

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000499-MR

KENTUCKY RETIREMENT SYSTEMS

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 07-CI-01538

JODY LENEAVE

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON AND STUMBO, JUDGES; KNOPF,¹ SENIOR JUDGE.

CAPERTON, JUDGE: The Appellant, Kentucky Retirement Systems, appeals the February 2, 2009, opinion and order of the Franklin Circuit Court, reversing the decision of the Disability Appeals Committee of the Board of Kentucky Retirement Systems (hereinafter the Board), to deny the application of Appellee,

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

Jody Leneave, for disability retirement benefits pursuant to KRS 61.600. Having reviewed the record, the arguments of the parties, and the applicable law, we affirm.

Leneave began working in the County Employees Retirement Systems as a sheriff with the Logan County Sheriff's Department, a position which he held from 1994 to 1997. Thereafter, he accepted a position with the Pennyrile Narcotics Task Force. Leneave began in that position in March of 1997, and remained there until his employment was terminated on August 31, 2006. Leneave's job duties included investigations, arresting and detaining prisoners, and disassembling methamphetamine labs. As part of that job, Leneave had to frequently lift 80 pounds, and when disassembling labs, would lift up to 100 pounds. Leneave's job was classified by the hearing officer as medium to heavy in nature.

Leneave was off-work in August of 2003 for approximately six weeks as a result of neck and back surgery. Subsequently, he returned to work at light duty for six weeks. In April of 2004, Leneave again underwent neck and back surgery, after which time he was again off-work for six weeks and returned to light duty for six weeks. On December 14, 2005, Leneave was placed on light duty. As of his last date of paid employment, Leneave was filing, answering the telephone, and reviewing pseudoephedrine logs. A letter from Leneave's supervisor, dated May 17, 2006, confirmed that his job had been accommodated to meet his limitations.

Subsequently, however, after Leneave's application for disability had been denied, Leneave's director, Cheyenne Albro, issued a letter stating that the force had attempted to accommodate Leneave, and that he had become a burden and a liability to the force due to the nature of his job description. As a result, Leneave was terminated. Leneave's last day of paid employment was November 10, 2006.

As noted, Leneave applied for disability retirement benefits from KERS pursuant to KRS 61.600, alleging disability on the basis of degenerative disc disease, cervical spine fusion, alleged related neurological damage, neck pain, headaches, tingling and numbness down both arms, low back pain, alleged weakness and radiculopathy in both legs. Leneave's application was denied by the KERS Medical Review Board. Leneave appealed that denial and an administrative hearing was conducted at his request. The hearing officer, following the hearing and a review of the evidence, recommended that Leneave's application be denied.

In denying the application, the hearing officer found that while objective medical records did demonstrate a herniated disc in Leneave's lumbar spine, such a finding was not in and of itself a sufficient basis for a determination of disability pursuant to KRS 61.600, noting that a mere abnormality in testing does not equate to an inability to perform work duties. The hearing officer went on to note that the records of physical examination from Leneave's treating physicians did not demonstrate any physical limitations which would prevent Leneave from performing his job duties.

The hearing officer also stated that the functional capacity evaluation submitted by Leneave demonstrated he was capable of at least sedentary work. Additionally, the hearing officer stated that Leneave's testimony concerning his physical limitations and daily activities lacked credibility in light of evidence of his ongoing fishing, hunting, and boating activities, which were not sedentary in nature.² Furthermore, the hearing officer found that Leneave's claim of mental stress due to financial difficulties was suspect, in light of his ongoing expenditures towards the acquisition of boating equipment. Accordingly, the hearing officer found that the objective medical and psychological evidence did not establish entitlement to benefits by a preponderance of the evidence. Further, the hearing officer found that Leneave's mental health condition pre-existed his employment. Leneave appealed the findings of the hearing officer.

