

RENDERED: JANUARY 12, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-002107-MR

JOHNNY M. YOUNG

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 04-CI-00734

KENTUCKY RETIREMENT SYSTEMS,
BOARD OF TRUSTEES

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: TAYLOR, JUDGE; ROSENBLUM,¹ SENIOR JUDGE; MILLER,²
SPECIAL JUDGE.

TAYLOR JUDGE: Johnny M. Young brings this appeal from a
September 13, 2005, Order and Opinion of the Franklin Circuit
Court affirming an order of the Disability Appeals Committee of

¹ Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

² Retired Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

the Board of Trustees of the Kentucky Retirement Systems (Board) to deny Young disability retirement benefits. We affirm.

Young was employed as a bus driver with the Transportation Authority of River City in Louisville, Kentucky. Young applied for disability retirement benefits in September 2001, due to alleged injuries from a March 2001 accident. Her application for disability was denied. Subsequently, Young reapplied for disability retirement benefits on August 2, 2002. In the subsequent application, Young claimed to be disabled as a result of osteoarthritis in her knees, depression, and back injury. Young alleged the back injury was caused by turning the steering wheel of her bus to make a left-handed turn. Following an evidentiary hearing, a hearing officer for the Board recommended denying Young's claim for disability retirement benefits. In making this decision, the hearing officer specifically concluded:

With respect to Claimant's physical condition, the objective medical evidence does not indicate that she suffers from any condition which renders her incapacitated from her job as a bus driver. Diagnostic tests are essentially normal, and physical exams are complicated by her lack of cooperation with her own physicians. Dr. Tillett writes on multiple occasions that she is disabled due to her knees, but offers no objective proof to support his conclusion, as is required by KRS 61.600 in order to justify an award of disability retirement benefits. Furthermore, both Claimant's back and knee conditions, to the

extent that they are considered abnormal medical conditions, pre-date her most recent re-employment date, and thus are pre-existing.

With respect to Claimant's medical condition, Claimant has failed to produce proof as required by KRS 61.600 that she suffers from a condition which incapacitates her from driving a bus.

The hearing officer also specifically found that Young failed to cooperate throughout the hearing by refusing to answer questions regarding her alleged mental disability. In particular, the hearing officer stated:

During cross-examination, Claimant refused to answer questions about mental health treatment that she is receiving, and refused to disclose the name of her pastor, from whom she received counseling.

Claimant has the burden of proving her entitlement to the disability retirement benefit which she is seeking. Claimant alleged disability due to depression, but refused to disclose the name of her treating mental health professional. Her refusal to cooperate throughout the hearing by refusing to answer relevant and necessary questions regarding issues about which she has alleged disability make it difficult if not impossible for her to sustain her own burden. Claimant's position throughout the hearing was in essence that because she was in pain and depressed and couldn't work, the retirement system had no right to question her own conclusions. Unfortunately, this is not the case, and her failure and refusal to give vital information about her condition leaves no conclusion but that she did not sustain the burden of proof, and thus is not entitled to disability retirement benefits.

Young filed exceptions to the hearing officer's recommendations, and on April 30, 2004, the Board denied the exceptions and adopted the hearing officer's recommended order to deny Young disability retirement benefits. Thereafter, Young sought review in the Franklin Circuit Court. By order entered September 13, 2005, the Franklin Circuit Court concluded "the decision to deny disability benefits was supported by substantial evidence from the record as a whole." As such, the court affirmed the Board's order. This appeal follows.

Young contends the Board erroneously denied her application for disability retirement benefits. In particular, Young believes she "established that she is permanently and totally disabled." In support thereof, Young cites to the medical opinion of Dr. John R. Dimar. Dr. Dimar opined that Young suffered from mild degenerative changes to her spine with some mild protrusions and significant degenerative facet disease. Young also cites to the testimony of Dr. J. Timothy Burger who believed Young suffered from a flat posterior disc bulge at L3-4 and posterior disc bulges at L4-5 and L5-S1. Dr. Burger also noted there was a slight anterior inferior foraminal narrowing at L5-S1. Young also points to the testimony of Dr. Edward Tillett. Dr. Tillett opined that Young would have work-related limitations, including restricted bending, and no lifting greater than 10 pounds. Dr. Tillett also opined that

Young suffered a severe bilateral chondromalacia secondary to her work that was "total disabling to her."

The circuit court's appellate role in the appeal of an administrative action is to provide review, not reinterpretation. Kentucky Unemployment Ins. Comm'r v. King, 657 S.W.2d 250 (Ky.App. 1983). In this context, we note the judicial review of administrative action is concerned with the question of arbitrariness. Am. Beauty Homes Corp. v. Louisville and Jefferson Co. Planning and Zoning Comm'n, 379 S.W.2d 450 (Ky. 1964). Arbitrariness has many facets, but relevant to this appeal is whether the Board's decision to deny Young disability retirement benefits was supported by substantial evidence. See id. When substantial evidence exists in the record to support an administrative agency's action, the circuit court has no authority to overturn it. Kentucky State Racing Comm'n v. Fuller, 481 S.W.2d 298 (Ky. 1972).

The burden of proving entitlement to disability retirement benefits was upon Young. As such, Young must now demonstrate that the record compels a finding in her favor in order to be successful on appeal. See Bourbon Co. Bd. of Adj. v. Currans, 873 S.W.2d 836 (Ky.App. 1994).

We must agree with the circuit court that Young failed to demonstrate the record compels a finding in her favor. As

pointed out by the circuit court, the evidence upon whether Young suffered a disabling condition was conflicting:

In the period from 1997 to 2001, Ms. Young saw nine (9) different physicians about her allegedly debilitating conditions. Of those nine, only two, Dr. Tillett and Dr. Monsma, felt that Ms. Young was in any way unable to return to work. Neither of these physicians provided evidence that was so persuasive as to prevent a reasonable person from determining that Ms. Young was in fact able to perform her job. In addition, there was ample evidence in the record supporting the Board's decision. Dr. Stewart examined Ms. Young and assigned her a five percent (5%) impairment rating. A.R. at 41. In another examination, Dr. Gliess gave the plaintiff a zero percent (0%) impairment rating. A.R. at 292. Furthermore, the vast majority of the tests in the record indicate essentially normal results. The evidence as a whole does not preclude a finding that Ms. Young is ineligible for disability.

As the weight and credibility of evidence is within the sole province of the Board, we cannot say the record compels a finding that Young suffers from any physical or mental condition that would prevent her from performing the essential duties of her job as bus driver under Kentucky Revised Statutes 61.600. See New v. Commonwealth of Kentucky, Kentucky Bd. of Embalmers, 156 S.W.3d 769 (Ky.App. 2005).

Young also asserts she "has established that her disability was due to a job-connected injury." As Young failed to demonstrate she suffered from a physical or mental condition

that prevented her from performing the essential duties of her job, we deem this contention to be moot.

For the foregoing reasons, the circuit court's Order and Opinion upholding the final order of the Kentucky Retirement Systems, Board of Trustees, is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

William A. Blakey
Washington, DC

BRIEF FOR APPELLEE:

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