

RENDERED: JANUARY 5, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

**Commonwealth of Kentucky
Court of Appeals**

NO. 2016-CA-001060-MR

FRANK RHODES

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 13-CI-00990

WILLIAM A. THEILEN, EXECUTIVE
DIRECTOR KENTUCKY RETIREMENT
SYSTEMS; BOARD OF TRUSTEES
KENTUCKY RETIREMENT SYSTEMS;
SUSAN SMITH, CHAIR DISABILITY
APPEALS COMMITTEE; HONORABLE
SUZANNE LEE SHAFFER, HEARING
OFFICER; AND KATHY RUPINEN, KENTUCKY
RETIREMENT SYSTEMS

APPELLEES

OPINION
AFFIRMING

*** * * * *

BEFORE: ACREE, DIXON AND STUMBO,¹ JUDGES.

¹ Judge Janet Stumbo dissented in this opinion prior to retiring from the Kentucky Court of Appeals effective December 31, 2017. Release of this opinion was delayed by administrative handling.

ACREE, JUDGE: Appellant Frank Rhodes appeals the Franklin Circuit Court's June 22, 2016 Opinion and Order affirming the final order of the Board of Trustees of the Kentucky Retirement Systems denying Rhodes' application for disability retirement benefits. We affirm.

FACTUAL BACKGROUND

Rhodes is a fifty-three-year-old male, born January 5, 1964. Northern Kentucky University (NKU) formerly employed Rhodes as a custodian/labor-crew worker/materials handler. That position afforded Rhodes membership in the Kentucky Retirement Systems. His employment began on November 1, 1998. Rhodes' last day of paid employment was August 1, 2008. As of that date, he had accrued 115 months of service.

Well before this employment, Rhodes trained as an amateur boxer from 1982 until 1987 when he turned professional. He fought professionally from 1987 -1997. During that time, he also worked as a cleaner, a floor waxter, and a loader. He did so until his employment with NKU. According to the official job description submitted by NKU, his position then involved removing trash, collecting recycling materials, following schedules, unlocking campus buildings, and completing assigned work-order requests. (R. 600-01). Infrequent tasks included assisting with window washing and delivery of supplies, and arranging set-ups for special University events. (*Id.*). It also required him to perform medium work, including lifting as much as fifty pounds; standing and walking for long periods of time; moving large and bulky items, such as sofas, desks, and filing

cabinets; working overhead and in cramped spaces; repetitively pushing, pulling, reaching, bending, stooping, and twisting; and operating heavy cleaning equipment.

On October 22, 2007, Rhodes and other workers were attempting to load a 150-pound scoreboard onto a dolly. While lifting the scoreboard, Rhodes felt pain in his lower back. He was unable to stand. Rhodes reported to a local hospital where he was prescribed pain medication and physical therapy. He was released to work, but restricted to light duty. Rhodes requested reasonable accommodations, but NKU indicated that he could not be accommodated due to the nature of his job duties. Rhodes continued to work, shredding paper and performing other light-duty tasks, while his co-workers did the heavy lifting.

Rhodes sought treatment for his injury at Concentra Medical Center. Dr. Mark Whitsett diagnosed Rhodes with a lumbar spine sprain. Dr. Whitsett restricted Rhodes to light-duty work and recommended physical therapy. He instructed Rhodes not to bend more than twice in an hour or push/pull more than 20 pounds of force.

Rhodes began treating with Dr. John B. Jacquemin in December 2007. Dr. Jacquemin also diagnosed a lumbar sprain as a result of the October 2007 work-related event. He recommended a MRI of Rhodes' low back, and released Rhodes to return to work at light duty. He restricted Rhodes to lifting no more than 10 pounds frequently, but noted that Rhodes reported that light duty did not exist in his job and that NKU was unable to accommodate his restrictions.

An MRI of Rhodes' lumbar spine revealed a L5-S1 moderate-sized right paracentral broad disc protrusion that compressed the right S1 nerve root.

Dr. Jacquemin continued treating Rhodes in early 2008. He indicated that Rhodes had a L5/S1 herniated nucleus pulposus and lumbar sprain. The doctor indicated Rhodes could return to work with restrictions of lifting up to 10 pounds frequently, occasional pushing/pulling, occasional walking/standing, and continuously sitting. Dr. Jacquemin recommended steroid injections in lieu of surgery, a work-conditioning program, and vocational rehabilitation.

When conservative treatment failed, Dr. Jacquemin recommended Rhodes undergo a L5/S1 discectomy. Dr. Jacquemin performed the recommended surgery in August 2008.

