

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000813-MR

GLORIA TOFTNESS

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 00-CI-00747

KENTUCKY RETIREMENT SYSTEMS

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; McANULTY, JUDGE; MILLER, SENIOR
JUDGE.¹

McANULTY, JUDGE: Gloria Toftness (Toftness) has been diagnosed by physicians with fibromyalgia, an illness the main symptom of which is hypersensitivity to pain, and major depression secondary to fibromyalgia. Toftness was employed in Kentucky state government for 25 years. The state agency for which she last worked, however, terminated her employment for excessive

¹ Senior 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 and KRS 21.580.

absenteeism and low productivity, both of which allegedly resulted from her physical and emotional health. She applied for disability retirement benefits. The Kentucky Retirement Systems (the Retirement Systems) denied her application. Eight months after the Retirement Systems denied her application, she filed a second application in which she asserted that her condition had substantially changed. The Retirement Systems denied her second application. On Toftness's petition for judicial review, the Franklin Circuit Court found that substantial evidence supported this decision. In this appeal, we must decide whether the Retirement Systems acted arbitrarily in denying her second application. Because we conclude that it did not, we affirm.

Toftness has been under a physician's care for fibromyalgia since at least July 1997. Treatment of fibromyalgia is generally accomplished with medicines to help sleep and an exercise program.

The Commonwealth of Kentucky was Toftness's employer from July 7, 1973, until June 23, 1998. The last position she held was that of an administrative assistant with the Kentucky Public Service Commission. In that position, she maintained files. In performing her duties, she used a typewriter, computer and other office machinery. The position was sedentary

in nature. The Public Service Commission terminated Toftness due to numerous absences and unacceptable productivity.

Toftness first applied for disability retirement benefits under KRS 61.600 in 1996. The hearing officer assigned to her application for benefits recommended that Toftness be found to be presently disabled but further recommended that her application be held in abeyance to allow her to present additional evidence of the permanence of her condition. The Retirement Systems filed exceptions to the hearing officer's factual findings and recommended order.

The Retirement Systems, through its Disability Appeals Committee of the Board of Trustees, rejected the hearing officer's report and issued an order denying Toftness's application. The order stated: "The preponderance of the evidence presented does not establish that Toftness is totally and permanently disabled by any condition."

Toftness filed a petition for judicial review in the Franklin Circuit Court. On review, the circuit court denied the petition.

Rather than filing an appeal from this adverse determination, Toftness filed a second application for disability retirement benefits on July 20, 1999. She filed this application under KRS 61.600, as amended, effective July 15,

1998. For purposes of this appeal, the relevant portions of KRS 61.600 are as follows:

(1)(e) No 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 disability benefits unless it is accompanied by evidence of a substantial change in the person's condition which shall satisfy subsection (4) of this section. The application shall be on file in the retirement office no later than twenty-four (24) months after the person's last day of paid employment in a regular full-time position.

. . .

(4) (a) 1. An incapacity shall be deemed to be permanent if it is expected to result in death or can be expected to last for a continuous period of not less than twelve (12) months from the person's last day of paid employment in a regular full-time position.

2. The 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.

(b) The person's residual functional capacity shall be the person's capacity for work activity on a regular and continuing basis. The person's physical ability shall be assessed in light of the severity of the person's physical, mental, and other impairments. The person's ability to walk, stand, carry, push, pull, reach, handle, and other physical functions shall be considered with regard to physical impairments. The 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. Other impairments, including skin impairments, epilepsy, visual sensory impairments, postural and manipulative limitations, and environmental restrictions, shall be considered in conjunction with the person's physical and mental impairments to determine residual functional capacity.

(c) The person's physical exertion requirements shall be determined based on the following 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.

In support of her application, Toftness submitted her recent medical records. She also filed the report from a medical exam performed by Dr. James C. Owen in conjunction with a Social Security Disability application that Toftness had filed. Dr. Owen opined that as to her ability to do work-related activities, she would have moderate to severe difficulty lifting, handling and carrying objects, commensurate with her age and stature.

