

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001263-MR

FLOSSIE HINKLE

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 03-CI-01401

KENTUCKY RETIREMENT SYSTEMS,
THE BOARD OF TRUSTEES OF THE
KENTUCKY RETIREMENT SYSTEMS

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: STUMBO AND VANMETER, JUDGES; PAISLEY,¹ SENIOR JUDGE.

VANMETER, JUDGE: Appellant Flossie Hinkle contends that the Franklin Circuit Court erred by affirming the decision of the appellee Kentucky Retirement Systems to deny her claim for disability retirement benefits. For the reasons stated hereafter, we affirm.

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 Kentucky Revised Statutes (KRS) 21.580.

Hinkle, who was employed by the Department of Parks at Cumberland Falls State Park, applied for disability retirement benefits on May 1, 2001. Some two months later, she took early retirement based on her 180 months of Kentucky Employee Retirement System (KERS) membership. After Hinkle's disability benefits claim was denied in November 2001, she reapplied for benefits several times. Eventually, two of appellee's medical examiners recommended denying, and one recommended granting, the disability claim. Ultimately, appellee conducted a hearing and denied the disability claim, finding in pertinent part:

Claimant was employed as a laundry worker with the Department of Parks, working at Cumberland Falls State Park. Her job duties included pulling dirty and sometimes wet laundry into wheeled carts and into washing machines, and placing folded linens onto shelves. She also testified that she was required to clean rooms, finish floors, move furniture, and wash walls, vacuum and gather garbage as well. She was required to lift-climb and balance, stoop and kneel, and handle objects, and was required to lift up to 25 pounds over 2/3 of the time and up to 50 pounds 1/3 to 2/3 of the time (Exhibit 4; Claimant's testimony). The employer did not complete the job description (Exhibit 3). Claimant's job is properly classified as light to medium in nature.

Claimant alleges disability due to deterioration of discs in her low back with pain and pressure, colon cancer with recurring polyps, knots on her feet, and possible abdominal hernia (Exhibit 1, page 3). Claimant has the burden of establishing that she is totally and permanently disabled from her employment and unable to perform the essential duties thereof. She must establish that her condition does not pre-date her membership in Kentucky Retirement Systems, or if it does, that she has at least sixteen (16) years of current or prior service, or that her condition was aggravated by an accident or injury (according to the statutory definition) arising out of or during the course of her employment. (KRS 61.600.)

Accommodations were not requested (Exhibit 3, page 5).

Claimant's application for disability retirement benefits was denied by the medical review physicians, and she requested an evidentiary hearing. The hearing was held on April 3, 2003. Claimant was present with her attorney, Hon. Paul Baker, and Kentucky Retirement Systems was represented by Hon. Jennifer Jones.

At the hearing, the entire administrative record consisting of Exhibits 1 through 22 was admitted into evidence without objection. One additional exhibit was presented, marked for identification as follows, and admitted into evidence without objection:

Exhibit 23 March 28, 2003 letter from Mr. Baker with attached records

Exhibit 24 Social Security Administration letter of approval of benefits

Following the hearing, the record was left open for submission of additional records. The following record was received, and is hereby marked for identification as follows:

Exhibit 25 April 24, 2003 letter from Danny Brown, park manager, with attached job description

Both parties submitted position statements and reply position statements.

All of the above documents have been reviewed and relied upon in making this Findings of Fact and Recommended Order.

Claimant had a hysterectomy in 1989 (Exhibit 14, page 130).

Claimant has seen Dr. David Williams over the years for a variety of reasons. In 1996 she had a metatarsal fracture of her right foot (Exhibit 6, page 35). In April 1997 she complained of changes in her left hand and joints secondary to osteoarthritis (Exhibit 6, page 33). In July 1997 she mentioned pain in her neck (Exhibit 6, page 33). In May 1998 she mentioned left flank discomfort, occasional shortness of breath, and Dr. Williams' diagnosis was a strain of the lower thoracic cavity (Exhibit 6, page 31).

