DISTRICT COURT OF APPEAL OF FLORIDA
FIRST DISTRICT
TALLAHASSEE, FLORIDA

Phyllis Crispin,	DOCKET NO: 1D19-863
Appellant,	OJCC NO: 12-009053MES
vs.	D/A: 4/18/2011

Orlando Rehabilitation Group
DBA Clermont Nursing & Rehab
Center and Gallagher Bassett
Services,

Appellees.
_____/

ANSWER BRIEF OF APPELLEES

Bill McCabe, Esquire
1250 S. Highway 17-92
Suite 210
Longwood, FL 32750
Counsel for Appellant

William G. Berzak, Esquire
203 E. Livingston Street
Orlando, FL 32801
Counsel for Appellant

William H. Rogner, Esquire
Scott B. Miller, Esquire
1560 Orange Avenue, Suite 500
Winter Park, FL 32789
Counsel for Appellees

This is an appeal from an Order of the Honorable Margaret E. Sojourner, Judge of compensation Claims, rendered February 20, 2019.

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PRELIMINARY STATEMENT

Appellee, Phyllis Crispin, is referred to as the "claimant." Appellants, Orlando Rehabilitation Group DBA Clermont Nursing & Rehab Center and Gallagher Bassett Services, are referred to as the "employer/carrier" or "E/C." The Judge of Compensation Claims is abbreviated "JCC."

Temporary total disability is abbreviated "TTD." Temporary partial disability is abbreviated "TPD." Permanent total disability is abbreviated "PTD." Average weekly wage is abbreviated "AWW." Maximum medical improvement is abbreviated "MMI." Major contributing cause is abbreviated "MCC." Expert medical advisor is abbreviated "EMA." Independent medical examiner is abbreviated "IME." Petition for benefits is abbreviated "PFB."

The letter "R" followed by the applicable volume and page number refers to the Record of Proceedings. Volume I is the record on appeal while volume II is the transcript of the hearing. The letters "IB" followed by the applicable page number refer to the Initial Brief.

STATEMENT OF THE CASE AND FACTS

The controlling facts are simple. The claimant received extensive medical care after her compensable accident and reached overall MMI on 5/25/12 with a permanent impairment rating and permanent work restrictions. (RI-19). On the next day, 5/26/12, the E/C voluntarily accepted the seventy-three year old claimant as permanently and totally disabled. (RI-27). Having been injured after her seventieth birthday, the claimant's entitlement to PTD benefits ceased "5 years following the determination of permanent total disability" according to the applicable statute. Therefore, the E/C suspended PTD benefits effective 5/25/17 after five years of continuous payments. (RI-29).

SUMMARY OF ARGUMENT

The plain language of section 440.15(1)(b) provides that where the accident occurs after the claimant reaches the age of seventy PTD benefits are payable "not to exceed 5 years following the determination of permanent total disability." The claimant, who was injured after the age of seventy, was determined to be PTD on 5/26/12. Under the plain language of the statute her entitlement to PTD benefits ceased five years later, on 5/25/17.

The claimant's argument in this appeal hinges on an assertion that section 440.15(1)(b) provides for a "bank" of benefits. Section 440.15(1)(b), however, is a "calendar-based" statute. It provides for a date certain upon which entitlement ceases whether or not an E/C continuously pays benefits during the period in question. Unlike a "bank" statute, section 440.15(1)(b) provides for payments for a period of "years" and not a set number of "weeks."

The JCC properly determined that section 440.15(1)(b) entitled the instant claimant's to PTD benefits for a period of "5 years following the determination of permanent total disability." Since that determination was made on 5/26/12, the JCC correctly ruled that her entitlement ended on 5/25/17. The order should be affirmed.

ARGUMENT

I. THE JCC CORRECTLY DETERMINED THAT WHEN A CLAIMANT IS DETERMINED TO BE PTD AFTER THE AGE OF SEVENTY, PTD BENEFITS ARE PAYABLE FOR FIVE CALENDAR YEARS FOLLOWING THE DETERMINATION OF PERMANENT TOTAL DISABILITY

(A) Standard of Review

The parties agree on the standard of review. The issue of whether a statute providing for a cessation of benefits is calendar-based, or whether it instead provides a bank of benefits, is reviewed by this Court *de novo*. See *Sch. Bd. of Lee Cnty. v. Huben*, 165 So. 3d 865, 867 (Fla. 1st DCA 2015).

