State of New York
Court of Appeals

OPINION

No. 14
In the Matter of the Claim
of Sandra L. O'Donnell,
Respondent,
v.
Erie County et al.,
Appellants.
Workers' Compensation Board,
Respondent.

Matthew M. Hoffman, for appellants.
Robert E. Grey, for respondent O'Donnell.
Patrick Woods, for respondent Workers' Compensation Board

RIVERA, J.:

Employer Erie County and its worker's compensation carrier challenge a Workers' Compensation Board decision upholding claimant's award for loss of post-accident

earnings on the ground that, at the time of her disability classification, claimant failed to establish that she attempted to and could not find work commensurate with her abilities. In a shift of position, the Board now maintains that it departed from its administrative precedent by applying a discretionary inference in favor of claimant as permitted by Matter of Zamora v New York Neurologic Assoc. (19 NY3d 186 [2012]), without first requiring claimant to present evidence of her efforts to obtain work or get retrained. All parties agree that pursuant to Zamora the Board may, but need not, infer from the fact that a claimant involuntarily retired due to claimant's permanent partial disability that the claimant's reduced post-accident earnings resulted from that disability (id. at 191). All parties also agree that once initially so classified, a claimant entitled under Workers' Compensation Law ("WCL") § 15 (3) (w) to compensation for the disability-related loss of wage-earning capacity need not demonstrate ongoing efforts to work or retrain for work after classification under the 2017 amendment to that provision. Given the parties' agreement on the applicable law, and the Board's representation that it departed from its purported precedent without explanation, we reverse and remit so that the Board may clarify its rationale and issue a decision in accordance with Zamora, which should include an explanation if it chooses to depart from an evidentiary requirement imposed on similarly situated claimants in prior proceedings.

I.

It is undisputed that claimant Sandra O'Donnell worked for respondent Erie County in various capacities for more than 28 years. While working as a probation officer, she

slipped and fell in the course of her job, injuring her back, knees, and elbows. She returned to work but was unable to perform her duties fully—particularly after the County transferred her from juvenile probation to adult probation, over claimant's protests of the increased pain associated with her new duties, which required more standing and walking. She applied for and was granted disability retirement from the County and has not worked since that time.

After a hearing, a Workers' Compensation Law Judge ("WCLJ") found claimant involuntarily retired, classified her as having a nonschedule permanent partial disability under WCL § 15 (3) (w), which entitled her to compensation for any disability-related loss of wage-earning capacity, and excused her from establishing efforts to work. On administrative appeal, the Board modified the decision by reducing claimant's percentage of loss of wage-earning capacity, and otherwise affirmed the WCLJ's decision. The Board rejected the argument, advanced by the County and its workers' compensation coverage administrator, FCS Administrators (hereinafter "Respondents"), that claimant had not adequately shown that her lack of employment was a result of her work-related disability, rather than her preference not to work, within the meaning of Zamora (see 19 NY3d 186).

Respondents petitioned for review by the full Board. While that request was pending, the Legislature amended WCL 15 § (3) (w) to provide "compensation . . . during the continuance of such permanent partial disability, without the necessity for the claimant who is entitled to benefits at the time of classification to demonstrate ongoing attachment to the labor market" (see L 2017, ch 59, part NNN). The Board panel, among other things,

reaffirmed claimant's modified award, and further concluded that under WCL 15 (3) (w), as amended, claimant "is not obligated to demonstrate an ongoing attachment to the labor market during the continuance of her permanent partial disability."

The Appellate Division unanimously affirmed the Board's decision (162 AD3d 1278 [3d Dept 2018]). We granted respondents leave to appeal (32 NY3d 907 [2018]). Thereafter, the Board moved to dismiss the appeal and for other relief, arguing that it had inadvertently strayed from its administrative precedent in this matter. We denied that motion (33 NY3d 1057 [2019]). In its brief on the merits, the Board continues to press the argument that its decision below was out of step with its precedent.

II.

