

RENDERED: May 7, 1999; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002895-MR

ELIZABETH SKAGGS

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 97-CI-0025

BOARD OF TRUSTEES,
KENTUCKY RETIREMENT SYSTEMS

APPELLEE

OPINION
REVERSING AND REMANDING
** ** * * * * *

BEFORE: BUCKINGHAM, JOHNSON AND KNOX, JUDGES.

JOHNSON, JUDGE: Elizabeth Skaggs (Skaggs) has appealed from an opinion of the Franklin Circuit Court entered on October 21, 1997, which affirmed a decision of the Board of Trustees of the Kentucky Retirement Systems (the Board), denying Skaggs' claim for disability benefits under Kentucky Revised Statutes (KRS) 61.600. We reverse and remand.

Skaggs was employed by the Jefferson County Board of Education (the school board) from April 1, 1986, until August 31, 1994. On January 23, 1995, she filed for disability retirement

benefits. In her application for benefits, Skaggs stated that she could no longer work due to pain and numbness in her legs which made standing and walking "almost impossible." Skaggs described her duties in her application as sweeping, mopping, vacuuming, buffing, stripping, and waxing floors, cleaning windows, dusting furniture, washing sinks and cleaning toilets. This work required that she move heavy furniture and lift up to 100 pounds with help and frequently lift items (furniture and garbage) weighing 25 pounds or more without help. There is no dispute that her work was in the "medium" category and required that she be on her feet for almost all of her work day.¹ Skaggs submitted the medical records from her treating physician, Dr. Joseph Bowling, and those of a vascular surgeon, Dr. Leo Wine. The medical examiners, employed by the Board in accordance with

¹Skaggs' description of her job duties is nearly identical to the "physical demands" of the position of custodian as described by her employer as follows:

The work is performed while standing or walking. It requires the ability to communicate effectively using speech, vision and hearing. The work requires the use of hands for simple grasping, pushing and pulling of arm controls and fine manipulations. The work at times requires bending, squatting, crawling, climbing, reaching, with the ability to lift, carry, push or pull heavy weights. The work requires activities involving unprotected heights, being around moving machinery, exposure to marked changes in temperature and humidity, and exposure to dust, fumes and gases.

KRS 61.665, denied Skaggs' application on April 26, 1995. Skaggs appealed and on July 18, 1995, an evidentiary hearing was conducted before a hearing officer.

At the hearing, Skaggs testified that she was born in 1939, and had worked for the school board since 1986, first as a cook and, beginning in 1987, as a custodian. She described her job duties much as she had in her original application for benefits. She stated that she began experiencing problems in 1993 when she was transferred to Atherton High School where there were more stairs to climb and floor-to-ceiling windows to clean. She testified that she experienced "throbbing" pain in her legs. She testified that in August 1994, she was required to stand on a ladder continuously for two days while cleaning windows, and following this episode she was forced to quit her job due to the pain she was experiencing. Skaggs testified that she could walk only about a block before she experienced pain, that she no longer did her own grocery shopping, and that she could not even wash dishes without taking a break because of her leg pain. Although not mentioned in her application, she testified that she also suffered from asthma and bronchitis. She claimed that a decreased oxygen supply from these conditions worsened her leg pain.

In addition to her own testimony, Skaggs submitted, for the hearing officer's consideration, several medical records and a favorable decision from the Social Security Administration (SSA) that had been rendered on August 25, 1995. The records of

Skaggs' treating physician, Dr. Bowling, indicated that she had a long history of progressive leg pain that was worse with walking. His diagnosis for the leg pain and numbness was claudication² due to small vessel diabetic disease. Dr. Bowling opined that Skaggs could no longer perform the type of work required of a custodian and should be limited to only sedentary work. Dr. Wine, a vascular specialist to whom Dr. Bowling referred Skaggs for a determination of the cause of her leg pain, attributed Skaggs' pain to diabetic neuropathy. He recommended that she take Trental, which his notes of February and June 1995, indicated was helpful in reducing her leg pain. Dr. Glen Lambert, also a vascular specialist, agreed that Skaggs' leg pain was the result of diabetes and not arterial insufficiency. Records from Audubon Regional Medical Center confirmed claudication in both legs upon treadmill testing. The same records also contained documentation of Skaggs' history of asthma, bronchitis and chronic obstructive pulmonary disease. Finally, the findings of the SSA stated that Skaggs suffered from "severe asthmatic bronchitis, chronic obstructive pulmonary disease, diabetes mellitus, and claudication of both legs." These findings also included that Skaggs was "precluded from performing all but light work with a sit/stand option in a controlled environment, ruling out past

