

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000484-MR

MARIE HOLLAND

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 98-CI-02036

KENTUCKY RETIREMENT SYSTEMS

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: JOHNSON AND KNOPF; AND MILLER, SPECIAL JUDGE.¹

KNOPF, JUDGE: Marie Holland appeals from an order of the Franklin Circuit Court which affirmed the Kentucky Retirement Systems= (the Retirement Systems) denial of her second application for disability retirement benefits. Holland contends that the Retirement Systems disregarded evidence of her disability and her testimony that her condition has grown worse. Although certain other aspects of this case are problematic, we

¹Senior Status Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

agree with the circuit court that evidence did not compel a finding in Holland's favor. Hence, we affirm. Holland was employed by the Marshall County Board of Education as a school bus driver from 1979 to 1995. She quit her job due to severe pain and sleep deprivation caused by a condition called fibromyalgia. In October 1995, Holland filed an application for disability retirement benefits. That application was denied on initial consideration by the Medical Review Board physicians. At Holland's request, the application was also considered by a hearing officer. On April 25, 1997, the hearing officer issued a report and order recommending that the application be denied. The Retirement Systems, through its Disability Appeals Committee, adopted the hearing officer's report and recommendation on June 10, 1997.

Rather than filing an appeal from this adverse determination, Holland filed a second application for disability retirement benefits on June 27, 1997. She alleged that her condition was causing her increased pain and fatigue and that her ability to handle stress had significantly diminished. The hearing officer recommended that the claim be denied because Holland failed to prove a substantial change in her condition as required by KRS 61.600(1)(e). The Retirement Systems, through its Administrative Appeals Committee, adopted the hearing officer's report. On appeal, the Franklin Circuit Court found that this decision was supported by substantial evidence.

Holland now appeals to this Court. Holland bore the burden of proof before the Administrative Appeals Committee, where she did not succeed in persuading that body that she was entitled to benefits. Therefore, the question before us is whether the record compels a contrary decision.² In reviewing an administrative decision, we stand in the stead of the circuit court and review the decision for arbitrariness.³ The court's role is to review the administrative decision, not to reinterpret or reconsider the merits of the claim.⁴ As long as the agency's decision is supported by substantial evidence of probative value, it is not arbitrary and must be accepted as binding by the appellate court. Substantial evidence is defined as evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable persons. In its role as a finder of fact, an administrative agency is afforded great latitude in its evaluation of the evidence heard and the credibility of witnesses, including its findings and conclusions of fact. However, this Court is authorized to review issues of law on a *de novo* basis.⁵

² See City of Louisville v. McDonald, Ky., 470 S.W.2d 173 (1971), and Bourbon County Board of Adjustment v. Currans, Ky. App., 873 S.W.2d 836, 838 (1994) ("[T]he failure to grant administrative relief to one carrying the burden is arbitrary if the record compels a contrary decision in light of substantial evidence therein.")

³ American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission, Ky., 379 S.W.2d 450 (1964).

⁴ Kentucky Unemployment Ins. Comm'n. v. King, Ky. App., 657 S.W.2d 250, 251 (1983).

⁵ Aubrey v. Office of Attorney General, Ky. App., 994 S.W.2d 516, 518-19

Holland first argues that the Retirement Systems and the circuit court applied the wrong legal standard. Essentially, she contends that fibromyalgia is not the type of condition which lends itself to Objective medical evidence.@ She asserts that the entire body of medical evidence which leads toward such a diagnosis should not be disregarded simply because it is not purely objective. Because the hearing officer required her to prove her condition wholly by objective medical evidence, Holland argues that she was held to an incorrect standard of proof which was impossible for her to meet.