(B) Argument on the Merits

This appeal is controlled by the plain language of section 440.15(1)(b), Fla. Stat. (2011), which provides in pertinent part:

> "If the accident occurred on or after the employee reaches age 70, benefits shall be payable during the continuance of permanent total disability, not to exceed 5 years following the determination of permanent total disability."

Since the statute's language is plain, there is no need for the Court to employ rules of construction or speculate on the Legislature's intent. See *Germ v. St. Luke's Hosp. Ass'n*, 993 So. 2d 576, 578 (Fla. 1st DCA 2008) ("If the statute's plain language is clear and unambiguous, courts should rely on the words used in the statute without

involving rules of construction or speculating as to the legislature's intent. Courts should give statutory language its plain and ordinary meaning, and may not add words that were not included by the legislature.").

Pursuant to rule making authority, the Department adopted Rule 69L-3.01945, Fla. Admin. C., which directs Carriers regarding the proper payment of PTD benefits. It provides:

> "(1) Permanent total benefits paid for injuries occurring on or after October 1, 2003, shall cease at age 75. If it is determined that the injury prevented the employee from working sufficient quarters to be eligible for social security benefits under 42 U.S.C. Section 402 or 423, benefits will continue to be paid in accordance with the requirements of chapter 440, F.S. **If the accident occurred on or after the employee reaches age 70, benefits shall be payable during the continuance of permanent total disability, not to exceed 5 years from the date of permanent total disability.**" (emphasis added).

The plain language of both the statute and the applicable rule control here. The instant claimant was injured after the age of seventy. She was determined to be permanently and totally disabled on 5/26/12. Her entitlement to PTD benefits, under the plain language of the statute, ceased on 5/25/17.

It is undisputed that the claimant has been totally disabled since 5/26/12. There is no evidence that she was ever employed, attempted to become employed, looked for work, or did anything other than continue to receive PTD checks and authorized medical care. The claimant's entire case hinges on the fact that the claimant had an

additional surgical procedure in 2014. According to the claimant, she was no longer entitled to PTD benefits for a period of ten weeks, but was instead entitled to TTD or TPD benefits for those ten weeks.

The instant claimant, however, was permanently and totally disabled before her 2014 surgery, permanently and totally disabled immediately following her 2014 surgery (which occurred when she was 75 years old), and she remains permanently and totally disabled now. According to the plain language of the statute, PTD benefits cease "5 years following the determination of permanent total disability." The claimant was determined to be PTD on 5/26/12 and her entitlement to such benefits ceased five calendar years following that date.

Section 440.15(1)(b) is a "calendar-based" statute. It provides a date certain that benefits cease, which is calculated from a date on a calendar. The claimant's argument rests on an assertion that section 440.15(1)(b) provides a "bank" of benefits. The claimant is wrong. Compare section 440.15(1)(b) to section 440.15(2)(a), Fla. Stat. (2011), which is a statute that provides for a "bank" of benefits:

> "Subject to subsection (7), in case of disability totaling character but temporary in quality, 66 2/3 percent of the average weekly wages shall be paid to the employee during the continuance thereof, not to exceed **104 weeks** except as provided in this subsection, s.440.12(1) and s.440.14(3)." (emphasis added). Section 440.15(2)(a), Fla. Stat. (2011).

The plain language of Section 440.15(2)(a) provides for "104 weeks" of

payments. The statute does not prescribe a date upon which the benefits commence or a date upon which the benefits cease. Therefore, this Court construes such a statute as providing a "bank" of benefits that can be paid out at various times over the course of the claim.

Compare language from another "calendar-based" statute:

> "Subject to the payment of permanent benefits under S.440.15, in no event shall temporary benefits for a compensable mental or nervous injury be paid for **more than 6 months after the date of maximum medical improvement** for the injured employee's physical injury or injuries, which shall be included in the period of 104 weeks as provided in S.440.15(2) and (4). Mental or nervous injuries are compensable only in accordance with the terms of this section." (emphasis added). Section 440.093(3), Fla. Stat. (2011).