²"Claudication" is defined in Stedman's Medical Dictionary, (4th ed. 1976), as "a condition caused by ischemia [narrowing] of the leg muscles due to sclerosis [hardening] with narrowing of the arteries of the legs. It is characterized by attacks of lameness and pain, brought on by walking, chiefly in the calf muscles."

relevant work due to the excessive exertional and nonexertional demands."³

On November 6, 1995, the hearing officer recommended that Skaggs' application be denied for the reason that she had "failed to establish by objective medical evidence the existence of a permanent physical impairment which would prevent her from performing her former job as a custodian. . . ." The hearing officer stated in his report as follows: "The medical evidence of record relates to [Skaggs'] asthmatic bronchitis, diabetes mellitus, pain and numbness in the calf of the right leg, referred to as claudication. It is clear that the basis for this has not been diagnosed." He further opined that in addition to failing to prove the cause of her pain in her legs, Skaggs had failed to "show that it would be expected to last more than twelve months."

Skaggs filed exceptions to the hearing officer's report. The Board's Disability Appeals Committee met on January 23, 1996, and remanded the matter to the hearing officer for reconsideration of his recommendation based on information to be obtained after Skaggs underwent an independent medical examination. Accordingly, Skaggs was seen by Dr. Jeffrey Hilb, a doctor of the Board's choosing, who was asked to provide an opinion as to whether Skaggs was physically capable of performing

³Skaggs was granted disability benefits by the SSA without the necessity of a hearing "[d]ue to the severity of the clinical findings and [Skaggs'] adverse vocational factors."

her previous job duties. Dr. Hilb confirmed that Skaggs suffered from claudication in addition to chronic lung disease and diabetes. Dr. Hilb's report stated that Skaggs' condition included "significant claudication with pain upon walking in both legs." Although Dr. Hilb did not specifically state whether or not Skaggs was capable of performing the work required of a custodian, his "plan" for her provided as follows: "The patient is significantly impaired with both her breathing function and her walking. . . . Her medication does seem to compensate for part of her problem and I have encouraged her to stay in regular contact with her personal physician" (emphasis added). After receipt of this report and another letter from Dr. Bowling,⁴ the

⁴Dr. Bowling's letter reads in relevant part as follows:

Mrs. Skaggs has a long history of leg pain which we have had evaluated on a number of occasions. Certainly the patient is a diabetic and suffers from diabetic neuropathy. . . . It was our feeling that the patient's combination of impairments, including her chronic obstructive pulmonary disease, diabetes and peripheral vascular disease, were, in combination, the cause of her lower extremity discomfort.

The patient has been treated with Trental, which has reduced some of her leg complaints, but has not completely eliminated those The patient's diabetes has been fairly well controlled of late with medication, but the fact that she has had this long-term and a continual history of leg discomfort would be consistent with the diagnosis of diabetic neuropathy.

In closing I would like to state that the patient's leg pain is real and causes her a
(continued...)

hearing officer recommended that Skaggs' application for benefits be denied.

On July 9, 1996, the Disability Appeals Committee remanded the matter and instructed its staff to contact Dr. Hilb "in order to clarify his opinion as to whether or not Ms. Skaggs is disabled pursuant to KRS 61.600." On August 29, 1996, the Board sent Dr. Hilb a letter which read: "Please note that the Committee is seeking, and has sought from the beginning, your opinion as to whether Ms. Skaggs is totally and permanently disabled using the definition prescribed in KRS 61.600. . . ." Dr. Hilb responded to this letter as follows: "Since Elizabeth Skaggs['] exam took place in April, I have no objective way to further clarify beyond what I have already stated. I don't know how to be any more specific." The hearing officer informed the Disability Appeals Committee of Dr. Hilb's correspondence and stated that in his opinion there was nothing in Dr. Hilb's report that would cause him to change his original recommendation.

