

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

February 20, 2013
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

**ELOISE DANKO, WIDOW OF
GEORGE DANKO,
Claimant Below, Petitioner**

vs.) No. 11-0870 (BOR Appeal No. 2045316)
(Claim No. 2001037760)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER
Commissioner Below, Respondent**

and

**PECHINEY ROLLED PRODUCTS, LLC,
Employer Below, Respondent**

MEMORANDUM DECISION

Petitioner Eloise Danko, by Robert Williams, her attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Alcan Rolled Products, LLC, by H. Toney Stroud, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated May 5, 2011, in which the Board affirmed a November 3, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's August 27, 2008, decision denying Ms. Danko's request for dependent's benefits. The Court has carefully reviewed the records, written arguments, and appendices contained in the briefs, and the case is mature for consideration.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Rules of Appellate Procedure.

Mr. Danko worked for Pechiney Rolled Products for thirty-five years. He had received a prior 10% permanent partial disability award for occupational pneumoconiosis. He passed away on July 4, 2007. On August 27, 2008, the claims administrator denied Ms. Danko's request for dependent's benefits.

The Office of Judges held that the evidence did not demonstrate that occupational pneumoconiosis played a material contributing role in the death of Mr. Danko. On appeal, Ms. Danko disagrees and asserts that the evidence, namely the reports of Drs. Gaziano and Rasmussen, establish that occupational pneumoconiosis was a material contributing factor in her husband's death and she is entitled to dependent's benefits. Drs. Gaziano and Rasmussen concluded that the decedent's occupational exposure to asbestos was sufficient to have caused or contributed to the development of Mr. Danko's lung cancer. Drs. Craighead and Renn disagreed and found that asbestosis must be present to attribute lung cancer to occupational exposure, and asbestosis was not present. The Occupational Pneumoconiosis Board found that no asbestos fibers were found during the autopsy, nor was there evidence of asbestosis in this case.

In affirming the claims administrator's Order, the Office of Judges found that the Occupational Pneumoconiosis Board's findings and testimony were not clearly wrong to conclude that occupational pneumoconiosis did not play a material contributing role in the decedent's death. The Occupational Board's chairman, Dr. Kinder, testified that the largest body of knowledge asserts that asbestosis is necessary to attribute a patient's occupational exposure to lung cancer. The Office of Judges found that the decedent did not have asbestosis or physical evidence of asbestos exposure. It concluded that the preponderance of the evidence did not support Ms. Danko's application for dependent's benefits. The Board of Review reached the same reasoned conclusions in its decision of May 5, 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: February 20, 2013

CONCURRED IN BY:

Chief Justice Brent D. Benjamin
Justice Robin J. Davis
Justice Margaret L. Workman
Justice Menis E. Ketchum
Justice Allen H. Loughry II