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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000414-WC

LAFARGE HOLCIM — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-16-90245

JAMES SWINFORD; HON. GREG HARVEY,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION
BOARD OF KENTUCKY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; KRAMER AND NICKELL, JUDGES.

CLAYTON, CHIEF JUDGE: Lafarge Holcim (Lafarge) appeals from an opinion of the Workers' Compensation Board which affirmed in part and reversed in part an order of the Administrative Law Judge (ALJ). The Board affirmed an award of

permanent partial disability (PPD) benefits to James Swinford, a former Lafarge employee who suffered a workplace injury while operating a bulldozer, and reversed the ALJ's determination that the benefits were subject to the "tier down" provision of the 1994 version of Kentucky Revised Statutes (KRS) 342.730(4). Having reviewed the record and applicable law, we affirm.

The claimant in this case, James Swinford, has a sixth-grade education and no vocational training. He started working for Lafarge's predecessor in 1973. Since 2010, his primary job was operating a bulldozer on twelve-hour shifts, five days per week. At the time of his injury, he was seventy-five years of age.

At some time in the 1990s, Swinford underwent surgery on his cervical spine to address nerve damage in his hands. The surgery did not provide any significant improvement in symptoms in his neck and upper extremities and he continued to experience tingling and numbness in both hands.

On March 10, 2016, the bulldozer Swinford was operating slid forty to seventy feet down an embankment. Swinford was wearing a seatbelt at the time of the accident. He had to wait for approximately seven hours in the cab of the bulldozer before help arrived. During that time, he ate his lunch and napped. When he woke up, he felt a "crick" in the right side of his neck.

Following the accident, Swinford was taken to the hospital by ambulance and later consulted his family physician, Dr. William Barnes. He

received physical therapy but it provided no relief. Dr. Barnes referred him to Dr. K. Brandon Strenge, an orthopedic surgeon. Dr. Strenge ordered an MRI and prescribed Tramadol, a pain medication. He referred Swinford to Dr. J. T. Ruxer, a doctor of osteopathic medicine, for pain management. Dr. Ruxer recommended injections and indicated that Swinford might need surgery.

Swinford continued to experience pain in his neck and right arm as well as numbness. He was released to work without restrictions in May 2016, but when he attempted to return to work at Lafarge, his employment was terminated. According to Swinford, his condition continues to worsen and his pain medication has been increased. He does not believe he will be able to return to work as a bulldozer operator due to his neck pain.

Swinford filed a Form 101 Application for Resolution of Injury Claim alleging that he sustained multiple upper extremity injuries and a neck injury as a result of the bulldozer accident.

Swinford testified that the cervical surgery in the 1990s provided little relief. He continued to experience numbness in his right hand, but it did not interfere with his ability to work, and he did not seek any treatment for his neck until after the March 10, 2016 accident.

Medical evidence was offered by Dr. Strenge, Dr. Ruxer, and Dr. Robert Weiss, a neurosurgeon who served as the Independent Medical Examiner

(IME). Office records from Baptist Occupational Medicine for the two months following the accident were also introduced.

Dr. Strenge acknowledged Swinford's prior cervical surgery in the 1990s but observed that Swinford had been able to work without restrictions or limitations for many years following that surgery. The MRI showed that Swinford suffers from a T1-T2 disc herniation causing mild central and foraminal stenosis. Dr. Strenge ultimately diagnosed Swinford with T1-T2 disc herniation caused by the bulldozer accident, which exacerbated his neck pain and caused worsening of right arm numbness and a new onset of right triceps weakness. He assigned a 15% impairment rating.

Dr. Ruxer described Swinford's condition as a worsening of pre-existing neck and right arm pain, although he noted that Swinford had been working without restrictions until the accident. He recommended pain medication and some cervical medial branch blocks on the right side.

The IME, Dr Weiss, found degenerative changes in the cervical spine and cervical spondylosis typical of a male of Swinford's age but no evidence of a surgical lesion or disc herniation. He did find Swinford's current symptoms to be related to the work injury and did not recommend Swinford return to operating heavy equipment. He did not believe surgery or any further treatment was necessary and gave no impairment rating.

The ALJ found that Swinford had sustained a work-related injury in the bulldozer accident. The ALJ relied upon Swinford's own testimony, which he found to be credible, and upon the opinions of Dr. Strenge and Dr. Ruxer. The ALJ did not find a pre-existing impairment relating to Swinford's condition and awarded PPD benefits based on the 15% impairment rating assigned by Dr. Strenge for as long as Swinford was eligible to receive them "in accordance with KRS 342.730(4) and applicable case law." The version of KRS 342.730(4) then in effect terminated workers' compensation income benefits for employees who qualified for old-age Social Security retirement benefits.

