

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: March 13, 2015

CLAIM NO. 201261717

DONNIE MOORE

PETITIONER

VS.

APPEAL FROM HON. ROBERT L. SWISHER,  
CHIEF ADMINISTRATIVE LAW JUDGE

FORD MOTOR COMPANY (KTP)  
HON. ROBERT L. SWISHER,  
CHIEF ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
AFFIRMING IN PART,  
VACATING IN PART & REMANDING

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BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

**ALVEY, Chairman.** Donnie Moore ("Moore") appeals from the Opinion, Award, and Order rendered October 21, 2014 by Hon. Robert L. Swisher, Administrative Law Judge ("ALJ") awarding temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits for a work-related lumbar injury sustained on September 26,

2012. The ALJ determined Ford Motor Company ("Ford") is entitled to an offset credit for benefits paid pursuant to the Ford Disability Retirement Plan. Moore also seeks review of the November 17, 2014 order overruling his petition for reconsideration.

On appeal, Moore argues the ALJ erred in providing credit for the full amount of monthly disability retirement benefits received by him because it is a hybrid plan. In the alternative, Moore argues the ALJ should not have awarded a credit to Ford. As a matter of law, the ALJ's determination Ford is entitled to some credit pursuant to KRS 342.730(6) for payments made to Moore under its Disability Retirement Plan, is affirmed in part. We vacate in part, and remand for the ALJ to determine whether the holding in Alcan Aluminum Corp. v. Stone, 276 S.W.3d 817 (Ky. 2009) is applicable to the case *sub judice*, and if so, for a determination of the appropriate offset credit to which Ford is entitled.

Moore filed a Form 101 alleging he injured his back, buttocks and left knee on September 26, 2012 while working for Ford. Because the medical evidence is irrelevant to the issue on appeal, it will not be summarized.

Moore testified by deposition on August 6, 2013 and at the hearing held August 26, 2014. Moore was born on September 15, 1958 and resides in Louisville, Kentucky. He began working for Ford in November 1999. On September 26, 2012, Moore injured his low back and left knee while working at Ford on the assembly line for which he subsequently received medical treatment, including a three level fusion surgery performed on August 29, 2013.

Following the September 26, 2012 accident, Moore was restricted to light duty. Moore continued to work for Ford through January 1, 2013, with the exception of November 26 and 27, 2012. During this time, Moore stated his work consisted of sitting in the break room. Moore has not worked since January 1, 2013, because Ford has no jobs available within his restrictions.

At his August 6, 2013 deposition, Moore testified he received TTD benefits from January 2, 2013 through June 23, 2013. Once the TTD benefits terminated, Moore began collecting benefits from Unicare<sup>1</sup> in the gross amount of \$694.00 and in the net amount of \$652.00 on a weekly basis. Moore testified he had also been approved for Social

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<sup>1</sup> Presumably this is the short term disability insurance plan through Ford.

Security disability benefits which he anticipated would begin in December 2013.

At the August 26, 2014 hearing, Moore indicated he began receiving Social Security disability benefits after his deposition, and continues to receive them. Moore no longer draws Unicare benefits. Moore stated he now receives "medical retirement" or disability retirement benefits from Ford in the amount of \$767.00 per month which he began receiving on January 1, 2014.

By agreement of the parties, Ford submitted the deposition testimony of Keith Murray ("Murray"), a pension analyst for Ford, taken on July 30, 2014 for a different claim, Connie Jones v. Ford Motor Company, Claim Number 2012-00198. Murray testified as a pension analyst, he is required to understand all pension plans offered by Ford. Murray testified he is familiar with the disability retirement benefit program, which is solely funded by Ford. Murray testified all benefit programs available through Ford are contained in the Ford UAW Collective Bargaining Agreement booklet. Article IV (Four) of the booklet explains eligibility for disability retirement benefits, while Article V (Five) explains how the benefits are calculated. Portions of Article V (Five) of the booklet were introduced as an exhibit.

Murray testified regarding the disability retirement benefit program. He explained a sick or ill Ford employee typically applies for medical leave from the company. The medical leave is substantiated by the disability insurance carrier, and if the employee is classified as permanently and totally disabled, he or she can apply for disability retirement.

