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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002186-MR

KIMBERLY LANHAM

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER J. CRITTENDEN, JUDGE
ACTION NO. 97-CI-01059

KENTUCKY RETIREMENT SYSTEMS

APPELLEE

OPINION
REVERSING AND REMANDING
** ** * * * * *

BEFORE: JOHNSON, McANULTY AND MILLER, JUDGES.

JOHNSON, JUDGE: Kimberly Lanham appeals from an opinion and order of the Franklin Circuit Court entered on August 17, 1998, which denied her petition for judicial review of the denial of her application for disability retirement benefits by the Kentucky Retirement Systems. Having concluded that the Retirement Systems denial of benefits was contrary to law and not based on substantial evidence, we reverse and remand.

Lanham, who was born on May 4, 1959, began her employment with the Marion County Board of Education as a

Volunteer Services Coordinator on September 1, 1989. According to the hearing officer's report and recommended order, Lanham "indicated that 50% of her job was teaching adults to read and the other 50% was training other adults to teach and recruit volunteers for assisting with reading." Her duties also included: (1) "driving to various locations within Marion County to provide either training or direct services to residents for the Literacy Program" and (2) "carry[ing] books in her trunk which required her to take the books from the building and plac[ing] them in her trunk, and then at her stop tak[ing] the books out of the trunk." Lanham estimated that normally the books she carried weighed approximately 25 pounds, but on some occasions they weighed as much as 50 pounds. Lanham has not challenged the hearing officer's finding of fact that under KRS¹ 61.600 her job was classified as "light work."²

In February 1996, Lanham began experiencing fatigue, lack of concentration and memory loss. On February 13, 1996, Lanham visited her primary care physician, Dr. Brian F. Scott.

¹Kentucky Revised Statutes.

²"Light work" is defined as "work that involves lifting no more than twenty (20) pounds at a time with frequent lifting or carrying of objects weighing up to ten (10) pounds. A job shall be in this category if lifting is infrequently required but walking and standing are frequently required, or if the job primarily requires sitting with pushing and pulling of arm or leg controls."

Dr. Scott diagnosed Lanham with "[m]yalgias [sic],³ FUO,⁴ lymphadenopathy⁵ and RUQ⁶ tenderness."⁷ Based on Dr. Scott's advice, she stayed off work beginning on March 11, 1996.⁸

On April 1, 1996, Lanham presented herself to Dr. Kelly Cole, a rheumatologist, with complaints of "right pleuritic chest pain and severe fatigue." Dr. Cole determined that Lanham had "[p]ositive ANA⁹ with arthralgias [sic]¹⁰ and myalgias [sic], as well as pleurisy,¹¹ adenopathy,¹² low-grade fevers and fatigue."

³"Myalgia" is defined as "pain in a muscle or in several muscles."

⁴Fever of undetermined origin.

⁵"Lymphadenopathy" is defined as "a disease or abnormality of the lymph nodes, but usually a simple enlargement due to absorption of infected material from neighboring sites."

⁶Right upper quadrant.

⁷Lanham saw Dr. Scott on three other occasions. Lanham continued to have a low grade fever and myalgia and Dr. Scott's diagnosis remained consistent.

⁸Lanham's last day of paid employment was April 22, 1996. Lanham asked that she be allowed to work out of her home so she could eventually return to work full-time, however, as her fatigue and pain continued to worsen, she had to stop working completely.

⁹Anti-nuclear antibodies.

¹⁰"Arthralgia" is defined as "pain in one or more joints."

¹¹"Pleurisy" is defined as "inflammation of the pleura, usually with fever, painful and difficult respiration, cough and exudation of fluid or fibrinous material into the pleural cavity."

¹²"Adenopathy" is defined as "any disease or enlargement involving glandular tissue, especially one involving the lymph nodes."

A report from Ms. Lucky Collins, a social worker, stated that Lanham was depressed due to the stress of her illness and her change of lifestyle. She noted that Lanham had a lack of physical strength and diagnosed her as having an adjustment disorder with depression.

In June 1996, Lanham was seen by Dr. Robert Fallis, of the Cardinal Hill Rehabilitation Hospital/Multiple Sclerosis Clinic, for purposes of testing for multiple sclerosis. After reviewing several of the previous tests performed on Lanham by other doctors, Dr. Fallis concluded that Lanham was suffering from "chronic fatigue" and "chronic lumbar strain."

