

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2001-CA-000380-MR

THOMAS HUGHES

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE WILLIAM L. GRAHAM, JUDGE  
ACTION NO. 98-CI-01397

BOARD OF TRUSTEES  
KENTUCKY RETIREMENT SYSTEMS

APPELLEE

OPINION  
AFFIRMING  
\*\* \*\* \* \* \* \* \*

BEFORE: DYCHE, GUIDUGLI, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Thomas Hughes appeals from a judgment of the Franklin Circuit Court which overruled his appeal and upheld the Board of Trustees of Kentucky Retirement Systems's hearing officer's determination denying his application for disability retirement benefits. We affirm.

The essential facts as to this claim are not in dispute. From February 1, 1981 until October 21, 1997, Hughes was employed as a Coal Development Technical Consultant with the Office of Coal Marketing and Export. His job duties required him to gather data, verify and compile information for publication, work on coal education projects, guide mine tours, and work as a

liaison for the coal industry, electric companies, coal associations, and state and federal agencies. To satisfactorily complete these job duties, Hughes was required to walk or stand for one hour a day, sit for 6½ hours a day, bend and reach for 1/3 to 2/3 of the time, climb and/or balance and stoop, kneel, crawl, and/or crouch for up to 1/3 of the time. Additionally, Hughes was required to handle, finger, and feel objects for over 2/3 of his working day. During his working day, he usually lifted boxes of books weighing between 40 and 50 pounds on a daily basis. The most he has ever lifted was 150 pounds, with this occurring on an infrequent basis. In addition to this office work, Hughes's position required him to give tours of coal mines and perform educational projects in local schools. This position also required Hughes to travel. These job duties were characterized by the hearing officer as being primarily sedentary to light duty in nature.

On July 18, 1995, Hughes was involved in a motor vehicle accident during which he sustained injuries to his back, neck, and shoulder, with the most significant injury being a herniated disc. Hughes also experienced headaches and muscle spasms as a result of this accident.

Hughes applied for disability retirement benefits from the Kentucky Retirement Systems pursuant to KRS 61.600 on May 6, 1997. In his application, Hughes alleged that constant severe pain in his shoulders, neck and right hip, frequent severe headaches, frequent pain in his chest, his inability to lift objects over fifteen pounds without severe pain and his inability

to drive longer than thirty minutes without muscle and nerve spasms as the specific disabilities that prevented him from being able to perform his job duties. According to Hughes's complaint filed with the Franklin Circuit Court, his last day of paid employment as a Coal Development Technical Consultant was October 21, 1997.

Hughes was denied disability retirement benefits on initial consideration by the Medical Review Board Physicians of the Kentucky Retirement Systems. After this denial, Hughes requested and was granted a hearing.

The hearing was convened concerning this matter on February 20, 1998. During this hearing, Hughes testified and was asked why he could not perform his job functions. Hughes responded that, while sitting and typing at a computer terminal, he suffered back pain, muscle spasms, and experienced pain in his neck and shoulders. Accommodations made by his employer at the request of a physical therapist, such as adjusting the height of the keyboard and obtaining another chair, did not help. Additionally, Hughes stated that he was unable to sit for any period of time. He also testified that he could not operate the jeep provided by his former employer for more than thirty minutes at a time because the bumping and jolting caused muscle spasms and extreme pain. He also was not able to hold his hands at the low elevation as advised by his doctors and adequately maneuver Eastern Kentucky roadways. Driving caused him to have a sharp pain from his neck down to his arms.

Hughes further testified that he believed he could lift approximately twenty pounds, but denied being able to lift the boxes of books. Hughes also noted that he had some extreme pain at the base of his skull, in his shoulders, and down his back when he does lift. Hughes suffered from headaches, but epidural shots temporarily relieved this problem.

The record contains several medical exhibits that were pertinent to the decision of the hearing officer. Dr. William Fannin determined on June 5, 1997 that Hughes was totally disabled based upon his diagnosis of cervico thoracic myofascial pain syndrome, ruptured nucleus pulposus C4-5, and depression. An x-ray and MRI of Hughes's back showed a large herniated disc and degenerative change of the spine. Medical records from Pikeville Methodist Hospital also noted the herniated disc.

Another physician, Dr. Gerald Klim, treated Hughes from January 1996 until July 1997. He found that Hughes's condition was stable and improving because he was sleeping better and performing a home exercise program.

On February 12, 1997, Dr. Leon B. Briggs of the Pain Clinic at Pikeville Methodist Hospital recommended that a neurosurgeon evaluate Hughes. Thereafter, Hughes was examined by neurosurgeon Dr. Richard Mortara. Dr. Mortara found a significant disc defect, but it was without lateralization. Dr. Mortara was unsure if surgery would ease his pain and suggested further testing. Yet, Dr. Mortara, in a letter dated August 22, 1997, wrote that he possessed no evidence that Hughes proceeded to have further testing conducted as advised.

