

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: May 29, 2020

CLAIM NO. 201800872

DEBORAH NEWCOM

PETITIONER

VS. APPEAL FROM HON. CHRISTINA D. HAJJAR,
ADMINISTRATIVE LAW JUDGE

KENTUCKY CABINET FOR HEALTH AND FAMILY SERVICES
and HON. CHRISTINA D. HAJJAR,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

STIVERS, Member. Deborah Newcom (“Newcom”) appeals from the December 19, 2018, Opinion, Order, and Award and the January 16, 2019, Order ruling on her petition for reconsideration of Hon. Christina D. Hajjar, Administrative Law Judge (“ALJ”). The ALJ awarded Newcom permanent partial disability (“PPD”) benefits “continuing until she reaches the age of 70 or October 2, 2012,” and medical benefits

for a September 12, 2017, work-related low back injury sustained while in the employ of the Kentucky Cabinet for Health and Family Services (“KCHFS”).

On appeal, Newcom asserts the ALJ erred by terminating the award of PPD benefits on her seventieth birthday since that causes the duration of the award to span less than 425 weeks. Within this argument are four sub-arguments. First, Newcom asserts that Parker v. Webster County Coal, LLC, 529 S.W.3d 759 (Ky. 2017) and Holcim v. Swinford (at that time, 2018-CA-000414-WC), rendered September 7, 2018, mandate the award of PPD benefits extend for 425 weeks. Second, Newcom asserts retroactive application of House Bill 2 is unconstitutional. Third, Newcom argues House Bill 2 is unconstitutional because the legislature did not comply with Section 46 of the Kentucky Constitution. Finally, Newcom asserts any age limitation applied to income benefits is unconstitutional.

As the scope of this appeal is limited, we will set forth an abbreviated procedural history.

The Form 101 alleges Newcom sustained work-related injuries to “multiple body parts” on September 12, 2017, while in the employ of KCFHS in the following manner: “Plaintiff slipped and fell while at work.” The Form 101 indicates Newcom’s date of birth is October 2, 1951.

The October 25, 2018, Benefit Review Conference Order and Memorandum lists the following contested issues: permanent income benefits per KRS 342.730; TTD benefits; and unpaid or contested medical expenses. Under “other contested issues” is the following: potential medical fee dispute concerning pain

management and referral for additional treatment, future medicals, underpayment as to duration of TTD benefits, out of pocket expenses, duration of benefits/HB2.”

The following findings of fact and conclusions of law from the ALJ’s decision are set forth, in relevant part, *verbatim*:

Permanent Partial Disability

...After a careful review of the evidence, this ALJ finds Dr. Barefoot’s 13% impairment rating most credible, and assigns a 13% impairment rating due to the injury.

Newcom filed Dr. Barefoot’s report establishing that she has a 13% impairment rating due to the injury. This ALJ is not convinced by Dr. Sexton otherwise. In Dr. Sexton’s first report, he related her low back pain to a lumbar myofibrous strain superimposed on lumbar spondylosis. In his second report, he related her low back pain to spondylolisthesis with mild spinal stenosis, but that it predated the fall. Dr. Sexton failed to discuss the effect of the fall and whether the fall aroused the preexisting condition into a disabling reality. He further failed to establish that her prior low back condition was active at the time of the injury. No evidence suggests that Newcom had any complaints immediately preceding the injury.

Dr. Sexton made the conclusion that because her ongoing complaints greatly exceed the objective evaluation, the complaints cannot be related to the fall in a cause-effect relationship. He further related her leg numbness and pain to her diabetes. However, this is not supported by the medical records, and his conclusion is not convincing particularly in light of the fact that her condition was not disabling until she fell. This ALJ notes that Newcom tended to show a lot of emotion while testifying, and this may have appeared to be an exaggeration of her symptoms. However, it is clear that she has had low back pain with symptoms radiating to her legs since the injury, and she has had much difficulty in getting workers’ compensation to approve treatment. This ALJ is convinced from her testimony and Dr. Barefoot’s report that she sustained an injury to her low back, which is still

causing her symptoms and that she has a 13% impairment rating.

