RENDERED: July 8, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001043-MR

KENTUCKY RETIREMENT SYSTEMS — APPELLANT

V.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
CIVIL ACTION NO. 03-CI-00637

JOHN R. DAVIES — APPELLEE

OPINION
REVERSING

** ** ** ** **

BEFORE: GUIDUGLI, McANULTY, AND MINTON, JUDGES.

MINTON, JUDGE: The Franklin Circuit Court reversed a decision of the Disability Appeals Committee of the Board of Trustees (Board) of the Kentucky Retirement Systems that John R. Davies did not qualify for disability retirement benefits under Kentucky Revised Statutes (KRS) 61.600. Having determined that the evidence of record does not compel a decision in Davies's favor, we reverse.

Davies joined the County Employees Retirement System, which is administered by the Board,[1] on February 1, 1991, as a sanitation tipper for the City of Louisville, Department of Solid Waste Management & Services. A sanitation tipper is required to perform extensive walking, stooping, bending, pushing, lifting, and carrying. According to the official job description, a sanitation tipper must load around 3,500 pounds of garbage per hour into a garbage truck and lift and carry containers and discarded items weighing up to 100 pounds. But Davies's immediate supervisor estimated that the heaviest weight that Davies would normally lift is about 80 pounds.

Davies has not worked for the City of Louisville since June 8, 2000, when he was thrown from the back of a garbage truck that was traveling at approximately 30 miles per hour. Since that time, Davies has complained of pain and tightness in the neck and back and especially in the tailbone area. The City of Louisville has indicated that there is no light-duty work or other accommodation available for Davies.

Davies filed for disability retirement benefits on February 11, 2001, alleging disability on the basis of a broken tailbone, pinched nerve in the neck, third and fourth lumbar strain, slipped disc, stiffness in legs, and imbalance. He alleged that he could not walk without a cane, could stand only

[1] *See* KRS 61.645.

20-30 minutes at a time, and could sit only for short periods of time and only on a pillow. He also alleged difficulty sleeping because of pain.

The Board denied this initial application for disability benefits based on the recommendations of Drs. Esten S. Kimbel and William P. McElwain of the Kentucky Retirement Systems' Medical Review Board. Both doctors were of the opinion that there was no objective medical evidence supporting Davies's claim that he had developed a condition which would permanently disable him from performing his ordinary work activity. Davies did not request an administrative appeal of this decision.

On March 26, 2002, Davies filed a second application for disability retirement benefits under KRS 61.600 alleging the following conditions: constant pain; inability to walk, sit, lay down, or stand for over 30 minutes at a time; inability to lift over ten pounds; broken tailbone; pinched nerve in neck; third and fourth lumbar sprain; and two angulated discs in the back. Drs. Kimbel and McElwain, again, recommended that Davies be denied benefits because of a lack of objective findings to support that he suffered from a permanent disability. Based on the Medical Review Board's recommendation, the Board denied Davies's second application for disability benefits.

Davies then requested a formal hearing, which was conducted on November 7, 2002. The hearing officer's findings of fact and recommended order were issued on January 27, 2003. The hearing officer found that Davies was not entitled to disability retirement benefits because "[t]he weight of the objective medical evidence does not support a finding that Claimant is totally and permanently disabled from the essential functions of his job duties pursuant to KRS 61.600." Davies filed timely exceptions to the hearing officer's findings of fact and recommended order. In addition to disagreeing with the hearing officer's conclusion that his disability claim was not supported by objective evidence, Davies took issue with the hearing officer's characterization of his job as medium work.[2]

On March 27, 2003, the Disability Appeals Committee of the Board (committee) remanded the case to the hearing officer to address two matters. First, the hearing officer had written that Davies's claim for "hazardous duty disability" retirement benefits should be denied. And the committee noted that Davies "is not" a hazardous duty employee. Second, the committee

[2] According to KRS 61.600(4)(c)3, "[m]edium work" is "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." The relevant version of KRS 61.600 is the version effective July 14, 2000, which was still in effect on March 26, 2002, when Davies filed his second application for disability retirement benefits. KRS 61.600 has, subsequently, been amended twice.

pointed out a discrepancy between the hearing officer's assessment of Davies's work as medium and the parties' earlier stipulation that his work is heavy work.[3]

The hearing officer's March 31, 2003, order on remand clarified that the designation of Davies's job as medium work was due to an oversight. But the hearing officer noted "[t]he finding . . . that the objective medical evidence does not support a finding that Claimant is totally and permanently incapacitated from his job does not change with the correct classification of his work activity" as heavy. The hearing officer also stated that the reference to hazardous duty disability retirement benefits was due to a typographical error, the correction of which also has no effect on the remaining findings of fact or recommended order.