Rhodes followed up with Dr. Jacquemin two weeks post-surgery. Rhodes reported mild improvement. Dr. Jacquemin ordered physical therapy. By December 2008, Dr. Jacquemin found Rhodes was physically capable of returning to light duty work with restrictions. He also noted Rhodes had been released from physical therapy. In February 2009, the doctor again released Rhodes to light-duty work and again recommended vocational rehabilitation. He opined in February 2009 and again in April 2009 that Rhodes was not totally disabled.

Dr. Richard Sheridan performed an independent medical examination in January 2009. He found Rhodes to be at maximum medical improvement, and had a permanent impairment of 13% due entirely to the work injury. He indicated Rhodes had the following permanent work restrictions: lift/push/pull/carry up to 10

pounds frequently and up to 20 pounds infrequently; bend, stoop, rotate at the waist; and reach from the floor to waist occasionally.

An MRI conducted on January 6, 2009, revealed mild degenerative disc disease along with scar tissue encasing the proximal right S1 nerve root. No residual or recurrent disc herniation was identified.

Dr. Jacquemin referred Rhodes to Dr. Rajbir Minhas for pain management. Dr. Minhas started treating Rhodes in early 2010 using a combination of medication and exercise. He indicated Rhodes had chronic pain syndrome, a herniated lumbar disc, post-laminectomy syndrome, and depression. The doctor ruled out lumbar radiculopathy.

Dr. David Roebker, a psychologist and vocational expert, interviewed Rhodes on July 27, 2010. He diagnosed Rhodes with depressive disorder. Dr. Roebker found Rhodes' employability in the local labor market to be poor, and observed that his psychological problems would pose difficulties in any work situation because of his problems with depression resulting in decreased energy, concentration, memory, and the ability to cope with the normal stress and pressure associated with competitive employment. The doctor diagnosed a 25% impairment due to Rhodes' mental problems resulting from the October 2007 work injury.

In contrast, Dr. R.P. Granacher conducted a psychiatric exam in December 2010 and found no evidence of a psychiatric disorder due to the 2007 work injury. Dr. Granacher stated Rhodes was exaggerating his symptoms. The

doctor observed “very significant symptom magnification” and concluded that Rhodes fabricated his reading and IQ test scores.

On August 4, 2010, Dr. Steven Wunder examined Rhodes and indicated that he was capable of only sedentary to light work. He did not think Rhodes could resume his prior work activities. He noted that these were permanent restrictions.

Dr. Stephanie Barnes, a vocational consultant, evaluated Rhodes on August 9, 2010. She concluded that, while Rhodes is not capable of performing his prior, heavy-duty job, he retains the capacity for light work, including jobs such as production assembler, manufacturing inspector, production packager, sorter, laundry folder, light janitorial work, and machine operator. Dr. Barnes felt Rhodes under-performed on his academic testing, noting he is limited, but more capable than he demonstrated. Specifically, she observed that Rhodes:

came in limping extensively and demonstrating pain-related behavior such as grimacing and groaning with frequent position changes during the evaluation. As I was leaving the building from a different location, I noticed Mr. Rhodes walking out of the building and down the walk with no limp, no altered gait, or no apparent discomfort. He has been with me for over an hour in the evaluation.

(R. 215). Dr. Barnes did not find Rhodes to be permanently and totally disabled.

In a report dated August 25, 2010, Dr. Thomas Bender reported that Rhodes has a 13% whole person impairment rating with permanent lifting restrictions of no greater than 20 pounds with any frequency and no stooping

below the waist more than two times per hour. Dr. Bender did not think Rhodes capable of returning to his prior work position. He found no evidence of malingering, exaggeration or symptom magnification.

Dr. Sheridan performed another IME on December 28, 2010. He did not find any evidence of active radiculopathy and stated Rhodes' most recent MRI did not show recurrent disc herniation. Dr. Sheridan opined that Rhodes' residual functional capacity is for sedentary work.

Rhodes also continued treating with Dr. Minhas for pain management. Dr. Minhas gave Rhodes various prescriptions, including Percocet, Elavil, Lyrica, Mobic, Paxil, and Celexa. A January 8, 2010 treatment note charts that Rhodes "states the current treatment regimen has helped relieve about 90% of the pain." (R. 86). Similarly, a March 5, 2010 treatment note states that Rhodes was exercising and walking "about 2 miles a day" and that his "current treatment regimen has helped relieve about 90% of his pain." (R. 84).

