

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002615-MR
&
NO. 2006-CA-001293-MR

ERMA JO CHARLES

APPELLANT

v. APPEALS FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 00-CI-00577

KENTUCKY WORKFORCE DEVELOPMENT CABINET
(now KENTUCKY EDUCATION CABINET); KENTUCKY
EMPLOYEES RETIREMENT SYSTEMS AND KENTUCKY
RETIREMENT SYSTEMS; THE BOARD OF TRUSTEES OF
THE KENTUCKY RETIREMENT SYSTEM

APPELLEES

OPINION
AFFIRMING

** ** * ** * **

BEFORE: DIXON, MOORE, AND TAYLOR, JUDGES.

DIXON, JUDGE: Appellant, Erma Jo Charles, appeals from a decision of the Franklin Circuit Court affirming Appellee, Kentucky Retirement Systems', denial of her application for disability retirement benefits. We affirm.

Appellant was employed as an Employment and Training Specialist, Senior, with the Workforce Development Cabinet. In December 1997, she was involved in an automobile accident, suffering injuries to her shoulder and neck area. Apparently, the injuries developed into fibromyalgia. Appellant continued working until February 16, 1998, which was her last day of paid employment.

On September 4, 1998, Appellant filed an application for disability retirement benefits claiming that she was disabled because,

It isn't just one specific disability. First of all, I have a heart problem - valve prolapse - which is aggravated by stress of any kind. Secondly, I have regular migraines and the medications needed for them also contributes to heart problems. Thirdly, I have fibromyalgia which causes constant pain in every muscle on my body, no energy, loss of sleep, headaches, bowel problems, etc. I was in a wreck in Dec. of '97 and I still can't tilt my head forward or use my arms without a lot of pain. Also having problems with seizures. I have epilepsy which my injuries have made worse.

After Appellant was twice denied benefits by the Medical Review Board Physicians of Kentucky Retirement Systems, she requested a formal hearing. A hearing officer thereafter recommended that her application for enhanced disability benefits be approved.

Kentucky Retirement Systems then filed exceptions and the matter proceeded to the Disability Appeals Committee of the Board of Trustees (DAC). After reviewing the record, the DAC issued a final administrative decision denying Appellant's application for benefits. The DAC's findings of fact included:

- (1) The Claimant meets the employment service requirements of KRS 61.600 in that she has 93 months of

total service under the Kentucky Employees Retirement Systems

(3) Claimant's employment as an Employment and Training Specialist, Senior . . . would fall in the category of sedentary work.

(5) Claimant has not been placed under any physical restrictions that would preclude her from performing sedentary work.

(6) There is no evidence of record that Claimant is disabled by alleged migraine headaches.

(7) There is no evidence of record that Claimant is disabled by the mitral valve prolapse or any heart condition.

(8) There is no evidence of record that Claimant is disabled by a seizure disorder or by epilepsy. The Board does specifically find that Claimant has suffered from a seizure disorder since childhood that pre-existed her initial membership date in County Employees Retirement System and would not entitle her to receive disability retirement benefits.

(9) Claimant's x-rays and MRI show no injury to her spinal column, no herniated discs, and no nerve root impingement. Claimant is neurologically intact and has full use of her arms and full range of motion. The rheumatology consultative report . . . confirms that Claimant has fibromyalgia However, . . . Claimant has normal muscle bulk and tone, normal spinal column, and generally good range of motion

(10) There is insufficient evidence of record to establish that Claimant is totally and permanently disabled because of fibromyalgia, depression, anxiety, or any other mental illness, either separately or in combination.

(11) Claimant's testimony that she was experiencing pain on a scale of ten out of ten during her hearing examined in context with the other evidence of record . . . would indicate

that she is claiming to be almost constantly experiencing the absolute maximum level of pain. This testimony is simply not credible. The Board finds that Claimant's testimony regarding her level of pain is unreliable and unpersuasive. Claimant's allegation that she cannot perform her sedentary job is based upon her subjective complaints of pain. Claimant testified about severe pain associated with her condition; however, she has not pursued any course of treatment in pain management . . . , medically supervised exercise program, or mental health treatment as recommended by her doctors. The Board finds that Claimant's subjective complaints of pain, without other evidence of functional impairment, does not establish that Claimant is functionally incapacitated from performing a sedentary position.

(12) There is no objective medical evidence of record to show that Claimant is totally and permanently disabled by any of the above-mentioned conditions, or by any condition at all.

Based upon the above findings, the DAC concluded that “Claimant is not entitled to disability retirement benefits pursuant to KRS 61.600, because Claimant failed to establish by a preponderance of the evidence the existence of a total and permanent incapacity which would prevent her from performing her former job . . . or jobs of like duties, as of her last day of paid employment” Pursuant to KRS 13B.140, Appellant thereafter appealed the DAC's final order to the Franklin Circuit Court, which upheld the denial of disability retirement benefits. This appeal ensued.

In *McManus v. Kentucky Retirement Systems*, 124 S.W.3d 454, 458-59 (Ky. App. 2004), this Court set forth the proper standard of review for appeals from the DAC's denial of benefits.

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. (Citations omitted.)

