

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001735-MR

KENTUCKY RETIREMENT SYSTEM

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
CIVIL ACTION NO. 98-CI-01010

TIMOTHY DAVIS

APPELLEE

OPINION

REVERSING

** ** * * *

BEFORE: BUCKINGHAM, HUDDLESTON and JOHNSON, Judges.

HUDDLESTON, Judge: Kentucky Retirement Systems (KRS) appeals from a Franklin Circuit Court opinion and order reversing a decision of the Board of Trustees denying disability benefits to Timothy Davis, finding that the uncontradicted evidence establishes that he is entitled to such benefits as he is incapable of performing his job despite the offered accommodation.

Davis was formerly employed by the Woodford County Fiscal Court Solid Waste Department as a solid waste coordinator at the county's Solid Waste and Recycling Center. He began working in that capacity on January 9, 1991, and his last day of paid

employment was June 4, 1996. In total, he accrued 62 months or 5.16 years of service toward qualifying for retirement benefits during his employment with WCFCSWD.

During a typical day as a solid waste coordinator at WCSWRC, Davis was required to walk or stand for six hours and sit for approximately two hours. His job duties included driving a semi-truck and trailer (as well as a pick-up truck and trailer or gooseneck) on collection routes, maintaining the vehicles, hooking and unhooking the trailer, inspecting and maintaining baling machines and other equipment, measuring loads of waste, loading and unloading waste,¹ overseeing the loading and unloading of materials delivered to the waste facility, operating a forklift, baler and metal separator, collecting fees from customers and sweeping/shoveling the area in which he worked upon completion of those duties. Over two-thirds of the time, his duties entailed bending, reaching, stooping, stretching, kneeling, crouching, crawling or handling, and the remainder of the time climbing was involved.

In September 1992, Davis was seriously injured in an automobile accident. As a result of the accident, his chest area, right humerus, right shoulder joint and blade were crushed or broken and muscles in his right shoulder and back were severed. Davis underwent surgery and a course of physical therapy at the direction of his treating physician, Dr. Garnett Sweeney. Although Davis experienced a gradual improvement in right shoulder strength

¹ Davis was required to lift trash bags weighing up to sixty pounds, lift/load recycle bags (part of his responsibility as chief driver), and push/pull dollies of waste one hundred feet.

and mobility (90 degrees of abduction and flexion), his capabilities remain "markedly decreased with his arms," with his right arm in particular sustaining a significant, permanent decrease in its range of motion (about 50% with no overhead extension). Davis retained about 80 degrees of flexion, 60 degrees of scapulo-humeral abduction, 80 degrees of internal rotation and 0 degrees of external rotation with respect to his right arm. He suffers from significant muscle atrophy in the infraspinatus and deltoid muscles associated with the injured shoulder area and x-rays reveal a clear distortion of his shoulder joint. He later developed thoracic outlet syndrome and traumatic arthritis of the right glenoid secondary to his injuries. Based on a combination of the two, Dr. Sweeney ultimately assigned Davis a 29% total body functional disability.

In early 1993, Davis returned to work in his former capacity at the WCSWRC, although he continued to suffer from the effects of his injuries. He worked from approximately February of 1993 until June of 1996. During that time, he often used his allotted vacation and sick days to attend physical therapy sessions and doctor appointments, at times being absent for several consecutive days due to his physical condition. Davis testified that when he was unable to perform the functions of his position such as lifting, he was instructed to go home and did so.

Between 1993 and 1996, Davis performed a variety of tasks for the WCSWRC, including working as a solid waste attendant which involved "manning the gate to the center to measure, unload and charge for waste brought in by customers." On average, Davis would

measure 60 loads of waste a day which entailed climbing onto the trucks and trailers, measuring their loads of refuse with an extension tape and calculating the disposal fee based upon cubic feet of waste present. Davis testified that he could obtain assistance if necessary to help measure ton trucks and trailers with loads that were more than six feet wide and that pickup truck loads did not have to be measured as a standard rate is applied to those deliveries.

Working as a gate attendant necessarily required Davis to perform his job duties outside and/or in and around the unheated shack that serves as an attendant's building at all times of the year. Although Davis verbally requested a space heater for the attendant's building for use on the days when there were extreme temperatures, he acknowledges that he never made a formal, written request or pursued the matter. According to his testimony, Davis experienced significant pain and discomfort during the fall and winter seasons due to the cold weather. He also had similar difficulties when engaged in the activity of hooking and unhooking the trailer connected to the truck that he drove in the course of his employment.

At the recycling center, there are various machines that compact and bale the solid waste before it is disposed of in pits in the ground. There are no retention walls or guard rails surrounding the pits. In the course of his duties at the WCSWRC, including those related to the attendant position, Davis was required to work in proximity to both the machines and the pits.

