

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

May 14, 2013

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

**MARGARET LOU HARDING, Widow of
DAVID LEE HARDING (Deceased),
Claimant Below, Petitioner**

vs.) **No. 11-0982** (BOR Appeal No. 2045332)
(Claim No. 880060996)

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

and

**LITTLE MAN COAL, INC.,
Employer Below, Respondent**

MEMORANDUM DECISION

Petitioner Margaret Lou Harding, by John C. Blair, her attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. The West Virginia Office of Insurance Commissioner, by Jon H. Snyder, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated June 8, 2011, in which the Board affirmed a November 17, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's June 8, 2009, decision to deny Ms. Harding dependent benefits based on her husband's death because the claim was not timely filed. 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.

On January 20, 2008, Ms. Harding's husband, an employee of Little Man Coal, Inc., died from coal worker's occupational pneumoconiosis which could have entitled Ms. Harding to dependent benefits under West Virginia Code § 23-4-10 (b) (2005) *amended by* West Virginia Code § 23-4-10 (2010) (effective June 8, 2010). Ms. Harding filled out the application for dependent benefits and had the application notarized on January 5, 2009, but did not submit the application to the claims administrator until June 5, 2009, over a year after her husband's death.

Under West Virginia Code § 23-4-15(b) (2005), *amended by* West Virginia Code § 23-4-15 (2010) (effective June 8, 2010), a claim for dependent benefits based on the death of an employee from occupational pneumoconiosis must be "filed by the dependent of the employee within one year from and after the employee's death, and such time limitation is a condition of the right and hence jurisdictional." In its November 17, 2010, Order the Office of Judges found that Ms. Harding failed to file her application for benefits within the applicable one year statute of limitations. The Office of Judges further found that Ms. Harding did not have any excuse that was sufficient to overcome the time limitation of her claim. The Office of Judges determined, by a preponderance of the evidence, that the claimant did not file her application in a timely manner and that her claim, therefore, was barred.

The Board of Review adopted the findings of the Office of Judges and affirmed its Order on June 8, 2011.

We agree with the determination of the Office of Judges that Ms. Harding failed to file her application within the effective time limit under West Virginia Code § 23-4-15(b). None of the justifications Ms. Harding gives for her late filing are sufficient to overcome the time limitation and, because it is a condition of her right, her claim is, unfortunately, barred. The Board of Review was correct to affirm the 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: May 14, 2013

CONCURRED IN BY:

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