Skaggs again took exceptions to the hearing officer's recommendation and pointed out to the Committee that Dr. Hilb's opinion was consistent with her treating physician's opinion that her ability to be on her feet, much less work on her feet, was severely limited. On December 10, 1996, the Board, in a split

⁴(...continued)
significant loss of function. . . .

decision, voted to adopted the hearing officer's report and denied Skaggs' application for disability retirement benefits.

Skaggs appealed to the Franklin Circuit Court. The circuit court agreed with Skaggs that the Board clearly erred in its determination that she had not demonstrated the cause of her leg pain. It held that the record conclusively established that Skaggs suffered from "claudication in the lower legs which causes numbness and severe pain." Nevertheless, the circuit court agreed with the Board that Skaggs had not proven that she was "permanently incapacitated" within the meaning of KRS 61.600. The circuit court stated as follows:

The question remains, however, whether this pain renders [Skaggs] "permanently incapacitated" under the meaning of KRS 61.600, such that disability retirement benefits are appropriate. An incapacity shall be deemed to be permanent if it "is expected to result in death or can be expected to last for a continuous period of not less than twelve (12) months from the person's last day of paid employment in a regular full-time position." KRS 61.600(4)(a)1.

The simple fact of the matter is that [Skaggs] presented no objective proof that her condition(s) either rendered her totally incapable of performing her duties or were expected to last continuously for one year. In fact, the evidence showed that [Skaggs'] leg pain improved with time and medication, although she made no attempt to return to work. There thus exists substantial evidence in the record to deny the application for disability retirement benefits, and there is no compelling reason in the evidence to overturn that decision.

This appeal followed.

In reviewing a decision of an administrative agency, a circuit court is "bound by the administrative decision if it is supported by substantial evidence." Commonwealth Transportation Cabinet, Department of Vehicle Regulations v. Cornell, Ky.App., 796 S.W.2d 591, 594 (1990). See also Kentucky Unemployment Insurance Commission v. King, Ky.App., 657 S.W.2d 250 (1983). "Substantial evidence has been conclusively defined by Kentucky courts as that which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person." Bowling v. Natural Resources & Environmental Protection Cabinet, Ky.App., 891 S.W.2d 406, 409 (1994). When determining whether the administrative agency's decision is supported by substantial evidence, the reviewing court must adhere to the principle that the trier of fact "is afforded great latitude in its evaluation of the evidence heard and the credibility of witnesses appearing before it." Id. at 409-410. Furthermore, an agency's decision may be supported by substantial evidence though a reviewing court may have arrived at a different conclusion. Kentucky State Racing Commission v. Fuller, Ky., 481 S.W.2d 298, 308 (1972). Overall, the primary concern of a reviewing court is whether the agency's decision is arbitrary. Cornell, 796 S.W.2d at 594. A decision not supported by substantial evidence is deemed arbitrary as a matter of law. Id.

The issue before this Court is whether the circuit court erred in affirming the Board's determination that Skaggs

failed to prove that she is disabled as contemplated by KRS 61.600. Portions of that statute pertinent to our review read as follows:

(2) Upon the examination of the objective medical evidence by licensed physicians pursuant to KRS 61.665, it shall be determined that:

(a) The person, since his last day of paid employment, has been mentally or physically incapacitated to perform the job, or jobs of like duties, from which he received his last paid employment. In determining whether the person may return to a job of like duties, any reasonable accommodation by the employer shall be considered; [5]

(b) The incapacity is a result of bodily injury, mental illness, or disease. For purposes of this section, "injury" means any physical harm or damage to the human organism other than disease or mental illness;

(c) The incapacity is deemed to be permanent; and

(d) The incapacity does not result directly or indirectly from bodily injury, mental illness, disease, or condition which pre-existed membership in the system or reemployment, whichever is most recent.

. . .

