

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002404-MR

KENTUCKY RETIREMENT SYSTEMS
and
THE BOARD OF TRUSTEES OF
KENTUCKY RETIREMENT SYSTEMS

APPELLANTS

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP SHEPHERD, JUDGE
ACTION NO. 06-CI-01044

LUCINDA HEDGES

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; MOORE AND THOMPSON, JUDGES.

COMBS, CHIEF JUDGE: Kentucky Employee Retirement Systems (KERS)

appeals from a ruling of the Franklin Circuit Court that Lucinda Hedges is entitled to permanent disability benefits. After our review, we affirm.

Hedges worked as an accounts clerk at Eastern Kentucky University (EKU) and enrolled in KERS on September 11, 1990. Her job involved writing

checks, filing documents, entering data, and answering the telephone.

Occasionally, the file folders that she had to carry weighed up to ten pounds.

In 1997, Hedges sustained injuries from a car accident.¹ As a result, she underwent surgery for a torn rotator cuff. The record also indicates that the accident caused back problems. In 2001, Hedges had surgery for carpal tunnel syndrome (CTS). She had more surgery for CTS a few months later. At that time, she was diagnosed with fibromyalgia. Hedges also suffers from cervical and lumbar degenerative arthritis, epicondylitis, asthma, and sleep apnea.

Hedges's last date of paid employment was May 27, 2002. She filed an application for disability retirement benefits on August 5, 2003, which she amended on December 11, 2003. After the reviewing physicians denied Hedges's application, a hearing was conducted on October 17, 2005. The hearing officer also found that Hedges was not entitled to benefits. On June 26, 2006, the Board of Trustees adopted the findings of the hearing officer. In response, Hedges filed a petition in Franklin Circuit Court, and on November 3, 2008, the court reversed the Board of Trustees. KERS filed this appeal.

Kentucky Revised Statute[s] (KRS) 61.665(3) provides that KERS hearings shall be conducted in accordance with KRS Chapter 13B. According to

¹ At page 11 of its brief, the Appellant reported a "second accident" purportedly occurring in November of 2002. We carefully searched the record at the cite referenced in the brief, and no mention whatsoever of a "second accident" can be found. This was a material misstatement of fact that we clarify for purposes of a possible petition for rehearing or any subsequent appellate proceedings.

KRS 13B.090(7), the burden of proof rests on the party who is seeking benefits from the agency. This statute also provides that the burden must be met by a preponderance of the evidence. If the party with the burden of proof is denied relief by the fact-finder, “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.” *McManus v. Kentucky Retirement Systems*, 124 S.W.3d 454, 458 (Ky. App. 2003).

When a court reviews an administrative agency’s actions, its primary inquiry is whether the agency has acted arbitrarily. *Bowling v. Natural Res. & Env’tl. Prot. Cab.*, 891 S.W.2d 406, 409 (Ky. App. 1994). (citations omitted). Three conditions must be met in order for an agency’s action not to be deemed arbitrary: 1) the agency has acted within its statutory powers; 2) the affected party was afforded due process; and 3) the agency’s actions were supported by substantial evidence. *Id.* In the case before us, neither party claims -- nor does the record indicate -- that the first two prongs were not met. The issue of the substantiality of the evidence alone is the focal point of our scrutiny. Substantial evidence is “evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men.” *Kentucky Ret. Sys. v. Bowens*, 281 S.W.3d 776, 780 (Ky. 2009). (citations omitted).

In order to prove that she qualified for disability retirement benefits, Hedges was required to present objective medical evidence proving that “[she], since [her] last day of paid employment, has been mentally or physically

incapacitated to perform the job or jobs of like duties, from which [s]he received [her] last paid employment.” KRS 61.600(3)(a)². Such incapacity must be permanent. KRS 61.600(3)(c). Permanent incapacitation is that which “is expected to result in death or can be expected to last for a continuous period of not less than twelve (12) months from the person’s last day of paid employment in a regular full-time position.” KRS 61.600(5)(a)(1)

KRS 61.600(5)(a) mandates that the findings of permanent incapacity be based upon the medical evidence in a claimant’s file, physical exertion requirements, and the claimant’s residual functional capacity (RFC). In issuing his order, the hearing officer relied heavily upon three RFC evaluations. The circuit court reversed the findings of the hearing officer and the Board because that order did not contain “sufficient rationale for its findings, [sic] and seriously mischaracterizes the evidence.” The court held that the hearing officer gave too much weight to the RFC’s while disregarding medical evidence in Hedges’s record.

