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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2002-CA-000442-MR

BOARD OF TRUSTEES,
KENTUCKY RETIREMENT SYSTEMS

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 01-CI-00423

BARBARA ANN FAETH

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BARBER, DYCHE AND TACKETT, JUDGES.

TACKETT, JUDGE. The Board of Trustees of the Kentucky Retirement Systems appeals from an opinion and order of the Franklin Circuit Court, which reversed the Board's decision denying Barbara Ann Faeth's application for disability retirement benefits under Kentucky Revised Statute (KRS) 61.600. We affirm.

Faeth has been employed as a maintenance custodian since 1984 at Northern Kentucky University (NKU). On July 8,

1998, she injured her back moving furniture while cleaning a dormitory room. At that time, her job description required her to perform duties requiring medium to heavy physical exertion with lifting up to fifty pounds, standing and walking for long periods of time, climbing stairs, stooping, bending and squatting, and operating heavy cleaning equipment. She was first seen by her primary care physician, Dr. Mark Schroer, with complaints of pain in her back and left leg. An MRI conducted on July 31, 1998, indicated degenerative disc disease, a small annular tear and disk bulge at the L4-L5 level, and joint changes of the lower spine. Dr. Schroer placed her on medication and physical therapy, and referred her to Dr. Richard Park, who performed several epidural cortisone injections that provided only temporary relief.

After being off for several months, Faeth was released by Dr. Schroer to return to work with the restriction that she lift no more than 5 pounds frequently and 15 pounds occasionally. Shortly after returning to work, NKU modified Faeth's work assignment to cleaning two floors of a classroom building that included a day-care area, twelve classrooms, and six restrooms. There was an elevator available and Faeth was able to use a pushcart for carrying her cleaning materials. Despite the modifications, in March 1999, Faeth continued to experience pain and told her supervisors that she was having

difficulty performing her work duties. After NKU informed her that it was unable to provide further modifications in her work assignment, she did not return to work and her last day of paid employment was April 3, 1999.

Given Faeth's continuing complaints of back pain and sciatica, Dr. Schroer referred her to Dr. Lester Duplechan in May 1999. Based on his examination of Faeth and the MRI, Dr. Duplechan diagnosed her as suffering chronic lumbar myofascial pain related to the small annular tear at the L4-L5 level and degenerative disk disease. He initially maintained her physical therapy and medicinal treatment and performed an epidural injection. Following a temporary improvement, Faeth reported continued back pain and muscle spasms that limited her activities. After several months, Dr. Duplechan opined that Faeth had not shown significant improvement and that she could possibly perform light duty work, but he referred her to Healthsouth Rehabilitation Hospital for a functional capacity evaluation.

On September 29, 1999, Healthsouth conducted several tests and found increased myofascial changes throughout the bilateral paraspinals from the thoracic to the pelvis and decreased sacroiliac joint mobility on the right side. Healthsouth reported that its tests indicated Faeth was lifting at a level commensurate with a sedentary work category as

demonstrated by an ability to lift and carry only up to 15 pounds occasionally and 5 pounds frequently. Her bilateral upper arm grip strength was also significantly below the norm for her age and sex. The Healthsouth evaluators concluded that Faeth did not meet the demands of her job description.

As an employee of NKU, Faeth is a member of the Kentucky Employees Retirement System (KERS). On August 24, 1999, she filed a notification/application of retirement with Kentucky Retirement Systems seeking disability retirement benefits. In her notification, Faeth stated that she suffered severe pain in her lower back and right leg. She asserted that she could not do some of her job duties including constant lifting, pushing, pulling of the vacuum sweeper, and lifting a 4-5 gallon water bucket. Faeth said that she had to carry up to 10 pounds frequently and 50 pounds occasionally. Faeth's notification also included medical records and reports from Drs. Duplechan, Schroer, and Parks, and the report of Healthsouth Rehabilitation Hospital.

On September 8, 1999, Charles Pettit, the Superintendent of Building Services, filed an Employers Job Description form (Form 8030) that stated Faeth had to push or pull vacuum cleaners, mop buckets and custodial carts, and lift and carry garbage cans, custodial supplies, cardboard boxes and other debris. He indicated she had to lift or carry up to 10

pounds frequently, 25 pounds one-third to two-thirds of time, and 50 pounds occasionally. Pettit also stated that Faeth's "restrictions were such that she could not perform the essential functions of her custodial job with or without accommodations."

