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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-000253-MR

RICHARD WHITTAKER

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 07-CI-00236

KENTUCKY RETIREMENT SYSTEMS;
BOARD OF TRUSTEES OF KENTUCKY
RETIREMENT SYSTEMS; AND DISABILITY
APPEALS COMMITTEE OF KENTUCKY
RETIREMENT SYSTEMS

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON AND MOORE, JUDGES; GUIDUGLI,¹ SENIOR
JUDGE.

MOORE, JUDGE: Richard Whittaker appeals from an opinion and order of the
Franklin Circuit Court affirming the final order of the Disability Appeals

¹ Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Committee of the Board of Trustees of the Kentucky Retirement Systems (the Board). On appeal, Whittaker argues the Board erred: (1) when it concluded he was not incapacitated; (2) when it concluded that he failed to prove he was incapacitated by an act in the line of duty; (3) when it concluded he failed to prove his pre-existing condition had been substantially aggravated by an act in the line of duty; and (4) when it addressed the issue of whether his disability was caused by a pre-existing condition, even though it was precluded from addressing this issue. Finding no error, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 1996, Whittaker began working for the Georgetown Fire Department as a firefighter. In March 2003, while on duty at the fire station, Whittaker was playing cards. The chair he was sitting in collapsed causing Whittaker to fall to the floor. Two days later, while climbing into a fire truck, Whittaker felt a “pop” in his back and experienced pain. After this incident, Whittaker did not work for a few weeks. Although he returned to work, his physician eventually restricted him from working.

After his injuries, Whittaker sought reasonable accommodations, but the City of Georgetown was unable to provide any. Whittaker was offered the position of telecommunicator; he declined, claiming that his doctor’s restrictions precluded him from that job. The position also paid considerably less than his firefighter position. Subsequently, Whittaker resigned.

In September 2004, Whittaker applied for hazardous duty disability retirement benefits pursuant to Kentucky Revised Statute (KRS) 16.582 with the Kentucky Retirement Systems, claiming he was disabled due to bulging discs at L3, L4, L5; a herniated disc at L4/L5; lumbar lumbago; lumbar sciatica; lumbar stenosis; lumbar nerve root injury syndrome; and depression caused by his injuries. The medical review board evaluated Whittaker's claim on more than one occasion and denied it each time. Whittaker eventually requested an evidentiary hearing, and his claim was referred to a hearing officer. The final hearing was held in March 2006.

Prior to the hearing, Whittaker submitted his medical records to the hearing officer. At the final hearing Dr. James Templin testified for Whittaker. Whittaker testified as well. After the hearing, the officer submitted his report and order, recommending denial of Whittaker's claim.

A. RELEVANT EVIDENCE CONSIDERED BY THE HEARING OFFICER AND THE BOARD

1. Test Results

After Whittaker's injuries, he underwent three separate MRIs. The first MRI was performed on April 5, 2003, just days after Whittaker's injuries. The report of that MRI revealed Whittaker had bulging discs at L3/4 and L4/5 with no herniations. The bulging was minimal and did not impinge upon any nerve roots. Moreover, the bulging at L4/5 was slightly asymmetrical to the left and the lateral recesses were narrowed at L3/4 and L4/5.

Additionally, the April 5 report referred to a pre-injury MRI from 2000. The report detailing this 2000 MRI was never placed in the record; however, the April 5 report stated that, in comparison to the 2000 MRI, no changes were seen. Accordingly, the Board logically reasoned that the 2000 MRI was consistent with the April 5 MRI, revealing bulging discs at L3/4 and L4/5 with no herniations.

The second MRI was performed in February 2004, and was unremarkable. The third MRI was performed in May 2005, and revealed Whittaker had mild occult rotary scoliosis, mild to moderate facet arthropathy, strain/sprain, and muscle spasm.

In addition to the MRIs, Whittaker submitted to two electromyograms. The first electromyogram (EMG) was performed in February 2004, and its result was normal. The second EMG was performed in March 2006, and was also normal.

2. Expert Opinions

In February 2004, Whittaker began treatment with Dr. Richard Lingreen. During an initial examination, Dr. Lingreen noted Whittaker was basically normal, exhibiting only spasms and some tenderness. Dr. Lingreen reviewed one of Whittaker's MRIs and noted it showed Whittaker had a bulging disc with lateral recess narrowing. The physician also reviewed an EMG which showed no signs of radiculopathy or peripheral nerve injury. Dr. Lingreen initially diagnosed Whittaker with lumbar degenerative disc disease, lumbar herniated

pulposus, lumbar lumbago, lumbar sciatica, and lumbar sprain/strain syndrome.

