

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: December 11, 2020

CLAIM NO. 200800126

CLEAN ENERGY MINING CO. 1 AND  
UNDERWRITERS SAFETY & CLAIMS

PETITIONER

VS.

APPEAL FROM HON. DOUGLAS W. GOTT,  
ADMINISTRATIVE LAW JUDGE

RICHARD W STACY, DECEASED;  
CATHY DOREEN STACY, WIDOW;  
KY COAL WORKERS' PNEUMOCONIOSIS FUND;  
HEALTHSMART CASUALTY SOLUTIONS; AND  
HON DOUGLAS W. GOTT,  
CHIEF ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
AFFIRMING

\* \* \* \* \*

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

**BORDERS, Member.** Clean Energy Mining Co. 1 ("Clean Energy") appeals from the July 6, 2020 Order to Substitute Party rendered by Hon. Douglas W. Gott, Chief Administrative Law Judge ("CALJ"). The CALJ permitted Cathy Stacy ("Cathy")

to substitute as a party for her deceased husband, Richard Stacy (“Richard”), and allowed her to continue receiving the permanent total disability (“PTD”) benefits he was awarded pursuant to KRS 342.730(3)(a). No Petitions for Reconsideration were filed.

On appeal, Clean Energy argues Cathy is not entitled to the continuation of benefits pursuant to the holding in Morse v. Frasier, 243 S.W.3d 757 (Ky. 2008), which limits her recovery of income benefits to the time she reaches 60 years of age. Clear Energy asserts since Cathy was 61 when she filed her Motion for Substitution of Party, she is not entitled to additional income benefits. We disagree and affirm.

The facts of this appeal are not in dispute. Richard was born on July 27, 1958. Richard and Cathy were married from June 25, 1977 until January 7, 2020, when he died from a cardiac event due to coal workers’ pneumoconiosis. Previously, Richard filed a Form 102 and prosecuted a claim for benefits alleging he was permanently and totally disabled due to contracting coal workers’ pneumoconiosis which resulted in the development of progressive massive fibrosis, being last exposed to coal dust while employed by Clear Energy. In an Opinion and Award rendered on October 10, 2008, former Administrative Law Judge Irene Steen determined Richard was permanently and totally disabled and awarded income benefits accordingly.

On March 19, 2020, Cathy filed a Form 11, Request to Substitute Party and Continue Benefits, seeking a continuation of Richard’s PTD benefits pursuant to KRS 342.730. On March 25, 2020, the Coal Workers’ Pneumoconiosis

Fund responded it had no objection to the continuation of benefits. On April 7, 2020, the CALJ entered a Show Cause Order providing Clean Energy 15 days to respond to Cathy's Motion to Substitute. On May 14, 2020, the CALJ issued an Order granting Cathy 15 days to determine and advise whether she was seeking continuation of benefits pursuant to KRS 342.730(3)(a) or pursuant to KRS 342.750(1)(a), and to clarify whether she was alleging Richard's death was due to coal workers' pneumoconiosis or matters not work-related. On May 20, 2020, Clean Energy responded to Cathy's Motion for Substitution of Party and Continuation of Benefits stating she is not entitled to payment of the benefits as she is over the age of 60. On May 27, 2020, the CALJ entered an Order setting a schedule to present proof on whether Richard's death was work-related. On June 22, 2020, Cathy filed a Notice of Intention advising the CALJ of her decision to pursue survivors benefits, not alleging Richard's death was work-related, pursuant to KRS 342.730(3)(a).

As a result which is set forth, the CALJ rendered the following Order,

*verbatim:*

This matter is before the CALJ on follow-up to an Order issued May 27, 2020. That Order set forth the background on Cathy Stacy's claim for widow's benefits; and provided a proof schedule for her to submit evidence on the work relatedness of her husband Richard's death, or alternatively state she was not pursuing widow's death benefits under KRS 342.750.

Cathy has submitted a statement choosing the later - that she is not pursuing benefits based on work relatedness of death.

Thus, Cathy is by default entitled to benefits under KRS 342.730(3)(a). As noted in the previous Order, the CALJ rejects the Defendants' argument that Cathy is

disqualified from widow's benefits because she is already 60 years of age.

The Defendants are correct that *Morsey v. Frasier*, 245 S.W.3d 757 (Ky. 2008), held that widow's benefits are limited to the age at which the widow qualified for social security benefits by virtue of being a widow, which is age 60. 42 U.S.C. §402(3). Previously, the CALJ would have applied *Morsey* to deny Gail's continuation of benefits request.