In addition to Dr. Owen's assessment, Toftness filed a letter written by another of her treating physicians, Dr. William C. Greenman. Dr. Greenman's letter stated that since he began treating Toftness in 1998 for asthma, she had consistently

reported worsening symptoms of pain in multiple locations. The pain was particularly accentuated by activities including her work program. Dr. Greenman reported that there had been a gradual escalation of analgesic usage by Toftness while in his care. Dr. Greenman concluded that it is likely that this situation is permanent and will prevent her from working in the future.

The Retirement Systems denied Toftness's second application. In its report denying her application, as to the fibromyalgia, the Retirement Systems stated that she presented no evidence that her original allegations of impairment had progressed to the point where she could not do sedentary work activities. The evaluator, who is a physician, noted that her complaints were primarily of a subjective nature, and there was little in the way of objective findings by Dr. Goldfarb, a rheumatologist, to indicate a physical, functional impairment. Toftness requested an administrative hearing before a hearing officer.

Before the hearing took place, Toftness took Dr. Owen's deposition and later submitted his testimony in support of her application. In his deposition, Dr. Owen testified that Toftness's primary problem is fibromyalgia. When questioned about his objective findings during his physical examination of Toftness in 1999, Dr. Owen responded:

The objective findings were primarily observations of her movement and range of motion, her tenderness to touch in multiple trigger points. Other than that, it was a fairly negative exam.

In preparation for his January 7, 2000 deposition, Dr. Owen re-examined Toftness. When questioned about her current condition, Dr. Owen testified as follows:

Q. Have you seen Ms. Toftness since this May 27, 1999 evaluation?

A. Yes, I have.

Q. Tell us about that.

A. She came back in basically for follow-up for purposes of this deposition, and she was stating that she was getting worse all the time. She continued to see Dr. Greenman who's an internal medicine person, and also Dr. Goldfarb and continued to carry the diagnose [sic] of fibromyalgia and chronic fatigue syndrome. At that time, her examination remained essentially the same. She was clearly worse than when I saw her in '97 and potentially a little bit worse than I saw her for a disability evaluation on '99.

Q. You've touched on this but let me ask the question. Based on your training and experience and the observations made in your consultation with Ms. Toftness, do you have an opinion as to whether Ms. Toftness has experienced a worsening of her condition since November 30 of 1997?

A. I do.

Q. Is your opinion that she has, in fact, worsened?

A. It is.

Q. And would you characterize that change as greater than would be expected from a normal progression of her condition over the time period from November 30 of 1997?

A. No, I couldn't say that.

Q. Would you characterize the worsening of her condition as substantial?

A. Yes.

Q. Do you have an opinion as to whether her condition is such as to make her unable to perform sedentary work? And I'll define. Sedentary work would be work involving lifting no more than 10 pounds, occasionally lifting or carrying articles such as large files or ledgers, small tools.

A. Yes, I would think that would be inappropriate for her at the present time.

Q. Also, sedentary work would involve sitting, occasional walking and standing. Would you still feel that she could not perform sedentary work?

A. I think the significant lifting aspect or any prolong [sic] standing, prolong [sic] sitting would be inappropriate. The way I understand sedentary work, it would be inappropriate for her.

Q. Do you have an opinion as to whether her condition is a permanent condition? Well, let me just ask you. Would you expect it to last at least another 12 months?

A. Oh, yes. Definitely.

. . .

Q. Doctor, with respect to the question I asked a moment ago regarding the change in Ms. Toftness being greater than would be expected from a natural progression of her condition, could you expand on that answer in light of the fact that we're dealing with this particular condition of fibromyalgia and explain to us what you mean by substantial character of the change in her condition.

A. Well, the natural progression of fibromyalgia is a variable situation. It doesn't always get progressively worse. It doesn't always get progressively better. It comes and goes. It would be my opinion that in this situation that her progression is probably greater than one would expect given the circumstances.

