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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001439-WC

FANNIE L. CRUSE — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-10-73734

HENDERSON COUNTY BOARD OF EDUCATION;
HON. JANE RICE WILLIAMS, ADMINISTRATIVE
LAW JUDGE; AND WORKERS' COMPENSATION
BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; STUMBO AND TAYLOR, JUDGES.

STUMBO, JUDGE: Fannie Cruse appeals from a decision of the Workers' Compensation Board ("Board") which affirmed a workers' compensation award. On appeal, Appellant claims she suffered more permanent injury than found by the

administrative law judge ("ALJ"), that she is totally disabled, and that KRS 342.730(4) violates federal law. We find no error and affirm.

Appellant was employed as an after-school care aide for the Henderson County Board of Education. It is undisputed that she suffered a workplace injury on October 14, 2010, when she fell at school. At the time of her injury, Appellant was 71 years old. She alleged injuries to her shoulders, bicep, knees, ankle, foot, neck, back, and toes. A hearing on this matter occurred before the ALJ on October 22, 2013. Numerous medical records were introduced into evidence, as was the deposition of Appellant, the deposition of Dr. Jules Barefoot,[1] and the deposition of Dr. Daniel Primm.[2] Dr. Barefoot found that Appellant suffered permanent injury to her cervical spine (neck), left knee, left shoulder, and right shoulder. Dr. Barefoot also gave Appellant a 23% whole person impairment rating. Dr. Primm opined that Appellant only suffered a permanent workplace injury to her left shoulder and that her other complaints were due to pre-existing conditions. Dr. Primm assigned a 7% whole person impairment rating.

The ALJ ultimately determined that Appellant only sustained a 7% whole person impairment due to her left shoulder injury and that she would be able to return to work. The ALJ based her opinion after reviewing the medical records and depositions. The ALJ found Dr. Primm's opinion most persuasive and found the majority of Appellant's medical problems were pre-existing. The ALJ believed

[1] Dr. Barefoot conducted an independent medical evaluation ("IME") at Appellant's request.

[2] Dr. Primm conducted an IME at the Henderson County Board of Education's request.

most of Appellant's work-related injuries were temporary which resolved themselves within a year. Both parties filed petitions for reconsideration. Some calculations were adjusted or changed, but the ultimate decision regarding Appellant's injuries was not altered.

Appellant then appealed to the Board. Appellant argued that the ALJ erred in not finding permanent injuries to her neck, knees, and right shoulder. Appellant also claimed that if she did have pre-existing conditions, they were dormant and only became active after the workplace accident, thus entitling her to increased benefits. She also asserted the argument that KRS 342.730(4), which limits entitlement to income benefits when an employee qualifies for Social Security retirement, violated the federal Age Discrimination in Employment Act. The Board found that the ALJ did not err in her award of benefits and that KRS 342.730(4) did not violate the federal act. This appeal followed.

"The function of further review of the [Board] in the Court of Appeals 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, 687-688 (Ky. 1992).

> KRS 342.285 designates the ALJ as the finder of fact. *Paramount Foods, Inc. v. Burkhardt,* 695 S.W.2d 418 (Ky. 1985), explains that the fact-finder has the sole authority to judge the weight, credibility, substance, and inferences to be drawn from the evidence. *Special Fund v. Francis,* 708 S.W.2d 641, 643 (Ky. 1986), explains that a finding that favors the party with the burden of

> proof may not be disturbed if it is supported by substantial evidence and, therefore, is reasonable.

AK Steel Corp. v. Adkins, 253 S.W.3d 59, 64 (Ky. 2008). "Substantial evidence means evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." *Smyzer v. B. F. Goodrich Chemical Co.*, 474 S.W.2d 367, 369 (Ky. 1971).

> The claimant in a workman's compensation case has the burden of proof and the risk of persuading the board in his favor. . . . If the board finds against a claimant who had the burden of proof and the risk of persuasion, the court upon review is confined to determining whether or not the total evidence was so strong as to compel a finding in claimant's favor.

