

RENDERED: APRIL 20, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000451-MR

LORNA CASSADY

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE O. REED RHORER, JUDGE
ACTION NO. 07-CI-01970

KENTUCKY RETIREMENT SYSTEMS

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: CAPERTON, KELLER AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Lorna Cassady appeals from an opinion and order of the Franklin Circuit Court affirming an order of the Board of Trustees of the Kentucky Retirement System (KERS) denying her application for duty-related benefits pursuant to KRS 61.621 and enhanced disability retirement benefits pursuant to KRS 61.600. Because the KERS did not properly consider the cumulative effect of Lorna's medical conditions, we reverse and remand.

Lorna was born on December 19, 1952. She was last employed by the Commonwealth of Kentucky as a social services specialist with the Cabinet for Health and Family Services (Cabinet). Prior to Lorna's employment with the Cabinet, she was a member of the County Employees Retirement Systems (CERS) and, as of December 31, 2005, had 242 months of combined membership in CERS and KERS.

On February 1, 2005, Lorna filed an application for disability retirement benefits alleging that she was disabled as a result of a combination of medical conditions. She alleged her disability was caused by a work-related heart attack in October 1992 and heart surgery in November 2004; bulging discs as a result of a 2002 work-related injury; and functional scoliosis with degenerative disc disease. Subsequently, she submitted medical records relating to her mental health and diagnosis of breast cancer.

Lorna's duties as a social services specialist included visiting families, interviewing children at their homes and schools, inspecting homes, counseling families, protecting neglected and abused children, testifying in court and investigating referrals. Her position required that she frequently drive a vehicle. Lorna's supervisor indicated that in a normal work day, she was required to walk or stand five and one-half hours and sit two hours. Additionally, she was required to repetitively feel, reach, push, pull, bend, stop, crouch, climb, and balance. She rarely had to lift over 100 pounds, fifty pounds occasionally, twenty pounds

frequently, and ten pounds repetitively. Her job was characterized by the KERS as sedentary to light work.

Lorna testified regarding the physical demands of her job and the stress caused by her work with the Cabinet. Following her heart surgery, her heart condition improved but she tires easily. As a result of her work-related back injury, Lorna filed a workers' compensation claim and was assessed a five percent functional impairment rating. She testified that she continues to have difficulty sitting, walking, or standing for prolonged periods. In 2005, she was diagnosed with breast cancer and, following surgery, underwent chemotherapy.

She described complications from her treatment including nausea, hair loss, and she developed lymphedema, a condition that caused swelling in her hand, pain, and weakness. She also had radiation sessions which she testified caused increased complications, including burns. On the Monday prior to the scheduled hearing, because an additional lump was found, Lorna completed a mammogram.

In addition to the physical restrictions she described, Lorna testified that she suffers from memory loss, an inability to concentrate and depression. The medical evidence consisted of reports from various physicians and psychologists and hospital records.

In 1992, during a child protection investigation, Lorna suffered chest pains. On October 22, 1999, Dr. Paulus diagnosed chest pain, left bundle branch block pattern, hypertension, tobacco abuse, and hyperlipidemia. On November 4, 2004, a coronary artery bypass was performed. Dr. Paulus's notes reflect that in

March 2005, Lorna complained of numb hands and right shoulder pain. Dr. Darnell, a cardiologist, noted that on September 13, 2006, Lorna had an ejection fraction of fifty percent.

Additional evidence was introduced from physicians who treated Lorna's work-related back injury. Dr. Rapier, an orthopedic surgeon, examined Lorna on July 31, 2003, and diagnosed a lumbar strain that aggravated a preexisting formant degenerative disc disease. He opined that Lorna had a five percent permanent functional impairment and advised her against lifting more than twenty pounds and to avoid repetitive bending, lifting, turning and twisting. Dr. Deitch treated Lorna from September 16, 2002, through July 15, 2005, for low back pain and pain down the left leg. He last saw Lorna on July 15, 2005, and recommended an EMG, nerve conduction studies, and a lumbar CT scan.