Davies filed exceptions to the order on remand, again, taking issue with the conclusion that his claim of permanent disability is not supported by the objective medical evidence. On May 2, 2003, the Board of Trustees issued its final order adopting the hearing officer's recommended order on remand and denying Davies's claim for disability retirement benefits.

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[3] This stipulation was made in a pre-hearing conference on September 19, 2002. According to KRS 61.600(4)(c)4, "[h]eavy work" is "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."

Having exhausted his administrative remedies, Davies then sought judicial review in Franklin Circuit Court. On April 23, 2004, the circuit court reversed the Board's decision. The circuit court stated that "the Board erred by ignoring substantial evidence in the record that supported the application" and that substantial evidence in the record compelled a finding in Davies's favor. Kentucky Retirement Systems then filed this appeal.

Kentucky Retirement Systems argues that the denial of Davies's application was supported by substantial evidence in the record and that the circuit court erred in substituting its judgment for that of the factfinder. Davies argues that the Board's decision was not supported by substantial evidence because he proved his disability with objective medical evidence in the record. He asserts that the circuit court applied the correct standard of review and properly determined that the evidence compelled an award of benefits in his favor.

In a claim for disability retirement benefits under KRS 61.600, the burden of proof is on the claimant.[4] "Where the [factfinder's] 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

[4] McManus v. Kentucky Retirement Systems, 124 S.W.3d 454, 457-458 (Ky.App. 2003).

reasonable person could have failed to be persuaded by it."[5] If the record contains such compelling evidence in favor of the claimant, the denial of relief is arbitrary.[6] However, reversal of the Board's decision is not justified by a mere showing that there is some evidence in the record supporting a contrary conclusion to that of the Board.[7] Because the Board is the trier of fact, the Board's evaluation of the evidence, including the credibility of the witnesses, is given great latitude.[8] The factfinder can choose to believe parts of the evidence and disbelieve other parts even where the parts come from the same witness.[9] A reviewing court may not substitute its own judgment on a factual issue for that of the Board unless the Board's decision is arbitrary.[10]

Davies bore the burden of proving his entitlement to disability retirement benefits under KRS 61.600, but he was unsuccessful before the Board. Ultimately, we must determine

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[5] *Id*. at 458.

[6] Bourbon County Board of Adjustments v. Currans, 873 S.W.2d 836, 838 (Ky.App. 1994).

[7] McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46, 47 (Ky. 1974).

[8] *See* Kentucky State Racing Commission v. Fuller, 481 S.W.2d 298, 309 (Ky. 1972); Bowling v. Natural Resources and Environmental Protection Cabinet, 891 S.W.2d 406, 409-410 (Ky.App. 1994); McManus, *supra* at 458.

[9] Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977).

[10] McManus, *supra* at 458.

whether the circuit court erred in reversing the Board's decision to deny disability retirement benefits to Davies. In order to answer that question, we must determine whether the circuit court properly concluded that the evidence in the record compelled a finding in Davies's favor such that the denial of his claim for disability benefits was arbitrary.

The version of KRS 61.600 applicable when Davies filed his second application for disability benefits on March 6, 2002, states, in relevant part, as follows:

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

. . . .

(4) (a) 1. 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.

2. The 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.

KRS 61.510(33)[11] then provided the following definition of "objective medical evidence":

> [R]eports 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

[11] The relevant version of KRS 61.510(33) is the one which went into effect on June 21, 2001, and was still in effect when Davies filed his second application for disability retirement benefits on March 26, 2002. KRS 61.510 has been amended three times since then; but the only changes to subsection (33) have been minor, grammatical changes.

> 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.

The Board denied Davies's claim for disability benefits because of a lack of objective medical evidence showing that he is permanently disabled under KRS 61.600. But the circuit court found that the evidence in the record compelled a finding that Davies is permanently disabled under the statute. To resolve this issue, we turn to the medical evidence in the record.

