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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001246-MR

KENTUCKY RETIREMENT
SYSTEMS AND BOARD
OF TRUSTEES OF KENTUCKY
RETIREMENT SYSTEMS — APPELLANTS

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 06-CI-00796

CHARLES WIMBERLY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; J. LAMBERT AND VANMETER, JUDGES.

LAMBERT, J., JUDGE: Kentucky Retirement Systems (KERS) appeals from the Franklin Circuit Court's opinion and order reversing the decision of the Board of Trustees of Kentucky Retirement Systems (the Board) to deny Charles Wimberly's

application for disability retirement benefits pursuant to Kentucky Revised Statutes (KRS) 61.600. After careful review, we affirm the Franklin Circuit Court's opinion and order.

Wimberly was formerly a bus driver for the Transit Authority of River City (TARC) in Louisville. His last day of paid employment was July 25, 2002, when he was forced to leave his job as a result of a heart problem. On February 7, 2003, Wimberly filed an application with KERS for disability benefits and submitted medical records supporting his claim. His claim was recommended for disapproval by the KERS medical review panel. Following an administrative hearing, the hearing officer issued a report recommending that the Board deny the claim. Before the Board issued a final order, Wimberly filed a KERS disability reapplication and supporting medical records pursuant to KRS 61.600(2). The KERS medical review panel again denied Wimberly's claim. Following another administrative hearing, a different hearing officer found that Wimberly had failed to prove his disability or that his disabling heart condition was not the result of a disqualifying preemployment medical condition. The Board adopted the hearing officer's report, and on May 5, 2006, issued a final order denying Wimberly's claim.

Wimberly appealed to the Franklin Circuit Court, which initially affirmed the Board's decision on the grounds of administrative *res judicata*. Wimberly then filed a motion to alter, amend, or vacate. The circuit court subsequently granted Wimberly's motion, vacating its previous opinion. The court

then entered another opinion and order on February 28, 2013. There, the court found that there was not substantial evidence to support the Board's determination that Wimberly had not proven that his cardiac condition disabled him from performing his job as a bus driver, or that his heart problem was the result of an alleged history of preemployment alcohol abuse, which would have disqualified him for disability benefits. Specifically, the circuit court found:

> Alcohol consumption is not a condition within the meaning of KRS 61.600(3)(d). In *Kentucky Retirement Systems v. Brown*, 336 S.W.3d 8 (Ky. 2011), the Kentucky Supreme Court set forth the appropriate standard governing pre-existing conditions. In that case, the Retirement Systems had denied benefits to the claimant on the grounds that his COPD was caused by his smoking habit.
>
> The Supreme Court construed the term "condition" and held that "the word 'condition' follows the words bodily injury, mental illness, and disease. KRS 61.600(3)(d). Thus, interpreting 'condition' as of the same kind or nature as the terms 'bodily injury,' 'mental illness,' and 'disease,' we cannot conclude that the word 'condition' encompasses 'behavior.'" *Brown*, 336 S.W.3d at 16. Accordingly, the Court held that smoking was not a condition within the meaning of KRS 61.600(3)(d) but rather that smoking was a behavior.
>
> Just as in *Brown*, it was error for the Retirement Systems to classify as a condition barring recovery any alleged alcohol abuse by Wimberly prior to his membership date. Applying the correct standard, it is clear that regardless of whether Wimberly ever abused alcohol, such activity could never constitute a condition as contemplated in KRS 61.600(3)(d).
>
> ….

> The Retirement Systems Final Order is not supported by substantial evidence on the record as a whole. The evidence presented over the course of both of Wimberly's applications clearly shows that he has met his burden of proof in showing that he has remained permanently incapacitated for a period exceeding twelve months. Moreover, all of his treating physicians concur that he should no longer operate a commercial vehicle. Even if his employer found that, without being cleared to operate a commercial vehicle by his doctors, Wimberly is incapable of performing the basic duties of his job as a Coach Operator.
>
> Additionally this Court is not persuaded by the Kentucky Retirement Systems' argument that since Wimberly was cleared to drive his own vehicle that he must somehow be able to return to operating a commercial bus. Wimberly's ability to drive his personal vehicle in no way indicates an ability to perform the duties of his former position as Coach Operator. *See Kentucky Retirement Systems v. Turner*, 2008-CA-1839-MR, 2010 WL 135118, 3 (Ky. App. Jan. 15, 2010).

KERS filed a motion to alter, amend, or vacate the new opinion, which was denied. This appeal now follows.

