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NOT TO BE PUBLISHED

**Commonwealth Of Kentucky
Court of Appeals**

NO. 2003-CA-002329-MR

KENTUCKY RETIREMENT SYSTEMS

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 03-CI-00156

RAYMOND ASHER, JR.

APPELLEE

OPINION
REVERSING

* * * * *

BEFORE: JOHNSON, KNOPF, AND SCHRODER, JUDGES.

JOHNSON, JUDGE: The Kentucky Retirement Systems has appealed from an order and opinion of the Franklin Circuit Court entered on October 3, 2003, which reversed the Systems' decision denying Raymond Asher, Jr.'s. application for disability retirement benefits under KRS¹ 61.600. Having concluded that the Systems' decision to deny benefits was supported by substantial evidence, we reverse the Franklin Circuit Court.

¹ Kentucky Revised Statutes

Asher was employed as an Environmental Inspector III for more than 20 years with Kentucky's Natural Resources and Environmental Protection Cabinet, Department for Surface Mining Reclamation and Enforcement. On Asher's last day of paid employment at the Department on August 31, 2000, he was 53 years old. Asher's duties as an inspector included frequent inspections of existing surface mine sites and proposed permit areas. He also performed investigations of citizen complaints and gave expert testimony at hearings. The physical requirements of Asher's job required him to walk or stand approximately three hours per day and to sit approximately four and one-half hours a day. He would either have to walk or drive a vehicle across rough terrain. He had to lift equipment weighing up to 50 pounds for about one-third of the work day.

Asher alleged in his application for disability retirement benefits filed on August 14, 2000, that he was no longer physically capable of performing his job duties. His reasons were stated as follows:

Due to lower back pain, I am unable to stand for more than about five minutes at a time. Also, I am unable to drive/ride in a vehicle or sit in an upright position for more than about five minutes at a time. Because of the pain, it is impossible for me to ride/drive or walk over rough terrain.

A Hearing Officer recommended approval of Asher's application for disability retirement benefits, but the Systems'

Disability Appeals Committee in a report and order dated January 28, 2003, rejected the Hearing Officer's recommendation and denied Asher's application. Pursuant to KRS 61.665(5) and KRS 13B.140, Asher sought judicial review of the Systems' decision. In an order and opinion entered on October 3, 2003, the Franklin Circuit Court reversed the Systems' denial of benefits. This appeal followed.

Judicial review of the Systems' decision is limited by KRS 13B.150. The parties are in agreement that the particular ground for judicial review applicable to this case is whether the Systems' decision was "[w]ithout support of substantial evidence on the whole record[.]"² Substantial evidence is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people.³ Further, "[t]he court shall not substitute its judgment for that of the agency as to the weight of evidence on questions of fact."⁴ The role of the courts in judicial review of an administrative determination "is one of review, not of reinterpretation."⁵

In reversing the Systems' denial of disability benefits, the Franklin Circuit Court addressed the issues of the

² KRS 13B.150(2)(c).

³ Owens-Corning Fiberglas Corp. v. Golightly, Ky., 976 S.W.2d 409, 414 (1998).

⁴ KRS 13B.150(2).

⁵ Kentucky Unemployment Insurance Commission v. King, Ky.App., 657 S.W.2d 250, 251 (1983).

medical evidence in support of Asher's physical disability and the proper classification of his work activity and stated as follows:

Overwhelming evidence supports a finding that Asher was disabled at the time of his last employment. During his employment Dr. Karen Saylor, a treating physician, recorded an office note on July 27, 2000, that stated Asher's physical ability was severely limited by his condition, his state would not significantly improve and he would never return to his previous employment. An April 11, 2000, MRI showed Asher had developed multiple level degenerative disc disease with bulging, mild to moderate right pericentral disk protrusion and bilateral facet arthropathy. Without evidence of severe stenosis or nerve root compression the Board characterized these degenerative changes identified by the MRI as mild or "mild to moderate". Yet, by August 2000 three treating physicians, Drs. Saylor, White and Shahzad concluded, Asher was permanently disabled. A January 30, 2001, report composed by Dr. Saylor in direct response to inquiries from the Retirement Systems placed severe limitations on Asher's ability to sit, bend, stoop or lift [citations to record omitted].

