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**SUPREME COURT GRANTED DISCRETIONARY REVIEW:
DECEMBER 12, 2007
(FILE NO. 2007-SC-0604-D)**

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001808-MR

CAROLYN LEDFORD

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE SAM G. McNAMARA, JUDGE
ACTION NO. 05-CI-00867

KENTUCKY RETIREMENT SYSTEMS;
BOARD OF TRUSTEES OF THE
KENTUCKY RETIREMENT SYSTEMS;
COUNTY EMPLOYEES RETIREMENT
SYSTEM; DISABILITY APPEALS
COMMITTEE OF KENTUCKY
RETIREMENT SYSTEMS

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * ** * ** *

BEFORE: COMBS, CHIEF JUDGE; NICKELL AND WINE, JUDGES

WINE, JUDGE: Carolyn Ledford was employed as a secretary/receptionist by the Laurel County Board of Education for 20 years, with 16.75 years of service in the County

Employees Retirement System (CERS). Her last date of paid employment was February 13, 2001. She applied for disability retirement benefits on March 9, 2001, claiming that she was unable to return to work due to asthma and pulmonary problems. Her application was denied by the medical review panel three times and she subsequently requested an administrative hearing.

The hearing officer recommended that Ledford's claim be denied because she was not functionally incapacitated from performing the duties of her position as accommodated by her employer. The Board of Trustees of the Kentucky Retirement Systems (the Board) adopted the hearing officer's findings, report and order and denied Ledford's application.

Ledford then filed a timely appeal to the Franklin Circuit Court pursuant to KRS 61.665(5) and 13B.140. The circuit court affirmed, concluding that the hearing officer's findings were supported by substantial evidence. Ledford now appeals to this Court.

On appeal, Ledford contends that the evidence "overwhelmingly demonstrates that [she] met the requirements of the statute to be granted disability retirement benefits" The objective medical evidence in the record supports this conclusion. The hearing officer clearly erred by rejecting the objective medical evidence submitted by Ledford's treating physicians in favor of the subjective and unsupported opinions of the medical review physicians. We further find that the hearing officer failed to consider the environmental factors in Ledford's workplace in determining her residual

functional capacity. Since the evidence which Ledford presented was so overwhelming that no reasonable person could have failed to be persuaded by it, the Board clearly erred by denying Ledford's application. Hence, we reverse and remand for entry of an award of disability retirement benefits.

In *McManus v. Kentucky Retirement Systems*, 124 S.W.3d 454 (Ky.App. 2003), 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:

Determination of the burden of proof also impacts the standard of review on appeal of an agency decision. 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 458-59 (citations omitted).

The uncontested medical evidence established, and the hearing officer found, that Ledford suffers from persistent asthma. The only question in this case is whether her asthma is so severe that she is permanently incapacitated from performing

her job duties. In support of her claim, Ledford primarily relied on reports from her treating physician, Dr. James R. Thomas, and her pulmonary specialist, Dr. Aqueel Mandviwala.

Both physicians opined that Ledford's work environment is causing her asthma to worsen and she should not expose herself to the allergens and germs present in the school office. The pulmonary tests provided by Ledford's physicians show a wide variation in results between 1997 and mid-2001. However, Dr. Mandviwala submitted results of a spirometry performed January 9, 2002, which showed a decline from the previous pulmonary functions of May 2001.

Ledford also testified in her own behalf and offered evidence from lay witnesses. Ledford and her daughter, Suzanna Cupp, both testified that Ledford's asthma has progressed to the point that she has difficulty carrying out normal activities. Likewise, Ledford's co-workers submitted letters stating that Ledford's condition deteriorated when she was exposed to conditions at the school. Similarly, Laurel County School Superintendent Walter Hulett and South Laurel Middle School Principal Jeff Reed confirmed these observations and added that they could not fully accommodate Ledford's condition at the school. Finally, Ledford submitted records showing that she was awarded Social Security disability benefits as of August 26, 2002.