The ALJ found only the two multiplier set forth in KRS 342.730(1)(c)2 was applicable. “Therefore, Newcom is entitled to PPD benefits beginning on September 12, 2017, and continuing until she reaches the age of 70 on October 2, 2021.” Newcom was awarded reasonable and necessary medical expenses for treatment of her low back injury. The ALJ found “that other pain management treatment may be compensable if [Newcom] pursues pain management modalities other than injections.” The ALJ also found physical therapy to be “reasonable and necessary.” Newcom was awarded PPD benefits of:

\$69.05 per week commencing on September 12, 2017, and continuing until she reaches the age of 70 or October 2, 2021, together with an interest rate of 6% per annum on all due and unpaid installments of such compensation, provided, however, that in the event that Newcom ceases to earn an average weekly wage equal to or greater than \$796.78 for reasons not attributable to her conduct shown to have been an intentional, deliberate action with a reckless disregard of the consequences either to herself or another, then upon such cessation plaintiff’s weekly benefits shall be \$138.10 per week.

In her petition for reconsideration, Newcom argued the duration of PPD benefits awarded should span 425 weeks without consideration of her age.

In the January 16, 2019, Order, the ALJ ruled:

This matter is before the undersigned Administrative Law Judge for consideration of Plaintiff’s Petition for Reconsideration of the Opinion, Order, & Award entered December 19, 2018, stating that the ALJ erred in finding that her permanent partial disability benefits terminate at age 70, as required by KRS 342.730 as amended by HB2. Plaintiff relies on *Holcin v Swinford*, Ky. App. Lexis 235 (2018), No.: 2018-CA-000414-WC. However, the

decision in *Swinford* is not final and is on appeal to the Kentucky Supreme Court. This ALJ is without authority to rely on the non-final decision in *Swinford*. Accordingly, it is ordered Plaintiff's Petition for Reconsideration of the Opinion, Order, & Award rendered on December 19, 2018, is overruled.

On February 13, 2019, Newcom filed a Notice of Appeal to this Board.

On March 7, 2019, Newcom filed a "Notice to Attorney General of Challenge to Validity of Kentucky Statute Pursuant to KRS 418.075."

On April 10, 2019, this Board placed Newcom's claim in abeyance pending the outcome of Lafarge Holcim v. James Swinford, *supra*. The Board removed the claim from abeyance by order dated February 19, 2020.

On March 20, 2020, Newcom filed a supplemental brief arguing that notwithstanding the Kentucky Supreme Court's holding in Holcim v. Swinford, 581 S.W.3d 37 (Ky. 2019) her award of PPD benefits must span 425 weeks, as the recently amended version of KRS 342.730(4) is unconstitutional for the reasons outlined in her initial appeal brief. Consequently, as argued, Newcom is still entitled to 425 weeks of income benefits.

We affirm the ALJ's limitation of Newcom's award of PPD benefits pursuant to the amended version of KRS 342.730(4).

The ALJ correctly determined KRS 342.730(4), amended by House Bill 2 and becoming effective on July 14, 2018, applies to Newcom's award of PPD benefits. Pursuant to House Bill 2, KRS 342.730(4) currently mandates 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, *supra*, the Supreme Court determined the amended version of KRS 342.730(4) has retroactive application, declaring as follows:

Since the newly-enacted amendment applies retroactively, it must be used to determine the duration of Swinford's benefits. We remand this matter to the ALJ to apply the time limits set out in the 2018 amendment to KRS 342.730(4).

We are cognizant of the fact that terminating Newcom's award of PPD benefits at the time she reaches seventy years of age negates her ability to receive 425 weeks of income benefits. However, the ALJ was required to apply KRS 342.730(4) to Newcom's PPD award since the Supreme Court has determined the statute has retroactive application. Accordingly, the ALJ correctly terminated Newcom's award of PPD benefits on October 2, 2021, when she reaches seventy years of age.