As an initial matter, the Retirement Systems's procedures for handling subsequent applications create some difficulties for our review. We first note that the Retirement Systems has treated the eligibility requirements of KRS 61.600(1)(a)-(c) & (e) as threshold criteria for further consideration of an application. Such matters were considered administratively by the hearing officers, and were not referred to the medical evaluators pursuant to KRS 61.665 unless the hearing officer made the requisite findings. A hearing officer's recommended findings that a claimant had failed to satisfy these threshold criteria would then be considered by the Administrative

(1998); (*citing Starks v. Kentucky Health Facilities*, Ky. App., 684 S.W.2d 5 (1984); *O'Nan v. Ecklar Moore Express, Inc.*, Ky., 339 S.W.2d 466 (1960); *Kentucky State Racing Commission v. Fuller*, Ky., 481 S.W.2d 298, 309 (1972); and *Mill Street Church of Christ v. Hogan*, Ky. App., 785 S.W.2d 263, 266 (1990)).

Appeals Committee, rather than by the Disability Appeals Committee.

In Baker v. Kentucky Retirement Systems,⁶ this Court held that the Retirement Systems was only authorized to delegate its authority to issue a final order in cases involving disability retirement. Accordingly, we held that the Administrative Appeals Committee lacked the authority to issue a final order in cases which did not involve disability retirement, and we remanded for entry of a valid final order. Shortly after Baker became final, the Retirement Systems filed a motion to dismiss this appeal, arguing that, under Baker, the final order entered by the Administrative Appeals Committee was invalid. The Retirement Systems argued that it was only authorized to delegate its authority to enter a final order in matters involving disability retirement determinations pursuant to KRS 61.665. The motion panel of this Court denied the motion to remand, and adopted the reasoning of another panel of this Court in Sturgill v. Kentucky Retirement Systems:⁷

Within its statutory and regulatory mandate, the Board is free to handle claims in the manner it deems most efficient. As a practical matter, the Board appears justified in treating the requirements of KRS 61.600(a)-(c) as administrative matters. Unlike the favorable medical determination required by KRS 61.600(d), a determination under subsections (a)-(c) does not require

⁶ Ky. App., 50 S.W.3d 770 (2001).

⁷ No. 2001-CA-000379-MR.

that the decision maker have any medical expertise. Nonetheless, characterizing such determinations as administrative neither enlarges nor reduces its statutory authority. Neither the medical examiners nor the hearing officer may make an award finding disability retirement benefits without at least an implied finding that all of the criteria of KRS 61.600(1) have been met.

Furthermore, KRS 61.600(2)-(4) set out the standards under which the medical examiners must evaluate the evidence to determine if a claimant is eligible for disability retirement. Indeed, a "substantial change" application must be evaluated using standards set out in KRS 61.600(4) - the same standard applied by the medical evaluators and the hearing officers. Therefore, we conclude that KRS 61.600 and 61.665 must be read together and not as involving separate and distinct proceedings.

Consequently, a "substantial change" application for disability retirement benefits brought pursuant to KRS 61.600(1)(e) is an intrinsic part of the proceedings outlined in KRS 61.665. Accordingly, an administrative finding denying an application under this section is a finding pursuant to KRS 61.665 as well as KRS 61.600(1)(e). As a result, the Board may delegate to an appeals committee the authority to adopt such a finding as a final order.⁸

However, while the Administrative Appeals Committee did have authority to enter a final order in this matter, the Retirement Systems's procedures create another problem as well. Had this matter been referred to the medical evaluators pursuant to KRS 61.665, a determination of Holland's disability would have been based on "an examination of the *objective medical evidence*

⁸ Sturgill v. Kentucky Retirement Systems, Order denying motion to reconsider, (January 24, 2002); adopted by reference in this case by order entered on January 25, 2002.

. . . ."⁹ The term "objective medical evidence" means "medical histories; 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 or 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."¹⁰

But because the Retirement Systems treated the "substantial change" provision of KRS 61.600(1)(e) as a threshold requirement for further consideration of a subsequent application, it is not clear that Holland's second application needed to be accompanied by "objective medical evidence". The applicable version of KRS 61.600(1)(e) did not include the Objective medical evidence@requirement.¹¹ Rather, at the time Holland submitted both of her applications (and at the time the Board denied her second claim), KRS 61.600(1)(e) provided that

⁹ KRS 61.600(2) (*Emphasis added*).

