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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000680-MR

KENTUCKY RETIREMENT SYSTEMS — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 07-CI-00689

ZACHARY BISSELL — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, NICKELL, AND VANMETER, JUDGES.

NICKELL, JUDGE: Kentucky Retirement Systems appeals the March 6, 2008, opinion and order of the Franklin Circuit Court, overruling the Systems's Board of Trustee's Disability Appeals Committee's denial of Zachary Bissell's application for disability retirement benefits pursuant to KRS[1] 61.600. The circuit court concluded evidence from Bissell's treating physician, work supervisor and a

[1] Kentucky Revised Statutes.

compliance officer established he was permanently incapacitated and could not return to his former position as a woodchipper for Louisville Metro government. Through its medical reviewers, the System maintains Bissell's condition is not permanent and accommodations are available. Having reviewed the record, the argument of the parties, and the applicable law, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Bissell began working for Louisville Metro as a woodchipper in December of 1987. When not chipping wood, he was part of a three-person crew picking up junk and debris. On November 20, 2004, Bissell sustained a work-related injury while helping an employee lift a washing machine as part of the junk work detail. He sustained an L5-S1 recurrent disc herniation for which Dr. Jonathan Hodes performed a 360-degree lumbar spinal fusion and discectomy with instrumentation. In December of 2005, Bissell was diagnosed with 1) degenerative disc disease lumbar spine and 2) chronic pain syndrome lumbar spine. He was placed on a permanent fifty pound lifting restriction and assigned a twenty-three percent[2] permanent impairment rating according to the AMA Guidelines, 5th edition. Two years later, Bissell was still taking prescription medication for lower back pain.

[2] Ten percent of the rating was attributed to the 2004 workplace injury. The other thirteen percent resulted from a 1999 work injury.

Bissell applied for disability retirement benefits[3] on August 11, 2005. Dr. William P. McElwain was the first of three System medical reviewers to recommend denial. He found discrepancies in the amount of weight Bissell was required to lift and believed Bissell could be accommodated by assigning him "odd jobs." The second reviewer, Dr. James D. Quarles, recommended denial on the belief that Bissell would improve, his condition was not permanent,[4] Bissell did not give a full effort during his functional capacity exam,[5] Dr. Hodes had stated Bissell could return to work, and Louisville Metro was willing to accommodate Bissell. The third reviewer, Dr. William Keller, concluded Bissell was not permanently disabled but acknowledged a fifty pound weight limit was "prudent" for anyone with Bissell's type of back injury. Like Dr. McElwain, Dr. Keller stated Bissell could perform "lesser" jobs. Bissell's application was ultimately denied by the Board in November 2005 and again on reconsideration in May 2006.

Bissell requested an administrative hearing which was convened in September 2006. At the hearing, Bissell's supervisor, Dave Wolheb, confirmed

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[3] Bissell settled a separate workers' compensation claim on the basis that he was physically unable to return to his former job. The settlement was computed using the 3.0 factor applicable to one who is unable to return to his prior position. The hearing officer accepted and entered as evidence the Form 110-I settlement agreement between Louisville Metro and Bissell in which the former employer admitted Bissell was incapable of returning to work as a woodchipper.

[4] Bissell's condition has persisted well over twelve months which constitutes a permanent condition under KRS 61.600(5)(a).

[5] The fifty pound weight restriction resulted from a functional capacity evaluation of Bissell on July 14, 2005. Bissell carried fifty-two pounds with his right upper extremity and the same on his left, but he could carry only forty pounds with both. Because Bissell suffered a prior back injury in 1999, it was suggested he did not want to risk re-injury during the test.

Bissell's job required him to lift more than fifty pounds, and because of the fifty-pound lifting restriction, Louisville Metro could not accommodate him. Wohleb also confirmed the job required Bissell to stand seven of eight hours each day without the option of alternating between sitting and standing. A compliance specialist for Louisville Metro, Angela Clark, echoed Wolheb's testimony that Bissell could not be accommodated due to the lifting restriction, a conclusion she reached after speaking personally with both Wohleb and Bissell, and collecting medical information from Dr. Hodes. As directed by Clark, Bissell submitted an employment application to Louisville Metro but he was unqualified for any other position and ultimately submitted a letter of resignation on January 10, 2006, at his employer's request.