An appellate court's role in a KRS Chapter 13B appeal is to review the administrative decision, not to reinterpret or reconsider the merits of the claim, nor to substitute its judgment for that of the agency as to the weight of the evidence. *500 Associates, Inc. v. Natural Resources and Environmental Protection Cabinet*, 204 S.W.3d 121, 131 (Ky. App. 2006). The reviewing court may only overturn the decision if the agency acted arbitrarily or outside the scope of its authority, if the agency applied an incorrect rule of law, or if the decision itself is not supported by substantial evidence on the record. *Kentucky State*

Racing Comm. v. Fuller, 481 S.W.2d 298 (Ky. 1972). As long as there is substantial evidence in the record supporting the agency's finding, the reviewing court must defer to that finding, even if there is evidence to the contrary. *Kentucky Comm. on Human Rights v. Fraser*, 625 S.W.2d 852 (Ky. 1981).

KERS first argues that the circuit court erred by rejecting the doctrine of administrative *res judicata* as it applies to determinations by KERS. Under the statute governing disability retirement benefits for KERS, KRS 61.600(2), if an application for disability is denied, the applicant may reapply and submit a second application if the application is timely and predicated upon "new" evidence. Specifically KRS 61.600(2) states:

> A person's disability reapplication based on the same claim of incapacity shall be accepted and reconsidered for disability if accompanied by new objective medical evidence. The reapplication shall be on file in the retirement office no later than twenty-four (24) months after the person's last day of paid employment in a regular full-time position.

KERS argues that the circuit court erred in its final opinion and order when it rejected the applicable doctrine of administrative *res judicata*. Under this doctrine, *res judicata* applies when a prior administrative proceeding afforded the participants a full and fair opportunity to litigate the issues and the agency made a final order as to its findings. *Kentucky Comm'n on Human Rights v. Lesco Mfg. & Design Co.*, 736 S.W.2d 361 (Ky. App. 1987).

KERS argues that in its original opinion from August 3, 2012, the circuit court correctly affirmed the determination of the Board based upon the doctrine of

administrative *res judicata*. In that opinion, the court found that Wimberly's first administrative hearing "provided a full and fair opportunity to litigate the issue of his disability and his eligibility for disability retirement benefits." KERS also points out the court's original opinion acknowledged *Hoskins v. Kentucky Retirement Systems, et. al.*, 2009-CA-000905-MR (Ky. App. 2011), and held that the facts in the instant case were very similar to *Hoskins*. In that case, this Court held that *res judicata* applies to disability determinations made by KERS and that an applicant for disability benefits cannot relitigate the same facts and issues on a second application under the doctrine of *res judicata*. *Hoskins* further held that an applicant for disability retirement benefits must have shown by new objective medical evidence not considered in the previous action that he was incapacitated since his last day of paid employment.

KERS argues that a panel of this Court also recently reaffirmed the doctrine of administrative *res judicata* as it applies to KERS cases. On October 11, 2013, this Court issued an opinion in *Howard v. Kentucky Retirement Systems*, 2012-CA-001488-MR (Ky. App. 2013), in which it specifically recognized that the application of *res judicata* is appropriate to a second application for disability retirement benefits, stating: "[i]t must be also noted that because this is Howard's second application for benefits, *res judicata* applies; therefore, we only review denial of benefits as it relates to the new evidence submitted with the second application."

KERS argues that *res judicata* serves the essential function of preventing repeat litigation over the same claims with the same set of facts and that KRS 61.600(2) embodies this doctrine with its plain language requiring the introduction of new facts (objective medical evidence) as a prerequisite to successive applications. KERS argues that because Wimberly did not appeal the final order in the first administrative action to the circuit court, the Board's final order in the first administrative action falls under the doctrine of administrative *res judicata*. KERS argues that Wimberly failed to prove by new objective medical evidence not considered in the previous application that he was incapacitated since his last day of paid employment. *Hoskins v. Kentucky Retirement Systems, et al.*, 2009-CA-00905-MR (Ky. App. 2011).

Wimberly argues that he was not required to appeal the first application for disability because under the law, he is permitted to file a second application. While the hearing officer's recommendation was pending before the Board, and thus not yet final, Wimberly filed a reapplication for disability benefits on June 3, 2004, pursuant to KRS 61.600(2). Wimberly contends that he accompanied his second application with new additional medical evidence including an October 26, 2004, report from treating physician Dr. John Arnett, who stated that although Wimberly's heart condition had improved, he was still not able to drive commercially because the risks were too high. Wimberly argues that he also submitted Dr. Arnett's December 1, 2004, report confirming that Wimberly had been a patient since 1986, and tests through the years indicated that Wimberly was

not a heavy drinker and that there was no evidence or medical records to suggest otherwise.