PROCEDURAL HISTORY

Rhodes applied for standard and duty-related disability benefits in July 2009. Two panels of medical examiners denied Rhodes' application. He then invoked his right to an administrative hearing pursuant to Kentucky Revised Statutes (KRS) Chapter 13B. At the hearing on August 2, 2012, Rhodes testified that his only current treatment involves visits with Dr. Minhas for pain management. As of July 2012, Dr. Minhas reported that the current treatment

regimen relieved most of Rhodes' pain and Rhodes denied any side effects from the pain medication.

Rhodes testified regarding the physical demands of his employment with NKU. He indicated that his main job was lifting, but that the labor crew had seven people who broke down into groups. He indicated on the last day he worked he was shredding paper and that he had devices for assistance when lifting.

Rhodes also testified that he tries to maintain an active lifestyle. He stated he gets up in the morning, stretches, walks about a mile each day, and then stretches some more. He also testified that he volunteers as a boxing coach three days a week at Cincinnati Recreational Center for two to three hours at a time. He clarified that he does not demonstrate the boxing movements and only coaches from the sideline. He indicated he had been depressed since his back injury.

The hearing officer issued an order recommending Rhodes' request for duty-related disability benefits be denied, but his application for standard disability benefits be granted. The hearing officer found Rhodes was not permanently incapacitated from performing any job, but had shown by a preponderance of the objective medical evidence that his back condition physically incapacitated him on a permanent basis from performing his assigned job duties at NKU. The hearing officer found it undisputed that NKU could not accommodate his medically-imposed restrictions. The hearing officer also found credible Rhodes' testimony that he volunteered a few hours a week as a boxing coach, but did not physically demonstrate the movements.

At the Board's request, the hearing officer issued a supplemental order finding Rhodes' psychological and lower-back conditions, taken together, did not cause him to be permanently disabled. The hearing officer re-affirmed her prior finding that Rhodes was disabled only as a result of his low-back condition. She also found that his psychological conditions were not present at the time of his last date of paid employment.

The Board issued a final order on July 25, 2013, rejecting the hearing officer's recommended order and denying Rhodes' application for both standard and duty-related disability benefits. The Board perceived Rhodes as "not entirely credible," and rejected as "less than credible" his testimony that, as a boxing coach, he only instructs from the sidelines while others demonstrate the moves.² It concluded that, based on his residual functional capacity, Rhodes failed to prove that, as of the last day of his paid employment and for a period of not less than 12 months therefrom that his condition prevented him from performing his job as a materials handler. It also found Rhodes was capable of engaging in some type of work, as multiple medical providers had released him to return to work in some capacity, and was, thus, ineligible to receive duty-related benefits.

Rhodes appealed to the Franklin Circuit Court which affirmed the Board's decision in an order entered on June 22, 2016. This appeal followed.

STANDARD OF REVIEW

² See footnote 3, *infra*, for a discussion of the agency head's authority under KRS Chapter 13B to reject the hearing officer's testimonial inferences in favor of its own, notwithstanding that the agency head was not present to assess the demeanor of the witness when he was testifying.

An appellate court plays a limited role in reviewing an administrative agency's findings of fact and may reverse such a finding only if it was unsupported by substantial evidence. KRS 13B.150(2)(c). Our review is of the legal conclusions and fact-finding of the agency head who we deem to be the ultimate factfinder, notwithstanding the agency's delegation of the factfinding function to a hearing officer. KRS 13B.120(2) (agency head authorized to "reject or modify, in whole or in part, the recommended order"). All that is required of the agency head before rejecting the factfinding of the hearing officer is to "include [in its final order] separate statements of findings of fact and conclusions of law." KRS 13B.120(3); *Swatzell v. Commonwealth*, 962 S.W.2d 866, 869 (Ky. 1998) (overruled on other grounds by *Rapier v. Philpot*, 130 S.W.3d 560 (Ky. 2004)) ("ultimate fact finder (in this case the Secretary)" is the agency head).

"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." *McManus v. Kentucky Ret. Sys.*, 124 S.W.3d 454, 458 (Ky. App. 2003) (citations omitted). Consequently, the Franklin Circuit Court was permitted to reverse the Board's conclusions only if the evidence was overwhelmingly in Rhodes' favor, and we are bound by the same standard. We must therefore give considerable deference to the agency's findings, particularly on matters of witness credibility and balancing of evidence. *Kentucky State Racing Comm'n v. Fuller*,

481 S.W.2d 298, 308 (Ky. 1972). We will consider Rhodes' arguments with these principles in mind.

ANALYSIS

Rhodes argues the circuit court erred in affirming the Board's decision to deny him both duty-related and standard disability benefits. Because Rhodes' arguments and the legal standards applicable to each kind of benefit are unique, we shall address them separately.

