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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001693-MR

KENTUCKY RETIREMENT SYSTEMS

APPELLANT

APPEAL FROM FRANKLIN CIRCUIT COURT
v. HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 03-CI-00321

JANICE T. VERNON

APPELLEE

OPINION
REVERSING

** **

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI, JUDGE; AND MILLER, SENIOR JUDGE.¹

GUIDUGLI, JUDGE: Kentucky Retirement Systems has appealed from a decision of the Franklin Circuit Court reversing the denial of Janet T. Vernon's request for disability benefits by its Board of Trustees. Having determined that the substantial evidence of record does not compel a decision in Vernon's favor, we reverse.

¹ Senior Judge John D. Miller, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 100(5)(b) of the Kentucky Constitution and KRS 21.580.

Vernon, a resident of Princeton, Kentucky, began her work as a school bus driver for Caldwell County Board of Education in 1982. Her last date of employment was February 5, 2001, when she retired. Vernon filed her application for disability retirement benefits one month later, citing significant pain in her back, neck and shoulders, which would increase when she was driving the school bus. After the medical review physicians denied her application, Vernon retained counsel and requested a full hearing. Hearing Officer Paul Fauri conducted the hearing on November 9, 2001, and reviewed the various medical records before entering a recommended order that Vernon's application be approved. Kentucky Retirement Systems filed exceptions to the Hearing Officer's recommended order.

In its final order entered February 21, 2003, the Board of Trustees rejected the Hearing Officer's recommended order, opting instead to issue its own findings of fact and deny Vernon's application. The findings of fact were as follows:

- 1) Claimant meets the employment service requirements of KRS 61.600 in that she has 169 months of total service and at least 12 months which are current service.

- 2) Claimant's application for disability retirement benefits was timely filed on March 5, 2001, her last date of paid employment was February 5, 2001.

3) Claimant's position as a School Bus Driver for the Caldwell County Board of Education is sedentary to light work. Claimant drove a school bus for 6-8 hours a day. On occasion, Claimant would help young children into their seats. Claimant was required to operate hand and foot controls when driving the bus. During the last two years of driving, Claimant had a snub-nose bus and did not have to lift the hood, and she also had an automatic door opener and an automatic transmission.

4) Claimant specifically set forth in her application that she was unable to perform her duties as a bus driver because of pain in her back, neck and shoulders.

5) Dr. [David] French diagnosed Claimant with cervical lumbar pain with radiculopathy, mainly upper and lower extremity numbness weakness. Dr. French in March, 2002 placed severe restrictions on Claimant's activities. Dr. French's functional limitations appear to be based mainly upon Claimant's subjective complaints. The restrictions imposed on Claimant by Dr. French are incongruous with the objective medical evidence of record.

6) Dr. [Bill] Bailey in January, 2001 gave Claimant a diagnosis of generalized osteoarthritis based upon her complaints of joint pain, and ruled out rheumatoid arthritis. Dr. Bailey recommended physical therapy for overall range of motion and conditioning exercises.

7) Dr. [Vaughan A.] Allen in February, 1999 found on physical examination that Claimant had intact reflex, motor, and sensory functions of the upper extremities. On lower extremities, Dr. Allen found some loss of range of motion, and positive straight leg raising. The rest of Dr. Allen's examination was normal. On follow up MRI of the lumbar spine, Dr. Allen noted

only "mild central stenosis at 4/5, moderate foraminal stenosis at 3/4 but not anything very major. At this point, would like to treat her with Celebrex, physical therapy and symptomatic treatment." An MRI of the cervical spine was negative.

8) Dr. [Robert P.] Meriwether treated Claimant for her complaints of back, neck, and shoulders. A September, 1999 cervical lumbar myelogram followed by CT scan found minimal degenerative changes without evidence of spinal stenosis or cord impingement. A February, 2002 MRI of the lumbar and cervical spine found minimal degenerative changes with only disc bulging. The myelogram followed by CT scan and MRI found only minimal degenerative changes with no evidence of any mechanical instability or neurological involvement of the cervical or lumbar spine. In March, 2002, Dr. Meriwether indicated Claimant was not a surgical candidate. Dr. Meriwether recommended a conservative course of treatment that included physical therapy, a TENS unit, and a muscle relaxant.

9) Dr. [James A.] Metcalf diagnosed Claimant with bilateral carpal tunnel syndrome on nerve conduction testing in September, 2001. Dr. Metcalf also diagnosed neuropathy of the lower extremities, which he described as not severe, and prescribed medication. A total body scan was normal. An x-ray report of the left shoulder and left knee indicated no significant degenerative changes present.

10) Dr. Meriwether performed left carpal tunnel release on Claimant in October, 2001 without any complications. Claimant's major complaints concerning her carpal tunnel came about 8-9 months after her last day of paid employment, which was February, 2001. Claimant, at the time of the hearing, indicated she was planning on having right carpal tunnel release, however,

there is no evidence that the surgery was performed. Claimant's major complaints concerning carpal tunnel came about after her last day of paid employment and appear amenable to surgical treatment.