Murray testified Ford's disability retirement benefit program is different from its normal retirement benefit program. A Ford employee becomes eligible for normal retirement upon turning sixty-five years of age. A Ford employee is eligible for disability retirement after completion of ten years of credited service and a finding he or she is permanently totally disabled. A Ford employee can apply for disability retirement at any age if he or she meets the two requirements. Murray explained the benefit amount would be the same under either the normal or disability retirement program since there is no early age reduction under either plan.

Murray also stated Ford offers "early age retirement." An employee is eligible for this program after completion of thirty years of credited service with no age requirement, or he or she is at least fifty-five years of age and has a minimum of ten years credited service.

However, if the employee applies for early age retirement before the age of sixty-two, an offset is applied to the pension amount. Murray testified regarding the advantage to the worker for receiving benefits pursuant to the disability retirement plan as follows:

Q: Now, a worker who would be eligible under both the disability retirement benefit program and the early age retirement benefit program, would there be an advantage to applying under one of the programs as opposed to the other program?

A: Yeah, again, depending on the years of credited service, the disability retirement had no early age reduction, so for somebody who's age 55 with ten years applied for early age, it's usually referred to early age retirement, they'll receive 57.9 percent of the pension. Under disability retirement, they would receive 100% of the pension, so there is a difference in the monthly payment amounts.

After describing the process an employee may undertake in being approved for disability retirement, Murray discussed section 16 of Article Five dealing with deductions for Workers' Compensation.

Q: . . . Could I get you to refer to Section 16 of Article 5?

A: Yes.

Q: Do you have a copy of that in front of you?

A: Yes, I do.

Q: In that particular section, down near the bottom, there were three subsections. The third one mentions that workers' compensation payments paid under a claim filed not later than two years after the breaking of seniority. Do you know what they mean by the breaking of seniority?

A: Yes. When you terminate your employment with Ford Motor Company, you are no longer an employee of Ford.

Q: Now, in a situation where we're dealing with disability retirement benefits, is the worker's seniority broken?

A: For a disability retirement? No, it's not.

. . . .

Q: If we look at Section 16, it deals with deductions for workers' compensation, correct?

A: Correct.

Q: And in that section, it states that you cannot make a deduction for workers' compensation under the disability retirement benefit program if a claim for workers' compensation benefits has been filed less than two years before seniority is broken.

So in Ms. Jones' situation, since her seniority has never been broken, then the disability retirement benefits program cannot take a deduction for workers' compensation benefits, correct?

A: Correct.

A benefit review conference ("BRC") was held on August 13, 2014. The BRC order and memorandum reflects credit for disability retirement as one of the contested issues.

In the October 21, 2014 opinion, the ALJ determined Moore sustained lumbar and left knee injuries as a result of the September 26, 2012 work accident. The ALJ found Moore sustained no more than a temporary sprain/strain injury to his left knee resulting in no permanent impairment rating and which requires no ongoing medical care or treatment. The ALJ therefore dismissed Moore's claim for permanent income and medical benefits for the left knee. Regarding the lumbar spine injury, the ALJ found Moore was entitled to PPD benefits based upon a 25% impairment enhanced by the 3.2 multiplier. The ALJ awarded TTD benefits from November 26, 2012 through November 27, 2012 and again from January 2, 2013 through April 8, 2014, and provided Ford a credit for TTD benefits already paid. The ALJ awarded medical benefits for the lumbar injury.

The ALJ made the following findings regarding "Credit for disability retirement:"

Plaintiff testified that he receives disability retirement benefits from Ford Motor Company in the amount of \$767 a month with those payments commencing January 1, 2014. The

defendant/employer argues that it is entitled to a credit against permanent disability benefits awarded in this workers' compensation proceeding to the extent of payments made under the Disability Retirement Benefit Program. It contends that that[sic] plan is exclusively employer-funded and that there is no internal offset provision for workers' compensation benefits. Plaintiff, for his part, initially questioned whether disability arose from the September 26, 2012 injury but concedes in his brief that "it appears from a review of the medical testimony that the discussion was always as to the low back as opposed to any other medical issues." In this regard the ALJ notes that the records/report of Dr. Waters has been submitted in evidence which the ALJ understands was a report submitted to Ford Motor Company in conjunction with plaintiff's application for disability retirement benefits. Therein, Dr. Waters' diagnoses and addresses only low back pain and "status-post spinal fusion" with restrictions assigned as to those diagnoses and offering a medical opinion that plaintiff is suffering from a condition which totally and permanently prevents him from engaging in his regular occupation. In other words, although plaintiff testified and there is evidence in the record as to prior injuries to the right shoulder, low back and right knee, the award of disability retirement benefits was based solely on plaintiff's lumbar spine condition, all of which is attributable to the September 26, 2012, work injury.