In the January 27, 2003, findings of fact and recommended order, the hearing officer summarized the medical evidence as follows:

> Claimant first treated on June 8, [2000,] from Occupational Physician Services of Louisville, P.S.C.[,] complaining of pain in his left knee, right middle back and arm. His tailbone and back were reported to be sore the next day. He saw Dr. Shea on July 5, 2000, and was diagnosed with a sprain of the left shoulder and lumbosacral spine. No fractures were shown on x-rays. On July 31, [2001], Dr. Shea noted that Claimant had continued pain and stiffness in his back, although he was improving with physical therapy. He kept Claimant off work through Labor Day.[12] Over the next several

[12] Initially, Dr. Shea was optimistic about Davies's progress stating on July 31, 2000, that Davies "is gradually improving with the physical therapy. He will remain off work for the next month and be released for work after [L]abor [D]ay." However, Davies never returned to work. In subsequent notes after Labor Day, Dr. Shea

months, Claimant had continued complaints of pain to Dr. Shea.

An MRI of the lumbar spine on July 23, 2000[,] was equivocal for L3-4 inferior left foraminal disk herniation with no nerve root effacement, and developmental spinal stenosis secondary to short pedicles.

A cervical MRI on August 7, 2000[,] showed a small left[-]sided disk herniation at C3-4 with extending nerve root compression.

An MRI of the sacrum-coccyx on August 25, 2000[,] showed the coccyx to be angulated at 90 [degrees] but with no fracture.[13] An MRI of the pelvis the same day was unremarkable.

Claimant saw orthopaedist Gregory Gleis on October 13, 2000[,] for an independent medical examination, presumably for his worker's compensation case. His chief complaint at that time was low back pain going into his coccyx, with greater pain on the left than the right. He also had neck pain, right shoulder pain, thoracic pain, left knee pain, and his bowels being "bound up[."] Dr. Gleis reviewed all of Claimant's medical records, and diagnosed him with 1. lumbosacral strain with coccyx and pelvic floor pain (worst pain on rectal examination); 2. cervical thoracic strain; 3. parasthesis left fourth and fifth nerve consistent with ulnar nerve; 4. left knee contusion, resolved; and 5. right heel pain of undetermined etiology.[14] Dr. Gleis

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writes that Davies continues to remain off work with no explanation of why.

[13] Dr. Shea also noted that the MRI showed no destructive bone lesion or acute inflammatory process.

[14] Dr. Gleis assessed Davies's impairment as of October 13, 2000, as "DRE cervical-thoracic category II – 5 percent whole person and DRE lumbosacral category II – 5 percent" based on the presence of muscle

strongly recommended a continued active exercise program, evaluation by a colorectal surgeon, epidural block for his back and coccyx pain, and EMG/NCV for his finger numbness, and medication.

On November 6, 2000, Claimant underwent an epidural steroid injection.[15]

On November 27, 2000, Claimant underwent a flexible sigmoidoscopy, which was normal.

Claimant sought mental health treatment in 2001 for what was diagnosed as Post-Traumatic Stress Disorder related to the June 8, 2000[,] injury.[16] As of October 10, 2001, Claimant was felt to be psychologically functional.

In August 2001, Claimant was examined by Dr. Warren Bilkey. He found no specific abnormalities, but noted through his report that Claimant's pain behaviors were markedly increased. He found no evidence of a significant contusion injury. . . [or] soft tissue [injury or musculoskelatal injury] affecting the functions of the hip, the back, the shoulder, or the neck. He felt that Claimant would not benefit from any other treatment, either physical,

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spasms; but he anticipated that Davies would not reach maximum medical improvement (MMI) for "at least two to three months."

[15] Actually, Davies underwent a series of caudal epidural steroid injections administered by Dr. Ricky S. Collis. Dr. Collis diagnosed Davies as suffering from coccygodynia, also called coccyodynia or coccydynia. This is merely a descriptive diagnosis, however, used to describe pain in the region of the coccyx. *See* THE AMERICAN HERITAGE STEDMAN'S MEDICAL DICTIONARY (2D ED. 2004), http://medical-dictionary.thefreedictionary.com/coccygodynia (last visited June 16, 2005).

[16] Mary Ellen Zuverink, Ph.D., gave Davies this diagnosis. She treated him between June 14, 2001, and October 10, 2001, when his visits, apparently, ceased due to lack of insurance. She stated that Davies's post-traumatic stress disorder (PTSD) symptoms were somewhat improved as of October 10, 2001.

psychological, or medicationally [sic]. He recommended no work restrictions.

On August 10, 2001, Claimant was evaluated by Chris Catt, Psy.D. He was diagnosed with a pain disorder related to herniated disc and orthopedic difficulties, and adjustment disorder with mixed anxiety and depressed mood. Dr. Catt offered the opinion that Claimant's ability to tolerate regular ongoing job related stress was limited, and his ability to sustain ongoing attention and concentration toward tasks was likely to be variable and fluctuate with varying levels of pain.

