

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002264-MR

LYNN D. FRASURE

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM GRAHAM, JUDGE
ACTION NO. 98-CI-01592

KENTUCKY RETIREMENT SYSTEMS

APPELLEE

OPINION
REVERSING AND REMANDING
** **

BEFORE: DYCHE, GUIDUGLI AND TACKETT, JUDGES.

GUIDUGLI, JUDGE. Lynn D. Frasure (Frasure) appeals from an opinion and order of the Franklin Circuit Court entered September 2, 1999, which affirmed a decision of the Kentucky Retirement Systems (KRS) denying his application for disability retirement benefits. We reverse the opinion and order of the Franklin Circuit Court and remand this matter back to the Board of Trustees of KRS with instructions to adopt the findings of fact, conclusions of law, and recommendation of the hearing officer entered September 14, 1998.

Frasure was employed by the Kentucky Department of Highways (DOH) as a light equipment operator. His last date of paid employment was November 15, 1996. He filed a Notice of Retirement on December 18, 1996, seeking disability retirement benefits. In his notice, Frasure alleged:

I have torn cartilage in my left knee as well as degenerative arthritis. I have attempted to improve my condition and regain my ability to work through surgery and physical therapy; However, [sic] my condition has worsen [sic]. I experience severe chronic pain and numbness in my knee which extends down to my foot and up to my hip. I an unable to stand or sit for very long and must continue to frequently change position to try to get some relief. Medication does not control the pain effectively. I am unable to sleep comfortably, am frequently awaken [sic] by pain and am often tired through the day. Additionally I have been diagnosed with sleep apnea and kidney and bladder disease.

In describing his job, Frasure stated that his employment consisted of flagging traffic, standing for long periods of time, manual labor, shoveling hot mix, cleaning culverts, and cribbing brakes. He indicated that he was required to stand 6-7 hours each day and sit 1-2 hours. He further reported that his job required him to bend, reach, stoop/kneel/crouch/crawl and handle/finger/feel one-third to two-thirds of the time, and climb/balance up to one-third of the time. Frasure indicated that he had to lift and carry guardrails, brakes and snowplow blades, that his job required lifting between 0-50 pounds one-third to two-thirds of the time and over 50 pounds one-third of the time.

Frasure's supervisor at DOH also provided a job description. He indicated that Frasure was required to stand 5

hours each day and sit 4 hours. In his estimation, Frasure was required to bend, reach, and handle/finger/feel one-third of the time, and that his job involved some climbing/balancing/ and stooping/kneeling/crouching/crawling. Attached to Frasure's notice was a medical release statement signed by a physician whose signature is illegible indicating that Frasure could return to work only if DOH was able to provide accommodations allowing him to avoid prolonged standing, walking and climbing.

A completed RS-22 was submitted from Dr. Dale Adkins (Dr. Adkins). Dr. Adkins indicated that Frasure was physically incapacitated from performing his employment and that the incapacity would continue for not less than 12 months. Dr. Adkins diagnosed degenerative arthritis in Frasure's left knee along with torn cartilage, and noted that he had poor recovery from surgery. Dr. Adkins also noted that Frasure complained of persistent pain despite the fact that surgery had been performed.

Medical records from Dr. Anbu Nadar (Dr. Nadar) indicate that Frasure was suffering from loose body degenerative arthritis in his left knee. Dr. Nadar performed surgery on Frasure's left knee on February 27, 1996. Office notes from Dr. Nadar demonstrate normal recovery from the surgery, although Frasure still complained of knee pain and swelling. On Frasure's last office visit, the date of which cannot be determined, Frasure stated that he did not believe he could return to work due to significant pain and swelling. Dr. Nadar noted the absence of swelling or loss of range of motion. Dr. Nadar reported that he told Frasure he had reached maximum medical

improvement and that if he was unable to return to his former job he should look for different work. Dr. Nadar did not complete the RS-22 form.