Newcom's supplemental brief disposed of Newcom's first argument on appeal asserting Parker v. Webster and Holcim v. Swinford mandate that her award of PPD benefits last for 425 weeks. Thus, Newcom's remaining arguments pertain to the constitutionality of KRS 342.730(4). First, she asserts that retroactive application of the amended version of KRS 342.730(4) is unconstitutional. Second, she contends retroactive application of certain sections of House Bill 2 and not others is arbitrary and violative of the due process and equal protection provision of the Kentucky Constitution. Third, Newcom asserts the amended version of KRS 342.730(4) applies to injured older workers but not all injured workers; therefore, it should not be applied

retroactively. Fourth, she urges House Bill 2 is unconstitutional because the legislature did not comply with Section 46 of the Kentucky Constitution. Finally, Newcom asserts the age limitation as set forth in the amended version of KRS 342.730(4) is unconstitutional.

The Board, as an administrative tribunal, has no jurisdiction to rule on any of the constitutional challenges raised by Newcom in her appeal. Blue Diamond Coal Company v. Cornett, 300 Ky. 647, 189 S.W.2d 963 (1945). Consequently, we are without authority to render a decision on the merits. We point out that the Court of Appeals has held KRS 342.730(4), as amended by House Bill 2 is constitutional. In Terry Adams v. Excel Mining, LLC, No. 2018-CA-000925-WC, rendered February 21, 2020, Designated Not To Be Published, the Court of Appeals held “retroactive application of KRS 342.730 does not infringe on the contract impairment clauses of the Kentucky and United States Constitutions.” Slip Op. at 3. The Court of Appeals reiterated its holding in Anthony Helton v. TM Power Enterprises, Inc., No. 2019-CA-001757-WC, rendered May 1, 2020, Designated Not To Be Published. In the case of Ford Motor Company (LAP) v. Ray Henry Pickett, No. 2018-CA-000415-WC and No. 2018-CA-000551-WC, rendered May 8, 2020, Designated Not To Be Published, the Court of Appeals held the amended version of KRS 342.730(4) is constitutional in response to Pickett’s argument that it violates the equal protection clause and the due process clause. Further, the Court in Pickett determined retroactive application of the amended version of KRS 342.730(4) does not violate Sections 1, 2, 3, 59, and 60 of the Kentucky Constitution. In Michael O’Bryan v. Zip Express, No. 2018-CA-001284-WC, rendered May 8, 2020, Designated Not To Published, the Court of Appeals held

the amended version of KRS 342.730(4) does not violate Sections 1, 2, 3, 59, and 60 of the Kentucky Constitution, equal protection, and federal due process. The Court of Appeals also held the legislature did not violate the reading requirements set forth in Section 46 of the Kentucky Constitution. Further, the court held that retroactive application of the amended version of KRS 342.730(4) is not unconstitutional. Finally, in Kroger v. Cheryl Cates, No. 2018-CA-001027-WC, rendered May 15, 2020, Designated Not To Be Published, the Court of Appeals determined the amended version of KRS 342.730(4) does not violate Sections 59 and 60 of the Kentucky Constitution, due process, equal protection, or constitute an arbitrary classification. Again, the Court of Appeals held the legislature did not violate the reading requirements set forth in Section 46 of the Kentucky Constitution, and retroactive application of the amended version of KRS 342.730(4) is not unconstitutional for, as argued by Cates, infringing upon Cates' vested rights to her benefits.

Since this Board is unable to render an opinion based upon Newcom's constitutional challenges, and the Court of Appeals has held five times that the amended version of KRS 342.730(4) is constitutional, we must affirm the ALJ's application of KRS 342.730(4) to Newcom's award of PPD benefits and the termination of her award of income benefits on the day she reaches seventy years of age.

Accordingly, the ALJ's limitation of Newcom's award of PPD benefits by the amended version of KRS 342.730(4), as set forth in the December 19, 2018, Opinion, Order, and Award and affirmed in the January 16 2019, Order, is **AFFIRMED**.

ALL CONCUR.

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