Despite these diagnoses, the doctor released Whittaker to return to work.

Subsequently, Dr. Lingreen restricted Whittaker from working and re-diagnosed Whittaker.² The physician diagnosed Whittaker with bulging and herniated discs at L4/5 with narrowing and stenosis, claiming this diagnosis was confirmed by an MRI. Dr. Lingreen also diagnosed Whittaker with lumbar lumbago, lumbar sciatica, lumbar stenosis, and lumbar nerve root injury syndrome. The physician ordered no repetitive lifting greater than 20 pounds and no lifting more than 25 pounds. Dr. Lingreen restricted Whittaker from sitting or standing for more than two hours without a fifteen minute break and from crawling, stooping, bending, or climbing. Dr. Lingreen opined Whittaker lacked the physical ability to return to work as a firefighter but believed he could eventually return to sedentary work.³

In November 2005, Whittaker submitted to an independent medical examination by Dr. James Templin. According to Dr. Templin, prior to the March 2003 injuries, Whittaker did not have an active impairment, but these injuries brought Whittaker's dormant degenerative disc disease into disabling reality. Dr. Templin diagnosed Whittaker with degenerative lumbar disc disease, soft tissue

² We found nothing in the record to explain why Dr. Lingreen decided to change his diagnoses and change his mind regarding Whittaker's ability to work.

³ While treating with Dr. Lingreen, Whittaker went through facet median nerve branch block at the L3, L4 and L5 vertebrae on two occasions. These treatments failed to relieve Whittaker's pain; consequently, a rhizotomy was performed. The rhizotomy initially reduced Whittaker's pain by 20-30 percent, but the pain eventually returned.

strain, and chronic musculo-ligament strain. While Dr. Templin noted Whittaker complained of pain radiating into his left hip and leg, the doctor admitted Whittaker's complaint was not verified by any of the medical studies. Ultimately, Dr. Templin opined Whittaker could not return to work as a firefighter.

At the final hearing, Dr. Templin testified that bulging discs are a characteristic of degenerative disc disease; however, he could not verify that Whittaker's bulging discs were caused by the March 2003 injuries. Furthermore, Dr. Templin testified that Whittaker was obese which affected his back and his range of motion. According to Dr. Templin, Whittaker's extra weight placed a great deal of strain on his back. The doctor suggested weight loss, opining it would improve Whittaker's range of motion. However, the doctor admitted that weight loss may not improve Whittaker's pain.

In 2003 and 2004, Whittaker was treated by Dr. Mujahid Khan for six to eight months for depression and anxiety. Eventually, Dr. Khan terminated Whittaker's treatment. Before ending his treatment, Dr. Khan noted that Whittaker was on medication and had made a good recovery. In Dr. Khan's later records, he indicated that Whittaker did not have any symptoms of depression.

B. THE BOARD'S FINAL ORDER

After considering the hearing officer's report, the Board adopted the hearing officer's recommendation of denial but entered its final order with its own findings of fact and conclusions of law. The Board analyzed the same evidence as the hearing officer, which is set forth *supra*. The Board found that Whittaker did

not meet his burden of proving that his disability was caused by something other than a pre-existing condition. The Board noted that Whittaker testified at the final hearing that he had been treated for a back injury prior to the March 2003 injuries and had previously been diagnosed with lumbrosacral musculoligamentous strain. Furthermore, the Board noted Whittaker asserted that his pre-2003 back pain was different from his current back pain; however, Whittaker submitted no medical evidence to support this assertion.

The Board also noted that Whittaker claimed even if he had a pre-existing condition, it was substantially aggravated by the two injuries he suffered in March 2003. Regarding the first injury, the Board found that playing cards was not a required duty of a firefighter so Whittaker did not sustain that injury during the course of his employment. Regarding the second injury, *i.e.*, the “pop” Whittaker felt in his back while climbing into a fire truck, the Board found that the evidence did not demonstrate the injury substantially aggravated his pre-existing condition.

Regarding Whittaker’s claim of disability due to depression, the Board found this claim was not supported by the evidence. The Board focused on the information from Dr. Khan who noted that Whittaker was on medication, had made a good recovery, and did not exhibit any symptoms of depression.

