

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000395-MR

SHARON JENKINS

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 17-CI-00431

KENTUCKY RETIREMENT SYSTEMS,
IN ITS OWN NAME AND BY AND
THROUGH ITS BOARD OF TRUSTEES

APPELLEE

OPINION
AFFIRMING IN PART AND REMANDING

** ** * ** * **

BEFORE: DIXON, JONES AND K. THOMPSON, JUDGES.

THOMPSON, K., JUDGE: Sharon Jenkins appeals from an order of the Franklin Circuit Court affirming a final order of the Board of Trustees of the Kentucky Retirement Systems denying her application for in-line-of-duty death benefits following the death of her husband, Malcolm Jenkins. She argues that Kentucky Retirement Systems did not apply the proper statutory standard to determine

whether Malcolm's heart attack was the direct result of an act in his line of duty as a firefighter. She further argues evidentiary errors occurred at her administrative hearing, she was improperly denied a request for an open hearing and Kentucky Retirement Systems improperly conditioned her receipt of basic death benefits on a waiver of her appeal rights.¹

We conclude there was substantial evidence to support Kentucky Retirement Systems' finding of fact that Malcolm's heart attack was not the direct result of an act in the line of duty and, therefore, properly denied in-line-of-duty death benefits. We further conclude that no evidentiary errors were committed at the hearing and that a denial of an open hearing does not require an award of in-line-of-duty death benefits. Finally, we conclude that Kentucky Retirement Systems improperly denied Sharon's receipt of basic death benefits pending appeal and remand to the Franklin Circuit Court to determine what, if any, amount is owed Sharon.

Malcolm was a firefighter for the Fern Creek Fire Protection District for three decades, having served nineteen years as a volunteer firefighter, and then twelve years as a paid, full-time firefighter. At the time his death in October 2014, he held the position of firefighter/fire training officer and the rank of Major.

¹ We use the term "basic death benefits" to refer to benefits other than in-line-of-duty death benefits to which Sharon is entitled.

Malcolm had been on light duty during the summer of 2014 because of surgery on an injured knee.

After Malcolm was released by his physician to return to full duty, Malcom was required to undergo an annual physical fitness examination. On October 30, 2014, at approximately 8:00 a.m., Malcolm reported to BaptistWorx for his annual physical. That examination included a physical demand test as well as various medical assessments. A resting EKG was performed at approximately 8:24 a.m.

Following the medical examination, Malcolm took the physical demand test during which he was required to perform various physical tasks emulating actions typically undertaken by firefighters on the scene of a fire or medical emergency. Malcolm was required to perform strenuous physical tasks including carrying tools up a ladder four times within two minutes, caring heavy equipment, simulating a rescue by pulling a blanket with the equivalent of a 200 pound person on it for 55 feet in one minute and various other physical tests. Malcolm successfully demonstrated the ability to perform all essential functions of his position.

Although it is unknown precisely when Malcolm left BaptistWorx, he called Sharon at 10:30 a.m. to tell her the testing was concluded. It is also known that he pulled into an abandoned gas station and, at 10:59 a.m., called 911

but hung up before a 911 operator answered. Almost immediately, a 911 operator called Malcom's number back, but Malcolm told the operator he did not need assistance. That call lasted fifteen seconds. A few minutes later, at approximately 11:08 a.m., he took a brief call from a co-worker. All further calls to Malcom's cell phone went unanswered. Malcolm was found deceased in his vehicle at the abandoned gas station at 9:57 p.m.

On the death certificate, the deputy coroner indicated that the immediate cause of Malcolm's death was hypertensive and atherosclerotic cardiovascular disease. According to that death certificate, obesity was a "significant condition contributing to his death" and Malcolm died of "natural" causes.

On January 30, 2015, Sharon filed an application for in-line-of-duty death benefits. The matter was submitted to a three member medical review panel. Two of the panel's members determined that Malcom's death did not occur as a direct result of an act in the line of duty as required for Sharon to receive increased benefits. Sharon was notified of the denial by letter of March 20, 2015.