Thereafter, the Disability Appeals Committee of the Board of Trustees conducted a review of the hearing officer's decision, after which it accepted the report and recommended order of the hearing officer. In denying Leneave's application, the Board found that Leneave failed to provide objective medical evidence that he was permanently disabled by a mental or physical condition from the job that he held as of the last day of his paid employment. Leneave appealed

² Specifically, this included testimony from Leneave indicating that he had last went hunting or fishing prior to the time he filed for disability in April 2006, statements which were contradicted by exhibits admitted into the record indicating that he continued to fish and hunt through the present time, hoped to begin engaging in fishing tournaments, and was continuing to make various purchases associated with his fishing and boating hobbies. In addition, evidence submitted indicated that Leneave, although testifying to not having gone duck hunting since 2005, had actually purchased a duck hunting permit in September of 2006, and had actually gone duck hunting in January of 2007. Further, the evidence indicates, among other things, that Leneave reported a turkey kill two weeks before filing for disability retirement benefits.

the decision of the Board to the circuit court, which entered an opinion and order of reversal. It is from that order that KERS now appeals to this Court.

In *McManus v. Kentucky Retirement Systems*, 124 S.W.3d

454(Ky.App. 2003), this Court held that:

Determination of the burden of proof also impacts the standard of review on appeal of an agency decision. When the decision of the fact-finder is in favor of the party with the burden of proof or persuasion, the issue on appeal is whether the agency's decision is supported by substantial evidence, which is defined as evidence of substance and consequence when taken alone or in light of all the evidence that is sufficient to induce conviction in the minds of reasonable people. Where the fact-finder's decision is to deny relief to the party with the burden of proof or persuasion, the issue on appeal is whether the evidence in that party's favor is so compelling that no reasonable person could have failed to be persuaded by it.

McManus v. Kentucky Retirement Systems, 124 S.W.3d 454, 458 (Ky.App. 2003).

Further, in *Bowling v. Natural Resources*, 891 S.W.2d 406 (Ky.App. 1994), we held that the trier of facts in an administrative agency is afforded great latitude in its evaluation of the evidence heard and the credibility of witnesses appearing before it. Indeed, it is the exclusive province of the administrative trier of fact to pass upon the credibility of witnesses and the weight of the evidence. *See 500 Associates, Inc. v. Natural Resources and Environmental Protection Cabinet*, 204 S.W.3d 121, 132 (Ky.App. 2006).

The law of this Commonwealth is clear that the circuit court cannot consider new or additional evidence, nor substitute its judgment as to the credibility of the witnesses, or the weight of the evidence concerning questions of

fact. *See Mill Street Church of Christ v. Hogan*, 785 S.W.2d 263 (Ky.App. 1990).

Likewise, this Court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. *See Louisville Edible Oil Products, Inc. v. Revenue Cabinet Commonwealth of Kentucky*, 957 S.W.2d 272, 273 (Ky.App.1997). We review this matter with these standards in mind.

On appeal, KERS argues that substantial evidence existed to support its decision to deny Leneave's application for benefits, and that the circuit court had no authority to overturn the hearing officer's determination as to credibility. In response, Leneave argues that the circuit court was correct in overturning the order of the hearing officer, as the hearing officer failed to base his decision on objective medical evidence, and impermissibly substituted his own judgment for that of qualified medical professionals. Further, Leneave argues that his credibility as a witness does not matter, in light of the objective medical evidence in the record, and that the hearing officer was in error in using Leneave's credibility as a basis for denying benefits.

We note that pursuant to KRS 13B.090(7), it was Leneave's burden to establish entitlement to benefits by a preponderance of the evidence. The hearing officer found that he did not do so. On appeal, Leneave argues that there is ample medical evidence in the record detailing his physical limitations. Specifically, Leneave directs this court to his MRI films, diagnoses of degenerative disc disease, reports of chronic neck and back pain, surgery notes, repeated attempts by

physicians to perform a cervical fusion, rehabilitation records, and “medical notes”.

Further, Leneave states that the “best objective evidence” for determining whether he is in fact disabled is the Medical Source Statement of Ability to do Work-Related Activities completed by Drs. Naimoli and Caballero.³ Leneave also directs this Court to an August 18, 2006, Functional Capacity Evaluation.⁴ Essentially, Leneave asserts that on the basis of this evidence, he can at best, lift 20 pounds occasionally, and frequently lift 10 pounds or less, while also being unable to sit or stand for long periods of time. Accordingly, Leneave states that he is unable to perform even sedentary work.