The Workers' Compensation Law provides a mechanism for compensation of workers who lose their earning power as a result of employment-related accidents (see Matter of Marhoffer v Marhoffer, 220 NY 543, 546-548 [1917]). As relevant here, it is the Board's obligation to determine whether the claimant suffered a work-related disability and the disability caused a wage-earning loss (see WCL § 20). A claimant who suffers a permanent partial disability—meaning the claimant is rendered less than totally disabled—"may receive a reduced earnings award" under WCL § 15 (3) (w) if the claimant "demonstrates that [their] reduced earnings are related to the partial disability" (Burns v Varriale, 9 NY3d 207, 216 [2007]). However, the Board must find that the reduction in income is due to the disability and not to an "unwillingness to work again" (Zamora, 19 NY3d at 191). In other words, the claimant is entitled to a statutory award upon proving

that there exists a causal link between the claimant's disability and reduced earning capacity (see id.; Matter of Jordan v Decorative Co., 230 NY 522 [1921]).

As this Court explained in Zamora, "a central question for the Board to resolve, before awarding wage replacement benefits in a nonschedule permanent partial disability case, is 'whether a claimant has maintained a sufficient attachment to the labor market,'" meaning that the claimant is willing to work "consistent with [the claimant's] physical limitations" (19 NY3d at 191, quoting Burns, 9 NY3d at 216). If the Board determines that a claimant classified with a permanent partial disability "'involuntarily retired from [the claimant's] job due to that disability,'" the Board "may" draw an inference that the claimant's reduced future earnings resulted from the disability rather than from unwillingness to work (id. at 191-192, quoting Burns, 9 NY3d at 216). Zamora expressly rejected the approach espoused in a line of Appellate Division cases that the inference was mandatory or presumed rather than permissible (see e.g. Matter of Leeber v LILCO, 29 AD3d 1198, 1199 [3d Dept 2006]; Matter of Pittman v ABM Indus., Inc., 24 AD3d 1056, 1057 [3d Dept 2005]). The central holding of Zamora is that a determination of an involuntary retirement due to a permanent partial disability does not require a finding that the claimant automatically satisfied the causation prong of the claimant's burden of proof. However, the Board may infer as much, based on its analysis of "the nature of the disability and the nature of the claimant's work" in the specific case (Zamora, 19 NY3d at 192). Zamora further explained that if the Board declines to draw such an inference, the claimant may nevertheless establish through other evidence that the lost earning capacity resulted

from the claimant's disability and not from unwillingness to work, for example "[b]y finding alternative work consistent with [the claimant's] limitations, or at least showing reasonable efforts at finding such work" (id. at 191).

Here, the parties agree that claimant is permanently partially disabled and that her retirement was involuntary, but they dispute whether claimant's loss of earnings was caused by her disability, and thus makes her eligible for loss of wage compensation under WCL § 15 (3) (w), as amended. All parties further agree that the 2017 amendment to WCL § 15 (3) (w) eliminated any post-classification obligation on the part of a permanent partial disability claimant who was eligible for benefits when classified to demonstrate ongoing attachment to the labor market, and does not change the statutory framework pre-classification. We agree this interpretation is correct. However, claimant's further contention that the amendment to WCL § 15 (3) (w) changed the pre-classification application of the Court's holding in Zamora is incorrect.

"[W]e begin our analysis with the language of the statute, recognizing that 'our primary consideration is to ascertain and give effect to the intention of the Legislature'" (Beck Chevrolet Co., Inc. v General Motors LLC, 27 NY3d 379, 389 [2016], quoting People v Ballman, 15 NY3d 68, 72 [2010]). "In this endeavor we are guided by the principle that 'the text of a provision is the clearest indicator of legislative intent and courts should construe unambiguous language to give effect to its plain meaning'" (id. at 380 [internal quotation marks omitted], quoting Matter of Albany Law School v New York State Off. of Mental Retardation & Dev. Disabilities, 19 NY3d 106, 120 [2012]). The