Regarding Lorna's mental condition, she introduced the records of Dr. Johnson, a psychologist, who examined Lorna in February 2003 and diagnosed a pain disorder and a general medical condition. He assessed a five percent functional impairment to the body as a whole. Dr. Granacher examined Lorna on January 22, 2004, and assessed a ten percent impairment due to depression. Dr. Williams noted that Lorna has extreme limitations on her ability to understand, remember, and make complex decisions and follow tasks. She opined that Lorna suffers from major depression secondary to her physical problems with possible organic brain syndrome secondary to her chemotherapy and open heart surgery.

In 2005, after Lorna was diagnosed with breast cancer, Dr. Sharma recommended breast radiation therapy and noted that Lorna experienced acute side effects including fatigue, radiation dermatitis, and tenderness. Possible permanent side effects included edema, scar tissue underlying the lung, shrinkage of the breast and skin changes. An ultrasound on December 18, 2006, revealed a solid mass in Lorna's right breast.

Dr. Chaffin treated Lorna from 1985 to August 2006 for various ailments including her heart condition, work-related injuries, and nervous problems. He advised that Lorna avoid stressful situations and not lift greater than ten pounds.

Dr. Strunk reviewed Lorna's medical records at the KERS's request. Although he noted that Lorna had a history of lumbar disc disease, depression, coronary artery disease and breast cancer, he opined that she did not suffer from a permanent disability. Dr. Keller also reviewed Lorna's medical records. Although initially he did not believe that Lorna was permanently disabled, after receipt of her December 18, 2006, mammogram report, he opined that Lorna should be approved for nonhazardous disability retirement benefits with the claim to be reviewed in one year. Dr. McElwain reviewed Lorna's medical records at the KERS's request and opined that Lorna was not permanently disabled.

The KERS hearing officer considered the medical evidence as it applied to each of Lorna's medical conditions and made findings regarding the disabling affect of each condition. After considering the evidence, the hearing officer found that Lorna was not totally and permanently disabled from engaging

in any occupation for remuneration or profit as a result of a duty-related injury occurring after June 1, 2000, the effective date of KRS 61.621. Finally, the hearing officer found that Lorna failed to present objective medical evidence to establish that she is totally and permanently incapacitated for the duties of a social services specialist. The KERS adopted the hearing officer's recommendations and the Franklin Circuit Court affirmed.

We begin with a recitation of our standard of review:

In its role as the finder of fact, an administrative agency is afforded great latitude in its evaluation of the evidence heard and the credibility of witnesses, including its findings and conclusions of fact.” *McManus v. Kentucky Retirement Systems*, 124 S.W.3d 454, 458 (Ky.App. 2003) (internal quotation marks and citation omitted). Thus, a reviewing court is not free to substitute its judgment for that of an agency on a factual issue unless the agency's decision is arbitrary and capricious.

In determining whether an agency's action was arbitrary, the reviewing court should look at three primary factors. The court should first determine whether the agency acted within the constraints of its statutory powers or whether it exceeded them. . . . Second, the court should examine the agency's procedures to see if a party to be affected by an administrative order was afforded his procedural due process. The individual must have been given an opportunity to be heard. Finally, the reviewing court must determine whether the agency's action is supported by substantial evidence. . . . If any of these three tests are failed, the reviewing court may find that the agency's action was arbitrary.

Bowling v. Natural Resources and Environmental

Protection Cabinet, 891 S.W.2d 406, 409 (Ky.App. 1994) (internal quotation marks and citation omitted). “‘Substantial evidence’ means evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men.” *Owens–Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998) (citing *Kentucky State Racing Comm'n v. Fuller*, 481 S.W.2d 298, 308 (Ky.1972)). We review an agency's conclusions of law *de novo*. See *Aubrey v. Office of Attorney General*, 994 S.W.2d 516, 519 (Ky.App. 1998).

Kentucky Retirement Systems v. Bowens, 281 S.W.3d 776, 779-780 (Ky. 2009).

