

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 24, 2020

CLAIM NO. 201899113

JUDY PIPPIN

PETITIONER

VS. APPEAL FROM HON. W. GREG HARVEY,
ADMINISTRATIVE LAW JUDGE

MCKECHNIE VEHICLE COMPONENTS
and HON. W. GREG HARVEY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

STIVERS, Member. Judy Pippin (“Pippin”) appeals from the July 16, 2019, Opinion and Order of Hon. W. Greg Harvey, Administrative Law Judge (“ALJ”), awarding her temporary total disability benefits already paid, permanent partial disability (“PPD”) benefits, and medical benefits for an injury sustained while in the employ of McKechnie Vehicle Components. The ALJ terminated Pippin’s PPD benefits on December 19, 2021, four years from the date of Pippin’s work-related injury, “pursuant

to the limitation contained in the current version of KRS 342.730(4).” At the time of the award, Pippin was 72 years old.

On appeal, Pippin challenges the constitutionality of the retroactive application of KRS 342.730(4). He acknowledges the matter will ultimately be decided by the Kentucky Supreme Court. Pippin asserts the issue of constitutionality was properly preserved.

BACKGROUND

The Form 101 indicates Pippin sustained a work-related injury to her hip on December 19, 2017, in the following manner: “I was trying to adjust a table and fell.” The Form 101 indicates Pippin’s date of birth is January 1, 1947.

On May 2, 2019, Pippin filed a “Notice to Challenge Constitutionality of KRS 342.730(4)” in which she asserted, in relevant part, as follows:

Comes the plaintiff, Judy Pippin, and hereby gives notice of her intention to challenge the constitutionality of KRS 342.730(4) on the grounds that:

1. It’s [sic] retroactivity clause is unconstitutional.
2. It constitutes age discrimination.

The May 23, 2019, Benefit Review Conference Order and Memorandum lists the following contested issues: permanent total disability; extent and duration; permanent income benefits per KRS 342.730, including multipliers. Under “other contested matters” is the following: “Constitutionality of KRS 342.730(4); retroactivity and whether or not it constitutes discrimination based on age.”

In the July 16, 2019, Opinion and Order, the ALJ's findings regarding the constitutionality of retroactively applying the amended version of KRS 342.730(4) are set forth *verbatim* as follows:

B. Constitutionality of KRS 342.730 (4); retroactivity and whether or not it constitutes discrimination based on age.

Plaintiff argues the current version of KRS 342.730(4) is not constitutional, cannot be retroactively applied to her claim and constitutes discrimination based on age. The ALJ is without any authority to rule on constitutional issues and cannot address those arguments.

KRS 342.730(4) was amended by House Bill 2 and now states:

(4) 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.

Further, HB 2 provides a retroactivity clause, which states:

(2) Sections 2, 4, and 5 and subsection (7) of Section 13 of this Act are remedial and shall apply to all claims irrespective of the date of injury or last exposure, provided that, as applied to any fully and finally adjudicated claim, the amount of indemnity ordered or awarded shall not be reduced and the duration of medical benefits shall not be limited in any way.

(3) Subsection (4) of Section 13 of this Act shall apply prospectively and retroactively to all claims:

(a) For which the date of injury or date of last exposure occurred on or after December 12, 1996; and

(b) That have not been fully and finally adjudicated, or are in the appellate process, or for which time to file an appeal has not lapsed, as of the effective date of this Act. (2018 Ky. Acts 40, 2018 Ky. Ch. 40, 2018 Ky. HB 2, 2018 Ky. Acts 40, 2018 Ky. Ch. 40, 2018 Ky. HB 2).

The ALJ also acknowledges the pending appeals in Lafarge Holcim v. Swinford, No. 2018-CA-000414-WC (Ct. App. Sept. 7, 2018) and AGI Transp., Inc. v. Adkins, No. 2018- CA-000861-WC (Ct. App. Nov. 30, 2018) which are both before the Supreme Court of Kentucky. Until the Supreme Court of the Commonwealth holds otherwise or upholds the constitutionality of KRS 342.730(4), the ALJ is bound to uphold the law passed by the General Assembly. As such, Pippin’s award will be limited to four years from the date of her injury pursuant to the legislature’s mandate in KRS 342.730(4).

On July 25, 2019, Pippin filed a Notice of Appeal appealing the “constitutionality of KRS 342.730(4); retroactively and whether or not it constitutes discrimination based on age.” In her notice, Pippin conceded that this Board does not have the authority to resolve constitutional arguments. Therefore, she filed a simultaneous motion to place the appeal in abeyance.

In her July 25, 2019, “Motion to Hold Appeal in Abeyance,” Pippin once again conceded this Board does not have the authority to rule on the constitutionality of retroactive application of the amended version of KRS 342.730(4). By Order dated August 7, 2019, this Board placed the appeal in abeyance pending a final resolution of Lafarge Holcim v. Swinford, at that time styled 2018-SC-000627-WC.

By Order dated December 18, 2019, the Board removed the appeal from abeyance when the Supreme Court’s decision in Holcim v. Swinford, 581 S.W.3d

37 (Ky. 2019) became final. However, as noted by the Board, “the question of whether KRS 342.730(4) is unconstitutional was not decided.”

On appeal, Pippin asserts the issue of the constitutionality of KRS 342.730(4) was properly preserved, and she expects this Board to rule that the issue of the constitutionality of the amended version of KRS 342.730(4) will be decided by the Supreme Court of Kentucky.

ANALYSIS

Pursuant to House Bill 2, signed by the Governor on March 30, 2018, and effective July 14, 2018, KRS 342.730(4) 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).

The ALJ correctly determined KRS 342.730(4), as amended, which became effective on July 14, 2018, applies to Pippin’s award of PPD benefits.

Pippin’s date of birth is January 1, 1947. Thus, she was 69 years old at the time of her injury on December 19, 2017. Pursuant to the amended version of KRS

342.730(4), the ALJ must terminate Pippin’s award of income benefits on the date she reached age 70 or four years after her work-related injury, “whichever last occurs.” Consistent with the amended version of KRS 342.730(4), the ALJ terminated Pippin’s income benefits on December 19, 2021, four years after Pippin’s injury, as this date falls later than the date Pippin reached the age of 70.

On appeal, Pippin contends retroactive application of the amended version of KRS 342.730(4) is unconstitutional because it comprises age discrimination. As acknowledged by Pippin, this Board, as an administrative tribunal, has no jurisdiction to rule on the constitutionality of a statute. Blue Diamond Coal Company v. Cornett, 300 Ky. 647, 189 S.W.2d 963 (1945). Consequently, we are without authority to render a decision based upon Pippin’s sole argument on appeal. Thus, we must affirm.

Accordingly, the ALJ’s termination of Pippin’s PPD benefits on December 19, 2021, four years from the date of Pippin’s work-related injury, as set forth in the July 16, 2019, Opinion and Order is **AFFIRMED**.

ALL CONCUR.

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