Snawder v. Stice, 576 S.W.2d 276, 279-80 (Ky. App. 1979) (citations omitted).

Appellant's first argument is that the ALJ failed to find that her pre-existing conditions relating to her neck, knees, and right shoulder were dormant prior to the workplace injury.

> [A] pre-existing condition that is both asymptomatic and produces no impairment prior to the work-related injury constitutes a pre-existing dormant condition. When a pre-existing dormant condition is aroused into disabling reality by a work-related injury, any impairment or medical expense related solely to the pre-existing condition is compensable. A pre-existing condition may be either temporarily or permanently aroused. If the pre-existing condition completely reverts to its pre-injury dormant state, the arousal is considered temporary. If the pre-existing condition does not completely revert to its pre-injury dormant state, the arousal is considered permanent, rather than temporary.

Finley v. DBM Technologies, 217 S.W.3d 261, 265 (Ky. App. 2007).

In her opinion, the ALJ found that Appellant suffered many injuries after her fall; however, she found that only the left shoulder injury was permanent. We believe this finding was not in error. In Dr. Primm's IME report and deposition, he stated that any injury to Appellant's right shoulder was most likely a result of a right shoulder rotator cuff injury and surgical repair which occurred prior to the workplace injury. As to Appellant's neck, Dr. Primm did not find any permanent injury. He stated any pain she was having was most likely due to car accidents she had in 1993, 2003, and 2012, after which she complained of neck and shoulder pain. Finally, Dr. Primm believed there was no permanent injury to Appellant's knees. The only evidence of injury to Appellant's knees found by Dr. Primm was related to arthritis which Appellant was diagnosed with in the 1960s.

We also believe it is relevant that Appellant went to different specialists for her neck, shoulder, and knee complaints. Each doctor released her from their care in 2011 without a scheduled follow-up. The doctors also released her to return to work without any restrictions and did not prescribe any medication.

The ALJ found Dr. Primm's medical opinion to be the most persuasive. His opinion, along with the lack of follow-ups and work restrictions, is substantial evidence to support the ALJ's decision. "Although a party may note evidence which would have supported a conclusion contrary to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal." *Whittaker v. Rowland*, 998 S.W.2d 479, 482 (Ky. 1999). Dr. Barefoot's opinion could have supported a

finding that all of Appellant's injuries were permanent, workplace injuries; however, the evidence was not so strong as to compel a finding in her favor.

Appellant's next argument is that the ALJ erred in finding that Appellant was not totally disabled and could return to work. As stated previously, none of Appellant's treating physicians recommended work restrictions. Dr. Primm did recommend a work restriction, but it was to simply avoid lifting objects of more than eight to ten pounds. We find no error.

Appellant's final argument on appeal regards KRS 342.730(4) which states in relevant part:

> All [Workers' Compensation] income benefits payable pursuant to this chapter shall terminate as of the date upon which the employee qualifies for normal old-age Social Security retirement benefits under the United States Social Security Act, 42 U.S.C. secs. 301 to 1397f, or two (2) years after the employee's injury or last exposure, whichever last occurs.

At the time of her injury, Appellant had already qualified for Social Security retirement benefits; therefore, she was awarded permanent partial disability benefits for only 104 weeks (two years). If Appellant had not already reached the Social Security retirement age, and would not reach said age for some time, she would have been entitled to 425 weeks of income benefits. KRS 342.730(1)(d).

Appellant argues that only allowing her to receive 2 years worth of benefits violates 29 U.S.C. § 623(a)(1). That statute states that it is unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms,

conditions, or privileges of employment, because of such individual's age[.]" 29 U.S.C. § 623(a)(1). She claims KRS 342.730(4) discriminates against her based on her age because it limits her compensation.

