

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

**BRENDA J. WESTFALL, widow of
CLYDE RAY WESTFALL (deceased),
Claimant Below, Petitioner**

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

**vs.) No. 100830 (BOR Appeal No. 2043883)
(Claim No. 2008001632)**

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

and

**EASTERN ASSOCIATED COAL, LLC,
Employer Below, Respondent**

MEMORANDUM DECISION

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated June 3, 2010, in which the Board affirmed a December 4, 2009, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's January 24, 2008 Order denying Ms. Westfall's application for dependent's benefits following her husband's death. The appeal was timely filed by the petitioner, and a response was filed by Eastern Associated Coal, LLC. 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 dependent's benefits. Ms. Westfall claims entitlement to these benefits based upon the report of Dr. Frank Scatteregia, Mr. Westfall's occupational dust exposure, his x-ray diagnosis of occupational pneumoconiosis, and the fact that he was a non-smoker. Dr. Scatteregia opined, to a reasonable degree of medical certainty, that the deceased's occupational lung disease was a material contributing factor to his death. His conclusion was based in part upon his observation of pleura pigmentation.

In affirming the denial of Ms. Westfall's claim for dependent's benefits, the Office of Judges relied on the Occupational Pneumoconiosis Board's findings. (Dec. 4, 2009 Office of Judges Order, p. 2.) The Occupational Pneumoconiosis Board concluded that the deceased died from complications secondary to cardiac disease. *Id.* Immediately prior to his death, he developed a gastrointestinal bleed and was hospitalized. *Id.* During his hospitalization his BNP increased, which is indicative of congestive heart failure. *Id.* With respect to the pleura pigmentation, the Occupational Pneumoconiosis Board noted that an observation of this type is not synonymous with occupational pneumoconiosis. *Id.* Furthermore, the deceased's autopsy report makes no mention of occupational pneumoconiosis. *Id.*

The Occupational Pneumoconiosis Board also noted that there were no objective studies to support a diagnosis of COPD, which was a diagnosis that Dr. Scatteregia gave. *Id.* at 3. The Occupational Pneumoconiosis Board found Dr. Scatteregia's report to be unreliable. *Id.* at 4-5. The Occupational Pneumoconiosis Board found the reports of several other physicians to be reliable, however. *Id.* at 5. These reports all concluded that dust exposure and/or occupational pneumoconiosis played no role in the deceased's death. Thus, the Office of Judges affirmed the denial of dependent's benefits, and the Board of Review reached the same reasoned conclusion in affirming the Office of Judges in its decision of June 3, 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 request 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 Menis E. Ketchum

Justice Thomas E. McHugh