Ultimately, the Board concluded that Whittaker had failed to prove: (1) “that he was incapacitated by an act in the line of duty;” (2) that his disability was not caused by a pre-existing condition; or (3) that his pre-existing condition

was substantially aggravated by an injury which occurred during the course of his employment.

After the Board's adverse ruling, Whittaker filed an appeal with the Franklin Circuit Court pursuant to KRS 61.615(5), but the circuit court affirmed the Board's decision. Now, Whittaker seeks relief from this Court.

II. STANDARD OF REVIEW

When the decision of the fact-finder is in favor of the party with the burden of proof or persuasion, the issue on appeal is whether the agency's decision is supported by substantial evidence, which is defined as evidence of substance and consequence when taken alone or in light of all the evidence that is sufficient to induce conviction in the minds of reasonable people. Where the fact-finder's decision is to deny relief to the party with the burden of proof or persuasion, the issue on appeal is whether the evidence in that party's favor is so compelling that no reasonable person could have failed to be persuaded by it. "In its role as a 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." Causation generally is a question of fact. 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.

McManus v. Kentucky Retirement Systems, 124 S.W.3d 454, 458-459 (Ky. App. 2003) (citations omitted).

III. ANALYSIS

A. INCAPACITATION

On appeal, Whittaker avers, in the hearing officer's report and recommended order, the officer concluded Whittaker was "totally and permanently incapacitated from performing the duties of a regular full-time Firefighter/EMT[.]" According to Whittaker, the Board did not enter any finding or conclusion that either disagreed with this conclusion or overruled it. Hence, Whittaker asserts the Board erred when it concluded he was not incapacitated because the hearing officer previously concluded that he was.

Chapter 13B of the Kentucky Revised Statutes governs administrative hearings before state agencies such as the Kentucky Retirement Systems. Kentucky Revised Statute 13B.110 authorizes a hearing officer to draft a recommended order which contains findings of fact, conclusions of law and a recommended disposition of the matter. According to KRS 13B.120(2), the head of an agency may accept a hearing officer's recommended order and may adopt it as the agency's final order. However, the agency head is not bound to accept the recommended order. The agency head may reject or modify the recommended order in whole or in part. KRS 13B.120(2). If the agency head chooses to reject or modify the recommended order, it must include in its final order its own separate findings of fact and conclusions of law. KRS 13B.120(3).

Although the hearing officer made a recommended finding of incapacitation, the Board was not required to adopt it. Consequently, the Board did not err when it rejected that finding.

B. LINE OF DUTY

Whittaker points out in his brief that the Board found he was on duty at the time of his first injury. However, the Board found that playing cards was not a required duty of a firefighter. According to Whittaker, this finding is merely

a misdirection play on the part of the Board designed to draw attention away from the fact that the medical evidence in the record shows that Mr. Whittaker's incapacitation was actually the result of the injury that he suffered on March 14, 2003, when he was climbing up into a fire truck.

Regarding Whittaker's second injury, he acknowledges the Board found the evidence did not support an assertion that the second injury substantially aggravated his pre-existing condition. Whittaker challenges this finding and refers to Dr. Templin's testimony that the second injury brought his pre-existing condition into disabling reality. Furthermore, Whittaker cites to the report of Dr. Strunk, one of the medical examiners who voted to deny his claim. According to Whittaker, Dr. Strunk stated in his report that Whittaker "has lumbar disease apparently exacerbated while getting into a Fire (sic) truck[.]" Based on this, Whittaker asserts that the second injury substantially aggravated his pre-existing condition and that the injury occurred while he was acting in the line of duty. Consequently, Whittaker reasons that the Board's conclusion that he failed to prove he was incapacitated by an act in the line of duty was arbitrary.

According to KRS 16.505(19), "[f]or employees in hazardous positions under KRS 61.592, an 'act in line of duty' shall mean an act occurring which was required in the performance of the principal duties of the position as

defined by the job description[.]” The City of Georgetown provided a detailed description of Whittaker’s position as a firefighter. After reviewing this description, we disagree with the Board regarding the first injury. The Board and the parties focused on the fact that Whittaker was playing cards at the time of the first injury. However, they focused on the wrong activity. As a firefighter, Whittaker was required to respond to fires and other emergencies. Hence, to perform his principal duties, Whittaker was required to be present and on duty at the fire station in order to respond at a moment’s notice. And that was exactly what Whittaker was doing when the chair collapsed, awaiting a possible emergency. The fact that he was playing cards while waiting is ultimately irrelevant. Thus, the Board erred when it concluded the first injury did not occur in the line of duty.

