

RENDERED: December 30, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2003-CA-002581-MR

KENTUCKY RETIREMENT SYSTEMS

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 03-CI-00141

CONNIE DONLEY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: JOHNSON, TAYLOR, AND VANMETER, JUDGES.

TAYLOR, JUDGE: Kentucky Retirement Systems (KYRS) brings this appeal from a November 4, 2003, order of the Franklin Circuit Court reversing the KYRS Disability Appeals Committee of the Board of Trustees' (Board) denial of disability benefits to Connie Donley. We affirm.

Connie was employed by the Kenton County Board of Education as a school bus driver. She applied for disability retirement benefits on August 7, 2001, after being diagnosed with hypertension, cardiomyopathy, congestive heart failure,

asthma and renal insufficiency. Connie's application for retirement disability benefits was initially denied by two medical examiners who comprised the KYRS' Medical Review Board. See Kentucky Revised Statutes (KRS) 61.665. Thereafter, her application went before a hearing officer for an evidentiary hearing. The hearing officer concluded that Connie had submitted objective medical evidence demonstrating that she had a permanent medical impairment of a severity that prevented her from performing the duties of her job as a school bus driver. The hearing officer then recommended that Connie be awarded disability retirement benefits.

On January 14, 2003, the Board entered an order which rejected the hearing officer's recommended order and denied Connie disability benefits. The Board concluded that Connie had failed to establish by objective medical evidence that she was permanently and totally incapacitated from the duties of her job. Thereupon, Connie sought judicial review in the Franklin Circuit Court. KRS 61.665(5). On November 4, 2003, the court entered an opinion and order concluding that the Board's denial of Connie's retirement benefits was arbitrary and capricious. The circuit court determined that overwhelming evidence supported Connie's claim that she was permanently and totally incapacitated from her job. This appeal follows.

KYRS contends the circuit court improperly substituted its judgment for that of the Board and that substantial evidence supported the Board's decision to deny Connie's claim for disability retirement benefits. We disagree.

In McManus v. Kentucky Retirement Systems, Ky. App., 124 S.W.3d 454, 458 (2003), the Court of Appeals set forth the standard of review when a claimant is unsuccessful before the Board:

Where the fact-finder's decision is to deny relief to the party with the burden of proof of 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.

In the case at hand, the circuit court outlined the compelling evidence demonstrating Connie's permanent and total disability from the duties of her job:

Retirement admits that objective medical evidence supports a finding that the Petitioner suffers from cardiomegaly with pulmonary hypertension. Despite this finding, Retirement erroneously concludes Donley was not entitled to disability retirement benefits because she failed to establish by a preponderance of the evidence the existence of a total and permanent physical impairment that would prevent her from performing her employment. Retirement contends the Petitioner's failure to lose bodyweight according to doctor's recommendations rendered Dr. Hardebeck's conclusion concerning the severity, totality and permanency of her disability premature. Retirement ignored evidence that Donley has lost thirty pounds throughout the last five

years. (A.R. at p. 299). Moreover, no objective evidence supports Retirement's contention that Donley's failure to lose additional bodyweight results from a failure to comply with physician's instructions. On the contrary, she consults a dietitian and is following a strict diet of only thirty grams of fat a day. (A.R. at p. 298-299).

Retirement overlooked Donley's high stress work environment, Dr. Hardebeck's opinion and his inability to control her condition with the use of aggressive diuretic therapy. . . .

. . . .

. . . Even so, it is the determination of this Court that Retirement disregarded overwhelming evidence that demonstrates the Petitioner is totally and permanently incapacitated.

Order and Opinion pages 4, 5, and 6. Indeed, the uncontradicted medical evidence established that Connie suffered from hypertension, cardiomyopathy, congestive heart failure, asthma and renal insufficiency. Her treating physician, Dr. Charles Hardebeck, expressed concern that "[s]ignificant gainful employment over the next year will pose a superimposed hazard to this patient" Based upon the evidence as a whole, we agree with the circuit court that the evidence compels a finding that Connie is permanently and totally disabled from the duties of her job.

For the foregoing reasons, the opinion and order of the Franklin Circuit Court is affirmed.

ALL CONCUR.

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