

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2007-CA-001025-MR

JOHN DODSON, SR.

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE THOMAS D. WINGATE, JUDGE  
ACTION NO. 03-CI-00492

BOARD OF TRUSTEES,  
KENTUCKY RETIREMENT SYSTEMS

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CAPERTON, KELLER, AND WINE, JUDGES.

KELLER, JUDGE: John Dodson, Sr. (Dodson) applied for disability retirement benefits through the State retirement system. The hearing officer recommended the denial of Dodson's application, and the Board of Trustees of the Kentucky Retirement Systems (the Board) adopted that recommendation. Dodson appealed the order denying his claim to the Franklin Circuit Court, which affirmed. It is from the circuit court's order denying his appeal that Dodson appeals. On appeal, Dodson argues that the findings of the hearing officer were not supported by substantial evidence. We affirm.

## FACTS

Dodson was born on January 3, 1947. According to his testimony before the hearing officer, Dodson has a 7th grade education<sup>1</sup> and is essentially illiterate. He worked for the Jefferson County Metropolitan Sewer District (the District) for approximately eighteen years as an equipment operator, a job that would be classified as heavy. On August 3, 2000, Dodson suffered a work-related back injury. He missed several months of work, returning to a sedentary job as a security officer. However, because of ongoing low back pain and right leg and right foot numbness, Dodson stated that he was not able to continue performing his duties, and he last worked on August 4, 2000. Dodson applied for retirement disability on February 19, 2001. Dodson's claim was initially denied; therefore, he requested a hearing, which was conducted on October 1, 2002. We note that, in correspondence dated August 30, 2001, the District's risk and benefits manager indicated that, due to budget constraints, Dodson had been offered a different job within his restrictions. It is unclear from the record if Dodson ever performed that job.

In support of his claim, Dodson filed records and reports from Ellen Ballard, M.D. In her initial report, dated August 25, 2000, Dr. Ballard made diagnoses of right hip and gluteal strains, took Dodson off work, and recommended medication and physical therapy. When Dodson's condition did not improve significantly with this conservative care, Dr. Ballard recommended an MRI, which revealed a right-sided disc herniation at L5-S1. Because of Dodson's continued complaints of low back and right hip pain, Dr. Ballard referred him to a neurosurgeon, Dr. Becherer. Dr. Becherer evaluated Dodson and concluded that, with his other myriad health problems – high blood pressure, diabetes, history of heart problems – Dodson would not be a surgical

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<sup>1</sup> We note that Dodson states in his brief that he has a 3<sup>rd</sup> grade education. However, his testimony was that he has a 7<sup>th</sup> grade education. Therefore, we will rely on Dodson's testimony.

candidate. On February 15, 2001, Dr. Ballard placed Dodson at maximum medical improvement, noted his numerous health problems, and stated that he was not capable of working an eight-hour day. On April 4, 2001, Dr. Ballard noted that Dodson was working on light duty but that he continued to have pain in his low back and right hip. Dr. Ballard next treated Dodson on May 2, 2001, when he complained of increased pain after a fall at work. Dr. Ballard took Dodson off work and kept him off work through June 21, 2001. On that date, Dr. Ballard stated that Dodson “could return to work with his previous restrictions due to his low back injury. However, because of his diabetes and heart disease, high cholesterol, high blood pressure, and multiple medication use” she recommended “that he apply for a medical disability and Social Security.”

The Board and Dodson filed records from Dodson’s Kentucky workers’ compensation claim. In pertinent part, those records contain the July 24, 2001, report of Gregory E. Gleis, M.D., who performed an independent medical examination for Dodson’s employer. Following his examination, Dr. Gleis made diagnoses of chronic episodic back pain with mild degenerative disc changes. Dr. Gleis assigned Dodson an 8% impairment rating and stated that Dodson could continue working a forty-hour week as a security guard provided he could alter positions between sitting and standing.

