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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001169-MR

FREDA MATTHEWS

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 04-CI-00346

COMMONWEALTH OF KENTUCKY,
KENTUCKY RETIREMENT SYSTEMS

APPELLEE

OPINION AFFIRMING

** ** *

BEFORE: KELLER AND NICKELL, JUDGES; KNOPF,¹ SENIOR JUDGE.

NICKELL, JUDGE: Freda Matthews (“Matthews”) appeals from a May 12, 2006,
opinion and order of the Franklin Circuit Court affirming the denial of her application for

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

disability retirement benefits by the Board of Trustees of the Kentucky Retirement Systems (hereinafter “System”). We affirm.

Matthews was born in 1952. She married when she was eighteen and bore two children. On September 1, 1979, she joined the Lake Cumberland Head Start Program where she worked until August 31, 1981. She rejoined the program on September 1, 1987. Her last day of paid employment was January 8, 2002. During this time she served as a preschool teacher, a home visitor, and finally as a family advocate. At the time of her termination, she had accrued 176 months (14.67 years) of service in the County Employees Retirement System (CERS).

In July 2001, Matthews was hired by Lake Cumberland as a family advocate and began a six-month probationary employment period. Although no formal job description was provided to us, Matthews testified she was responsible for creating a new early education program for three-year-olds and shepherding it through the licensing process. She described some of her duties as meeting with families, preparing paperwork, and transporting children to medical appointments. Her job duties were classified as sedentary to light² and included lifting children, carrying supplies, and moving furniture and playground equipment. She attended monthly community meetings which lasted anywhere from an hour to a full day. She testified she worked fourteen and fifteen hour days because she was the only employee of the four hired to staff the program having any experience with children. She said she sought help in performing

² KRS 61.600(5)(c) classifies work as sedentary, light, medium, heavy or very heavy depending upon the physical exertion requirements of the particular job.

her essential job duties, but her request went unanswered because her co-workers were unable to do their own jobs. Matthews said she requested reasonable accommodations,³ but the record does not specify the nature of any such request. On the job description form submitted by her employer, the response to the “accommodations” section was simply “Dismissed 1/8/02.” Toward the end of 2001, Matthews went on medical leave when her migraines worsened. According to Matthews, as the migraines intensified her blood pressure would become elevated and this in turn increased her headaches and pain.

The record before us is replete with medical records from fourteen doctors and four other health care professionals who have treated and evaluated Matthews for various maladies. These records span a period from 1997 through 2003, but medical histories contained within them show Matthews has had mental and physical problems for many years, some of which relate back to the sexual, physical and emotional abuse she experienced when she was a child of just six or eight years of age. A lifelong asthmatic, she admitted suffering from anxiety and depression since she was in her twenties. The health issues and diagnoses of greatest relevance to this appeal are: heart problems, sleep problems, asthma, fibromyalgia, anxiety, depression, obsessive-compulsive disorder, back and hip pain culminating in back surgery, and migraine headaches.

³ KRS 61.665(2)(a) requires a person seeking benefits to file with the retirement office “evidence that the person has made a request for reasonable accommodation. . . .” Similarly, KRS 61.665(2)(b) requires the employer to “submit a detailed description of reasonable accommodations attempted.”

At the suggestion of her primary care physician, Dr. Mary Jane Castro (“Dr. Castro”), Matthews took a three-week medical leave of absence in November 2001. While on leave, as was her yearly custom, Matthews called area businesses and solicited donations of Christmas gifts for Head Start children. With Dr. Castro’s approval, Matthews returned to work the following month but remained on the job just five days before Dr. Castro advised her to take a second leave of absence. While on medical leave in December 2001, Matthews received a letter of suspension from her employer. When she questioned the reason for her suspension, Matthews says she was told she should have used her medical leave to focus on her own health. Then, on January 8, 2002, Matthews was fired for becoming upset with a business that declined to donate to the holiday drive.⁴