Since Appellant 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.* If the record contains such compelling evidence, the denial of relief is arbitrary. *Bourbon County Board of Adjustments v. Currans*, 873 S.W.2d 836, 838 (Ky. App. 1994). However, reversal of the DAC's decision is not justified by a mere showing that there is some evidence in the record supporting a contrary conclusion to that of the DAC. *McCloud v. Beth-Elkhorn Corp.*, 514 S.W.2d 46, 47 (Ky. 1974). And a reviewing court may not substitute its own judgment on a factual issue for that of the DAC unless the DAC's decision is arbitrary. *McManus, supra* at 458.

Furthermore, because the DAC is the trier of fact, its evaluation of the evidence, including the credibility of the witnesses, is given great latitude. See *Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 309 (Ky. 1972); *Bowling v. Natural*

Resources and Environmental Protection Cabinet, 891 S.W.2d 406, 409-410 (Ky. App. 1994); *McManus*, *supra* at 458. The factfinder can choose to believe parts of the evidence and disbelieve other parts even where the parts come from the same witness. *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977).

Appellant's arguments in this Court are identical to those raised in the circuit court. First, Appellant argues that the DAC's findings of fact are not supported by substantial evidence. Specifically, Appellant claims that the DAC erred in finding that she had not been placed under work restrictions. However, as noted by the trial court, there was substantial evidence that the physical restrictions that were placed upon her “would not prevent her from performing her sedentary work.” Appellant next contends that her ailments referred to by the DAC in findings 6, 7, and 8 were not the basis of her claim for disability benefits. However, it is clear from reading Appellant's own application that she relied on all of her conditions as grounds for her entitlement to benefits. Further, Appellant takes issue with some of the language used in finding 9 to argue that the DAC misconstrued the evidence. Again, we agree with the circuit court that Appellant is “mincing words” and that the “DAC is allowed to summarize findings.” Finally, Appellant criticizes findings 10 and 11 that she does not suffer from pain. However, as the circuit court noted, the DAC did not find that she was pain free, but rather that her alleged level of pain was not credible. Regardless, the DAC, as the arbiter of witness credibility, was free to accept or reject any portion of Appellant's testimony. *See Caudill, supra.*

Our review of the DAC's order is essentially limited to determining whether the decision is arbitrary, or not supported by substantial evidence. *Commonwealth, Transportation Cabinet, Department of Vehicle Regulation v. Cornell*, 796 S.W.2d 591 (Ky. App. 1990). After reviewing the record and the DAC's report, we agree with the reasoning and conclusion of the circuit court:

[Appellant's] overall argument is that she is entitled to disability due to her fibromyalgia. However, a review of the record indicates she failed to meet her burden in establishing a permanent disability that keeps her from performing her sedentary job. On appeal, the record does not compel reversal of that decision. Although [Appellant] may have fibromyalgia, there is no indication that diagnosis is disabling.

We are of the opinion that the evidence in Appellant's favor is not "so compelling that no reasonable person could have failed to be persuaded by it." *McManus, supra*. Thus, the circuit court did not err in upholding the DAC's decision.

Appellant next makes a confusing argument that Kentucky Retirement Systems has an internal policy that failure to follow medical advice will result in the denial of disability retirement benefits "even if it would not have affected disability." Appellant relies on proposed legislation in 2000 that would have amended KRS 61.600 to include within the determination of whether an incapacity was permanent, the consideration of whether the claimant made an attempt to comply with any medical treatments recommended by the physicians of record. Appellant notes that during the 2000 Legislative Session, an officer of Kentucky Retirement Systems testified before the

House State Government Committee that the Board had, in practice, already implemented such a policy.

We find Appellant's argument specious at best, and fail to see how it has any bearing upon the determination in this case. The DAC concluded that Appellant failed to establish that any of her conditions, alone or in conjunction with each other, rendered her permanently incapacitated to perform her job. While the DAC noted that Appellant had not pursued any recommended courses of treatment to improve her condition, it did not base the denial of benefits upon that fact.

Next, Appellant argues that the Commonwealth is prohibited from dismissing her from her job due to disability, yet denying her disability retirement benefits. However, as Kentucky Retirement Systems aptly points out, Appellant was not terminated from her job. Appellant simply failed to return to work after her sick leave without pay was exhausted. The record contains various correspondences between Kentucky Retirement Systems and Appellant informing her of the date she needed to return to work. When Appellant failed to do so, she was deemed as having resigned her position. 101 KAR 2:102 Section 2(3)(g)(1) (“An employee is deemed to have resigned if he (1) Has been on one (1) year continuous sick leave without pay.”). Clearly, Appellant's employer, Kentucky Workforce Development Cabinet, made no independent determination under KRS 61.600 regarding her ability to return to work.

Finally, we would note that Appellant appealed the Franklin Circuit Court's order dismissing Appellee, the Kentucky Workforce Development Cabinet, as a party on

the grounds that Appellant had failed to exhaust her administrative remedies. Appellant sought to have the circuit court order the Cabinet to re-employ her. However, Appellant makes no argument on this issue in her brief to this Court. Nevertheless, we agree with the Cabinet that Appellant's failure to appeal the Cabinet's determination that she resigned her position to the Kentucky Personnel Board pursuant to KRS 189A.095 rendered such determination final.

The Opinion and Order of the Franklin Circuit Court upholding Kentucky Retirement Systems' denial of disability retirement benefits is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

James P. Benassi
Henderson, Kentucky

BRIEF FOR APPELLEES:

Jennifer Jones
Frankfort, Kentucky

Randall K. Justice
Frankfort, Kentucky