Medical records were also submitted from Dr. Larry Munch (Dr. Munch), who treated Frasure for bladder problems. In a letter to KRS, Dr. Munch stated:

Although he does have dysfunction in his bladder functions, there is no apparent kidney disease and no obvious reason from my standpoint that he cannot perform regular duties although may [sic] require some special attention in regard to his urinary habits.

Dr. Munch did not complete the RS-22 form.

By letter dated June 18, 1997, Frasure was informed by KRS that the Medical Review Board had denied his request for disability retirement benefits. Frasure appealed from the Medical Review Board's determination and requested a hearing.

Following his notice of appeal, Frasure filed a copy of a "Notice of Decision - Fully Favorable" from the Social Security Administration. Frasure also submitted additional records from Dr. Adkins. These records appear to be Dr. Adkins's entire file on Frasure, and some of the records are not relevant to Frasure's claim. The records also consist of numerous hand written office notes which are for the most part illegible. There is one handwritten, undated, note stating that Frasure is disabled due to degenerative arthritis and torn cartilage in the left knee. Another handwritten note dated February 23, 1996, indicated that Frasure reported being hurt at work after slipping on ice. The

records also show that Frasure underwent some studies for sleep apnea.

A physical RFC form completed by Dr. Adkins on September 16, 1997, indicated that Frasure's left knee problems required restrictions on lifting and carrying, pushing and pulling, and standing and walking. He also put restrictions on Frasure's ability to climb, balance, stoop, crouch, kneel or crawl. In regard to standing, Dr. Adkins indicated that Frasure could stand and/or walk for a total of six to eight hours during an eight hour work day, but that he should only do so without interruption for two hours at a time.

A physical RFC form from Dr. Nadar dated September 18, 1997, was also submitted. Dr. Nadar's findings were similar to those reported by Dr. Adkins, with the exception that Dr. Nadar listed environmental restrictions in regard to heights, moving machinery, and humidity. In regard to standing, Dr. Nadar indicated that Frasure should stand and/or walk no more than three hours in an eight hour work day. KRS objected to the filing of Dr. Nadar's report on the ground that fifteen months had passed since the date Dr. Nadar last saw Frasure and the date he filled out the report. The hearing officer allowed Dr. Nadar's report to be filed, but noted that "considering the length of time that has elapsed since Dr. Nadar last treated Claimant the undersigned anticipates that this particular piece of evidence shall be accorded relatively little weight in the consideration of Claimant's entitlement to a declaration of disability retirement."

A narrative report from Dr. Joseph Rapier (Dr. Rapier) dated March 13, 1997, also appears in the file. Dr. Rapier performed an independent orthopedic evaluation of Frasure in conjunction with a disability claim Frasure filed against a disability insurance policy carried on a vehicle he owned. Dr. Rapier indicated that Frasure told him he injured his left knee at work in January 1996 when he slipped on ice. Frasure complained of pain and swelling which would become worse with squatting, weight bearing activities, and rising from a sitting position. Dr. Rapier diagnosed degenerative osteoarthritis of the left knee, and indicated that Frasure would continue to have knee pain. He also indicated that the torn cartilage in Frasure's knee was attributable to the work injury, and that the arthritis was aggravated by the injury. In Dr. Rapier's opinion, Frasure would not be able to "return to a job which caused him to be on his feet most of the day." Dr. Rapier restricted Frasure from standing and walking for longer than one hour and from sitting more than one hour at a time. He also indicated that Frasure should not stand or walk more than one hour during an eight hour work day.

In a memorandum dated November 2, 1997, to KRS, Dr. John Rawlings indicated that he had evaluated Frasure's medical evidence and would recommend denial of benefits. According to Dr. Rawlings, Frasure's bladder problem would cause more inconvenience than disability and his sleep apnea would only foreclose commercial driving occupations. In regard to Frasure's knee problem, Dr. Rawlings found that while he does have

moderately severe degenerative arthritis, "his symptoms are out of proportion to the objective findings. He should be capable of medium work activity. Based upon the description of his job by his supervisor, he should be able to return to his job with slight modifications[.]"

