

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

October 31, 2012

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

**SHELBY PHILLIPS, WIDOW OF NORMAN PHILLIPS,
DECEASED, Petitioner**

vs.) No. 11-0414 (BOR Appeal No. 2044906)
(Claim No. 2007211604)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
EASTERN ASSOCIATED COAL,
LLC, Respondent**

MEMORANDUM DECISION

Petitioner Shelby Phillips, by Paige Flanigan, her attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Eastern Associated Coal, LLC, by Ann Rembrandt¹, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated February 16, 2011, in which the Board affirmed a July 30, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's February 21, 2007, decision denying Ms. Phillips's request for dependent's benefits based on a finding that occupational pneumoconiosis did not materially contribute to her husband's death. 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.

¹ On May 1, 2012, Ann Rembrandt withdrew from the representation of Eastern Associated Coal. Eastern Associated Coal is currently represented by Henry Bowen.

Ms. Phillips filed an application for dependent's benefits following the death of her husband. Mr. Phillips worked as an underground coal miner for fifteen years, and subsequently received a 20% permanent partial disability award for occupational pneumoconiosis. In September of 2005, Mr. Phillips was diagnosed with carcinoma of the right lower lung, and it was noted that he had a one hundred pack year smoking habit. On July 2, 2006, Mr. Phillips passed away, with respiratory failure listed as his cause of death. On January 9, 2007, the Occupational Pneumoconiosis Board found that occupational pneumoconiosis was not a material contributing factor in the death of Mr. Phillips. On November 12, 2007, Dr. Rasmussen performed a records review and found that Mr. Phillips's medical record contains radiographic evidence consistent with occupational pneumoconiosis, that both coal dust and cigarette smoke were responsible for Mr. Phillips's fatal disease, and that coal dust exposure materially contributed to his death. At a May 19, 2010, Occupational Pneumoconiosis Board hearing, the Board testified that if Mr. Phillips did have occupational pneumoconiosis, it was minimal. The Board disagreed with Dr. Rasmussen that occupational pneumoconiosis materially contributed to Mr. Phillips's death, and found that his death was caused by lung cancer that was unrelated to coal dust exposure. Further, the Occupational Pneumoconiosis Board found that coal dust exposure did not interfere with the diagnosis or treatment of Mr. Phillips's lung cancer. Finally, the Board found that the abnormal x-ray findings that Dr. Rasmussen attributed to occupational pneumoconiosis are instead radiographic evidence of heart failure.

In its decision affirming the February 21, 2007, claims administrator's decision, the Office of Judges held that occupational pneumoconiosis did not play a material contributing role in Mr. Phillips's death. Ms. Phillips disputes this finding and asserts, per the opinion of Dr. Rasmussen, that occupational pneumoconiosis did play a material contributing role in her husband's death and that she is therefore entitled to dependent's benefits.

In *Bradford v. Workers' Compensation Com'r*, Syl. Pt. 3, 185 W.Va. 434, 408 S.E.2d 13 (1991), this Court held that in order to establish entitlement to dependent's benefits, a claimant must show that an occupational disease or injury "contributed in any material degree to the death." In its Order, the Office of Judges noted that Mr. Phillips had a significant history of cigarette smoking well beyond his date of last exposure to coal dust. The Office of Judges further noted that the Occupational Pneumoconiosis Board found that occupational pneumoconiosis did not materially contribute to Mr. Phillips's death. The Office of Judges found that Dr. Rasmussen failed to consider the existence of Mr. Phillips's heart failure when rendering his opinion. The Office of Judges further found that occupational pneumoconiosis did not hinder Mr. Phillips's lung cancer diagnosis or interfere with his treatment, and that although he received a lifetime occupational pneumoconiosis award, it did not materially contribute to his death. The Board of Review reached the same reasoned conclusion in its decision of February 16, 2011. We agree with the reasoning and conclusions of the Board of Review.

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 decision of the Board of Review is affirmed.

Affirmed.

ISSUED: October 31, 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