To support their decision the Board relies heavily on the medical diagnoses of Dr. Kimbel and Dr. McElwain. Both medical review physicians concurred that the Petitioner failed to present competent objective medical evidence to support a finding of total and permanent incapacity. Dr. Kimbel indicated that objective findings in the medical records were not of such severity to prevent Asher from performing a wide range of light to medium work activity. Neither physician treated or examined Asher. Moreover, the overwhelming amount of objective medical evidence in this case

contradicts the diagnoses of Drs. Kimbel and McElwain. The Board also highlights Dr. Peppiatt's August 25, 2000, diagnosis. He stated he felt Asher was not incapacitated and could perform his job. There is no indication that Dr. Peppiatt performed any diagnostic tests or reviewed the Petitioner's medical records [citations to record omitted].

"To put it simply the trier of facts in an administrative agency may consider all the evidence and choose the evidence that he believes." Bowling Green v. Natural Resources, Ky.App., 891 S.W.2d 406, 410 (1995). But it was unreasonable for the appeals committee to rely upon the findings of two reviewing physicians and ignore the overwhelming amount of objective evidence that supports the Petitioner's claim.

Although this Court must give the trier of fact great latitude in his evaluation of the evidence and the credibility of the witnesses before him, Bowling, 891 S.W.2d at 410, based on the medical evidence presented the committee unreasonably concluded Asher's incapacity at the time of his last employment was not supported by objective medical evidence on the record.

Consequently[,] Asher was unreasonably disqualified for enhanced disability retirement benefits under KRS 61.600 [emphasis added].

B. Work Activity Classification

Asher's essential employment duties listed in the record involve conducting on-ground inspections of surface mine sites, conducting on site investigations, and investigating citizen complaints concerning mining activities. Upon a request for accommodation, Mark Thompson, Director of Field Services, determined that Asher's employment duties were prohibited by Asher's alleged medical limitations. Chester L. Edwards, the Environmental Control

Supervisor, indicated that during permit inspections Asher was responsible for lifting or carrying field equipment including water testing and camera equipment distances approximating a quarter mile and occasionally moving impassible objects during inspections. Mr. Edwards indicated the heaviest weight lifted ranged from 50-75 pounds. In a May 18, 2001 letter Jim Bussell, Environmental Control Manager and Asher's supervisor, acknowledged the physical requirements of employment as an Environmental Inspector III demand physical and strenuous activity on a daily basis. Mr. Bussell notes that the Petitioner's back condition caused him to miss an unacceptable amount of work [citation to record omitted].

The hearing officer correctly concluded that Asher's work activity level qualified as "medium to heavy" under KRS 61.600.⁶

On appeal, the Systems argues that from the above-quoted language that it is obvious that the circuit court improperly weighed the evidence and substituted its judgment for the Systems'. Thus, in order for this Court to determine whether the circuit court improperly reversed the Systems, we must review the record to determine whether the Systems' contested findings of fact are supported by substantial evidence. The disputed findings of fact are as follows:

- (3) Claimant's former position as an Environmental Inspector III involved inspecting existing surface mine sites and proposed permit areas,

⁶ Under KRS 61.600 medium work involves lifting no more than 50 pounds at a time with frequent lifting or carrying of objects weighing up to 25 pounds. KRS 61.600(2)(c)(3). Heavy work involves lifting no more than 100 pounds at a time with frequent lifting or carrying of objects weighing up to 50 pounds. KRS 61.600(2)(c)(4).

investigating citizen complaints, and testifying at hearings. Claimant indicated that he would lift up to 50 pounds up to 1/3 of the work day and that he would walk or stand up to 3.0 hours and sit up to 4.5 hours of a work day. Claimant was required to drive or walk over rough terrain in his job of inspecting mine sites, and he would routinely carry mining records and surveying equipment. Claimant's position of mining inspector falls within the category of light to medium work pursuant to KRS 61.600(4)(c) [citations to record omitted].