This Court held that Section 440.093(3) does not provide for a bank of benefits. Under the plain language of this calendar-based statute, temporary disability benefits for a mental or nervous injury cannot be paid for more than six months after the date of maximum medical improvement from the physical injury. The statute provides for a simple mark on the calendar and entitlement to such benefits expires even if no such benefits were paid during the six month period. See *Utopia Homecare/Guaranty Ins. Co. v. Alvarez*, 230 So.3d 72 (Fla. 1st DCA 2017); *Kneer v. Lincare & Travelers Ins*., 267 So. 3d 1077 (Fla. 1st DCA 2019).

Consider also section 440.15(2)(b), Fla. Stat. (2011), which provides:

> "Notwithstanding the provisions of paragraph (a), an employee who sustained the loss of an arm, leg, hand, or foot, has been rendered a paraplegic, paraparetic, quadriplegic, or quadriparetic, or has lost the sight in both eyes shall be paid temporary total disability of 80% of his or her average weekly wage. The increased temporary total disability compensation provided for in this paragraph **must not extend beyond six months from the date of the accident**." (emphasis added).

Again, the statute provides for a calendar-based calculation of benefits instead of a bank of benefits. The statute prescribes a fixed date and entitlement ceases on that date even if no benefits were payable during the prescribed six month period. See *A&J Highbeam Service v. Kendle, Jr.*, 511 So.2d 653 (Fla. 1st DCA 1987); *Occidental Chemical Co. v. Howard*, 508 So.2d 466 (Fla. 1st DCA 1987).

When addressing these issues this Court often looks to whether a particular statute utilizes the word "weeks" instead of "months" or "years." The use of "weeks" is suggestive of a bank of benefits. In contrast, a statute using "months" or "years" suggests a calendar-based construction. See *Sch. Bd. of Lee Cnty. v. Huben*, 165 So.3d 865, 867 (Fla. 1st DCA 2015). Section 440.15(1)(b) does not permit PTD benefits to continue beyond 5 **years** following the determination of permanent total disability. The statute does not provide for a set number of weeks and is therefore a calendar-based statute. The instant claimant was determined to be PTD on 5/26/12 and therefore her entitlement ended on 5/25/17.

In her brief, the claimant relies on cases that are readily distinguishable from the

instant case. She begins with *Auman v. Lever Rocks Seafood House*, 997 So.2d 476 (Fla. 1st DCA 2008), *Cooper v. Buddy Freddy's Restaurant*, 889 So.2d 125 (Fla. 1st DCA 2004), and *Wright v. City of Rockledge*, 813 So.2d 283 (Fla. 1st DCA 2002). Each addressed whether the 104-week limitation on temporary disability benefits was calendar-based or a bank. The Court correctly held that it was a bank.

The Court was correct since the statute provides for temporary benefits that are "not to exceed 104 weeks." The statute is silent regarding the date such benefits begin, the date such benefits end, and it specifically provides for a set number of "weeks." Therefore, the statute provides for a bank of such benefits that can be paid out at various times depending on the claimant's entitlement to them.

The claimant next relies on *Winn Dixie v. Resnikoff*, 669 So.2d 1297 (Fla. 1st DCA 1995), which addressed since-repealed wage loss benefits. The very nature of wage loss benefits was that they were paid out as needed. A claimant might work and earn wages in excess of his AWW and be entitled to nothing. Other times the claimant may not work at all or work at a reduced wage and seek resulting wage loss benefits. Wage loss benefits were, by design, episodic and paid out only as needed over time.

Contrast wage loss benefits with PTD benefits. Such benefits are only paid when the claimant becomes *permanently* and *totally* disabled. The date the claimant becomes entitled to PTD benefits determines the proper calculation of PTD

supplemental benefits since the initial calculation of such benefits is based on the number of calendar years between the date of accident and the date of acceptance. See section 440.15(1)(f)(1), Fla. Stat. The initial date of entitlement also *permanently* controls the calculation of the social security offset. See *Hunt v. Stratton*, 677 So. 2d 64, 67 (Fla. 1st DCA 1996). Moreover, the date of PTD acceptance must be reported to the Division on a form DFS-F2-DWC-4, which must contain the date of PTD acceptance, the PTD rate, and the PTD supplemental benefit effective date. See Rule 69L-56.404, Fla. Admin. C. Wage loss benefits and PTD benefits are wholly dissimilar.