A hearing on Frasure's claim was held on September 23, 1997. Frasure described his job duties and related the details of his work-related accident. Frasure stated that he is in constant pain, and that he has problems with his knee swelling. He indicated that sitting and standing for prolonged periods of time is painful, and that his condition has worsened over the last several months. In regard to his bladder problem, Frasure testified that his co-workers would get angry at him for taking a long time to use the bathroom. Frasure stated that his problems with sleep apnea caused problems with dizziness and with falling asleep while driving or working. He also related having problems with his stomach as well as high blood pressure.

On February 3, 1998, the hearing officer entered his findings of fact, conclusions of law, and recommended order in which he recommended that Frasure's application be denied. In reaching his decision, the hearing officer noted that he found Dr. Nadar's findings on the RFC form to be unreliable and that he did not give Dr. Nadar's opinion as to restrictions serious consideration. The hearing officer found that Frasure had presented no evidence which would show he was disabled as a result of his bladder or sleep apnea problems. In regard to his knee condition, the hearing officer stated:

Frasure's subjective complaints of pain are well-documented in the record; however, Frasure has not presented objective medical evidence to support a physical dysfunction so severe that it would prevent him from performing his previous work duties or a job with similar duties. Although Frasure offers Dr. Rapier's assessment as an independent evaluation, Dr. Adkin's functional assessment is the most current capacity evaluation of record, and the undersigned places greater weight of [sic] the more recent assessment made by Frasure's own family and treating physician (Adkins) who has continued to see Frasure approximately every three months. Dr. Adkins made no finding of a functional limitation based upon any physiological finding or condition. Instead, the limitations were rendered apparently based solely on Frasure's complaints of left knee pain. Dr. Nadar's medical entry of June 10, 1996 . . . also supports the conclusion that Frasure has failed to prove that he is totally and permanently incapacitated[.]

Frasure sought further review of the hearing officer's recommendation before the Disability Appeals Committee. On March 11, 1998, the Committee sent a letter to the hearing officer advising him that Frasure's claim was being remanded. The letter provided that while the Committee had not reached a determination on Frasure's claim, remand was necessary to gain additional information for clarification. The letter further stated:

Specifically, the Committee wishes to offer Mr. Frasure the opportunity to undergo an independent orthopaedic examination and functional capacity evaluation at the Systems' expense.

. . . .

Upon receipt of the additional information, you will be requested to reconsider the record in its entirety and render your [report] to this officer within sixty (60) days.

In accordance with the Committee's directive, Frasure was evaluated by Dr. Kooros Sajadi on June 29, 1998. Dr. Sajadi noted Frasure's complaints of pain, swelling, and numbness in the left knee. On exam, Frasure's left knee was tender, and crepitation was noted. Range of motion showed full extension and flexion to 60 degrees. Dr. Sajadi diagnosed traumatic arthritis of the left knee with pain and limitation of motion, along with hypertension and obesity. In Dr. Sajadi's opinion:

It is my opinion that Mr. Frasure has sustained reaggravation of a pre-existing degenerative arthritis of the left knee which resulted in traumatic arthritis. I believe with his pain and limitation of motion his obesity is an aggravating factor and failure of rehab program to mobilize the knee is also an added factor to his functional impairment. I don't think he can perform any duty which requires prolonged standing, stooping, kneeling, squatting, climbing steps, or walking on uneven surfaces.

Dr. Sajadi also indicated that Frasure was incapacitated as of November 15, 1996, that the disability would continue for at least twelve months from that date, and that the condition was a result of bodily injury, illness, or disease.

After reviewing Dr. Sajadi's report, the hearing officer entered his second report and recommendation on September 14, 1998, this time recommending that Frasure's application be approved. In so holding, the hearing officer stated:

Dr. Sajadi's report . . . adequately addresses the undersigned's [prior concerns]. Dr. Sajadi's examination was conducted independently of either party to this action, and Sajadi's report is the latest assessment of Frasure's functional abilities filed in this record. As such, of the objective medical evidence to be considered, Dr.

Sajadi's opinions are given the greatest credence by the undersigned.

. . . .

