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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000329-MR

KENTUCKY RETIREMENT SYSTEMS — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 10-CI-00346

JOHN PARKER — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; DIXON AND LAMBERT, JUDGES.

DIXON, JUDGE: Kentucky Retirement Systems (the Systems) appeals a decision of the Franklin Circuit Court reversing and remanding the Systems' Board of Trustees' (the Board) final order denying John Parker's application for disability retirement benefits. We affirm.

Parker's date of birth is January 18, 1957, and he became a member of the Systems on April 2, 1996, when he began working as a janitor for Laurel County Fiscal Court. Parker's last day of employment was December 23, 2005; thereafter, he applied for disability retirement benefits. In his application, Parker opined that he was unable to perform his former job duties due to disabling conditions of HIV/PCP Pneumonia and Emphysema/COPD. Parker subsequently amended his application to include additional disabling conditions of depression and pancreatitis. Parker asserted his health conditions caused chronic fatigue, rendered him unable to walk for more than a few minutes at a time, and made him susceptible to germs. Parker submitted a large volume of medical records chronicling his health care from the 1980s through 2008. A panel of medical review physicians recommended denial of Parker's application, concluding his conditions were either pre-existing or not permanently incapacitating.[1]

After the Systems notified Parker his application was denied, he requested a formal administrative hearing to appeal the decision. An evidentiary hearing was held March 18, 2009, where Parker testified on his own behalf. Parker opined that, prior to 2005, he had been in good health and that he had visited the doctor only for ailments like seasonal colds. Parker admitted he had been a life-long smoker, that he previously drank alcohol excessively, and that he had been in homosexual relationships. Parker testified that, since he became ill, he gets winded

[1] Pursuant to KRS 61.665(2)(d), three licensed physicians evaluate a claimant's medical records and recommend whether to approve or deny disability benefits.

very easily and he cannot perform his prior job due to the physical demands. Parker stated he lives with his elderly mother and, although he cleans the 900 square foot house, he explained that it takes him nearly two days to complete tasks that used to take two hours. Parker also acknowledged he takes eighteen different medications that sometimes cause unpleasant side-effects.

The hearing officer reviewed Parker's medical records, noting chest x-rays from December 2004 showed changes consistent with COPD. Parker was hospitalized in February 2005 and diagnosed with pancreatitis. In November 2005, Parker was hospitalized for two weeks, after complaining of increasing shortness of breath for six months. Parker was diagnosed with PCP-Pneumonia, COPD, and additional testing revealed Parker was HIV positive. Parker did not return to work following his November hospitalization. Parker was admitted to the hospital again in January 2006, due to a recurrence of pneumonia. Thereafter, Parker reported feeling weak, nauseated, and short of breath. Records from March 2006 indicated Parker's breathing improved; however, a pulmonary function test administered in July 2006 showed airflow obstruction. Chest x-rays taken in November 2006 revealed scarring, fibrosis, and underlying emphysema. A January 2007 pulmonary function test showed mild obstruction with no reversibility. The administrative record also included the reports of the Systems' medical review physicians. The Systems also tendered several medical journal articles regarding HIV/AIDS and COPD/Emphysema.

On November 24, 2009, the hearing officer rendered findings of fact and a recommended order on remand[2] denying Parker's request for disability benefits. The hearing officer found Parker's pancreatitis was asymptomatic during the year following his last day of employment and was attributable to Parker's chronic alcohol abuse. The hearing officer cited medical journal articles and Parker's admission that he was a life-long smoker in finding that Parker's COPD/Emphysema was a pre-existing condition. The hearing officer reviewed Parker's mental health records and concluded Parker's depression was not an incapacitating condition. As to Parker's HIV, the hearing officer noted it was diagnosed in 2005, but cited Parker's admission that he had homosexual encounters prior to his employment in 1996. The hearing officer cited a journal article indicating it might take ten years for AIDS to develop after HIV is contracted. The hearing officer also noted Parker's viral load had been well-controlled since February 2006. The hearing officer rendered the following specific findings of fact:

> 15. The objective medical evidence demonstrates by a preponderance of the evidence that Claimant's application for disability retirement benefits fails on multiple levels. Claimant's COPD/emphysema, HIV, pancreatitis, and anxiety and depression were conditions predating his CERS employment. Claimant was not suffering from or incapacitated by

[2] The hearing officer's original recommended order denying benefits was remanded by the Board with instructions to clarify Finding of Fact #15. We need not address the administrative procedural history of the original order.

