

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2017 MTWCC 6

WCC No. 2014-3352

SILKITWA "SCOUT" FERREL

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

APPEALED TO MONTANA SUPREME COURT 06/30/2017

ORDER FOR DISMISSAL OF APPEAL 09/18/2017

**JOINT STIPULATION FOR JUDGMENT AND DISMISSAL
WITH PREJUDICE 12/06/2017**

**JUDGMENT VACATED AND WITHDRAWN PURSUANT TO
STIPULATION OF THE PARTIES 12/07/2017**

ORDER GRANTING PETITIONER'S MOTION FOR SUMMARY JUDGMENT AND
DENYING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

Summary: Petitioner and Respondent move for summary judgment on stipulated facts on three issues: (1) At the time Respondent terminated Petitioner's PTD benefits, was Petitioner receiving benefits "from a system that is an alternative to social security retirement" within the meaning of § 39-71-710(1), MCA? (2) If Petitioner was receiving benefits "from a system that is an alternative to social security retirement," is State Fund's termination of Ferrel's PTD benefits barred by the equitable defense(s) of estoppel and/or laches? (3) If State Fund's termination of Ferrel's PTD benefits is not barred by estoppel and/or laches, is § 39-71-710(1), MCA, constitutional?

Held: Because Petitioner's receipt of retirement benefits from the Montana Highway Patrol Officers' Retirement System does not preclude her from receiving them from Social Security when she is age-eligible, and she is not collecting retirement benefits from the Montana Highway Patrol Officers' Retirement System instead of collecting them from Social Security, Petitioner was not receiving benefits "from a system that is an alternative to social security retirement" within the meaning of § 39-71-710(1), MCA. Thus, Respondent incorrectly determined that Petitioner was "retired," and is liable for her PTD benefits from the time it terminated those benefits.

Stipulated Facts

¶ 2 Ferrel was sworn into the Montana Highway Patrol (MHP) on January 13, 1992.

¶ 3 While working with the MHP on January 22, 2000, Ferrel was involved in a physical altercation at the end of a high-speed pursuit. She was seriously injured while making the arrest.

¶ 4 After her efforts to recover failed, Ferrel was physically incapable of returning to work and retired from the MHP on December 27, 2002. She sought disability retirement benefits from the Montana Highway Patrol Officers' Retirement System (HPORS), which were granted to her on or about January 24, 2003.¹

¶ 5 State Fund paid Ferrel temporary total disability benefits from August 12, 2003, through August 25, 2003, and again from August 29, 2005, through March 10, 2007, until it declared Ferrel permanently totally disabled on or about March 11, 2007. At that point, State Fund began paying Ferrel permanent total disability (PTD) benefits without any offset.

¶ 6 HPORS converted Ferrel's disability retirement benefits to regular retirement benefits when she turned 50 on March 3, 2003. Ferrel's monthly benefit amount did not change as a result of the conversion.

¶ 7 State Fund determined that Ferrel would be "retired" when she started receiving HPORS retirement benefits, which it considered "an alternative to social security retirement" benefits. State Fund notified Ferrel on February 4, 2011, that when she turned 60 and HPORS converted her benefits from disability retirement to regular retirement, State Fund would terminate her workers' compensation benefits. The letter did not recognize that HPORS had already converted the benefits in 2003.

¶ 8 After sending a 14-day termination letter, State Fund terminated Ferrel's PTD benefits on February 28, 2013. State Fund acknowledged that Ferrel's disability benefits had been converted to retirement benefits at some earlier time, and that PTD benefits should not have been paid from the time that Ferrel first received retirement benefits. However, it stated that it would not retroactively seek repayment of PTD benefits paid from her date of conversion to retirement benefits.

¹ HPORS is a public pension plan for Montana Highway Patrol officers, including supervisory personnel. The monthly benefit an officer receives is based upon her years of service and her highest average compensation. See Montana Highway Patrol Officers' Retirement System Member Handbook, <http://mpera.mt.gov/docs/HPORS.swf> (last visited April 28, 2017).

¶ 9 Prior to her work for the MHP, Ferrel worked for the U.S. Forest Service. During that time, she paid into the Social Security retirement system and accumulated sufficient credits to entitle her to future Social Security retirement benefits.

