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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001176-MR

ROGER WEST — APPELLANT

v. — APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 07-CI-01892

KENTUCKY RETIREMENT SYSTEMS — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE, CLAYTON, AND WINE, JUDGES.

WINE, JUDGE: Roger West appeals from an order of the Franklin Circuit Court affirming the denial of his claim for disability retirement benefits by the Board of Trustees ("the Board") of the Kentucky Retirement Systems ("the Systems"). Upon review, we reverse and remand.

History

West's first employment with the Commonwealth began in September of 1973; however such employment was not continuous. West became re-employed with the Commonwealth on January 18, 1991, and remained employed by the Commonwealth as a plant operator in a waste/water sewage treatment plant for the City of Middlesboro until May 1, 2005. West's job duties were classified as heavy work or labor. On May 1, 2005, West suffered a work-related injury to his back. West was off work until December 18, 2005, at which point he returned and promptly suffered a re-injury which prevented him from continuing in the manual labor his job required. His last date of paid employment was December 31, 2005. Although West did not request reasonable accommodations be made for him, a letter was submitted by his employer stating that West could not request reasonable accommodations because there were no light duty jobs available to him. At the time West left his employment with the Commonwealth, he suffered from lower back injuries as well as breathing problems due to a diagnosis of Chronic Obstructive Pulmonary Disease ("COPD"). At that time, he had approximately one hundred eighty-five months of combined service with the Kentucky Employees Retirement System and the County Employees Retirement System.

West timely filed for disability retirement benefits pursuant to Kentucky Revised Statute ("KRS") 61.600. However, the Kentucky Retirement Systems Medical Review Board denied West's application. West appealed the denial of his request for benefits and an administrative hearing was held on the

matter. The hearing officer affirmed the Medical Review Board's denial, holding that West had failed to prove that he suffered a permanent physical or mental impairment that would prevent him from performing his former job or a job of like duties and that he failed to prove that his incapacity did not result either directly or indirectly from an injury or condition which pre-existed his membership in the Kentucky Retirement Systems. West appealed and the Board affirmed the hearing officer.

Thereafter, West appealed to the Franklin Circuit Court. The Franklin Circuit Court affirmed the Board (albeit on other grounds). West then filed a motion to alter, amend, or vacate the opinion and order. The motion was denied. West now appeals.

Standard of Review

Upon review of the denial of disability retirement benefits, we accept the agency's findings of fact as true as long as they are supported by substantial evidence. *Bowling v. Natural Resources and Environmental Protection Cabinet*, 891 S.W.2d 406 (Ky. App. 1995). Substantial evidence is such evidence as would "induce conviction in the minds of reasonable [persons]." *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). Where it is determined that the agency's findings are supported by substantial evidence, the court must then ask whether the agency has correctly applied the law. *Kentucky Unemployment Insurance Commission v. Landmark Community Newspapers of Kentucky, Inc.*, 91 S.W.3d 575, 578 (Ky. 2002). A reviewing court may also

reverse a final order of an administrative agency, in whole or in part, where it is found that the agency's order violates statutory or constitutional provisions, is in excess of the agency's authority as granted by statute, or is deficient as otherwise provided by law. KRS 13B.150(2).

Analysis

On review, we consider the hearing officer's findings, as adopted by the Board, that (1) West failed to prove he suffered a permanent physical or mental impairment that would prevent him from performing his former job or a job of like duties; and (2) his incapacity did not result either directly or indirectly from an injury or condition which pre-existed his membership in the Kentucky Retirement Systems.

To begin, we must look to KRS 61.600, which governs disability retirement benefits. KRS 61.600 provides, in pertinent part, that

> (1) Any person may qualify to retire on disability, subject to the following conditions:
>
> > (a) The person shall have sixty (60) months of service . . .
> >
> > . . . .
> >
> > (c) The person's application shall be on file in the retirement office no later than twenty-four (24) months after the person's last day of paid employment . . .
> >
> > (d) The person shall receive a satisfactory determination pursuant to KRS 61.665 [from the Board's medical examiners].

