

RENDERED: May 27, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001766-MR

RUTH ANN JONES

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 02-CI-00782

KENTUCKY RETIREMENT SYSTEMS

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

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

GUIDUGLI, JUDGE: Ruth Ann Jones has appealed from a decision of the Franklin Circuit Court upholding the denial of her request for disability benefits by Kentucky Retirement Systems pursuant to KRS 61.600. We affirm.

Jones, born January 16, 1951, worked as a custodian with the McCracken County Board of Education at Heath High

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.

School. Her duties included cleaning classrooms, the library, the hall and the stairs. She began working on December 1, 1985, and her last date of paid employment was September 12, 2000. On March 26 and May 14, 2001, Jones filed applications for disability retirement benefits, stating that she had osteoarthritis in her back, knees and hands, which she claimed prevented her from performing her job duties, and that she suffered from migraine headaches. The Medical Review Board physicians recommended that her applications be denied because her orthopedic impairment did not appear to be severe enough to preclude her usual work activity and because her headaches predated her employment.

After retaining counsel, Jones requested a hearing on the issue of her disability. The matter was assigned to Hearing Officer Paul Fauri, and was heard on October 23, 2001. The Hearing Officer allowed the record to stay open after the hearing so that Jones could obtain additional x-rays, and also allowed the parties to file position statements. On April 17, 2002, the Hearing Office issued his report and recommended order. After summarizing the evidence of record, the Hearing Officer set out his findings of fact as follows:

- 1) The Claimant meets the employment service requirements of KRS 61.600 in that she has 178 months of total service and at least 12 months which are current service.

2) The Claimant's application for disability retirements benefits was timely filed on March 26, 2001 and May 14, 2001, her last date of paid employment being September 12, 2000.

3) Claimant's position as a custodian falls within the category of medium work, although there appears to be heavy lifting during the summer cleaning period.

4) The Claimant's application was based on her osteoarthritis and migraine headaches. Counsel for Claimant stated that the migraine headaches were not being pursued as a basis for disability due to the fact that they have been in existence prior to the Claimant's employment.

5) The Claimant received a neurological workup for her migraine headache syndrome on December 20, 2000 by Dr. William Hogancamp. Dr. Hogancamp noted the medical history of osteoarthritis and, in his review of the Claimant, indicated that she was in no acute distress, and further indicated that the patient has a full range of motion of the cervical and lumbar spine, and also that she had a normal gait and was able to heel and toe walk. Counsel for the Retirement Systems argues that this is the most accurate report of record due to the fact that the Claimant's last date of paid employment was September 12, 2000 and she stopped working some time in August of 2000.

6) The reports from Dr. Bailey note that the Claimant is suffering from osteoarthritis, and further that the MRI from April 15, 1999 showed various problems of lumbar sacral interspace and osteoarthritis of the hips and the knees. There was no additional testing after this report. Dr. Bailey further indicates that he does not routinely measure range of motion unless there is a specific joint. He concludes that Claimant can lift no more

than ten pounds, no bending, squatting, crawling, climbing. Counsel for the Claimant argues that this is the most accurate evidence of the Claimant's condition, who testified she was having pain while working and was unable to basically work her job for the last six months.

7) It is found that the medical evidence of record is insufficient to substantiate the Claimant's claim for disability retirement due to the fact that, while she may be suffering pain and while Dr. Bailey has limited her lifting, this was not done until after her last date of paid employment, and furthermore there is no current MRI information following up the April 15, 1999 evaluation.

8) Dr. Hogancamp noted normal strength, as well as normal muscle tone and bulk.

9) The Hearing Officer believes that the Claimant has pain, but the evidence is insufficient to show that there has been a restriction in her range of motion or of an inability for her to perform the duties that she previously performed as a Custodian.

10) The Claimant has failed to set forth objective medical evidence to show that her physical conditions would prevent her from performing her work as a Custodian.

The Hearing Officer then concluded that Jones was not entitled to disability retirement benefits because she failed to establish by objective medical evidence that she had a permanent mental or physical impairment preventing her from performing her former job or a similar one. Therefore, he recommended that her application be denied. After allowing the parties to file exceptions, the Board of Trustees issued a Final Order on May

20, 2002, adopting the Hearing Officer's recommended order and denying the application.

Jones then timely filed a Petition for Judicial Review in the Franklin Circuit Court, asserting that she was permanently incapacitated under KRS 61.600. In her brief, Jones argued that no valid reason was given for rejecting the opinion of her treating rheumatologist and that no consideration was given to her employer's statement that she required help in performing her job duties prior to her resignation. In an Opinion and Order entered August 3, 2004, the circuit court affirmed the Final Order of Kentucky Retirement Systems. This appeal followed.

On appeal, Jones argues that the circuit court erred in upholding the agency's final order. She asserts that there was no substantial evidence to support the denial of her application, that Dr. Bailey's assessment should be controlling as he treated her for her arthritis, and that the Hearing Officer erroneously found that there was no objective evidence of her ability to perform her past work. On the other hand, Kentucky Retirement Systems contends that its decision to deny her application was supported by substantial evidence of record.

KRS 61.600 sets out the statutory requirements disability retirement benefits, and the version in effect when Jones made her application read, in pertinent part, as follows:

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

. . . .
- (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.

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 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

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).

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.

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

In the present matter, we must uphold the decision unless substantial evidence of record compels a finding in Jones’s favor or Kentucky Retirement Systems incorrectly applied the law. We agree with the circuit court that based upon Dr. Hogancamp’s medical records, a different result is not compelled. Furthermore, the trier of fact has the discretion to weigh the evidence before it. Unlike her treating rheumatologist’s records, Dr. Hogancamp’s records reflect a fuller examination closer in time to her last day of work. In his neurological examination, Dr. Hogancamp noted normal strength in Jones’s upper and lower extremities as well as full range of motion in her lumbar and cervical spine. We also note

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.

that Dr. Bailey did not impose any type of work restrictions until over a year after Jones stopped working, and only did so after being requested by her attorney. Based upon the objective medical evidence of record, Jones failed in her burden to establish that she has been permanently incapacitated from returning to work due to osteoarthritis. Therefore, the Kentucky Retirement Systems properly denied her application for retirement benefits pursuant to KRS 61.600. Likewise, the circuit court did not err in affirming the decision below.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

William A. Kitchen
Paducah, KY

BRIEF FOR APPELLEE:

Jennifer A. Jones
Frankfort, KY