According to Davis's testimony, he has been in constant pain since the time of his injury, and that pain is exacerbated by lifting, sitting and weather changes, particularly when the weather turns cold. He copes with the pain which results from cold weather by using a hot tub, heating pad and special clothing. For several years, Davis treated his disabilities with these methods, enabling him to continue working. In 1997, Dr. Sweeney prescribed Hydrocodone for Davis to take as needed for pain. Side effects of this medication include drowsiness and dizziness. Davis complains of these symptoms, weakness and unsteadiness when he takes this medication. His other pain medications have the same or a similar effect.

In addition to the pain, Davis has continued to suffer from numbness and tingling in his arms and legs. When he sits for any significant period of time, his back hurts, his legs go to sleep and he cannot move them. He is also unsteady on his feet and, as a consequence, has fallen at home while walking on a flat, carpeted floor. In October 1996, he fell when his legs collapsed underneath him, fracturing his left shoulder. Due to the numbness in his hands, he has become clumsy and often drops things.

On June 4, 1996, Davis left work and has never returned. Shortly thereafter, Dr. Sweeney restricted him to "light and nonrepetitive use of the right arm." Dr. Sweeney further recommended that Davis not be exposed to cold for prolonged periods of time and limited him from reaching, handling and pushing due to the condition of his right arm. He also confirmed that Davis has problems lifting over five pounds with his right hand only and

documented the subsequent fracture to his left arm, noting that it seems to be healing fairly well. Significantly, Dr. Sweeney advised against Davis returning to his "manual laboring-type occupation." Davis refrains from lifting now and does virtually no other physical work.

On August 29, 1996, Frank Watts, Judge-Executive of Woodford County, and C. Murray Brown, Sr., Woodford County Solid Waste Management Director, met with Davis and his wife to discuss possible job accommodations for Davis. Initially, Watts and Brown informed Davis that there was no suitable job available for him at the department. However, on October 10, 1996, Watts and Brown offered Davis the position of solid waste attendant, "a full-time job that only requires load measurements, the collection of money, and the issuance of receipts." Consistent with the terms of the offer, Davis's absence on the designated starting date was treated as a rejection of the offer and his employment with the county was terminated, effective October 23, 1996. Davis declined the offer because he did not believe that he could fulfill the requirements of the position, namely, working in the unheated shack, moving about safely among dangerous machinery, sitting for the requisite amount of time without numbness and staying alert given his regiment of pain medication.

In October 1996, Davis filed an application for disability retirement benefits with KRS.² Based on the

² In a decision rendered on July 24, 1997, an attorney advisor for the Social Security Administration determined that Davis is "entitled to a period of disability commencing June 4, 1996, and to disability insurance benefits under Sections 216(i) (continued...)

recommendations of three medical reviewers, KRS notified Davis that his application had been denied on July 28, 1997. Davis subsequently submitted additional information regarding his case, namely the Social Security Administration decision awarding him benefits. Finding that the rationale for the SSA decision's allowance "is not supported by objective medical evidence in the file," the Board of Medical Examiners denied his application upon reconsideration on September 2, 1997, unanimously concluding that he is clinically capable of performing the type of sedentary work required by the position made available to him. In response, Davis requested a formal review of the determination by KRS before a Hearing Officer pursuant to Kentucky Revises Statutes (KRS) 13B and 105 Kentucky Administrative Regulations (KAR) 1:210.

On January 22, 1998, the officer held a hearing at which Davis offered two documentary exhibits along with his testimony and the testimony of his wife in support of his claim. KRS offered no witnesses, relying on the cross-examination of Davis's witnesses and the thirteen exhibits presented in support of its position. In a post-hearing order, the officer granted Davis additional time in which to procure records from Dr. Sweeney with the Commonwealth filing its response on March 10, 1998. In a recommended order entered on May 7, 1998, the officer made extensive findings of fact which formed the basis for the following legal conclusions:

33. KRS 61.600(4)(a)(2) requires that Davis's permanent incapacity be determined based upon "medical evidence

² (...continued)
and 223, respectively, of the Social Security Act, as amended."

contained in the member's file." Davis has produced X-rays, EMG nerve conduction test results, his medical history, reports of examinations and treatments, and observable anatomical or physiological abnormalities all of which support a finding that Davis is permanently incapacitated. The undersigned finds this evidence to be "medical evidence" within the meaning of KRS 61.510(33). In considering the substance of that evidence, the undersigned finds particularly significant the opinions, medical history, and reports of examinations by Dr. Garnett Sweeney, Davis's examining and treating physician. Dr. Sweeney's records give a detailed and lengthy chronology for and explanation of Davis's condition, diagnoses and impairments; these records, opinions and diagnoses are based upon Dr. Sweeney's firsthand experience with Davis, and are supported by the clinical and laboratory results referred to in the record. Moreover, Dr. Sweeney's conclusions as to Davis are entirely consistent with other substantial evidence in the record. The undersigned therefore concludes that Dr. Sweeney's opinions and assessment of Davis's condition, restrictions and capacity are entitled to controlling weight over the opinions of Drs. Kimbel, Addams and McElwain, who have no examining or treating relationship with Davis and who reviewed only some of his medical records.