The Board held that KRS 342.730(4) did not violate federal law. The Board stated: "KRS Chapter 342 is a system of compensation mandated by the state, not the employer. Thus, even assuming *arguendo* KRS 342.730(4) is discriminatory, we are not convinced such action can be imputed to the employer as it is not within the employer's control." We agree with the Board. The federal Age Discrimination in Employment Act statute 29 U.S.C. § 623(a)(1) specifically states that an employer cannot discriminate based on age. Here, the Henderson County Board of Education is not discriminating against Appellant, the state of Kentucky is.

With that being said, we believe it is worth noting another argument which was not raised here, that KRS 342.730(4) violates the equal protection clause of the United States Constitution.

The Kentucky Supreme Court has ruled on this issue a number of times. *See Keith v. Hopple Plastics*, 178 S.W.3d 463 (Ky. 2005); *McDowell v. Jackson Energy RECC*, 84 S.W.3d 71 (Ky. 2002); *Wynn v. Ibold, Inc.*, 969 S.W.2d 695 (Ky. 1998). We wish to recount our Supreme Court's holding on this issue because it seems to us that limiting the duration of income benefits based on a worker's age is discriminatory and a violation of equal protection.

> A statute involving the regulation of economic matters or matters of social welfare comports with both due process and equal protection requirements if it is rationally related to a legitimate state objective. The constitutionality of a statutory classification will be upheld if the classification is not arbitrary, or if it is founded upon any substantial distinction suggesting the necessity or propriety of the classification.

Wynn at 696. Our Supreme Court has held that

> reducing income benefits at an age when workers became eligible for other forms of income replacement avoided a duplication of benefits. It also reduced the overall cost of workers' compensation, thereby improving the economic climate for all citizens of the commonwealth. Finding those to be legitimate state objectives and sound public policy, the [C]ourt determined that the statute complied with the requirements of due process and equal protection.

Hopple Plastics at 465 (citation omitted).

> The Workers' Compensation Act does not create a quasi tort. Workers' compensation is a form of social welfare legislation. Its purpose is to require employers to provide necessary medical treatment for workers who are injured in the course of their employment and to replace some of the income they will lose, thereby enabling them to meet their own essential needs and those of their dependents.
>
> In a case involving social or economic legislation where no fundamental right is at stake and no suspect class is implicated, a statute will comply with the Fourteenth Amendment's right to equal protection if it furthers a legitimate state objective and there is any conceivable rational basis for the classes it creates. Legislative acts are presumed to be valid; therefore, the burden is on one attacking a statute to show the negative. Although the court may impose procedural safeguards on the administration of a statute, its role is not to second-guess the statute's wisdom. Equal protection does not

> require there to be a perfect fit between means and ends. Nor does it concern whether the statute fulfills ideal social or economic objectives or whether it could have been more just and humane.

Id. at 466 (citations omitted).

We believe it is time for the Supreme Court to look at this issue again. It seems to this Court that KRS 342.730(4) punishes those employees who elect to continue working after they reach the social security retirement age.

> [W]hile the Commonwealth's desire to eliminate duplicative benefits is appropriate and necessary for the preservation of workers' compensation, the means chosen for achieving that goal are improper in this instance because it draws an impermissible difference between the similarly situated classes of social security recipients who continue to supplement their benefits by working and social security recipients who would continue to supplement their incomes except for work-related injuries.

Jackson Energy at 81 (Graves, J., dissenting).

> Many individuals who have participated in the social security program now choose to work beyond the normal retirement age. . . .[M]any must do so because their social security retirement benefit alone is inadequate for their essential needs. The principles of requiring industry rather than the public to bear the cost of industrial injuries and providing employers with an incentive to promote workplace safety apply no less to such workers than they do to workers who are ineligible for social security retirement. Equal protection demands that they be treated the same.

Hopple Plastics at 469 (Scott, J., dissenting).

Based on the foregoing reasons, we find no error in the award of workers' compensation benefits to Appellant.

ALL CONCUR.

BRIEF FOR APPELLANT:

Austin P. Vowels
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BRIEF FOR APPELLEE
HENDERSON COUNTY BOARD
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