In response, the Retirement Systems relied on the opinions of the medical review board physicians, Dr. Esten S. Kimbel, Dr. Parandhamulu Saranga, and Dr. Robert W. Strunk. None of these physicians personally examined Ledford, but instead

based their opinions on the medical records provided in support of her claim. The medical review physicians agreed that Ledford suffers from persistent asthma, but they concluded that the asthma does not prevent her from performing the essential functions of her position as accommodated.

In particular, they focused on the lack of objective medical evidence showing a deterioration in Ledford's pulmonary capacity. Dr. Strunk noted the variability in Ledford's pulmonary function tests, but he concluded that there had been little overall decline when viewed over the entire period. Dr. Strunk also acknowledged the decline in Ledford's pulmonary function as shown on the January 9, 2002 spirometry. But he discounted the results because it was based on only one trial of the pulmonary functions done, and because the test was performed before Ledford began broncho-dilator therapy.

In addition, Dr. Strunk noted that the periodic flare-ups of Ledford's asthma had improved with the use of oral Prednisone and antibiotics. But he did not dispute Dr. Thomas's concern that prolonged use of steroidal medications can have other harmful side-effects. Dr. Strunk also took the position that the accommodations offered by Ledford's employer would minimize her potential exposure to allergens or illnesses while working at the school.

Dr. Saranga observed that Ledford had not been hospitalized since 1998 due to asthma. Finally, Dr. Kimbel opined that Ledford may be disabled as a result of

Guillian-Barre Syndrome. But he noted that this condition may not be considered because it developed after Ledford's last day of paid employment.

In support of his conclusion denying disability retirement benefits, the hearing officer primarily relied on the opinions of the medical review physicians. The hearing officer found that "[t]he preponderance of the objective medical evidence contained of record indicates that the Claimant's asthma would not permanently prevent her from performing her usual work activity." The hearing officer also stated that Ledford's susceptibility to developing respiratory illnesses was not a basis for awarding disability. And while the hearing officer agreed that Ledford suffers from periodic flare-ups of her asthma, he concluded that these conditions are treatable with medication and that the school system has adequately accommodated Ledford to allow her to continue in her position. He further noted that Ledford had not been hospitalized for her asthma flare-ups for several years.

Disability retirement is controlled by KRS 61.600. The pertinent part of the statute reads:

(3) 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 as provided in 42 U.S.C. sec. 12111(9) and 29 C.F.R. Part 1630 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; [and]

(c) The incapacity is deemed to be permanent[.]¹

Ledford first contends that the hearing officer failed to give sufficient weight to the Social Security Administration’s decision finding that she was entitled to disability benefits under that system. But 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 KAR 1:210 § 8(1) & (2). Thus, the hearing officer was not required to defer to the Social Security ruling.

Likewise, we disagree with Ledford that the hearing officer improperly disregarded her Guillian-Barre Syndrome in determining the extent of her disability. The parties agree that Ledford developed Guillian-Barre Syndrome after she received a flu vaccination. Ledford contends that, since she took the flu shot to avoid further infection related to her asthmatic condition, the condition should be considered in determining the extent of her disability. However, the uncontested evidence clearly shows that Ledford developed Guillian-Barre Syndrome nearly two years after her last date of paid employment. Since disability benefits must be based upon an incapacitating condition

¹ KRS 61.600(3)(d) also requires the hearing officer to find that “the incapacity does not result directly or indirectly from bodily injury, mental illness, disease, or condition which pre-existed membership in the system” But since Ledford has more than 16 years of service with the CERS, this section does not apply. KRS 61.600(4)(b).

existing on the last date of paid employment, the later-developing condition could not serve as a basis for awarding disability retirement benefits.

