

RENDERED: DECEMBER 20, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-001371-WC

SHIRLEY DONATHAN

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-14-86413

TOWN AND COUNTRY FOOD MART;
HON. ROLAND CASE, ADMINISTRATIVE
LAW JUDGE; ANDY BESHEAR,
KENTUCKY ATTORNEY GENERAL;
AND THE WORKERS' COMPENSATION
BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CLAYTON, CHIEF JUDGE; ACREE AND NICKELL,¹ JUDGES.

¹ Judge C. Shea Nickell concurred in this opinion prior to being sworn in as a Justice with the Supreme Court of Kentucky. Release of this opinion was delayed by administrative handling.

ACREE, JUDGE: Shirley Donathan appeals the Workers' Compensation Board's August 17, 2018 opinion and order adverse to her. She contends the Board erred by denying her lifetime benefits in her workers' compensation claim under the language of the newly-enacted version of KRS² 342.730(4). She also argues KRS 342.730(4) is unconstitutional. Finding no error, we affirm.

BACKGROUND

On April 17, 2014, Donathan, a sixty-nine-year-old woman, was injured while working as a cook at Town and Country Food Mart in Owingsville, Kentucky. On that day, she slipped and fell on melted ice on the work premises. She injured her left ankle, her left side, and chest. Thereafter, she received medical treatment, but was unable to immediately return to work.

Donathan filed a workers' compensation action against Town and Country and her claim was heard by an Administrative Law Judge (ALJ) on November 2, 2015. The ALJ found Donathan permanently disabled and awarded her benefits accordingly. Benefits were to be paid in the sum of \$225 per week with 12% interest on all due and unpaid installments of the compensation. However, the benefits were to terminate pursuant to KRS 342.730(4) as of the date when Donathan qualified for Social Security retirement benefits.

² Kentucky Revised Statutes.

Donathan challenged the order's termination language in a petition for reconsideration. The ALJ denied the petition, prompting Donathan to file a notice of appeal to the Workers' Compensation Board. The case was held in abeyance pending the outcome of Kentucky Supreme Court case *Parker v. Webster County Coal, LLC (Dotiki Mine)*, 529 S.W.3d 759 (Ky. 2017).

In April 2017, the Supreme Court issued its ruling. In that opinion, the Court held the limitation of benefits at Social Security retirement age under KRS 342.730(4) was unconstitutional. After *Parker* was rendered, the Board entered its opinion in this case, vacating and remanding the ALJ's order. It opined that Donathan should continue to receive benefits without reduction or limitation pursuant to KRS 342.730(4), as the law existed prior to its 1996 amendment.

On June 7, 2018, Town and Country filed an appeal with the Board arguing the issue should be revisited in light of pending legislation. Almost a month later, on July 14, 2018, the 2018 amended version of KRS 342.730(4) became effective. Because of this new version, the Board entered an opinion and order affirming the ALJ's original decision. This appeal followed.

STANDARD OF REVIEW

Our review of an opinion of the Workers' Compensation Board is limited. We only reverse the Board's opinion when "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.” *W. Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

The Court reviews questions of law, such as the constitutionality of statutes, using the *de novo* standard. *U.S. Bank Home Mortgage v. Schrecker*, 455 S.W.3d 382, 384 (Ky. 2014). When determining the constitutionality of legislation, the court’s sole duty is to “lay the article of the constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.” *Fiscal Court of Jefferson County. v. City of Louisville*, 559 S.W.2d 478, 481 (Ky. 1977) (citation omitted). We take care not to weigh the merits of the legislative policy, and instead focus only on whether the legislation is “in accordance with or in contravention of the provisions of the constitution.” *Id.* (citation omitted).

ANALYSIS

Retroactivity of KRS 342.730(4)

Donathan argues the Board failed to apply the language of KRS 342.730(4) in effect at the time she was injured. Given the Supreme Court’s recent decision in *Holcim v. Swinford*, 581 S.W.3d 37 (Ky. 2019), we affirm the Board’s decision and find the statute retroactive.

The ALJ acknowledged the Kentucky Supreme Court’s opinion in *Parker, supra*, which found the then-current version of KRS 342.730(4)

unconstitutional on equal protection grounds. Because a portion of the statute was ruled unconstitutional, the ALJ applied an earlier version of the statute, which included a tier system. On appeal to the Board, Donathan argued she should receive the full award without the tier system from the previous version of the statute utilized by the ALJ. The Board agreed and held that Donathan was entitled to the full period of her benefits.

