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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000644-WC

JERRY MULLINS — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-15 89349

PUBLISHERS PRINTING COMPANY;
TANYA PULLIN, ADMINISTRATIVE LAW JUDGE; AND
KENTUCKY WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, DIXON, AND K. THOMPSON, JUDGES.

ACREE, JUDGE: Jerry Mullins appeals the decision of the Workers' Compensation Board (Board) alleging that: (1) the Board erred in reviving the 1994 version of KRS[1] 342.730(4); (2) the 1994 version of KRS 342.730(4) is

[1] Kentucky Revised Statutes.

unconstitutional; (3) the 2018 version of KRS 342.730(4) is unconstitutional; and (4) the retroactive application of the 2018 version KRS 342.730(4) is invalid. Because the most recent iteration of KRS 342.730(4) governs this review, the first two claims of error are moot. We address only the last two arguments. After review, we affirm.

BACKGROUND

Jerry Mullins (Jerry) is a 63-year-old man who sustained a work-related injury to his right upper extremity on March 11, 2015. The administrative law judge (ALJ) heard his claim on May 10, 2017, and awarded Jerry permanent partial disability benefits "subject to the limitations set forth in KRS 342.730(4)." Jerry appealed the ALJ's decision regarding the constitutionality of KRS 342.730(4), relying upon the Kentucky Supreme Court's decision in *Parker v. Webster County Coal, LLC (Dotiki Mine)*, 529 S.W.3d 759 (Ky. 2017).

The *Parker* decision led to the Board's recalculation of Jerry's income benefits based on the 1994 version of the statute, instead of the 1996 version since held unconstitutional. The 1994 version includes a "tier-down" calculation, wherein the court calculates the injured party's benefits by reducing their benefits 10% when the party reaches 65, and 10% each year after that until the party reaches the age of 70. For workers 65 and older at the time of injury, there is no tier-down reduction. The Board vacated the ALJ's award of benefits "subjected to

the limitations as set forth in KRS 342.730(4)" and remanded for a revised calculation using the "tier-down" approach.

Responding to *Parker*, the legislature passed, and the governor signed, House Bill 2 which amended KRS 342.730(4). House Bill 2 terminates income benefits upon turning seventy years of age or four years after injury, whichever last occurs, and includes a provision indicating retroactivity. The House Bill became effective July 13, 2018. Jerry now appeals.

STANDARD OF REVIEW

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). 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

The newly enacted 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." Jerry's only two remaining arguments are that this version of KRS 342.730(4) is unconstitutional and that it cannot be applied retroactively. Both arguments fail.

The legislature says a statute's constitutionality is an issue that, at least typically, first needs to be raised in the tribunal first deciding the case. KRS 418.075(1) ("In any proceeding which involves the validity of a statute, the Attorney General of the state shall, before judgment is entered, be served with a copy of the petition . . . ."). The Courts agree. *Grider v. Commonwealth*, 404 S.W.3d 859 (Ky. 2013) (holding that raising a constitutional issue for the first time on appeal is insufficient) (citing *Benet v. Commonwealth*, 253 S.W.3d 528, 532 (Ky. 2008) ("[W]e reject any contention that merely filing an appellate brief, which necessarily occurs post-judgment, satisfies the clear requirements of KRS 418.075.").

However, that cannot happen under the modern scheme of addressing workers' compensation claims in which the first court to consider such claims is this Court of Appeals. More significantly, the Workers' Compensation Board and

ALJs lack jurisdiction to determine the constitutionality of a statute. *See Austin Powder Company v. Stacy*, 495 S.W.3d 732, 735 (Ky App. 2016); *Blue Diamond Coal Co. v. Cornett*, 300 Ky. 647, 189 S.W. 2d 963 (1945). The first subsection of KRS 418.075, therefore, cannot be strictly followed.