On February 2, 2002, Matthews applied for disability retirement benefits alleging she suffered from fibromyalgia, asthma, chronic bronchitis, mild hypertension, tachycardia, migraine headaches, general anxiety disorder with panic attacks, and depression. Between April 5, 2002, and October 1, 2002, medical evidence submitted by Matthews was reviewed fifteen times by members of the Medical Review Board (“Board”). On October 2, 2002, a letter was sent to Matthews informing her the Board

⁴ Matthews has consistently claimed she was fired because a medical condition prevented her from doing her job. The System challenges this contention because Matthews' employer never assessed her ability to work. Copies of Matthews' suspension and termination letters are not included in the record. On May 22, 2003, Matthews told Dr. Paul Ebben (“Dr. Ebben”), an Independent Psychological Evaluator (IPE), she was fired because she “wasn’t very nice” to a company that declined to participate in a Christmas gift solicitation. Notes from Dr. Castro dated December 20, 2001, say Matthews was “suspended from work regarding complaints from a company.”

had denied her application for benefits. Comments from the medical reviewers indicated the application was being denied generally because her medical complaints pre-existed her reemployment and she had less than sixteen years of service credit. The doctors who reviewed her claims found numerous reasons to deny her application for benefits. For example, much of her current condition stemmed from abuse suffered when she was just six or eight years old and nothing refuted that conclusion. She performed well on a functional capacity evaluation (FCE), completing all requested tasks without complaining of any functional restrictions. The record failed to describe any total and permanent physical limitations. According to the record, Matthews was a lifelong asthmatic. Matthews' cardiologist specifically denied any disability from a cardiac condition, a diagnosis that upset Matthews. A psychiatric report indicated Matthews was receiving treatment and her mental health status was expected to improve even though she was noncompliant with a proposed treatment regimen. While the presence of fibromyalgia was confirmed, there was no objective proof that Matthews was totally and permanently disabled because of this condition and there was no description of any physical limitation resulting from it that would prevent her from being a family advocate. The record contained no objective proof that Matthews' was permanently disabled because of depression, anxiety, or sleep apnea. Matthews' complaints were mostly subjective in nature without objective medical support. Finally, there was no demonstrated joint, muscle or neurological change and no evidence her range of motion was limited.

On November 25, 2002, Matthews submitted additional evidence from Drs. Castro and Kelly Cole and requested further review by the Board. Following additional review, on January 30, 2003, Matthews was again notified her claim had been denied for similar reasons.

At Matthews' request, a hearing was held on September 12, 2003, with Matthews as the sole witness. Thereafter, each party filed a position statement and a reply. On November 14, 2003, the hearing officer issued her findings of fact which stated in relevant part:

1. Claimant applied for disability retirement benefits on February 14, 2002.
2. Claimant has 176 months of CERS membership.
3. Reasonable accommodations were not requested, as Claimant was terminated from her probationary employment on January 8, 2002.
4. The objective medical evidence establishes that Claimant suffered from a psychological and/or psychiatric condition prior to her membership in the retirement systems, and thus she is ineligible for disability retirement benefits based on these conditions, as she has less than 16 years of membership.
5. There is no evidence that Claimant's mental health condition was substantially aggravated by a work-related accident or injury.
6. The objective medical evidence does not establish by a preponderance of the evidence that Claimant is totally and permanently incapacitated from her job duties by reason of any physical condition, or that any such incapacity is likely to remain for a period of not less than 12 months from her last date of paid employment.

As a result of these findings, the hearing officer recommended denial of the request for disability retirement benefits. Following the filing of exceptions by Matthews, for which

we find no ruling in the record, the System entered its final order on February 9, 2004, adopting as its own the hearing officer's findings and recommended order denying benefits.

Matthews timely petitioned the Franklin Circuit Court for judicial review⁵ on March 5, 2004, alleging the System's denial of benefits was unsupported by substantial evidence and she was entitled to disability retirement benefits because the medical proof in the record demonstrated by a preponderance of the evidence that she was disabled. In answering the allegation, the System argued the denial of benefits was proper because it was based upon substantial evidence.