Swinford and Lafarge filed petitions for reconsideration raising multiple issues. The ALJ issued two subsequent orders neither of which altered his finding regarding the absence of a pre-existing impairment and the award of PPD benefits. The first order, dated November 3, 2017, amended his ruling regarding the application of KRS 342.730(4) in light of a Kentucky Supreme Court opinion which had just held the subsection to be unconstitutional. The ALJ ordered that the duration of the award should be 425 weeks. In the second order, entered on November 7, 2017, he ordered instead the application of a prior version of KRS 342.730(4) dating from 1994. The Board subsequently affirmed the ALJ's finding that Swinford did not have a pre-existing active impairment but reversed the ALJ's

ruling that a prior version of KRS 342.730(4) was applicable to Swinford's case. This appeal by Lafarge followed.

Our standard of review requires us to show considerable deference to the ALJ and to the Board. "The ALJ, as the finder of fact, and not the reviewing court, has the sole authority to determine the quality, character, and substance of the evidence." *Square D Co. v. Tipton*, 862 S.W.2d 308, 309 (Ky. 1993) (citing *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418 (Ky. 1985)). Because the decision of the fact-finder in this case favored Swinford, the person with the burden of proof, "his only burden on appeal is to show that there was some evidence of substance to support the finding, meaning evidence which would permit a fact-finder to reasonably find as it did." *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986). Our role in reviewing the decision of the Board "is to correct the Board only where the Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

Lafarge argues that the Board erred in upholding the ALJ's finding that Swinford did not have a pre-existing active impairment and in relying on Dr. Strenge's 15% impairment rating in awarding PPD benefits. In Lafarge's view, Swinford's prior neck surgery and subsequent treatment with pain medication

constituted a pre-existing and active disability not resulting from the bulldozer accident and consequently not compensable.

"To be characterized as active, an underlying pre-existing condition must be symptomatic *and* impairment ratable pursuant to the AMA *Guidelines* immediately prior to the occurrence of the work-related injury. Moreover, the burden of proving the existence of a pre-existing condition falls upon the employer." *Finley v. DBM Techs*., 217 S.W.3d 261, 265 (Ky. App. 2007) (emphasis in original) (citing *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky. App. 1984).

Lafarge points to the fact that Swinford's previous cervical fusion is an impairment ratable condition under the AMA Guides, and Swinford's admission the fusion did not alter his symptoms and he continued to take medication for ongoing nerve pain in the upper extremities for ten to fifteen years preceding the date of the bulldozer accident. Lafarge argues that Dr. Strenge did not account for or address this situation and urges us to rely instead on Dr. Weiss's opinion that Swinford's ongoing problems related back to his prior cervical surgery.

In finding that Swinford's condition was not symptomatic prior to the accident, the ALJ relied on Swinford's own testimony that he worked twelve-hour shifts, five days per week prior to the accident and had no trouble getting in and out of the bulldozer or operating its controls. The ALJ concluded:

> Because the right arm weakness was not actively disabling prior to the incident the ALJ declines to find pre-existing active impairment as it pertains to that condition. Similarly, with regard to the disc herniation at T1-T2 and resulting triceps weakness there is no evidence that condition was symptomatic and ratable immediately prior to the bulldozer accident[.] Therefore the ALJ does not believe there is any pre-existing active impairment here and relies upon Dr. Strenge's rating of 15%.

The Board affirmed the ALJ's analysis, also emphasizing the fact that Swinford had been able to continue working for Lafarge for many years following the cervical surgery as evidence that there was no active impairment. The Board also noted that none of the medical experts, including Dr. Weiss, assessed a pre-existing active impairment.

We agree with the Board's analysis. The ALJ was not compelled to accept the opinion of Dr. Weiss, and acted well within his powers in relying on the opinion of Dr. Strenge and on Swinford's own testimony. "As fact-finder, an ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same party's total proof." *Ford Motor Co. v. Jobe*, 544 S.W.3d 628, 631-32 (Ky. 2018) (quoting *Abel Verdon Const. v. Rivera*, 348 S.W.3d 749, 753-54 (Ky. 2011) (footnotes omitted)). There was no medical testimony that Swinford had a ratable pre-existing impairment and no evidence that any symptoms experienced by Swinford following the surgery had any effect whatsoever on his ability to perform his job.

Lafarge's next argument concerns the effect of KRS 342.730(4) on the duration of Swinford's PPD benefits. "[T]he law in effect on the date of injury or last injurious exposure is deemed to control . . . an employer's obligations with regard to any claim arising out of and in the course of the employment." *Hale v. CDR Operations, Inc.*, 474 S.W.3d 129, 137 (Ky. 2015) (quoting *Magic Coal Co. v. Fox*, 19 S.W.3d 88, 93 (Ky. 2000)). On the date of Swinford's injury, March 10, 2016, KRS 342.730(4) provided that all workers' compensation benefits would "terminate as of the date upon which the employee qualifies for normal old-age Social Security retirement benefits . . . or two (2) years after the employee's injury or last exposure, whichever last occurs." KRS 342.730(4). This version of the statute came into effect in 1996.