The first opportunity to raise a constitutional challenge is in this Court. The first step in that process is still timely notification to the Attorney General whose role is to defend the statute. *Holcim v. Swinford*, 581 S.W.3d 37, 44 (Ky. 2019). Provision for that notification is found in KRS 418.075(2), which says:

> In any appeal to the Kentucky Court of Appeals or Supreme Court or the federal appellate courts in any forum which involves the constitutional validity of a statute, the *Attorney General shall, before the filing of the appellant's brief, be served with a copy of the pleading, paper, or other documents which initiate the appeal* in the appellate forum. This notice shall specify the challenged statute and the nature of the alleged constitutional defect.

KRS 418.075(2) (emphasis added). Like the first subsection of KRS 418.075, this second subsection is equally ill-suited to workers' compensation claims. That is because, ordinarily, the "document[] which initiate[s] the appeal in the appellate forum" is a notice of appeal. Notices of appeal are filed months before the appellant's brief is due. That allows quite a bit of time for the Attorney General to

review a record and decide whether to move this Court to intervene in the appeal as a matter of right. CR[2] 24.01(2).

This Court's review of decisions of the Workers' Compensation Board is not initiated by a notice of appeal. It is initiated by a "petition for review," CR 76.25(2), and that makes the initiating document and the brief, effectively, one and the same. However, special provision is made for constitutional challenges of decisions by the Workers' Compensation Board, as follows:

> In any case in which the constitutionality of a statute is questioned, a copy of the petition and response shall be served on the Attorney General of the Commonwealth by the party challenging the validity of the statute. The Attorney General may file an entry of appearance within ten (10) days of the date of such service. If no entry of appearance is filed, no further pleadings need be served on the Attorney General.

CR 76.25(8).

Therefore, unlike civil appeals which allow the Attorney General much time between the filing of the initiating document and the brief, in workers' compensation appeals, the Attorney General must decide in ten (10) days to file an entry of appearance – a much shorter period than in civil appeals for the Attorney General to decide whether to defend the Commonwealth's statutes. However, the

[2] Kentucky Rules of Civil Procedure.

ten-day window is not too short a time for the Attorney General to act. "While allowing the Attorney General a reasonable time to respond is the better practice, neither the statute [KRS 418.075] nor the rule [CR 24[3]] . . . establish a period of delay between the notice [of constitutional challenge of a statute] and the entry of judgment" or rendition of an opinion on appellate review of that judgment. *Hinkle v. Commonwealth*, 104 S.W.3d 778, 780 (Ky. App. 2002). The Supreme Court has made plain "that KRS 418.075 is mandatory and that strict enforcement of the statute will eliminate the procedural uncertainty." *Maney v. Mary Chiles Hosp.*, 785 S.W.2d 480, 482 (Ky. 1990). As nearly as possible, Jerry strictly complied with the statute given the rules that govern this Court's review of constitutional challenges of the workers' compensation laws. CR 76.25(1) ("Pursuant to Section 111(2) of the Kentucky Constitution and SCR 1.030(3), decisions of the Workers' Compensation Board shall be subject to direct review by the Court of Appeals in accordance with the procedures set out in this Rule."); KY. CONST. 111(2) ("The Court of Appeals shall have appellate jurisdiction . . . to review directly decisions of administrative agencies . . . ."); SCR[4] 1.030(3) ("Final decisions of the Workers' Compensation Board are subject to review by the Court of Appeals in accordance

[3] Whether the Attorney General may proceed outside this ten-day window by a timely motion to intervene pursuant to CR 24.01(2) is not before this Court because the Attorney General did not move to intervene.

[4] Kentucky Supreme Court Rules.

with procedures set out in the Rules of Civil Procedure."). Because the Attorney General was properly served, this Court can address Jerry's argument regarding the constitutionality of the 2018 version of KRS 342.730(4).

