

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001260-MR

BOARD OF TRUSTEES,
KENTUCKY RETIREMENT SYSTEMS

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 03-CI-01074

BEVERLY TROXTLE

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: KNOPF, TAYLOR, AND VANMETER, JUDGES.

TAYLOR, JUDGE: The Board of Trustees of Kentucky Retirement Systems (the Board) brings this appeal from a May 28, 2004, Order and Opinion of the Franklin Circuit Court reversing the decision of the Disability Appeals Committee denying disability retirement benefits to Beverly Troxtle.

Since November 1, 1990, Troxtle was employed as a Patient Aide II at Oakwood by the Cabinet For Health Services. As a patient's aid, Troxtle was required to stand or walk six

and a half hours out of a seven and a half hour day. She was also required to occasionally lift over one hundred pounds and frequently lift up to fifty pounds. Her daily duties included lifting people, transferring people to and from wheelchairs, getting people on and off vans, doing laundry, washing diapers, changing diapers, and generally providing care for adults with developmental disabilities.

From March 19, 1999, to November 2, 2000, Troxtle suffered some five work-related injuries. Each work-related injury was directly related to the care of an adult patient. Troxtle's last day of paid employment was on February 2, 2001.

Troxtle filed an Application for Disability Retirement Benefits claiming disability as a result of cervical and lumbar spine injuries. Troxtle's application for retirement disability benefits was initially denied by medical examiners which comprised the Medical Review Board. See Kentucky Revised Statutes (KRS) 61.665. Thereafter, her application went before a hearing officer for an evidentiary hearing. The hearing officer found that Troxtle had not submitted objective medical evidence demonstrating her "low back condition, as of her last date of paid employment, totally and permanently disables her from performing the essential functions of her job duties." The hearing officer also found that Troxtle's cervical neck injury was the result of a preexisting condition and was not

substantially aggravated by a work-related injury. Thus, the hearing officer recommended denying Troxtle's application for disability retirement benefits.

On August 5, 2003, the Board entered an order adopting the hearing officer's recommendations and denying Troxtle's application for disability retirement benefits. Thereupon, Troxtle sought judicial review in the Franklin Circuit Court. KRS 61.665(5). On May 28, 2004, the court concluded that the Board's denial of Troxtle's retirement disability benefits was arbitrary and capricious. The circuit court determined that compelling evidence supported Troxtle's claim that she was permanently and totally disabled as a result of the cervical and lumbar spine injuries. This appeal follows.

The Board contends the circuit court improperly substituted its judgment for that of the Board's and that substantial evidence supported the Board's decision to deny Troxtle's claim for disability retirement benefits. We disagree.

In McManus v. Kentucky Retirement Systems, 124 S.W.3d 454, 458 (Ky.App. 2003), the Court of Appeals set forth the standard of review when a claimant was unsuccessful before the Board:

Where the fact-finder's decision is to deny relief to the party with the burden of proof of persuasion, the issue on appeal is

whether the evidence in that party's favor is so compelling that no reasonable person could have failed to be persuaded by it.

On appellate review, we step in the shoes of the circuit court and review the Board's decision to determine whether compelling evidence existed to support Troxtle's claim for disability retirement benefits. The circuit court outlined the compelling evidence supporting its decision:

The Board found Troxtle's cervical defect was a preexisting condition relying upon Dr. Amr El-Naggar's opinion. The doctor concluded that Troxtle's cervical condition remained in a dormant state until *manifested by a work related [sic] injury*. The Petitioner underwent extensive cervical surgery during her state employment. Nevertheless, the Board found that since Troxtle never reported any injury to her neck, but only back injuries, any alleged neck injury was not substantially aggravated by injuries occurring at work. Instead, the Board determined that Troxtle's neck injuries were of a persistent nature and had bothered her for six months prior to her last job-related injury. The Board also determined the objective medical evidence regarding Troxtle's lower back did not establish a total or permanent disability that would preclude her from performing medium to heavy work. . . .