In pursuit of her claim for duty-related disability retirement benefits, Lorna relies on KRS 61.621, the Fred Capps Memorial Act, enacted in June 2000. It states in part:

(1) Notwithstanding any provision of any statutes to the contrary, effective June 1, 2000, any employee participating in one (1) of the state-administered retirement systems who is not in a hazardous duty position, as defined in KRS 61.592, shall be eligible for minimum benefits equal to the benefits payable under this section or KRS 61.702 if the employee dies or becomes totally and permanently disabled to engage in any occupation for remuneration or profit as a result of a duty-related injury.

(2) (a) For purposes of this section, “duty-related injury” means:

1. a. A single traumatic event that occurs while the employee is performing the duties of his position;
or
- b. A single act of violence committed against the employee that is found to be related to his job duties, whether or not it occurs at his job site; and

2. The event or act of violence produces a harmful change in the human organism evidenced by objective medical findings.

(b) Duty-related injury does not include the effects of the natural aging process, a communicable disease unless the risk of contracting the disease is increased by nature of the employment, or a psychological, psychiatric, or stress-related change in the human organism unless it is the direct result of a physical injury.

The hearing officer found that Lorna's heart condition occurred prior to the effective date of the statute and that her work-related back injury did not result in a total and permanent disability as defined in the statute. On this point, we agree.

The statute requires a single traumatic event that occurs while the employee is performing his duties or a single act of violence that results in a permanent total disability. Lorna's heart condition first manifested itself in 1994, prior to the effective date of the statute and gradually deteriorated resulting in surgery.

Regarding her 2002 back injury, there was substantial evidence to support the finding that alone, the injury did not cause a permanent total disability. Because the statute requires a "single traumatic event" that occurred after June 1, 2000, and caused a permanent total functional disability, we conclude there was no error.

We turn to Lorna's contention that she is entitled to disability retirement benefits pursuant to KRS 61.600. To be entitled to benefits, Lorna was required to present objective medical evidence that, since the last date of paid employment, she has been mentally or physically incapacitated to perform her duties as a social

services specialist because of injury, mental illness, or disease and that her incapacity is permanent. KRS 61.600(3).

Lorna contends that her work was improperly classified as sedentary to light. We disagree. The classification was based on KRS 61.600(5)(c), which states:

1. Sedentary work shall be work that involves lifting no more than ten (10) pounds at a time and occasionally lifting or carrying articles such as large files, ledgers, and small tools. Although a sedentary job primarily involves sitting, occasional walking and standing may also be required in the performance of duties.
2. Light work shall be work that involves lifting no more than twenty (20) pounds at a time with frequent lifting or carrying of objects weighing up to ten (10) pounds. A job shall be in this category if lifting is infrequently required but walking and standing are frequently required, or if the job primarily requires sitting with pushing and pulling of arm or leg controls. If the person has the ability to perform substantially all of these activities, the person shall be deemed capable of light work. A person deemed capable of light work shall be deemed capable of sedentary work unless the person has additional limitations such as the loss of fine dexterity or inability to sit for long periods.

Based on her supervisor's testimony, she was required to lift up to ten pounds infrequently and to stand or walk five and one-half hours. There was substantial evidence in the record to support the classification assigned.

The ALJ considered each of Lorna's physical conditions and her mental condition in isolation. However, in contrast to KRS 61.621, KRS 61.600 does not require that a single work-related traumatic event cause a permanent disability. In

Bowens, decided after the KERS's order in this case, the Supreme Court interpreted KRS 61.600 and adopted the "cumulative effect" rule enunciated in *Dillon v. Celebrezze*, 345 F.2d 753, 757 (4th Cir. 1965).