¹⁰ KRS 61.510(31) (now KRS 61.510(33)).

¹¹ In 2000, the General Assembly amended KRS 61.600(1) to require that an application based upon a previously denied claim of disability must be supported by *A*new objective medical evidence." 2000 Ky. Acts ch. 385, '19.

A[n]o disability application based on the same claim of incapacity shall be accepted and considered for disability for any person who has previously applied for and been denied unless it is accompanied by evidence of substantial change in the person's condition which shall satisfy subsection (4) of this section."

Subsection (4)(2) further required that "[t]he determination of a permanent incapacity shall be based on the medical evidence contained in the member's file and the member's residual functional capacity and physical exertion requirements [as set out in subsections (4)(b)&(c)]." As framed by the Board's procedures, the threshold question is not whether the applicant's evidence of a substantial change would be sufficient to convince the medical examiners under the "objective medical evidence" standard of KRS 61.600(2) and 61.665, but merely whether the application is "accompanied by evidence of a substantial change in the person's condition" sufficient to meet the standards in KRS 61.600(4).

Once this and the other threshold requirements are met, a claimant's application would then be referred to the proceedings outlined in KRS 61.665. Under the latter statute, any award of disability retirement benefits must be supported by objective medical evidence.¹² However, contrary to the position taken by the hearing officer and the circuit court, we do not

¹² KRS 61.600(2).

read the applicable version of KRS 61.600(1)(e) as requiring Holland to present wholly objective evidence to meet the threshold showing of a substantial change in her condition.¹³ Any other reading of the statute would allow the Retirement Systems to deny a claimant's application on the merits without following the procedures set out in KRS 61.665.¹⁴

Nevertheless, we are not convinced that any error in this regard affected the outcome of Holland's claim. In denying her initial claim, the hearing officer found insufficient objective medical evidence to support Holland's claim of disability. Because Holland did not appeal from the Board's order adopting the hearing officer's conclusion, this finding is

¹³ In paragraph 5 of his findings of fact, the hearing officer states:

While it is argued that she takes increased medication and that her testimony indicates that she is in pain all of the time and it is more severe than it was previously, there is nothing in this record to support a substantial change in her condition from that of her first application. There has been no new objective medical evidence submitted to show that her condition has substantially changed from that of her last application.

Likewise, the circuit court stated in its order affirming the Board:

The Court must consider whether there is objective medical evidence leading to the conclusion that there is a substantial change in Petitioner's condition and whether the Retirement Systems' decision is supported by substantial evidence on the record.

¹⁴ The more difficult question is whether the Retirement Systems's procedures for reviewing a substantial change application comply with its statutory mandate. KRS 61.665 does not distinguish between an original application and a substantial change application on medical issues. Arguably, medical determinations on all applications must be submitted to the medical examiners, as provided by KRS 61.665(2)(e). We need not reach this issue, however, because Holland has not challenged the propriety of the Retirement Systems's procedures in this case. But likewise, we do not address whether the Retirement Systems is authorized to treat the substantial change requirement of KRS 61.600(1)(e) as a threshold condition for further consideration of a subsequent application.

now *res judicata*.¹⁵ Consequently, in her subsequent application, Holland was required to make a showing that her condition had substantially changed. While we agree with Holland that subjective evidence could have been sufficient to meet the threshold showing of a substantial change in her condition, the hearing officer was not bound to accept her subjective complaints of increased pain without corroboration with at least some objective medical evidence.

