

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-000525-MR

BEATRICE CHEEK

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 09-CI-01743

KENTUCKY RETIREMENT SYSTEMS;
AND BOARD OF TRUSTEES OF
THE KENTUCKY RETIREMENT SYSTEMS

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; TAYLOR AND VANMETER, JUDGES.

TAYLOR, JUDGE: Beatrice Cheek brings this appeal from a February 28, 2013, Opinion and Order of the Franklin Circuit Court affirming a final order of the Board of Trustees of the Kentucky Retirement Systems (Board) denying Cheek's application for disability retirement benefits. We affirm.

In April 1998, Cheek was hired as a school bus driver by the Jessamine County Board of Education. In October 2006 Cheek stopped working due to alleged work-related injuries. Cheek claimed to have suffered two work-related injuries to her right knee on March 24, 2006, and October 26, 2006. Because of the cumulative effect of these injuries, Cheek alleged that she was physically incapacitated from performing the duties of school bus driver.

On August 16, 2007, Cheek filed an application for disability retirement benefits with the Kentucky Retirement Systems. Per Kentucky Revised Statutes (KRS) 61.665(2)(d), three medical examiners employed by the Kentucky Retirement Systems initially reviewed Cheek's claim for disability retirement benefits. All three medical examiners, Dr. Nancy K. Mullen, Dr. Michael Growse, and Dr. William P. McElwain, recommended denying Cheek's application for disability retirement benefits.

Cheek then appealed the medical examiners recommendations to deny her benefits and requested a hearing. A hearing officer conducted a hearing in January of 2009. By Findings of Fact, Conclusions of Law, and Recommended Order, entered June 26, 2009, the hearing officer concluded that Cheek failed to prove by objective medical evidence that she was incapacitated from performing the duties of school bus driver and that any incapacity suffered by Cheek was due to the preexisting conditions of arthritis and obesity. KRS 61.600(3). The hearing officer also found that the preexisting conditions were not substantially aggravated by the alleged work-related injuries to the right knee. KRS 61.600(4)(a). Cheek

then appealed to the Board, and by final order dated September 14, 2009, the Board adopted the hearing officer's recommended order and denied Cheek's application for retirement disability benefits.

Thereupon, Cheek sought judicial review by filing a petition in the Franklin Circuit Court. KRS 61.665(5). By Opinion and Order entered February 28, 2013, the circuit court affirmed the Board's denial of Cheek's application for retirement disability benefits. The circuit court held that "[s]ubstantial evidence supports the [Board's] Final Order, and . . . [t]he Final Order properly determined that Cheek failed to prove her permanent incapacity from performing the duties of her former job" Opinion and Order at p.7. Also, the circuit court concluded that the "Final Order properly determined that Cheek's osteoarthritis was a pre-existing condition which was not substantially aggravated by her work injuries." Opinion and Order at p.8. This appeal follows.

Cheek contends that the circuit court erred by affirming the Board's final order denying her retirement disability benefits. For the following reasons, we disagree.

Judicial review of an administrative agency's decision is limited. Upon review of the denial of disability retirement benefits, the Board's findings of fact will not be disturbed if supported by substantial evidence, and all issues of law are reviewed *de novo*. *Ky. Ret. Sys. v. Lowe*, 343 S.W.3d 642 (Ky. App. 2011). To prevail in the courts, a claimant denied disability benefits must demonstrate that the evidence compels a finding in her favor. *Id.* Our review proceeds accordingly.

To determine if a claimant is entitled to disability retirement benefits,

KRS 61.600(3) and (4) provides:

(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.

(4) Paragraph (d) of subsection (3) of this section 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.

And, the term “objective medical evidence” is defined as

[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 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[.]

KRS 61.510(33).

Simply stated, a claimant must present objective medical evidence that she is permanently incapacitated from performing the duties of her job. Additionally, the incapacity must not preexist membership in the Kentucky Retirement Systems. In the event the incapacity was preexisting, a claimant may still be entitled to benefits if such was “substantially aggravated” by an injury arising in the course of employment.

In denying Cheek’s application for retirement disability benefits, the Board found that Cheek possessed the functional capacity to resume her duties as a school bus driver. To support this finding, the Board pointed to a Physical Residual Functional Capacity Assessment performed on July 6, 2007. In particular, the Board found that “[t]he residual function capacity evaluation

performed in July 2007 showed any restrictions placed upon the Claimant would fall within the physical demands of her driving a school bus.”

Contained in the record is the Employer’s Job Description setting forth the duties of bus driver and the physical requirements necessary to perform the duties of bus driver. By juxtaposing the Employer’s Job Description and the Functional Capacity Evaluation, we cannot say that the Board erred by finding that Cheek possessed the functional capacity to perform the duties of bus driver. In short, the evidence does not compel a finding that Cheek is physically incapacitated from performing the duties of school bus driver.

We view any remaining contentions of error as moot or without merit.

In sum, we hold that the circuit court properly affirmed the Board’s denial of Cheek’s application for retirement disability benefits.

For the foregoing reasons, the Opinion and Order of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEES:

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