But three years ago the Supreme Court of Kentucky issued *Parker v. Webster County Coal*, 529 S.W.3d 759 (Ky. 2017), holding that the termination of benefits based on social security age under KRS 342.730(4) was unconstitutional. The CALJ believed that *Parker* overruled *Morsey* and, thus ordered a continuation of benefits to a widow over 60 years of age in *Gary Coffey v. Woodford County Board of Education*, claim number 2011-77455. The CALJ made the benefits subject to the last constitutional version of KRS 342.730(4), the so-called "tier-down" statute enacted in 1994. Woodford County Board of Education appealed. The Workers Compensation Board affirmed the continuation of benefits to a widow greater than 60 years of age, stating: "We believe a logical extension of the holding in (*Parker*) is applicable to the continuation of benefits to a surviving spouse. Based on that decision, we believe the holding in *Morsey, Inc., v. Frasier* is no longer applicable." The Board also affirmed on the decision to continue the widow's benefits under the "tier-down" version of KRS 342.730(4).

Woodford County appealed again to the Court of Appeals, which in an unpublished decision reversed the application of the 1994 tier-down statute based on the General Assembly's intervening enactment of a new version of KRS 342.730(4) in response to *Parker*; and a decision on the retroactivity of that new statute in *Holcim v. Swinford*, 581 S.W.3d 37 (Ky. 2019). *Woodford County Board of Education v. Coffey*, No. 2018-CA-001120. On remand, the Court of Appeals instructed the CALJ that, "The award in this case should order (the widow's) benefits to 'terminate as of the date upon which (her husband) would have reached age seventy (70) or four (4) years after (his) date of injury

or last date of exposure, whichever last occurs.’ KRS 342.730(4).”

The Court of Appeals did not appear to address Woodford County’s argument that *Morsey, Inc., v Frasier* precluded a continuation of benefits to Gary Coffey’s widow since it was the law in effect on the date of his injury, award, and death. No further appeal was taken, and the case was settled.

The CALJ has second-guessed himself over his decision in the Coffey case. Does *Parker*, which effectively overruled *Morsey*, apply to cases that were final long before *Parker* was decided? There is little authority to provide direction on the issue, but, coincidental to the tier-down statute references above, *Whittaker v. Cecil*, 69 S.W.3d 69 (Ky. 2002) somewhat speaks to the issue. In that case, a tier-down award was issued against an employer and the Special Fund, with liability apportioned between the two defendants under existing law. The employer later settled with the claimant, but, at the same time, sought a more favorable apportionment of liability result against the Fund based on a Supreme Court case that was rendered after the settlement and “evened up” the prior law on apportionment that had been in the Fund’s favor.

The Court of Appeals reversed an ALJ’s reliance on the new case to reapportion liability, saying: “Although it is clear that the method of apportionment that was set forth in *Southern v. R.R.Coal Co., Inc.*, supra, and that was ordered by the ALJ in 1996 was contrary to the view that the employer now espouses, the employer failed to challenge the method of apportionment either in a petition for reconsideration of in its appeal to the Board. After the award became final, it could be amended only by means of a reopening.” *Whittaker* at 72.

Despite misgiving over his decision in the Coffey case, the CALJ defers to the appellate decisions in that case in continuing benefits to Cathy. The Workers’ Compensation Board and the Court of Appeals have affirmed a continuation of benefits to a widow who was already 60 years old by applying *Parker* and a retroactive KRS 342.730(4). Those decisions are not binding

authority, but persuasive authority to the CALJ since rejecting them would be setting aside appellate guidance issued to him in a prior, similar case.

Thus, Cathy's requests to substitute as party plaintiff and have benefits continued under KRS 342.730 are granted. As directed by the Court of Appeals in Coffey, Cathy's benefits shall terminate as of the date upon which Richard would have reached age 70.

(On June 17, 2020, the CALJ issued consistent Orders on continuation requests by widows over age 60 in Brewer v. Lone Mountain Processing, claim number 2003-68141, and Higgins v. PICI, claim number 2010-00160.)

On appeal, Clean Energy argues the holding in Morsey v. Frazier, supra, controls, thereby extinguishing any right Cathy may have to the payment of additional income benefits. It argues Richard's case was final in 2008, and therefore the application of KRS 342.730(4) as amended in July 2018 is improper. We do not believe the holding in Morsey is applicable to this claim.