KRS 342.730(6) states as follows:

All income benefits otherwise payable pursuant to this chapter

shall be offset by payments made under an exclusively employer-funded disability or sickness and accident plan which extends income benefits for the same disability covered by this chapter, except where the employer-funded plan contains an internal offset provision for workers' compensation benefits which is inconsistent with this provision.

In order to obtain credit under this section the defendant/employer must prove (1) the plan is exclusively employer-funded, (2) that income benefits are made for the same disability covered by the Workers' Compensation Act; and (3) that the employer-funded plan does not contain an internal offset provision for workers' compensation benefits inconsistent with the statute. In support of its claim for credit, the defendant/employer submitted the deposition of Ford Motor Company pension analyst Keith Murray which was taken in a parallel claim. Murray testified that the Disability Retirement Benefit Program is solely funded by Ford Motor Company. Plaintiff does not contend otherwise. In addition, plaintiff testified that as part of his disability retirement, paperwork was submitted by Dr. Waters which, as addressed and summarized above, speaks only to plaintiff's lumbar spine condition and resulting fusion surgery. There is no evidence that plaintiff was granted disability retirement on the basis of any condition other than the lumbar spine injury he sustained on September 26, 2012.

With respect to the issue of internal offset, Keith Murray testified with

respect to various provisions of the book entitled "Benefit Plans and Agreements, Ford Motor Company and the UAW" including that section of the retirement program dealing with disability retirement and any potential offset by virtue of workers' compensation benefits awarded. Murray was asked specifically about Article V, Section 16 regarding the coordination of disability retirement benefits and workers' compensation benefits. In the exhibit attached to Mr. Murray's deposition, only part of Section 16 is attached. Specifically, Section 16 indicates that the monthly benefit for disability retirement awarded shall be reduced to the extent of workers' compensation benefits payable "except that no deduction shall be made for the following:" after which two subsections are listed. Murray, however, referred to a third subsection, a copy of which is not attached to his deposition, which he testified creates an exclusion from the offset for workers' compensation benefits paid under a claim filed not later than two years after the breaking of seniority. He explained that seniority is broken when "you terminate your employment with Ford Motor Company, you are no longer an employee of Ford." In a situation dealing with disability retirement benefits, a workers' seniority is not broken. The ALJ infers from Mr. Murray's testimony that the plan documents do not provide for an offset or decrease in disability retirement benefits by virtue of corresponding workers' compensation benefits when a claim for such benefits is filed within two years of the "breaking of seniority." First, it is unclear to the ALJ whether plaintiff is or is not an employee of Ford. By implication, however, he remains an employee of Ford

since the receipt of disability retirement benefits does not break one's seniority according to Mr. Murray. In any event, plaintiff testified that he last worked at Ford either in December of 2012 or December of 2013 (his testimony in this regard being unclear to the undersigned). Regardless, however, even if he was no longer considered an employee of Ford at the earlier date, December 2012, and his seniority was thereby "broken", his claim was filed on June 10, 2013, well within the two year period post-"breaking." Accordingly, by the terms of the plan itself, there is no reduction or offset in the Disability Retirement Benefits Plan received under the Ford/UAW plan by virtue of his receipt of workers' compensation benefits herein.

In his brief, plaintiff does not argue that the plan is technically deficient or non-compliant with KRS 342.730(6) but he argues, instead, that the designation of the plan as providing a retirement benefits takes it outside the scope of the credit section of the statute. As plaintiff frames the issue, "the question becomes the significance of the phrase 'under an exclusively employer-funded disability or sickness and accident plan'." He contends that nowhere in the definition is the word "retirement" used and no punctuation is used to delineate other than that the reference in the statute is to a disability or sickness and accident plan, a phrase which he contends is commonly used to denote short term and long term disability policies. In the absence of the word "retirement" as part of the definition in the statute, there should be no credit allowed.