Having reviewed the record in detail, including the medical records cited by Leneave, and the order of the court below, we are compelled to affirm. In so doing, we recognize that Leneave’s burden on appeal was high, but we believe it was satisfied based on the objective evidence of record. In reviewing the record, it is clear that Leneave underwent two fusions of his cervical spine, as a result of a

³ Leneave argues that Dr. Naimoli stated therein that Leneave could only lift 20 pounds occasionally, and less than 10 pounds frequently. From a standing and walking standpoint, the statement recommends that Leneave stand or walk less than two hours of an eight hour day with normal breaks. Further, Dr. Naimoli indicated that at most, Leneave could sit for 45 minutes and then he must lie down for 15 minutes. Leneave was apparently advised against balancing, kneeling, crouching, crawling, or stooping, and was told to climb only occasionally.

Further, Leneave states that Dr. Caballero also places limitations upon him which preclude work, by limiting his capacity for lifting to 20 pounds, and his ability to stand for less than 2 hours, as well as determining that he can sit no more than six hours. According to Leneave, Dr. Caballero also believes him to have limitations of the upper extremities due to radiculopathy and herniation, as well as chronic pain following cervical fusion. Further, Dr. Caballero apparently found Leneave to be limited in reaching, handling, fingering, and feeling, as well as limitations with respect to temperature extremes, vibrations, and hazards, and a limited range of motion.

⁴The FCE essentially places Leneave’s limitations at less than a sedentary level.

herniated disc found by MRI exam to be compressing his spinal cord. The record further establishes that as a result of these procedures, Leneave was placed under significant and numerous restrictions.

It is further clear that although Leneave attempted to return to light duty work, his own supervisor believed him to be incapable of performing the tasks associated with the light duty accommodations. While KERS makes note of the fact that the supervisor issued this letter only after Leneave's application was initially denied, we do not believe that taken alone this stands as a basis to find that the letter was not written in good faith.

Accordingly, in light of the cumulative evidence of record, we are compelled to agree with the circuit court that the decision of the hearing officer was not supported by substantial evidence. It is well-established in this Commonwealth that an action taken by an administrative agency is arbitrary if not supported by substantial evidence. *See Kentucky Board of Nursing v. Ward*, 890 S.W.2d 641, 642-43 (Ky.App.1994). Further, it is clear that substantial evidence is that which has sufficient probative value to induce conviction in the minds of reasonable men. *Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972)(quoting *O'Nan v. Ecklar Moore Express, Inc.*, 339 S.W.2d 466 (Ky. 1960)). In the matter *sub judice*, our review of the record does not reveal evidence of a nature substantial enough to rebut the medical evidence submitted on Leneave's behalf. Therefore, we must affirm.

Having so found, we nevertheless feel compelled to briefly address the issue of Leneave's credibility. We disagree strongly with Leneave's assertion that his truthfulness or lack thereof is not relevant to these matters. While it may be true that no specific evidence was submitted concerning the exertional requirements of his hunting and fishing activities,⁵ the fact remains that Leneave provided testimony regarding his participation in these activities that was construable as conflicting with the medical evidence.

In finding as we feel compelled to do, we wish to make it clear that we do not desire to reward or commend falsification of testimony, or a denial of one's true physical capabilities. Indeed, we understand why the revelation of Leneave's participation in such activities despite his claims to the contrary would lead the hearing officer to suspect him of being capable of an activity level greater than that which he is willing to acknowledge.

Nevertheless, the issue before the agency was not whether Leneave was able to participate in those recreational activities, but instead, whether he was able to perform the duties of his job as a narcotics officer, or a job of similar duties. In reviewing the record, we believe the circuit court to have correctly determined that the objective medical evidence established that he was not. As a result, we are bound to affirm.

⁵ It is of importance that no evidence was offered to prove the physical exertion required for Leneave's to participate in these activities. Had this not been so, a different decision may have been reached by our Court.

Wherefore, for the foregoing reasons, we hereby affirm the March 10, 2009, opinion and order of the Franklin Circuit Court, the Honorable Phillip J. Shepherd, presiding.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Katherine Rupinen
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BRIEF FOR APPELLEE:

Brent Yonts
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