¶ 10 Members of HPORS do not pay into the Social Security retirement system while they are employed with the MHP. And, during the time Ferrel worked as an MHP Officer, she did not concurrently work in another job in which she paid into the Social Security retirement system.

¶ 11 When Ferrel turns 66, she will be eligible to collect her full Social Security retirement benefits. According to her last correspondence from the Social Security Administration, Ferrel expects she will earn \$477 per month when she reaches full retirement age.

Law and Analysis

¶ 12 This case is governed by the 1999 version of the Montana Workers' Compensation Act (WCA) since that was the law in effect at the time of Ferrel's industrial accident.²

¶ 13 This Court grants summary judgment when the moving party demonstrates an absence of a genuine issue of material fact and entitlement to judgment as a matter of law.³ The material facts necessary for disposition of this case are undisputed. Accordingly, this case is susceptible to summary disposition.

¶ 14 The parties present three issues: (1) At the time State Fund terminated her PTD benefits, was Ferrel receiving benefits "from a system that is an alternative to social security retirement" within the meaning of § 39-71-710(1), MCA? (2) If Ferrel was receiving benefits "from a system that is an alternative to social security retirement," is State Fund's termination of her PTD benefits barred by the equitable defense(s) of estoppel and/or laches? (3) If State Fund's termination of Ferrel's PTD benefits is not barred by estoppel and/or laches, is § 39-71-710(1), MCA, constitutional? Because this Court's ruling on the first issue is dispositive, this Court does not reach the others.

¶ 15 The Legislature has stated that wage-loss benefits under the WCA should bear a reasonable relationship to actual wages lost.⁴ PTD benefits are meant to "assist the

² *Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶ 32, 365 Mont. 405, 282 P.3d 687 (citation omitted); § 1-2-201, MCA.

³ ARM 24.5.329(2).

⁴ § 39-71-105(1), MCA.

worker over the course of his or her work life.”⁵ An employee has ended his or her work life, and is no longer entitled to lost wages, when he or she retires.⁶ “[S]ection 39-71-710, MCA, merely uses eligibility for social security retirement benefits, or an alternative system, as guideposts to determine when a PTD claimant should be considered ‘retired.’ ”^{7, 8} That an employee may have continued working past the age his or her retirement benefits became payable is not a barrier to the employee being deemed “retired” by the terms of the statute.⁹ Without § 39-71-710, MCA, PTD benefits would become a lifetime benefit.¹⁰

¶ 16 Section 39-71-710(1), MCA, states:

If a claimant is receiving disability or rehabilitation compensation benefits and the claimant receives social security retirement benefits or is eligible to receive or ***is receiving*** full social security retirement benefits or ***retirement benefits from a system that is an alternative to social security retirement***, the claimant is considered to be retired. When the claimant is retired, the liability of the insurer is ended for payment of permanent partial disability benefits other than the impairment award, payment of permanent total disability benefits, and payment of rehabilitation compensation benefits. However, the insurer remains liable for temporary total disability benefits, any impairment award, and medical benefits.¹¹

¶ 17 Ferrel presents several arguments as to why she was not receiving benefits “from a system that is an alternative to social security retirement” at the time State Fund terminated her PTD benefits. Ferrel’s primary argument is that the statute is unambiguous. The plain meaning of the word “alternative,” although not defined in the statute, is “one or the other of two things” or “a proposition or situation offering a choice

⁵ *Satterlee v. Lumberman’s Mut. Cas. Co. (Satterlee I)*, 2009 MT 368, ¶ 27, 353 Mont. 265, 222 P.3d 566 (citation omitted).

⁶ *Id.*

⁷ *Satterlee v. Lumberman’s Mut. Cas. Co.*, 2005 MTWCC 55, ¶ 31.

⁸ In *Satterlee I*, the Montana Supreme Court affirmed this Court’s conclusion that § 39-71-710, MCA, is constitutional as applied to PTD benefits, which, though held in 2005 MTWCC 55, was appealed by way of 2006 MTWCC 36.