In August 1998, Claimant underwent surgery for colon cancer (Exhibit 7, pages 92-95).

In January 1999 Claimant mentioned right flank discomfort (Exhibit 6, page 29). A CT scan of the abdomen [followed], which showed no evidence of a herniation (Exhibit 7, page 103). In May 1999, she complained of 4th and 5th finger paresthesias and edema in her lower extremity and chronic low back discomfort (Exhibit 6, page 29).

In January 2001, Dr. Williams noted episodic discomfort in the right hip, thigh, and leg with some burning sensation, although no weakness or sensory decline (Exhibit 6, page 27). An x-ray was done, which showed degenerative changes in the lumbar spine, disc narrowing at L5-S1 and L3-L4, and anterior spurring noted, decreased height of T11 and T12 and bilateral renal calcifications (Exhibit 6, page 39).

In May 2001, Dr. Williams noted the Claimant planned to retire soon, and that it was more and more difficult [for] her to do her activities at work because of her back (Exhibit 6, page 27).

On January 10, 2002, Dr. Williams wrote that Claimant suffers from decreased range of motion in her c-spine and l-spine, recurring colon polyps, a probable abdominal wall hernia, and degenerative arthritis in her hands, neck and lumbar spine (Exhibit 11, page 113).

An MRI of the lumbar spine on April 29, 2002 revealed degenerative disc disease with diffuse bulging at L4-L5 and L5-S1, increased kyphosis at the level of T11-12,

minimal compression of vertebral body of T12 anteriorly and mild degree of protrusion of disc material (Exhibit 17, page 142).

Claimant saw Dr. Brooks on August 8, 2002 (Exhibit 23). He wrote that she suffered from severe pain in her back related to advanced degenerative osteoarthritis, with no spinal cord or nerve root entrapment, and stomach problems. He recommended physical therapy. A steroid injection was done on September 12, 2002 with good results.

On February 25, 2003, Dr. Williams completed a Medical Assessment of Ability to Do Work Related Activities (Exhibit 23). He wrote that she can lift up to 15 pounds, with up to 10 pounds frequently, and that she can stand a total of two hours in a workday.

Claimant testified that she verbally asked for accommodations, but was told that there was no light duty. She testified that she is unable to bend over or lift very well, and that she has pain in her low back from her belt line on down. Her back pain affects her daily activities, and she had pain every day she worked for the last two to three years. She testified that she is doing physical therapy now, but was not prior to leaving work.

The objective medical evidence does not indicate that Claimant is incapacitated from her job duties. She had relatively minor complaints to Dr. Williams about pain in her hands and back, and diagnostic tests have not shown incapacitating conditions. Dr. Williams never offered an opinion about her ability to work until after the disability application was filed, and his physical exams do not support his opinion now that she is disabled.

FINDINGS OF FACT

1. Claimant timely filed for disability retirement benefits on May 8, 2001.
2. Claimant has 180 months of KERS membership.
3. No reasonable accommodations were requested.

4. The objective medical evidence does not establish by a preponderance of the evidence that Claimant is incapacitated from her employment, nor that she is likely to remain so for a period of 12 months from her last date of paid employment.

CONCLUSION OF LAW

Claimant is not entitled to disability retirement benefits pursuant to KRS 61.600.

The circuit court affirmed, and this appeal followed.

First, Hinkle contends that the circuit court erred by failing to find that appellee's findings and conclusions were inadequate. We disagree.