In December 1999, based on the recommendations of three reviewing physicians, Kentucky Retirement Systems rejected Faeth's application for benefits. Pursuant to KRS 61.665, Faeth requested a hearing on her application.

On April 20, 2000, an administrative hearing was conducted. Faeth testified that her job duties when she was last working included cleaning several classrooms, restrooms, and a day-care area. She stated that she had to push a cart with cleaning supplies and at the same time carry a 4-5 gallon bucket of water, lift and carry garbage, and vacuum and mop floors. Faeth said the vacuum cleaner was a very heavy commercial model. She indicated that after two weeks on this assignment, she told her supervisors that she could not continue due to pain. Faeth testified that she could not perform her duties because items such as the vacuum cleaner, cleaning supplies, water buckets, and garbage often weighed over 20 pounds, and because of the constant bending required to clean the floors and furniture. Faeth said that her supervisors told her that there were no job assignments available with easier physical requirements.

In June 2000, Faeth submitted a follow-up report from Dr. Duplechan involving an evaluation conducted on April 17, 2000. In his report, Dr. Duplechan opined that Faeth's physical limitations as set forth in the Healthsouth functional capacity evaluation were present and would likely continue for the near future. He stated that while Faeth might be capable of light duty or sedentary work with lifting of 10 pounds frequently and 20 pounds occasionally, she could not return to her previous level of work given the level of her functional abilities and pain. He assigned her a 10% whole person impairment under the American Medical Association Guidelines for Evaluation of Permanent Impairment.

On October 6, 2000, the hearing officer issued a report recommending denial of her application for disability benefits. He stated that Faeth's condition prevented her from performing the full duties of a custodian prior to her being put on light duty. He found that Faeth's testimony was credible but there was no evidence to support a claim for disability retirement benefits based on the duties she last performed. After Faeth filed exceptions to the report, the Disability Appeals Committee remanded the case along with a request that NKU provide additional information on Faeth's last job duties with respect to two issues on whether the latest assignment to the classroom building was (1) temporary or permanent and (2) an

accommodation based on restrictions placed on Faeth by her physicians.

On November 28, 2000, Charles Pettit provided a letter in response to the Disability Appeals Committee's inquiries in which he stated Faeth's assignment was temporary as long as she was under the medical restrictions placed on her that she lift no more than 5 pounds frequently and 15 pounds occasionally. He said her assignment was an accommodation based on her medical restrictions in that she was no longer required to climb stairs, could use an elevator to transport supplies, had no large/heavy trash receptacles to empty, and had 7.5 hours to perform duties time analysis studies indicated could be done in 3-4 hours. Pettit stated, "Ms. Faeth's reassignment to the first floor of the BEP Center was deliberate as it is considered the 'lightest' of any custodial assignment available."

After Faeth filed a response to the Pettit letter, the hearing officer issued a second report recommending denial of benefits. He stated that the Pettit letter indicated that Faeth's job assignment was changed sufficiently to accommodate the restrictions placed on her by her physicians. He again concluded that Faeth's latest job assignment consisted of light duty and nothing in the record indicated she could not perform those job duties. Faeth filed a response to this second report. On March 21, 2001, the Disability Appeals Committee, on behalf

of the Board of Trustees, accepted and adopted the hearing officer's report and recommendation denying Faeth's application for disability retirement benefits.

On April 9, 2001, Faeth filed a petition in Franklin Circuit Court appealing the Kentucky Retirement Systems' denial of disability benefits pursuant to KRS 61.665(5). In an opinion and order entered on January 28, 2002, the circuit court reversed the Board's decision. The court found that the hearing officer's finding that Faeth's final job duties were within the light duty range sufficient to accommodate the functional restrictions placed on her by her treating physicians was not supported by substantial evidence. This appeal followed.