⁹ See *Gray v. Montana State Fund*, 2014 MTWCC 2, ¶ 27 (“Although it is true that Gray may have continued working past age 62, this is equally true of workers such as those in *Satterlee*, who may have continued working past the age of full retirement eligibility but were nonetheless deemed ‘retired’ by the terms of the statute.”).

¹⁰ *Satterlee I*, ¶ 28, citing *Satterlee*, 2005 MTWCC 55.

¹¹ Emphasis added.

between two or more things only one of which may be chosen.” Since Ferrel is entitled to collect retirement benefits from both HPORS and Social Security, the benefits cannot be “alternatives” to one another.

¶ 18 However, if this Court determines that the statute is ambiguous, Ferrel argues that the legislative history of SB 375, which added the “alternative” language to § 39-71-710(1), MCA, in 1995, validates her position. She points out that when State Fund’s General Counsel, Nancy Butler, testified before the Senate Labor & Employment Relations Committee in support of the bill, she explained how the new language was intended to work: “If a worker is permanently disabled and also on retirement benefits, *taken in lieu of a social security retirement benefit*, the benefits can be terminated.” Because Ferrel did not take HPORS retirement benefits “in lieu of” Social Security retirement benefits, she maintains the two systems are not “alternatives.”

¶ 19 Ferrel also contends that the fact that no public employee union representatives commented or complained during debate on SB 375 is some indication that the Legislature never intended for public sector pension programs to be considered “alternatives” to Social Security retirement. Such an interpretation could leave many injured workers, like Ferrel, without PTD long before “statistically, most people’s work-lives have ended.”¹² For law enforcement in particular, this result would be inconsistent with the more favorable treatment they receive in other statutes. According to Ferrel, a true “alternative” would be the Railroad Retirement program.¹³

¶ 20 State Fund offers a variety of arguments in support of its position that Ferrel was receiving benefits “alternative” to Social Security retirement benefits at the time it terminated her PTD benefits. State Fund contends that § 39-71-710(1), MCA, is ambiguous since the definitions of “alternative” cited by Ferrel also support its position. It argues that this “Court should consider the workers’ compensation claim for which she was declared PTD arising from a single employment, and the single retirement system under which she was working at the time she was injured.”¹⁴ At the time State Fund terminated her PTD benefits, Ferrel was in a “situation offering a choice between two . . . things only one of which [could] be chosen.” I.e., she was able to draw retirement benefits from HPORS, but not Social Security, or in other words, “one or the other of

¹² See *Satterlee I*, ¶¶ 13, 28.

¹³ The Railroad Retirement program, which is separate though similar to the Social Security retirement program, was established in the 1930s. It provides retirement, survivor, unemployment, and sickness benefits to individuals who have spent a substantial portion of their career in railroad employment, and their families. See U.S. Soc. Sec. Admin., Office of Ret. and Disability Policy, *An Overview of the Railroad Retirement Program*, Soc. Sec. Bulletin, Vol. 68, No. 2 (2008), SSA.gov, <https://www.ssa.gov/policy/docs/ssb/v68n2/v68n2p41.html> (last visited April 28, 2017).

¹⁴ Emphasis in original.

two things.” Although she will eventually be able to draw retirement benefits from Social Security as well, she was not yet age-eligible at the relevant time.

¶ 21 While State Fund argues that the meaning of “alternative” to Social Security retirement is clear if considered in the context of the statute’s text, language, structure, and object, it does not see any benefit to considering Butler’s testimony, suggesting that “[g]rappling with the meaning of ‘in lieu of’ only leads to the same ambiguity as defining the meaning of ‘alternative’ in the statute.” Instead, it contends that federal law should determine what constitutes an “alternative” since, where a person’s entitlement to Social Security retirement benefits and PTD intersect, federal law controls “who receives social security benefits, when they receive such benefits, and how much they receive.” Under federal law, all employments must be covered for Social Security retirement purposes — meaning *inter alia* that employees have to pay Social Security retirement taxes and thereby accrue those benefits — unless the employer offers comparable benefits.¹⁵ State Fund points out that MHP employees do not pay Social Security retirement taxes, or accrue those benefits, because HPORS offers retirement benefits that are comparable to Social Security’s.¹⁶ Therefore, it argues, the two types of benefits are “alternatives.”

