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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2003-CA-002636-MR

BETTY JACOBS

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 01-CI-00309

KENTUCKY RETIREMENT SYSTEMS; AND
BOARD OF TRUSTEES OF
THE KENTUCKY RETIREMENT SYSTEMS

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * *

BEFORE: JOHNSON, KNOPF, AND SCHRODER, JUDGES.

KNOPF, JUDGE: Betty Jacobs appeals from an opinion and order of the Franklin Circuit Court which affirmed an order by the Board of Trustees of the Kentucky Retirement Systems (Board) denying her claim for disability retirement benefits. She argues that the Board's conclusion that she is able to perform her job with reasonable accommodation was not supported by substantial evidence because her physical condition put her at a heightened

risk of injury. She further argues that the Board erred in finding that the position, as accommodated, involved "sedentary work" as defined in KRS 61.600(4)(c). We agree with Jacobs that the Board erroneously defined her position as involving sedentary work. We also agree that the Board failed to consider whether Jacobs is able to perform the essential functions of her job, as accommodated, without exposing herself to a significant risk of injury. Hence, we reverse and remand for additional findings and conclusions by the Board.

Jacobs was employed as a teacher's aide with the Martin County Board of Education at Inez Elementary School. She was employed by the school system in 1977-1978, and was then re-employed by the school system as of August 15, 1985. Her last date of paid employment was August 31, 1999.

In her most recent position, Jacobs worked as a computer lab activities coordinator at her elementary school. Her job duties consisted of supervising kindergarten through fifth-grade students in the computer lab. She also assisted the students in the use of the computers, wrote and maintained schedules for the use of the lab, made minor repairs to and cleaned the computers and printers, and decorated the computer lab to keep the students motivated. Jacobs indicated that she would be walking or standing for five to six hours per day and sitting for one to two hours. During each school day, Jacobs

conducted six classroom sessions, each of which was attended by fifteen to thirty students and lasted forty-five minutes to an hour. She also testified that her job sometimes required bending, stooping, climbing, and lifting of up to thirty pounds.

In 1999, Jacobs's physician, Dr. Don Chaffin, wrote a report to the school superintendent stating that Jacobs had mitral valve prolapse, murmur, osteoporosis, fibromyalgia, bulging disc in her back, irritable bowel syndrome, chronic hearing loss, headache, and memory loss. Based on these diagnoses, Dr. Chaffin imposed severe restrictions on Jacobs's work activities. Dr. Chafin also expressed his concern that Jacobs's osteoporosis placed her at risk of bone fractures should she be knocked over by a child.

In response to these restrictions, the superintendent notified Jacobs that Dr. Chaffin's lifting restriction of not more than ten pounds could be accommodated on a permanent basis. However, the superintendent went on to state that the school was not in a position to absolutely protect Jacobs from falling or being knocked over by a child. Consequently, the superintendent notified Jacobs that the school could not accommodate these restrictions.

After Jacobs left her employment with the school system, she filed a claim for disability retirement benefits. However, the medical review board of physicians denied the claim.

Jacobs made a timely request for an administrative hearing. Following that hearing, the hearing officer entered his report and recommended order on January 17, 2001. The hearing officer found that, while a number of Jacobs's conditions were supported by objective medical evidence, Jacobs had not shown they prevent her from performing her duties as a teacher's aide as reasonably accommodated by the school.

Thereafter, the Board overruled Jacobs's exceptions and adopted the hearing officer's report and recommended order. Jacobs then filed a timely appeal to the Franklin Circuit Court pursuant to KRS 61.665(5) and 13B.140. After reviewing the record and the arguments of counsel, the circuit court affirmed the Board's findings and conclusion. This appeal followed.

In McManus v. Kentucky Retirement Systems,¹ this Court recently set out the standard of review for decisions by the Board as follows:

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. [citations omitted] Where the fact-finder's

¹ Ky. App., 124 S.W.3d 454 (2003).