On January 25, 2006, Matthews moved for summary judgment to which the System filed a response on March 10, 2006. The System argued Matthews had not offered objective medical evidence showing she was permanently functionally incapacitated, either physically or mentally, from her duties as a family advocate or from work with similar duties. The System further argued all of Matthews' physical and mental conditions either pre-existed, or were directly or indirectly related to conditions that pre-existed, her reemployment. Denying that it had "cherry picked" the evidence,

⁵ Matthews also argued, for the first time, that she was entitled to receive disability retirement benefits under KRS 61.600(3)(b) because her brief return to work in December 2001 constituted a "trial period" therefore rendering KRS 61.600(2) inapplicable. In response, the System argued the only statutory reference to a "trial basis" appears in KRS 61.615(1) and applies only to those employees with a minimum of sixteen years service who are already receiving disability retirement benefits. Since Matthews had only 14.67 years of service and she was not receiving disability benefits, she could not claim any benefit from this provision. Matthews appears to have abandoned this portion of her argument on appeal to this Court.

the System argued it had considered all the proof and ultimately relied upon the evidence it found to be the most convincing.

On May 12, 2006, an opinion and order of the Franklin Circuit Court denying the appeal was entered. The court found evidence that Matthews' psychological condition pre-existed her reemployment since she admitted being an obsessive perfectionist⁶ as a young adult and further admitted her perfectionism caused anxiety at work. Since Matthews was not already receiving disability retirement benefits she did not qualify for benefits under KRS 61.615. The Board is permitted to give more weight to the objective results of an FCE than it gives to contrary conclusions drawn by an independent medical examiner (IME). Objective medical reports established Matthews' back pain was not disabling. Matthews' asthma pre-existed her reemployment date and was not shown to be disabling. Matthews' cardiologist stated she was not disabled due to a cardiac condition. There was no evidence Matthews was permanently incapacitated as a result of migraine headaches and, even though Matthews had been diagnosed with fibromyalgia, she was able to manage her pain with medication. Ultimately, the circuit court found the Board's decision denying Matthews' claim for disability retirement

⁶ This revelation came during Dr. Ebben's psychological examination of Matthews. At the request of the Board, on September 25, 2002, Dr. Ebben reviewed Matthews' medical records and recommended denial of benefits because her psychological condition predated her reemployment. On January 2, 2003, he reviewed additional medical records and still recommended denial of the claim because her "current condition originated during childhood." On May 22, 2003, he met with Matthews. It is at this time that Matthews spoke of being "exceptionally perfectionistic" and suffering from obsessive-compulsive personality disorder since she was eighteen; suffering panic attacks and anxiety before she began working for Lake Cumberland; and suffering migraines for fifteen or more years.

benefits was supported by substantial evidence and denied the appeal. This appeal followed.

Matthews alleges she proved she is disabled by a preponderance of the evidence and therefore should be awarded benefits. Disagreeing, the System argues Matthews is not entitled to benefits because she has not alleged any error by the circuit court and the record contains substantial proof that all Matthews' ailments pre-existed her reemployment date or can be traced to a pre-existing condition.

In reviewing a circuit court's opinion affirming an administrative agency's action we are guided by *Jones v. Cabinet for Human Resources*, 710 S.W.2d 862, 866 (Ky.App. 1986) which directs:

In an appeal of an administrative action by an agency, the circuit courts are to provide review, not reinterpretation. *Kentucky Unemployment Insurance Commissioner v. King*, 657 S.W.2d 260 (Ky.App. 1983). Thus, when substantial evidence exists in the record to support an administrative agency's action, the circuit court has no authority to overturn it. *Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298 (Ky. 1972). Our task is to determine whether or not the circuit court's findings upholding the Cabinet are clearly erroneous. CR 52.01; *See also Kirk v. Jefferson County Medical Society*, 577 S.W.2d 419, 422 (Ky.App. 1978).

Thus, for us to reverse the circuit court and remand the case as Matthews requests, she must convince us the System's denial of benefits was unsupported by substantial evidence and the circuit court clearly erred in finding it was. After reviewing the evidence and the trial court's analysis, we are convinced only that Matthews has failed to carry her burden. Hence, we affirm.

