

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

**ROSE MARTIN, Widow of GARY
R. MARTIN (Deceased), Petitioner**

**vs.) No. 101266 (BOR Appeal No. 2044214)
(Claim No. 2008040124)**

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
AMERICAN ELECTRIC POWER, Respondent**

FILED
November 8, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated September 1, 2010, in which the Board affirmed a March 2, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's November 6, 2008, Order, which denied Ms. Martin dependent's benefits. The appeal was timely filed by the petitioner, and the West Virginia Office of Insurance Commissioner 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, this Court is of the opinion that this matter 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 Office of Judge's Order, which denied Ms. Martin dependent's benefits. Ms. Martin argues that she is entitled to dependent's benefits because occupational pneumoconiosis contributed in a material degree to her husband's death. In support of her argument, she relies on letters from several of her deceased husband's treating physicians claiming that Mr. Martin suffered from occupational pneumoconiosis prior to his

death. Two of these physicians claimed that occupational pneumoconiosis contributed to Mr. Martin's death to a material degree.

The Office of Judges noted the absence of diagnostic studies confirming the presence of occupational pneumoconiosis from Mr. Martin's treating physicians. (March 2, 2010, Office of Judges Order, p. 4.) An autopsy of Mr. Martin found no evidence of complicated occupational pneumoconiosis. *Id.* Further, a pulmonary tissue study completed by Dr. Erika Crouch similarly found no evidence of occupational pneumoconiosis. *Id.* Dr. Crouch concluded that coal dust exposure could not have caused, contributed to, or hastened Mr. Martin's death.

In line with Dr. Crouch's conclusion, the OP Board also opined that occupational pneumoconiosis did not contribute to Mr. Martin's death. *Id.* The OP Board reviewed the letters submitted by Ms. Martin, but it ultimately found that Mr. Martin did not suffer from occupational pneumoconiosis. *Id.* In the absence of occupational pneumoconiosis, it could not have contributed in any material way to Mr. Martin's death. Rather, Mr. Martin had several severe non-occupational diseases, including metastatic renal cell cancer, emphysema, non-specific fibrosis, and pleurodesis. *Id.* at 4-5. Thus, the Office of Judges concluded that occupational pneumoconiosis did not play a material contributing role in Mr. Martin's death. *Id.* at 5. The Board of Review reached the same reasoned conclusion in affirming the Office of Judges in its September 1, 2010, decision.

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 Ms. Martin's application for dependent's benefits is affirmed.

Affirmed.

ISSUED: November 8, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman

Justice Robin J. Davis

Justice Thomas E. McHugh

DISSENTING:

Justice Menis E. Ketchum

Justice Brent D. Benjamin, disqualified.