Kentucky Retirement Systems argues the circuit court exceeded its authority by substituting its judgment for that of the administrative agency. It is well established that judicial review of administrative agency decisions is limited to determining whether the agency's action was arbitrary. American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission, Ky., 379 S.W.2d 450, 456 (1964); Burch v. Taylor Drug Stores, Inc., Ky. App., 965 S.W.2d 830, 835 (1998). Whether an agency action is arbitrary is a question of law. See Ashland Board of Education v. Jayne, Ky., 812 S.W.2d 129, 131 (1991). In determining arbitrariness, the reviewing court looks at three factors: (1) whether the agency acted within its

statutory powers; (2) whether the parties affected by the agency order received procedural due process; and (3) whether the agency's action is supported by substantial evidence. American Beauty Homes, 379 S.W.2d at 456; Board of Adjustments, Bourbon County v. Brown, Ky. App., 969 S.W.2d 214, 216 (1998).

Substantial evidence is defined as "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." Owens-Corning Fiberglass v. Golightly, Ky., 976 S.W.2d 409, 414 (1998); Burton v. Faster Wheeler Corp., Ky., 72 S.W.3d 925, 929 (2002). An appellate court should not engage in a de novo review of the evidence or substitute its own judgment for that of an agency on factual issues even though there may be contrary or conflicting evidence. Urella v. Kentucky Bd. of Medical Licensure, Ky., 939 S.W.2d 869, 873 (1997); Kentucky Bd. of Nursing v. Ward, Ky. App., 890 S.W.2d 641, 642-43 (1994). "If the court finds the correct rule of law was applied to facts supported by substantial evidence, the final order of the agency must be affirmed." Commonwealth, Cabinet for Human Resources v. Bridewell, Ky., 62 S.W.3d 370, 373 (2001). Generally, a claimant bears the burden of proof and risk of nonpersuasion before the fact-finder as to every element of the claim. Burton, 72 S.W.3d at 929. Where the party bearing the burden of proof is unsuccessful before the agency, he must show evidence

so overwhelming that it compels a decision in his favor. See, e.g., Carnes v. Tremico Mfg. Co., Ky., 30 S.W.3d 172, 176 (2000); Morgan v. Natural Resources & Environmental Protection Cabinet, Ky. App., 6 S.W.3d 833, 837 (1999).

Kentucky Retirement Systems asserts that the issue before the circuit court was whether there was evidence of substance to support the agency's finding that Faeth was not functionally incapacitated from her former job as accommodated or jobs of like duties as of her last day of paid employment. See KRS 61.600(2)(a). It argues that the circuit court erroneously substituted its judgment for that of Kentucky Retirement Systems. It recites statements from Faeth's treating physicians that the MRI indicated little or no central stenosis and nerve root impingement. Kentucky Retirement Systems primary contention is that the circuit court failed to evaluate Faeth's incapacity in light of the accommodations made in her job duties. It states that NKU modified Faeth's job assignment in response to Dr. Schroer's restriction that she lift no more than 5 pounds frequently and 15 pounds occasionally, which also complied with the Dr. Duplechan's restriction that she lift no more than 10 pounds frequently and 20 lbs occasionally. Kentucky Retirement Systems maintains that there was substantial evidence to support the agency's decision that Faeth was still capable of performing her job as of her last day of paid

employment and was not entitled to disability retirement benefits.

Unfortunately, this case is complicated by ambiguity in applying the physicians' medical opinions to Faeth's job duties. KRS 61.600(4)(c) sets out the various physical exertion standards:

1. Sedentary work shall be work that involves lifting no more than ten (10) pounds at a time and occasionally lifting or carrying articles such as large files, ledgers, and small tools. Although a sedentary job primarily involves sitting, occasional walking and standing may also be required in the performance of duties.

2. Light work shall be work that involves lifting no more than twenty (20) pounds at a time with frequent lifting or carrying of objects weighing up to ten (10) pounds. A job shall be in this category if lifting is infrequently required but walking and standing are frequently required, or if the job primarily requires sitting with pushing and pulling of arm or leg controls. If the person has the ability to perform substantially all of these activities, the person shall be deemed capable of light work. A person deemed capable of light work shall be deemed capable of sedentary work unless the person has additional limitations such as the loss of fine dexterity or inability to sit for long periods.