After finding Bissell's job was classified as "heavy" and that he had suffered a work-related injury to his low back since joining the System, the hearing officer found specifically:

> 6. The objective medical evidence does not establish by a preponderance of the evidence that [Bissell] is totally and permanently disabled form (sic) his former job duties by reason of the September 20, 2004 work-related injury nor that he is likely to remain so for a period of less than 12 months from his last date of paid employment.

In December of 2006, the hearing officer recommended denial of Bissell's application. Despite Bissell's filing of exceptions, the Board of Trustees of the Kentucky Retirement Systems adopted the hearing officer's findings of fact and conclusions of law. On March 29, 2007, the Board entered its final order denying

Bissell's application for disability retirement benefits because he had failed to provide objective medical evidence of permanent disability due to a mental or physical condition arising from his job as a woodchipper. Bissell appealed to the Franklin Circuit Court, disputing the hearing officer's failure to award benefits when the uncontradicted evidence established he had suffered a permanent injury for which Louisville Metro could not accommodate him.

Bissell had accumulated 159 months of membership in the County Employees Retirement System as of January 31, 2006, his last date of paid employment. This appeal followed.

LEGAL ANALYSIS

This appeal presents a unique scenario pitting an injured employee and his former employer against the System. Both Bissell and Louisville Metro *agree* Bissell cannot return to his position as a woodchipper due to a fifty pound lifting restriction for which Louisville Metro cannot provide an accommodation. In contrast, the System suggests Bissell is malingering and believes he can request help from co-workers when lifting heavy items and can use equipment, such as a Bobcat, to perform heavy tasks.

In *McManus v. Kentucky Ret. Sys.*, 124 S.W.3d 454, 458 (Ky. App. 2003), we explained how determining the burden of proof impacts our review 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.

Further, in *Bowling v. Natural Res. & Envtl. Prot. Cabinet*, 891 S.W.2d 406, 410 (Ky. App. 1994), we held an administrative trier of fact is "afforded great latitude" in evaluating the evidence heard and the credibility of the 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 Assocs., Inc. v. Natural Res. and Envtl. Prot. Cabinet*, 204 S.W.3d 121, 132 (Ky. App. 2006). Thus, a 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, 266 (Ky. App. 1990) (citing *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985)). Similarly, we shall not substitute our judgment for that of an agency as to the weight of the evidence on questions of fact. *See Louisville Edible Oil Prods., Inc. v. Revenue Cabinet, Commonwealth of Kentucky*, 957 S.W.2d 272, 273 (Ky. App. 1997). To prevail, Bissell had to prove he was entitled to the benefits he sought by a preponderance of the evidence. KRS 13B.090(7).

Per *McManus*, the issue on appeal is whether the evidence in Bissell's favor was so compelling that no reasonable person could fail to be persuaded by it. We hold it was.

The hearing officer's opinion and recommendation was based upon conjecture and supposition, not substantial evidence. The uncontroverted evidence established Louisville Metro *could not* accommodate Bissell's lifting restriction. Apart from the lifting restriction, there was no evidence Louisville Metro could accommodate Bissell's inability to stand for long periods of time without incurring significant pain. In contrast, the System's three medical reviewers concluded Louisville Metro was willing to and *could* accommodate Bissell's permanent lifting condition because a Bobcat was available to lift heavy items and Bissell could ask the other members of his three-person crew to help in lifting heavy objects. While that may seem perfectly logical to a person sitting in a medical office with no vocational expertise, we cannot say it is practical for the person in the field, especially when Bissell's supervisor, the person in the best position to know the realities of the job, testified unequivocally that no accommodation was available. We find it ironic that Bissell was *injured while helping* another crewmember lift a washing machine. Thus, the mere availability of another pair of hands is not the answer to putting Bissell back on the job. Without question, Bissell satisfied his burden by more than a preponderance of the evidence. Furthermore, based upon the record before us, we cannot say the hearing officer's opinion and recommendation was based upon substantial evidence.

For the foregoing reasons, the opinion and order of the Franklin Circuit Court, finding in favor of Bissell, is AFFIRMED.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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