Dr. Mortara's August 22, 1997 letter also summarized his findings from Hughes's June 1997 Ergos evaluation. According to the report of this testing, Hughes met all criteria for sedentary work and for light duty work. Hughes, however, did not meet maximum medium level work. This report also indicated inconsistencies in his performance during the test, such as pulling more than pushing at a cart, inconsistent lifting behaviors, and performing the keyboard activity while slouched back in the chair. Hughes, according to Dr. Mortara, appeared to display self-limiting behaviors which are compatible with symptom magnification. Finally, Dr. Mortara concluded that it would seem unlikely that Hughes should be out of work for one year's time.

Another orthopedic surgeon, Dr. T. Robert Love, indicated that there is nothing in his examination to suggest a herniated disc. He also did not anticipate the need for surgery.

Dr. John T. Rawlings reviewed all of the medical evidence of record pursuant to the request of Kentucky Retirement Systems. On April 14, 1998, based upon his review of this evidence, he concluded that Hughes should be capable of light work with the restriction of no frequent reaching or overhead work due to cervical disc disease. He stated that Hughes should not lift more than twenty-five pounds maximum and recommended that his required driving time be accommodated.

Based upon Hughes's testimony and the evidence within the record, the hearing officer recommended that Hughes's claim for disability benefits be denied. The Disability Appeals Committee upheld the hearing officer's determination. Hughes

appealed to the Franklin Circuit Court which overruled the appeal by finding that the appellee's decision was based on substantial evidence on the record as a whole. This appeal follows.

As for his allegations of error, Hughes states that the hearing officer abused his discretion by determining that Hughes could return to work with reasonable accommodation and that the hearing officer's decision was not supported by substantial evidence. We disagree.

"If there is any substantial evidence to support the action of the administrative agency, it cannot be found to be arbitrary and will be sustained." Taylor v. Coblin, Ky., 461 S.W.2d 78, 80 (1970). In reviewing a decision by an administrative agency, the reviewing court is "bound by the administrative decision if it is supported by substantial evidence." Commonwealth Transportation Cabinet v. Cornell, Ky. App., 796 S.W.2d 591, 594 (1990). Substantial evidence is defined as evidence which, when taken alone or in the light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person. Bowling v. Natural Resources, Ky. App., 891 S.W.2d 406, 409 (1994). When determining whether an administrative agency's decision is supported by substantial evidence, the reviewing court must defer 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 410. An agency's decision may be supported by substantial evidence even though a reviewing court may have arrived at a different

conclusion. Id. Furthermore, if an agency's findings are supported by substantial evidence, "the findings will be upheld, even though there may be conflicting evidence in the record." Kentucky Commission on Human Rights v. Fraser, Ky., 625 S.W.2d 852, 856 (1981). Simply put, "the trier of facts in an administrative agency may consider all of the evidence and choose the evidence that he believes." Cornell, 796 S.W.2d at 594. The applicant seeking benefits from the Kentucky Retirement System has the burden to prove entitlement to benefits. Personnel Board v. Heck, Ky. App., 725 S.W.2d 13 (1986).

We are persuaded that substantial evidence exists in the record to support the hearing officer's findings, as well as the Retirement Board's determination that the medical evidence established that Hughes could return to work and satisfactorily perform his past duties with reasonable accommodations. In particular, the Ergos evaluation determined that Hughes displayed self limiting behaviors that are compatible with symptom magnification. Additionally, this evaluation states that Hughes met all criteria for sedentary work and for light duty work, a description that adequately describes his past job duties. Finally, Dr. Mortara concluded that it was unlikely that Hughes should be out of work for one year's time with these injuries. The previously described conclusions of three other physicians, Dr. Love, Dr. Klim, and Dr. Rawlings, were also significant because they supported Dr. Mortara's conclusion that Hughes's physical condition was such that he could successfully perform sedentary and light duty work. While there may be conflicting

evidence in the record, Dr. Mortara's conclusion that was based upon the results of the Ergos evaluation, as well as the findings submitted by Dr. Rawlings, Dr. Klim, and Dr. Love, represent substantial evidence supporting the Retirement Board's denial of disability benefits. While we may have reached a different decision were we to review Hughes's claim de novo, because the Retirement Board's decision is supported by substantial evidence, we are compelled to defer to its decision.

For the foregoing reasons, the judgment of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Miller Kent Carter  
Pikeville, Kentucky

BRIEF FOR APPELLEE:

James Dodrill  
Frankfort, Kentucky