

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**KAREN BOLYARD, WIDOW OF
HOWARD JOHN BOLYARD,
Claimant Below, Appellant**

FILED

June 1, 2011

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

**vs.) No. 35748 (BOR Appeal No. 2043698)
(Claim No. 2004020133)**

**WEST VIRGINIA OFFICE INSURANCE
COMMISSION and PACKAGING
CORPORATION OF AMERICA, Appellees**

MEMORANDUM DECISION

This appeal arises from the West Virginia Workers' Compensation Board of Review order dated March 22, 2010, in which the Board affirmed the Workers' Compensation Office of Judges' order which affirmed the Claims Administrator's denial of a claim for dependent's benefits as untimely filed. In this appeal, the Appellant requests that this Court grant her Petition for Appeal, reverse the Board's March 22, 2010, order, and grant dependent's benefits.

Pursuant to Revised Rule 1(d), this matter should be, and hereby is, considered under the Revised Rules of Appellate Procedure. Having considered the parties' submissions and the relevant decision of the lower tribunal, this Court is of the opinion that the decisional process would not be significantly aided by oral argument. 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 Appellant, Karen A. Bolyard, is the widow of Howard John Bolyard. Mr. Bolyard was granted a PTD award on September 14, 2005, due to Occupational Pneumoconiosis, and Mr. Bolyard passed away on August 16, 2006. On September 26, 2006, an "Application for 104 Weeks Dependents' Benefits" was submitted, and the Appellant's attorney, Mr. Robert F. Cohen, Jr., notified the Claims Administrator that "I expect to submit an Application for Fatal Dependents' Benefits on behalf of Mrs. Bolyard in the near future." By order dated October 12, 2006, the Appellant was granted 104 weeks of dependents' benefits. No protest was filed to that order.

On June 6, 2008, twenty-two months after the decedent's death, the Appellant requested Fatal Dependents' Benefits. The Claims Administrator, Office of Judges, and Board of Review concluded that dependents' benefits would be denied based upon the Appellant's failure to file the application within one-year of the decedent's death, as required by West Virginia Code § 23-4-15(b) (2009) (Repl. Vol. 2010).¹

On appeal of that denial to this Court, the Appellant argues that the filing of the 104 Weeks Benefits application provided constructive notice that the Fatal Dependents' Benefits claim would be filed and that her claim should not be defeated based upon a technicality. *See* W. Va. Code § 23-5-13 (1995) (Repl. Vol. 2010) ("It is also the policy of this chapter to prohibit the denial of just claims of injured or deceased workers or their dependents on technicalities."). The Appellant further argues that West Virginia Code § 23-4-16(a) (2005) (Repl. Vol. 2010) provides that jurisdiction is retained in fatal cases for two years in order to make justified modifications or changes with respect to former findings or orders.²

¹At the time of the decedent's death and the Appellant's filing, West Virginia Code § 23-4-15(b) provided, in pertinent part, that "in the case of death, the application shall be filed by the dependent of the employee within one year from and after the employee's death, and such time limitation is a condition of the right and hence jurisdictional." Effective June 8, 2010, the limitations period was changed to two years.

²West Virginia Code § 23-4-16(a) provides, in pertinent part, as follows:

The power and jurisdiction of the commission, successor to the commission, other private carrier or self-insured employer, whichever is applicable, over each case is continuing and the commission, successor to the commission, other private carrier or self-insured employer, whichever is applicable, may, in accordance with the provisions of this section and after due notice to the employer, make modifications or changes with respect to former findings or orders that are justified. Upon and after the second day of February, one thousand nine hundred ninety-five, the period in which a claimant may request a modification, change or reopening of a prior award that was entered either prior to or after that date shall be determined by the following subdivisions of this subsection. Any request that is made beyond that period shall be refused.

(continued...)

Subsequent to thorough review of the briefs of the parties and the evidence of record, this Court affirms the Board's order dated May 22, 2010. The evidence demonstrates that the decedent passed away on August 16, 2006. Thus, the statutory one-year limitation would require that the Appellant apply for Fatal Benefits by August 16, 2007. The request for Fatal Dependents' Benefits was made on June 6, 2008, over nine months late. The 104 Weeks Dependents' Benefits application is appropriate where the death did not arise from a work-related injury or disease. The Appellant applied for such benefits, was granted those benefits, and did not protest that order. Moreover, in correspondence attached to the application for the 104 Weeks Dependents' Benefits, the Appellant's attorney not only referenced a future filing of an application for Fatal Dependents' Benefits but also specifically stated, "I have been informed by a representative of BrickStreet that we can file the Application for 104 Weeks Dependents' Benefits now and the Fatal Application later." Thus, any concern regarding potential confusion between the two forms is directly contradicted by the statements in the letter accompanying the 104 Weeks application. This is not an instance in which the 104 Weeks Dependents' Benefits application was mistakenly submitted. The evidence clearly presents a scenario in which the Appellant intended to file a Fatal Dependents' Benefits application and thereafter failed to do so.

The Appellant's argument that the filing of the 104 Weeks Benefits application provided constructive notice that the Fatal Dependents' Benefits claim would later be filed is unpersuasive. The Appellant's contention that this is a mere technicality is similarly flawed. West Virginia Code § 23-4-15, as referenced above, specifies that the benefits claim must be submitted within one year of the decedent's death. This is a jurisdictional requirement, and constructive notice of the death and the intent to file a claim at a later date is not sufficient. Compliance with the statute is mandatory, and denial based upon failure to comply is not a mere technicality.

The Appellant's argument based on retention of jurisdiction also fails. The statutory provision, West Virginia Code § 23-4-16(a)(3), permitting retention of jurisdiction for two years is predicated upon proper establishment of jurisdiction by the filing of a claim within the designated time limitation. Without the proper establishment

²(...continued)

Subsection (3) thereafter states that "[n]o further award may be made in fatal cases except within two years after the death of the employee." W. Va. Code § 23-4-26(a)(3).

of jurisdiction, the statute regarding retention of jurisdiction to make justified modifications or changes is not relevant to this claim.

Accordingly, for the foregoing reasons, we find that the decision of the Board of Review dated May 22, 2010, is not in clear violation of constitutional or statutory provisions, 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. *See* W. Va. Code § 23-5-15 (2005) (Repl. Vol. 2010). Therefore, the denial of the Claimant's request for Fatal Dependents' Benefits is affirmed.

Affirmed.

ISSUED: June 1, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh