

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002550-MR

LORETTA SIZEMORE

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 02-CI-00827

KENTUCKY RETIREMENT SYSTEMS

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: BARBER, BUCKINGHAM, AND HENRY, JUDGES.

HENRY, JUDGE: Loretta Sizemore appeals from an opinion and order of the Franklin Circuit affirming the Board of Trustees of Kentucky Retirement Systems' denial of Sizemore's application for disability retirement benefits. The hearing officer found that Sizemore met the disability standards but that her chronic obstructive pulmonary disease directly or indirectly resulted from a disease or condition that pre-existed her membership in the system. It is undisputed that Sizemore does not have

sixteen years of service credits and that there was no accident or injury arising out of or in the course of her employment that substantially aggravated her pulmonary condition and therefore she does not qualify for either exception to the pre-existing condition exclusion.¹

On April 1, 1991, Sizemore was employed as a nurse with the Commission for Children with Special Health Care Needs. Her job duties included working with special needs children and their families in Heart and Neurology Clinics, supervising staff, and assisting doctors with exams. Her duties required extensive walking, standing, bending, crouching, crawling, and lifting. While at work on January 22, 2001 she became ill and was taken to the hospital. Her last date of paid employment was February 26, 2001. The medical evidence reveals that Sizemore, who had been a smoker for the thirty-seven years prior to 2001, suffers from chronic obstructive pulmonary disease with advanced severe emphysema. It further reveals that in 1983 an x-ray revealed bronchitis at the lung bases and a February 22, 1991 chest x-ray noted mild chronic obstructive pulmonary disease. The hearing officer found that Sizemore could not return to her employment as a nurse but denied benefits on the basis that her

¹ Kentucky Revised Statutes 61.600(3). All citations to statutes are to those in effect at the time of the administrative decision. Subsequent amendments changed the enumeration of the relevant statutes but there are no substantive changes to the applicable sections.

pulmonary condition pre-existed her 1991 employment date and was further aggravated by her smoking.

Our standard of review on an appeal from an administrative agency is whether the decision is based on substantial evidence and whether the agency applied the correct rule of law. Unemployment Ins. Comm'n v. King, 657 S.W.2d 250 (Ky. App. 1983). Sizemore contends that her pre-existing pulmonary condition was not, at the time of her employment, capable of directly or indirectly causing a disability. KRS 61.600(2)(d). She argues that to exclude eligibility for benefits the pre-existing condition must be such that prior to employment it is capable of causing incapacity, and is not merely a condition that might expand into disabling reality. The proper test, she submits, is whether the pre-existing condition was a "substantial factor" in causing the incapacity.

In Lindall v. Kentucky Retirement Systems, 112 S.W.3d 391 (Ky. App. 2003) the claimant made a similar argument. Although Lindall suffered from bi-polar disorder prior to her membership in the Kentucky Retirement Systems, her condition was asymptomatic during the eight years of her employment. The court rejected the contention that it could read into KRS 61.600(2)(d) the requirement that the pre-existing condition be active prior to the date of employment:

Courts are not at liberty to add or subtract from a legislative enactment, nor to discover meaning not reasonably ascertainable from the language used. Courts are also required to give the words of a statute plain meaning, which prevents a court from adding language to the statute which does not presently exist. Furthermore, where the legislature has not created exceptions to the terms of a statute, courts must presume that none were intended. Id at 394.

KRS 61.600(2)(d) does not permit the courts to inquire into the severity of the pre-existing condition or to apply a substantial factor test. Sizemore's pulmonary condition pre-existed her membership in the system and as a result of her smoking continued to develop into an incapacitating condition. There is substantial evidence that her disability resulted directly or indirectly from her pre-existing pulmonary condition.

The opinion and order of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

James D. Holliday
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BRIEF FOR APPELLEE:

Jennifer A. Jones
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