We are cognizant of the strong presumption of constitutionality afforded to legislative acts. *Keith v. Hopple Plastics*, 178 S.W.3d 463, 468 (Ky. 2005), *overruled on other grounds by Parker v. Webster County Coal, LLC (Dotiki Mine)*, 529 S.W.3d 759 (Ky. 2017). When a statutory provision results in disparate treatment, we must consider the 14th Amendment of the United States Constitution and Sections 1, 2, and 3 of the Kentucky Constitution. The goal of these constitutional provisions "is to keep governmental decision makers from treating differently persons who are in all relevant respects alike while recognizing that nearly all legislation differentiates in some manner between different classes of persons." *Parker*, 529 S.W.3d at 767 (internal quotation marks and brackets omitted) (quoting *Vision Mining, Inc. v. Gardner*, 364 S.W.3d 455, 465 (Ky. 2011)).

In determining the constitutionality of a statute, courts apply three different scrutiny levels – strict, intermediate, and rational basis. *Id*. The scrutiny level applied depends on the classifications made in the statute and the interests affected. *Id*. Strict or intermediate scrutiny applies if a statute makes a

classification because of a suspect or quasi-suspect class. *Id.* If the statute merely affects social or economic policy, it is subject to the rational basis test. *Id.*

"Workers' compensation statutes concern matters of social and economic policy. As a result, such a statute is not subject to strict or [intermediate] scrutiny and therefore must be upheld if a 'rational basis' or 'substantial and justifiable reason' supports the classifications that it creates." *Id.* (internal quotation marks omitted). The Court 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. "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). Jerry argues that KRS 342.730(4) is unconstitutional because of a discrimination between older and younger injured workers.

The Supreme Court made it clear that *Parker* addresses "the equal protection problem with KRS 342.730(4) . . . that . . . treats injured older workers who qualify for normal old-age Social Security retirement benefits differently than it treats injured older workers who do not qualify." *Id.* at 768. Before saying so, however, the Court said the parties had argued the wrong question. Their focus was "on the perceived discrimination between injured older workers and injured younger workers." *Id.* at 767. The Court then said:

> The rational bases for treating younger and older workers differently is: (1) it prevents duplication of benefits; and (2) it results in savings for the workers' compensation system. Undoubtedly, both of these are rational bases for treating those who, based on their age, have qualified for normal Social Security retirement benefits differently from those who, based on their age, have yet to do so.

Id. at 767-68. Although this is *dicta* because that specific issue was not before the Court in *Parker*, it is consistent with this Court's analysis of the issue which now is squarely before it.

The newly enacted KRS 342.730(4) states "all income benefits . . . shall terminate as of the date upon which the employee reaches age seventy (70) or four (4) years after the employee's injury or last exposure, whichever last occurs." Jerry simply argues, with no factual or legal support, that the new version continues to result in disparate treatment and asserts that the statute's new version neither saves money nor prevents duplication of benefits. We cannot agree with Jerry.

"In considering an equal protection challenge, a court does not engage in accounting of debits and credits; rather the court must examine whether similarly situated individuals have been treated differently . . . and, if so, whether or not such treatment is rationally related to a legitimate state interest." *Parker*, 529 S.W.3d at 769 (quoting *Vision Mining*, 364 S.W.3d at 474 (internal quotation marks omitted; original capitalization restored)).

Applying the rational basis test, we find this version of the statute constitutional. The legislators enacted this version in response to *Parker*, and we are cognizant of the strong presumption of constitutionality afforded to legislative acts. *Keith*, 178 S.W.3d at 468. Accordingly, we hold 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. It cannot be disputed that the provision rationally relates to a cost savings for the workers' compensation system. It places a limit on the amount of benefits every person is awarded, not just a select group of individuals. Here, to the extent there is disparate treatment between younger and older workers, that disparate treatment is rationally related to that cost savings provision.

We can dispatch Jerry's last argument regarding retroactivity easily. Addressing KRS 342.730(4), our Supreme Court recently said, "the newly-enacted amendment applies retroactively . . . ." *Holcim,* 581 S.W.3d at 44.

CONCLUSION

The March 30, 2018 opinion of the Board vacated the ALJ's order and remanded the claim for entry of an amended award of PPD benefits and for clarification of the length of the award. For the foregoing reasons, we affirm that opinion.

ALL CONCUR.

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