

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

FILED
January 14, 2014
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

ILA GEORGE,
WIDOW OF CHARLES F. GEORGE,
Claimant Below, Petitioner

vs.) **No. 12-0663** (BOR Appeal No. 2046614)
(Claim No. 840069423)

WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER
Commissioner Below, Respondent

and

PHARES PIPELINE COMPANY,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Ila George, by Robert Stultz, her attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. The West Virginia Office of Insurance Commissioner, by Mary Rich Maloy, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated May 1, 2012, in which the Board reversed a November 7, 2011, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's July 7, 2010, decision rejecting Ms. George's application 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.

Ms. George filed a claim for dependent's benefits following the December 20, 2008, death of her husband, Charles. The decedent's death certificate listed the cause of death as chronic obstructive pulmonary disease, with Alzheimer's disease listed as a contributing condition. On April 8, 2010, the Occupational Pneumoconiosis Board noted that the decedent had received a presumptive lifetime permanent total disability award for occupational pneumoconiosis. The Occupational Pneumoconiosis Board reviewed radiographic films that it obtained in 1989 when evaluating the decedent's prior claim, and found that the films are consistent with a diagnosis of chronic obstructive pulmonary disease, with insufficient evidence of pleural or parenchymal changes to establish a diagnosis of occupational pneumoconiosis. The Occupational Pneumoconiosis Board concluded that occupational pneumoconiosis did not materially contribute to the decedent's death.

In an undated letter, Dr. Miller, the decedent's treating physician, stated that she treated the decedent primarily for exacerbations of chronic obstructive pulmonary disease and Alzheimer's disease-related dementia. She stated that a history of pneumoconiosis was never provided to her, and that she is unable to comment on pneumoconiosis and its potential relationship to the decedent's occupation because it is not her area of expertise. However, she then goes on to state that if the decedent had received a lifetime permanent total disability award for occupational pneumoconiosis, occupational pneumoconiosis would have played a large role in the course of his chronic obstructive pulmonary disease and subsequent death.

At a hearing on September 7, 2011, the Occupational Pneumoconiosis Board found that the decedent's cause of death was chronic obstructive pulmonary disease with underlying dementia. The Occupational Pneumoconiosis Board then found that occupational pneumoconiosis did not materially contribute to the decedent's death. The Occupational Pneumoconiosis Board stated that the 1989 permanent total disability award for occupational pneumoconiosis was based on a presumptive diagnosis, and that no radiographic diagnosis of occupational pneumoconiosis has been made. On July 7, 2010, the claims administrator denied Ms. George's application for dependent's benefits. On November 7, 2011, the Office of Judges reversed the claims administrator's July 7, 2010, decision and granted Ms. George dependent's benefits based on a finding that occupational pneumoconiosis materially contributed to the decedent's death.

In its Order reversing the November 7, 2011, Order of the Office of Judges and reinstating the July 7, 2010, claims administrator's decision, the Board of Review held that the evidence of record does not establish that occupational pneumoconiosis contributed to the decedent's death. Ms. George disputes this finding and asserts that the evidence of record establishes that occupational pneumoconiosis materially contributed to her husband's death.

In *Bradford v. Workers' Compensation Commissioner*, 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." Further, West Virginia Code § 23-4-6a (2005) states in part that "the Office of Judges shall affirm the decision of the Occupational Pneumoconiosis Board made following hearing

unless the decision is clearly wrong in view of the reliable, probative and substantial evidence on the whole record.”

The Office of Judges concluded that the Occupational Pneumoconiosis Board’s opinion was clearly wrong based upon a finding that the Occupational Pneumoconiosis Board required that a positive radiographic diagnosis of occupational pneumoconiosis be present in order to conclude that occupational pneumoconiosis materially contributed to the decedent’s death. The Office of Judges further concluded that the Occupational Pneumoconiosis Board’s opinion was clearly wrong because its finding that occupational pneumoconiosis did not materially contribute to the decedent’s death rejected the presumptive diagnosis of occupational pneumoconiosis made in 1989.

In its decision reversing the Order of the Office of Judges, the Board of Review noted that the test for granting dependent’s benefits is not whether the decedent had been diagnosed with occupational pneumoconiosis, but whether occupational pneumoconiosis contributed in any material degree to the decedent’s death. Further, the Board of Review found that there is nothing in the evidentiary record to indicate that the Occupational Pneumoconiosis Board’s decision was clearly wrong. The Board of Review then found that Dr. Miller’s report does not establish that occupational pneumoconiosis materially contributed to the decedent’s death and does not refute the findings of the Occupational Pneumoconiosis Board. Finally, the Board of Review found that the statutory presumption concerning exposure to the hazards of occupational pneumoconiosis contained in West Virginia Code § 23-4-8c(b) (2009) alone does not satisfy the requirement for an award of dependent’s benefits and noted that the Statute itself states that even if an individual is entitled to the presumption of exposure to the hazards of occupational pneumoconiosis, the presumption is not conclusive. 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: January 14, 2014

CONCURRED IN BY:

Chief Justice Robin J. Davis
Justice Menis E. Ketchum
Justice Allen H. Loughry II

DISSENTING:

Justice Margaret L. Workman

Justice Brent D. Benjamin, not participating