(4) (a) 1. An incapacity shall be deemed to be permanent if it is expected to result in death or can be expected to last for a continuous period of not less than twelve (12) months from the person's last day of paid employment in a regular full-time position.

⁵There was no dispute as the hearing officer found that the school board could make no reasonable accommodations for Skaggs because of the physical demands of the work.

The basis for the Board's denial which the circuit court affirmed was Skaggs' failure to establish the "permanent" nature of her incapacity. KRS 61.600(2)(c). Having reviewed the entire record, it is our conclusion that the circuit court erred in affirming this determination and that the record compels a finding that Skaggs' disabling condition is permanent. Every physician who examined Skaggs, including the independent medical examiner, Dr. Hilb, determined that she suffers from claudication in both legs. The only vascular specialists who examined Skaggs determined the cause of Skaggs' claudication was attributable to complications of diabetes, a known progressive and debilitating disease. A determination that this condition is one "expected to last for a continuous period of not less than twelve (12) months" as set out in KRS 61.600(4)(a)(1)., is further compelled from the fact that by the time the Board remanded the matter for an independent medical examination—an event which occurred in April 1996, and resulted in a diagnosis of "significant claudication . . . in both legs"—more than twelve months had already passed since Skaggs' last day of work on August 30, 1994. While the records of Dr. Bowling and Dr. Wine indicated that Skaggs' diabetes is being "controlled" with medication, and that the claudication-related pain is "reduced" by yet other medication, there was no evidence from which the Board could infer that Skaggs' condition was curable, that the damage to her blood vessels already caused by her diabetes was reversible, or that the prescribed medication altered her ability to work at a job

that required that she be on her feet for a significant part of the work day.

Simply stated, the evidence in the record that Skaggs can no longer perform the type of work from which she received her last paid employment, the standard required by the statute, is overwhelming. Indeed, Dr. Hilb, the independent physician, did not know how he could be "more specific" on the issue of her ability to work as a custodian after reporting that both her "breathing" and "walking" functions were "significantly impaired."

Accordingly, the judgment of the Franklin Circuit Court is reversed and this matter is remanded for entry of an award consistent with this Opinion.

BUCKINGHAM, JUDGE, CONCURS.

KNOX, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

KNOX, JUDGE, DISSENTING. I respectfully dissent. Given the burdensome standard of review that an unsuccessful claimant before an administrative agency must meet, I believe the trial court was correct in affirming the Board. The "compelling evidence" standard of review has not been without controversy. See Tucker v. Tri-State Lawn & Garden, Inc., Ky. App., 708 S.W.2d 116 (1986). It has its basis in the idea that a claimant in an administrative hearing bears the risk of nonpersuasion, and having failed to persuade the agency notwithstanding substantial evidence in his favor, bears a heavy burden in overturning the

decision of the agency. Lee v. International Harvester Co., Ky., 373 S.W.2d 418, 420 (1963).

In this case, the majority has recited evidence of a substantial nature which would justify a determination in Mrs. Skaggs' favor. The majority opines that the evidence in Skaggs' favor is compelling and overwhelming. However, the trial court's opinion recited evidence relied upon by the Board from which other less favorable inferences could be drawn, particularly evidence that Mrs. Skaggs' condition was improving with medication. Further, the hearing officer noted inconsistencies in the medical record relating to Mrs. Skaggs' statements as to whether walking caused her leg pain.

As noted by our highest Court:

Even though the reviewing court may not agree with the inferences drawn by the Board, it did not have the authority to overrule that finding because it was supported by the evidence. In order to reverse the finding of the Board, the claimant, who has the burden of proof, must present evidence that is so overwhelming as to compel a finding in his favor.

Howard D. Sturgill & Sons v. Fairchild, Ky., 647 S.W.2d 796, 798 (1983) (citation omitted).

Although I believe that the majority has reached the more equitable result in this case, I believe the trial court's judgment is the legally correct result, given the stringent standard of review which it must apply.

BRIEF FOR APPELLANT:

BRIEF FOR APPELLEE:

Hon. Alvin D. Wax

Hon. James P. Dodrill

Louisville, KY

Frankfort, KY