

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

**AUDREY HOFFMAN, WIDOW OF
DARREL C. HOFFMAN, deceased, Petitioner**

**July 26, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

**vs.) No. 11-0020 (BOR Appeal No. 2044620)
(Claim No. 2005037515)**

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
APPALACHIAN POWER COMPANY, Respondent**

MEMORANDUM DECISION

Petitioner, Audrey Hoffman, by John H. Skaggs, her attorney, appeals the Board of Review Order denying her request for occupational pneumoconiosis death benefits. Appalachian Power Company, by James W. Heslep, its attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated December 3, 2010, in which the Board affirmed a May 12, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's denial of dependent's 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.

Darrell C. Hoffman was employed for 37 years as an instrument reader in the Philip Sporn power plant for Appalachian Power Company, from which Mr. Hoffman retired on December 30, 1985. On January 26, 1996, Mr. Hoffman underwent chest x-rays to determine the presence of occupational pneumoconiosis. Dr. Dominic Gaziano opined the x-rays showed rounded and irregular opacities of both mid and lower lung zones and bilateral pleural plaques, for which Dr. Gaziano opined Mr. Hoffman suffered from occupational pneumoconiosis category 1/0, p/q.

Prior to his death Mr. Hoffman underwent a variety of testing including a CT scan of his chest. The CT scan showed no suggestion of pleural plaquing or calcified pleural plaques in any of the left or right hemithorax; however, there was evidence of a large left-sided pleural effusion, related to Mr. Hoffman's malignancy, diagnosed as adenocarcinoma. Pleural staining could not permit an unequivocal identification of the source of malignancy, but strongly suggested mesothelioma was not the cause. Electron microscopy results were negative for mesothelioma. Following Mr. Hoffman's death, Ms. Hoffman completed and submitted an application for dependent's benefits. This application was considered by the claims administrator and forwarded to the Occupational Pneumoconiosis Board.

Dr. Thomas M. Hayes testified that he reviewed Mr. Hoffman's evidence and found the x-ray and CT scan studies fail to establish Mr. Hoffman suffered from occupational pneumoconiosis or mesothelioma. Dr. Jack Kinder also testified that the pleural staining studies and electron microscopy results, when considered in tandem, eliminate mesothelioma as the source of Mr. Hoffman's malignancy. Dr. Mahendra Patel also opined Mr. Hoffman suffered from undifferentiated malignancy with an unknown primary since a diagnosis of mesothelioma was excluded based upon the stain testing.

Based upon the above medical evidence, the Office of Judges held Mr. Hoffman's death was not materially contributed to by occupational pneumoconiosis or mesothelioma. "The decedent's death certificate indicates that [Mr. Hoffman] died from cardiac asystole and recurrent pleural effusion and hypertension as underlying causes." Dr. Joseph Renn opined Mr. Hoffman developed a left pleural effusion, prior to his death, and underwent a thoracentesis. During Mr. Hoffman's hospitalization a diagnosis of poorly differentiated carcinoma was made since electron microscopy was felt to eliminate mesothelioma as the source of the malignancy.

Dr. Stephen Bush opined the three pleural biopsies show similar histologic findings: an undifferentiated, large cell malignant neoplasm with a tendency to spindle invading muscle and fat. Biopsies removed from the diaphragm included a benign collagenous nodule surrounded by the malignant neoplasm. None of these histologic findings contained specific features that allowed for identification of the source of the malignancy. Special staining strongly suggested the malignancy was of epithelial origin, but did not permit unequivocal identification of the source of malignancy.

Dr. Bush and Dr. Renns' reports were found to be reliable and very credible, while Dr. Gaziano's and Dr. Agrawal's reports were found less credible. The Office of Judges further held the Occupational Pneumoconiosis Board testified Mr. Hoffman did not have mesothelioma. "The evidence of this protest demonstrates that [Mr. Hoffman] did not die of mesothelioma and that this diagnosis was ruled out by electron microscopy that was performed." The Office of Judges, too, found no basis for awarding dependent's benefits or 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 3, 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 and finding Mr. Hoffman's death was not materially contributed to by an occupational disease.

Affirmed.

ISSUED: July 26, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum

Justice Robin J. Davis

Justice Margaret L. Workman

Justice Thomas E. McHugh

Justice Brent D. Benjamin, Disqualified