11) Claimant's application for disability benefits based upon subjective complaints of pain is not supported by the objective medical evidence of record. Absent significant objective findings, Claimant's subjective complaints of pain in the back, neck and shoulders are not credible. Claimant's doctors have recommended Claimant be treated symptomatically with a conservative course of treatment that includes medication and physical therapy to improve range of motion and conditioning exercises.

12) Dr. [Owen T.] Nichols, Psy.D., performed a mental status examination of Claimant in January, 2002 and gave a diagnosis of Major Depression, Single Episode, Moderate. Dr. Nichols noted Claimant had been experiencing a major depressive episode for approximately one year. Dr. Nichols noted Claimant was taking an anti-depressant and he recommended supportive counseling. Dr. Nichols noted Claimant's insight and judgment were good, and that she appeared to be capable of comprehending, recalling, and following some detailed directions. Claimant's depression is being treated with medication and further conjunctive counseling was recommended. Claimant retains good insight and judgment, and intact ability to comprehend and follow directions.

Based upon its findings, the Board of Trustees concluded that Vernon was not entitled to disability retirement benefits, and therefore denied her application.

Vernon filed a Petition with the Franklin Circuit Court, arguing that the Board of Trustees ignored substantial evidence in the record and that its conclusions were largely based upon the opinions of the non-examining state physicians. Kentucky Retirement Systems maintained that the substantial evidence of record did not compel a finding of disability due to a lack of objective medical evidence. In an Opinion and Order entered July 26, 2004, the circuit court reversed the Final Order of the Board of Trustees and granted Vernon's petition, holding that the decision below was arbitrary in light of the substantial evidence to the contrary. This appeal followed.

On appeal, Kentucky Retirement Systems argues that the denial of Vernon's application was supported by substantial evidence, that the circuit court erred in substituting its judgment for that of the fact-finder, and that the circuit court made several errors of fact and law that affected its decision. On the other hand, Vernon continues to argue that she demonstrated by objective medical evidence that she is disabled and is entitled to retirement disability benefits, that the Board of Trustees' denial of her application is not supported by substantial evidence, and that the Board of Trustees applied improper legal standards in evaluating her application.

KRS 61.600 provides for disability retirement, and the version in effect when Jones made her application reads, in pertinent part, as follows:

- (1) Any person may qualify to retire on disability, subject to the following conditions:

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- (2) Upon the examination of the objective medical evidence by licensed physicians pursuant to KRS 61.665, it shall be determined that:
 - (a) The person, since his last day of paid employment, has been mentally or physically incapacitated to perform the job, or jobs of like duties, from which he received his last paid employment. In determining whether the person may return to a job of like duties, any reasonable accommodation by the employer shall be considered:
 - (b) The incapacity is a result of bodily injury, mental illness, or disease. For purposes of this section, "injury" means any physical harm or damage to the human organism other than disease or mental illness;
 - (c) The incapacity is deemed to be permanent; and
 - (d) The incapacity does not result directly or indirectly from bodily injury, mental illness, disease, or condition which pre-existed membership in the system or reemployment, whichever is most recent.

KRS 61.510(33) defines "objective medical evidence" as:

[R]eports of examinations or treatments; medical signs which are anatomical, physiological, or psychological abnormalities that can be observed; psychiatric signs which are medically demonstrable phenomena indicating specific abnormalities of behavior, affect, thought, memory, orientation, or contact with reality; or laboratory findings which are anatomical, physiological, or psychological phenomena that can be shown by medically acceptable laboratory diagnostic techniques, including, but not limited to, chemical tests, electrocardiograms, electroencephalograms, X-rays, and psychological tests.

Our standard of review in this case "is limited to determining whether the decision was erroneous as a matter of law."² It has long been settled in this Commonwealth that "judicial review of administrative action is concerned with the question of *arbitrariness*. . . . Unless action taken by an administrative agency is supported by substantial evidence it is arbitrary."³ Substantial evidence is defined as "that which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person."⁴ In weighing the evidence, "the trier of facts is

² McNutt Construction v. Scott, 40 S.W.3d 854, 861 (Ky. 2001).

³ American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission, 379 S.W.2d 450, 456 (Ky. 1964)(emphasis in original).

⁴ Bowling v. Natural Resources and Environmental Protection Cabinet, 891 S.W.2d 406, 409 (Ky.App. 1994). See also Kentucky State Racing Commission v. Fuller, 481 S.W.2d 298 (Ky. 1972).

afforded great latitude in its evaluation of the evidence heard and the credibility of witnesses appearing before it.”⁵ A reviewing court may not substitute its own judgment on a factual issue “unless the agency’s decision is arbitrary and capricious.”⁶

As in this case, “[w]here the fact-finder’s decision is to deny relief to the party with the burden of proof or 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.”⁷ The failure to grant relief would be arbitrary “if the record compels a contrary decision in light of substantial evidence therein.”⁸ Once a reviewing court has determined that the agency’s decision is supported by substantial evidence, the court must determine the correct rule of law was applied to those facts by the agency in making its determination. If so, the final order of the agency has to be upheld.⁹

⁵ Bowling, 891 S.W.2d at 409-10. See also McManus v. Kentucky Retirement Systems, 124 S.W.3d 454 (Ky.App. 2003).