3. Medium work shall be 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. If the person is deemed capable of medium work, the person shall be deemed capable of light and sedentary work.

As the circuit court noted, the hearing officer's decision depended on his findings that Faeth was capable of doing "light work" and her accommodated job duties fell within that category. While Dr. Duplechan indicated that Faeth was capable of performing light duty work with lifting of 10 pounds frequently and 20 pounds occasionally, he also stated that Faeth could not return to her previous type of work and referred to the Healthsouth functional capacity evaluation, which indicated that Faeth was lifting in the sedentary category range. In addition, Dr. Schroer suggested lifting restrictions of 5 pounds frequently and 15 pounds occasionally. Faeth also testified about her constant level of pain and physical restrictions. Those portions of the record cited by the Kentucky Retirement Systems for its statement asserting that Faeth's "condition at the time of the hearing was to a large extent the fact that she has not been working" does not support its assertion. Dr. Schroer suspected that depression may be a component of Faeth's pain manifestation. Dr. Duplechan stated Faeth's medical issues are "confounded by her loss of work." Neither quantified Faeth's mental attitude as particularly significant. In any event, the hearing officer found Faeth's testimony on her complaints to be credible and that she was unable to perform duties more strenuous than light work.

The major issue on appeal involves the circuit court's holding that the hearing officer's finding that Faeth's final job duties were within the "light work" range under KRS 61.600(4)(c)(2) was not supported by substantial evidence.¹ The court relied primarily on Faeth's testimony and Charles Pettit's initial September 1999 Employer's Job Description form in evaluating Faeth's job duties. The job description in the employer form clearly fell within the medium work range requiring lifting up to 25 pounds frequently and 50 pounds occasionally. Kentucky Retirement Systems criticizes the circuit court for not relying on Pettit's November 2000 letter submitted in response to the Disability Appeals Committee's inquiries for additional evidence. While it is unclear why the circuit court did not discuss the letter more fully, we do not believe it requires reversal of the court's opinion.

First, we note that under KRS 61.665(2)(b), in conjunction with an employee's application for disability retirement benefits, an "employer shall file at the retirement office a complete description of the job and duties for which the employee was last paid and shall submit a detailed description of reasonable accommodations attempted." In the Employer's Job Description form, Pettit states that Faeth's

¹ The circuit court's opinion erroneously cites to KRS 61.600(3)(c)(2), which (FOOTNOTE CONTINUED)

restrictions prevented her from performing the essential functions of her job "with or without accommodations." This form was completed and filed long after Faeth's last day of employment. While the November 2000 Pettit letter indicates that NKU attempted to provide some accommodation for Faeth's restrictions by changing her assignment, Faeth testified that she still could not perform the duties necessary for the new job assignment. She stated that items such as the water buckets, vacuum cleaner, and trash containers often weighed in excess of 20 pounds and the constant bending caused excessive pain.

We agree with the circuit court that the hearing officer's finding that Faeth's last job duties constituted "light work" was not supported by substantial evidence. Pettit's November 2000 letter states that Faeth's reassignment was intended to accommodate her restrictions, it does not state her duties in fact did not require activities exceeding the light work category. The letter merely says that Faeth's reassignment was considered "the 'lightest' of any custodial assignment available." Faeth testified that when she told her supervisors she still could not perform the duties required under the reassignment, they told her there was no other easier assignment available. This is consistent with Pettit's

we perceive to be a typographical error.

statement in the September 1998 Employer Job Description form that Faeth's restrictions prevented her from performing her custodial job functions "with or without accommodation."

Accordingly, we believe the hearing officer misconstrued the job description evidence provided by NKU and Kentucky Retirement Systems' reliance on Pettit's November 2000 letter is misplaced. Faeth has provided compelling evidence that the hearing officer erred and in support of her claim that she could not perform the job or jobs of like duties as accommodated as of her last day of paid employment. As a result, the circuit court did not err in reversing the Board of Trustees and finding that Faeth qualified for disability retirement benefits pursuant to KRS 61.600.

The judgment of the Franklin Circuit Court is affirmed.

BARBER, JUDGE, CONCURS.

DYCHE, JUDGE, CONCURS IN RESULT ONLY.

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