The State ex rel. Chime, Appellant, v. Board of Trustees of Police and Firemen's Disability and Pension Fund of Ohio, Appellee.

[Cite as State ex rel. Chime v. Bd. of Trustees of Police & Firemen's Disability & Pension Fund of Ohio (1993), Ohio St.3d .]

Police and Firemen's Disability and Pension Fund -- Application for permanent total disability compensation -- "Permanent total disability," construed -- Claimant who has re-employment potential does not meet the criteria for permanent total disability.

(No. 92-2364 -- Submitted September 22, 1993 -- Decided December 8, 1993.)

Appeal from the Court of Appeals for Franklin County, No. 92AP-928.

Appellant-claimant, John D. Chime, was a police officer for the city of Clyde from March 1988 through January 1991. During his tenure, claimant sustained allegedly work-related knee, back and psychiatric conditions. In 1991, at age twenty-seven, claimant filed a "Disability Retirement Application" with the Police and Firemen's Disability and Pension Fund of Ohio ("fund"). Claimant has since re-enrolled in college and is majoring in psychology, with a goal of obtaining his Ph.D.

Claimant submitted several medical reports. Dr. Robert Daniels, claimant's attending psychologist, diagnosed claimant with an "anxiety disorder," and stated that claimant's prognosis was "good." He indicated on a form that claimant was "permanently incapacitated for performance of duty as a (fire fighter) or (police officer). His/her disability is 'partial' and performance of any gainful occupation would depend upon the occupation in question." In a September 16, 1991 follow-up, he assessed claimant's psychological disability at thirty to thirty-five percent.

Dr. R.E. Dwight noted that claimant had a "fair" prognosis with regard to his left knee condition. On September 24, 1991, he concluded:

"I believe your knee plays a significant role in your

disability as a police officer, in that I believe that it has resulted in 100% disability from that type of employment. Of course, it does not indicate that you are 100% disabled, but the fact that you require the use of a cane on frequent occasions indicates that you are limited to the type of employment that does not require you to carry objects of any significant weight, or to stand for long periods of time. Therefore, I believe it is reasonable to assume that you are 50% disabled."

Dr. Brett Kuns addressed claimant's back condition and concluded that it resulted in a twenty-five-percent permanent partial impairment. He noted that claimant had "marked limitations to his work capacity" and recommended that claimant be restricted to sedentary work.

The claimant also submitted an evaluation of physical capacity from occupational therapist Donya Hogston. She found claimant incapable of lifting, pushing, pulling, climbing, stooping, bending and kneeling. Prolonged sitting, standing, and walking were also ruled out. She made no specific vocational recommendations.

Claimant was examined on the fund's behalf by Drs. Francis McCafferty and Ira Weiden. The latter concluded that claimant's knee, back and psychological conditions and stress-based asthma prevented him from returning to police work. He felt, however, that claimant could do sedentary work. Dr. McCafferty examined claimant psychiatrically and reported that claimant's prognosis for his major depressive disorder was good, and the prognosis for his adjustment disorder with anxiety and depression was fair. He felt that claimant could not return to his former position, but, depending on the job, could do other work.

On June 24, 1992, the fund's board of trustees denied the compensation for permanent total disability that claimant sought, and instead awarded partial disability retirement at twenty percent pursuant to R.C. 742.37(C)(3). In reaching its decision, the board had before it a report from its disability committee that cited eighteen pieces of evidence that it had reviewed and evaluated. Relying on the previously named physicians' reports, the committee found claimant incapable of resuming his police duties. It did not, however, find him incapable of all work, writing:

"The difference between total disability and partial disability is whether or not Mr. Chime can '* * * perform the duties of any gainful occupation for which * * * [he] * * * is reasonably fitted by training, experience, and accomplishments * * *.'

"It is significant that neither one of the two Fund-appointed physicians found Mr. Chime to be totally disabled. Also, his personal physicians found his impairment to be not total and less than maximum partial. Dr. R. Dwight stated in his report dated 24 Sep. 91 that Mr. Chime was '* * * 50% disabled.' Dr. B. Kuns stated in a report dated 18 Nov. 91 that Mr. Chime had '* * * a 25% whole person permanent partial impairment due to his lower back.'