Ledford next argues that the hearing officer was required to give greater weight to the opinions of her treating physicians over the opinions of non-examining physicians on the medical review board. There is no statutory or regulatory authority which requires the hearing officer to give more weight to any particular medical witness, whether a treating physician or a member of the medical review panel. While we would agree that a treating physician generally would be more familiar with the facts of a particular claim than a non-examining physician, we also must note that the decision to grant disability retirement benefits must be based on the objective medical evidence of record. KRS 61.600(3).

This leads us to the primary issue in this case: the sufficiency of Ledford's evidence of permanent incapacity. The Retirement Systems argues that the hearing officer properly discounted the conclusions of Ledford's treating physicians because they were not based on "objective medical evidence." However, the statutory definition of "objective medical evidence" includes more than just medical test results. Rather, KRS 61.510(33) defines "objective medical evidence" as:

[R]eports of examinations or treatments, medical signs which are anatomical, physiological, or psychological abnormalities that can be observed; psychiatric signs which are medically demonstrable phenomena indicating specific abnormalities of behavior, affect, thought, memory, orientation, or contact with reality; or laboratory findings which are anatomical, physiological, or psychological phenomena that can be shown by medically acceptable laboratory diagnostic techniques,

including but not limited to chemical tests, electrocardiograms, electroencephalograms, X-rays, and psychological tests[.]

Ledford's treating physicians provided detailed records detailing her course of treatment. In particular, the record includes the detailed reports of Drs. Thomas and Mandviwala. In addition, Ledford submitted records from other treating physicians, Drs. Glen R. Baker, Gordon P. Guthrie, Jr., and Neven J. Gardner. While these other physicians' records were mostly cumulative of those provided by Drs. Thomas and Mandviwala, they confirm the observations and reports of Ledford's primary treating physicians. These records constitute "objective medical evidence" within the meaning of KRS 61.510(33).

Furthermore, the "objective" medical tests demonstrate a decline in Ledford's pulmonary capacity. As noted above, Dr. Strunk took issue with the results of the January 9, 2002 spirometry. But Dr. Mandviwala responded to this criticism by stating that Dr. Strunk's recommended method of testing would interfere with Ledford's treatment and would be detrimental to her health. He also stressed that Ledford's spirometry readings were well below normal even while Ledford was on broncho-dilator therapy.

As a general rule, we would agree with the Retirement Systems that matters involving the weight to be given to particular medical testimony are within the exclusive province of the fact-finder. But the hearing officer is not entitled to cherry-pick medical evidence which lacks a sound factual support. Ledford's pulmonary function studies

were consistently below normal, and the January 9, 2002 spirometry showed a significant decline even while Ledford was undergoing treatment. Dr. Strunk's criticism of that test was not sufficient to entirely undermine the diagnoses of Ledford's treating physicians.

The hearing officer also focused on Dr. Saranga's observation that Ledford had not been to the emergency room or hospitalized for acute asthmatic attacks since 1998. The hearing officer conceded that the absence of such treatment was not determinative of the existence of an incapacitating condition. But he stated that it was indicative of the seriousness of the asthmatic condition.² We find no support in KRS Chapter 61 that a claimant must be hospitalized or bedridden before she may be considered incapacitated from performing the job duties of her position. Similarly, the absence of recent hospitalizations is not an objective indicator of the seriousness of Ledford's asthma.

Moreover, we strongly disagree with the Retirement Systems that disability benefits may not be awarded based upon Ledford's susceptibility to developing future illnesses in her work environment. A finding of permanent incapacity must be based upon the person's "residual functional capacity and physical exertion requirements." KRS 61.600(5)(a)2. KRS 61.600(5)(b) defines "residual functional capacity" as "the

² Contrary to the statement in the Retirement Systems' brief, Dr. Saranga did place significant weight on this factor. While his report of September 26, 2001, discusses other factors and evidence, he concludes "[s]ince [Ledford] has not been hospitalized since 1998 due to asthma and has not had any acute asthmatic attacks, the claimant is not qualified for disability retirement benefits."

person's capacity for work activity *on a regular and continuing basis.*" (Emphasis added).