Between 1997 and 2003, Matthews saw a wide variety of doctors for a multitude of physical conditions. Several of the doctors and specialists suggested she meet with a mental health professional, but she did not do so until January 2002, just prior to being terminated from her job. Many of the medical doctors attributed her physical problems to various stressors within her family life as well as her need to be in control, a condition which Matthews told Dr. Ebben that she herself noticed when she was an eighteen-year-old bride.

Matthews alleges a plethora of health concerns which we will address individually. To justify an award of disability retirement benefits, there must be objective medical proof of four items: (1) since leaving her job, and considering any reasonable accommodation provided by her employer, Matthews must be “mentally or physically incapacitated” to work as a family advocate or a job with similar duties; (2) her incapacitation must be the “result of bodily injury, mental illness, or disease”; (3) she must be permanently incapacitated; and (4) her incapacity cannot “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 61.600(3).

Back and hip pain culminating in back surgery in early 2003. Nearly one year after being fired as a family advocate, Matthews awoke on December 27, 2002, with severe pain in her right hip and thigh. An MRI showed a herniation and in early February 2003 Dr. El-Naggar performed back surgery. When Dr. Dennis Lane examined her on April 14, 2003, Matthews complained of pain in the right hip and leg but had a full

range of motion in her right leg and only a very mild increase in lower extremity pain. Since Matthews' back complaints arose after her last date of paid employment, they cannot be the basis for awarding disability retirement benefits.

Asthma. Matthews is a lifelong asthmatic. Medical records from her pulmonologist, Dr. John Rodrigues, show Matthews underwent spirometry studies in October 1997, November 1997, and July 1998, with the latest test showing her lung function to be "essentially within normal limits." As of January 2, 2002, Matthews' asthma was under "good control" with medication. Because her asthma pre-dated her reemployment and her asthma alone is not disabling, this condition cannot be the basis for awarding disability retirement benefits.

Cardiac. Dr. Natarajan Thannoli became Matthews' cardiologist in January 1997. At that time, Matthews was able to work "without much difficulty" and was generally maintaining good health. A February 1992 echocardiogram was normal. As early as 1997, Dr. Thannoli encouraged Matthews to curb her caffeine intake and noted she was highly stressed because of numerous family issues. In 2000 he found her to be borderline positive for lupus and perhaps fibromyalgia but suspected her main problem was an anxiety disorder. In May 2001, he concluded Matthews had a regular heart rhythm without any cardiac symptomatology. On June 18, 2002, Dr. Thannoli wrote, "from the cardiac status she has no evidence of disability." Because Matthews has no disability of a cardiac nature, this condition cannot be the basis for awarding disability retirement benefits.

Migraines. Matthews has suffered from migraines for fifteen years or more, however, no evidence was offered as to the length, severity or frequency of her headaches. Because no objective medical evidence was introduced showing Matthews' migraine headaches are permanently incapacitating, this condition cannot be the basis for awarding disability retirement benefits.

Fibromyalgia. Matthews was diagnosed with fibromyalgia in 1999. However, there is no objective medical evidence that she is functionally disabled as a result of this condition. Doctors recommended physical therapy, water aerobics and home exercise, as well as meeting with a mental health professional to decrease the effects of the fibromyalgia. It was also strongly suggested that she curtail her intake of caffeine. Matthews did not pursue any of these courses of treatment. Instead, she relied upon medication beginning with hydrocodone, progressing to methadone, and finally moving to oxycontin to which Dr. Syed Umar believed she had developed an addiction.

While it is true that Dr. Castro and Dr. John Nickerson (“Dr. Nickerson”), an independent medical evaluator, both concluded Matthews' fibromyalgia was totally incapacitating, those conclusions are not supported by objective medical findings and indeed were based upon highly subjective statements from Matthews. Dr. Nickerson examined Matthews on June 13, 2002. Although she exhibited a full range of motion in her shoulders, elbows, wrists, and lower extremities at the hips, knees and ankles she claimed to be in constant pain. As a result, Dr. Nickerson found her fibromyalgia to be disabling and opined that other health conditions contributed to her disability. He

deemed her 100 percent permanently disabled from her occupation as a family advocate and from every other occupation for which she was qualified. He strongly suggested she undergo an FCE, but was confident Matthews:

will not be able to perform the activities of a functional capacity evaluation very well given her functional level at this time and I am certain that it will cause increased discomfort and not be very helpful from a standpoint of being able to transfer her functional activities on an FCE to what she could do eight hours per day, five days per week, forty-eight weeks a year.