To the undersigned's review of reported cases, this is a matter of first impression. That said, the ALJ is not persuaded that the title of the plan or description of plan benefits is the determinative factor in whether a credit is allowed. The ALJ finds that the Ford Disability Retirement Plan is an exclusively employer-funded disability plan as contemplated by the statute. Whether such benefits are denominated as retirement disability benefits as opposed to temporary disability benefits or sickness/accident disability benefits or short term/long term disability benefits is a distinction without a difference. The defendant/employer has unilaterally funded a program providing benefits to compensate plaintiff for disability arising from, in this case, the same injury for which workers' compensation benefits are payable. The disability retirement plan is, in essence, a long term disability plan simply called another name. Regardless, however, the ALJ finds as a matter of law that the Ford Disability Retirement Plan is, under the facts presented in this claim, the type of disability plan for which the employer is entitled to an offset against workers' compensation benefits. Accordingly, the ALJ finds, based on plaintiff's testimony with respect to his monthly benefit, that Ford is entitled to a credit against its obligation to pay disability benefits hereunder to the extent of \$179.08 per week ( $\$776 \times 12 \div 52$ ) for benefits payable hereunder beginning and after January 1, 2014.

The ALJ awarded PPD benefits in the sum of \$507.96 per week from September 26, 2012. The ALJ found Ford was entitled to an offset credit as follows:

2 . . . . Provided, however, that the defendant/employer shall take credit against benefits for temporary total and/or permanent partial disability at the rate of \$179.08 per week from and after January 1, 2014, by virtue of payments made to plaintiff under the defendant/employer's Disability Retirement Benefit Program. Should such disability retirement benefit payments cease, however, the credit allowed hereunder will likewise terminate at the time of such cessation.

Moore filed a petition for reconsideration arguing the ALJ erred as a matter of law in finding the disability retirement plan is the type of plan contemplated under KRS 342.730(6), since the statutory language does not include the word "retirement." The ALJ found Moore's petition a re-argument of the merits and therefore overruled it on November 17, 2014.

On appeal, Moore states the parties and the ALJ mistakenly thought the issue of credit for disability retirement was an issue of first impression. He argues the Kentucky Supreme Court's case of Alcan Aluminum Corp. v. Stone, 276 S.W.3d 817 (Ky. 2009) is directly applicable. Moore states the Court in Stone directed since disability plans are hybrid, combining the attributes of both a disability and a retirement plan, offset credit is appropriate only to the extent the disability retirement

benefit exceeds the retirement benefit for which the worker would have been eligible, because only that portion of the benefit is attributable to the same disability covered by KRS Chapter 342. The balance is based upon the workers' years of service and other criteria. In his brief, Murray argues the following:

Here, fortunately the deposition of Keith Murray at page 10 establishes that depending on the years of credit service, the disability has no early age retirement, so for anybody who is age 55 with 10 years of service who applies for early age retirement, and it is usually referred to as that, they will receive 57.9% of the pension. Under a disability retirement, they receive 100%. So that is the difference in the monthly payment amount. Claimant was born on September 15, 1958 which means that in January of 2014, he was 55 years of age and he had worked for Ford since November 1999, so he had over the 10 years required for early retirement. Accordingly, 42.1% is all of the credit that the Employer would be entitled to. The ALJ therefore erred in the amount of the credit as the ALJ took the full \$776.00 per month x 12 and divided by 52 weeks to get the credit of \$179.08, when in fact based upon the testimony of Keith Murray and the cited case, it should have only been 42.1% of that or \$75.39 per week.

Moore requests the claim should be remanded to the ALJ for re-calculation of the credit in accordance with Alcan Aluminum Corp. v. Stone, supra, or, in the alternative, requests Ford be provided no offset credit.

On appeal, Ford states if the Board determines Alcan Aluminum Corp. v. Stone, supra, is applicable, then a remand for recalculation of the credit benefits would be appropriate. However, it argues Moore provides no basis for his argument no credit at all should be allowed.

KRS 342.730(6) requires a three part analysis before it applies to a particular benefit, in this case disability retirement benefits. The plan must be exclusively employer funded, it must extend income benefits for the same disability covered by workers' compensation, and it must not contain an internal offset provision for workers' compensation benefits.

In this instance, the ALJ set forth the correct three part analysis, and made specific findings of fact under each prong in determining Ford is entitled to a credit. The ALJ relied upon Murray's testimony in finding the Disability Retirement Plan is solely funded by Ford. This specific finding is not challenged by Moore. The ALJ then addressed the second prong of the analysis and determined no evidence established Moore was granted disability retirement on the basis of any condition other than the lumbar injury he sustained on September 26, 2012. This finding is not challenged by Moore. The ALJ then outlined portions of Murray's testimony and the disability

plan upon which he relied in determining it does not contain an internal offset provision for workers' compensation benefits. This finding is not challenged by Moore. Here, the ALJ appropriately performed the proper three part analysis in determining Ford is entitled to a credit. The testimony of Murray and Moore, along with documentation attached to Murray's deposition outlining the disability retirement plan, constitutes the requisite substantial evidence supporting of the ALJ's determination Ford is statutorily entitled to at least some offset.