The Kentucky Supreme Court subsequently ruled that the disparate treatment of older workers under this provision violated their equal protection rights. *Parker v. Webster Cty. Coal, LLC (Dotiki Mine)*, 529 S.W.3d 759, 770 (Ky. 2017), *reh'g denied* (Nov. 2, 2017). Swinford argued, in reliance on *Parker*, that his award of PPD should extend for the full 425 weeks as provided in KRS 342.730(1)(d) rather than the shorter period imposed under KRS 342.730(4).

The ALJ ultimately ruled that the version of KRS 342.730(4) in effect before 1996 should apply to Swinford's benefits and found that he was subject to its "tier down" provision, which states:

> If the injury or last exposure occurs prior to the employee's sixty-fifth birthday, any income benefits awarded under KRS 342.750, 342.316, 342.732, or this section shall be reduced by ten percent (10%) beginning at age sixty-five (65) and by ten percent (10%) each year thereafter until and including age seventy (70). Income benefits shall not be reduced beyond the employee's seventieth birthday[.]

The Board agreed with the ALJ that the 1996 version of KRS 342.730(4) was no longer applicable but reversed the ALJ's use of the "tier down" provision, holding that the plain language of the 1994 version of the statute did not apply to Swinford who was already seventy-five years of age at the time of the accident.

In its appellate brief, Lafarge acknowledged the effect of *Parker* but argued that currently proposed legislation pending before the Kentucky General Assembly might lead to further amendment of KRS 342.730. During the pendency of this appeal, the General Assembly did pass an amended version of KRS 342.730 which became effective on July 14, 2018. Subsection (4) now provides in relevant part 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." KRS 342.730(4).

The issue is whether this provision applies retroactively to limit the duration of Swinford's PPD benefits to four years following the injury. Generally,

"[n]o statute shall be construed to be retroactive, unless expressly so declared." KRS 446.080(3). The Legislative Research Commission Note appended to the amended statute reports the following statements which are contained in the text of Chapter 40 of House Bill 2:

> This statute [KRS 342.730] was amended in Section 13 of 2018 Ky. Acts ch. 40. Subsection (2) of Section 20 of that Act reads, "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." Subsection (3) of Section 20 of that Act reads, "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 [July 14, 2018]."

Although the Note is evidence the legislature considered making the statutory amendment of subsection (4) retroactive, this language was not included in the final version of the statute. "[T]he plain meaning of the statutory language is presumed to be what the legislature intended, and if the meaning is plain, then the court cannot base its interpretation on any other method or source." *Commonwealth v. Ford*, 543 S.W.3d 579, 581 (Ky. App. 2018) (quoting *Revenue Cabinet v. O'Daniel*, 153 S.W.3d 815, 819 (Ky. 2005)). Under the circumstances,

the amended statute does not apply retroactively to limit the duration of Swinford's benefits. This interpretation is in keeping with the general principle that when a statutory amendment affects "the level of income benefits payable for a worker's occupational disability, the [Kentucky Supreme] Court has consistently determined that the amendment was substantive in nature and that the law on the date of injury . . . controls." *Schmidt v. S. Cent. Bell*, 340 S.W.3d 591, 595 (Ky. App. 2011) (quoting *Spurlin v. Adkins*, 940 S.W.2d 900, 901 (Ky. 1997)). We see no reason that this principle should not also apply when the duration of a worker's benefits is affected.

"It is a fundamental principle that a statute may be valid in one part and invalid in another part, and if the invalid part is severable from the rest, the part which is valid may be sustained." *Democratic Party of Kentucky v. Graham*, 976 S.W.2d 423, 437 (Ky. 1998), *as modified* (Oct. 15, 1998) (citation omitted); *see also* KRS 446.090 ("It shall be considered that it is the intent of the General Assembly, in enacting any statute, that if any part of the statute be held unconstitutional the remaining parts shall remain in force, unless the statute provides otherwise, or unless the remaining parts are so essentially and inseparably connected with and dependent upon the unconstitutional part that it is apparent that the General Assembly would not have enacted the remaining parts without the unconstitutional part, or unless the remaining parts, standing alone, are incomplete

and incapable of being executed in accordance with the intent of the General Assembly.").

The version of KRS 342.730 in effect at the time of Swinford's injury included the unconstitutional provision in subsection (4). Because the remainder of the statute is valid and can be executed without subsection (4), the duration of Swinford's benefits is controlled by KRS 342.730(1)(d), which specifies a compensable period of 425 weeks for PPD benefits of 50% or less. This provision of the statute has remained unchanged since 1996.

In light of the foregoing, we affirm the opinion of the Board as to the award of PPD benefits based upon a 15% impairment rating and the absence of a pre-existing active impairment; affirm its holding that the ALJ's application of the 1994 version of KRS 342.730(4) containing the "tier down" provision was erroneous; and affirm the Board insofar as the PPD benefits must be awarded in accordance with KRS 342.730(1)(d).

ALL CONCUR.

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