

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

**BLACKHAWK MINING, LLC,
Employer Below, Petitioner**

v.) No. 24-ICA-357 (JCN: 2023006737)

**FILED
February 28, 2025**

ASHLEY N. DEEM, CHIEF DEPUTY CLERK
INTERMEDIATE COURT OF APPEALS
OF WEST VIRGINIA

**CHRISTI BANKS, dependent of TIMOTHY BANKS, Jr. (deceased),
Claimant Below, Respondent**

MEMORANDUM DECISION

Petitioner Blackhawk Mining, LLC, (“Blackhawk”) appeals the August 12, 2024, order of the Workers’ Compensation Board of Review (“Board”). Respondent Christi Banks filed a response.¹ Blackhawk filed a reply. The issue on appeal is whether the Board erred in reversing the claim administrator’s orders, which rejected the claim and denied the application for fatal dependents’ benefits.

This Court has jurisdiction over this appeal pursuant to West Virginia Code § 51-11-4 (2024). After considering the parties’ arguments, the record on appeal, and the applicable law, this Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision affirming the Board’s order is appropriate under Rule 21 of the Rules of Appellate Procedure.

Timothy Banks, Jr., was employed as a surface mine blaster for Blackhawk Mining. Mr. Banks submitted an Employees’ and Physicians’ Report of Occupational Injury or Disease dated July 21, 2022, alleging that he developed mucormycosis of the brain as a result of his occupational exposure to soil, dirt, dust, and mold while working as a surface miner. Mr. Banks provided a date of last exposure of February 2, 2022. The physician’s portion of the claim application was completed by Joby Joseph, M.D., at CAMC, who diagnosed Mr. Banks with a fungal brain abscess, mucormycosis, as a result of his occupation. A second Employees’ and Physicians’ Report of Occupational Injury or Disease was completed on August 11, 2022. The physician’s portion was completed by Sravanthi Marella, M.D., at CAMC, who diagnosed Mr. Banks with an occupational brain condition.

¹ Blackhawk is represented by T. Jonathan Cook, Esq. Ms. Banks is represented by William B. Gerwig, III, Esq.

Records from CAMC General Hospital dated May 31, 2022, through August 18, 2022, indicate that Mr. Banks was admitted to CAMC with a progressive decline in memory, brain fog, and seizure activity. Imaging studies revealed a left parietal brain mass, and Mr. Banks underwent a craniotomy for resection of the mass on June 3, 2022. Mr. Banks was seen by Joby Joseph, M.D., for neurological follow-up on July 13, 2022. Following a biopsy of the mass taken from his brain, Mr. Banks was diagnosed with mucormycosis. Mr. Banks underwent anti-fungal treatment. Dr. Joseph noted that Mr. Banks had worked in a surface mine where he was exposed to dust and assessed seizure, brain abscess, mucormycosis, atrial fibrillation, sleep apnea, visual field cut, hemi-neglect of right side, and aphasia.

Mr. Banks was treated at Cleveland Clinic from November 3, 2022, through November 8, 2022. An admission note dated November 3, 2022, drafted by Jazmine Oliver, M.D., indicated that Mr. Banks presented for a second opinion regarding his diagnosis of recurrent left parietal brain abscess with mucormycosis. Mr. Banks reported several prolonged hospital stays. Mr. Banks further reported that he underwent an initial craniotomy on June 3, 2022, followed by a second craniotomy on August 12, 2022. One month after the second craniotomy, he developed a superficial wound infection with *Klebsiella/Enterobacter* and was treated with IV antibiotics. An MRI showed that the mass in Mr. Banks' left parietal lobe had increased in size, and worsening vasogenic edema with mass-effect and a 1 cm midline shift from left to right. Mr. Banks underwent a third craniotomy and abscess evacuation on October 26, 2022, and the pathology showed osteomyelitis. The admission note indicated that in October 2020, Mr. Banks was hospitalized for a Covid-19 infection and treated with steroids, and he subsequently developed occasional word-finding difficulty. Dr. Oliver assessed Mr. Banks with a mucormycosis brain abscess with bacterial osteomyelitis, seizure, Afib, hyponatremia, chronic kidney disease, and normocytic anemia. Dr. Oliver opined that the initial source of Mr. Banks' brain abscess was most likely environmental soil exposure at work.

