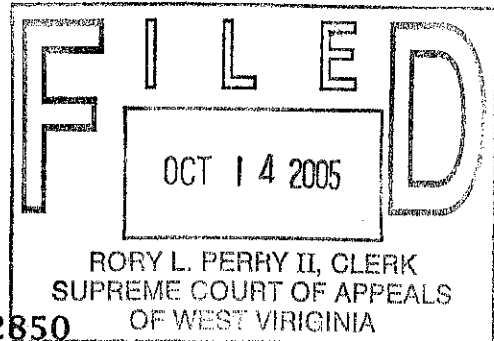


BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

**PEGGY ANN MAYHORN,
Appellant,**



v.

**Appeal No. 32850
Civil Action No. 04-AA-71**

**WEST VIRGINIA CONSOLIDATED
PUBLIC RETIREMENT BOARD,
Appellee.**

**BRIEF FILED TO THE WEST VIRGINIA SUPREME COURT OF
APPEALS ON BEHALF OF APPELLANT PEGGY MAYHORN**

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I. Procedural History and Nature of Proceeding

On April 11, 2003, Appellant applied for disability retirement benefits from the Appellee. Her application was denied on August 20, 2003. Appellant appealed this decision to the Appellee's hearing officer. Appellee appointed Jack DeBolt, Esq, as hearing examiner to conduct a hearing on the appeal and to make a recommendation to Appellee. Mr. DeBolt conducted a hearing on March 19, 2004. By decision dated April 13, 2004, he recommended the denial of Appellant's application for disability retirement benefits. Appellee adopted Mr. DeBolt's recommendation by order dated May 19, 2004 and received May 21, 2004. Appellant appealed to circuit court pursuant to West Virginia Code §29A-5-4(b) on June 22, 2004. By decision entered and filed upon January 5, 2005, the circuit court affirmed the decision of Appellee. Appellant seeks review of this order.

II. Statement of Facts

Peggy Ann Mayhorn, Appellant, was employed as a cook with the Board of Education of the County of Logan. As such, Appellant was a member of the Teacher's Retirement System, hereinafter referred to as TRS. The West Virginia Consolidated Public Retirement Board, Appellee, is the state agency that administers the TRS.

Appellant ceased physically working for the Board of Education of the County of Logan on December 9, 2001. At that point she had 11.972 years of retirement credit with TRS and was fifty-two years of age.

Appellant suffers from a number of serious physical ailments including coronary artery disease. Although Appellant had a two artery bypass graft in 2000 and a stent implanted in 2002, she continues to have chest and left arm pain. Appellant also suffers from pain and swelling in her legs, back pain, depression, fibromyalgia, obstructive sleep apnea, restless leg syndrome, gastroesophageal reflux disease, gastroenteritis, gastroparesis, and dyspepsia. An MRI performed in 1999 demonstrated generalized disc degeneration and a small disc bulge at T12-L1 level. She has suffered from lumbrosacral muscle strain and radiculitis on the left.

Appellant is restricted to lifting no more than ten pounds as a result of her physical impairments. Unfortunately, Appellant's responsibilities as a cook require her to lift up to fifty pounds as well as perform other vigorous activities.

As a result of the disabilities described above, Appellant cannot perform the duties of a cook. Further, she is impaired in performing some normal life functions, including normal housekeeping tasks. Appellant has been found to be disabled by the Social Security Administration retroactive to December 10, 2001.

Two of Appellant's physicians have indicated that Appellant is permanently incapacitated for service in her job category. Dr. Bassam MoushMoush, M.D., reached this opinion based upon her continuing cardiac problems. Dr. Lawrence Kelly, M.D., also indicated that Appellant is unable to maintain regular work duties. Barabara Browning, Personnel Officer for Appellant's employer, also asserted that Appellant was unable to perform the duties of a cook because of her heart problems and back condition.

After her application for disability retirement benefits was filed, Appellant was examined by two physicians selected by Appellee, Dr. John Walden, M.D., and Dr. William Jeffrey, M.D.. Both concluded Appellant was not permanently disabled. However, Dr. Walden did not evaluate Appellant's heart condition. He was aware of it and in his summary report stated:

It would be helpful to have documentation from her cardiologist regarding objective findings with respect to her cardiovascular status.

