

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

April 13, 2012

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

**CAROLINE SCARBERRY, widow of
HENRY SCARBERRY (deceased), Petitioner**

**vs.) No. 101601 (BOR Appeal No. 2044552)
(Claim No. 2005033135)**

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
RUTTMAN CONSTRUCTION COMPANY,
Respondent**

MEMORANDUM DECISION

Petitioner Caroline Scarberry, by Wendle Cook, her attorney, appeals the West Virginia Workers' Compensation Board of Review's Order denying a request for dependent's benefits. The West Virginia Office of Insurance Commissioner, by Mary Rich Maloy, its attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated November 17, 2010, in which the Board affirmed an April 16, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's December 8, 2006, Order denying dependent's benefits. The Court has carefully reviewed the records, written arguments, and appendices contained in the petition, and the case is mature for consideration.

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.

The Board of Review affirmed the holding that occupational pneumoconiosis did not contribute in a material degree to the decedent's death. Ms. Scarberry disagrees and asserts that there was not sufficient evidence to overcome the presumption that occupational pneumoconiosis was a significant cause of her husband's death.

In holding that the Occupational Pneumoconiosis Board was not clearly wrong in finding that occupational lung disease did not materially contribute to the death of Mr. Scarberry, the Office of Judges noted that he was being treated for a condition completely unrelated to the lung condition. It also noted that Mr. Scarberry's cause of death was a myocardial infarction and he had a cardiac history including several different heart problems. The Office of Judges also noted that the treating physician only included pneumoconiosis in his second death certificate, and then only as another significant condition contributing to the cause of death. The Board of Review reached the same reasoned conclusion in affirming the Office of Judges in its decision of November 17, 2010.

For the foregoing reasons, we find that the decision of the Board of Review is not in clear violation of any constitutional or statutory provision, nor is it clearly the result of erroneous conclusions of law, nor is it based upon a material misstatement or mischaracterization of the evidentiary record. Therefore, the Board of Review's November 17, 2010, Order is affirmed.

Affirmed.

ISSUED: April 13, 2012

CONCURRED IN BY:

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Margaret L. Workman

Justice Thomas E. McHugh

DISSENTING:

Chief Justice Menis E. Ketchum