Moore argues, based on the holdings in Alcan Aluminum Corp. v. Stone, 276 S.W.3d 817 (Ky. 2009), the claim should be remanded to the ALJ for recalculation of the amount of credit to which Ford is entitled. In Alcan Aluminum Corp. v. Stone, the Claimant sustained a 2002 work-related injury, and his employer ultimately determined he qualified for disability retirement. The Court noted the employer made all contributions and paid all costs of the plan, which provided three types of benefits.

First, a worker could retire at the normal retirement age, which was 65, and receive a benefit based on a dollar amount multiplied by the number of years of service. Second, a worker with ten or more years' service could retire early, at age 60 or greater, and receive a discounted benefit. Third, a worker with 10 or more years' service

who met the medical criteria could receive a disability retirement benefit that was calculated like the normal retirement benefit but not discounted for an age less than 65. Id. at 818.

The Claimant elected to receive disability retirement benefits, which were greater than the benefits he would have received had he elected early retirement. The ALJ determined the employer was entitled to a dollar-for-dollar offset for disability retirement benefits, and the Board reversed to the extent that it limited the offset to the amount the benefit for disability retirement exceeded the benefit the claimant would have been entitled had he taken early retirement. The Court of Appeals affirmed. Id.

The Kentucky Supreme Court provided the following analysis in affirming the Court of Appeals:

The employer emphasizes that the claimant receives benefits under an exclusively employer-funded disability retirement plan. It asserts that the Board and the Court of Appeals erred by limiting the offset because KRS 342.730(6) refers to "[a]ll income benefits" and does not limit the offset to "some benefits" or "a portion of the benefits" paid for the same disability that Chapter 342 covers. What the argument overlooks is that the employer-funded plan at issue does not pay a disability benefit but a disability *retirement* benefit. The difference is significant under KRS 342.730(6).

KRS 342.730(6) prevents a duplication of the income-replacement benefits that an employer must pay under Chapter 342 and a private, exclusively employer-funded disability or sickness and accident plan. [footnote omitted]. Although benefits paid under a private, exclusively employer-funded pension or retirement plan also replace lost income, Chapter 342 does not provide an offset for such benefits. Thus, KRS 342.730(6) would not have entitled the employer to an offset if the claimant had elected to receive early retirement benefits.

As the Board noted, disability retirement plans are a hybrid, combining attributes of both a disability plan and a retirement plan. When such a plan is at issue, KRS 342.730(6) permits an offset to the extent that the disability retirement benefit exceeds the retirement benefit for which the worker would have been eligible because only that portion of the benefit is attributable to the same disability covered by Chapter 342. The balance is based on the worker's years of service and/or other criteria. Id. at 818-819.

Stone is applicable to the issue regarding offset credit for payments made pursuant to Ford's Disability Retirement Plan. As the Court stated above, "disability retirement plans are a hybrid." In this instance, Murray's testimony establishes a worker is eligible for disability retirement if they meet the minimum years of credited service and are permanently and totally disabled. Therefore, Ford's plan is similar to the hybrid plan in

Stone. The Court in Stone provides clear guidance in calculation of offset credit pursuant to such a hybrid plan. "KRS 342.730(6) permits an offset to the extent that the disability retirement benefit exceeds the retirement benefit for which the worker would have been eligible because only that portion of the benefit is attributable to the same disability covered by Chapter 342." Id. at 819.

On remand, the ALJ is directed to determine from the evidence the extent the disability retirement benefit exceeds the early retirement benefit for which Moore would have been eligible. The ALJ is directed to recalculate the offset credit to which Ford is entitled. The ALJ is further directed to provide the basis for his calculations.

Accordingly, the October 21, 2014 Opinion, Award, and Order and the November 17, 2014 order on petition for reconsideration by Hon. Robert L. Swisher, Administrative Law Judge, are hereby **AFFIRMED IN PART, VACATED IN PART**. This claim is **REMANDED** to the ALJ for entry of an amended opinion and award in conformity with the views expressed herein.

ALL CONCUR.

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