

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-002087-MR

SAM BOONE

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 05-CI-01552

KENTUCKY RETIREMENT
SYSTEMS

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; DIXON AND LAMBERT, JUDGES.

LAMBERT, JUDGE: Samuel Boone appeals from the denial of his application for disability retirement benefits and duty-related disability retirement benefits. After careful review, we affirm.

Boone worked with the Livingston County Road Department from March 1978 to October 2002. On August 12, 2002, while Boone was on duty, a

trailer became disconnected from its hauling vehicle, crossed the center line, and connected with Boone's truck, causing his truck to flip several times. Boone was taken by ambulance to a hospital where he was treated for "neck pain." A CT scan of his cervical spine revealed "mild disc C2-C3 and C3-C4 protrusions...with no definite evidence of nerve root compression." Shortly thereafter, Boone saw Dr. William E. Barnes, Jr., a board certified surgeon, for "numbness down both arms." Dr. Barnes stated that Boone's numbness was related to thoracic outlet syndrome (TOS) but that he thought Boone would be able to return to work in about three months. Boone was then transferred to Dr. Michael P. Gavin, another board certified surgeon, of the same office, due to Dr. Barnes taking a leave of absence because of illness. Dr. Gavin diagnosed Boone with C5-C6 disc herniation, based on an MRI, but a cervical spine x-ray from over a year before the accident showed "degenerative change with narrowing of C5-C6 disc space."

Boone also saw neurologist, Dr. William Hogancamp, who stated that "there is no neurologic[al] reason for him to have [such symptoms]." Dr. Hogancamp ordered a Duplex Arterial (or Doppler) study of Boone's arms on January 14, 2003. The results of this test revealed that Boone had "significant brachial waveform abnormalities identified bilaterally...[with] persistently reproducible and bilateral brachial waveform abnormalities." Dr. Hogancamp referred Boone to vascular surgeon Dr. Charles Ross who opined that "[Boone] may well require surgical decompression of the thoracic outlet." Two other physicians, Dr. Erdogan Atasoy and Dr. Gregory Gleiss, saw Boone and agreed on

the diagnosis of TOS. Dr. Ross, however, testified that TOS is quite “controversial” and “is a source of controversy in medical literature.” Dr. Gleiss went on to opine that Boone could return to work with certain restrictions. Furthermore, Dr. Gleiss noted that Boone used “inconsistent effort with...testing.”

Boone was also evaluated by Dr. Robert Weiss for the workers’ compensation carrier. Dr. Weiss found nothing wrong with Boone and stated that he thought Boone was magnifying his symptoms.

On August 1, 2003, Boone applied for disability retirement benefits and duty-related disability retirement benefits from the Kentucky Retirement Systems pursuant to KRS 61.600 and KRS 61.621. The Kentucky Retirement Systems’ Medical Review Board denied Boone’s application. An administrative hearing was conducted to appeal the denial at Boone’s request. The Hearing Officer recommended that the application be denied as well. The Disability Appeals Committee of the Board of Trustees (the Committee) then carefully reviewed all the evidence of record and adopted the Hearing Officer’s Report and Recommended Order as the final order of the Committee, denying Boone’s application for enhanced disability retirement benefits. The Committee held that Boone failed to establish by objective medical evidence the existence of a permanent physical or mental impairment that would prevent him from performing his former job or a job of like duties as of his last day of paid employment.

Boone appealed this final agency action in Franklin Circuit Court, which upheld the decision of the Disability Appeals Committee. Boone now appeals the decision of the Franklin Circuit Court.

“The position of the circuit court in administrative matters is one of review, not of reinterpretation.” *Commonwealth, Department of Education v. Commonwealth, Kentucky Unemployment Insurance Commission*, 798 S.W.2d 464, 467 (Ky.App. 1990). The court is not free to consider new or additional evidence or substitute its judgment as to the credibility of the witnesses and/or the weight of the evidence concerning questions of fact. *Mill Street Church of Christ v. Hogan*, 785 S.W.2d 263 (Ky.App. 1990). Thus, if administrative findings of fact are based upon substantial evidence, meaning evidence that when taken alone or in the light of all the evidence has sufficient probative value to induce conviction in the minds of reasonable persons, then those findings are binding upon the court. *See e.g., Commonwealth, Dept. of Education*, 798 S.W.2d 464, 467 (Ky. 1990); *Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972). Moreover, where the administrative agency’s decision is to deny relief to the party with the burden of proof, as in the instant case, “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.” *See McManus v. Kentucky Retirement Systems*, 124 S.W.3d 454 (Ky.App. 2004).

The only question remaining for the court then to address is “whether or not the agency applied the correct rule of law to the facts so found.” *Starks v.*

Kentucky Health Facilities, 684 S.W.2d 5, 6 (Ky.App. 1984). If the court finds the correct rule of law was applied to facts supported by substantial evidence, the final order of the agency must be affirmed. *Brown Hotel Company v. Edwards*, 365 S.W.2d 299, 302 (Ky. 1963).

KRS 61.600 states in pertinent part that:

(1) Any person may qualify to retire on disability, subject to the following conditions:

.....

(3) Upon the examination of the *objective medical evidence* by licensed physicians pursuant to KRS 61.665, it shall be determined that:

(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;

(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. For purposes of this subsection, reemployment shall not mean a change of employment between employers participating in the retirement systems administered by the Kentucky Retirement Systems with no loss of service credit.

(Emphasis added).

The Hearing Officer's report and the Committee's subsequent adoption of said report were based on an extensive review of Boone's medical history before, during, and after the relevant period of time, October 15, 2002-October 15, 2003, and correctly applied the above statute. The opinion of the Franklin Circuit Court outlines in detail the precise and substantial medical evidence taken into consideration by the Hearing Officer and the Committee in the decision to deny Boone disability benefits. Moreover, the court's opinion recognizes, as we do, that Boone offered medical evidence in support of his contention that he was entitled to disability benefits. In *Com. Transp. Cabinet v. Cornell*, 796 S.W.2d 591, 594 (Ky.App. 1990), this Court stated quite simply that "the trier of facts in an administrative agency may consider all of the evidence and choose the evidence that he believes." The record clearly reflects that substantial evidence existed to support the Committee's decision to deny Boone disability benefits, and it was within its discretion to decide what evidence was credible as well as the weight afforded said evidence.

Accordingly, we affirm the opinion and order of the Franklin Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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