The letter informed Sharon she could appeal the medical examiner's denial and, if successful, would receive a lump sum of \$10,000 and a monthly payment equal to 10% of Malcolm's monthly final rate of pay. Alternatively, if she did not appeal, she would begin receiving basic death benefit payments based

on whichever of three described methods of payment she chose. She could also select an actuarial refund or a lump sum refund. Sharon was advised:

If you do not wish to pursue the appeal for death in the line of duty benefits, you may begin receiving death benefit payments from [Malcolm's] account as outlined on the enclosed form 5040. If you choose this option, you must notify us in writing that you are withdrawing the application for death in the line of duty benefits. Upon receipt of that notification, a final retirement system estimate will be forwarded to you.

Sharon chose to appeal and requested an evidentiary hearing. She subsequently filed a motion for an open hearing that was denied. A hearing was held on September 20, 2016.

While Sharon's appeal was pending, the matter was resubmitted to the medical review panel for a second review. The results were the same as before with two votes against Sharon's claim for in-line-of-duty death benefits and one for the receipt of benefits.

At the hearing, various medical records were introduced including those concerning Malcolm's history of obesity, hypertension and stress echocardiograms performed prior to October 2014, that showed left ventricular hypertrophy with borderline T abnormalities. However, Dr. Snell, who treated Malcolm for hypertension, noted Malcolm's hypertension was controlled with medication.

Also included in the record was a Louisville Metro Police Department Investigative Report. The report indicated that Malcolm suffered a cardiac event triggered by physical activity exerted during his physical examination.

Fern Creek Fire Chief Charles M. Schmidt, Jr. testified as to the rigorous demands of the physical demand test. He explained that the test is performed wearing “full turnout gear and an air pack.” The weight of the equipment weighs between 60 and 75 pounds depending on the size of the person.

Dr. Darius Arabadjief, a physician for the Office of Medical Examiner and a board-certified forensic pathologist, performed an autopsy on October 31, 2014. In Dr. Arabadjief’s post-mortem report, he opined the cause of Malcom’s death was hypertensive and atherosclerotic cardiovascular disease. He also noted obesity was a contributing factor.

At his deposition, Dr. Arabadjief again opined that Malcolm’s cause of death was hypertensive and atherosclerotic cardiovascular disease and his death resulted from the normal stressors of everyday life and not the direct result of any physical exertion experienced in the hours prior to his death. As he did in his report, Dr. Arabadjief stated obesity was a significant condition that contributed to Malcolm’s death. He testified it was mere coincidence that Malcom suffered a fatal cardiac event after significant physical exertion. Specifically, he opined that

the physical demand test was not a factor in Malcom's heart attack occurring when it did.

Dr. William Smock testified as Sharon's medical expert. Dr. Smock is a police surgeon for the Louisville Metro Government. In that position, he determines whether emergency personnel are fit for duty. He testified that the proximity in time was an "extremely significant" indication of the causal effect between the physical demand test Malcom undertook and his heart attack. He testified that the cardiovascular stress put on Malcolm during his physical examination directly resulted in his death.

The hearing officer issued a recommended order denying Sharon's application for in-line-of-duty death benefits. The hearing officer found as follows:

While Claimant has adequately demonstrated that the physical demand test was an act occurring which was required in the performance of the principal duties of the position as defined by the job description, Claimant has failed to prove by a preponderance of the evidence that [Malcolm's] death was the direct the result of this act.

Medical records submitted by Claimant show that [Malcom] had a longstanding history of morbid obesity and hypertension. These diagnoses are confirmed by the medical examiner's determination that [Malcolm's] cause of death was due to hypertensive and atherosclerotic cardiovascular disease, along with his obesity. Dr. Arabadjief opined that [Malcolm's] cardiovascular disease was so severe, that it was likely that [Malcolm] could have died at any moment and that the fact that he

died sometime after performing a physical demand test was mere coincidence. Dr. Arabadjief testified that this artery blockage prevented the blood from flowing from [Malcolm's] heart to the rest of the body, causing the cardiac event which resulted in [Malcolm's] death. He confirmed that he believed that the fact that [Malcolm] died after leaving the medical facility after significant physical exertion was mere coincidence.