A. Duty-Related Disability Retirement Benefits

A claimant is entitled to duty-related disability retirement benefits if he or she “dies or becomes totally and permanently disabled to engage in any occupation for remuneration or profit as a result of a duty-related injury.” KRS 61.621(1). A “duty-related injury” means, for purposes of this case, “[a] single traumatic event that occurs while the employee is performing the duties of his position[.]” KRS 621.621(2)(a)1.

We agree with the circuit court that there was ample evidence to support the Board's finding that Rhodes' back injury did not cause a permanent total disability. Dr. Jacquemin repeatedly cleared Rhodes for light duty work, and twice opined that Rhodes was not totally disabled. Dr. Barnes also identified several jobs that Rhodes could perform. Drs. Wunder, Bender, and Sheridan all indicated Rhodes was capable of sedentary to light work. In fact, not a single medical professional found Rhodes to be totally and permanently disabled. The circuit court was correct to affirm the Board.

B. Standard Disability Retirement Benefits

A claimant seeking standard disability retirement benefits must demonstrate she is disabled from performing her job duties, or jobs of like duties, by a preponderance of evidence. KRS 13B.090(7); KRS 61.600(3); KRS 61.665.

Any such claim must be supported by objective medical evidence, defined as:

reports 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[.]

KRS 61.510(33).

More specifically, a worker is entitled to benefits if it is determined that she is permanently incapacitated as a result of bodily injury, mental illness, or disease from performing her prior job or jobs of like duties. KRS 61.600(3)(a) – (c). “An incapacity shall be deemed to be permanent if it 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. Thus, to be entitled to benefits, Rhodes was required to present objective medical evidence that, since his last date of paid employment, he has been physically incapacitated to perform his duties as a

materials handler, or a job of like duties, because of his back injury and that his incapacity is permanent. KRS 61.600(3).

The frequent duties outlined for the materials handler position at NKU appear relatively light. They involve unlocking doors, collecting and sorting recyclables, and collecting trash. However, the physical requirements of the position require an employee to lift up to fifty pounds, operate heavy cleaning equipment, move large and bulky items, and stand and walk for long periods of time. This is medium work. KRS 61.600(5)(c)(3) (defining medium work as “work that involves lifting no more than fifty (50) pounds at a time with frequent lifting or carrying of objects weighing up to twenty-five (25) pounds.”). Additionally, NKU repeatedly indicated it could not accommodate Rhodes’ physical limitations, yet on his last date of paid employment Rhodes was shredding paper and indicated he had device assistance for lifting. Rhodes testified his pain is incapacitating, yet he is physically active, walks frequently, and volunteers as a boxing coach. Recent treatment records indicate medication relieves almost all of Rhodes’ pain.

Again, a claimant is only entitled to standard disability benefits if he or she, “since his last day of paid employment, has been mentally or physically incapacitated to perform the job, *or jobs of like duties[.]*” KRS 61.600(3)(a) (emphasis added). The opinion of every medical provider is that Rhodes is unable to perform anything more than light-duty work, yet his job duties clearly include occasional medium work and NKU has indicated it is unable to accommodate

Rhodes. Setting minor inconsistencies aside, the Board found convincing Rhodes' testimony that at the time of his last day of paid employment he was on light-duty assignment shredding paper and that he worked in a team setting wherein his co-workers were able to do the heavy lifting. Again, the position of materials handler focuses on the collecting, sorting, storing, and disposing of paper products, aluminum cans, plastics, and scrap metal. Dr. Barnes found in her vocational evaluation that Rhodes is capable of performing comparable light duty jobs, such as production assembler, sorter, laundry folder, and light janitorial work. Accordingly, the Board found, and the evidence supports, that while Rhodes is unable to perform the exact duties he conducted at the time of his injury, he retains the residual functional capacity to perform jobs of like duties. KRS 61.600(3)(a). For that reason, we cannot say the circuit court erred in finding substantial evidence supports the Board's conclusion that Rhodes is not entitled to standard disability benefits.

Rhodes also takes issue with the Board's credibility determination. He faults the Board for substituting its judgment for that of the hearing officer. We see no such error. As earlier stated, the Board is the ultimate trier of fact here. KRS 13B.120(2); *Bowling v. Natural Res. & Env'tl. Protection Cabinet*, 891 S.W.2d 406, 410 (Ky. App. 1994) ("The Board as trier of facts considered all the evidence and chose the evidence it believed."). Credibility determinations are reserved to the Board. *Id.* at 409-10 ("[A] reviewing court must hold fast to the guiding principle that the trier of facts is afforded great latitude in its evaluation of

the evidence heard and the credibility of witnesses appearing before it.”). It was fully within the Board’s prerogative to find Rhodes’ testimony as to his physical limitations suspect, particularly in light of multiple medical opinions suggesting Rhodes was less than forthcoming and was magnifying his symptoms.³