As pointed out by the hearing officer and by the circuit court, the evidence that Holland's fibromyalgia has grown worse was based almost entirely on her subjective complaints of increased pain. There was no additional evidence regarding her residual functional capacity and physical exertion requirements as set out in KRS 61.600(4). In addition, the hearing officer specifically noted that most of Holland's medical evidence was considered at her first hearing or related to the period when her first application was pending. The only new medical evidence was

¹⁵ In the findings of fact and conclusions of law denying Holland's initial claim, the hearing officer recited the medical and other testimony substantiating that she suffers from fibromyalgia and that she is disabled. Each of the physicians who examined Holland stated that her symptoms were consistent with fibromyalgia, although several physicians questioned the degree to which Holland was disabled. Nevertheless, in denying the claim, the hearing officer focused on the lack of objective medical evidence of fibromyalgia. However, it is established that fibromyalgia cannot always be confirmed or diagnosed through objective medical tests. Rather, it usually can only be diagnosed by elimination of other medical conditions which may cause similar symptoms. When properly supported, such a diagnosis meets the requirement of objective medical evidence. See *Crouch v. Secretary of Health and Human Services*, 909 F.2d 852 (6th Cir., 1990); (citing *Preston v. Health and Human Services*, 854 F.2d 815, 819 (6th Cir., 1988)). While it does appear that the first hearing officer held Holland to an incorrect standard of proof in this regard, Holland's failure to appeal from the Retirement Systems' initial denial of her claim precludes our review of this question.

offered in Dr. Porter's report, which stated that Holland had a slightly elevated sedimentation rate. The evidence showing a substantial change in Holland's condition was not so overwhelming as to compel a contrary result.¹⁶ Based on our standard of review, we must affirm the hearing officer's conclusion.

Holland next argues that the Retirement Systems violated her rights to procedural due process and equal protection of the law. In essence, she contends that the hearing officer improperly disregarded her testimony of increased pain, thus denying her right to a fair hearing. She further asserts that the statutory requirement of objective medical evidence arbitrarily discriminates against persons with conditions that are not always demonstrable by such evidence. We find no merit to either argument.

Although the hearing officer believed Holland's testimony about her increased pain, he found that evidence alone insufficient to support a finding of a substantial change in her condition. Such determinations are within the prerogative of the fact-finder and will not be disturbed absent a showing of clear error. Furthermore, Holland's right to receive disability retirement is governed by the scheme set out in KRS 61.600. As noted above, Holland was not required to make the threshold showing of a substantial change in her condition solely by objective medical evidence. However, the hearing officer found

¹⁶ Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986).

no medical evidence, objective or otherwise, to support Holland's subjective complaints of increased pain. Under the circumstances, we cannot find that this conclusion was arbitrary or without rational basis.

Lastly, Holland argues that her 1995 application for disability benefits should be reopened. We disagree. KRS Chapter 61 provides no statutory authority for a de novo reconsideration of a denied disability retirement application. Rather, KRS 61.600(1)(e) sets out how subsequent applications based on the same claim of disability must be treated. The statute did not allow Holland to reopen her previously denied claim in the manner which she seeks.

Nevertheless, Holland asserts that due process requires that she be allowed to reopen her 1995 application. She points out that when her first application was denied, she was not represented by counsel. She also contends that her mental impairments prevented her from pursuing her administrative remedies. Under such circumstances, a colorable due process claim has been recognized to permit a reopening even in the absence of a specific statutory or regulatory mandate.¹⁷

Yet even if we agreed that due process requires the sort of reopening that Holland seeks, Holland offered no evidence that her mental condition prevented her from timely pursuit of

¹⁷ Wills v. Secretary, Health and Human Services, 802 F.2d 870 (6th Cir., 1986) ; (citing Parker v. Califano, 644 F.2d 1199 (6th Cir., 1981)).

her administrative remedies following the denial of her first application. The psychological evaluation from Dr. Muehlmann merely stated that Holland's mental impairments limited her ability to engage in work-related activities. However, Dr. Muehlmann's report also states that at the time of his examination, Holland's remote memory, concentration, information processing, abstract thinking, and judgment were not impaired. In short, there was no evidence that Holland did not understand the nature of the proceeding, the nature of the hearing officer's or the Board's orders, or her right to appeal. As a result, Holland has not shown that her due process rights would be impaired from the Board's denial of her motion to reopen her 1995 application.

Accordingly, the opinion and order of the Franklin Circuit Court is affirmed.

ALL CONCUR.

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