Wimberly contends that not until July 28, 2004, after he filed his reapplication for disability benefits on June 3, 2004, did the Board finally issue a final order denying Wimberly's first application—an order which had already been rendered moot by Wimberly's reapplication. Rather than file an appeal to a moot final order, Wimberly argues he proceeded with his reapplication for benefits, and on February 8, 2005, he requested a formal administrative hearing to consider his second application. Wimberly's reapplication hearing was held on May 17, 2005, at which time Wimberly introduced, without objection, the medical evidence from his first hearing—as well as the new medical evidence summarized above. Wimberly points out that KERS did not introduce any evidence to rebut or contradict his medical evidence, nor did it move to limit the hearing officer's consideration of all the evidence from both applications or otherwise invoke *res judicata* in an attempt to preclude it.

We agree that KRS 61.600 specifically allows Wimberly to file a second application for benefits based on new objective medical evidence. The statute does not require that Wimberly first appeal the denial of the first application. Instead, it simply states that he may file a second application based on new objective medical evidence. Thus, we find no merit in KERS' argument that Wimberly was somehow prevented from filing this second application.

According to KERS, the circuit court's finding that KERS is required to reconsider all of the medical records submitted with an individual's previous application is simply not supported by the law. KERS contends the evidence that was submitted as a part of the initial action was ruled upon, and it is therefore final and not subject to appeal.

Wimberly contends that determination of his occupational incapacity and entitlement to KERS disability benefits must be based on "objective medical evidence" defined by KRS 61.510(33) 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[.]

Wimberly argues that the uncontested objective medical evidence of record shows that due to his physical condition, he was not only physically incapacitated from performing the required duties of his job (safely operating a public transport bus) but due to his heart condition he was also medically restricted from his bus driving duties for the entire one-year period following his last day of paid employment.

Wimberly argues that KERS did not preserve its *res judicata* argument on appeal because it failed to object to the introduction of evidence contained in the

first application of benefits and did not argue *res judicata* before the circuit court. Wimberly also notes that KERS failed to file exceptions to the hearing officer's recommended order following his administrative hearing.

After careful review of the record, we agree with both KERS and Wimberly. While we agree that the unpublished cases cited by KERS do hold that *res judicata* can apply in the disability context, the record reflects that Wimberly did provide new objective medical evidence of his disability when he filed his second application. The circuit court relied on this, in addition to the evidence introduced at the first administrative hearing, to conclude that, based upon the evidence as a whole, Wimberly had proven that he was no longer able to drive commercially based on his heart condition. We find no error in this regard. KRS 61.600(2) requires new evidence to be submitted upon a second application, and if no new evidence is submitted, *res judicata* applies. However, when new evidence is submitted, as in the instant case, *res judicata* does not bar a reviewing court from considering the evidence presented in an initial application and a subsequent reapplication to determine whether substantial evidence supports the disability determination.

We also find merit in the circuit court's conclusion that substantial evidence did not support the hearing officer or the Board's opinions that Wimberly had failed to prove that he has remained permanently incapacitated for a period exceeding twelve months. The overwhelming evidence was that Wimberly suffered from a heart condition and could not drive commercially. We specifically

disagree with KERS' argument that because Wimberly could drive his own personal vehicle, he was capable of driving commercially. This simply defies logic and is in direct contradiction of the objective medical evidence in this case.

We note that a consideration of a second application necessarily requires consideration both of the new medical evidence and the evidence in support of the first application. In *Hoskins*, which KERS argues controls here, the Board concluded that the claimant's second application for disability retirement benefits was barred by *res judicata*. In Wimberly's case, there was no such conclusion by the Board. The agency did not raise the issue of *res judicata* at the second administrative hearing or object to the introduction and consideration of the medical evidence from Wimberly's first application by the second hearing officer, whose recommended order reflected his consideration of that evidence. Further, as the circuit court noted, KRS 61.665(3)(d) requires that a final order of the Board shall be based on substantial evidence appearing in the record as a whole.

The record as a whole in Wimberly's case consisted not only of medical evidence from his second application and hearing, but also the medical evidence from his first application and hearing—all of which was considered by the KERS medical reviewers following the second application and all of which was later admitted into the record at his second hearing without any objection from KERS.

