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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1318

Filed: 3 May 2016

N.C. Industrial Commission, I.C. No. U00463

IN THE MATTER OF JOYCE, Claim for Compensation Under the North Carolina Eugenics Asexualization and Sterilization Compensation Program, Claimant-Appellant.

Appeal by Claimant from decision and order entered 15 July 2015 by the North Carolina Industrial Commission. Heard in the Court of Appeals 11 April 2016.

*Marva L. McKinnon for Claimant-Appellant.*

*Attorney General Roy Cooper, by Assistant Attorney General Marc X. Sneed, for N.C. Department of Justice, Tort Claims Section.*

McGEE, Chief Judge.

Claimant Joyce<sup>1</sup> (“Claimant”) was involuntarily sterilized in 1972. Claimant was one of thousands of North Carolinians who were involuntarily sterilized between 1933 – when Chapter 224 of the Public Laws of 1933 (“Eugenics Act”) was enacted and the Eugenics Board of North Carolina was created – and 1977, when the Eugenics Board was abolished by statute.<sup>2</sup> 1977 N.C. Sess. Laws ch. 497.

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<sup>1</sup> We will use only Claimant’s last name in this opinion in order to help preserve her anonymity.

<sup>2</sup> The name of the “Eugenics Board” was changed to the “Eugenics Commission” in 1973. 1973 N.C. Sess. Laws 476, § 133.3. For consistency, we shall always refer to this entity as the “Eugenics Board.”

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In 2013, the General Assembly enacted the Eugenics Asexualization and Sterilization Compensation Program (“the Compensation Program”), N.C. Gen. Stat. § 143B-426.50 *et seq.*, in order to provide compensation to “qualified recipients” asexualized or sterilized pursuant to the Eugenics Act. The Compensation Program defined a “qualified recipient” under the Compensation Program as “[a]n individual who was asexualized involuntarily or sterilized involuntarily under the authority of the Eugenics Board of North Carolina in accordance with Chapter 224 of the Public Laws of 1933 or Chapter 221 of the Public Laws of 1937.” N.C. Gen. Stat. § 143B-426.50(5) (2013).

Claimant followed the procedures set forth in the Compensation Program, filing a claim with the North Carolina Industrial Commission (“Industrial Commission”). Her claim was initially reviewed by the Industrial Commission and was denied based, in part, upon a lack of evidence that Claimant’s sterilization was conducted “under the authority of the Eugenics Board.” N.C. Gen. Stat. § 143B-426.50(5). Claimant followed the appellate review procedures set forth in N.C. Gen. Stat. § 143B-426.53 and, ultimately, a final Decision and Order was entered by the Full Commission of the Industrial Commission, in which the Full Commission found that Claimant was involuntarily sterilized, but that there was insufficient evidence to show that her involuntary sterilization had been performed pursuant to the authority of the Eugenics Board, or that it had been performed “in accordance with

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Chapter 224 of the Public Laws of 1933 or Chapter 221 of the Public Laws of 1937.”

N.C. Gen. Stat. § 143B-426.50(5). Claimant appeals.

I.

Claimant makes two arguments on appeal: (1) that the Industrial Commission erred in construing N.C. Gen. Stat. § 143B-426.50(5) to deny Claimant status as a “qualified recipient,” and (2) that the Industrial Commission erred in “concluding that Claimant was not sterilized ‘under the authority of the Eugenics Board of North Carolina in accordance with’” the eugenics laws, thereby “violating Claimant’s constitutional rights to equal protection and fundamental fairness.” We address each argument in turn.

II.

We note that, in her argument, Claimant refers to the findings of fact from the Determination of Ineligibility of a deputy commissioner. However, it is the 15 July 2015 Decision and Order of the Full Commission that is the subject of Claimant’s appeal, and our review is limited to the findings and conclusions contained in that decision. The following are the findings of fact relevant to this appeal:

6. In or around 1972, [Claimant] became pregnant and requested an abortion through the Iredell County welfare department. A supervisor within [the Department of Social Services (“DSS”)] discouraged [Claimant] from having any more children given her condition. In response, [Claimant] told the supervisor that in the future she desired to marry and have three children. This supervisor scheduled [Claimant’s] abortion and notified [Claimant] of

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the procedure. Dr. William Cherry at Davis Hospital performed the scheduled abortion and also performed an involuntary tubal ligation on [Claimant]. [Claimant] was informed of the tubal ligation by Dr. Cherry when she awoke from the procedure. According to subsequent medical records dated February 11, 1976, [Claimant] did have a tubal ligation. [Claimant] never desired to be sterilized. She felt ashamed following the procedure and did not reveal this information to anyone until she told her sister in 2012.

7. [Claimant] produced no documents showing that her sterilization occurred under the authority of the Eugenics Board of North Carolina. The Office of Justice for Sterilization Victims performed a search and review of the records of the Eugenics Board of North Carolina and did not find any records that pertained to [Claimant].

