

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

**SHIRLEY ROBERTS, widow of
KERMIT G. ROBERTS (deceased),
Claimant Below, Petitioner**

FILED
July 25, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

**vs.) No. 100811 (BOR Appeal No. 2043889)
(Claim No. 2006029976)**

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

and

**HUNTINGTON ALLOYS CORPORATION,
Employer Below, Respondent**

MEMORANDUM DECISION

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated June 2, 2010, in which the Board affirmed a November 30, 2009, 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 on August 3, 2006. The appeal was timely filed by the petitioner, and Huntington Alloys Corporation filed a response. The Court has carefully reviewed the records, written arguments, and appendices contained in the petition, and the case is mature for consideration.

Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, the Court is of the opinion that this case is appropriate for consideration under the Revised Rules. Having considered the parties' submissions 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.

The Board of Review affirmed the denial of Ms. Roberts's request for dependent's

benefits. In arguing that she is entitled to dependent's benefits, Ms. Roberts asserts that the death certificate completed by Dr. James C. Goetz following her husband's death lists occupational pneumoconiosis as a significant contributing cause of her husband's death. Because there has been no showing that Mr. Goetz's opinion is unreliable, Ms. Roberts asserts that she has established that occupational pneumoconiosis was a material contributing cause of Mr. Roberts's death, thus entitling her to dependent's benefits.

The Office of Judges, however, reviewed the death certificate and found that metastatic lung cancer is listed as the immediate cause of death, and COPD and pneumonia are listed as other significant conditions. (Nov. 30, 2009 Office of Judges Order, p. 5.) There is no mention of occupational pneumoconiosis on this document. *Id.* Thus, the Office of Judges was left with the testimony of the Occupational Pneumoconiosis Board's physicians, Dr. Jack L. Kinder, Jr., Dr. Thomas M. Hayes, and Dr. Bradley D. Henry.

Although Mr. Roberts was granted a 5% PPD award for occupational pneumoconiosis, Dr. Kinder stated that this determination was based upon a review of Mr. Roberts's x-ray and was "given the benefit of the doubt." When Mr. Kinder had the benefit of a more reliable CT scan, he concurred with Dr. Hayes's assertion that there is no evidence of occupational pneumoconiosis. Specifically, Dr. Hayes did not find pleural plaquing or specific areas of fibrosis, which he believed adequate to exclude occupational pneumoconiosis. Dr. Kinder stated that Mr. Roberts's smoking history of one pack per day for 50 years was sufficient to cause cancer. Dr. Henry agreed with this testimony. The Occupational Pneumoconiosis Board concluded that Mr. Roberts would have died in the same manner and at the same time irrespective of any occupational dust exposure and that occupational pneumoconiosis played no role in Mr. Roberts's death. Accordingly, the Office of Judges affirmed the denial of Ms. Roberts's claim for dependent's benefits, and the Board of Review reached the same reasoned conclusion in affirming the Office of Judges in its decision of June 2, 2010.

For the foregoing reasons, we find that the decision of the Board of Review is not in clear violation of constitutional or statutory provision, clearly the result of erroneous conclusions of law, or based upon the Board's material misstatement or mischaracterization of particular components of the evidentiary record. Therefore, the denial of the petitioner's claim for dependent's benefits is affirmed.

Affirmed.

ISSUED: July 25, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Thomas E. McHugh

DISSENTING:

Justice Menis E. Ketchum