⁶ McManus, 124 S.W.3d at 458.

⁷ Id. See also Bourbon County Board of Adjustment v. Currans, 873 S.W.2d 836 (Ky.App. 1994).

⁸ Currans, 872 S.W.2d at 838.

⁹ Bowling, 891 S.W.2d at 410.

In the present matter, we must determine whether there is substantial evidence of record that would compel a decision in Vernon's favor, as she was unsuccessful before the fact-finding Board of Trustees. In that same vein, we must also determine whether the circuit court erred in reversing the Board of Trustee's decision.

First, we must agree with Kentucky Retirement Systems that the circuit court applied an incorrect standard of review in making its decision and misstated a portion of the medical evidence introduced. Addressing the factual misstatement first, we note that the circuit court on page 5 of its Opinion and Order incorrectly attributed to Dr. Meriwether the statement that "due to Vernon's pain associated with her back and the unsuccessful left carpal tunnel release, the right carpal tunnel release would have to be postponed to a later date." Later, on page 6, the circuit court again referenced that the left carpal tunnel release "did not provide the results expected." These poor assessments of the left carpal tunnel release do not appear in any of the medical records, but only appear in a letter from Vernon's counsel to counsel for Kentucky Retirement Systems.

We shall now turn our attention to the standard of review issue. As set forth above as well as in the beginning of the circuit court's Opinion and Order, a reviewing court may overturn a decision of the fact-finding Board of Trustees not in

favor of the party with the burden of proof only if the substantial evidence of record compels a contrary result.¹⁰ Based upon this standard, it is not enough to establish that there is substantial evidence of record to support a decision in favor of the claimant; the substantial evidence must compel such a result.

In this case, it is at least arguable that the objective medical evidence could be interpreted to support a finding of disability. Even if this were so, the evidence cannot be said to compel such a finding. Although the medical tests established bulging, stenosis, and degenerative changes in her back, these conditions were generally described as minimal, mild, or not severe, and it appears that the diagnoses of and restrictions imposed by the various physicians were based more upon Vernon's subjective complaints of pain. The exception to this would be her diagnosis of bilateral carpal tunnel syndrome, which was not diagnosed until several months after she had retired. Furthermore, at least the left side had been successfully treated surgically, according to Dr. Meriwether. We agree with Kentucky Retirement Systems' statement that although Vernon had been diagnosed with several conditions, these conditions were not of sufficient severity to render her

¹⁰ Bourbon County Board of Adjustment v. Currans, 873 S.W.2d 836 (Ky.App. 1994).

incapacitated to the extent that she could be deemed permanently and totally disabled. Because the Board of Trustees' findings of fact were based upon substantial evidence of record, those findings are not arbitrary, and a contrary result is not compelled by that evidence. Therefore, the circuit court erred in reversing the decision below.

Finally, we agree with Kentucky Retirement Systems that the circuit court appears to have impermissibly substituted its judgment for that of the trier of fact. The circuit court reinterpreted the medical evidence, which is a function of the trier of fact, not a court of review.

For the foregoing reasons, the judgment of the Franklin Circuit Court is reversed, and the order of the Board of Trustees is reinstated.

MILLER, SENIOR JUDGE, CONCURS.

COMBS, CHIEF JUDGE, DISSENTS AND FILES SEPARATE
OPINION.

COMBS, CHIEF JUDGE, DISSENTING: I dissent. The Franklin Circuit Court undertook a meticulous review in this case and determined that substantial evidence existed to support an award and that denial of those benefits indeed constituted arbitrariness on the part of the Board. Even though the findings of the Board were internally contradictory, they nonetheless substantiated the existence of numerous degenerative

physical and mental changes: a bulging disc, stenosis, neuropathy of the lower extremities, carpal tunnel syndrome, a major depressive disorder. At finding #11, the Board made a sweeping conclusion that Ms. Vernon's complaints were all subjective and unsupported by objective medical evidence and that they were, therefore, not credible.

Claimant's application for disability benefits based upon subjective complaints of pain is not supported by the objective medical evidence of record. Absent significant objective findings, Claimant's subjective complaints of pain the back, neck and shoulders are not credible.

It is apparent that the Board simply dismissed compelling medical evidence and mis-characterized Vernon's ailments as figments of her imagination. It elected to disregard the significant objective evidence of disability. Additionally, the Board necessarily ignored the fact that Vernon was required to implement hand and foot controls in the operation of a school bus -- feats which could not have been performed with the numbness that afflicted her extremities. KRS 61.600(2)(a) clearly provides the legal test against which these disabilities are to be assessed in order to determine eligibility for benefits:

The person, since his last day of paid employment, has been mentally or physically incapacitated to perform the job, or jobs of like duties, from which he received his last paid employment.

It is incomprehensible to imagine that Vernon could return to a similar job in light of her impairments -- surely not if the safety of children were to receive any consideration.

The Franklin Circuit Court did not substitute its judgment for that of the Board. Instead, it gave proper credence to the compelling evidence disregarded by the Board. I would, therefore, affirm the Franklin Circuit Court in its reversal of the Board.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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