In *Bowens*, the claimant was involved in a motor vehicle accident and had been diagnosed with breast cancer, causing various medical conditions and injuries. The KERS denied her benefits. The hearing officer focused on the impact of each of her individual ailments in concluding that she "failed to provide objective evidence of *a condition* that would permanently prevent her from performing her usual work activity." *Id.* at 783. The Court concluded that the hearing officer's fragmentation of the claimant's various medical conditions was erroneous and stated:

[I]n considering Appellee's claim for disability benefits, the hearing officer evaluated the effect of each insular injury on Appellee's ability to perform her job duties and determined that no one injury rose to the level of disabling Appellee. He did not evaluate the *cumulative effect* of Appellee's multiple ailments on the "whole person." At a minimum, Appellee produced sufficient evidence of disability due to her various ailments that she was entitled to a determination of whether the *cumulative effect* of her ailments rendered her unable to work. However, by analyzing each ailment singularly, the hearing officer "so fragmented [Appellee's] several ailments and the medical opinions regarding each of them that he failed to properly evaluate their effect in combination upon this claimant." *Dillon*, 345 F.2d at 757. The hearing officer's review and findings regarding Appellee's injuries thus failed to consider her multiple ailments in accordance with the "residual functional capacity" standard in KRS 61.600(5)(a)(2), which clearly, in instances such as this, supports an additional "cumulative effects" analysis.

By failing to properly consider the cumulative effect standard implicit in KRS 61.600, Appellant exceeded the constraints of its statutory powers and arbitrarily denied Appellee's disability claim.

Id.

In this case, the hearing officer addressed each of Lorna's conditions separately and did not analyze the cumulative affect of her combined conditions. Although the hearing officer and the KERS did not have the benefit of the *Bowens* decision when Lorna's case was decided, the KERS "exceeded the constraints of its statutory powers and arbitrarily denied" Lorna's disability claim. *Id.*

For the foregoing reasons, the Opinion and Order of the Franklin Circuit Court is reversed and the case remanded to the KERS for further review of the evidence under the "cumulative effect" standard.

CAPERSON, JUDGE, CONCURS.

KELLER, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

KELLER, JUDGE, DISSENTING: I respectfully dissent because I disagree with the majority's assessment that *Kentucky Retirement Systems v. Bowens*, 281 S.W.3d 776 (Ky. 2009) requires reversal and remand for additional findings. In *Bowens*, the court stated that

As a result of her various ailments, Appellee's doctors found that she was unable to lift more than five (5) pounds; that she could not stand or walk for more than four (4) hours total in a work day, with no more than two hours uninterrupted; and that she could not sit for more

than four (4) hours in a work day, with no more than one hour uninterrupted. She was unable to walk up stairs. Further, she could *never* climb, stoop, crouch, or kneel, and could only balance or crawl infrequently. She was restricted from moving machinery, among other environmental restrictions. Moreover, Appellee's ability to reach, push, and pull were affected by her impairments. Her various ailments also rendered her unable to type and typing was one of her primary job responsibilities.

Id. at 782.

Unlike in *Bowens*, the hearing officer herein found that Lorna's physicians imposed no restrictions related to her heart condition, only temporary restrictions related to her cancer, and no credible or objective restrictions related to her psychological condition. In fact, the hearing officer found that the only objective-physician-imposed restrictions came from Dr. Rapier, who restricted Lorna because of her back condition. Before the hearing officer is required to make a cumulative effect analysis, there must be something to accumulate. No heart-related restrictions plus no psychological-related restrictions plus no cancer-related restrictions equals no restrictions. The accumulation of no restrictions added to back-related restrictions equals only back-related restrictions. The hearing officer determined that Lorna was not disabled because of her back-related restrictions to light and sedentary work, because that is the type of work Lorna performed. Once the hearing officer determined that Lorna's back-related restrictions were not disabling, and that she had no other permanent restrictions, the hearing officer had

nothing left to do. Although I sympathize with Lorna's health issues, in this case, with these facts, and even in light of *Bowens*, I would affirm.

BRIEF FOR APPELLANT:

Leonard Stayton
Inez, Kentucky

BRIEF FOR APPELLEE:

Leigh A. Jordan
Frankfort, Kentucky