34. The undersigned also finds and concludes that Davis's testimony in this matter was credible and substantial evidence in and of itself. After observing Davis's testimony and a demonstration of his impairment, the undersigned concludes that Davis was credible, consistent, and entirely truthful as to his incapacity to perform his job even with the accommodations offered him. His testimony established impairment, incapacity and an inability to perform his job or the job offered to him. It alone was substantial evidence of great weight to the undersigned.³

36. Upon all of the foregoing, the undersigned concludes Davis has established by a preponderance of the evidence in the record that he "has been . . . physically incapacitated to perform the job, or jobs of like duties, from which he received his last paid employment . . . reasonable accommodation by the employer . . . considered." KRS 61.600(2); KRS 13B.090(7). The undersigned therefore concludes that Davis is entitled to retirement disability benefits under KRS 61.600.

KRS appealed the officer's decision to the Disability Appeals Committee of the Board of Trustees which reviewed the matter at its meeting on July 13, 1998. Based on the evidence of record compiled at the hearing, the Board made extensive findings of fact as summarized above, rejected the officer's recommendation

³ Citations omitted.

and ordered that Davis be denied disability benefits. Davis petitioned the circuit court for judicial review of the Board's decision. After reviewing the evidence and acknowledging its limited standard of review, the court reversed the Board's decision based on the following analysis:

While Davis was offered an accommodation, the requirements of the proposed job were still too strenuous. There is no dispute that Davis suffers from a disability, nor is there a dispute that his physician has stated Davis is incapable of engaging in manual labor, that he cannot be exposed to cold weather, and that he is unsteady on his feet. In light of this uncontradicted evidence, it is unreasonable to conclude that Davis can work in a position which would require him to be very physically active, where he would be exposed to all extremes of weather, and where he would be in danger of falling into open pits containing dangerous machinery.

It is from this order that KRS appeals, arguing that the court improperly substituted its judgment for that of the Board.

"The position of the circuit court in administrative matters is one of review, not reinterpretation."⁴ If

⁴ Kentucky Bd. of Nursing v. Ward, Ky. App., 890 S.W.2d 641, 642 (1994). Under KRS 13B.150(2), **Conduct of judicial review:**

The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the final order or it may reverse the final order, in whole or part, and remand the
(continued...)

administrative findings of fact are based upon substantial evidence, those findings are binding upon the appellate court and the only question remaining for the appellate court to address is whether the agency applied the law to those facts correctly.⁵ A reviewing court may substitute its judgment for that of the agency only if the agency bases its ruling on an incorrect view of the law.⁶

When reviewing an agency's action, the court is concerned with arbitrariness which is defined as clearly erroneous. Clearly erroneous means unsupported by substantial evidence.⁷ Substantial evidence is defined as evidence which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the minds of reasonable persons.⁸ In weighing

⁴ (...continued)

case for further proceedings if it finds the agency's final order is:

- (a) In violation of constitutional or statutory provisions;
- (b) In excess of the statutory authority of the agency;
- (c) Without support of substantial evidence on the whole record;
- (d) Arbitrary, capricious or characterized by abuse of discretion;
- (e) Based on an ex parte communication which substantially prejudiced the rights of any party and likely affected the outcome of the hearing;
- (f) Prejudiced by a failure of the person conducting a proceeding to be disqualified pursuant to KRS 13B.040(2); or
- (g) Deficient as otherwise provided by law.

⁵ Id.

⁶ Id.

⁷ Id.

⁸ Bowling v. Natural Resources, Ky. App., 891 S.W.2d 406, 409 (1994).

whether an agency's decision is supported by substantial evidence, a reviewing court must adhere to the principle that the fact-finder is afforded great latitude in its evaluation of the evidence heard and the credibility of the witnesses appearing before it.⁹ There may be substantial evidence to support an agency's decision even though a reviewing court may have arrived at a different conclusion.¹⁰ If an agency's findings are supported by substantial evidence, "the findings will be upheld, even though there may be conflicting evidence in the record."¹¹

According to (2) of KRS 61.600 (Disability retirement), upon examination of the objective medical evidence by licensed physicians pursuant to KRS 61.665, it shall be determined that: (a) the applicant, 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 making that determination, "any reasonable accommodation by the employer" shall be considered; (b) The incapacity resulted from a bodily injury (as defined by the statute), mental illness or disease; (c) The incapacity is considered permanent; and (d) "The incapacity did not result directly or indirectly from bodily injury, mental illness, disease, or condition which pre-existed membership in the system or re-employment [as defined by the statute], whichever is most recent."