In August 1996, Lanham saw Dr. William D. Kirk, a primary care physician, who diagnosed her with chronic fatigue, depression and an "undefined auto immune disorder." In his initial report, Dr. Kirk noted that Lanham was "mentally or physically incapacitated," but the incapacity was "expected to last for less than 12 months." However, Dr. Kirk also opined that her prognosis was "poor."

In September 1996, prior to the medical review board's denial of Lanham's claim, Dr. Kirk completed a second medical disability report in which he stated that "since the last day of paid employment. . . [Lanham] has been: [m]entally or physically incapacitated to engage in the job which [she] held as of [her] last day of paid employment, or a job of like duties, and such incapacity is expected to continue for not less than 12 months from [her] last day of paid employment, . . ." Dr. Kirk's

diagnosis was "chronic fatigue, unspecified inflammatory disorder;" and his prognosis was "disabled indefinitely."

Lanham filed her application for disability retirement benefits on May 14, 1996.¹³ On December 12, 1996, the Retirement

¹³KRS 61.600 reads in pertinent part:

(1) Any person may qualify to retire on disability, subject to the following conditions:

. . .

(2) Upon examination of the objective medical evidence by licensed physicians pursuant to KRS 61.665, it shall be determined that:

(a) The person, since his last day of paid employment, has been mentally or physically incapacitated to perform the job, or jobs of like duties, from which he received his last paid employment. In determining whether the person may return to a job of like duties, any reasonable accommodation by the employer as provided in 42 U.S.C. sec. 12111(9) and 29 C.F.R. Part 1630 shall be considered;

(b) The incapacity is a result of bodily injury, mental illness, or disease. For purposes of this section, "injury" means any physical harm or damage to the human organism other than disease or mental illness;

(c) The incapacity is deemed to be permanent; and

(d) The incapacity does not result directly or indirectly from bodily injury, mental illness, disease, or condition which pre-existed membership in the system or reemployment, whichever is most recent. For purposes of this subsection, reemployment shall not mean a change of employment between employers participating in the retirement systems administered by the Kentucky Retirement Systems with no loss of service

(continued...)

Systems denied Lanham's claim for disability retirement benefits on the grounds that she presented no objective medical evidence¹⁴ of an impairment that would prevent her from performing her usual work activity. On February 18, 1997, a hearing was held before a hearing officer for the Retirement Systems. In his report and recommended order dated April 21, 1997, the hearing officer's conclusions of law stated that Lanham "is not entitled to disability retirement benefits pursuant to KRS 61.600 since she has failed to establish by objective medical evidence the existence of a permanent physical impairment which would prevent her from performing her former job as a Volunteer Services Coordinator, or a similar job from which she received her last paid employment." Lanham filed exceptions to the hearing officer's report. The exceptions were denied on June 10, 1997,

¹³ (...continued)
credit.

¹⁴KRS 61.510(33) provides:

"Objective medical evidence" means medical histories; reports of examinations or treatments; medical signs which are anatomical, physiological, or psychological abnormalities that can be observed; psychiatric signs which are medically demonstrable phenomena indicating specific abnormalities of behavior, affect, thought, memory, orientation, or contact with reality; or laboratory findings which are anatomical, physiological, or psychological phenomena that can be shown by medically acceptable laboratory diagnostic techniques, including, but not limited to, chemical tests, electrocardiograms, electroencephalograms, X-rays, and psychological tests[.]

when the Disability Appeals Committee of the Board of Trustees, with one irrelevant amendment, adopted the hearing officer's findings of fact, conclusions of law, and recommended order.

On July 10, 1997, Lanham filed a petition for judicial review in the Franklin Circuit Court. She claimed the final order of the Retirement Systems was "not based on substantial evidence" and "violate[d] statutory provisions, [was] arbitrary, capricious and/or characterized by an abuse of discretion." The circuit court denied Lanham's petition and affirmed the denial of benefits. In its opinion and order, the circuit court agreed with Lanham that the evidence she presented to the Retirement Systems did, in fact, include objective medical evidence:

It is beyond dispute that Lanham presented the [Retirement Systems] with ample medical evidence to support the thrust of her claims. The record contains medical reports and records from no fewer than four physicians, and demonstrates a prolonged period of examination and evaluation by these physicians.