The workers’ compensation records also contain a report from Dr. Ballard dated January 2, 2001. In that report, Dr. Ballard stated that, as a result of his back condition, Dodson should avoid lifting more than twenty pounds and should change positions as needed. However, she also noted that, because of his other health conditions, Dodson “may be unable to return to any type of work” and “may well be best served by applying for Social Security disability.”

In addition to Dr. Ballard’s records, Dodson filed records from Alan Rothschild, M.D. Dr. Rothschild performed cardiac bypass surgery on January 4, 2000,

and treated Dodson in follow-up after that surgery. Dr. Rothschild's records do not contain any work restrictions.

Dodson also filed records from Jagdish Kothari, M.D. On March 5, 2001, Dr. Kothari opined that Dodson was mentally or physically incapacitated at that time but Dodson's incapacity was expected to last for less than twelve months.

The Board filed the February 21, 2002, report of William P. McElwain, M.D. Dr. McElwain recommended rejecting Dodson's application, noting an absence of physical limitations that would prohibit Dodson from performing his job as a security officer.

The Board also filed the April 1, 2002, report from Roger W. Strunk, M.D. Dr. Strunk reviewed records from Dr. Ballard, Dr. Rothschild, and Dr. Kothari and concluded that there was no indication that Dodson was disabled or would be disabled for a period of more than twelve months. Therefore, Dr. Strunk also recommended denial of Dodson's claim.

Based on the above evidence, the hearing officer recommended denial of Dodson's claim. In doing so, the hearing officer noted Dodson's complaints and the above listed medical records and reports. Specifically, the hearing officer noted that Dodson appeared to have recovered from his cardiac condition. He also noted that the orthopedic restrictions from Dr. Gleis and Dr. Ballard would permit Dodson to return to his work as a security guard. As to Dodson's high blood pressure and diabetes, the hearing officer stated that "[n]one of the Claimant's physicians have indicated that he would be unable to work because of these conditions."

Dodson timely filed exceptions to the hearing officer's report and recommended order. In his exceptions, Dodson primarily complained that the hearing officer relied on the orthopedic restrictions from Drs. Ballard and Gleis but ignored Dr.

Ballard's statement that the combination of Dodson's conditions would prevent him from working an eight-hour day.

As noted above, the Board adopted the hearing officer's report and recommended findings and denied Dodson's claim. Dodson appealed the Board's denial to the Franklin Circuit Court, which affirmed the Board. On appeal, Dodson argues before us, as he did before the circuit court, that the hearing officer's report and recommended findings were not supported by evidence of substance.

Although there is nothing in the record, we note that counsel for Dodson states in his brief before us that Dodson died on March 12, 2004, as a result of complications related to his heart condition, high blood pressure, and diabetes. That information is not supported by anything in the record, and while we offer our condolences to Dodson's family, we cannot consider it in addressing the issue raised by Dodson.

#### STANDARD OF REVIEW

In reviewing the Board's findings, this Court, like the circuit court, is required to determine if the Hearing Officer's findings of fact, as adopted by the Board, are supported by substantial evidence of probative value and if the Board applied the correct rule of law to the facts. *Southern Bell Telephone & Telegraph Co. v. Kentucky Unemployment Insurance Commission*, 437 S.W.2d 775, 778 (Ky. 1969); *see also Kentucky Board of Nursing v. Ward*, 890 S.W.2d 641, 642-43 (Ky. App. 1994). As long as there is substantial evidence in the record to support the Board's decision, this Court must defer to the Board, even if there is conflicting evidence. *Kentucky Commission on Human Rights v. Fraser*, 625 S.W.2d 852, 856 (Ky. 1981). Evidence is substantial if "it has sufficient probative value to induce conviction in the minds of reasonable men."

*Blankenship v. Lloyd Blankenship Coal Co., Inc.*, 463 S.W.2d 62, 64 (Ky. 1970). With this standard in mind, we will address the issue raised by Dodson.

#### ANALYSIS

Dodson argues that the hearing officer, and subsequently the Board and the circuit court, focused only on his back condition, ignoring his other medical conditions. According to Dodson, if all of his conditions are taken into consideration, a finding in his favor is compelled. The Board argues that the hearing officer's report and recommended order are supported by substantial evidence. Furthermore, the Board argues that there is no objective medical evidence to support Dodson's contention that his high blood pressure, heart condition, high cholesterol, and diabetes were in any way disabling. For the reasons set forth below, we agree with the Board.