On November 4, 2022, Patricia Bartley, M.D., performed an infectious disease consultation at Cleveland Clinic. Dr. Bartley noted that Mr. Banks' occupation involved mountain blasting in West Virginia for twenty years without masking, and he denied outdoor activities or yard work. Dr. Bartley's impression was left parietal cerebral mucormycosis with complicated craniotomy deep infection *Klebsiella aerogenes* and *Staphylococcus epidermidis* MSSSE and acute osteomyelitis of the cranial bone. Dr. Bartley noted that Mr. Banks' diagnosis was very difficult to treat. Dr. Bartley opined that Mr. Banks' isolated cerebral mucor was likely contracted through his occupational exposure to dirt while mountain blasting.

At Cleveland Clinic, Mr. Banks was also seen by Juan Barbastefano, M.D., on November 5, 2022; November 6, 2022; and November 7, 2022. Dr. Barbastefano noted that a recent MRI of Mr. Banks' brain showed an interval decrease in the size of his left

parietal abscess; however, there were portions of the left parietal lobe that were herniating through the craniectomy defect. Dr. Barbastefano assessed Mr. Banks with mucormycosis brain abscess with bacterial osteomyelitis, seizure, Afib, hyponatremia, and chronic kidney disease. Dr. Barbastefano opined that the initial source of Mr. Banks' brain abscess was most likely environmental soil exposure at work.

Dr. Bartley drafted a progress note dated November 8, 2022. Dr. Bartley's impression was brain abscess, left parietal cerebral mucormycosis, complicated craniotomy with deep infection *Klebsiella aerogenes* and *Staphylococcus epidermidis*, acute osteomyelitis of the cranial bone, and worsening leukocytosis. Dr. Bartley opined that Mr. Banks' COVID-19 and steroids in the setting of his work-place exposure was the source of his infection.

On September 27, 2022, the claim administrator issued an order rejecting Mr. Banks' application for workers' compensation benefits based upon a finding that the injury was not the result of a work-related event or exposure. Mr. Banks protested this order.

Mr. Banks passed away on December 14, 2022. His death certificate listed the cause of death as brain bleed due to a cerebral abscess, brain compression, and lactic acidosis. Ms. Banks submitted an application for fatal dependent's benefits dated December 30, 2022, alleging that Mr. Banks contracted mucormycosis as a result of his employment and subsequently died as a result of the condition. On March 10, 2023, the claim administrator issued an order denying the claim for fatal dependent's benefits based upon a finding that the reported injury was not the result of a work-related event or exposure. Ms. Banks protested this order.

Christopher Martin, M.D., performed a record review and drafted a report dated April 16, 2024. Dr. Martin opined that it was extremely challenging to determine the work-relatedness of Mr. Banks' mucormycosis diagnosis. Dr. Martin noted that this type of fungal brain abscess is rare, meaning that the relevant medical literature is very limited, and many of the largest reviews do not include any information on occupation. Dr. Martin stated that he could locate no case reports or other literature on the topic of brain abscesses from mucormycosis among patients who were employed as miners. However, Dr. Martin did note medical research indicating that this type of infection could be related to COVID-19. Dr. Martin further opined that fungal species can be found throughout the environment, and he stated that all of us are constantly exposed to such species both while at work and away. Finally, Dr. Martin opined that while Mr. Banks' fungal brain abscess due to mucormycosis might have been causally related to his exposures at work, he was unable to make such a conclusion on a medically probable or more likely than not basis.