The hearing officer explained why he was not convinced by Dr. Smock's testimony:

Significant emphasis was placed by Dr. Smock on the temporal proximity of [Malcolm's] death to the physical demand test. However, the record does not establish [Malcolm's] actual time of death in proximity to the completion of the physical demand test with any specificity. [Malcolm] was not located and pronounced dead until 9:57 p.m. and his status during the hours that elapsed is largely unexplained by the record. Further, Dr. Smock's testimony was based solely upon his review of the medical records provided by Claimant. While Dr. Smock testified that the physical exertion led to the fatal arrhythmia suffered by Claimant, he confirmed that [Malcolm's] activities on October 30, 2014 could not have caused the significant amount of plaque buildup in [Malcolm's] arteries. Dr. Arabadjief noted that there was at least a 30-minute gap between events based (on) the information available to him, which would have been time for Claimant to relax and recover while driving. Moreover, [Malcolm's] EKG showing ischemia was marked at 8:24 a.m. and interpreted that reading to be before the physical agility test was performed. The undersigned concludes that Dr. Smock's testimony is less persuasive than that of Dr. Arabadjief, given that Dr. Arabadjief's Board-certification in Pathology and personal examination of [Malcolm] during the autopsy.

Both parties filed exceptions. Kentucky Retirement Systems adopted the recommended order with only a minor correction.

Sharon appealed. She argued Kentucky Retirement Systems erred when it found that Malcolm's death was not the direct result of the physical demand test, evidentiary errors were committed at the hearing and the denial of an open hearing rendered the administrative action voidable. She also argued that Kentucky Retirement Systems improperly denied her basic death benefits while her appeal was pending. The Franklin Circuit Court affirmed. However, it did not address whether Sharon was entitled to basic death benefits pending her appeal. This appeal followed.

As to factual findings made by an administrative agency, a reviewing court is required to defer to the agency in its evaluation of the evidence heard and the credibility of witnesses. *McManus v. Kentucky Retirement Systems*, 124 S.W.3d 454, 458 (Ky.App. 2003). To warrant reversal, the evidence in favor of the claimant must be "so compelling that no reasonable person could have failed to be persuaded by it." *Id.* If there is substantial evidence in the record supporting the agency's finding of fact, a reviewing court must defer to that finding, even if the court would have reached a different conclusion. *Kentucky Comm'n on Human Rights v. Fraser*, 625 S.W.2d 852, 856 (Ky. 1981). "A reviewing court assesses whether the agency correctly applied the law under a *de novo* standard of review."

Smith v. Teachers' Ret. Sys. of Kentucky, 515 S.W.3d 672, 675 (Ky.App. 2017).

At issue is KRS 16.601(1), which is applicable to Malcom as a member of the County Hazardous Employees Retirement System. That statute provides in part that a spouse of a member who dies “as a *direct result of an act* in line of duty” is entitled to the benefits available under that statute. *Id.* (emphasis added). There is no dispute that the physical demand test was an act in the line of duty. The dispute is whether the cardiovascular event was a direct result of that act.

In considering the meaning of the term “direct result” in the context of workers’ compensation law, the Court in *Coleman v. Emily Enterprises, Inc.*, 58 S.W.3d 459, 462 (Ky. 2001), held that “[a]lthough the legislature has used the terms ‘proximately causes’ and ‘direct result’ in KRS 342.0011(1), we are persuaded that those terms do not denote different types of causal relationships because the terms ‘proximate cause’ and ‘direct cause’ are synonymous.” *Id.* Taking into consideration the purpose of KRS 16.601 is to benefit the beneficiaries of those who die while performing acts in the line of duty, the only possible meaning that can be ascribed to the term “direct result” in the present case is that the act must cause the employee’s death. Otherwise stated, the act in the line of duty must have been such that without it, the employee’s death would not have occurred.

Sharon's first argument is that Kentucky Retirement Systems erred as a matter of law because it did not apply the direct result test to the facts. However, it clearly did. In the recommended order, the hearing officer expressly found that Sharon "failed to prove by a preponderance of the evidence that Mr. Jenkins's death was the direct result" of the physical demand test. Sharon merely disagrees with the finding of fact that Malcolm's heart attack was not the direct result of that test.

Pursuant to KRS 13B.090(7), Sharon had the burden of proving that Malcolm's death was the direct result of an act in the line of duty. As noted in our recitation of our standard of review, we may not reverse if the Board's finding of fact is supported by substantial evidence.