¶ 22 State Fund also argues that its interpretation squares with the Legislature’s intent, as shown in SB 375’s history, to reduce costs to the workers’ compensation system. On the other hand, as State Fund explains, Ferrel’s interpretation would increase costs to the system. E.g., a career MHP Officer — meaning someone who has only ever worked at the MHP — who is ultimately declared permanently totally disabled on account of work injuries, would receive PTD benefits for life.

¶ 23 In construing a statute, this Court’s purpose is to “ascertain the legislative intent and give effect to the legislative will.”¹⁷ The Montana Supreme Court has stated: “We discern the intent of the legislature from the text of the statute if the words are clear and

¹⁵ However, even if the employer offers comparable benefits, employees are required to pay Social Security retirement taxes if they are covered under Montana’s Section 218 Agreement. “A Section 218 Agreement is a written voluntary agreement between a State and the Social Security Administration to provide Social Security and Medicare Hospital Insurance or Medicare coverage only for employees of State and local governments. This agreement is authorized under Section 218 of the Social Security Act. Employees covered under a Section 218 Agreement have the same coverage and benefit rights as employees in the private sector. All States have a Section 218 Agreement, but the extent of coverage varies.” See U.S. Soc. Sec. Admin., Frequently Asked Questions, *What is a Section 218 Agreement?*, SSA.gov., <https://www.ssa.gov/slge/faqs.htm> (last visited April 28, 2017).

¹⁶ This is because MHP employees are not covered under Montana’s Section 218 Agreement.

¹⁷ *S.L.H. v. State Comp. Mut. Ins. Fund*, 2000 MT 362, ¶ 16, 303 Mont. 364, 15 P.3d 948 (citing § 1-2-102, MCA).

plain.”¹⁸ “In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted.”¹⁹

¶ 24 When a statute does not define a term, this Court generally gives a word its usual and ordinary meaning.²⁰ To determine the meaning of a statutorily undefined term, this Court may consider dictionary definitions.²¹ However, as part of the plain meaning analysis, this Court does not isolate specific terms, but considers them in the context in which they are used.²² “To give effect to the purpose of the statute as intended by the legislature, the context in which the words are used is more important than precise grammatical rules or a dictionary definition.”²³ Although courts should generally apply the plain meaning of legislation, “when ‘the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.... [T]he intention of the drafters, rather than the strict language, controls.’ ”²⁴

¶ 25 Ferrel is correct that, as used by the Legislature in § 39-71-710(1), MCA, “alternative” means “one or the other of two things” or “a proposition or situation offering a choice between two or more things only one of which may be chosen.” This Court has located several other definitions of the word “alternative,” which are particularly applicable to this matter. One dictionary defines “alternative” as: “a choice limited to one of two or more possibilities, as of things, propositions, or courses of action, the selection of which precludes any other possibility.”²⁵ Another defines it as: “A choice or course of action that is mutually exclusive with another.”²⁶ In addition to those provided by Ferrel, these definitions make clear that to be “alternatives,” one possibility, once selected, must preclude all others; if two or more possibilities can be selected, they are not “alternatives.”

¹⁸ *S.L.H.*, ¶ 17 (citation omitted).

¹⁹ § 1-2-101, MCA.

²⁰ *Maney v. Louisiana Pac. Corp.*, 2000 MT 366, ¶ 19, 303 Mont. 398, 15 P.3d 962 (citation omitted).

²¹ *Giacomelli v. Scottsdale Ins. Co.*, 2009 MT 418, ¶ 18, 354 Mont. 15, 221 P.3d 666 (citation omitted).

²² *Montana Sports Shooting Ass’n v. Dep’t of Fish, Wildlife, and Parks*, 2008 MT 190, ¶ 11, 344 Mont. 1, 185 P.3d 1003 (citation omitted).

²³ *Burritt v. City of Butte*, 161 Mont. 530, 535, 508 P.2d 563, 566 (1973) (citation omitted).

²⁴ *S.L.H.*, ¶ 31 (citation omitted).

²⁵ The Random House Dictionary, <http://www.dictionary.com/browse/alternative> (last visited April 28, 2017).