However, the circuit court concluded that regardless of the Retirement Systems' mischaracterization of Lanham's objective medical evidence, there was still substantial evidence to support the denial of benefits:

However, while this information appears to qualify as the type of 'objective medical evidence' defined by KRS 61.510(33), [Lanham] has failed to demonstrate that the [Retirement Systems'] denial of benefits was not based on substantial evidence.

This appeal followed.

When a reviewing court examines the decision of an administrative agency, the court must determine whether the agency's decision is arbitrary.¹⁵

In determining whether an agency's action was arbitrary, the reviewing court should look at three primary factors. The court should first determine whether the agency acted within the constraints of its statutory powers or whether it exceeded them. (citation omitted). Second, the court should examine the agency's procedures to see if a party to be affected by an administrative order was afforded his procedural due process. The individual must have been given an opportunity to be heard. Finally, the reviewing court must determine whether the agency's action is supported by substantial evidence. (citation omitted). If any of these three tests are failed, the reviewing court may find that the agency's action was arbitrary.¹⁶

An applicant for disability retirement benefits has the burden of proving she satisfies the statutory criteria which entitles her to those benefits. An administrative agency is afforded great latitude in evaluating evidence and determining the credibility of witnesses, and although a reviewing court might have come to a different conclusion had it heard the case de novo, such disagreement does not deprive the agency's decision of support by substantial evidence.¹⁷ "[T]he possibility of drawing two inconsistent conclusions from the evidence does not

¹⁵Cornell, supra.

¹⁶Bowling v. Natural Resources & Environmental Protection Cabinet, Ky.App., 891 S.W.2d 406, 409 (1994) (quoting Cornell, supra at 594).

¹⁷Bowling, supra at 410.

prevent an administrative agency's finding from being supported by substantial evidence."¹⁸ Indeed, an administrative agency's trier of facts may hear all the evidence and choose the evidence that he believes.¹⁹ It is the role of the courts in conducting judicial review of an administrative action to determine both "[i]f the findings of fact are supported by substantial evidence of probative value" and "whether or not the administrative agency has applied the correct rule of law to the facts so found."²⁰

Our review of the record and the law convinces us that both the Retirement Systems and the circuit court have erred as a matter of law. The circuit court, in denying Lanham relief from the Retirement Systems' decision, appeared to recognize that the Retirement Systems' application of KRS 61.510(33), which defined "objective medical evidence," was incorrect as a matter of law. However, the circuit court then erred by ruling that regardless of the error of law made by the Retirement Systems' that Lanham "has failed to demonstrate that the [Retirement Systems'] denial of benefits was not based on substantial evidence." Without specifically citing the hearing officer's decision, the circuit court stated that "[i]t is plain in this case that the hearing

¹⁸Kentucky State Racing Commission v. Fuller, Ky., 481 S.W.2d 298, 307 (1972).

¹⁹Bowling, *supra* at 410 (citing Commonwealth Transportation Cabinet v. Cornell, Ky.App., 796 S.W.2d 591, 594 (1990)).

²⁰Southern Bell Telephone & Telegraph Co. v. Kentucky Unemployment Insurance Commission, Ky., 437 S.W.2d 775, 778 (1969) (citing Brown Hotel Co v. Edwards, Ky., 365 S.W.2d 299 (1962)).

officer weighed the evidence, both objective and subjective, and concluded that Lanham had not proven a disability so as to qualify her for disability retirement benefits. . . . Thus, as there is substantial evidence on the record to support the [Retirement Systems'] decision, it will not be disturbed."

We must consider the findings of fact relied upon by the Retirement Systems in its denial of benefits. In his recommended order denying benefits, the hearing officer separated his findings of fact into eight numerical paragraphs:

- 1) The Claimant meets the employment service requirements of KRS 61.600 in that she has at least 72 months of total service and at least 12 months which are current service.
- 2) The Claimant's application for disability retirement benefits was timely filed on May 14, 1996. Her last date of paid employment was April 22, 1996.
- 3) The Claimant's employment as a Volunteer Services Coordinator as set forth on Exhibits 2 and 3 would fall within the category of light work. KRS 61.600(4)(c)2. Claimant indicates that she would lift 25 pounds on a regular basis, her employer says 20 pounds. She says she lifts up to 50 pounds maximum. However, the frequency is somewhat in question. The amount of lifting would potentially place the job in medium work, but it does appear that the lifting is basically of books which can be controlled by Claimant, and primarily there is little other exertional requirement in the job.
- 4) The Claimant has had several diagnoses--one, fibromyalgia; the other, chronic fatigue syndrome. There is a potential diagnosis of Lupus. **However, the**

diagnoses are not supported by any objective medical evidence.