. . .

- (5) The MRI study dated April 11, 2000 and MRI study dated November 9, 2001 showed that Claimant had diffuse degenerative changes and mild multi level disc bulging of the lumbar spine. The MRI studies revealed normal alignment and stature of the vertebrae. The MRI studies did not reveal significant neuroforaminal stenosis, disc herniation, or nerve root or cord compression.
- (6) Dr. Kimbel and Dr. McElwain, medical review physicians who reviewed Claimant's medical records in consideration of his claim for disability benefits, both concurred that Claimant failed to present competent objective medical evidence to support a finding of total and permanent incapacity. Dr. Kimbel indicated that Dr. Saylor put severe functional limitations on Claimant but with no positive physical findings on which to base the limitations. Dr. Kimbel indicated that Claimant on MRI [sic] did show some disc bulging at multiple levels, but with no significant neural foraminal stenosis,

no nerve root or cord compression, and no evidence of any significant neurological problems. Dr. Kimbel indicated the objective findings in the medical records were not of such severity to prevent Claimant from performing a wide range of light to medium work activity. Dr. McElwain indicated Claimant had severe subjective complaints without significant objective findings.

- (7) Dr. El-Naggar, neurosurgeon, performed a physical and neurological examination of Claimant on February 11, 2002 at the request of Dr. Saylor. Dr. El-Naggar found on examination that Claimant had normal reflexes and muscle strength, and no dysfunction of gait or coordination. Claimant had negative straight leg raising and was found to be neurologically intact. Dr. El-Naggar reviewed the lumbar MRI and found Claimant had diffuse degenerative disc changes and multi level disc bulging. Dr. El-Naggar found no evidence of disc herniation or nerve root compression. Dr. El-Naggar recommended a conservative six-week course of physical therapy and encouraged Claimant to perform home strengthening exercises and to walk. Claimant was to continue with anti-inflammatory medication. Dr. El-Naggar could not recommend surgery. Claimant testified that he initiated physical therapy but discontinued therapy because of the inconvenience of the distance he had to travel to attend the sessions and because of the cost.
- (8) Dr. Saylor and Dr. Shahzad, Claimant's treating internists, have treated Claimant medicinally for multi level disc bulging and degenerative disc disease with anti-inflammatory, muscle relaxants, and narcotic pain

medication. Dr. Saylor indicated Claimant presented symptoms of sciatica, but acknowledged he did not have evidence of nerve root compression by MRI. Dr. Saylor noted limitation in motion with muscle spasms in the mid and lower back. Dr. Saylor and Dr. Shahzad both placed severe postural and lifting restrictions on Claimant. The postural and lifting restrictions imposed on Claimant by Dr. Saylor and Dr. Shahzad are incongruous with the objective medical evidence of record.

- (9) Dr. Muffly, orthopedic, performed a consultative examination of Claimant at the request of Social Security. Dr. Muffly reviewed the MRI report dated April 11, 2000 and the MRI report dated November 6, 2001. Dr. Muffly gave an Assessment: "Multiple level degenerative disc disease with bulging and multiple level osteoarthritis. Mild and central canal stenosis at L3-4 and L2-3. No frank sign of nerve root impingement" [citation to record omitted].

. . .

- (11) Claimant's subjective complaints of pain are not credible.
- (12) Claimant's application for disability retirement benefits based upon his subjective complaints of low back pain is not supported by the objective medical evidence of record. Claimant presented no evidence of any mechanical instability or neurological involvement of the lumbar spine. The MRI study dated April 11, 2000 and MRI study dated November 9, 2001 showed Claimant has mild multi level disc bulging of the lumbar spine. However, the MRI's also show Claimant has normal alignment of the vertebrae, with no evidence of

significant stenosis, disc herniation, or nerve root or cord compression. Dr. El-Naggar, neurosurgeon, conducted a relatively normal examination of Claimant's low back, and offered conservative modalities of treatment. Surgery is not recommended. Dr. Kimbel and Dr. McElwain, medical review physicians who reviewed Claimant's medical records, both concurred that Claimant failed to present competent objective medical evidence to support a finding of disability. Claimant is not totally and permanently incapacitated from performing his light to medium duties of Environmental Inspector III.

