

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 15, 2021

CLAIM NO. 201501592

HIGHLAND MINING LLC (C/O PATRIOT)

PETITIONER

VS.

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

DARRELL HEDGEPTH, DECEASED
JANET HEDGEPTH, WIDOW
CWPF C/O KEMI
and HON. DOUGLAS W. GOTT,
CHIEF ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

STIVERS, Member. Highland Mining LLC (C/O Patriot) (“Highland Mining”) appeals from the September 3, 2020, Order and the September 28, 2020, Order on Petition for Reconsideration of Hon. Douglas Gott, Chief Administrative Law Judge (“CALJ”). In the September 3, 2020, Order, the CALJ sustained Janice Hedgepath’s

motion to be substituted as a party plaintiff and to have the benefits of Darrell Hedgepath, her deceased husband, paid to her pursuant to KRS 342.730(3)(a).

On appeal, Highland Mining asserts the CALJ erred by awarding Janice Hedgepath a continuation of benefits pursuant to KRS 342.730(3)(a) because she is already past the age she qualifies for Social Security benefits.

BACKGROUND

Darrell Hedgepath filed a Form 102 on October 5, 2015, alleging he contracted work-related coal workers' pneumoconiosis on December 31, 2014, due to breathing in coal dust for thirty-eight years. The Form 102 indicates Darrell Hedgepath's date of birth is May 7, 1958.

In the July 18, 2016, Benefit Review Conference Order & Memorandum, the following contested issues are listed: benefits per KRS 342.732 and notice.

The Form 110 Settlement Agreement entered into between the parties was filed in the record on September 12, 2016. The agreement indicates the following settlement terms:

Claimant is 100% disabled. The Employer is to pay a lump sum of \$85,000.00 plus \$111.39 weekly for 404 consecutive weeks. The CWP Fund is paying \$267.49 per week for 404 consecutive weeks plus past due benefits of \$267.49 per week without interest (82 weeks x \$267.49 = \$21,934.15). Plaintiff is not seeking vocational rehabilitation and medicals are left open.

On July 9, 2020, Janice Hedgepath filed a Form 11 Request to Substitute Party and Continue Benefits. The Form 11 notes Janice Hedgepath's date

of birth is August 22, 1956. Attached is the Death Certificate for Darrell Hedgepath which indicates he passed away on May 27, 2020, at the age of 62.

In the July 31, 2020, Order, the CALJ held, *verbatim*, as follows:

Plaintiff Darrell Hedgepath settled a claim against Patriot Coal Company for stipulated total disability from work related coal workers' pneumoconiosis on September 16, 2016. The agreement called for a lump sum, plus weekly benefits for 404 weeks; it is inferred that the number of weeks stretched until Darrell qualified for social security on his 66th birthdate, which at the time was the limitation of income benefits payable under KRS 342.730(4).

Darrell died on May 27, 2020. His widow, Janice, has filed a Request to Substitute Party and Continue Benefits awarded to Darrell in 2016 (a Form 11). The death certificate lists "black lung disease, chronic obstructive pulmonary disease" among the contributing causes of death.

Defendants Patriot Coal and the Coal Workers' Pneumoconiosis Fund have filed objections to Janice's continuation request on grounds that she is not eligible for benefits because she is already over 60 years of age, citing Morsey v. Frasier, 245 S.W.3d 757 (Ky.2008).

Two issues are presented by Janice's Form 11 and the Defendants' responses. First, by claiming that "black lung disease, chronic obstructive pulmonary disease" contributed to Darrell's death, she is alleging a work related cause of death. That is significant because benefits to a widow are paid at a greater rate under KRS 342.750 if the death is work related than under KRS 342.730 if it is not.

Thus, Janice is given 30 days to submit evidence of work relatedness of Darrell's death, followed by 30 days of proof time for the Defendants. Alternatively, Janice may submit a statement that she does not intend to pursue enhanced benefits, in order to expedite the order granting her continuation of benefits under KRS 342.730.

The second issue raised is whether Janice's claim should be denied based on her age. The CALJ determines that, whether it is under KRS 342.750 or KRS 342.730, benefits will ultimately be extended to the 63-yearold Janice.

