obstructive pulmonary disease. On August 21, 2009, Dr. Rasmussen performed a records review and found that the decedent suffered from a progressively severe and ultimately fatal chronic lung disease that was the result of a combination of smoking cigarettes and exposure to coal dust; he further found that the decedent had a severe infection that led to the virtual destruction of his right lung and concluded that this, coupled with the underlying lung disease, led to his death. Dr. Rasmussen then stated that chronic lung disease acquired as a result of exposure to coal dust materially contributed to the decedent's death. On April 15, 2010, Dr. Fino stated that after reviewing the decedent's medical records, including the report of his 1995 evaluation of the decedent, the decedent's death is attributable to chronic obstructive pulmonary disease coupled with a lung infection. Dr. Fino found that there was no radiographic evidence of occupational pneumoconiosis, and that the decedent's pulmonary function studies were consistent with chronic obstructive pulmonary disease secondary to cigarette smoking. He further found that even if it was assumed that occupational pneumoconiosis was present, it still could not be considered a material contributing factor to the death of the decedent. At a hearing on July 7, 2010, the Occupational Pneumoconiosis Board noted that the decedent received a presumptive 50% permanent partial disability award for occupational pneumoconiosis in 1993, despite the fact that a radiographic diagnosis of occupational pneumoconiosis had not been made. The Occupational Pneumoconiosis Board found that the decedent's medical records document a clear case of chronic obstructive pulmonary disease with a fungal infection complicated by a bacterial infection, with no radiographic or pathologic evidence of occupational pneumoconiosis. The Occupational Pneumoconiosis Board concluded that occupational pneumoconiosis did not materially contribute to the decedent's death.

In its Order affirming the January 22, 2009, claims administrator's decision, the Office of Judges held that occupational pneumoconiosis did not cause or materially contribute to the decedent's death. Ms. Thompson disputes this finding and asserts that the evidence of record demonstrates that occupational pneumoconiosis materially contributed to her husband's death, and that she is therefore entitled to dependent's benefits.

In *Bradford v. Workers' Compensation Com'r*, Syl. Pt. 3, 185 W.Va. 434, 408 S.E.2d 13 (1991), this Court held that in order to establish entitlement to dependent's benefits, a claimant must show that an occupational disease or injury "contributed in any material degree to the death." The Office of Judges found that there is no evidence of record indicating that occupational pneumoconiosis caused or materially contributed to the death of the decedent. The Office of Judges noted that the decedent had a severe lung infection caused by bacteria and fungus, and also a significant history of cigarette smoking. The Office of Judges further noted that a radiographic diagnosis of occupational pneumoconiosis has never been made, and that all

of the x-rays in the record have been negative for occupational pneumoconiosis. Finally, the Office of Judges found that when considering the overwhelming degree of non-occupational causes of the decedent's pulmonary impairment present in the record, it is not reasonable to conclude that occupational pneumoconiosis materially contributed to the death of the decedent. The Board of Review reached the same reasoned conclusions in its decision of February 24, 2011. 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: May 24, 2013

CONCURRED IN BY:

Chief Justice Brent D. Benjamin
Justice Robin J. Davis
Justice Margaret L. Workman
Justice Allen H. Loughry II

DISSENTING:

Justice Menis E. Ketchum