

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

January 14, 2014

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

**NANCY JOHNSON, WIDOW OF
BOBBY LEE JOHNSON,
Claimant Below, Petitioner**

vs.) **No. 12-0783** (BOR Appeal No. 2046665)
(Claim No. 920067158)

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

and

**BOHICA, INC.,
J A L COAL COMPANY, INC.,
MORNINGSIDE DEVELOPMENT CORPORATION,
and PRESTON ENERGY, INC.,
Employers Below, Respondent**

MEMORANDUM DECISION

Petitioner Nancy Johnson, widow of Bobby Johnson, by Robert Williams, her attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. The West Virginia Office of Insurance Commissioner, by David Stuart, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated May 31, 2012, in which the Board affirmed a November 17, 2011, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's September 30, 2009, decision denying a claim 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.

Bobby Johnson was a coal miner for thirty-eight years. In the course of his employment, he contracted occupational pneumoconiosis, for which he received an award of 40% impairment. Mr. Johnson passed away in August of 2008. His death certificate lists his cause of death as complicated pneumoconiosis and lung cancer. In a hearing before the Office of Judges on September 7, 2011, the Occupational Pneumoconiosis Board disagreed with the cause of death. It found that the certificate listed complicated pneumoconiosis, which was not present at the time of death, and that the complicated pneumoconiosis was secondary to lung cancer, which makes no clinical sense. The Occupational Pneumoconiosis Board found that while Mr. Johnson did have occupational pneumoconiosis that caused some disability in his lung function, he also had lung cancer. Mr. Johnson was first diagnosed with lung cancer in 1995. In 1997, he had a resection of the cancer. The Occupational Pneumoconiosis Board testified that Mr. Johnson's pulmonary function studies conducted after the 1997 resection were similar and even slightly better than they were before he developed lung cancer. The Occupational Pneumoconiosis Board noted that Mr. Johnson's occupational pneumoconiosis did not hamper the diagnosis or treatment of his lung cancer. It was not until the second time he developed lung cancer that his pulmonary function began to decline. The Occupational Pneumoconiosis Board also noted that the nature of Mr. Johnson's cancer was that it would spread and result in his death. It determined that Mr. Johnson's fifty year history of smoking a pack of cigarettes a day caused his lung cancer, which ultimately resulted in his death.

Mr. Johnson's widow, Nancy Johnson, filed for dependent's benefits. The claims administrator denied her claim on September 30, 2009. The Office of Judges affirmed the claims administrator's decision on November 17, 2011. The Office of Judges relied heavily on the opinion of the Occupational Pneumoconiosis Board which found that Mr. Johnson's occupational pneumoconiosis did not materially contribute to his death. Occupational Pneumoconiosis Board members testified in a hearing before the Office of Judges on September 7, 2011, that Mr. Johnson would have died as he did, when he did, regardless of his occupational dust exposure. Based upon those findings, the Office of Judges concluded that the claim for dependent's benefits should be denied.

The Board of Review adopted the findings of fact and conclusions of law of the Office of Judges in its May 31, 2012, Order. This Court agrees with the reasoning and conclusions of the Board of Review. The standard for granting dependents benefits is not whether the employee's death was the result of the occupational disease exclusively, but whether the occupational disease contributed in any material degree to the death. *Bradford v. Workers' Compensation Commissioner*, 185 W.Va. 434, 408 S.E.2d 13 (1991). The evidentiary record indicates that Mr. Johnson's occupational pneumoconiosis did not materially contribute to his death. The Occupational Pneumoconiosis Board determined that, though Mr. Johnson had occupational

pneumoconiosis, it was not a contributing factor in his death. Its opinion is supported by the opinion of Erika C. Crouch, M.D., Ph.D. Dr. Crouch's pulmonary pathology consultation report which found that Mr. Johnson's occupational pneumoconiosis was too mild to have caused any significant degree of respiratory impairment or disability and could not have caused, contributed to, or hastened his death. Therefore, the decision of the Board of Review is clearly supported by the evidentiary record.

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 Margaret L. Workman
Justice Menis E. Ketchum
Justice Allen H. Loughry II

Justice Brent D. Benjamin, Not Participating