The evidence in this case overwhelmingly demonstrates that from his last day of paid employment on July 25, 2002, Wimberly was continuously medically disabled from driving a public transportation bus for twelve consecutive months

and beyond. Due to his cardiac condition, its symptoms, as well as concerns over Wimberly's ability to safely operate a bus, his physicians would not clear him to return to commercial driving and, without medical clearance from his physicians, TARC would not let Wimberly drive its buses. In fact, in response to Wimberly's condition and restrictions, on February 24, 2003, Wimberly's employer completed a "Reasonable Accommodation Determination" form, stating: "Based on medical documentation it has been determined that the above employee is unable to perform the essential functions of the position of Coach Operator."

KERS next argues that that the circuit court erred by failing to apply existing law as that law applies to issue preservation of new precedent. KERS contends that the circuit court based a large portion of its decision on the issue of alcohol consumption and preexisting conditions. However, as the circuit court noted, the case of *Kentucky Retirement Systems v. Brown*, 336 S.W.3d 8 (Ky. 2011), had not been issued when the KERS' determination was made in the instant case. As such, there was no error by KERS in not applying this standard. KERS argues that the circuit court erred when it did not follow existing published case law that clearly holds that the failure to raise an issue before an administrative body precludes a litigant from asserting that issue in an action for judicial review of that agency's decisions. *Personnel Board v. Heck*, 725 S.W.2d 13 (Ky. App. 1987). KERS argues that the circuit court also erred in failing to apply the recent case of *Hollen v. Kentucky Retirement Systems*, 2009-CA-000119-MR (Ky. App. 2010), which addresses the issue of preservation as it applies to new precedent. In *Hollen*, this

Court cited to *Burns v. Level*, 957 S.W.2d 218, 222 (Ky. 1997), and held that a new precedent should not be retroactively applied unless the subject issue was preserved for review. KERS argues that because Wimberly did not preserve the issue of alcoholism as a behavior and not as a condition in his exceptions, and the circuit court did not find that he had preserved the issue, the circuit court should have applied the case law cited above.

Wimberly argues that KERS' assertion that he failed to preserve the issue of alcoholism as behavior, and not a condition, in his exceptions to the hearing officer's recommended order is directly contradicted by the record. In fact, in his exceptions he stated, "The Hearing Officer erroneously characterized the claimant's past potential alcohol abuse as indirectly or directly affecting his cardiac condition. The Hearing Officer relied primarily upon his prior Findings in a prior claim. There was new & material medical proof submitted with the current case that disputed alcoholism."

We agree with Wimberly that we recently held in *Kentucky Retirement Systems v. Stewart*, 2011-CA-001262-MR and 2011-CA-001340-MR, that while *Rapier v. Philpot,* 130 S.W.3d 563 (Ky. 2004), requires the filing of exceptions, "[t]he *Rapier* case dealt with a situation where no exceptions had been filed, not one where exceptions had been filed but an issue had not been raised. Since the circuit court is hearing an original action, there is no requirement that issues be preserved for appeal." In the instant case, the record reflects that Wimberly

preserved the issue of alcoholism as behavior and not a condition in his exceptions to the hearing officer's recommended order.

Based on the evidence, we simply cannot say that the circuit court's opinion that *res judicata* did not apply in this particular case to bar Wimberly's second application for disability benefits was in error. Wimberly proved by new objective medical evidence that he was disabled and was therefore prohibited from performing the essential functions of his position as a commercial bus operator. Furthermore, the issue of alcoholism as a behavior was properly raised before the circuit court.

Finding no error, we affirm the February 28, 2013, opinion and order of the Franklin Circuit Court.

ACREE, CHIEF JUDGE, CONCURS.

VANMETER, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

VANMETER, J., DISSENTING: I respectfully dissent. In my view, the trial court erred in its conclusion of law that alcohol abuse can never constitute a preexisting condition under KRS 61.600(3)(d), citing *Kentucky Ret. Sys. v. Brown*, 336 S.W.3d 8, 16 (Ky. 2011). The trial court made two statements that are quoted in the majority opinion: 1) "[a]lcohol consumption is not a condition within the meaning of KRS 61.600(3)(d);" and 2) "regardless of whether Wimberly ever abused alcohol, such activity could never constitute a condition as contemplated in KRS 61.600(3)(d)." *Brown* is not controlling in this case, since the court addressed

whether smoking tobacco cigarettes was a "condition" within the meaning of the statute. The case before us deals with alcohol abuse.

KRS 61.600 sets forth the requirements for disability retirement from KERS. Subsection (3)(d) provides a qualifier that "incapacity does not result directly or indirectly from bodily injury, mental illness, disease, or condition which preexisted membership in the system or reemployment, whichever is most recent." The claimant bears the burden of proof that the disability did not predate membership in the system. *Kentucky Ret. Sys. v. West*, 413 S.W.3d 578, 580-81 (Ky. 2013).

