

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

**Alliance Coal, LLC,
Employer Below, Petitioner**

v.) **No. 22-573** (BOR Appeal No. 2057692)
(JCN: 2014012909)

**Brenda Buser, widow of
William Buser (decedent),
Claimant Below, Respondent**

MEMORANDUM DECISION

Petitioner Alliance Coal, LLC, appeals the decision of the West Virginia Workers' Compensation Board of Review ("Board of Review"). Respondent Brenda Buser, widow of William Buser (decedent), filed a timely response.¹ The issue on appeal is whether Mr. Buser's occupational pneumoconiosis was a material contributing factor in his death, thus entitling Mrs. Buser to dependent's benefits. The claim administrator denied Mrs. Buser's claim for dependent's benefits on the basis that occupational pneumoconiosis was not a material contributing factor in Mr. Buser's death on February 20, 2019. The Workers' Compensation Office of Judges ("Office of Judges") affirmed the claim administrator's order in its December 9, 2021, decision. The decision of the Office of Judges was reversed and vacated by the Board of Review on June 8, 2022, and dependent's benefits were granted. Upon our review, we determine that oral argument is unnecessary and that a memorandum decision affirming the Board of Review's decision is appropriate. *See* W. Va. R. App. P. 21.

During his lifetime, Mr. Buser sustained multiple orthopedic injuries and occupational pneumoconiosis. On September 24, 2018, he was found to have an advanced esophageal adenocarcinoma with widely metastatic disease. An Oncology Note written by Kevin J. Shannon, M.D., Director of the West Virginia University Cancer Institute at Garrett Regional Medical Center, on October 2, 2018, reported that the advanced metastatic esophageal adenocarcinoma with a secondary hypercoagulable state resulted in multiple venous clots in limbs and lungs, and a shower of arterial thrombi which had resulted in numerous ischemic cerebral and cerebellar infarcts. Mr. Buser was discharged to hospice care on October 3, 2018, by Paul D. Miller, D.O., his family physician, with the following diagnosis: 1) adenocarcinoma of the esophagus; 2)

¹ The petitioner is represented by James W. Heslep, and the respondent is represented by J. Thomas Greene Jr. and T. Colin Greene.

metastatic adenocarcinoma of the esophagus to liver and lungs; 3) pulmonary embolus; 4) deep vein thromboses; 5) multiple embolic stroke; 6) pneumoconiosis; and 7) pulmonary fibrosis.

Mr. Buser passed away on October 8, 2018. A State of Maryland Certificate of Death, dated October 10, 2018, and signed by Dr. Miller, reported the immediate cause of death as “Adenocarcinoma of esophagus with liver metastasis.” Dr. Miller also noted hypercoagulable state embolic strokes with deep vein thrombosis. Subsequent to the decedent’s death, Mrs. Buser filed an application for fatal dependent’s benefits and asserted that the decedent’s death resulted from an occupational disease.

The claim administrator designated the claim as an occupational pneumoconiosis claim and referred the matter to the Occupational Pneumoconiosis Board (“OP Board”) for consideration. Prior to his death, Mr. Buser had been examined by the OP Board on April 10, 2014, and it was found that he had been exposed to a dust hazard in his employment for thirty-five years that was sufficient to have caused occupational pneumoconiosis or to have perceptibly aggravated a preexisting occupational pneumoconiosis. During the 2014 examination, the OP Board found x-ray evidence showing a conglomerate of masses in the perihilar areas bilaterally, with a minimal background of nodular fibrosis consistent with occupational pneumoconiosis. After the 2014 examination, the OP Board issued a report finding 15% impairment attributable to occupational pneumoconiosis.

On January 10, 2019, the OP Board considered the application for fatal benefits and reviewed Mr. Buser’s medical records, as well as the records related to the OP Board’s 2014 examination. The OP Board found radiographic evidence of complicated pneumoconiosis; however, the OP Board concluded that there was insufficient evidence to find that pneumoconiosis constituted a material contributing factor to the decedent’s death. Based upon the findings of the OP Board, the claim administrator issued a February 20, 2019, order denying an award of dependent’s benefits. Mrs. Buser protested this decision.