An MRI of the left hip on August 28, 2001[,] was normal.

On January 21, 2002, Dr. Shea completed a functional capacity form in which he stated that Claimant is able to sit, stand, and walk for one hour (each activity) in an 8-hour work day, could occasionally lift and carry up to 10 pounds, never lift or carry over 11 pounds, . . . was not able to bend, squat, crawl, climb, or reach above shoulder level. Dr. Shea totally restricted Claimant from unprotected heights and driving automotive equipment, but placed no restrictions on exposure to changes in temperature and humidity or exposure to dust, fumes, and gases.

On August 1, 2002, Claimant saw Dr. Keisler, who took a full history and conducted a complete examination. He concluded that Claimant likely has a chronic pain syndrome, with no orthopaedic explanation for his symptoms and findings, and further opined that the majority of Claimant's impairments in functioning are probably psychological. [Handwritten notes] following Dr. Keisler's report state "there are no valid objective findings but significant pain with all back and hip movements. Significant signs of

> magnification, suggestive of an atypical chronic pain syndrome. None of the subjective findings explainable on an organic basis and no records available with objective findings[.”] Dr. Keisler completed functional capacity form, restricting Claimant to occasional lifting of 20 pounds, frequent lifting of 10 pounds, standing for at least two hours in an 8-hour work day, and unlimited reaching, handling, fingering, and feeling.
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> Claimant testified that he currently takes Darvocet, Vioxx, stool softeners, an anti-anxiety/[depression] medication, and Percocet on bad days. He testified to significant limitations in his daily activities.[17]

There are also additional medical records which were included in the administrative record and considered by the hearing officer but not specifically addressed in her summary. In February 2001, Dr. Shea referred Davies to Dr. Rolando Puno of the Spine Institute to rule out the possibility of a surgical lesion on Davies’s spine. Dr. Puno reviewed Davies’s MRIs, finding them to be “essentially unremarkable,” except for the angulation of the sacrococcygeal junction. He observed no fracture. Determining that the etiology of Davies’s pain probably was not due to his spine,[18] he referred Davies to

[17] Citations to record omitted.

[18] Dr. Puno wrote that Davies’s back pain “is probably of mild facial nature.” We speculate that he may have intended to say that the pain is of a “mild fascial nature” or even “myofascial nature” since Davies never complained of pain in his face.

Dr. David Weston, a physician practicing physical medicine and rehabilitation.

When Dr. Weston first examined Davies in March 2001, he observed pelvic obliquity, an increase in lumbar lordosis, and tightness in the hamstrings, quadriceps, and lumbar paravertabrals; but he had difficulty assessing the level of injury because Davies appeared to be experiencing severe anxiety and projecting a great deal. In later examinations, Dr. Weston observed some trigger points and tightness of muscles but attributed some of this to significant voluntary tightening of the muscles by Davies. Dr. Weston treated Davies with myofascial release; strain/counterstrain techniques; and medication for pain, muscle spasms, and anxiety. Despite the anti-anxiety drugs, Dr. Weston noted on June 5, 2001, that Davies's recovery was complicated significantly by anxiety and depression. The last medical records by Dr. Weston are dated approximately a week later. On May 27, 2002, Dr. Weston indicated on a Kentucky Retirement Systems' form that Davies suffered from a sacroiliac sprain, lumbosacral sprain, and coccydynia and that his prognosis was very poor. However, he also wrote that the date of diagnosis was March 8, 2001, and that he was not currently treating Davies.

Dr. Kimbel of the Medical Review Board reviewed Davies's available medical records in June 2002 after Davies

filed his second application for disability benefits. He concluded that Davies might have spinal stenosis in the cervical and lumbar areas but noted that this is a congenital condition. He also noted that Davies had an angulated coccyx and had been diagnosed with coccyodynia (coccygodynia) and PTSD. However, Dr. Kimbel stated that there was no evidence in the record to indicate that any of these conditions would prevent Davies from performing his ordinary work activity.