Upon receiving Dr. Nickerson's report, Dr. Castro referred Matthews to Jeff Parmelee for a modified FCE. That test was conducted on June 27, 2002, and Matthews "gave maximum, consistent effort" throughout the exam. According to Parmelee, Matthews showed "no deviations with her gait, transfers or with her mechanics while performing the functional lifts." She also "demonstrated a fast gait moving from one testing area to another." While she had "difficulty performing the floor to shelf lift, due to improper mechanics," in eighty-two seconds she lifted "20 pounds safely through 5 repetitions from a floor to waist lift." She also lifted twenty-five pounds from her waist to her crown four and one-half times before being instructed to stop due to unsafe lifting techniques. She was also able to lift fifteen pounds five times with "very good form and technique." Five times she did a horizontal lift of fifty pounds, and, without difficulty, she carried thirty pounds for five repetitions. During all trials she showed "good force curves." Three times, while maintaining a good heart rate, she ascended and descended a flight of ten steps in twelve seconds "showing good symmetry and speed." When asked

to demonstrate her normal walking speed, she traveled one-quarter mile in eight minutes and twenty-five seconds on a treadmill. Finally, she scored on the average/above average borderline in terms of hand coordination.

As far as significant deficits, Matthews “showed no gross musculoskeletal deficits in regard to function” although she did exhibit weakness in her left ankle due to an old sprain. Because of unsafe lifting mechanics, Parmelee suggested Matthews lift no more than twenty pounds from the floor, but he acknowledged this limitation was not “necessarily permanent.” When giving his assessment, Parmelee wrote:

The patient has demonstrated very well, that she is able to perform all major functional tasks. It should also be noted that she does not complain of any functional restrictions. The patient’s complaints are that of chronic pain and inability to function at times due to her discomfort. As mentioned previously, the patient had taken her pain medication prior to this test. She did perform the tests with no problems and was very pleasant and cooperative. In taking a long history from this patient, it is evident, that her limitation is not musculoskeletal, but from dealing with anxiety, stress, and other related issues, which in turn limit her function.

When faced with contradictory medical evidence, the finder of fact is authorized to evaluate all the evidence and rely upon that which it finds to be the most convincing. As stated in *Wheatley v. Shields*, 292 F.Supp. 608, 616 (D.C. 1968), “it is the exclusive province of the administrative trier of fact to pass upon the credibility of witnesses, and the weight of the evidence.” See also *Bowling v. Natural Resources and Environmental Protection Cabinet*, 891 S.W.2d 406, 409 (Ky.App. 1995). Furthermore, as explained in *Com. Transp. Cabinet Dept. of Vehicle Regulation v. Cornell*, 796 S.W.2d

591, 594 (Ky.App. 1990), “the trier of facts in an administrative agency may consider all of the evidence and choose the evidence that he believes. (citation omitted)” In this case, the System considered all the proof and in its view the most credible evidence happened to be the results of Matthews’ functional capacity exam. As required by *McManus v. Kentucky Retirement Systems*, 124 S.W.3d 454, 458 (Ky.App. 2003), and a long line of cases before it, we must give “great latitude” to that decision. Pitting the subjective statements made by Drs. Castro and Nickerson against the objective test results from Parmelee, we cannot say the circuit court was clearly erroneous in finding Matthews' fibromyalgia, as the System stated, was not incapacitating and could not be the basis for awarding disability retirement benefits .

Anxiety and depression. In 1997, the beginning point of the medical records submitted for review, Dr. Thannoli urged Matthews to see a mental health professional. At that time, he thought Matthews' main problem was an anxiety disorder. She did not seek help until January 2002.