8. Based upon the preponderance of the evidence and in view of the entire record, the Full Commission finds that [Claimant] was involuntarily sterilized.

These findings of fact establish that Claimant was involuntarily sterilized. They suggest, but do not state with certainty, that a DSS supervisor encouraged the doctor performing Claimant's abortion to also perform a tubal ligation. Assuming, *arguendo*, that Claimant's involuntary sterilization was performed at the request of DSS, that fact alone is insufficient to prove Claimant's involuntary sterilization was performed "in accordance with Chapter 224 of the Public Laws of 1933 or Chapter 221 of the Public Laws of 1937." N.C. Gen. Stat. § 143B-426.50(5).

Claimant argues further that the Industrial Commission "erred as a matter of law when it improperly imposed an overly strict and technical construction of the

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[Compensation Program] to require that a victim’s paperwork must have survived in the Eugenics Board archives.” We want to make clear that this Court has never held that survival of paperwork in the archives of the Eugenics Board is a prerequisite to compensation. However, there must be some evidence, whether documentary or testimonial, indicating that an involuntary sterilization was performed pursuant to the Eugenics Act, and thus under the authority of the Eugenics Board.

III.

Claimant argues that “[i]nvoluntary sterilizations performed at the behest of a county welfare worker in North Carolina between 1929 and 1974 presumptively were pursuant to North Carolina’s eugenics policy.” However, as this Court previously stated in *In re House*, \_\_ N.C. App. \_\_, \_\_, 782 S.E.2d 115, 120 (2016), “many involuntary sterilizations [were] conducted outside the parameters of the Eugenics Act – and thus [were] conducted without legal authority[.]” *Id.* As in *House*, the evidence currently before this Court strongly suggests that the involuntary sterilization performed in the present case was conducted without any statutory authority. However, there is no evidence that Claimant’s involuntary sterilization was carried out under the authority of the Eugenics Board, or pursuant to either “Chapter 224 of the Public Laws of 1933 or Chapter 221 of the Public Laws of 1937.” N.C. Gen. Stat. § 143B-426.50(5). Unfortunately, the fact that Claimant’s involuntary sterilization appears to have been unlawfully performed does not bring

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it within the ambit of the Compensation Program. *See House*, \_\_ N.C. App. at \_\_, 782 S.E.2d at 120.

IV.

Claimant’s argument that the Industrial Commission “imposed an overly strict and technical construction of the [Compensation Program]” was previously rejected in this Court’s earlier decision in *House*. *Id.* (“We cannot make any holding contrary to the clear meaning of N.C. Gen. Stat. § 143B-426.50(5). We must consider the words of the statute as they appear. N.C. Gen. Stat. § 143B-426.50(5) sets forth two requirements that must be proven before a claimant may be considered a qualified recipient: (1) the claimant must have been involuntarily sterilized ‘under the authority of the Eugenics Board of North Carolina,’ and (2) the claimant must have been involuntarily sterilized in accordance with the procedures as set forth in ‘Chapter 224 of the Public Laws of 1933 or Chapter 221 of the Public Laws of 1937.’ N.C. Gen. Stat. § 143B–426.50(5). In the present case, unfortunately, [the c]laimant cannot show that either of these requirements has been met.”).

V.

Claimant also argues:

By requiring that a sterilization victim must have documentation in the Eugenics Board archives in order to be compensated under the Eugenics Compensation Act, the Industrial Commission created a classification which makes the Act “grossly underinclusive” as it “does not include all who are similarly situated,” a construction

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which undercuts any claims that the requirement serves a legitimate state interest, and thus violates Claimant's constitutional rights to equal protection and fundamental fairness.

First, as we have discussed above, there is no requirement that documentation be preserved in the archives of the Eugenics Board in order to receive compensation. However, there must be evidence sufficient for the Industrial Commission to conclude that a claimant's involuntary sterilization was conducted pursuant to the Eugenics Act and under the authority of the Eugenics Board.

Second, there is no record evidence in the present case that Claimant presented any constitutional argument to the Industrial Commission, or argued a violation of her constitutional rights in any manner prior to this argument in her appellate brief. Nor did Claimant petition this Court for review of this issue. "Where a party appeals a constitutional issue from the Commission and fails to file a petition for *certiorari* or fails to have the question certified by the Commission, this Court is without jurisdiction." *Myles v. Lucas & McCowan Masonry*, 183 N.C. App. 665, 665, 645 S.E.2d 143, 143 (2007) (citation omitted). Therefore, Claimant's constitutional argument must be dismissed. Further, Claimant's argument appears to contain a facial challenge to the Eugenics Act based upon alleged violations of the North Carolina Constitution and federal law. This Court has held that it does not have jurisdiction to decide such a challenge. *See In re Hughes*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_, 2016 WL 611548 (Feb. 2016).

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AFFIRMED IN PART; DISMISSED IN PART.

Judges STEPHENS and DAVIS concur.

Report per Rule 30(e).