Next, the claimant cites *Smitty's Coffee Shop v. Florida Industrial Commission*, 86 So. 2d 268 (Fla. 1956), along with several similar cases from this Court holding that a claimant who undergoes a post-MMI surgery may be entitled to additional temporary benefits following that surgery. While this is certainly true, none of the cases cited by the claimant addressed an injured worker who was *already receiving PTD benefits at the time of that post-MMI surgery*. Instead, each addressed an injured worker who was *not* permanently and totally disabled, but who underwent post-MMI surgery.

Smitty's and the other cases cited stand for the proposition that a claimant who reaches MMI normally loses entitlement to all temporary indemnity benefits. When that claimant undergoes a compensable surgery months or years later, however, the

claimant becomes entitled to additional temporary benefits during the period of post-surgical recovery. Neither *Smitty's* nor any of the other cases establish that a claimant already receiving PTD benefits would be entitled to have those benefits reclassified to TTD or TPD benefits, which is the claimant's assertion here.

Moreover, the instant claimant was over the age of sixty-two and therefore not entitled to PTD supplemental benefits. See section 440.15(1)(f)(1), Fla. Stat. The majority of those receiving PTD benefits, however, are also receiving PTD supplemental benefits. Under the instant claimant's construction, a claimant receiving PTD and PTD supplemental benefits who has surgery would lose her entitlement to PTD supplemental benefits during the period of post-surgical recovery. Such a claimant would suffer a reduction in benefits as the result of having surgery, which is absurd. This Court is obligated to avoid interpreting a statute in a manner that leads to an absurd result. See *Carawan v. State*, 515 So. 2d 161, 167 (Fla. 1987); *R.F.R. v. State*, 558 So. 2d 1084, 1085 (Fla. 1st DCA 1990).

The instant record is devoid of any evidence that the claimant's 2014 surgery restored any functionality or increased the claimant's capacity to work. In fact, Dr. Nowicki testified that the claimant's condition was, for a while, *worse* after the 2014 surgery. She was even *more* disabled. (RI-71). The claimant was PTD before the surgery, PTD after the surgery, and PTD now. Once a claimant is determined to be

PTD she remains entitled to such benefits notwithstanding the receipt of additional medical care, surgical or otherwise. Pursuant to the plain language of the statute, the claimant's entitlement to PTD benefits ended "5 years following the determination of permanent total disability." The claimant was determined to be PTD on 5/26/12 and therefore her entitlement to such benefits ceased five years following that date. The order should be affirmed.

II. SINCE THE JCC CORRECTLY DETERMINED THAT THE CLAIMANT'S PTD BENEFITS WERE PAYABLE FOR FIVE CALENDAR YEARS FOLLOWING THE DETERMINATION OF PTD, HE ALSO CORRECTLY DENIED THE CLAIMANT'S REQUEST TO "RECLASSIFY" BENEFITS FROM PTD TO TTD/TPD

The claimant's argument here rests exclusively on the success or failure of the argument presented above. Since the JCC properly determined that the PTD benefits cease "5 years following the determination of permanent total disability" on 5/26/12, the JCC properly determined that the claimant's entitlement to such benefits ended on 5/25/17. Therefore, the claimant had no right to a "reclassification" of her benefits from PTD to TTD/TPD from 10/22/14 to 1/4/15. The order should be affirmed.

CONCLUSION

The E/C respectfully asks this Court to affirm the order appealed. In the event of a reversal the Court should remand the case to the JCC for additional proceedings consistent with the Court's opinion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by Electronic Mail to William G. Berzak, Esquire, 203 E. Livingston Street, Orlando, FL 32801, williamberzak@aol.com and Bill McCabe, Esquire, 1250 S. Highway 17-92, Suite 210, Longwood, FL 32750, billjmccabe@earthlink.net, on this 27th day of June 2019.

____/S/_____
William H. Rogner, Esquire
Scott B. Miller, Esquire
1560 Orange Avenue, Suite 500
Winter Park, FL 32789
(407) 571-7400
Counsel for Appellees

CERTIFICATION

I HEREBY CERTIFY that the foregoing Brief complies with the font type and size requirements designated in Rule of Appellate Procedure 9.210 on this 27th day of June 2019.

_____/S/_____
William H. Rogner, Esquire
Scott B. Miller, Esquire
1560 Orange Avenue, Suite 500
Winter Park, FL 32789
(407) 571-7400
Counsel for Appellees