²⁶ American Heritage Dictionary of the English Language (5th ed. 2016), <http://www.thefreedictionary.com/alternative> (last visited April 28, 2017).

¶ 26 Moreover, the legislative history of SB 375 supports Ferrel’s interpretation. Contrary to State Fund’s contention, its General Counsel’s testimony about how the bill would work should not be disregarded. State Fund has not cited to any history that contradicts Butler’s testimony, and, far from ambiguous, her testimony clearly explained that the bill provided for termination of PTD benefits if a worker was on retirement benefits taken *in lieu of* Social Security. There is no indication that Butler used the term “in lieu of” in any way other than its usual and ordinary sense, which is “instead of.”²⁷

¶ 27 Under the definition of “alternative,” and the facts of this case, HPORS is not an alternative system to Social Security retirement. Ferrel’s receipt of retirement benefits from HPORS does not preclude her from receiving them from Social Security, nor is she collecting retirement benefits from HPORS instead of collecting them from Social Security. Ferrel currently receives retirement benefits from HPORS and, at age 66, will begin receiving them from Social Security as well, at which time State Fund may terminate her PTD benefits under § 39-71-710(1), MCA. To the extent that she has thus far been unable to receive retirement benefits from Social Security, that inability is temporary and due only to her age. Therefore, Ferrel was not receiving benefits “from a system that is an alternative to social security retirement” at the time State Fund terminated her PTD benefits. For Ferrel, HPORS is complementary to Social Security retirement.

¶ 28 Notwithstanding State Fund’s argument, the definition of “alternative” does not support its position. Ferrel never had a choice between the two systems of retirement benefits; she was only ever eligible to receive retirement benefits from HPORS. Nor, as State Fund suggests, does comparability, which means similarity or equivalency, enter into the analysis of what constitutes an “alternative.” Thus, State Fund incorrectly determined that Ferrel was “retired,” and is liable for her PTD benefits from the time it terminated those benefits.

¶ 29 Finally, this Court acknowledges that it is taking the middle ground between the parties’ arguments by making the determination as to whether HPORS is an alternative to Social Security retirement on a case-by-case basis. However, given the fact that some people will work for the MHP for their entire careers and not have enough Social Security earnings to qualify for Social Security retirement, while others will work for the

²⁷ American Heritage Dictionary of the English Language (5th ed. 2016), <http://www.thefreedictionary.com/lieu> (last visited April 28, 2017). *But see Gordon v. H.C. Smith Constr. Co.*, 188 Mont. 166, 171, 612 P.2d 668, 670-71 (1980) (although court did not define “in lieu of,” it did not find those words a “primary consideration” in holding that “subsistence . . . in lieu of . . . travel allowance” in labor contract constituted travel pay so as to entitle claimant to workers’ compensation benefits under an exception to the “going and coming” rule).

MHP for part of their work lives and also at other jobs at which they have enough earnings to qualify for Social Security retirement, it is simply not possible to say that HPORS is an alternative to Social Security retirement in all cases. To further the Legislature's intentions, the correct approach under § 39-71-710(1), MCA, is to determine whether a retirement system is an alternative to Social Security retirement for each claimant. Under this approach, HPORS will not be an alternative system for some employees, such as Ferrel, but it could be for others. For example, HPORS may be an alternative to Social Security retirement in the State Fund's hypothetical of an injured career MHP Officer who does not have enough Social Security earnings to be "fully insured" under the Social Security Act, as defined in 20 C.F.R. § 404.110 through § 404.115. In such a case, the insurer could terminate PTD benefits under § 39-71-710(1), MCA, when the claimant received her retirement benefit, and the statute would serve its purpose of reducing costs to the workers' compensation system.

ORDER

¶ 30 Petitioner's Motion for Summary Judgment is **granted**. Respondent shall reinstate Petitioner's PTD benefits from the time it terminated those benefits.

¶ 31 Respondent's Motion for Summary Judgment is **denied**.

¶ 32 Pursuant to ARM 24.5.348(2), this Order is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

DATED this 3rd day of May, 2017.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: Jonathan McDonald/James G. Hunt
Greg E. Overturf

Submitted: December 17, 2015