Neither Dr. Walden nor Dr. Jeffrey gave any consideration to the weight lifting restrictions applicable to Appellant and the effect the same would have on her ability to resume employment as a cook for the Board of Education of the County of Logan. Neither was aware of Appellant's disability award with the Social Security Administration, apparently because her application was still pending at the time of these evaluations.

III. Issue Presented

A. Did the circuit court err in determining that Appellant was not totally and permanently incapacitated from resumption of her duties as a cook and therefore not entitled to disability retirement benefits from Appellee.

IV. Citatition of Authority

- A. West Virginia Code §18-7-35(a)
- B. West Virginia Code §18-7-35(b)
- C. West Virginia Code of State Rules §162-2-3.2.b

V. Argument

Appellee's regulations provide the following definition applicable to Appellant's application for disability benefits:

3.2.b. For members of the Teachers Retirement System "mentally or physically incapacitated for service" means a member's inability to engage in substantial gainful activity by reason of any medically determinable physical or mental impairment that can be expected to result in death, or has lasted and can be expected to last for a continuous period of not less than twelve months. In order for a member of the Teachers Retirement System to be eligible to be retired by the Board on account of the incapacity, the evidence must

demonstrate that the member's incapacity is so severe that he or she is likely to be permanently unable to perform the duties of the position which the member occupied immediately prior to his or her disabling illness or injury. Evidence demonstrating that the member has been awarded disability benefits by the Social Security Administration establishes a presumption, rebuttable by medical evidence or opinion to the contrary, that the member suffers from a mental or physical incapacitation for service under the Teachers Retirement System.¹

It is clear from the evidence of the record that Appellant cannot function as a cook for the Board of Education of the County of Logan. Her weight lifting restrictions, her continuing heart problems, and the legion of other disabling conditions have made it clear not only to her but also to her physicians and employer that she will never be able to return to work as a cook.

Appellant also meets the first of the two requirements of the code for receipt of disability benefits. She has over ten years of service credit with Appellee. West Virginia Code §18-7-35(a). The reason that her application was rejected is that the physicians appointed by Appellee did not find that she was totally and permanently disabled. West Virginia Code §18-7-35(b)

Appellant contends that there are several problems with the report of Appellee's physicians. First, neither took into consideration the weight-lifting restrictions that in and of themselves disqualify Appellant from

¹ The last sentence relating to the rebuttable presumption of disability based upon an award of disability benefits to the employee did not become a part of the regulations until May 1, 2004.

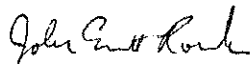
resuming her employment as a cook with the Board of Education of the County of Logan. Second, Dr. Walden did not thoroughly evaluate her heart condition. As mentioned above, he did not have the information which would have allowed him to do that adequately. Third, neither physician gave any weight to the presumption of disability provided by the action of the Social Security Administration. The hearing officer also did not address this last issue.

In fairness to the physicians and to Mr. DeBolt, the regulations concerning the rebuttable presumption created by a disability award from the Social Security Administration did not go into effect until after the date of their reports/findings, i.e. May 1, 2004. However, these regulations were clearly in effect when the Appellee made its decision on Appellant's application for disability benefits on May 19, 2004.

The failure of the physicians to take into consideration Appellant's disability award from the Social Security Administration and of the hearing officer and Appellee to address this fact would justify remand to Appellee for further consideration of Appellant's application for disability benefits. The same is true of Dr. Walden's failure to adequately address Appellant's heart condition. However, the clear evidence of the record that Appellant is restricted to lifting no more than ten pounds and that this prevents her from working as a cook for the Board of Education of the County of Logan

justifies a simple reversal of the decision fo Appellee and a direction from this Court to Appellee to award the disability benefits to Appellant.

PEGGY ANN MAYHORN, Appellant,
By counsel,

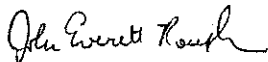


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CERTIFICATE OF SERVICE

I, John Everett Roush, Esq., counsel for Appellant, hereby certify that I have served a true copy of the foregoing brief upon the following by placing it in a properly addressed envelope, First Class postage prepaid, in the United States Mails, on this the 14th day of October 2005, to:

Anne Werum Lambright, Esq.
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Building 5, Suite 1000
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