Objective medical evidence does not support the Board's decision. The Board appears to conclude that Troxtle's continual neck pain stemmed from her preexisting condition. But in over one hundred visits Troxtle made to her physician, Dr. Chad Henderson, from March 22, 1999, to November 3, 2000, only twice did she complain of neck pain. The following evidence compels a finding that a work-related injury caused

Troxtle's severe neck pain. In Dr. Henderson's November 2, 2000, medical report Troxtle told the doctor, "[w]hile changing a resident's diaper, when I [Troxtle] bent over to do the taps, I felt my back pop up top plus a pulling in the lower back caused pain from my neck to my tailbone." (emphasis added). November 3, 2000, office notes written by Dr. Henderson provide, "Beverly (Troxtle) enters the office today complaining of pain throughout her upper back and neck." (emphasis added). The Board quoted Dr. El-Naggar but ignored his opinion. He found that the Petitioner's cervical and thoracic condition resulted from a congenital condition that was dormant. But her condition was **substantially aggravated** by her work-related injury. The Board ignored compelling evidence that would entitle Troxtle to disability retirement benefits. KRS 61.600.

The Board concluded that the Petitioner's lower back condition was not of a severity to prohibit her from performing medium to heavy work at time she left state employment. Approximately one month after leaving her job, Troxtle was involved in an automobile accident. After this accident, the Petitioner underwent lumbar surgery. The surgery entailed an anterior L5-S1 [sic] discectomy and fusion using iliac crest bone graft and anterior BAK titanium cages. The Board found the car accident caused Troxtle's debilitating lower back pain. The Board referenced a MRI taken after the accident. The MRI revealed an apparently new annular tear at the LS-S1 disc level. Despite the automobile accident, compelling evidence indicates disability disc herniation at the LS-S1 existed prior to the accident.

In a medical report dated November 22, 2000, five months before the accident, Dr. El-Naggar determined, "if she (Troxtle) does not improve or if no relief is noted then

she would be considered for a myelogram and possible surgery. The surgery would include an hemilaminectomy and discectomy vs. interbody fusion at the level of LS-S1." No definitive evidence reveals if the annual tear was caused by the car accident or occurred during Troxtle's employment. The radiologist comparing two MRIs taken before and after the accident stated, "perhaps the annual tear is new."

Well before the accident, Dr. El-Naggar determined Troxtle's August 5, 2000, work injury caused lower back injuries that would prevent her from lifting weights in excess of twenty pounds. This would preclude the Physician Aide from lifting residents weighing over 100 pounds to and from wheelchairs and beds. The Petitioner was permanently disabled and could not perform medium to heavy work duties on her last day of employment.

As to Troxtle's lumbar injury, the Board argues that any resulting disability was caused by the car accident, which occurred after Troxtle's last paid date of employment. In support thereof, the Board references a MRI taken on June 6, 2001; wherein, the radiologist opines that Troxtle may be suffering from a new annular tear. However, there is no objective medical evidence demonstrating that Troxtle's disabling lumbar injury was caused by the car accident. Rather, the uncontradicted objective medical evidence of Dr. Amr El-

Naggar was that her disabling lumbar injury¹ was due to the work-related accident of August 5, 2000.

As to Troxtle's cervical injury, the Board contends that Troxtle suffered from a congenital condition that preexisted her membership in the retirement system and was not substantially aggravated by a work-related incident. Dr. El-Naggar opined that Troxtle suffered a congenital defect to her cervical spine, but that such condition was only manifested after her November 2000 work-related injury. We observe that Dr. El-Naggar's medical opinion is uncontradicted. Moreover, the notes of Dr. Chad Henderson reveals that Troxtle reported neck pain resulting from the work-related injury of November 2000. Thus, the hearing officer's finding that there was no work-related injury to Troxtle's neck was plainly contrary to the evidence.

Upon the whole of the record, we are inclined to agree with the circuit court that compelling evidence exists demonstrating that Troxtle's congenital cervical condition was substantially aggravated by her work-related injury of November 2000 and that Troxtle was permanently disabled from her lumbar spine injury as of February 2, 2001.

¹ Because of Troxtle's lumbar injury, Dr. Amr El-Naggar restricted her lifting to no more than twenty pounds and required her to alternate sitting, standing, and walking every hour.

For the foregoing reasons, the Opinion and Order of
the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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