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. [citations omitted] In its role as a finder of fact, an administrative agency is afforded great latitude in its evaluation of the evidence heard and the credibility of witnesses, including its findings and conclusions of fact. [citations and internal quotations omitted] ... A reviewing court is not free to substitute its judgment for that of an agency on a factual issue unless the agency's decision is arbitrary and capricious. [citation omitted]²

Jacobs primarily argues that the Board erred in finding that she is capable of performing the job duties. She asserts that she presented sufficient objective medical evidence of physical impairments which prevent her from performing her job, even with the accommodations offered by the school system. We agree that the Board erroneously classified her position as involving sedentary work, and therefore the Board considered the reasonableness of the school's accommodation under the wrong standard.

To be eligible for disability retirement benefits, KRS 61.600(2)(a) requires a worker to prove, among other things, that "since his last day of paid employment, [he] has been mentally or physically incapacitated to perform the job, or jobs of like

² Id. at 458-59.

duties, from which he received his last paid employment." KRS 61.600(4)(a)2 further provides that "[t]he determination of a permanent incapacity shall be based on the medical evidence contained in the member's file and the member's residual functional capacity and physical exertion requirements". The hearing officer found that the position of teacher's aide, as accommodated by the school system, would meet the definition of sedentary work as set out in KRS 61.600(4)(c)1.

However, sedentary work may only require occasional walking or standing, while light work may require frequent walking or standing.³ Jacobs testified that her position required her to be walking or standing five to six hours a day and sitting one to two hours. The hearing officer agreed that Jacobs's position involved walking and standing for much of the day, but found that the lifting requirements of the position, as accommodated, would meet the definition of sedentary work.

This conclusion was clearly erroneous. The evidence presented unequivocally places the physical exertion requirements of Jacobs's position, even as accommodated, within the statutory definition of light work. By failing to consider Jacobs's standing and walking requirements, the Board erred in finding that her position involved sedentary work, rather than light

³ KRS 61.600(4)(c)2.

work. Consequently, the Board applied an incorrect standard in concluding that Jacobs can perform the physical exertion requirements of her position as accommodated by the school system. Therefore, we must remand this matter for additional findings using the proper standard.

Jacobs also argues that the Board erred in finding that the accommodations offered by the school system are adequate to allow her to perform her job duties. Because we have already found that the Board improperly classified her position as involving sedentary work, we agree with Jacobs that the Board also failed to consider the adequacy of the offered accommodation under the proper standard. However, because this matter will be considered by the Board on remand, we will address the accommodation issue in some detail.

As noted above, a person seeking disability retirement benefits must prove that he or she has been mentally or physically incapacitated to perform the job, or jobs of like duties. KRS 61.600(2)(c) goes on to explain, "[i]n 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". The statutory definition of (and accompanying regulation regarding) reasonable accommodation is contained in the federal Americans

with Disabilities Act of 1990 (ADA).⁴ The ADA is a comprehensive act designed to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.⁵ The ADA imposes upon employers the duty to provide reasonable accommodations for known disabilities unless doing so would result in undue hardship to the employer.⁶ An accommodation is reasonable only if it enables the employee to perform the essential functions of her job.⁷

The inquiry in an ADA claim is whether an employee can perform the essential functions of his or her job with or without reasonable accommodation. An ADA plaintiff must show that she "could perform the essential functions of the job" despite her disability or "that a reasonable accommodation of ... [her] disability would have enabled [her] ... to perform the essential functions of the job".⁸ "The term 'essential functions' is defined as 'the fundamental job duties of the employment position

⁴ 42 U.S.C. § 12101 *et seq.*

⁵ 42 U.S.C. § 12101(b)(2).

⁶ 42 U.S.C. § 12112(b)(5)(A).

⁷ 29 C.F.R. § 1630.2(o)(ii).