In support of her protest, Mrs. Buser offered an April 16, 2019, report from Dr. Shannon, who treated Mr. Buser during the time leading up to his death. Dr. Shannon’s report states that Mr. Buser developed esophageal cancer related to his exposure to coal and silica dust. Dr. Shannon also stated that recent epidemiological data indicated that esophageal squamous cell and adenocarcinoma are rare, comprising only about 1% of all incidents of cancer. Dr. Shannon further listed several commonly accepted risk factors for esophageal adenocarcinoma including tobacco smoking, Barrett’s esophagitis, excess alcohol consumption, helicobacter infection, morbid obesity, and achalasia. It was noted that Mr. Buser had none of the listed risk factors. Dr. Shannon stated that Mr. Buser was a life-long non-smoker, and further reported that there is a growing amount of literature linking exposure to silica and coal dust with esophageal cancer. After referencing several studies showing a statistical association between exposure to coal dust and silica and the subsequent development of esophageal cancer, Dr. Shannon concluded his report by stating that “a review of the above published literature, patient historical and clinical facts, including the unexpected development of an uncommon malignancy in the very anatomic region of work-related disease and chronic inflammation, leads to a conclusion that Mr. Buser’s occupational pneumoconiosis was materially related to his cancer and demise.”

During the litigation process, the Office of Judges determined that the claim administrator erred by processing Mrs. Buser's claim as a "fatal claim," rather than as an occupational disease claim. As a result, the claim was converted to an occupational disease claim by order dated April 23, 2020, and the claim was subsequently remanded to the OP Board for further review of the claim as an occupational disease. The OP Board issued new findings on October 6, 2020, reporting that occupational disease was not a material contributing factor in Mr. Buser's death. Based upon the OP Board's findings, the claim administrator issued a new order, dated December 8, 2020, finding that occupational disease of the chest/lung was not a material contributing factor in Mr. Buser's death, and the request for dependent's benefits was denied. Mrs. Buser protested the claim administrator's decision.

George L. Zaldivar, M.D., reviewed Mr. Buser's records at the request of the employer and issued an independent medical evaluation report dated June 1, 2021. In his report, Dr. Zaldivar noted the decedent's past medical history of coal workers' pneumoconiosis with progressive massive fibrosis and esophageal reflux. After reviewing the report of Dr. Shannon dated April 16, 2018, Dr. Zaldivar disagreed with Dr. Shannon's assessment of Mr. Buser's past medical history and opined that Mr. Buser had two risk factors for gastric cancer: a gastric reflux condition and obesity. Dr. Zaldivar was of the opinion that Mr. Buser's esophageal adenocarcinoma was wholly unrelated to his occupational exposure and his resultant occupational pneumoconiosis.

On October 6, 2021, members of the OP Board testified at a hearing for the purpose of evaluating Mrs. Buser's claim for dependent's benefits. Jack L. Kinder, M.D., the chair of the OP Board, acknowledged that Mr. Buser suffered from occupational pneumoconiosis; however, he did not feel that it played a material role in Mr. Buser's death. Although Dr. Shannon's April 16, 2019, report was taken into consideration, Dr. Kinder stated that the OP Board's initial findings and original decision regarding Mr. Buser's condition were correct. Dr. Kinder agreed with Dr. Zaldivar's opinion that the esophageal carcinoma was caused by factors other than silicosis.

By decision dated December 9, 2021, the Office of Judges affirmed the denial of dependent's benefits in the claim. The Office of Judges noted that the OP Board concluded that occupational disease of the chest/lung was not a material contributing factor in Mr. Buser's death. Based upon the report of Dr. Zaldivar, the OP Board found that Mr. Buser's esophageal cancer was due to his history of Barrett's esophagitis, esophageal reflux, and hiatal hernia, and not attributed to silicosis. As a result, the Office of Judges concluded that, in light of Dr. Shannon's finding as to the absence of risk factors, his report did not establish that the OP Board was clearly wrong in determining that occupational disease was not a material contributing factor in Mr. Buser's death. Accordingly, the Office of Judges affirmed the claim administrator's order denying the payment of dependent's benefits.

