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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000098-MR

MARJORIE EBERT

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 02-CI-01620

BOARD OF TRUSTEES OF
KENTUCKY RETIREMENT SYSTEMS

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: SCHRODER, TAYLOR, AND VANMETER, JUDGES.

SCHRODER, JUDGE: Marjorie Ebert appeals from a judgment of the Franklin Circuit Court affirming a decision of the Board of Trustees of the Kentucky Retirement Systems denying her application for disability retirement benefits. As the Board's decision was based on substantial evidence, we affirm.

Ebert was employed as a secretary for the Louisville Fire Department. Her job duties involved general secretarial functions in addition to processing timesheets, preparing monthly payroll reports, picking up the mail, and transcribing reports. Ebert testified that she would alternate between sitting and standing throughout the day depending on the job task she was performing, and lift no more than 10 pounds.

Ebert's last day of paid employment was September 7, 1999, at which time she was 58 years old. She filed for disability retirement benefits in November, 1999, for a variety of ailments. Her claim was denied due to insufficient evidence of impairment. She filed for disability retirement benefits again in July, 2001, alleging disability due to fibromyalgia, osteoarthritis of the left knee, thoracic and cervical spine disc disease, bilateral carpometacarpal joint arthritis, left carpal tunnel syndrome, chronic gastritis, COPD, sleep apnea and post lumbar spine surgery. She alleged depression and other mental problems as well. Her application for benefits was denied again by the medical examiners and she appealed. An administrative evidentiary hearing was held on June 27, 2002. Numerous medical records were introduced for the hearing officer to consider. The parties stipulated that Ebert's job duties

were primarily sedentary in nature.¹ Ebert testified regarding her numerous medical problems and her inability to perform her job duties. After a detailed analysis of the various medical records, and Ebert's testimony, the hearing officer concluded that the "[t]he preponderance of the objective medical evidence contained of record failed to prove that the Claimant has been physically or mentally incapacitated since her last day of paid employment" His recommendation was to deny disability retirement benefits. The Board adopted the hearing officer's report and recommended order. Ebert appealed to the Franklin Circuit Court which affirmed the Board. This appeal by Ebert followed.

On appeal to this Court, Ebert argues that the Board's decision to deny benefits was arbitrary, capricious, an abuse of discretion, contrary to law and not supported by substantial evidence. A reviewing court may overturn the decision of an administrative agency only if the agency acted arbitrarily or outside the scope of its authority, if the agency applied the incorrect rule of law, or if the decision is not supported by substantial evidence in the record. Kentucky State Racing

¹ Ebert nevertheless argues on appeal that "[t]he Hearing Officer erroneously found [her] job duties to be only sedentary work." The hearing officer found that "Claimant's position as a Secretary falls within the category of sedentary work as defined by KRS 61.600". The hearing officer is correct. KRS 61.600(5)(c) defines "sedentary work" as "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."

Commission v. Fuller, 481 S.W.2d 298 (Ky. 1972). Substantial evidence is "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." Owens-Corning Fiberglas Corp. v. Golightly, 976 S.W.2d 409, 414 (Ky. 1998). Where the evidence is conflicting, the court must affirm the agency's findings if supported by substantial evidence. Kentucky Commission on Human Rights v. Fraser, 625 S.W.2d 852, 856 (Ky. 1981). The party seeking a benefit before an administrative agency has the burden of persuading the fact-finder of the party's entitlement to benefits. See Energy Regulatory Commission v. Kentucky Power Co., 605 S.W.2d 46 (Ky.App. 1980).

Ebert's contention that the Board's decision to deny her application for disability retirement benefits was not supported by substantial evidence must fail. The hearing officer had numerous medical exhibits to consider. He went to great lengths to summarize the medical opinions, which both proved and disproved her claim. The hearing officer was the trier of fact and as such "is afforded great latitude in [his] evaluation of the evidence heard and the credibility of witnesses appearing before [him]." Bowling v. Natural Resources and Environmental Protection Cabinet, 891 S.W.2d 406, 409-410 (Ky.App. 1995). The hearing officer considers all the evidence and chooses what he believes. Id. at 410. As the evidence was

conflicting, we must affirm the Board because the findings were supported by substantial evidence. Fraser, 625 S.W.2d at 856.