On August 12, 2024, the Board reversed the claim administrator's orders, which rejected the claim and the application for fatal dependent's benefits. The Board found that

Mr. Banks established by preponderance of evidence that he acquired a cerebral mucormycosis infection as a direct result of his employment. The Board further found that Ms. Banks established by a preponderance of evidence that Mr. Banks' cerebral mucormycosis infection materially contributed to his death. Blackhawk now appeals the Board's order.

Our standard of review is set forth in West Virginia Code § 23-5-12a(b) (2022), in part, as follows:

The Intermediate Court of Appeals may affirm the order or decision of the Workers' Compensation Board of Review or remand the case for further proceedings. It shall reverse, vacate, or modify the order or decision of the Workers' Compensation Board of Review, if the substantial rights of the petitioner or petitioners have been prejudiced because the Board of Review's findings are:

- (1) In violation of statutory provisions;
- (2) In excess of the statutory authority or jurisdiction of the Board of Review;
- (3) Made upon unlawful procedures;
- (4) Affected by other error of law;
- (5) Clearly wrong in view of the reliable, probative, and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Syl. Pt. 2, *Duff v. Kanawha Cnty. Comm'n*, 250 W. Va. 510, 905 S.E.2d 528 (2024).

Blackhawk argues that 1) the type of fungi such as those potentially responsible for Mr. Banks' infection is "omnipresent in the environment" and Mr. Banks could have been exposed elsewhere, 2) the specific fungus is unable to be identified, 3) the evidence establishes that Mr. Banks admitted to working outdoors while at home, and 4) there is evidence linking mucormycosis infections to COVID-19, and Mr. Banks was admitted to the hospital for COVID-19. Blackhawk further argues that Dr. Martin opined that he was unable to determine the cause of Mr. Banks' infection. Therefore, Blackhawk argues that Mr. Banks' infection and, further, death are attributable to factors other than his employment with Blackhawk. We disagree.

Here, the Board found that:

the findings of Dr. Martin are not persuasive. For one, Dr. Martin's opinion is at odds with the weight of the medical evidence – specifically, the findings and conclusions of Drs. Joseph, Marella, Oliver, Bartley, and Barbastefano.

Moreover, Dr. Martin's medical opinion was based solely upon a review of Mr. Banks' medical records, while the medical opinions of Drs. Joseph, Marella, Oliver, Bartley, and Barbastefano were informed by their objective clinical findings as treating physicians. Additionally, Dr. Martin noted that he was unable to find any case studies to support a causal connection in the claim; however, an infectious disease specialist at Cleveland Clinic, Dr. Bartley, and a neurologist at CAMC, Dr. Joseph, both agreed that Mr. Banks' mucormycosis infection was related to his employment. In that regard, the clinical opinions of Drs. Bartley and Joseph are found to be more persuasive than the case study research conducted by Dr. Martin.

Further, the Board found that Mr. Banks' compensable infection required extensive treatment, including four brain surgeries. Mr. Banks' condition deteriorated following a craniotomy and he ultimately died. Thus, the Board found that the compensable infection materially contributed to his death.

Upon review, we conclude that the Board was not clearly wrong in finding that the compensable injury materially contributed to Mr. Banks' death based on the medical evidence. The Board performed a thorough review of the evidence and provided its rationale for how it weighed the evidence in the record. As the Supreme Court of Appeals of West Virginia has set forth, "[t]he 'clearly wrong' and the 'arbitrary and capricious' standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis." Syl. Pt. 3, *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996). With this deferential standard of review in mind, we cannot conclude that the Board was clearly wrong in reversing the claim administrator's orders rejecting the claim and denying Ms. Banks' application for fatal dependent's benefits.

Accordingly, we affirm the Board's August 12, 2024, order.

Affirmed.

ISSUED: February 28, 2025

CONCURRED IN BY:

Chief Judge Charles O. Lorensen
Judge Daniel W. Greear
Judge S. Ryan White