While the medical evidence indicates that prior to his injury Frasure suffered from degenerative arthritis, Frasure was able to perform the responsibilities of his position up until the time of his fall. . . . Following the fall, Frasure's subjective complaints of pain were corroborated by the physical examination conducted by both Drs. Rapier and Sajadi. Thus, Frasure has met his burden by proving that he has suffered a substantial aggravation to his pre-existing condition.

Despite the hearing officer's findings on remand, on November 24, 1998, the Board of Trustees entered a report and order denying Frasure's application. In so holding, the Board stated:

Frasure's subjective complaint of pain are well-documented in the record; however, Frasure failed to present objective medical evidence to support the find of a physical dysfunction so severe that it would prevent him from performing his previous work duties or job with similar duties. Dr. Adkins submitted a function assessment that is the most contemporaneous capacity evaluation of record, and the Board places greater weight of the assessment made by Frasure's own family and treating physician who has continued to see Frasure approximately ever three months. Dr. Adkins found that Claimant could stand 6 to 8 hours in an eight hour work day. Dr. Adkins made no finding of a functional limitation based upon any physiological finding or condition; instead, the limitations were rendered apparently based solely on Frasure's complaints of left knee pain. Dr. Nadar's last medical entry of June 10, 1996, stated that Frasure's left knee wound healed well, that he had no significant swelling or effusion, that his range of motion was comparable to the opposite side, that the joint was stable, and that he had bony crepitus. This post-operative treatment record supports the

conclusion that Frasure failed to prove that he is totally and permanently incapacitated from performing his duties as Light Equipment Operator for the Kentucky Department of Highways as of his last date of paid employment on November 15, 1996.

The trial court affirmed the Board's opinion, and this appeal followed.

We note that the trial court set forth the proper standard of review in this case, and therefore adopt the following portion of the trial court's opinion and order as our own:

When this Court is presented with an appeal from an administrative agency, the Court's function is to ensure that the agency did not act arbitrarily in that its decision is based on substantial evidence of fact in the record and that it did not apply the wrong rule of law. Kentucky Unemployment Insurance Comm'n. v. King, Ky. App., 657 S.W.2d 250 (1983). Evidence is substantial if "when taken alone or in light of all the evidence it has sufficient probative value to induce conviction in the minds of reasonable men." Kentucky Racing Comm'n. v. Fuller, Ky., 481 S.W.2d 298, 308 (1972) (citing Blankenship v. Lloyd Blankenship Coal Co., 463 S.W.2d 62 (1970)). Simply put, ". . . the trier of facts in an administrative agency may consider all the evidence and choose the evidence that he believes." Bowling v. Natural Resources, Ky. App., 891 S.W.2d 406, 410 (1995); Comm. Transp. Cab. v. Cornell, Ky. App., 796 S.W.2d 591, 594 (1990).

We would also note that in order to prevail on appeal, Frasure must show that "the evidence was so overwhelming, upon consideration of the entire record, as to have compelled a finding in his favor." Wolf Creek Collieries v. Crum, Ky. App., 673 S.W.2d 735, 736 (1984). Having reviewed the record on

appeal, we believe that the evidence compels a finding that Frasure is entitled to disability retirement benefits.

The evidence shows that Frasure's employment with DOH requires him to be on his feet for significant periods of time during the course of the work day. All of the medical evidence is in agreement that Frasure sustained an injury to his left knee, and that it continues to be problematic. All of the doctors who have seen Frasure either in conjunction with this claim or other claims have given restrictions on standing and walking. We especially note that Dr. Rapier, who saw Frasure for independent evaluation, Dr. Adkins, and Dr. Nadar indicated the need for restrictions on Frasure's ability to stand and walk for long periods of time. Based on our review of the record on appeal, we agree with Frasure that both the Board and the trial court erred in denying his petition for disability retirement benefits.

Having considered the parties' arguments on appeal, the opinion and order of the Franklin Circuit Court is reversed and we order that this matter be remanded back to the Board of Trustees of KRS with instructions to adopt the findings of fact, conclusions of law, and recommendation of the hearing officer entered September 14, 1998.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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