Dr. William P. McElwain of the Medical Review Board also evaluated Davies's condition in October 2001 and, again, in July 2002, based on the available medical records. In 2001, he noted that the orthopedist had characterized Davies's complaints of pain as "getting out of hand" and had described his subjective complaints of pain "all over" even in the absence of muscle spasm or other objective findings. Dr. McElwain also noted one of the independent medical examiner's diagnosis—lumbosacral strain and cervical-thoracic strain—and his recommendation that Davies engage in an active exercise program do not suggest a permanent disability. Dr. McElwain stated that Davies's multiple medical reports submitted "document the presence of extensive and severe objective symptoms without objective findings." Finding no evidence of a total and permanent disability, Dr. McElwain recommended that Davies's application for disability retirement benefits be denied.

The circuit court's evaluation of this medical evidence and reasoning behind its decision to reverse the Board's denial of Davies's disability benefits claim are revealed as follows:

> A sanitation tipper must have physical strength and mobility. Sanitation tippers lift weights of 80 pounds on average and at times are required to lift objects that weigh 100 pounds or more. The job demands long hours of walking, standing and climbing off of and back onto a sanitation truck. The opinions of Drs. Shea and Keisler demonstrate that the Appellant is physically incapacitated to perform as a sanitation tipper and is unable to perform any similar duties. The record indicates the City of Louisville could not accommodate by reassignment or any other means. The Board argues the Petition still fails because the Appellant has not provided substantial evidence that his impairment is permanent in nature.
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> The Board heavily relied upon Dr. Keisler's opinion that no orthopedic evidence supports the Appellant's claim. While the Board attempts to characterize the Appellant's impairments as psychological, they also ignore the fact Drs. Keisler and Shea imposed *severe restrictions* on the Appellant's physical ability. For instance, the physicians determined that Appellant could lift at best 20 pounds frequently 12 months after the accident. The Board either disregarded or failed to apply KRS 61.600(4)(a)1.

CONCLUSION

> The record unequivocally demonstrates that Davies'[s] condition lasted twelve months past the date of his accident.

> Substantial evidence supports a finding that his disability is permanent under KRS 61.600. The Board was in error to find otherwise. While "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an agency's findings from being supported by substantial evidence[,]" this [c]ourt finds "the record compels a contrary decision in light of substantial evidence which it contains." [Kentucky State Racing Commission, *supra* at 307; Bourbon County Bd. of Adjustments, *supra* at 838.]
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> For these reasons, the Board's decision is **REVERSED**.[19]

The circuit court stated that "the Board erred by ignoring substantial evidence in the record that supported [Davies's] application" for disability benefits. In particular, the circuit court concluded that the Board ignored the restrictions on physical activity Drs. Shea and Keisler prescribed for Davies. It is true that Davies cannot perform his job or a similar job while complying with these restrictions. But this does not render the physical restrictions substantial evidence that Davies suffers from a disability within the meaning of KRS 61.600.

Under KRS 61.600, a claimant's disability must be established by objective medical evidence, as defined by KRS 61.665. These restrictions imposed by Drs. Shea and Keisler are not objective medical evidence because they are inconsistent

[19] Some citations omitted. Emphasis in original.

with the doctors' objective findings or, more precisely, the absence of objective findings. Dr. Keisler concluded that Davies exhibited significant signs of pain magnification, there were no valid objective findings to support Davies's claims of pain, and none of Davies's subjective claims of pain had an organic explanation. Similarly, Dr. Shea never diagnosed Davies with anything more severe or permanent than a sprained left shoulder and sprained lumbosacral spine. Two years after his first diagnosis, when Davies continued to complain of pain, Dr. Shea stated, "[Davies's] objective findings are minimal" and "physical findings are unchanged." Dr. Shea's notes reveal that Davies's subjective complaints of pain, which the doctor once described as "getting out of hand," are not supported by objective evidence. The only explanation for the severe physical restrictions imposed by Drs. Shea and Keisler is that these restrictions are based solely on Davies's self-assessment of the severity of pain and its limitations on his activity.

The Kentucky Supreme Court has held in the context of a workers' compensation case that a claimant's complaints of symptoms are not "objective medical findings" as defined by KRS 342.0011(33).[20] The Court explained as follows:

[20] Gibbs v. Premier Scale Company/Indiana Scale Company, 50 S.W.3d 754, 761-762 (Ky. 2001).

