

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001906-MR

KATHY HOWARD

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 05-CI-01002

KENTUCKY RETIREMENT
SYSTEMS

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CLAYTON AND LAMBERT, JUDGES; HENRY, SENIOR JUDGE.

CLAYTON, JUDGE: Kathy Howard appeals from an order of the Franklin Circuit Court affirming the denial of her claim for “hazardous in-line-of duty” disability retirement benefits by the Board of Trustees (“the Board”) of the Kentucky Retirement Systems (“the Systems”). Howard, a correctional officer, sought and was denied disability retirement benefits after she was injured during the course of her employment. We affirm.

HISTORY

Kathy Howard was employed as a correctional officer at the Eastern Kentucky Correctional Complex from February 17, 1998, (date of membership) until March 31, 2002, (last day of paid employment). The duration of the employment gave her forty-three months of Kentucky Retirement service credit.

As a correctional officer her job duties included guarding inmates, monitoring inmates, overseeing recreational activities of inmates, writing reports, conducting searches, and transporting inmates when required. In addition, Howard was required to take action to prevent or suppress emergency situations, and she carried a firearm. For the most part, she stood the majority of the day although she had some opportunity to alternate between sitting and standing. The maximum weight Howard was required to lift was fifty pounds, but she lifted significantly less weight on a regular basis. Her job was classified as medium in nature but under KRS 61.592, it was also classified as hazardous.

On February 8, 2001, while working, Howard sustained an injury to her foot when a metal panel, which measured approximately four by eight feet, fell approximately ten to twelve feet, from the ceiling onto her foot. Howard suffered a crush injury of the left foot with fractures of the first, second, and third metatarsals. Howard claims a disability due to this work-related injury; however, the fractures were repaired and the doctors noted no continuing structural damage. Notwithstanding this fact, Howard contends that she continues to suffer extreme pain from the injury, which prevents her from performing a hazardous job with

similar duties. Therefore, she believes that she is entitled to disability retirement benefits.

On October 30, 2002, Howard applied for hazardous “in the line of duty” disability retirement benefits. The Systems’ medical review board denied Howard’s request for “in the line of duty” benefits. Howard appealed the medical review board’s decision and an administrative hearing was held on September 10, 2004. Because Howard had only accumulated forty-three months of service, she had to establish at that hearing that her alleged disability was a “direct result of an act in the line of duty[.]” KRS 16.582(2)(a). Howard had to prove this fact in order to waive the disability service requirement.

In addition, Howard had to demonstrate that she is disabled from performing her duties as a correctional officer. While the claimant goes into great detail to describe her pain, the medical evidence itself is conflicting. First, the fractures suffered by Howard are well-healed. Other studies, including nerve conduction studies, a test for osteopenia, and x-rays, are either normal, show no evidence of osteopenia, and show healed fractures. The administrative record contained discussion by numerous doctors. One issue opined about was the possibility of Howard having developed reflex sympathetic dystrophy, that is, regional pain syndrome, following the injury. The record reveals, however, that one of the physicians noted that at least eight criteria were necessary to establish the pain syndrome, and Howard merely had two symptoms. In pleading her contention about the pain syndrome, Howard relied on the deposition of Dr.

William Coble. But while Dr. Coble noted Howard's subjective reports of pain, he also pointed out the lack of objective symptoms for such a diagnosis. The Hearing Officer's report goes into much greater depth and discusses other evidence. In sum, the evidence presented by Howard was disputed by the Systems' evidence.

After review of the entire administrative record, the Hearing Officer did not find Howard's subjective reports of pain sufficiently compelling to support an award of retirement disability. Hence, the hearing officer found that Howard failed to meet her burden of proof and entered a recommendation that Howard's application for disability benefits be denied. Next, Howard filed exceptions to the hearing officer's report and recommended order. Then, on June 29, 2005, the Board issued a report and order sustaining the denial of benefits. After that, Howard appealed the final agency action to Franklin Circuit Court. On September 22, 2009, the Franklin Circuit Court issued an order affirming the Board's decision. Howard now appeals this decision.

We must review the circuit court's decision upholding the Board's denial of "in the line of duty" disability retirement benefits under KRS 16.505(19) and 16.582. To recap, Howard claims that she suffers extreme pain resulting from a foot injury incurred during her employment, and therefore, is entitled to disability retirement benefits. The Systems counters that the Franklin Circuit Court did not err in upholding the Board's decision, which denied Howard disability retirement benefits. And it maintains that the Board's decision is supported by substantial evidence.