language of the amendment to WCL § 15 (3) (w), which speaks of "*continuance* of such permanent partial disability" and "*ongoing* attachment," makes clear that it addresses the period after classification (WCL § 15 [3] [w]). Thus, for this section to relieve a claimant of the former burden to demonstrate ongoing attachment, the claimant must have been classified initially as permanently partially disabled and found to be entitled to a loss of wage earnings compensation award. The Board General Counsel's interpretation of the proposed amendment to WCL § 15 (3) (w) lends additional support to our understanding of the amendment's purpose (Letter from David F. Wertheim, Workers' Compensation Board General Counsel, May 23, 2017, Bill Jacket, L 2017, ch 59 at 29 ["It will be important for the Board to make labor market attachment determinations at the time of classification as claimants 'entitled to benefits' at that time[] will have no continuing obligation to show labor market attachment under WCL § 15 (3) (w)."]). Further, the canon disfavoring interpreting statutes so as to overrule the common law weighs in favor of retaining the part of the court-imposed rule that requires a claimant to show labor-market attachment at the time of classification, even though it plainly overrules the part of the rule requiring ongoing attachment thereafter (see Oden v Chemung County Indus. Dev. Agency, 87 NY2d 81, 86 [1995] ["(A) statute enacted in derogation of the common law . . . is to be construed in the narrowest sense that its words and underlying purposes permit."]).

III.

Respondents claim the Board improperly inferred labor market attachment under Zamora and the WCL in this case. The Board argues that we should not address that issue on the record before us. According to the Board, its post-Zamora practice has been to infer continuing labor-market attachment from an involuntary retirement "only when the employer does not dispute labor-market attachment." If the employer does challenge the claimant's labor-market attachment, the Board says it rejects the inference and demands a showing of evidence by the claimant that would satisfy the labor-market attachment requirement without the benefit of the inference, such as, for example, evidence that the claimant made "efforts to obtain or train for alternate employment," or that the claimant's doctor ordered the claimant not to return to work.

Here, respondents challenged claimant's labor-market attachment because claimant testified at the hearing that since her retirement she had not looked for work, gone back to school or sought retraining. According to the Board, it implicitly inferred that claimant remained attached to the labor market. Although it previously defended that decision, the Board has changed course and now requests that we remand because it did not follow or explain its departure from its purported administrative precedent that requires claimant to establish efforts to work or retrain, or provide evidence explaining her failure to do so.

Given the procedural posture of this appeal—where the Board changed position after we granted leave and now represents that it departed from its established purported precedent, and the parties agree on the meaning of WCL § 15 (3) (w) as amended and

applied to claimant's case post-classification—a ruling from us at this juncture would be limited to these unique facts and to an administrative action that the Board claims is not its normal practice. Under the circumstances, we conclude the better course is to remit this matter to the Appellate Division for further remand to the Board. We do not take any position on this appeal as to whether the Board's decision below in fact violated a line of internal administrative precedent, nor whether any such precedent or purported "evidentiary requirement" comports with the law, including Zamora, as those questions are not properly before us.

To be clear, by remitting without deciding whether the Board violated internal precedent, we do not hold that in another case, an agency's bare representation that it failed to follow internal precedent would be grounds for vacatur and remand to the agency. However, here, remittal will permit the Board to develop a record of its purported precedent as applied to claimant and clarify its determination whether to draw an inference in accordance with Zamora's core holding. It also permits claimant an opportunity to challenge any adverse decision if she believes, as she now argues, that the Board has misapplied Zamora or other applicable law.

The order of the Appellate Division should be reversed, with costs, and the matter remitted to that court with instructions to remand to the Board for further proceedings in accordance with this opinion.

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Order reversed, with costs, and matter remitted to the Appellate Division, Third Department, with directions to remand to the Workers' Compensation Board for further proceedings in accordance with the opinion herein. Opinion by Judge Rivera. Chief Judge DiFiore and Judges Stein, Fahey, Garcia, Wilson and Feinman concur.

Decided March 26, 2020