In reaching a conclusion unfavorable to Sharon, the hearing officer considered Malcolm's medical records which showed his history of obesity and hypertension. The hearing officer also considered the autopsy and post-mortem report compiled by Dr. Arabadjief and his opinion that it was mere coincidence that Malcom had a heart attack after performing the physical demand test.

Although Dr. Smock opined to the contrary, the Board was not compelled to accept his opinion. As the fact-finder, the Board is "afforded great latitude in its evaluation of the evidence heard and the credibility of witnesses, including its findings and conclusions of fact." *McMannus*, 124 S.W.3d at 458.

Sharon argues that despite Dr. Arabadjief's testimony, the temporal proximity of the physical demand test and Malcolm's heart attack satisfies the "direct result" requirement. Even if, as Sharon argues, Malcolm was having a cardiac event thirty minutes after the physical demand test, Dr. Arabadjief opined that the timeframe would not causally connect the test with Malcolm's heart attack. Dr. Arabadjief was asked to explain his understanding of the causal relationship between the time gap between the test and the cardiac event and Dr. Arabadjief responded:

Well, from-from looking at the report, it was not exactly clear to me when he performed the physical activity test in relation to when he-he left the physician's office. But, he left the office around 10:30 and made the first phone call that I could see to 911 was noted at 10:58. So, that - or 10:59, it's been noted different times. But that-that's, at least half an hour and there may be some more time in there to where he would have been able to-to relax and recover while driving. In forensic pathology we generally consider these events occurring while the physical activity is going on or shortly after, to me, would be a few minutes afterward.

Dr. Arabadjief's testimony that the physical demand test and the cardiac event were not so close in proximity in time to support a conclusion that the physical demand test was a direct cause of the cardiac event constitutes substantial evidence.

Sharon points out that under federal law providing death benefits to federal safety officers, it is presumed that a fatal heart attack occurring within 24

hours of a nonroutine stressful or strenuous physical activity in the line of duty is presumed to be the direct and proximate result of that activity. 34 United States Code §10281. While such a presumption might resolve some of the inherent difficulty in determining the cause of a cardiac event, that same presumption is not found in KRS 16.601. “As administrative agencies are creatures of statute,” this Court cannot require that such a presumption be applied to claims for in-line-of-duty death benefits. *Kentucky Retirement Systems v. Bowens*, 281 S.W.3d 776, 784 (Ky. 2009).

Sharon argues that the hearing officer committed several evidentiary errors. The first concerns exhibits offered by Sharon but excluded from the evidence on the basis that they were irrelevant, immaterial and unduly repetitious.

Sharon sought to introduce a map which, among other things, allowed calculations of the distance Malcolm travelled after leaving BaptistWorx before pulling over in the abandoned gas station. She also sought to introduce a timeline setting out the known time intervals for events on that date.

KRS 13B.090(1) provides:

In an administrative hearing, findings of fact shall be based exclusively on the evidence on the record. The hearing officer shall exclude evidence that is irrelevant, immaterial, unduly repetitious, or excludable on constitutional or statutory grounds or on the basis of evidentiary privilege recognized in the courts of this Commonwealth. Hearsay evidence may be admissible, if it is the type of evidence that reasonable and prudent

persons would rely on in their daily affairs, but it shall not be sufficient in itself to support an agency's findings of facts unless it would be admissible over objections in civil actions.

The exclusion of the map was proper on the basis that it was irrelevant and immaterial. There were too many unknown factors such as traffic patterns, whether Malcolm drove directly to the abandoned gas station or whether Malcom even followed that same route to the abandoned gas station.

The timeline Sharon sought to admit was also properly excluded. There was no dispute about the known interval of events that was established by testimony of multiple witnesses and Malcolm's cell phone records. The timeline was available elsewhere in the administrative record and, therefore, properly excluded.

Sharon also argues that the medical examiners' reports should not have been admitted into the administrative record. She argues that the medical review physicians did not have Malcolm's medical records, no knowledge of the physical demand test, and lacked the autopsy report.

Sharon overlooks that once the hearing process began, by the parties' agreement, the matter was resubmitted to the medical review physicians for a second evaluation with all relevant information provided. Moreover, it is clear from the hearing officer's findings, the denial of in-line-of-duty death benefits was

based on the persuasiveness of Dr. Arabadjief's opinion, not on the medical review physicians' decisions.