On May 22, 2003, Dr. Ebben examined Matthews. The history he took from her and the psychological tests he performed on her that day revealed a number of salient facts. At the age of eighteen, Matthews became “exceptionally perfectionistic” and began suffering from anxiety, depression, and obsessive-compulsive disorder. Prior to being employed by Lake Cumberland Head Start, Matthews began experiencing panic attacks. On May 20, 2002, Matthews was diagnosed with post-traumatic stress syndrome and major depressive disorder by Dr. John Gatschenberger, a psychiatrist who examined

her for a Social Security Disability claim.⁷ Dr. Nickerson deemed her “totally disabled” with severe pain on a constant basis. Additionally, while she has endured migraines for at least fifteen years, she is able to control them with medication.

During Dr. Ebben's exam, Matthews completed the Miller Forensic Assessment of Symptoms Test (M-FAST) which is designed to identify possible symptom exaggeration or malingering. Her total score was eighteen, suggesting she was probably malingering or exaggerating her mental illness. She also completed the Personality Assessment Inventory (PAI). However, her responses indicated she may have been deliberately distorting the clinical picture of her condition and thus invalidating the results. Matthews also completed the Pain Patient Profile (P-3). Again her scores were unusually high, being just one point away from being ruled invalid.

Because Matthews' test scores were questionable, Dr. Ebben was unable to draw reliable and meaningful conclusions. He suspected she was experiencing some amount of physical and mental distress, including depression, anxiety, a somatoform disorder, and a personality disorder, but he could not quantify it or determine whether it was total and incapacitating. He did, however, believe it was permanent since it would last at least twelve months. He concluded a portion of her psychiatric condition pre-

⁷ Matthews suggests disability retirement benefits should be awarded to her because she is receiving Social Security Disability benefits and disability benefits from a private insurance carrier. Contrary to her allegation, the criteria for awarding disability retirement benefits is stated in KRS 61.600 and is not influenced by awards from other sources. As stated in *Ledford v. Kentucky Retirement Systems*, --- S.W.3d ---, 2007 WL 2141819 (Ky.App. 2007), “while the hearing officer may consider the medical records supporting an award of SSDI benefits, the Retirement Systems is not bound by factual or legal findings of other state or federal agencies. 105 Kentucky Administrative Regulation 1:210 § 8(1) & (2).”

existed her reemployment and while some facets of her condition probably arose after she began working for Lake Cumberland Head Start, he concluded they would still be related to her longstanding personality disorder and would not in and of themselves be disabling. Furthermore, there was “no evidence Matthews’ psychiatric condition was substantially aggravated by ‘an accident or injury’ arising out of, or during the course of, employment.” Ultimately, Dr. Ebben recommended denial of the claim because a portion of Matthews' condition pre-existed her reemployment and there was evidence she tried to distort the test results.

Carrie Schultz, a licensed clinical social worker, began seeing Matthews in January 2002. She provided no test results showing the onset of anxiety and depression was recent. Given that Matthews herself told Dr. Ebben she had suffered from perfectionism and obsessive-compulsive personality disorder since the age of eighteen and that her perfectionism caused anxiety at work, the System correctly found this pre-existing condition could not be the basis of an award of disability retirement benefits.

When viewing the evidence as a whole, there is substantial evidence upon which to conclude Matthews' many health concerns stem from abuse she suffered as a child and for which she still seeks resolution. Because these maladies pre-existed her reemployment, they cannot be considered in determining whether Matthews meets the statutory criteria for an award of benefits. Other medical conditions may have developed after she began working, but based upon reasonable medical probability, they can still be traced to events occurring when Matthews was between the ages of six and eight and

again when she was eighteen. KRS 61.600(3) requires that these complaints be excluded from consideration. Matthews' other conditions are controlled by medication or are otherwise not disabling or permanently incapacitating and therefore cannot be considered. Thus, we must agree with the trial court and affirm the System's denial of disability retirement benefits.

For the foregoing reasons, the opinion and order of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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