Ebert next contends that the Franklin Circuit Court failed to consider the record as a whole in determining that she was not entitled to disability retirement benefits, pursuant to KRS 61.600. She argues that she is incapacitated by a combination of various medical impairments not considered by the court, and that the court failed to take into consideration the cumulative effect or overall combination of her various illnesses and conditions.

We disagree. The court's function is to review the agency's findings. The record includes the report of Dr. Robert W. Strunk, a Kentucky Retirement Systems Medical Review Physician. Dr. Strunk reviewed all the medical evidence presented, which we acknowledge was mostly piecemeal concerning different ailments. After reviewing and summarizing all of Ebert's complaints, Dr. Strunk concluded:

[t]he claimant has multiple problems and illnesses, which do not add up individually or together as being disabling. Ultimately her only potentially disabling problem comes down to her cervical disc disease. She in fact did not seek attention for this according to the records obtained until after her last date of employment. There is still some question as to the significance of the lesion that ultimately underwent surgery. An EMG was never done to document radiculitis. Based on the facts that the claimant did not seek medical attention for

any type of neck or arm problem until October of 1999 well after her last date of employment and the fact that there is no clear documentation of a functional impairment from this lesion. Also the fact that it is now corrected by surgery, I do not feel the claimant was disabled at the time of her last date of employment and is therefore not permanently disabled according to the regulations governing the Kentucky Retirement System. I would therefore recommend DENIAL of her claim for disability retirement benefits."

The circuit court, and this Court, cannot evaluate the evidence *de novo* but must review all the evidence in the record and must affirm the Board when supported by substantial evidence.

Fraser, 625 S.W.2d 852. Dr. Strunk's report is substantial evidence.

Ebert further argues that the court incorrectly applied that portion of KRS 61.600(4)(b), (now KRS 61.600(5)(b)), which states "[t]he person's ability to understand, remember, and carry out instructions and respond appropriately to supervision, coworkers, and work pressures in a work setting shall be considered with regard to mental impairments." Ebert contends the court incorrectly applied KRS 61.600(4)(b) as it "dismissed [her] psychological complaints of incapacity because a 'personality inventory' taken a few weeks after her last day of employment noted she fared okay in 'comfortable social settings.'" Ebert contends that the ability

to respond in "comfortable social settings" is irrelevant to a finding of disability under KRS 61.600.

Ebert only cites part of what the circuit court and the hearing officer found. The court concluded "[h]er psychological problems also were not disabling by her last day of employment because a personality inventory taken a few weeks after that day indicated that she was 'self-assured, confident and dominant in comfortable social settings.'" The court drew this conclusion from paragraph 11 of the hearing officer's findings, which states:

11. Several mental health professionals have diagnosed the Claimant with dysthymia, pain disorder, anxiety and depression. She is currently taking medication and seeking treatment approximately once per month or every two months. A personality assessment inventory was taken on September 23, 1999, only a few weeks after her last day of paid employment. The Claimant reported that she was experiencing stress due to job changes and was unable to relax, that she had trouble controlling anxiety at times and that she believed her health was not as good as others in her age group. The Claimant was noted to be self-assured, confident and dominant and was comfortable in social settings. Claimant reported that her temper was within normal limits and she had no trouble controlling her anger. The records do not reflect that the Claimant's mental conditions would have been disabling as of her last day of paid employment.

The Claimant submitted a mental functional capacity evaluation indicating she had fair ability to understand detailed instructions, maintain attention, perform

duties within a schedule, work with or near others, complete a normal workday, perform at a consistent pace, interact with the public, accept instructions and respond appropriately to changes in the work. However, this report was completed on August 22, 2001, almost two years after her last day of paid employment.

Ebert's selective reading does not present the whole picture before the hearing officer. The hearing officer had the evidence before him and made findings. Again, the circuit court's function is one of review and if the findings are supported by substantial evidence, the findings must be upheld. Fraser, 625 S.W.2d 852. We are persuaded that substantial evidence exists in the record to support the hearing officer's findings.

For the foregoing reasons, the judgment of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Michael P. Sullivan
Louisville, Kentucky

BRIEF FOR APPELLEE:

Jennifer Ann Jones
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