KRS 61.665(3)(d) requires appellee to base its final orders “on substantial evidence appearing in the record as a whole and . . . set forth the decision of the board and the facts and law on which the decision is based.” As stated in *Kentucky Comm'n on Human Rights v. Fraser*, 625 S.W.2d 852, 856 (Ky. 1981), “[t]he rule in Kentucky is that if there is substantial evidence in the record to support an agency's findings, the findings will be upheld, even though there may be conflicting evidence in the record.” Further, “the trier of facts is afforded great latitude in its evaluation of the evidence heard and the credibility of witnesses appearing before it[,]” and it may choose what evidence to believe. *Bowling v. Natural Resources and Env'tl. Protection Cabinet*, 891 S.W.2d 406, 409-10 (Ky.App. 1984). This court's role is to review the agency's decision, not to reconsider or reinterpret the merits of the claim. *Kentucky Unemployment Ins. Comm'n v. King*, 657 S.W.2d 250 (Ky.App. 1983). The reviewing court may not substitute its judgment in place of the agency's judgment regarding the weight of the evidence

pertaining to issues of fact. KRS 13B.150(2); *Louisville Edible Oil Products, Inc. v. Revenue Cabinet Commonwealth of Kentucky*, 957 S.W.2d 272, 273 (Ky.App. 1997).

Contrary to Hinkle's argument, appellee's order included adequate findings of fact and conclusions of law. As shown above, the order included a detailed summary of the medical treatment Hinkle received from three different physicians. Although substantial evidence existed which could have supported a finding of disability, other substantial evidence clearly supported appellee's finding to the contrary, i.e., that Hinkle did not meet her burden of showing she was disabled from her job duties. *See* KRS 61.665(3)(d). We cannot say that the evidence was insufficient to support appellee's finding that the “objective medical evidence does not indicate the claimant is incapacitated from her job duties.”

Next, Hinkle raises several claims relating to the paragraph of appellee's order which immediately precedes the “Findings of Fact,” as set out above. Although Hinkle refers to the statements in that paragraph as “allegations,” the statements clearly constitute findings regardless of whether they are placed above or below the topic heading of “Findings of Fact.”

We reject Hinkle's claim that because the paragraph refers only to Dr. Williams, it should be concluded that appellee failed to consider the entire record. In fact, appellee's order specifically describes the evidence provided by each doctor. Similarly, we reject Hinkle's claim that the findings are not based on substantial evidence. Although Hinkle asserts that appellee ignored the evidence by describing as “relatively

minor” her “complaints to Dr. Williams about pain in her hands and back,” a different description is not compelled by the record's inclusion of several references, over the years, to the inherently subjective topic of “pain.” Indeed, although the record shows that Hinkle at one point was referred to a pain specialist, the record also shows that the specialist's treatment, by means of a single epidural steroid injection, was so successful that the specialist found further treatment unnecessary.

We also are not persuaded by Hinkle's complaint that the evidence failed to support the finding that “diagnostic tests have not shown incapacitating conditions.” Simply put, although the record reflects that Hinkle underwent tests which showed she incurred certain degenerative changes to her back, no showing was made that such changes caused her to be incapacitated or unable to perform her work.

Hinkle next complains that appellee erred by relying on the fact that Dr. Williams did not comment on Hinkle's ability to work until after the disability benefits application was filed. However, while the absence of such evidence was not proof of whether Hinkle was disabled at an earlier date, it was relevant to the determination of the time when Dr. Williams perceived that Hinkle's medical condition became incapacitating.

Next, Hinkle complains that appellee failed to clearly cite to the record to support its statement that “Dr. Williams' physical exams do not support his opinion now that she is disabled.” She also asserts that appellee impermissibly “played doctor” by picking and choosing which evidence to believe. Again, given the conflicting but substantial evidence adduced below, we must uphold appellee's findings regardless of

whether a panel of this court might have made a different decision if sitting as the trier of fact. *See Fraser*, 625 S.W.2d at 856.

Finally, we are not persuaded by Hinkle's assertion that appellee erroneously denied her claim because she did not request accommodations. A request for accommodations is not required prior to the filing of a claim for disability benefits, and the absence of such a request is not dispositive of a disability claim. Although appellee noted that no formal request was made, it does not appear that fact played a role in its decision to deny benefits.

The Franklin Circuit Court's order, affirming the denial of Hinkle's application for disability benefits, is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

James P. Benassi
Henderson, Kentucky

BRIEF FOR APPELLEE:

Jennifer A. Jones
Frankfort, Kentucky