In an order dated June 8, 2022, the Board of Review reversed and vacated the decision of the Office of Judges after finding that the order was clearly wrong in view of the reliable, probative, and substantial evidence on the whole record. The Board of Review found that prior to his death, Mr. Buser was treated by Dr. Shannon, who provided extensive details regarding Mr. Buser's medical condition and treatment and explained that his occupational exposure to coal dust led to the development of pneumoconiosis with eventual massive bilateral perihilar nodular fibrosis.

Because Dr. Shannon opined that occupational pneumoconiosis was materially related to Mr. Buser's cancer and his demise, the Board of Review concluded that Mrs. Buser is entitled to dependent's benefits.

This Court may not reweigh the evidentiary record, but must give deference to the findings, reasoning, and conclusions of the Board of Review, and when the Board's decision effectively represents a reversal of a prior ruling of either the Workers' Compensation Commission or the Office of Judges, we may reverse or modify that decision only if it is in clear violation of constitutional or statutory provisions, is clearly the result of erroneous conclusions of law, or is so clearly wrong based upon the evidentiary record that even when all inferences are resolved in favor of the Board's findings, reasoning, and conclusions, there is insufficient support to sustain the decision. *See* W. Va. Code § 23-5-15(c) & (e). We apply a de novo standard of review to questions of law. *See Justice v. W. Va. Off. of Ins. Comm'n*, 230 W. Va. 80, 83, 736 S.E.2d 80, 83 (2012).

In this case, Mrs. Buser filed an application seeking dependent's benefits under West Virginia Code § 23-4-10(b), which provides for dependent's benefits if an employee's death results from occupational pneumoconiosis. The function of the OP Board is to determine all medical questions concerning whether an employee died from occupational pneumoconiosis based upon the evidence submitted.² In dependent's benefits cases, the appropriate test, under West Virginia Code § 23-4-10(b), is not whether the employee's death was the result of the occupational injury or disease exclusively, but whether the injury or disease contributed in any material degree to the employee's death. *See* Syl. Pt. 3, *Bradford v. Workers' Comp. Comm'r*, 185 W. Va. 434, 408 S.E.2d 13 (1991).

In West Virginia, the OP Board is charged with determining all medical questions relating to occupational pneumoconiosis cases, and substantial deference is afforded to the OP Board in connection with occupational cases. The party challenging the OP Board's findings and conclusions bears the burden of establishing through competent and reliable evidence that such findings and conclusions are clearly wrong. *See Fenton Art Glass Co. v. W. Va. Office of the Ins. Comm'r*, 222 W. Va. 420, 664 S.E.2d 761 (2008). The employer asserts on appeal that the Board of Review erred in reversing a medical determination of the OP Board, and a proper order from the Office of Judges, in order to substitute its own medical findings and reverse the outcome of this matter. Although the OP Board concluded that occupational disease of the chest/lung was not a material contributing factor in Mr. Buser's death, the Board of Review relied on the report of Dr. Shannon and concluded that pneumoconiosis caused both the Mr. Buser's cancer and death. As a result, the employer argues that the Board of Review interjected its own medical determinations to grant dependent's benefits, which is in clear violation of statutory language and is clearly wrong based upon the evidentiary record.

After review, we agree with the reasoning and conclusions of the Board of Review, and its finding that occupational pneumoconiosis contributed in a material degree to Mr. Buser's death. The Board of Review found that Dr. Shannon provided extensive details regarding Mr. Buser's medical condition and treatment, and he opined that occupational pneumoconiosis was materially

² West Virginia Code § 23-4-8c governs the findings and conclusions of the OP Board.

related to Mr. Buser's cancer and demise. Since the Board of Review found that occupational pneumoconiosis contributed in a material degree to Mr. Buser's death, Mrs. Buser is entitled to dependent's benefits.

Affirmed.

ISSUED: March 20, 2024

CONCURRED IN BY:

Justice Elizabeth D. Walker
Justice John A. Hutchison
Justice William R. Wooton

DISSENTING:

Chief Justice Tim Armstead
Justice C. Haley Bunn

Armstead, Chief Justice and Bunn, Justice, dissenting:

We dissent to the majority's resolution of this case. We would have set this case for oral argument to thoroughly address the errors alleged in this appeal. Having reviewed the parties' briefs and the issues raised therein, we believe a formal opinion of this Court was warranted, not a memorandum decision. Accordingly, we respectfully dissent.