> pancreatitis or PCP pneumonia as of his last day of paid employment. Any incapacity that Claimant may have been experiencing as of his last day of paid employment was not a permanent incapacity, and was the result, either directly or indirectly, of preexisting conditions.
>
> 16. Claimant has failed to prove by a preponderance of the objective medical evidence that his conditions, or the cumulative effect of these conditions, mentally or physically incapacitated him on a permanent basis since or from his last day of paid employment. This finding of fact is made with consideration of evidence of the Claimant's residual functional capacity and the physical exertion requirements of his last job as a custodian/maintenance worker, as accommodated, or a job of like duties.

On February 22, 2010, the Board adopted the recommended order on remand as its final order denying Parker's claim for disability benefits.

Parker appealed the Board's decision to the Franklin Circuit Court. On October 29, 2010, the circuit court reversed the Board's decision and remanded the case for additional proceedings. The circuit court concluded the hearing officer erred by classifying Parker's physical exertion requirements as "light to medium." The court found the evidence compelled a finding the exertion requirements were "medium" and remanded the issue for consideration of the permanent incapacity analysis using "medium" physical exertion requirements. The circuit court also found the hearing officer failed to conduct a full analysis to determine whether Parker was incapacitated as a result of the cumulative effect of his health

conditions pursuant to *Kentucky Retirement Systems v. Bowens*, 281 S.W.3d 776 (Ky. 2009). The court noted the hearing officer clearly addressed each condition individually, and while the hearing officer included a cursory acknowledgment of the cumulative effect analysis, there was no indication any analysis was actually conducted. The court remanded the cumulative effect issue for further consideration in conjunction with "medium" physical exertion requirements. The circuit court also held that neither the reports of the medical review physicians, nor the medical journal articles constituted objective medical evidence. Finally, the circuit court addressed the burden of proof on the issue of pre-existing conditions. The court instructed the hearing officer on remand to consider whether Parker presented "some evidence" that his conditions did not pre-exist his employment. The Systems now appeals the circuit court's order, contending the court exceeded the scope of its review by impermissibly re-weighing the evidence and substituting its judgment for that of the fact-finder.

"In its role as a finder of fact, an administrative agency is afforded great latitude in its evaluation of the evidence heard and the credibility of witnesses, including its findings and conclusions of fact." *McManus v. Kentucky Retirement Systems*, 124 S.W.3d 454, 458 (Ky. App. 2003). As Parker was unsuccessful before the Board, he is entitled to prevail on appeal only if the evidence in his favor was "so compelling that no reasonable person could have failed to be persuaded by it." *Id*.

Kentucky Revised Statutes (KRS) 61.600 sets forth the criteria for disability retirement. The statute requires a determination, based on objective medical evidence, as to whether the claimant has been permanently incapacitated by injury or disease from performing his prior job. KRS 61.600(3)(a)-(c). However, the claimant's physical incapacity cannot "result directly or indirectly from bodily injury, mental illness, disease, or condition which pre-existed membership in the system . . . [.]" KRS 61.600(3)(d).

A claimant's incapacity is permanent if it is expected to last for a continuous period of at least one year from the last day of paid employment. KRS 61.600(5)(a)1. Furthermore, "[t]he determination of a permanent incapacity shall be based on the medical evidence contained in the member's file and the member's residual functional capacity and physical exertion requirements." KRS 61.600(5)(a)2. The claimant's residual functional capacity is based on "the person's capacity for work activity on a regular and continuing basis." KRS 61.600(5)(b). This provision further explains:

> The person's physical ability shall be assessed in light of the severity of the person's physical, mental, and other impairments. The person's ability to walk, stand, carry, push, pull, reach, handle, and other physical functions shall be considered with regard to physical impairments. The person's ability to understand, remember, and carry out instructions and respond appropriately to supervision, coworkers, and work pressures in a work setting shall be considered with regard to mental impairments. Other impairments, including

> skin impairments, epilepsy, visual sensory impairments, postural and manipulative limitations, and environmental restrictions, shall be considered in conjunction with the person's physical and mental impairments to determine residual functional capacity.