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 Janice'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. Nevertheless, the order continuing benefits was affirmed. 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? In post-Coffey orders issued earlier this year on similar requests for continuation of benefits, the CALJ cited Whittaker v. Cecil, 69 S.W.3d 69 (Ky. 2002) as a case that fueled that self-doubt. (List below.) 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.

The CALJ has more recently been cited to Burns v. Level, 957 S.W.2d 218 (Ky. 1997), which holds that appellate constitutional decisions are not retroactively

applicable unless the constitutional issues were preserved during the original litigation.

Despite misgiving over his decision in the Coffey case, the CALJ will defer to the appellate decisions in that case to continue benefits to Janice. 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, in the ultimate order to be issued after the question of the work relatedness of death is resolved, Janice's requests to substitute as party plaintiff and have benefits continued will be granted under the appropriate statute. As directed by the Court of Appeals in Coffey, Janice's benefits will be continued to the date Darrell would have reached age 70.

(The CALJ has recently granted continuation requests by widows over age 60 in Brewer v. Lone Mountain Processing, 2003-68141; Higgins v. PICI, 2010-00160; Stacy v. Clean Energy Mining Co., 2008-00126; and Miller v. Commonwealth, 2016-68072.)

On August 14, 2020, Janice Hedgepath filed a Notice of Election, stating she is electing to receive a continuation of benefits pursuant to KRS 342.730.

In the September 3, 2020, Order, the CALJ held as follows:

In response to the Order of July 31, 2020, the Form 11 applicant, Janice Hedgepath, has notified the CALJ of her election to claim survivor's benefits under KRS 342.730 instead of KRS 342.750. Thus, for the reasons set forth in the prior Order, Janice's requests to substitute as party plaintiff and have benefits continued under KRS 342.730(3)(a) are granted.

Highland Mining filed a Petition for Reconsideration asserting the same argument it now makes on appeal.

In the September 28, 2020, Order denying Highland Mining's Petition for Reconsideration, the CALJ held as follows:

The Defendant has filed a petition for reconsideration of the Order that substituted the widow, Janet Hedgepeth, as party plaintiff, and continued benefits to her from her husband's settlement under KRS 342.730(3)(a).

As documented in the Order of July 31, 2020, the CALJ has in recent months issued orders in other cases continuing benefits to widows who were already 60 years of age; this despite objections of defendants that argued the holding of Morsey v. Frazier 245 S.W.3d 757 (Ky. 2008), precluded such continuation. The day after the September 3, 2020, Order continuing benefits in this case, the decision in one of those earlier cases was affirmed by the Workers' Compensation Board. Allen v. Yamamoto FB Engineering, Inc., claim number 2012-96799. Thus, the petition is denied.

On appeal, Highland Mining asserts the CALJ erred by substituting Janice Hedgepeth as party Plaintiff and awarding her a continuation of Darrell Hedgepeth's benefits pursuant to KRS 342.730(3)(a) until he would have reached the age of 70 because she was already past the age she qualified for Social Security benefits when her husband passed away. We affirm.

ANALYSIS

The resolution of this appeal is quite straightforward.

Significantly, KRS 342.730(3)(a) begins by stating it is "subject to the limitations contained in subsection (4)." The amended version of KRS 342.730(4), effective July 14, 2018, *which is directly applicable to Janice Hedgepeth's entitlement to a continuation of her husband's benefits*, 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.*

(Emphasis added).

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. Janice Hedgepath's rights to a continuation of income benefits vested on May 27, 2020, the date Darrell Hedgepath passed away and almost two years after the effective date of statutory change. Consequently, the amended version of KRS 342.730(4) is applicable to her entitlement to a continuation of her husband's benefits until Darrell Hedgepath would have reached 70 years of age.

Despite Highland Mining's arguments to the contrary, Morsey, Inc. v. Frasier, 245 S.W.3d 757 (Ky. 2008), has no applicability in the case *sub judice*. The determination by the Morsey Court indicating a spouse's benefits cease when he or she qualifies for Social Security benefits is no longer controlling, as it concerned a version of KRS 342.730(4) that has not only been deemed unconstitutional but subsequently amended.

For the aforementioned reasons, the CALJ did not err in awarding Janice Hedgepath a continuation of income benefits until Darrell Hedgepath would have reached age 70.

Accordingly, the September 3, 2020, Order and the September 28, 2020, Order on Petition for Reconsideration are **AFFIRMED**.

ALL CONCUR.

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