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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-937

Filed: 5 April 2016

North Carolina Industrial Commission, IC No. U00540

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

Appeal by Claimant-Appellant Zimmerman from decision and order entered 21 May 2015 by the North Carolina Industrial Commission. Heard in the Court of Appeals 25 January 2016.

*Leslie O. Wickham, Jr. for Claimant-Appellant.*

*Attorney General Roy Cooper, by Assistant Attorney General Marc X. Sneed, for the North Carolina Department of Justice, Tort Claims Section.*

McCULLOUGH, Judge.

I. Background

“[T]housands of North Carolinians . . . were involuntarily sterilized between 1933, when Chapter 224 of the Public Laws of 1933 (“Eugenics Act”) was passed and the Eugenics Board of North Carolina was created, and 1977, when the Eugenics

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Board<sup>[1]</sup> was abolished by statute.” *In re Maye*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_, 2016 WL 1012877 (Mar. 2016) (unpub.).

In 2013, the North Carolina General Assembly enacted the Eugenics Asexualization and Sterilization Program (“the Compensation Program”), N.C. Gen. Stat. § 143B-426.50 *et seq.*, in order to provide compensation to individuals asexualized or sterilized pursuant to the Eugenics Act. A “qualified recipient” under the Compensation Program was defined 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 Zimmerman (“Zimmerman”)<sup>2</sup> followed the procedures set forth in the Compensation Program and submitted a claim for compensation to the North Carolina Industrial Commission (“Industrial Commission”). Claimant’s claim was initially reviewed by the Industrial Commission and was denied based upon insufficient evidence that his sterilization procedure occurred under the authority of the Eugenics Board. N.C. Gen. Stat. § 143B-426.50(5). Claimant, following appellate review procedures pursuant to N.C. Gen. Stat. § 143B-426.53 filed notice of appeal to the Full Commission of the Industrial Commission. The Full Commission held that

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<sup>1</sup> The name of the “Eugenics Board” was changed to “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.”

<sup>2</sup> We will only use Claimant’s last name in this opinion in order to help preserve his anonymity.

there was no medical evidence establishing that Claimant was sterilized on or after 1955, the date Claimant alleged he was sterilized, or that he was sterilized “under the authority of the Eugenics Board . . . in accordance with Chapter 224 of the Public Laws of 1933 or Chapter 221 of the Public Laws of 1937.” As such, the Full Commission concluded that Claimant was not entitled to receive compensation pursuant to N.C. Gen. Stat. § 143B-426.51. Claimant appeals.

## II. Discussion

Claimant presents three issues on appeal: (A) that his involuntary sterilization “had to be performed under Public Law 1933, Chapter 224 in order to be performed lawfully[;]” (B) that the Full Commission’s “strict construction of N.C. Gen. Stat. § 143B-426.50(5) constitute[d] denial of compensation benefits to [Claimant] due to an overly strict and technical construction of the statute[;]” and, (C) that the “Industrial Commission violated [Claimant’s] constitutional rights to equal protection and fundamental fairness by denying compensation” based upon a lack of record evidence of Eugenics Board involvement. We address each argument in turn.

### A.

Claimant argues that his involuntary sterilization “had to be performed under Public Law 1933, Chapter 224 in order to be performed lawfully.”

In the present case, we note that the Full Commission concluded that there was no medical evidence establishing that Claimant was sterilized on or after 1955,

the year he alleged his involuntary sterilization occurred, or that he was sterilized under the authority of the Eugenics Board in accordance with Chapter 224 of the Public Laws of 1933 or Chapter 221 of the Public Laws of 1937.

Our recent holding in *In re Maye; In re Davis; In re Staggers*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_, 2016 WL 1012877 (Mar. 2016) (unpub.), controls the outcome here. Similar to the circumstances surrounding Claimant, in *Maye*, three individuals filed claims under the Compensation Program. The Industrial Commission found that the individuals were involuntarily sterilized, “but that there was insufficient evidence to show that their involuntary sterilizations had been performed pursuant to the authority of the Eugenics Board or that they had been performed in accordance with Chapter 224 of the Public Laws of 1933 or Chapter 221 of the Public Laws of 1937.” *Id.* at \_\_, \_\_ S.E.2d at \_\_. The individuals in *Maye* appealed to our Court and presented the same three issues.

The *Maye* Court noted that the evidence “strongly suggested that the involuntary sterilizations performed in the present cases were conducted without any statutory authority.” *In re Maye*, \_\_ N.C. App. at \_\_, \_\_ S.E.2d at \_\_. However, our Court held that because there was no evidence that the three individuals’ sterilizations were 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, “the fact that [the three individuals] involuntary sterilizations appear to

have been unlawfully performed does not bring them within the ambit of the Compensation Program.” *In re Maye, Id.* at \_\_, \_\_ S.E.2d at \_\_. In the present case, even assuming *arguendo* that Claimant was involuntarily sterilized in 1955 as he alleges, there is no indication that it was performed pursuant to the authority of the Eugenics Board, or pursuant to Chapter 224 of the Public Laws of 1933 as he argues. Accordingly, we reject Claimant’s assertion that his alleged involuntary sterilization was performed within the ambit of the Compensation Program.

B.

Next, Claimant contends that the Full Commission’s “strict construction of N.C. Gen. Stat. § 143B-426.50(5) constitute[d] denial of compensation benefits to [Claimant] due to an overly strict and technical construction of the statute.”

This argument was previously decided against Claimant in *In re House*, \_\_ N.C. App. \_\_, 782 S.E.2d 115 (2016). The Court in *House* held that the language of N.C. Gen. Stat. § 143B-426.50(5) is “clear and without ambiguity.” *Id.* at \_\_, 782 S.E.2d at 120. Furthermore, our Court stated as follows:

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

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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.

*Id.* Likewise, we must consider the words of the statute as they appear and conclude that Claimant is unable to demonstrate that either of these requirements has been met.

C.

In his last argument, Claimant asserts that the “Industrial Commission violated [Claimant’s] constitutional rights to equal protection and fundamental fairness by denying compensation” based upon a lack of record evidence of Eugenics Board involvement.

Claimant failed to present this argument to the Industrial Commission and has failed to petition this Court for review of these matters. This Court has held that, “[w]here 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). Accordingly, we hold that we are without jurisdiction to hear this issue and dismiss this argument

AFFIRMED IN PART; DISMISSED IN PART.

Chief Judge McGEE and Judge GEER concur.

Report per Rule 30(e).