In 1994, the legislature enacted KRS 342.730(4), which provides any income benefits payable to an injured worker becomes "tiered down" at the age of 65 and reduced 10% per year through age 70. Pursuant to KRS 342.730(3)(a), any applicable survivor benefits would commensurately be reduced accordingly. In December 1996, the legislature modified KRS 342.730(4), limiting benefits to when the recipient would reach normal Social Security retirement age. Widow benefits were limited to age 60. That statute was held unconstitutional by the Kentucky Supreme Court in Parker v. Webster Coal, 529 S.W.3d 759 (Ky. 2017). By extension, we believe the holding in Morsey is ineffective.

While not citing to our previous decisions as authority, we do look to them for guidance. The case of Woodford County Board of Education v. Gary D. Coffey, Deceased, WCB No. 2011-77455 (June 29, 2018), presents a similar fact pattern to this appeal. Gary Coffey (“Coffey”) sustained work injuries in August 2011. On January 23, 2014, Hon. Robert L. Swisher, Administrative Law Judge, awarded temporary total disability benefits, permanent partial disability benefits, and medical benefits for Coffey’s injuries.

Coffey died from unrelated causes on April 13, 2017. The CALJ permitted Dean Coffey, Coffey’s widow, to substitute as a party, and found she was entitled to a continuation of income benefits. Pursuant to the holding in Parker v. Webster Coal, *supra*, the CALJ determined the limitation set forth in Morsey was no longer applicable. The CALJ specifically found as follows, *verbatim*:

The CALJ disagrees, and finds Dena Coffey is entitled to continuation of benefits under KRS 342.730(3)(a), as dictated by the 1994 version of KRS 342.730(4). When a statute is unconstitutional, it is null and void from its enactment date, as if it never existed. Legislative Research Commission v. Fischer, 366 S.W.3d 905 (Ky. 2012). The 1996 changes to KRS 342.730 were amendments, not a repeal of the 1994 changes. When those amendments, and, specifically, section four, are viewed as having never existed, the unconstitutional pre-amendment version is the law. Moseley v. Commonwealth Dept. of Highways, 489 S.W.2d 511 (Ky. 1972). To preclude Dena from a continuation of benefits would be to rely on a limitation of benefits in a statute that does not exist.

This Board noted that KRS 342.730(4), as argued by Woodford County, specifically stated as follows:

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 qualify for benefits under the United States Social Security Act by reason of the fact that the worker would have qualified for normal old-age Social Security retirement benefits.

This Board noted that although widow's income benefits were not the direct focus of the decision, we believed this issue was resolved by the holding of the Kentucky Supreme Court in Parker v. Webster County Coal, LLC (Dotiki Mine), supra. There, the Kentucky Supreme Court found KRS 342.730(4), as amended in 1996, is unconstitutional. We interpreted the holding in Parker v. Webster County Coal, LLC (Dotiki Mine), supra, is applicable to the continuation of income benefits to a surviving spouse.

This Board affirmed the CALJ's determination in a decision rendered on June 29, 2018, prior to the effective date of the amendment to KRS 342.730(4). The decision was appealed and reversed by the Kentucky Court of Appeals on November 22, 2018, based upon the statutory change to KRS 342.730(4) effective July 14, 2018, which it determined was retroactive to Coffey's case.

The version of KRS 342.730 (4), effective July 14, 2018, states as follows:

All income benefits payable pursuant to this chapter shall terminate as of the date upon which the employee reaches the age of seventy (70), or four (4) 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 as of the date upon which the employee would have reached age seventy (70) or four (4) years after the employee's date of injury or date of last exposure, whichever last occurs.

In Holcim v. Swinford, 581 S.W.3d 37 (Ky. 2019), the Kentucky Supreme Court determined the amendments to KRS 342.730(4) were retroactive to all claims still pending on the effective date of the statutory changes.

The mandates set forth in Morsey v. Frasier, *supra*, do not apply to this appeal, nor do they restrict Cathy's right to a continuation of benefits. The determination by the Morsey court that the spouse's benefits cease when he or she qualifies for Social Security benefits at age 60 is not controlling, as it concerned a statute, KRS 342.730(4), that was subsequently deemed unconstitutional. We likewise determine Cathy's rights did not vest until Richard's death in January 2020, at which time her entitlement to a continuation of income benefits accrued. For the foregoing reasons, we determine the CALJ did not err in applying KRS 342.730(4), effective July 14, 2018, and finding Cathy is entitled to a continuation of income benefits pursuant to KRS 342.730(3)(a) until Richard would have reached age 70.

Accordingly, the July 26, 2020 Order to Substitute Party rendered by Hon. Douglas W. Gott, Chief Administrative Law Judge, is hereby **AFFIRMED**.

ALL CONCUR

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