STANDARD OF REVIEW

Initially, we observe that when a circuit court reviews an administrative decision, its role is not to reinterpret or reconsider the merits of the claim. *Kentucky Bd. of Nursing v. Ward*, 890 S.W.2d 641, 642 (Ky. App. 1994). Instead, the circuit court must ascertain whether the findings of fact are “supported by substantial evidence of probative value” and whether the administrative agency “applied the correct rule of law to the facts so found.” *Southern Bell Tel. & Tel. Co. v. Kentucky Unemployment Ins. Comm’n*, 437 S.W.2d 775, 778 (Ky. 1969) (citing *Brown Hotel Co. v. Edwards*, 365 S.W.2d 299 (Ky. 1962)). If there is substantial evidence in the record to support the agency's decision, the circuit court must defer to the agency notwithstanding conflicting evidence. *Kentucky State Racing Comm’n v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972) (citing *Blankenship v. Lloyd Blankenship Coal Co., Inc.*, 463 S.W.2d 62 (Ky. 1970)).

Next, we examine the circuit court’s decision affirming the Board’s denial. In reviewing a state agency's administrative decision, which is adverse to a claimant, we will not overturn it unless the agency acted arbitrarily, outside the scope of its authority, applied an incorrect legal standard, or its decision was not supported by substantial evidence. *Kentucky State Racing Comm’n*, 481 S.W.2d at 307-08. When disability benefits are denied, 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 Ins. Comm’n 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, when 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

The issue before this Court is to determine whether the circuit court was correct when it decided that the Board’s decision was supported by substantial evidence and that the Board correctly applied the law to the facts. Under KRS 13B.090(7), the burden of proof rests upon Howard to show by a preponderance of the evidence that she is entitled to hazardous in-the-line-of duty disability retirement benefits.

According to KRS 61.592(1)(a), one type of “hazardous position” for participating Kentucky Employees Retirement System (KERS) employees is a position in the Department of Corrections in state correctional institutions or the Kentucky Correctional Psychiatric Center, which requires regular and routine face-to-face contact with inmates. Howard fits this category because she was employed as a correctional employee.

KRS 16.582 elucidates disability retirement benefits for KERS members who qualify as serving in hazardous duty employment. Under this statute, a person qualifies to retire on disability if the person has served sixty months but the service requirement is waived if the disability is total and “permanent disability or a hazardous disability and is a direct result of an act in [the] line of duty[.]” KRS 16.582(2)(a). To ascertain whether disability benefits are to be awarded, the statute provides the following guidance:

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

(a) The incapacity results from 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;

(b) The incapacity is deemed to be permanent; and

(c) The incapacity does not result directly or indirectly from:

1. Injury intentionally self-inflicted while sane or insane;

2. Injury or disease resulting from military service; or

3. Bodily injury, mental illness, disease, or condition which pre-existed membership in the system or reemployment, whichever is most recent, unless:

a. The disability results from bodily injury, mental illness, disease, or a 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.

Here, after a painstaking review of the medical evidence, the hearing officer found that the objective medical and psychiatric evidence did not establish, by a preponderance of the evidence, that Howard is totally and permanently disabled or that she is likely to remain disabled for less than twelve months from the last date of employment.

The circuit court noted in its opinion that the evidence in Howard's case is conflicting. In fact, it commented that "Howard's case appears to be tarnished by conflicting and less than credible evidence." In particular, the circuit court was troubled by Howard's reports of pain. The court also observed that the hearing officer heard the testimony, saw the claimant first hand, and viewed the claimant's demeanor so the court found it proper to defer to the hearing officer's assessment of the claimant's credibility. According to the standard of review, the court must defer to the finder-of-fact's determination. *See Kentucky State Racing Comm'n*, 481 S.W.2d 298. Moreover, in *Bowling v. Natural Resources and environmental Protection*, 891 S.W.2d 406 (Ky. App. 1995), our Court held that the trier of facts in an administrative agency "is afforded great latitude in its

evaluation of the evidence heard and credibility of the witnesses appearing before it.” *Id.* at 409-10.

We concur with the trial court’s reflection that it is plausible that Howard has some residual pain from her injury; yet, she provided no evidence sufficiently convincing to overturn the Systems’ denial of disability retirement benefits. For instance, the court opined regarding Howard’s failure to follow the recommendations of her treating physicians regarding possible pain and not seeking psychiatric assistance for her claims of depression. These facts bolster the hearing officer’s determination that Howard was not permanently disabled.

Thus, after a thorough review of the record and the previous decisions in this case, we have determined that neither the Systems nor the trial court committed an error of law. And we hold that substantial evidence did support the factual findings of the administrative agency. Howard presented evidence to support her request for permanent disability retirement; however, the evidence presented by Howard did not meet the burden of proof necessary to prove entitlement to retirement benefits, and the evidenced presented by the Systems was more compelling. In its review, the Franklin Circuit Court said that the Board’s decision was “fully justified” and the proffered evidence by the Systems was sufficiently compelling. We concur.

CONCLUSION

Accordingly, it is our determination that the Franklin Circuit Court's decision upholding the Kentucky Retirement Systems was legally correct, based on

substantial evidence, and not erroneous. For these reasons, we affirm the judgment of the Franklin Circuit Court.

ALL CONCUR.

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