Rhodes also argues, somewhat convolutedly, that the effects of his back injury directly caused depression, and his scholastic and mental aptitude

³ We are not unsympathetic to Rhodes’ credibility argument. In this case, disregard of the hearing officer’s credibility determination was direct: the hearing officer who observed Rhodes’ demeanor found the “Claimant was credible” (R. 707); the agency head rejected the hearing officer’s credibility findings and concluded, “The Claimant was not entirely credible.” (R. 745). Unfortunately for Rhodes, the statute-based lack of deference to the hearing officer’s factfinding contrasts with the deference required and afforded Administrative Law Judges in the workers compensation scheme where “[a]n award or order of the administrative law judge . . . shall be conclusive and binding as to all questions of fact” KRS 342.285(1). The Jones Act, KRS Chapter 13B, assigns ultimate factfinding (including assessing witness credibility) to the agency head that, ironically, neither conducted the hearing nor observed witnesses. We are mindful that this distinction impacts administrative hearings under the Jones Act because it allows the agency head to disregard the hearing officer’s factfinding even when based on “testimonial inferences.” A “testimonial inference” is “an inference that a fact to which a witness orally testified is an actual fact because that witness so testified *and because observation of the witness induces a belief in that testimony.*” *Center Const. Co., Inc. v. N.L.R.B.*, 482 F.3d 425, 441 (6th Cir. 2007) (emphasis added). The approach under the Jones Act runs contrary to that which is generally accepted: “Repeatedly, the courts have said that, since observation of such ‘demeanor evidence’ is open to a trier of the facts when witnesses testify orally *in his presence*, and since *such observation is not open to a reviewing tribunal*, that fact-trier’s findings, to the extent that they comprise *direct or ‘testimonial’ inferences, are ordinarily unreviewable.*” *N.L.R.B. v. Dinion Coil Co.*, 201 F.2d 484, 487 (2d Cir. 1952) (emphasis added). “We [reviewing tribunals] accept [credibility-based testimonial inferences], as we must, [because the factfinder] drew [them] directly from his estimates of the credibility of witnesses whom he observed as they testified in his presence- i.e., his inferences (sometimes called ‘testimonial inferences’) that certain facts existed because he believed some witness or witnesses who testified before him that those facts did exist.” *Id.* at 491. Derivative inferences are different. “We are not required, however, to accept . . . secondary or derivative inferences from the facts which the [fact-finder] directly inferred from such testimony.” *Id.* Such reason-based or logic-based “‘derivative inferences,’ [are] facts to which no witness orally testified but which the examiner inferred from facts orally testified by witnesses whom the examiner believed.” *Center Const.*, 482 F.3d at 441. Consequently, there is a rational protocol for rejecting derivative inferences. “We may disregard such a finding of facts thus derivatively inferred, if other rational derivative inferences are open. And we must disregard such a finding when the derivative inference either is not rational or has but a flimsy foundation in the testimony.” *Dinion Coil Co.*, 201 F.2d at 487. Other than legislative prerogative as expressed in the Jones Act, we can offer no rationale to justify the agency head’s disregard of the hearing officer’s role in drawing testimonial inferences. We are nonetheless bound by it.

along with his physical limitations and psychological symptoms prevents him from engaging in any occupation for remuneration or profit. Rhodes emphasizes, correctly so, that KRS 61.600(5)(b) requires that a person's physical ability be assessed in light of the severity of the person's physical, mental, or other impairments. But we disagree with him that the Board erred in rejecting his claim of a psychological impairment.

The Board was presented with conflicting evidence supporting two opposing conclusions. Drs. Minhas and Wunder either diagnosed or noted signs of depression. Dr. Roebker conducted a thorough psychological analysis and assessed a 25% psychological impairment due to depression. Dr. Granacher, on the other hand, found no evidence of psychological impairment or depression. He thought Rhodes was symptom magnifying. Dr. Barnes' report supports Dr. Granacher's general conclusion that Rhodes was exaggerating the severity of his symptoms. It was not erroneous for the Board to rely on Dr. Granacher's medical opinion in reaching the conclusion that Rhodes did not suffer from a psychological impairment as a result of the 2007 work event. *See Fuller*, 481 S.W.2d at 308.

CONCLUSION

We affirm the Franklin Circuit Court's June 22, 2016 Opinion and Order affirming the Board's Final Order denying Rhodes' application for standard and duty-related disability retirement benefits.

DIXON, JUDGE, CONCURS.

STUMBO, JUDGE, DISSENTS.

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