However, on appeal, Whittaker does not claim that the first injury caused his disability. Furthermore, as we discuss more fully below, the medical evidence did not demonstrate that either injury substantially aggravated his pre-existing condition.

Regarding Whittaker’s second injury, certainly climbing into a fire truck is a principal duty of a firefighter. Nevertheless, the Board did not err when it found the evidence did not demonstrate that Whittaker’s second injury substantially aggravated his pre-existing condition. First, neither the hearing officer nor the Board was required to believe the opinions of either Dr. Templin or

Dr. Strunk regarding whether the second injury rendered Whittaker's pre-existing condition into disabling reality. *See McManus*, 124 S.W.3d at 458-459.

Second, the objective medical evidence supports the Board's decision. Shortly after Whittaker experienced both injuries, he submitted to the April 5, 2003 MRI. In the report regarding that MRI, Whittaker was diagnosed with bulging discs at L4/L5 and L3/L4. It was noted that the bulging was minimal with no herniations and no nerve root impingement. Furthermore, it was noted that the April 5, 2003 MRI revealed no changes when compared to Whittaker's pre-injury MRI from 2000. Significantly, because the pre-injury MRI and the post-injury MRI were the same, they are competent and objective evidence that Whittaker's injuries had no discernable effect on his lower back. Therefore, despite the opinions of Dr. Templin and Dr. Strunk, the objective medical evidence supports the Board's conclusion that Whittaker's second injury did not substantially aggravate his pre-existing condition.

C. PRE-EXISTING CONDITION

According to Whittaker, the Board was precluded from addressing the issue of causation, *i.e.*, whether Whittaker's disability was caused by a pre-existing condition, because the medical examiners did not address this issue. To support this proposition, Whittaker relies on *McManus*, 124 S.W.3d at 458. Whittaker points out that in *McManus*, the medical examiners specifically addressed the issue of causation/pre-existing conditions; thus, the claimant in that case was on notice that causation was an unresolved issue. However, in the present case, none of the

medical examiners mentioned a pre-existing condition. Thus, Whittaker asserts he had no notice that the Board intended to address it. Because he had no notice that causation/pre-existing condition was an outstanding issue, Whittaker reasons the Board was precluded from addressing it.

In the appellees' brief, they cite *Rapier v. Philpot*, 130 S.W.3d 560, 563-564 (Ky. 2004), and argue that to identify and preserve issues for review by an agency head, a claimant must file exceptions. Because Whittaker failed to raise this issue in his exceptions, the appellees assert it was not preserved for appeal. After reviewing Whittaker's exceptions, we note that he did not address this issue. Consequently, he failed to properly preserve it for appeal.⁴

D. SUBSTANTIAL AGGRAVATION OF PRE-EXISTING CONDITION

In the alternative, Whittaker argues that the Board erred when it concluded that he failed to prove that his pre-existing condition was substantially aggravated by an injury that occurred in the course of his employment. According to Whittaker, Dr. Templin testified that the second injury (climbing into a fire truck) transformed his pre-existing condition into disabling reality. Furthermore, he points out that Dr. Strunk stated that the second injury appeared to exacerbate his pre-existing lumbar disease. Whittaker insists no medical evidence was presented that would contradict these opinions; thus, the Board erred regarding this issue.

⁴ While this issue is not properly preserved for our review, we note the record amply illustrates Whittaker received adequate notice that his preexisting condition was an issue in the case. The issue was addressed in a prehearing order and in a response by the Kentucky Retirement Systems.

As previously discussed, we reiterate that the Board was not required to believe either of these opinions. *See McManus*, 124 S.W.3d at 458-459.

Additionally, as previously noted, the MRIs contradict the doctors' opinions. The MRIs, spanning over three years, were essentially the same, demonstrating that the second injury did not have any measurable, discernable effect on Whittaker's back. In other words, the MRIs support the Board's finding that the second injury did not substantially aggravate Whittaker's pre-existing condition.

E. CONCLUSION

Given that the evidence did not compel a result in Whittaker's favor, the opinion and order of the Franklin Circuit Court, which affirmed the final order of the Board, is affirmed.

ALL CONCUR.

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