The final evidence Toftness submitted in support of her application was a report from a psychiatric exam performed

by Dr. Kim Grant in December 1998, for the Social Security Disability application. Dr. Grant concluded that Toftness suffered from major depression secondary to her medical condition of fibromyalgia and that the condition is chronic. As to Toftness's prognosis, Dr. Grant opined that Toftness could benefit from long-term counseling, as well as management under the care of a psychiatrist.

A hearing officer conducted the administrative hearing on January 26, 2000. Toftness and her husband testified at the hearing. Toftness stated that she stopped working because of worsening pain. It now takes her three to four hours to get ready for the day's activities, when it used to take only one to two hours. She had widespread pain in her joints and worsening fatigue.

On cross-examination, Toftness admitted that her rheumatologist, Dr. Goldfarb, had recommended that she participate in an aqua therapy program, but she has not done so. She admitted that she still smokes cigarettes despite being advised by her doctors to quit. And despite being advised by at least one doctor to participate in a sleep study program, she had not followed up on any such program. In response to whether any of her physicians had recommended that she lose weight, she could not recall if Dr. Goldfarb had advised her to lose weight. She did plan to do so, however, after she started receiving her

Social Security Benefits. When asked about treatment of her depression, she said she takes Prozac.

After the hearing, the hearing officer issued his report and recommended order that her application be denied because she had failed to establish a substantial change in her condition by objective medical evidence. In his report, the hearing officer found support for Toftness's application in Dr. Owen's testimony. In spite of this finding, the hearing officer placed greater weight on (1) Toftness's failure to follow any type of recommended treatment for pain management control; and (2) the lack of evidence from Dr. Goldfarb, the rheumatologist, that would support her application as to anything other than a normal progression of her condition.

Toftness filed exceptions with the Board of Trustees of the Retirement Systems. The Board of Trustees adopted the hearing officer's report and recommendations. Toftness filed a petition for judicial review in the Franklin Circuit Court. After concluding that substantial evidence supported the decision to deny benefits, the circuit court denied the petition, precipitating this appeal.

In this appeal, the sole argument for our review is whether the Retirement Systems acted arbitrarily in denying Toftness's second application under the substantial change provision of KRS 61.600.

We turn to the issue of the proper standard of review. "Basically, judicial review of administrative action is concerned with the question of *arbitrariness*." American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Comm'n, 379 S.W.2d 450, 456 (Ky. 1964).

Toftness bore the burden of proof before the Disability Appeals Committee, where she did not succeed in persuading that body that she was entitled to benefits. Because she had the burden of proof, we must decide whether the record compels a contrary decision in light of substantial evidence. See Bourbon County Bd. of Adjustment v. Currans, 873 S.W.2d 836, 838 (Ky.App. 1994). "Substantial evidence is that which when taken alone or in light of all the evidence has sufficient probative value to induce conviction in the minds of reasonable men." Id. 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 this Court. See Kentucky Unemployment Ins. Com'n. v. King, 657 S.W.2d 250, 251 (Ky.App. 1983).

In this case, the evidence that Toftness's fibromyalgia has grown worse was based almost entirely on her subjective complaints of increased pain. Coincidentally, she did not follow her doctor's advice as to any of those

techniques, therapies or programs that may have helped control that pain or alleviate other symptoms of the syndrome.

The evidence in this case was that the symptoms of fibromyalgia can come and go, and under the natural progression of fibromyalgia, one doesn't always get progressively better or progressively worse. While two of her physicians support her claim that she cannot work due to pain and this situation is permanent, another of her physicians, Dr. Goldfarb, made no objective findings that would indicate a physical, functional impairment. The unbiased, routine report by a rheumatologist is substantial evidence of probative value. Moreover, this was a disability application based on a substantial change in her condition. The evidence showing a substantial change in Toftness's condition was not so overwhelming as to compel a contrary result. Based on our standard of review, we must affirm the hearing officer's conclusion.

ALL CONCUR.

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