Two issues remain. The first is whether Kentucky Retirement Systems wrongfully denied Sharon's request for the administrative hearing to be open to the public. On appeal, the Franklin Circuit Court concluded that Kentucky Retirement Systems' decision to close the hearing did not violate Kentucky's open meetings laws, because it applies only to "meetings of a quorum of the members of any public agency[.]" KRS 61.810(1).² We agree that because the administrative hearing did not involve a quorum of the members of Kentucky Retirement Systems, an open hearing was not required.

However, the circuit court concluded that under KRS 13B.080(8), the hearing was required to be open to the public. That statute provides in part: "An administrative hearing shall be open to the public unless specifically closed pursuant to a provision of law." The circuit court noted that there could be no violation of the Federal Insurance Portability and Accountability Act of 1996, commonly referred to as HIPAA, because Sharon was the personal representative of Malcom's estate with full authority to waive any application of HIPAA.

² The open meeting laws also apply to meetings with less than a quorum in circumstances not present in this case. *See* KRS 61.810(2).

We do not need to further comment on whether Kentucky Retirement Systems violated KRS 13B.080(8). As the circuit court observed, Sharon cannot demonstrate any harm suffered by the closed hearing or that the outcome would have been different had the hearing been open to the public. There is no legal authority to void the final administrative ruling in the absence of a showing that closing the hearing impaired Sharon's substantive rights.

The final issue to resolve is whether Kentucky Retirement Systems improperly conditioned Sharon's receipt of basic death benefits on the waiver of her right to appeal its decision. The refusal to allow Sharon to receive basic death benefits while her appeal was pending was based on the provision of KRS 61.590(3) that forecloses a different payment option after selection of one payment option. That section provides in part:

A member shall not have the right to select a different payment option on or after the first day of the month in which the member receives his or her first retirement allowance or after the effective date of a deferred retirement option as provided by subsection (6) of this section. A beneficiary shall not have the right to select a different payment option after the effective date of the beneficiary's retirement allowance as provided in subsection (7) of this section.

The "payment option" referred to in the statute are the various ways basic death benefits can be taken, such as a life annuity, 60 months certain, or 120 months certain. There is sound reason to not permit an individual who has selected

a payment option for his or her retirement allowance to change options after receipt of the first check. For instance, an individual who changes from a 60 months certain option to a 120 months certain option would have already received checks in the higher amount. However, Kentucky Retirement Systems reliance on this same statute to deny Sharon basic death benefits during the pendency of her appeal is without any legal basis and outside the bounds of sound public policy.

The beneficiary's claim for in-line-of-duty death benefits is a claim in addition to a beneficiary's entitlement to receipt of basic death benefits. It is an enhanced benefit and not a payment option as that term is used in KRS 61.590(3). The claim is not a payment option at all but is a claim for an increased benefit package.

As a matter of public policy, Kentucky Retirement Systems' interpretation of the statute and its denial of basic death benefits to Sharon was erroneous. There is no doubt that Sharon was entitled to death benefits, the only question being whether she was entitled to a greater amount. To make her choose between her right to appeal the denial of in-line-of-duty death benefits or immediate income from Malcolm's benefit plan is unconscionable. Properly so, the General Assembly has ensured that in future cases in which the issue arises the law is clear.

Effective April 13, 2016, the General Assembly amended KRS 16.601 to allow a beneficiary to receive payments during the pendency of an appeal regarding in-line-of-duty death benefits. In accordance with that amendment, Sharon began receiving benefits as the beneficiary of Malcolm's retirement account in May 2016. However, we hold that any benefits wrongfully withheld from Sharon prior to that date while her appeal of the denial of in-line-of-duty death benefits was pending must be paid by Kentucky Retirement Systems. Because the Franklin Circuit Court did not address this issue, we remand this case for a determination of the amount, if any, Sharon is entitled to for benefits wrongfully withheld.

We are obligated to uphold the Kentucky Retirement Systems' decision because we are precluded from making a different finding even though we might disagree with its evaluation of the evidence. The opinion and order of the Franklin Circuit Court is affirmed as to the denial of in-line-of-duty death benefits. The case is remanded for the Franklin Circuit Court to determine what, if any, amount Sharon is entitled to for benefits wrongfully withheld while her case was pending on appeal.

ALL CONCUR.

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