⁹ Kentucky State Racing Comm'n v. Fuller, Ky., 481 S.W.2d 298, 308 (1972).

¹⁰ Id.

¹¹ Kentucky Comm'n on Human Rights v. Fraser, Ky., 625 S.W.2d 852, 856 (1981).

Here, the Board explicitly stated that its order is based upon "the evidence admitted in the record compiled at the hearing. KRS 61.665(3), KRS 13B.090(1)." Next, it set forth the proper standard for reviewing that evidence, specifically citing KRS 61.600(2)(a) for the proposition that Davis would be entitled to receive disability retirement benefits if he established by a preponderance of the evidence that he satisfied the criteria contained in that provision. As reiterated by the Board, an incapacity "shall be deemed to be permanent if it is expected to result in death or can be expected to last for a continuous period of not less than twelve (12) months from the person's last day of paid employment in a regular full-time position."¹²

Regarding the burden of proof in administrative proceedings, the Board correctly cited KRS 13B.090(7), which is the codification of the case holdings cited by KRS. Under KRS 13B.090(7), "the party proposing the agency take action or grant a benefit has the burden to show the propriety of the agency action or entitlement to the benefit sought." The burden of proof encompasses both the burden of going forward and the ultimate burden of persuasion as to the contested issue. "Failure to meet the burden of proof is grounds for a recommended order from the

¹² KRS 61.600(4)(a). Although this statute has been amended since the Board's decision, substantively this aspect is unchanged. However, there were no subsections in the former version. Also, for the purposes of determining permanence under this section, the Board's examiners were formerly instructed to use the medical criteria under the Social Security disability program whereas, the current requirement is that it be based on the medical evidence contained in the member's file and his residual functional capacity and physical exertion requirements. KRS 61.600(4)(a)2.

hearing officer.¹³ In the instant case, such an order was issued by the officer following the hearing conducted pursuant to an appeal by Davis.¹⁴ Agreeing with KRS's assertion, the Board determined that the agency had no obligation to present evidence on the issue of whether Davis was physically incapacitated in accordance with the statute unless Davis first established a prima facie case on that point. "The party having the burden of proof before an administrative agency must sustain that burden, and it is not necessary for an agency to show the negative of an issue when a prima facie case as to the positive has not been established."¹⁵

With respect to the requirement that any reasonable accommodation made by the employer be considered, the Board made the following determination:

. . . [T]he Board has taken into consideration the accommodation offered by the Woodford County Fiscal Court, and concludes that Davis was offered a position which required only load measuring, collecting money, and issuing receipts. These duties are well within the restrictions placed on Davis by his physicians. Frank S. Watts, the County Judge-Executive, specifically indicated in his October 10, 1996 letter that no driving or lifting would be required.

¹³ KRS 13B.090(7).

¹⁴ With the exception of the more detailed factual summary included in the officer's factual summary, the findings of the Board parallel those of the officer. In summarizing the relevant facts, this Court deferred to the findings of the Board.

¹⁵ Personnel Bd. v. Heck, Ky. App., 725 S.W.2d 13, 17 (1986).

In light of that conclusion, the Board found that Davis had failed to establish by a preponderance of the evidence in the record that he is physically incapacitated to perform his last job or comparable duties given the "reasonable accommodation" offered by his employer.

Although the current case presents a close question as to this dispositive issue, the Board's decision can only be reversed if there is no substantial evidence to support it, *i.e.*, it is clearly erroneous/arbitrary. As reflected by the Board's thorough factual summary, such evidence exists. That being the case, the circuit court erred in substituting its judgment for that of the Board as to the inferences to be drawn from that evidence, *i.e.*, that the accommodation would require Davis to "be very physically active," "exposed to all extremes of weather," and subjected to the "danger of falling into open pits containing dangerous machinery." The circuit court's sole function was to answer the question of whether, under the evidence of record as a whole, it was an abuse of discretion for the Board to deny the claim.¹⁶ In the absence of evidence that is "so overwhelming as to compel a finding in Davis's favor,"¹⁷ we are left with no choice but to reverse the circuit court's decision and reinstate that of the Board.

ALL CONCUR.

¹⁶ Dawson v. Driver, Ky., 420 S.W.2d 553, 555 (1967).

¹⁷ Howard D. Sturgill & Sons v. Fairchild, Ky., 647 S.W.2d 796, 798 (1983).

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