Id. Finally, KRS 61.600(5)(c) delineates the following relevant categories to assess a claimant's physical exertion requirements:

> 2. Light work shall be work that involves lifting no more than twenty (20) pounds at a time with frequent lifting or carrying of objects weighing up to ten (10) pounds. A job shall be in this category if lifting is infrequently required but walking and standing are frequently required, or if the job primarily requires sitting with pushing and pulling of arm or leg controls. If the person has the ability to perform substantially all of these activities, the person shall be deemed capable of light work. A person deemed capable of light work shall be deemed capable of sedentary work unless the person has additional limitations such as the loss of fine dexterity or inability to sit for long periods.
>
> 3. Medium work shall be work that involves lifting no more than fifty (50) pounds at a time with frequent lifting or carrying of objects weighing up to twenty-five (25) pounds. If the person is deemed capable of medium work, the person shall be deemed capable of light and sedentary work.

A. Parker's Physical Exertion Requirements

Parker's job duties included cleaning, grounds-keeping, custodial work, and maintenance of the courthouse. The job description submitted by the employer

indicated Parker was required to lift 10 to 20 pounds frequently and up to 50 pounds seldom/rarely. The job description form submitted by Parker stated he lifted 15 to 20 pound boxes on a frequent basis.[3] The hearing officer concluded Parker engaged in "light to medium" work.

The circuit court reversed the hearing officer's finding, concluding the evidence compelled a finding Parker's work was "medium" in nature. The court stated: "A 'light' job involves lifting *no more than* 10 pounds frequently. Both [Parker] *and* his employer indicated that he lifted up to 20 pounds frequently."

The Systems asserts the court erred by failing to recognize that "gaps" exist in the statutory exertion levels; accordingly, the Systems contends the hearing officer properly assessed a "range" of exertion levels in Parker's case. We disagree.

The circuit court correctly pointed out that both Parker and the employer classified his duties as requiring frequent lifting of up to 20 pounds. Engaging in work that requires frequently lifting up to 20 pounds clearly exceeds the threshold established in the description for "light" work, which includes frequent lifting of objects weighing up to 10 pounds. Medium work, on the other hand, includes frequent lifting of objects weighing up to 25 pounds. Parker was required to frequently lift up to 20 pounds; accordingly, his exertion level would properly be classified as "medium." The hearing officer erred by assigning Parker a "range" of

[3] The form indicates "frequent basis" means 1/3 to 2/3 of the workday.

exertion levels, and the circuit court correctly concluded the evidence compelled a finding Parker engaged in "medium" work.

The statute clearly indicates that a determination of "permanent incapacity" is comprised of the medical evidence, residual functional capacity, and exertion requirements. KRS 61.600(5)(a)2. Because the physical exertion requirement is integral to the permanent incapacity analysis, remand to the Board is warranted for consideration of Parker's claim based on a "medium" exertion level.[4]

B. Cumulative Effect

The Systems next contends the trial court erred by concluding the hearing officer failed to consider the cumulative effect of Parker's ailments. The Systems points to Finding of Fact #16, wherein the hearing officer stated Parker is not incapacitated by the cumulative effect of his conditions.

We reiterate that a "permanent incapacity" determination must be based on the medical evidence, residual functional capacity, and physical exertion requirements. KRS 61.600(5)(a)2. Further, *Bowens*, *supra*, provides that the residual functional capacity analysis requires consideration of the "cumulative effect" of multiple ailments on a claimant's capacity for work on a regular and continuing basis. *Bowens*, 281 S.W.3d at 783.

In the case at bar, Parker presented evidence that his health problems rendered him easily winded, caused difficulty sleeping, caused fatigue and nausea,

[4] In light of our conclusion, we deem it unnecessary to address an unpreserved, alternative argument raised by the Systems relating to the sufficiency of the evidence as to the duration of Parker's incapacity. The entire permanent incapacity statutory analysis must be addressed on remand utilizing the "medium" exertion level.

in addition to the unpleasant side-effects he experienced as a result of eighteen daily prescription medications needed to manage his illnesses. Parker also testified that his health rendered him incapable of performing his prior job due to the physical demands of walking, climbing stairs, carrying items, mowing, and mopping. In light of this evidence, Parker's physical disability should be assessed based on the cumulative effect Parker's ailments have on his "ability to walk, stand, carry, push, pull, reach, handle . . . ." KRS 61.600(5)(b).