The statute further sets out that the hearing officer must consider "environmental restrictions" in determining residual functional capacity. Thus, an employee may be physically incapacitated to perform her job duties based upon a heightened susceptibility to further injury or because further exposure to conditions in the workplace will exacerbate an existing condition. Otherwise, the disability retirement statute would have the perverse effect of requiring an employee either to leave her employment to preserve her health or to stay and risk a more serious injury.

Ledford's physicians testified that she should not work at the school given that her continued exposure to workplace allergens and illnesses, combined with the potential for side-effects from her medications, will likely cause her condition to deteriorate. The hearing officer was required to consider this factor in determining Ledford's residual functional capacity. But he specifically refused to do so. Such restrictions clearly reflect on Ledford's capacity for work activity on a regular and continuing basis. And none of the medical review physicians addressed the treating physicians' concerns about side-effects from prolonged use of steroidal medications. Since the medical review physicians disregarded these environmental and medical factors, the hearing officer clearly erred by relying on their opinions over those of Ledford's treating physicians.

Nevertheless, the Retirement Systems points to Dr. Strunk's testimony that the transmission of viral illnesses in the workplace "could easily be prevented by frequent hand washing and use of sanitizing alcohol gel." However, Superintendent Hulett specifically contradicted this opinion, stating that "the school district participated in a hand sanitizing program, with no significant reduction in absenteeism" Other employees also testified regarding the significant presence of mold, dust and other allergens at the school, as well as Ledford's observable difficulties performing in this environment. Because Dr. Strunk's opinion on this matter was unsupported by the evidence of the actual conditions at the school, the hearing officer could not reasonably rely on his testimony.

The Retirement Systems also contends that the school system's accommodation of Ledford would allow her to continue to perform her job duties. Indeed, the school district has made laudable efforts to accommodate Ledford's condition. But it is not required to reallocate essential functions of her position. *Holbrook v. City of Alpharetta, Georgia*, 112 F.3d 1522, 1528 (11th Cir. 1997).³ In his findings, the hearing officer noted that the school district allowed Ledford to take frequent breaks for her breathing treatments and doctors' appointments, allowed her to leave the building to avoid substances that could trigger an attack, and counseled co-workers against using air fresheners and perfumes which could also trigger an attack.

³ While *Holbrook* involved a claim under the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq., KRS 61.600(3)(a) requires the Board to consider the ADA and its regulations in determining what constitutes a "reasonable accommodation."

Despite these accommodations, Ledford's necessary absences substantially interfered with the performance of her job duties to the point that she was no longer able to continue working. Consequently, the hearing officer clearly erred in finding that the accommodations were reasonable and sufficient to allow Ledford to continue performing the essential functions of her position on a regular and recurring basis.

In conclusion, Ledford presented objective medical evidence supporting her claim that she is permanently incapacitated from performing her job duties. While the medical review physicians took issue with aspects of Ledford's objective evidence, they did not point to any objective medical evidence of record to support their contrary opinions. Furthermore, none of the medical review physicians adequately addressed the treating physicians' concerns about environmental factors in the workplace or the side-effects on Ledford from prolonged use of steroidal medications. In addition, Ledford supplemented the medical evidence with credible lay testimony describing her inability to continue working even with her employer's accommodations. This evidence clearly contradicts the unsupported, contrary opinions of the medical review physicians. Under the circumstances, we find that the Board applied the wrong standard in determining Ledford's residual functional capacity, and that it clearly erred in rejecting the objective medical evidence presented in support of Ledford's claim. Therefore, the Board's finding that Ledford was not qualified to receive disability retirement benefits was arbitrary and must be set aside.

Accordingly, the order of the Franklin Circuit Court affirming the order of the Board of Trustees of the Kentucky Retirement Systems is reversed and this matter is remanded for entry of an award of disability retirement benefits pursuant to KRS 61.600.

ALL CONCUR.

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