> We recognize that a diagnosis of a harmful change which is based solely on complaints of symptoms may constitute a valid diagnosis for the purposes of medical treatment and that symptoms which are reported by a patient may be viewed by the medical profession as evidence of a harmful change. However, KRS 342.0011(1) and (33) clearly require more, and the courts are bound by those requirements even in instances where they exclude what might seem to some to be a class of worthy claims. A patient's complaints of symptoms clearly are not objective medical findings as the term is defined by KRS 342.0011(33).[21]

While the statutory definition for objective medical evidence for a claim for disability retirement benefits before the Kentucky Retirement Systems differs from the definition of objective medical findings for a workers' compensation claim,[22] the Supreme Court's analysis of the significance of a claimant's subjective symptoms is equally applicable to a claim for disability benefits under KRS 61.600. Under KRS 61.600 and KRS 61.510(33), a claimant's mere subjective complaints are not objective medical evidence and cannot establish a disability. By extension, the restrictions on Davies's physical activity imposed by Drs. Shea and Keisler are not objective medical evidence supporting Davies's disability claim since these

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[21] *Id*.

[22] *Compare* KRS 61.510(33), *supra* (defining "objective medical evidence"), *with* KRS 342.0011(33) (defining "objective medical findings" as "information gained through direct observation and testing of the patient applying objective or standardized methods.")

restrictions are based solely on Davies's subjective self-assessment of his condition.

Even if these physical restrictions imposed by Drs. Shea and Keisler are objective medical evidence in support of Davies's claim, it is within the authority of the Board, as factfinder, to pick and choose among the available evidence, even where it comes from the same witness.[23] Thus, the Board could choose to accept Dr. Keisler's opinion that no orthopedic evidence supports Davies's claim while rejecting the apparent contrary assessment of Davies's condition implicit in the physical restrictions placed on him.

Moreover, the mere existence of some substantial evidence in the record supporting Davies's disability claim is not grounds for the circuit court to overturn the Board's denial of Davies's disability claim. As the circuit court itself stated, "[a]s long as there is substantial evidence in the record supporting the agency's decision, the [c]ourt must defer to the agency, even if there is conflicting evidence." Reversal of the Board's decision denying Davies's claim is only appropriate if the evidence in the claimant's favor "is so

[23] Caudill, *supra* at 16.

compelling that no reasonable person could have failed to be persuaded by it."[24]

This appears to be a case involving conflicting objective medical evidence, some of which could be interpreted to support a finding of a permanent disability. Yet, it cannot be said that the evidence compels a finding of disability. Several doctors noted their inability to find any objective evidence demonstrating a permanent disability. Multiple doctors diagnosed Davies as suffering from a sprain or strain in his cervical back area and lower back/coccyx area, but these are temporary conditions. He was also diagnosed as potentially having spinal stenosis that might interfere with his ability to perform his job, but all of the doctors agreed that this condition is developmental or congenital and would pre-exist Davies's hiring by the City of Louisville. Therefore, this condition may not be the basis for disability benefits for Davies under KRS 61.600.[25] He was diagnosed as having a probable

[24] McManus, *supra* at 458.

[25] *See* KRS 61.600(2)(b). The exceptions for pre-existing conditions which may be disabilities under KRS 61.600——conditions which have been substantially aggravated by an injury arising out of employment in the Kentucky Retirement Systems or pre-existing conditions in persons who have been employed by the Kentucky Retirement Systems for at least sixteen years——are not applicable in the instant case. *See* KRS 61.600(3)(a)-(b).

pain disorder,[26] a condition which can be psychological in nature. But no doctor or psychologist ever stated that this would permanently disable Davies from performing his normal job duties. The same is true of his diagnosis of PTSD.

Rather than deferring to the Board's decision to deny Davies's claim for disability benefits, the circuit court indulged in assaying the weight and credibility of the evidence, which is the prerogative of the Board as factfinder. But the reviewing court is not free to substitute its own judgment for that of the Board so long as the Board has not acted arbitrarily. Even though the circuit court stated that the evidence compelled a finding in Davies's position, the language of the opinion reveals that the circuit court reached this conclusion by usurping the Board's role as factfinder and by mistakenly equating the existence of any substantial evidence in support of Davies's position with the existence of evidence compelling a finding in Davies's favor.

The circuit court erred by substituting its judgment for that of the Board on matters of fact and by mistakenly concluding that the evidence compelled a finding in Davies's favor. For these reasons, the circuit court's decision

[26] In one instance, this probable diagnosis was made not because of any affirmative findings but, rather, because all of the tests were negative; yet, Davies continued to complain of pain.

overturning the Board's denial of Davies's claim for disability retirement benefits is reversed.

ALL CONCUR.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEE:
Jennifer A. Jones Frankfort, Kentucky	Scott M. Miller Louisville, Kentucky