"Based on his current age (29 years) and past college education, as well as his current enrollment in college, it is felt that Mr. Chime will be retrained for a sedentary

occupation and capable of engaging in a gainful occupation for the remainder of his life. Given the prognosis that his psychiatric problems should improve over time and his very short police service, the Committee recommends that he be awarded 20% percent of his three years of highest earnings allowed under Sec. 742.37(C)(3) of the Ohio Revised Code."

The board's decision was affirmed on administrative appeal.

Claimant filed a complaint in mandamus in the Court of Appeals for Franklin County, claiming that the board had abused its discretion in denying permanent total disability compensation. In the alternative, claimant argued that he was entitled to no less than sixty-percent partial disability compensation. Both parties moved for summary judgment. Finding no abuse of discretion, the court sustained the fund's motion and denied the writ.

This cause is now before the court upon an appeal as of right.

Doyle, Lewis & Warner, John A. Borell and Kevin A. Pituch, for appellant.

Lee I. Fisher, Attorney General, Doug S. Musick and Lorraine M. Nestor, Assistant Attorneys General, for appellee.

Per Curiam. Claimant asserts an entitlement to permanent total disability compensation. Claimant's challenge requires us to determine whether there is "some evidence," as Kinsey v. Bd. of Trustees of Police & Firemen's Disability & Pension Fund of Ohio, (1990), 49 Ohio St.3d 224, 551 N.E.2d 989, requires, to support the denial of compensation for permanent total disability. The appellate court found that there was, and, for the reasons to follow, we affirm its judgment.

R.C. 742.01(G) defines "permanent disability" as:

"[A] condition of disability with respect to which the board of trustees of the police and firemen's disability and pension fund finds there is no present indication of recovery.***"

R.C. 742.01(F) describes "total disability" as:

"[I]nability to perform the duties of any gainful occupation for which the member of the fund is reasonably fitted by training, experience, and accomplishments, provided that absolute helplessness is not a prerequisite of total disability."

A determination of permanent total disability must, therefore, include consideration of all relevant medical and nonmedical factors. See, also, State ex rel. Montague v. Police & Firemen's Disability & Pension Fund of Ohio (1992), 78 Ohio App. 3d 661, 605 N.E.2d 1009.

As to his vocational prospects, claimant is a thirty-year-old college student who plans to get a Ph.D. in psychology. As to his psychological impairment, Drs. Daniels and McCafferty forecast that claimant's work-related psychological condition will improve. As to his physical abilities, the medical evidence uniformly indicates a capacity for sedentary work. All of these factors and the evidence underlying them were discussed in the board's order, leaving it supported by "some evidence."

Claimant admits that he intends to pursue a career that is

consistent with the sedentary limitations placed on him. Claimant argues that the board erred in considering his potential for future employment. He contends that the only relevant question is whether he can work now. Stressing that he has not yet completed his studies, claimant argues that there are no jobs within his current capacities and, accordingly, a finding of permanent total disability is warranted. Claimant's argument fails.

Claimant does not seek compensation merely for "total disability," he seeks compensation for permanent total disability. "Totality" demands an inability to perform gainful employment. "Permanency" requires that the "condition of disability" underlying the inability to work is one that will not improve. Considering these criteria together, "permanent total disability" implies an inability to ever work. A claimant who, as here, has re-employment potential does not meet the criteria for permanent total disability.

R.C. 742.37 supports our interpretation. Subsection (C)(2) orders that permanent total disability compensation continue until death. Since inability to work is a prerequisite to payment, Subsection (C)(2) obviously contemplates that the inability to work will never change.

Accordingly, the judgment of the court of appeals is affirmed.

Judgment affirmed.

Moyer, C.J., A.W. Sweeney, Douglas, Wright, Resnick, F.E. Sweeney and Pfeifer, JJ., concur.