⁸ Burch v. City of Nacogdoches, 174 F.3d 615, 619 (5th Cir., 1999). See also Anderson v. Coors Brewing Co., 181 F.3d 1171, 1175 (10th Cir., 1999).

the individual with a disability holds or desires' ".⁹ "Whether a particular function is essential is a factual inquiry".¹⁰ If the employee cannot perform the essential functions of the job, or accommodation would present an unreasonable hardship to the employer, then an employer does not violate the ADA by terminating or refusing the hire the disabled person. The burden of proof is on the employee to show that reasonable accommodations are available, but is on the employer to prove that an accommodation would impose an undue hardship.¹¹

A disability retirement claim requires a different approach, but essentially applies the same analysis of these standards. The employee must prove that he or she cannot perform the essential functions of his or her job, and that that the reasonable accommodation offered by the employer is not sufficient to allow the employee to safely perform those functions. In this case, the hearing officer did not cast doubt on the validity of most of the conditions claimed by Jacobs. Indeed, the hearing officer did not expressly reject Jacobs's proof that she suffers from fibromyalgia, chronic pain, irritable

⁹ Martin v. Kansas, 190 F.3d 1120, 1130 (10th Cir.1999) (quoting 29 C.F.R. § 1630.2(n)(1)).

¹⁰ Martin, 190 F.3d at 1130 (citing 29 C.F.R. § 1630.2(n)).

¹¹ See Holbrook v. City of Alpharetta, Ga., 112 F.3d 1522, 1526-28 (10th Cir., 1997).

bowel syndrome, and various psychological disorders.

Furthermore, the hearing officer specifically found that she suffers from osteoporosis in her back and hip. Jacobs's symptoms clearly make performance of her jobs duties more difficult.

These symptoms, together with Dr. Chaffin's recommendation that Jacobs is at risk of serious injury should she be knocked over at work, may have been reasonable grounds for Jacobs to leave her employment.

But to be entitled to disability retirement benefits, Jacobs was required to prove that she has been mentally or physically incapacitated to perform her job duties even with reasonable accommodation from her employer. The hearing officer found that Jacobs's conditions, while for the most part real, were not totally disabling at the time she left her employment. The hearing officer also concluded that, while the school could reasonably accommodate the lifting restriction, Jacobs had not shown that the risk of falling was more than a remote possibility.

On remand, the Board must first consider whether Jacobs is incapacitated from performing "light duty" work, as defined by KRS 61.600(4)(c)2. Furthermore, Jacobs must prove that reasonable accommodation would not be sufficient to allow her to perform the essential functions of her job without placing her at a significant risk of injury. The hearing officer found that

Jacobs's performance of the essential functions of her job, as accommodated, did not expose her to any significant risk of falling or being knocked over by children. The hearing officer discounted this risk because Jacobs has never fallen or been knocked over in the past.

However, the standing and walking requirements are also essential functions of Jacobs's position which the lifting accommodation does not address. The hearing officer conceded that Jacobs suffers from periodic dizziness or loss of balance. In addition, the osteoporosis in her hip is significant and increases her risk of bone breakage should she fall. When considered in this context, along with the nature of an elementary classroom situation, the likelihood of a fall in the future appears to be more than a remote possibility.

Furthermore, even if the risk that an employee will be exposed to physical trauma is minimal, it still may involve an essential function of the job.¹² Reasonable accommodation under the ADA does not require an employer to reallocate essential functions of the position.¹³ But likewise, in the context of disability retirement, an accommodation is not sufficient if an employee remains at a significant risk of injury. The evidence

¹² Holbrook, 112 F.3d at 1527-28.

¹³ Id. at 1528.

in this case does not point to a definitive conclusion either way. Nonetheless, Jacobs is entitled to have her claim re-considered under the correct standard.

Accordingly, the judgment of the Franklin Circuit Court is reversed, and this matter is remanded to the Board for additional findings of fact and conclusions of law as set forth in this opinion.

JOHNSON, JUDGE, CONCURS.

SCHRODER, JUDGE, DISSENTS.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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