Furthermore, the Claimant has failed to follow through on her physical therapy due to the pain that it has caused her [emphasis added].

- 5) The Claimant also has seen a social worker who has diagnosed her condition as adjustment disorder with depression. There has been no diagnosis by a psychiatrist or psychologist. [However, based on her testimony, it does appear that the Claimant is obviously having some psychological or psychiatric component to her condition, but she is not receiving treatment for same.]²¹
- 6) There is a question about reasonable accommodation, which at first blush would appear to be available, that is to allow Claimant to work out of her home as she requested. However, the Claimant in her testimony indicated that she could not even do the job now with this type of accommodation.
- 7) The Hearing Officer has no reason to disbelieve the Claimant's claim of pain and fatigue and it is found that she obviously is enduring **some type of fatigue and pain problem. However, there has not been a definitive diagnosis of this condition,** nor has there been a diagnosis and treatment of her mental condition [emphasis added].
- 8) **As was indicated initially by Dr. Kirk, Claimant's incapacity would not be expected to last for twelve months. The Hearing Officer finds that her condition would appear to be resolved by treatment and accordingly, she has not shown that the condition would last for more than**

²¹The Disability Appeals committee amended the hearing officer's findings of fact "to strike sentence 3 of Finding of Fact number 5."

**twelve months or persist in incapacity
severity for more than twelve months**
[emphasis added].

From these findings of fact, it is clear that the only findings that were adverse to Lanham's claim that could possibly have been used by the hearing officer to support his conclusion that Lanham "has failed to establish by objective medical evidence the existence of a permanent physical impairment which would prevent her from performing her former job as a Volunteer Services Coordinator," are found in numerical paragraphs 4, 7 and 8. Since none of these three critical findings of fact was supported by substantial evidence, the Retirement Systems' denial of benefits must be reversed.

Whether finding no. 4 is viewed from the standpoint that the hearing officer erred as a matter of law in the misapplication of the legal definition of "objective medical evidence" or from the standpoint that this finding of fact is not supported by substantial evidence, it is clearly erroneous. The correct application of the definition of "objective medical evidence," as noted by the circuit court, can only lead one to conclude "that Lanham presented the [Retirement Systems] with ample medical evidence to support the thrust of her claims." As noted by the circuit court, "Dr. William Kirk [] made [a] conclusive diagnosis [of] . . . chronic fatigue syndrome . . . [the] condition upon which Lanham primarily bases her claim for benefits." Thus, the hearing officer's finding that Lanham's diagnosis of chronic fatigue syndrome was not supported by any

objective medical evidence is clearly erroneous, and the evidence compels the opposite finding.²²

Finding no. 7 is also not supported by substantial evidence and is clearly erroneous. The hearing officer erroneously found that "there has not been a definitive diagnosis of this condition," i.e., "some type of fatigue and pain problem." The evidence was to the contrary. As shown above, Dr. Kirk made a conclusive diagnosis of chronic fatigue syndrome. Thus, once again the hearing officer's finding is clearly erroneous and the evidence compels the opposite finding.

In making finding no. 8, the hearing officer failed to consider all the evidence of record. While the hearing officer was correct that at one time Dr. Kirk did indicate that Lanham's incapacity was not expected to last for 12 months, this was not the complete report by Dr. Kirk. In his final report, Dr. Kirk clearly stated that due to her chronic fatigue Lanham's "incapacity is expected to continue for not less than 12 months from [her] last day of paid employment" and that she was "disabled indefinitely." The hearing officer overlooked this evidence and relied upon incomplete records from Dr. Kirk. His finding as to the duration of Lanham's disability is clearly erroneous.

Accordingly, we hold that the Retirement Systems as a matter of law erroneously applied the statute requiring

²²While the hearing officer did not specifically so find, Dr. Fallis also diagnosed chronic fatigue syndrome.

"objective medical evidence," and that the three critical adverse findings of fact used to deny Lanham's claim for disability benefits are not supported by substantial evidence. The judgment of the Franklin Circuit Court is reversed and this matter is remanded for entry of a disability award in favor of Lanham.

McANULTY, JUDGE, CONCURS IN RESULT ONLY.

MILLER, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

Stacey L. Hardin
Lebanon, KY

BRIEF FOR APPELLEE:

James P. Dodrill
Frankfort, KY