

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

February 17, 2012

**RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

**MARY GANNON, WIDOW OF MILLARD GANNON,
Petitioner**

**vs.) No. 101392 (BOR Appeal No. 2044399)
(Claim No. 900010810)**

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
PERRY & HYLTON, INC., Respondent**

MEMORANDUM DECISION

Petitioner Mary Gannon, by Robert Williams, her attorney, appeals the decision of the Board of Review. The West Virginia Office of Insurance Commissioner, by David Stuart, its attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated October 12, 2010, in which the Board affirmed a March 29, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's March 6, 2008, decision denying the petitioner death benefits. 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 petition 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.

In its Order, the Office of Judges held that the conclusion of the Occupational Pneumoconiosis Board that Mr. Gannon died as a result of congestive heart failure and

atherosclerosis is supported by a preponderance of the evidence, and also held that occupational pneumoconiosis did not materially contribute to Mr. Gannon's death. Ms. Gannon, Mr. Gannon's widow, disputes this finding and asserts, per the opinions of Dr. Adkins and Dr. Rasmussen, that occupational pneumoconiosis did materially contribute to Mr. Gannon's death.

The Office of Judges pointed to *Bradford v. Workers' Compensation Commissioner*, 185 W.Va. 434, 408 S.E.2d 13 (1991), which provides that in order to receive death benefits, it is not necessary to prove that occupational pneumoconiosis was the sole cause of death, but only that it was a material contributing cause of the decedent's death. The Office of Judges noted that Mr. Gannon's death certificate listed his cause of death as congestive heart failure and atherosclerotic heart disease. The Office of Judges found that the Occupational Pneumoconiosis Board and Dr. Fino agreed that Mr. Gannon's cause of death was congestive heart failure and atherosclerotic heart disease, and that occupational pneumoconiosis did not materially contribute to his death. The Office of Judges also found that the Occupational Pneumoconiosis Board was unable to make a diagnosis of occupational pneumoconiosis based on the diagnostic imaging available to it. Finally, the Office of Judges found that the report of Dr. Adkins did not provide adequate detail and that the report of Dr. Rasmussen failed to adequately address Mr. Gannon's known cardiac disease. The Board of Review reached the same reasoned conclusion in its decision of October 12, 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 is based upon the Board's material misstatement or mischaracterization of particular components of the evidentiary record. Therefore, the decision of the Board of Review is affirmed.

Affirmed.

ISSUED: February 17, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Margaret L. Workman

Justice Thomas E. McHugh