

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

February 20, 2013
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

**JACQUELINE SMITH, WIDOW OF
DANIEL CARL SMITH,
Claimant Below, Petitioner**

vs.) **No. 11-0840** (BOR Appeal No. 2045164)
(Claim No. 980054591)

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

and

**DIVITA COAL COMPANY, INC.,
and MAPTONA INC.,
Employers Below, Respondent**

MEMORANDUM DECISION

Petitioner Jacqueline Smith, by Robert Williams, her attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. The West Virginia Office of Insurance Commissioner, by Mary Rich Maloy, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated April 26, 2011, in which the Board affirmed a September 21, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's February 28, 2008, decision denying Ms. Smith'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.

Daniel Carl Smith worked as a coal miner for Maptona, Inc. and Divita Coal Company. He passed away at home on April 11, 2007. An autopsy was performed, but was limited to the lungs. On February 28, 2008, the claims administrator denied Ms. Smith's application for dependent's benefits.

The Office of Judges affirmed the claims administrator's Order, and held that occupational pneumoconiosis did not materially contribute to the decedent's death. Ms. Smith disputes that finding, and argues that several doctors found that occupational pneumoconiosis materially contributed to her husband's death, and it was found on the autopsy, therefore she should be granted dependent's benefits. Dr. Gaziano on April 22, 2009, concluded that occupational pneumoconiosis was a significant contributory factor in Mr. Smith's death; he noted that the death certificate stated Mr. Smith died a respiratory death. Dr. Crouch found that that the cause of death could not be definitively established based on the autopsy because the post-mortem exam was restricted to the lungs; however, he noted that no lesions of coal worker's pneumoconiosis were observed. The Occupational Pneumoconiosis Board concluded that occupational pneumoconiosis was not a material contributing factor in Mr. Smith's death.

In affirming the claims administrator's Order, the Office of Judges found that the testimony and conclusions of the Occupational Pneumoconiosis Board were persuasive in that occupational pneumoconiosis was not a material contributing factor in Mr. Smith's death. The Office of Judges noted that the testimony of Dr. Kinder indicated that there was evidence of a one to two pack per day smoking habit, that the information related to the decedent's death was unclear, and that the autopsy was limited. The Office of Judges concluded that occupational pneumoconiosis did not materially contribute to the decedent's death, and therefore Ms. Smith was not entitled to dependent's benefits. The Board of Review reached the same reasoned conclusions in its decision of April 26, 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: February 20, 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