

RENDERED: JANUARY 27, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002327-MR

DIANE P. BLOYD

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
CIVIL ACTION NO. 04-CI-00342

KENTUCKY RETIREMENT SYSTEMS

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DYCHE AND GUIDUGLI, JUDGES; PAISLEY, SENIOR JUDGE.¹

PAISLEY, SENIOR JUDGE: This is an appeal from an Opinion and Order of the Franklin Circuit Court, which affirmed a Final Order of the Kentucky Retirement Systems Board of Trustees denying appellant's claim for disability retirement benefits.

Diane P. Bloyd worked as a nutrition services assistant with the Jefferson County Public School system from March 1993 until May 2002. In 1995, Bloyd began experiencing

¹ Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

pain in her shoulder after several boxes of frozen meat fell on her at work. Later, in May 2001, Bloyd began experiencing severe pain in her upper back after she threw a heavy garbage bag over the top of a dumpster at work.

Subsequently, Bloyd was diagnosed by Dr. David Petruska with a herniated disc in her neck at C6-7. Dr. Petruska initially treated Bloyd conservatively, but, ultimately, in December 2001, he performed a discectomy and a disc fusion in an attempt to relieve Bloyd's pain. Although the surgery seemed successful at first, Bloyd began to complain of pain again and, in May 2002, resigned from her job.

In August 2002, Bloyd filed an application for disability retirement benefits with the Kentucky Retirement Systems, claiming that she was unable to perform her job as a nutrition services assistant due to the herniated disc. Bloyd's claim was first evaluated by the Medical Review Board which denied her claim. After she requested an administrative hearing, her claim was assigned to a Hearing Officer, who found that Bloyd retained the ability to perform her last job and recommended denying her claim. The Disability Appeals Committee of the Board of Trustees of the Kentucky Retirement Systems (Board) found the Hearing Officer's report persuasive and, in its final order, adopted the Hearing Officer's recommended order. Pursuant to Kentucky Revised Statutes (KRS) 13B.140,

Bloyd appealed the Board's final order to Franklin Circuit Court, which affirmed the Board's order.

On appeal to this court, Bloyd argues that the current standard of review for an appeal from the denial of retirement benefits is unfair and should be changed because the Kentucky Retirement Systems has a fiduciary relationship with its members. According to Bloyd, the current standard of review restricted the Franklin Circuit Court to a superficial review of the record that focused only on evidence that supported the Hearing Officer's recommended order. Bloyd contends that we should look at the record as a whole. According to Bloyd, if we do so, then we shall see that she continued to have upper back problems that required ongoing medical treatment. If we analyzed this evidence pursuant to the new, more lenient standard of review advocated by Bloyd, we would be persuaded to reverse the circuit court and enter a judgment in her favor.

In McManus v. Kentucky Retirement Systems, 124 S.W.3d 454 (Ky. App. 2004), this court set forth the proper standard of review for appeals from the Disability Appeals Committee of the Board of Trustees of the Kentucky Retirement Systems.

When the decision of the fact-finder is in favor of the party with the burden of proof or persuasion, the issue on appeal is whether the agency's decision is supported by substantial evidence, which is defined as evidence of substance and consequence when taken alone or in light of all the evidence

that is sufficient to induce conviction in the minds of reasonable people. Where 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. "In its role as a finder of fact, an administrative agency is afforded great latitude in its evaluation of the evidence heard and the credibility of witnesses, including its findings and conclusions of fact." Causation generally is a question of fact. A reviewing court is not free to substitute its judgment for that of an agency on a factual issue unless the agency's decision is arbitrary and capricious. Id. at 458-459. (Citations omitted.)

Since Bloyd had the burden of proof and since her claim was denied, we may reverse under this standard only if the evidence in her favor is "so compelling that no reasonable person could have failed to be persuaded by it." Id. We find no basis to change or modify the standard so recently set out by this court.

In addition, Bloyd argues that the Hearing Officer failed to conduct a residual capacity analysis as required by KRS 61.600(5)(a)(2)&(b). Bloyd also argues that the evidence shows that she was required to lift 80-100 pounds during work making her job "heavy work" as defined by KRS 61.600(5)(c)(4). Despite this evidence, the Hearing Officer found that her job was only "medium work." Bloyd argues that this finding is contrary to the evidence. According to Bloyd, if the Hearing Officer had conducted a residual capacity analysis taking into

consideration that her job was actually heavy work, then he would have been compelled to find in her favor.

Regarding this issue, we adopt the Franklin Circuit Court's sound reasoning:

KRS § 61.600(5)(b) defines "residual functional capacity" as the [person's] capacity for work activity on a regular and continuing basis. This Court is satisfied that the Hearing Officer's report and recommended order considered Bloyd's capacity to return to work as a Nutritional Services Assistant on a regular and continuing basis (functional residual capacity) when recommending denial of disability benefits. The Hearing Officer included in his report evidence that Bloyd continues to have an active lifestyle illustrated by her ability to clean the house (make beds, mop, and load the dishwasher), shop, garden, go to the grocery and travel. He considered the testimony of Bloyd indicating she would no longer have to swing heavy garbage bags on top of the dumpster because the dumpster was being emptied daily which allowed her to place trash directly in the bin opening. Further, the Hearing Officer considered the testimony of Dr. Petruska that proper lifting techniques were taught in order to protect the neck but Bloyd felt she didn't need them. Lastly, the Hearing Officer determined that Dr. Petruska's basis for any restrictions on job duties resulted from Bloyd's subjective complaints because objective medical tests revealed no focal neurological deficits. The abovementioned demonstrates that the Hearing Officer did in fact evaluate Bloyd's residual functional capacity to return to work when making his recommendation. Opinion and Order of Franklin Circuit Court at pages 4-5.

While the Hearing Officer's recommended order may have been awkwardly written, we agree with the circuit court that he did, in fact, consider Bloyd's ability to continue to perform her last job or a similar job when he evaluated her claim.

Finally, Bloyd argues that the Hearing Officer required her to prove that she was "totally and permanently incapacitated." According to Bloyd, this element of proof is not found anywhere in KRS Chapter 61, which established the Kentucky Retirement Systems and set forth the procedures regarding claims for retirement benefits. She argues that she was only required to prove that she was unable to perform her last job.

We agree with Bloyd that the Hearing Officer indicated the wrong standard of proof in his order when he stated the legal issue was "whether the Claimant is totally and permanently incapacitated." According to KRS 61.600(3)(a), Bloyd was required to prove that, since her last day of paid employment, she was incapable of performing her last job or a similar job. Although the Hearing Officer did err in this respect, he stated in his conclusions of law that, "The preponderance of the medical evidence contained of record indicates that the Claimant retains the ability to perform her usual work activity[.]" Considering his report in its entirety we conclude that when the Hearing Officer evaluated Bloyd's claim, he applied the correct

standard by only requiring her to prove that she was incapable of performing her last job or a similar job. The Hearing Officer determined that Bloyd had failed to meet her burden of proof under this standard.

We note that the record does contain evidence which could support a finding in Bloyd's favor. However, we may not substitute our judgment for that of the fact-finder's; thus, we defer to the Board's decision to follow the Hearing Officer's recommendation since the evidence contained in the record does not compel a finding in Bloyd's favor.

The order and opinion of Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Peter J. Naake
Louisville, Kentucky

BRIEF FOR APPELLEE:

Brown Sharp II
Frankfort, Kentucky