Thus, the Systems found Asher's position of mining inspector to fall "within the category of light to medium work," while the circuit court concluded that the evidence only supported the Hearing Officer's more demanding determination of "medium to heavy" work. KRS 61.600(4)(c) provides in part that a "person's physical exertion requirements shall be determined based on the following standards:"

2. Light work shall be 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. If the person has the ability to perform substantially all of these activities, the person shall be deemed capable of light work. A person deemed capable of light work shall be deemed capable of sedentary work unless the person has

additional limitations such as the loss of fine dexterity or inability to sit for long periods.

3. Medium work shall be work that involves lifting no more than fifty (50) pounds at a time with frequent lifting or carrying of objects weighing up to twenty-five (25) pounds. If the person is deemed capable of medium work, the person shall be deemed capable of light and sedentary work.
4. Heavy work shall be work that involves lifting no more than one hundred (100) pounds at a time with frequent lifting or carrying of objects weighing up to fifty (50) pounds. If the person is deemed capable of heavy work, the person shall also be deemed capable of medium, light, and sedentary work.

In determining that Asher's position qualified as "medium to heavy" work, the circuit court failed to acknowledge the Systems' acceptance of Asher's own testimony that he would lift up to 50 pounds for one-third of the work day, as opposed to Edwards's testimony that Asher would be responsible for lifting from 50-75 pounds. The Systems, as the fact finder, was within its authority to give more weight to Asher's testimony that he was required to lift up to 50 pounds, thus, placing his work classification at its highest as "medium work." Accordingly, we conclude that the circuit court erred by substituting its finding as to Asher's work activity classification for the Systems' finding. The Systems' finding that Asher's work as a mining inspector fell within the category

of light to medium work pursuant to KRS 61.600(4)(c) was supported by substantial evidence of record which included Asher's own testimony.

Having determined that the Systems properly classified Asher's work as a mining inspector as light to medium work, we must now determine whether the Systems' denial of benefits to Asher was supported by substantial evidence of record. We conclude that the circuit court also improperly weighed the evidence concerning whether Asher met the statute's disability requirements. This improper weighing of the evidence can best be demonstrated by the circuit court's statement that "it was unreasonable for the appeals committee to rely upon the findings of two reviewing physicians and [to] ignore the overwhelming amount of objective evidence that supports [Asher's] claim." To the contrary, the Systems "is afforded great latitude in its evaluation of the evidence heard and the credibility of witnesses appearing before it."⁷ "[T]he trier of facts in an administrative agency may consider all the evidence and choose the evidence that he believes."⁸

Evidence of substance that supports the Systems' denial of disability includes the two MRI studies which showed no evidence of significant stenosis, disc herniation, or nerve

⁷ Bowling v. Natural Resources & Environmental Protection Cabinet, Ky.App., 891 S.W.2d 406, 409-10 (1994).

⁸ Bowling, 891 S.W.2d at 410.

root or cord compression; Dr. El-Naggar's findings that Asher had negative straight leg raising and was neurologically intact; Dr. Muffly's assessment that the MRI studies showed no frank sign of nerve root impingement; Dr. Kimbel's indication that the objective findings in the medical records were not of such severity to prevent Asher from performing a wide range of light to medium work activity; and Dr. McElwain's indication that Asher had severe subjective complaints without significant objective findings. It was the Systems' role to evaluate the evidence, judge its credibility, and choose which evidence to rely upon. The evidence relied upon by the Systems was evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people. Thus, the circuit court erred by substituting its judgment for the judgment of the Systems.

Based on the foregoing reasons, the order and opinion of the Franklin Circuit Court is reversed.

ALL CONCUR.

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