

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

**SVENNA SUE PARTLOW, widow of KENNY
E. PARTLOW (deceased), Petitioner**

**vs.) No. 101273 (BOR Appeal No. 2044153)
(Claim No. 2005044828)**

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
OWENS-ILLINOIS, INC., 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 Final Order dated August 31, 2010, in which the Board affirmed a January 28, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's February 21, 2007, Order, which denied Ms. Partlow's request for 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. Partlow's application for dependent's benefits. Ms. Partlow argues that her deceased's husband's cancer, which caused his death, originated in his lungs as supported by a pathology report. This, in conjunction with his history of asbestos exposure, supports a finding that occupational pneumoconiosis was a materially contributing factor in the decedent's death.

The Office of Judges acknowledged first that the decedent had been diagnosed with occupational pneumoconiosis in 1996. (Jan. 28, 2010, Office of Judges Order, p. 3.) Between 1996 and 2003, however, there was no progression of the few irregular opacities observed on the earlier film, which suggests the absence of occupational pneumoconiosis. The Occupational Pneumoconiosis Board stated that the decedent had been afforded the benefit of the doubt in 1996 based on one study; however, later evidence did not correlate with the earlier findings. *Id.* Thus, the Occupational Pneumoconiosis Board concluded that occupational pneumoconiosis did not play a material contributing role in the decedent's death. *Id.*

Moreover, with respect to the pathology report suggesting that the decedent's cancer originated in his lungs, the pathology report itself states that the staining pattern is non-specific. Additionally, the Occupational Pneumoconiosis Board opined that his cancer was actually pancreatic in origin. *Id.* The basis of this opinion was the decedent's development of diabetes despite having lost weight and not being overweight. *Id.* Individuals with pancreatic cancer can develop diabetes in spite of a lack of weight gain or obesity. Based upon the Occupational Pneumoconiosis Board's conclusions, the Office of Judges affirmed the denial of Ms. Partlow's request for dependent's benefits. The Board of Review reached the same reasoned conclusion in affirming the Office of Judges in its August 31, 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. Partlow's request for dependent's benefits is affirmed.

Affirmed.

ISSUED: November 8, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Menis E. Ketchum

Justice Thomas E. McHugh