. . . .

(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. . . .

However, KRS 61.600(4) states that the requirement in subsection (3)(d) that the condition must not pre-exist membership in the system, shall not apply if

(a) The incapacity is a result of bodily injury, mental illness, disease, or condition which has been substantially aggravated by an injury or accident arising out of or in the course of employment; or
(b) The person has at least sixteen (16) years' current or prior service for employment with employers participating in the retirement systems administered by the Kentucky Retirement Systems.

West clearly had over sixty months of service and he clearly filed his application for disability retirement within twenty-four months of his last day of paid employment. The only issues remaining are whether West was incapacitated from performing his previous job or jobs of like duties under KRS 61.600(3)(a) and whether West's incapacity resulted from a condition or conditions which pre-dated his membership in the Systems under KRS 61.600(3)(d). West is not exempted from the requirement in KRS 61.600(3)(d), that the incapacity may not result from a pre-existing condition or illness, as it was determined that he had apparently fifteen-and-a-half years of service, just shy of the sixteen years required in KRS 61.600(4)(b), for exemption from the pre-existing condition requirement.

West argues on appeal that the hearing officer erred by failing to consider the cumulative effect of his impairments when determining whether he was incapacitated from performing his previous job or jobs of like duties. West further argues that it was error for the hearing officer to find that his tobacco use was a pre-existing condition to his ultimate diagnosis of COPD.

A. The "Cumulative Effect" Rule

First, we consider West's argument that it was error for the hearing officer to fail to consider the cumulative effect of his various injuries and impairments. Although the Franklin Circuit Court found that the hearing officer's failure to consider the cumulative effects of his back and breathing injuries was not error, we must disagree. Indeed, the Kentucky Supreme Court has recently held that it is error to neglect to consider the cumulative effects of an individual's

impairments in Kentucky Retirement Systems cases. *Kentucky Retirement Systems v. Bowens*, 281 S.W.3d 776, 783 (Ky. 2009).[1] West was diagnosed by his doctors as having (1) Advanced COPD; (2) Chronic lumbar sacral disc disease; (3) Seizure disorder; (4) Hypertension; (5) Hypercholesterolemia; (6) Degenerative joint disease; (7) Sleep apnea requiring a c-pap at night; and (8) Hypothroism. It seems questionable, given all these factors, that he would have been able to carry on in a position requiring heavy labor. "By failing to properly consider the cumulative effect standard implicit in KRS 61.600, [the Systems] exceeded the constraints of its statutory powers and arbitrarily denied Appellee's disability claim." *Id*. at 783. *See also*, KRS 13B.150(2)(b). As such, we reverse and remand on this issue for a determination of whether the combined effects of West's impairments rendered him unable to return to his former position or like positions.

B. Smoking is Not a "Condition"

Next, we address West's argument that his prior smoking and tobacco use may not be considered a "pre-existing condition" to his diagnosis of COPD. As we find that tobacco use is a behavior rather than a "condition" as contemplated under the statute, we agree with West that it was error for the hearing officer to deny coverage on the ground that his smoking was a pre-existing condition.

KRS 61.600(3)(d) excludes disability retirement coverage for any incapacity which is caused, directly or indirectly, by a "bodily injury, mental illness, disease, or condition" which pre-existed the member's employment. To

[1] To be fair to the circuit court, this opinion was rendered only a month before the Franklin Circuit Court issued its opinion and order.