According to the DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (Am. Pyschiatric Publ'g, 5th Ed., 2013) ("DSM-5"), substance abuse, including alcohol use disorder, is a psychiatric disorder. DSM-IV (1994), the previous edition of the Manual, described two distinct disorders, alcohol abuse and alcohol dependence, which DSM-5 combined into "a single disorder, called alcohol use disorder (AUD) with mild, moderate and severe sub-classifications." National Inst. on Alcohol Abuse and Alcoholism (http://pubs.niaaa.nih.gov/publications/dsmfactsheet/dsmfact.pdf) (27 Oct. 2014). Further citation that alcohol abuse is a "mental illness, disease or condition" within the meaning of the statute hardly seems necessary.

I agree with the trial court that mere alcohol consumption is likely not a condition under KRS 61.600(3)(d). But, as a matter of law, the conclusion that alcohol abuse can never constitute a condition contemplated in KRS 61.600(3)(d)

is erroneous. That said, the distinction is clearly one of degree and whether an employee suffered from preexisting alcohol abuse, as opposed to mere alcohol consumption, is a factual matter.

In this case, the record initially contained doctors' reports indicating that Wimberly had abused alcohol, *i.e.*, suffered from alcoholism, based on Wimberly's self-reporting to the doctors. Then, after Wimberly apparently became aware that his alcohol abuse predating his employment may be a disqualifying factor to his receiving benefits, Wimberly attempted to "clarify" the record. In this regard, the hearing officer included the following in his Report and Recommended Order on Remand:

> There is little doubt that the Claimant used alcohol prior to his initial employment date. . . . **Wimberly had stated to Dr. Kinney that he was drinking at least a case of beer a week.** This report was made on March 16, 2002. . . . **The Claimant also admitted to heavy alcohol abuse in the past**.
>
> The previous hearing decision . . . made a finding of fact stating as follows:
>
> > The evidence suggests that it is likely that the conditions from which Claimant suffers including diabetes and cardiac problems, are the results of conditions which pre-existed the membership in the systems.
> > (Finding of Fact No. 4, Page 540 of Record)
>
> That decision in a discussion of the evidence and testimony stated on the same page:
>
> > In addition, **the treating physicians note throughout the record that Claimant's cardiac problems are likely the result of alcohol use, a**

> **situation which predates his membership in the systems**.
>
> The record does not indicate that there was a determination that Mr. Wimberly was an alcoholic, but **the record does reflect that he reported to his doctor that he abused alcohol**.
>
> Accordingly, **it is found that the Claimant's use of alcohol, which existed prior to his initial employment date, indirectly, if not directly, affected his cardiac condition, as evidenced by the previous findings of the undersigned Hearing Officer and statements of doctors prior to the second hearing of the Claimant**.

(Emphasis added). The hearing officer, as fact-finder, was within his prerogative to believe the doctors' original reports as to Wimberly's mental illness or disease of alcohol abuse, as opposed to those which sought to "clarify" the record. *See, e.g., 500 Assocs., Inc. v. Natural Res. & Envtl. Prot. Cabinet*, 204 S.W.3d 121, 132 (Ky. App. 2006) (stating "exclusive province of the administrative trier of fact to pass upon the credibility of witnesses, and the weight of the evidence[]"). And, changes in testimony "are quite naturally regarded with great distrust and usually given very little weight." *Hensley v. Commonwealth*, 488 S.W.2d 338, 339 (Ky. 1972).

The question is, thus, whether Wimberly's alcohol abuse as found by the Hearing Officer to have indirectly contributed to his heart disease, as opposed to mere alcohol use, predated his employment and membership in the system. As noted, Wimberly, as claimant, bears the burden of proving that his alcohol abuse did not predate his employment. *West*, 413 S.W.3d at 580-81. From the record,

Wimberly presented no evidence of when his alcohol abuse started. Admittedly, this burden of proof would seem to present an almost insurmountable difficulty for Wimberly and other similarly situated claimants. Rhetorically, how does one prove when his or her mere alcohol use became alcohol use disorder, a mental illness or disease? This result, however, is mandated by the statute, KRS 61.600, and its allocation of the burden of proof, as set forth in *West*. Wimberly's claim for disability benefits therefore fails as a matter of law.

I would reverse the Franklin Circuit Court's Opinion and Order and remand this matter to that court with direction to reinstate the Final Order of the Board of Trustees of the Kentucky Retirement Systems.

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BRIEF FOR APPELLEE:

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