KRS 61.600(3) provides that a person who is otherwise qualified is entitled to retirement disability if he can establish with objective medical evidence that

(a) [s]ince his last day of paid employment, [he] 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;

(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;

(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. . . .

*See also 105 KAR 1:210 § 8(2)*. Based on the above, we agree with the Board that the issue is whether there was any objective evidence that Dodson's medical conditions

were disabling. Therefore, we must examine each of Dodson's conditions to determine whether there is any objective evidence that they singularly or collectively cause disability sufficient to qualify Dodson for retirement disability benefits.

There is little dispute that Dodson suffered a back injury and that objective evidence supports a diagnosis of degenerative changes and a herniated disc. Both Drs. Ballard and Gleis stated that, taking into consideration only Dodson's back condition, Dodson was capable of returning to his job as a security guard. Therefore, there is also little dispute that Dodson's back injury, in and of itself, would not result in his disability as defined in KRS 61.600(3). It follows then that the hearing officer correctly found that, based on his back condition, Dodson did not qualify for retirement disability benefits.

Next, we look to Dodson's heart condition. Dr. Rothschild performed bypass surgery in January of 2000 and treated Dodson following that surgery. Dr. Rothschild did not place any permanent restrictions on Dodson, and Dodson returned to his job as an equipment operator following his recovery from surgery. This evidence indicates that Dodson did not have any disability related to his heart condition and supports the findings of the hearing officer, the Board, and the circuit court.

As to Dodson's diabetes, we note that Dr. Rothschild noted its existence, as did Drs. Becherer, Ballard, Gleis, and Kothari. Furthermore, blood test results contained in Dr. Kothari's records show elevated blood sugar levels. However, no physician specifically stated what impact, if any, Dodson's diabetes had on his ability to perform work activity. In the absence of such evidence, the hearing officer and the Board could not have found that Dodson's diabetes was disabling. Therefore, we discern no error in the findings of the hearing officer, the Board, or the circuit court with regard to the disabling nature of Dodson's diabetes.

As to Dodson's blood pressure, we note that, in his last letter, dated June 6, 2000, Dr. Rothschild found that Dodson's blood pressure had risen to 160/80. However, Dr. Kothari's records show that Dodson's blood pressure dropped in the fall of 2001 to 128/72 and, in the spring of 2002, it was 130/80. Furthermore, as with Dodson's heart condition and diabetes, there is no indication from any physician what specific impact, if any, Dodson's blood pressure had on his ability to perform his job duties. Therefore, we discern no error in the findings of the hearing officer, the Board, or the circuit court with regard to the disabling nature of Dodson's blood pressure.

As to Dodson's cholesterol, we note that blood test results in Dr. Kothari's records indicate that Dodson's cholesterol level was consistently elevated. However, as with all of Dodson's medical conditions, other than his back, there is no specific indication how his elevated cholesterol levels interfered with Dodson's ability to return to his work as a security guard. Therefore, as with Dodson's other conditions, we discern no error with the findings of the hearing officer, the Board, or the circuit court.

Based on the above, only Dodson's back condition resulted in the imposition of any restrictions. Those restrictions would not have precluded Dodson from returning to work as a security guard or from performing other similar work. Despite Dr. Ballard's statement, Dodson had no restrictions related to his heart condition, diabetes, high blood pressure, or high cholesterol. Therefore, the hearing officer's finding that the cumulative effect of Dodson's conditions did not result in disability sufficient to warrant an award of benefits is supported by substantive evidence. We cannot disturb that finding on appeal and must affirm.

#### CONCLUSION

Based on the paucity of evidence regarding the disabling impact of Dodson's non-back related physical conditions and the evidence from Dr. Gleis and Dr.



Ballard, we hold that Board's denial of Dodson's claim was supported by substantial evidence. Therefore, we affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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