Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: May 23, 2014

CLAIM NO. 201201787

KENNETH E. RICE, by and through
PEGGY RICE, EXECUTRIX PETITIONER

VS. **APPEAL FROM HON. R. SCOTT BORDERS,**
ADMINISTRATIVE LAW JUDGE

MCCOY ELKHORN COAL;
and HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART,
REVERSING IN PART AND REMANDING

* * * * * *

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

RECHTER, Member. Kenneth E. Rice, by and through Peggy Rice, Executrix ("Rice") appeals from the October 16, 2013 Opinion and Order rendered by Hon. R. Scott Borders, Administrative Law Judge ("ALJ"). The ALJ dismissed the claim in its entirety, finding Mrs. Rice failed to meet her

burden of proving entitlement to survivor's benefits pursuant to KRS 342.730(3)(a). She argues the estate is entitled to benefits from September 26, 2012, the date of last hazardous noise exposure, to March 15, 2013, the date of death. She further argues entitlement to widow's benefits at 50% of the award for the remainder of the two-year period of permanent partial disability benefits.

Mr. Rice was last exposed to hazardous noise on September 26, 2012, the date he retired from McCoy Elkhorn Coal. He filed an occupational hearing loss claim on December 7, 2012. On March 15, 2013, while the claim was being litigated, he passed away from a non-work-related cause. His widow, as executrix of the estate, was substituted as plaintiff.

The ALJ rendered his opinion and Order on October 16, 2013, finding Mr. Rice had a 10% functional impairment rating as a result of his occupational hearing loss. Because he was 66 years old at the time of his last exposure, the ALJ found Mr. Rice would be entitled to benefits for a period of two years from the last day he worked. However, the ALJ determined Mrs. Rice was not entitled to recovery pursuant to KRS 342.730(4), finding as follows:

> In this instance, the widow's entitlement to benefits expires when she qualifies for benefits based on the fact that the worker, her husband, upon whose entitlement for benefits are based reaches the age of entitlement is 62 [sic]. There is no provision in the Act to extend the widow's benefits for two years, as it does for the Plaintiff's benefits. Therefore, the Plaintiff is not entitled to widow's benefits. While the Administrative Law Judge recognizes this creates a harsh result, the statutory language is clear and unambiguous.
>
> Therefore, the Administrative Law Judge finds that the Plaintiff's widow has not met her burden of proving entitlement to survivors benefits pursuant [to] KRS 342.730(3)(a) and therefore the claim must be dismissed.

The applicable provisions of KRS 342.730 provide as follows:

> (3) Subject to the limitations contained in subsection (4) of this section, when an employee, who has sustained disability compensable under this chapter, and who has filed, or could have timely filed, a valid claim in his or her lifetime, dies from causes other than the injury before the expiration of the compensable period specified, portions of the income benefits specified and unpaid at the individual's death, whether or not accrued or due at his or her death, shall be paid, under an award made before or after the death, for the period specified in this section, to and for the benefit of the persons within the classes at the time of death and in the proportions and upon the

> conditions specified in this section and in the order named:
>
> (a) To the widow or widower, if there is no child under the age of eighteen (18) or incapable of self-support, benefits at fifty percent (50%) of the rate specified in the award. . .
>
> (4) All income benefits payable pursuant to this chapter shall terminate as of the date upon which the employee qualifies for normal old-age Social Security retirement benefits under the United States Social Security Act, 42 U.S.C. secs. 301 to 1397f, or two (2) years after the employee's injury or last exposure, whichever last occurs. In like manner all income benefits payable pursuant to this chapter to spouses and dependents shall terminate when such spouses and dependents qualify for benefits under the United States Social Security Act by reason of the fact that the worker upon whose earnings entitlement is based would have qualified for normal old-age Social Security retirement benefits.

We agree the estate is entitled to recover the benefits that accrued prior to Mr. Rice's death and therefore reverse that portion of the ALJ's order finding otherwise. Disability benefits that accrued prior to the worker's death are an asset of the estate, like any other debt. Arthur Larson, *Larson's Workers' Compensation – Desk Edition* §58.41 (1998). Mr. Rice's right to compensation originated under the statute during his lifetime and he commenced litigation of the claim. The amount of benefits

due to Mr. Rice became fixed at the time of his death. An employee's death does not extinguish his right to compensation for disability preceding his death. *See* Young v. Bentley, 449 S.W.2d 755, 757 (Ky. 1970). The estate was properly substituted and is entitled to those benefits payable from the date of last exposure until Mr. Rice's death. These benefits are not survivor's benefits and are not altered by KRS 342.730(4).

Mrs. Rice next argues the phrase "in like manner" contained in KRS 342.730(4) should be interpreted as providing a minimum of two years of benefits for a widow even if she qualifies for Social Security benefits based upon her husband qualifying for normal old-age retirement benefits. In Campbell v. Hauler's Inc., 320 S.W.3d 707 (Ky. App. 2010), the Court of Appeals rejected the interpretation urged by Mrs. Rice, reasoning as follows:

> Because Ms. Campbell was sixty-two years old at the time of her husband's death and qualified for Social Security benefits under 42 U.S.C.A. § 402(e), Hauler's Inc. argues that she was not entitled to income benefits. We agree.
>
> In *Morsey, Inc. v. Frazier,* 245 S.W.3d 757 (Ky. 2008), the Court held that a widow's award of income benefits terminated when she qualified for Social Security benefits. Thus, following *Morsey*, Ms. Campbell was not eligible to receive income benefits. Nevertheless, the ALJ held that the

> two-year provision contained in the first sentence of KRS 342.730(4) applied. However, the clear and unambiguous language of the statute states that the two-year provision applies to income benefits awarded to employees and is not contained in the sentence applicable to spouses and dependents. Therefore, the only reasonable interpretation of the statute is that the legislature did not intend for spouses and dependents to qualify for a minimum two years of income benefits.

Because Mr. Rice was 66 at the time of his last exposure, he was only entitled to benefits for two years. Mrs. Rice is only entitled to receive benefits for the remaining weeks of the two year period following her husband's death if she has not yet reached age 60, the age at which she would qualify for Social Security benefits as a widow. Upon review of the record, we are unable to find any evidence of Mrs. Rice's age, and she has made no allegation she is eligible for continuation of benefits based upon her age. Accordingly, based upon the record, the ALJ correctly concluded Mrs. Rice failed in her burden of proving entitlement to survivor's benefits as a widow.

Accordingly, the October 16, 2013 Opinion and Order rendered by Hon. R. Scott Borders, Administrative Law Judge, is **AFFIRMED IN PART, REVERSED IN PART AND REMANDED**

for entry of an award of benefits to the estate for the period from September 26, 2012 through March 15, 2013.

ALL CONCUR.

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