Furthermore, we acknowledge the hearing officer recited the "cumulative effect" language in Finding of Fact #16. We tend to agree with the circuit court, however, that such a bare statement with no attendant analysis could be perceived as mere lip service to the *Bowens* mandate. Here, as in *Bowens*, the findings of fact set forth an analysis of each ailment singularly, which "fragmentized" the ailments without consideration of their combined effect on Parker's ability to work. *Bowens*, 281 S.W.3d at 783.

In light of our conclusion that remand is warranted to apply the "medium" exertion level, the entire permanent incapacity analysis must be reconsidered. On remand, the Board should assess Parker's residual functional capacity based on his individual ailments as well as the cumulative effect of those ailments on Parker's capacity for work.

C. Preexisting Condition & Objective Medical Evidence

We now address the final two arguments asserted by the Systems, as the issues are related.

Pursuant to KRS 61.600(3)(d), a claimant is disqualified from receiving disability retirement benefits if the claimant's incapacity results "directly or indirectly from bodily injury, mental illness, disease, or condition which pre-existed membership in the system . . . ."[5] This Court has held that a claimant must prove by a preponderance of the evidence that the incapacity did not pre-exist the claimant's membership. *McManus*, 124 S.W.3d at 458. Recently, in *Kentucky Retirement Systems v. Brown*, 336 S.W.3d 8, 17 (Ky. 2011), the Kentucky Supreme Court concluded a claimant satisfied the preponderance standard by producing medical evidence which tended to show the disabling condition did not pre-exist the claimant's employment.

The Systems contends the circuit court applied an incorrect burden of proof on the issue of pre-existing conditions. In its order, the circuit court stated:

> Proving the non-existence of a disease involves proving a negative. Because of the difficulty of proving a negative, Kentucky courts have imposed a lighter burden than a preponderance of the evidence. *See*, *e.g.*, *Motorists Mutual Insurance Co. v. Hunt*, 549 S.W.2d 845, 847 (Ky. App. 1977). A claimant must present some evidence – less than a preponderance – that his conditions did not preexist membership in the system; at that point, the burden shifts to Retirement Systems, which must prove that the conditions preexisted membership. Retirement Systems shall apply this correct standard on remand.

[5] This provision applies where, as here, the claimant has less than sixteen years of membership in the Systems. KRS 61.600(4)(b).

The circuit court erred by instructing the Board to apply the lesser "some evidence" standard on remand; however, we agree with the notion that proving the absence of a health condition involves the difficult task of "proving a negative." *See Fankhauser v. Cobb*, 163 S.W.3d 389, 402 (Ky. 2005) (". . . it is difficult, if not impossible, to prove a negative").

Nevertheless, the circuit court's error is immaterial to our review. We believe Parker satisfied the preponderance standard by submitting medical records, prior to his employment, which contain no indication he suffered from HIV, COPD, pancreatitis, or depression. It appears Parker was diagnosed with depression in 2000, he was diagnosed with pancreatitis in February 2005, and he was diagnosed with HIV and COPD in November 2005. In *Brown*, *supra*, the Court interpreted the meaning of the pre-existing condition statutory provision as follows:

> We believe it the intent of our legislative authority to preclude from benefits those individuals who suffer from symptomatic diseases which are objectively discoverable by a reasonable person. We do not believe it the intent of the legislature in drafting KRS 61.600 to deny benefits to those individuals who suffer from unknown, dormant, asymptomatic diseases at the time of their employment, ailments which lie deep within our genetic make-up, some of which may not yet be known to exist. Rather, we believe the legislature intended to deny benefits to individuals whose diseases are symptomatic and thus were known or reasonably discoverable. Why else would

> the legislature have referred to 'objective medical evidence' in KRS 61.600(3)?

Brown, 336 S.W.3d at 15.