Because of that ruling, Town and Country appealed to the Board and pointed out proposed legislation pending before the Kentucky General Assembly that might further amend KRS 342.730. Shortly after the appeal, the amendment became effective. The amended version of KRS 342.730(4) reads:

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.

KRS 342.730(4).

The issue in this case was made more challenging by the failure to codify subsection (3) of Section 20 of 2018 Ky. Acts ch. 40 as part of the Kentucky Revised Statutes. Portions of the Act passed by the General Assembly were omitted from the official, codified version of the Kentucky Revised Statutes.

A Legislative Research Commission note appears below the official version of KRS 342.730 stating:

This statute was amended in Section 13 of 2018 Ky. Acts ch. 40. . . . 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.”

However, this language failed to be included in the codification as part of KRS 342.730, but could only be found in the codifier’s notes to the statute. Given the confusion surrounding this issue, multiple cases flooded the court system. While this case was before us, the Kentucky Supreme Court granted discretionary review of a similar workers’ compensation case – *Holcim v. Swinford*. This Court abated this case and others in anticipation of a ruling from the Kentucky Supreme Court.

That Court issued its opinion in *Holcim v. Swinford* on August 29, 2019, holding KRS 342.730(4) must apply retroactively. 581 S.W.3d at 44. Because the newly-enacted amendment applies retroactively, it must be used to determine the duration of Donathan’s benefits. Thus, we affirm the Board’s decision.

Constitutionality of KRS 342.730(4)

Donathan also argues the newly-enacted KRS 342.730(4) is unconstitutional. In determining the constitutionality of a statute, courts apply three different scrutiny levels – strict, intermediate, and rational basis. *Vision Mining, Inc. v. Gardner*, 364 S.W.3d 455, 465-66 (Ky. 2011). The scrutiny level applied depends on the classifications made in the statute and the interests affected. *Id.* at 465 (citation omitted). Strict or intermediate scrutiny applies if a statute makes a classification because of a suspect or quasi-suspect class. *Id.* at 466 (citation omitted). If the statute merely affects social or economic policy, it is subject to the rational basis test. *Id.* (citation omitted).

Here, workers’ compensation benefits concern social and economic policy, thereby requiring the rational basis test. *Parker*, 529 S.W.3d at 767 (citation omitted). Courts will uphold a statute if it passes the rational basis test, which requires a “rational basis” or “substantial and justifiable reason” supporting the classifications created. *Id.* (citation omitted). “Proving the absence of a rational basis or of a substantial and justifiable reason for a statutory provision is a steep burden; however, it is not an insurmountable one.” *Id.* (citation omitted).

Donathan argues KRS 342.730(4) is unconstitutional because of a perceived discrimination between older and younger injured workers. This

argument triggers the rational basis analysis based on the alleged discrimination being age-related.

Parker determined the state’s interest in age-related disparate treatment is to: (1) prevent duplication of benefits; and (2) result in savings for the workers’ compensation system. *Id.* at 768. The Kentucky Supreme Court rejected the state’s argument the interest satisfied the rational basis test and ruled the 1996 version unconstitutional. The Court held the statute unconstitutional because it treated workers who qualified for Social Security differently than those who did not. The Court made the distinction that teachers who suffer work-related injuries are not subject to KRS 342.730(4) because they do not participate in Social Security, as they have their own retirement program. Therefore, the Court found the statute unconstitutional based upon there being no rational basis for treating other workers differently than teachers in the Commonwealth.

Here, the disparate treatment is no longer linked to Social Security benefits. Instead, the current and applicable version of KRS 342.730(4) states “[a]ll income benefits . . . 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.”

Applying the rational basis test, we find this version of the statute constitutional. The legislators enacted this version in response to *Parker*. We are

also cognizant of the strong presumption of constitutionality afforded to legislative acts. *Brooks v. Island Creek Coal Co.*, 678 S.W.2d 791, 792 (Ky. App. 1984) (citations omitted). Accordingly, we find the statute, as enacted, does not treat similarly situated persons differently. The statute allows for the benefits to terminate upon reaching the age of 70, or four years after the employee’s injury, whichever occurs last. This stipulation rationally relates to the government’s basis for the legislation – to save taxpayer dollars allocated to the workers’ compensation system. It places a limit on the amount of benefits every person is awarded, not just a select group of individuals. Therefore, we find the statute constitutional.

CONCLUSION

For the foregoing reasons, we affirm the Workers’ Compensation Board’s August 17, 2018 opinion and order.

ALL CONCUR.

BRIEF FOR APPELLANT:

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Owingsville, Kentucky

BRIEF FOR APPELLEE:

Gregory L. Little
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