arrive at the meaning of the word "condition," above, we must interpret the statute. Statutory interpretation is a matter of law for the court. *City of Worthington Hills v. Worthington Fire Protection Dist.,* 140 S.W.3d 584, 591 (Ky. App. 2004). "When interpreting a statute, a word is to be afforded its ordinary meaning unless it has acquired a technical meaning." *Garcia v. Commonwealth*, 185 S.W.3d 658, 664 (Ky. App. 2006). As we interpret the word "condition," in KRS 61.600(3)(d), we are also guided by the canon of statutory construction called *ejusdem generis*. *Id*. The doctrine of *ejusdem generis* provides that, in statutory interpretation,

> [W]here, in a statute, general words follow or precede a designation of particular subjects or classes of persons, the meaning of the general words ordinarily will be presumed to be restricted by the particular designation, and to include only things or persons of the same kind, class, or nature as those specifically enumerated, unless there is a clear manifestation of a contrary purpose.

Steinfeld v. Jefferson County Fiscal Court, 312 Ky. 614, 229 S.W.2d 319, 320 (1950). Here, when applying the rule of *ejusdem generis*, we note that the term "condition" is preceded by the terms "bodily injury," "mental illness," and "disease." As such, we find that the word condition is restricted to an interpretation which is of the same kind or nature as the terms "bodily injury," "mental illness," or "disease." Accordingly, we cannot interpret "condition" in a way that would incorporate *behavior* or *lifestyle choices* into its meaning, nor can we interpret it to mean anything other than a medically diagnosable ailment. There is no clear manifestation of a contrary purpose.

Moreover, we note the impropriety, for public policy reasons, of dubbing smoking and tobacco use a "condition" which may pre-exist smoking-related illnesses later in life. This logic would necessitate the corresponding rationale that individuals who fail to exercise, eat healthily, or manage their weight have laid the groundwork for, and indeed have a pre-existing condition for, eventual heart disease, diabetes or other like illnesses. To interpret KRS 61.600(3)(d) so broadly as to encompass nearly any human behavior that could adversely affect a person's future health would be to effectively render it impossible for a state employee with less than sixteen years' service to qualify for disability retirement benefits. Moreover, we cannot conceive that the Legislature had any such intention when it penned the phrase "bodily injury, mental illness, disease, or condition[.]" KRS 61.600(3)(d). Rather, it seems clear that the statute refers to medically and psychiatrically diagnosable maladies only.

Although the Franklin Circuit Court aptly acknowledged the hearing officer's error in deeming smoking a pre-existing condition, it still affirmed the Board on other grounds. Specifically, the Franklin Circuit Court found that West failed to meet his burden to show that his COPD did not pre-exist his membership in the Systems. However, the Franklin Circuit Court misunderstands West's burden in showing whether his COPD was pre-existing, and understandably so, as the case law to date has been less than clear on the matter.[2]

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[2] We note, as an aside, that the Supreme Court has recently taken up this issue on discretionary review in the case of *Kentucky Retirement Systems v. Brown*, 2008-SC-000326-D, however no opinion has yet been rendered. This Court held in *Brown* that placing the burden upon the claimant to show absence of a pre-existing condition requires the difficult task of "proving a negative." Consequently, this Court found that

As such, we turn to the Franklin Circuit Court's opinion affirming the Board on other grounds.

This case presents a unique circumstance, in that West's primary care physician prior to 1998 retired and all of West's medical records pre-dating that time were destroyed. The only evidence in the record concerning whether West's COPD pre-existed his membership in the Systems was contained in the deposition testimony of Dr. Westerfield. When asked whether West had COPD in 1991 (his first year of re-employment with the Systems), Dr. Westerfield stated it was his medical opinion that it was highly unlikely that West experienced that level of pulmonary impairment in 1991. The Franklin Circuit Court found that this evidence did not meet West's burden to show his COPD did not predate his membership, stating as follows: "Given Petitioner's burden to demonstrate his condition was not pre-existing, the Board's decision was based upon substantial evidence." However, we find that this misinterprets West's burden.