The first RFC evaluation was issued in October 2002. The doctor who performed the evaluation quoted one of Hedges’s treating physicians as saying that he believed Hedges could return to work in four weeks. However, as the circuit court duly noted, the quoted statement was made more than four weeks prior to the evaluation date, and Hedges had not been able to return to work during

² The parties do not dispute preliminary qualifications such as length of service and timely filings.

that time as predicted. Moreover, the evaluating doctor did not provide his own independent opinions concerning Hedges's fitness for work.

The second RFC evaluation was conducted in January 2003. The hearing officer reported that this evaluating doctor had concluded that Hedges could perform her job. However, as the circuit court pointed out, this doctor did not make any conclusions. He offered observations and referred to the first RFC, merely bootstrapping an essentially incorrect analysis.

The third RFC evaluation was conducted in June 2004. That doctor concluded that Hedges was unable to perform *light-duty* work. Categories of work are classified by KRS 61.600(5)(c). Light work involves "*frequent* lifting or carrying" of ten-pound objects or frequent walking or standing or pushing and pulling of arm and leg controls. KRS 61.600(5)(c)(2). (emphasis added). However, the parties agree that Hedges's former job fell into the *sedentary* category, defined by KRS 61.600(5)(c)(1) as involving "lifting no more than ten (10) pounds at a time and *occasionally* lifting or carrying articles such as large files, ledgers, and small tools." (emphasis added). A sedentary job primarily involves sitting – entailing only occasional standing or walking. The third RFC stated that "it may be likely" Hedges could tolerate an 8-hour workday of a sedentary job. As the circuit court observed, this statement was speculative rather than conclusory. The evaluator failed to provide actual findings concerning Hedges's ability to perform a sedentary job. As noted by the circuit court, KRS 61.600(3) requires a disability determination to be founded upon objective medical

evidence. The definition of objective medical evidence in KRS 61.510(33) requires observed phenomena or laboratory findings and does not include speculation.

The court also emphasized that the hearing officer and the Board had **not considered** records from Hedges's physicians that indicated she would not be able to perform a sedentary job. In 2003, one of her treating physicians wrote that "it would be very difficult for her to sustain full-time gainful employment." This doctor repeated her prognosis approximately one year and one-half later, ominously predicting that "it is very unlikely that she will ever improve significantly." Again in 2004, one of the doctors who had requested an RFC reported that Hedges was not a surgical candidate and that it was "unlikely she would be able to obtain gainful employment."

The Franklin Circuit Court found that as a whole, the physical exertion requirements, the medical evidence in Hedges's record, and the RFC's (when viewed properly) actually supported a finding of permanent disability. We agree. The voluminous record does not contain any probative medical evidence or other proof that rebuts Hedges's proof. The mere presence of evidence in a record does not magically characterize it as substantial in nature. Indeed, we would characterize the Board's decision as a textbook example of arbitrariness for failure to recognize the only truly substantial evidence in the record – and that was Hedges's evidence that compelled recovery for her.

Hedges suffered severely from a vast array of ailments; the cumulative effect was overpowering. Our Supreme Court has condemned basing disability decisions on fragments of information, explicitly holding that in disability cases, “a cumulative effects analysis is mandated.” *Kentucky Ret. Sys. v. Bowens*, 281 S.W.3d at 783. We reiterate that Hedges suffers from symptoms of carpal tunnel syndrome, pain from degenerative disc disease, significant fatigue resulting from her fibromyalgia, and pain and weakness associated with most activities. The totality of her myriad of symptoms compels a finding of permanent disability.

Because we are persuaded that the hearing officer and the Board acted arbitrarily and without the requisite foundation of substantial evidence, we affirm the Franklin Circuit Court.

THOMPSON, JUDGE, CONCURS.

MOORE, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

MOORE, JUDGE, DISSENTING: Respectfully, I dissent. In my opinion, substantial evidence exists in the record to support the ALJ’s decision.

BRIEF FOR APPELLANT,
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