Despite this language, the Systems contends Parker failed to satisfy his burden of proof because he "failed to get reasonable medical testing and treatment" prior to his employment. Essentially, the Systems would impose the unreasonable burden of requiring an otherwise healthy person to go on a fishing expedition for unknown illnesses in order to prevent that person's future reliance on an *absence* of medical evidence as proof of the non-existence of a condition.

We believe the Systems' argument is without merit, and we find the plain language in *Brown*, *supra*, applicable to Parker's case. We are satisfied that Parker established by a preponderance of the evidence that he was not laboring under any known, symptomatic condition at the time he became a member of the systems. The evidence compels a finding in favor of Parker on this issue. On remand, Parker is entitled to full consideration for disability benefits, as he has satisfied the pre-existing condition provision.

Although we have resolved this issue in Parker's favor, we believe the specific findings of the hearing officer warrant our attention. The hearing officer deemed Parker's pancreatitis as pre-existing due to a history of alcohol abuse. The hearing officer concluded Parker's COPD was pre-existing because Parker was a life-long smoker. Finally, the hearing officer indicated that Parker's HIV was a

pre-existing condition due to pre-employment homosexual relationships. We believe the hearing officer clearly erred in reaching these conclusions.

Brown, *supra*, established that smoking is a "behavior," not a "condition" within the meaning of the statute. *Id*. at 16. The Court noted, "Thus, interpreting 'condition' as of the same kind or nature as the terms 'bodily injury,' 'mental illness,' and 'disease,' we cannot conclude that the word 'condition' encompasses 'behavior.'" *Id*.

The Systems attempts to avoid the application of *Brown* by arguing that Parker was actually diagnosed with "tobacco use disorder and tobacco dependency;" therefore, the Systems contends smoking was a pre-existing medical condition in this case. We simply find this argument wholly unpersuasive. Furthermore, just as smoking is not a "condition," we conclude neither Parker's pre-employment alcohol abuse, nor his pre-employment homosexual relationships constituted a pre-existing "condition" as that term was interpreted in *Brown*, *supra*.

Finally, the Systems contends the circuit court erroneously concluded the hearing officer's findings were not based on objective medical evidence.

KRS 61.510(33) defines "objective medical evidence" as:

> reports of examinations or treatments;
> medical signs which are anatomical,
> physiological, or psychological
> abnormalities that can be observed;
> psychiatric signs which are medically
> demonstrable phenomena indicating specific
> abnormalities of behavior, affect, thought,
> memory, orientation, or contact with reality;
> or laboratory findings which are anatomical,

> physiological, or psychological phenomena that can be shown by medically acceptable laboratory diagnostic techniques, including but not limited to chemical tests, electrocardiograms, electroencephalograms, X-rays, and psychological tests[.]

The circuit court concluded that journal articles and the reports of the medical review physicians did not constitute objective medical evidence within the meaning of the statute. In *Brown*, *supra*, the Court held, "A medical treatise or article alone, written in the abstract or concerning another patient, is never sufficient to qualify as objective medical evidence." *Id*. at 17. The hearing officer clearly cited several journal articles as the basis for his conclusions as to causation. We agree with the circuit court that the hearing officer improperly relied on these articles because they did not constitute objective medical evidence.

The circuit court also concluded the reports of the medical review physicians did not meet the statutory definition of "objective medical evidence." The court opined, "the role of the Medical Review Board physicians under Chapter 61 is to review the medical evidence submitted with an application, not to generate objective medical evidence for the hearing." We believe the court's assertion is well-taken. According to KRS 61.600(3) and KRS 61.665(2)(d), the medical review physicians are tasked with evaluating the objective medical evidence submitted by a claimant for the purpose of recommending that disability retirement should either be approved or denied. Pursuant to these statutory directives, we

conclude the physicians' reports are not objective medical evidence within the meaning of KRS 61.510(33).

Conclusion

For the foregoing reasons, we affirm the judgment of the Franklin Circuit Court. We remand this matter to the Board for further proceedings consistent with this opinion, including: 1) Parker is not disqualified from receiving disability benefits based on any pre-existing conditions; 2) Parker's permanent incapacity must be evaluated under the "medium" exertion level; 3) In the evaluation of Parker's residual functional capacity, he is entitled to consideration of his individual ailments, and alternatively, consideration of the "cumulative effect" of those ailments on his capacity for work.

ALL CONCUR.

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