A claimant seeking disability retirement benefits under KRS 61.600, and who has less than sixteen years of service with the Commonwealth, bears the burden of showing that his condition does not predate his service with the Commonwealth. KRS 13B.090. *See also, McManus v. Kentucky Retirement Systems*, 124 S.W.3d 454 (Ky. App. 2004).

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the proof necessary to meet the burden was minimal, and that once met, would *effectually* create a rebuttable presumption in favor of the claimant, shifting the burden of going forward to the Systems to come forward with some evidence in rebuttal. *Kentucky Retirement Systems v. Brown*, 2006-CA-000296-MR.

Although *McManus, supra*, established that a claimant bears the burden to show his condition is not pre-existing, it did not address the quantum of evidence necessary for a claimant to meet this burden. Courts of justice have often recognized that proving a negative is an exceedingly difficult thing to do. Indeed, we reject the concept by rule. Kentucky Rule of Civil Procedure ("CR") 43.01(1). Thus, in those infrequent circumstances where we impose such a burden upon a party, it is usually found that the evidence required to meet such burden is minimal. *See, e.g., Motorists Mut. Ins. Co. v. Hunt,* 549 S.W.2d 845, 847 (Ky. App. 1977) (As proving a negative is always difficult, if not impossible, the quantum of proof required to prove a motorist is uninsured is merely such as will convince the trier that all reasonable efforts have been made to ascertain the existence of an applicable insurance policy).

Thus, we find the proper interpretation of the statute to be that a claimant bears the burden to come forward with *some evidence* that his condition did not pre-exist his service with the Commonwealth. Upon such a threshold showing, the burden of going forward shifts back to the Systems. While the ultimate burden of persuasion is not moved from the party upon which it was originally cast (the claimant), the Systems must come forward with some evidence in rebuttal where a claimant makes a threshold showing that his or her condition was not pre-existing. While we agree with the Systems that the fact-finder is free to accept or reject any evidence it chooses, it is not free to reject *uncontested* evidence.

Here, the only evidence concerning whether West's COPD pre-existed his membership was the unrebutted deposition testimony of Dr. Westerfield. As our Courts have often stated, medical testimony need not be couched in terms of absolute certainty. Rather, medical testimony need only be stated in terms of reasonable medical probability. *See, Lexington Cartage Co. v. Williams*, 407 S.W.2d 395 (Ky. 1966); *Turner v. Commonwealth*, 5 S.W.3d 119 (Ky. 1999). Westerfield's testimony certainly seems to do so. As such, the onus was upon the Systems to rebut that evidence. Here, if the Systems had indicated any particular reasons to disbelieve Dr. Westerfield, or had referred to any contrary medical evidence, then the hearing officer may have been justified in rejecting West's evidence to the contrary. However, as the Systems offered no contrary medical evidence, the hearing officer was not free to reject the uncontested evidence in Dr. Westerfield's deposition testimony. Indeed, the Systems' arguments that West's COPD was pre-existing seem to be based solely upon the fact that West's early medical records were unavailable and the fact that he smoked long before he ever became reemployed with the Commonwealth in 1991. As previously stated, smoking cannot be considered a pre-existing condition. Further, mere speculation unsupported by medical opinion is not a valid basis upon which a hearing officer may choose to accept or reject given evidence. Accordingly, we reverse and remand this issue for reconsideration given that smoking may not be considered a pre-existing condition for the purposes of disability retirement in Kentucky and given that we find KRS 61.600(3) requires only that a claimant

come forward with some evidence that his condition did not predate his employment with the Commonwealth before the Systems must then come forward with any other evidence it may have in rebuttal.

For the foregoing reasons, we hereby reverse the opinion and order of the Franklin Circuit Court and remand this matter to the Kentucky Retirement Systems for further review of the evidence in light of the cumulative effect rule, the fact that smoking may not be considered as a pre-existing condition, and in consideration of the standard espoused herein that the Systems bears the burden of going forward after a claimant comes forward with threshold evidence that his condition is not pre-existing.

ALL CONCUR.

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