

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-001282-MR

JANICE TAYLOR

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 14-CI-00504

KENTUCKY RETIREMENT
SYSTEMS; and BOARD OF
TRUSTEES OF KENTUCKY
RETIREMENT SYSTEMS

APPELLEES

OPINION
AFFIRMING

** ** *

BEFORE: KRAMER, CHIEF JUDGE; D. LAMBERT AND J. LAMBERT,
JUDGES.

KRAMER, CHIEF JUDGE: Janice Taylor is 52 years of age and accumulated 104
months of service credit in the Kentucky Employee Retirement Systems (KERS)
working for the Cabinet for Health and Family Services in the position of Citizen

Assistance Specialist II, a job which involved sitting during the entire 7.5 hour work day. For the purpose of disability retirement benefits, her last date of paid employment was July 29, 2010.¹ Taylor has several pre-existing conditions in the region of her lower back which have intermittently disabled her from work prior to July 29, 2010. In her application for disability retirement benefits, filed February 9, 2011, Taylor claimed she was unable to continue working because she was afflicted with a new condition, coccydynia, which is characterized by intense pain in the coccyx (tailbone) when sitting. The Board of Trustees of the KERS (Board) ultimately denied Taylor's application because it was unpersuaded coccydynia rendered Taylor disabled since her last date of paid employment. *See* Kentucky Revised Statute (KRS) 61.600. Thereafter, Taylor appealed the Board's determination by filing an original action in Franklin Circuit Court. The issue presented in this appeal is whether the circuit court erred in affirming the final order of the Board. Finding no error, we likewise affirm.

Kentucky Revised Statute (KRS) 61.600 lists the eligibility requirements a KERS member must satisfy in order to receive disability retirement benefits. Relevant to this appeal, it provides:

(3) Upon the examination of the objective medical evidence by licensed physicians pursuant to KRS 61.665, it shall be determined that:

¹ Taylor was absent from work for the remainder of July and fourteen days during August, 2010. Accordingly, July 29, 2010, was Taylor's last day of paid employment that averaged 100 hours per month and was her last day of paid employment for purposes of disability retirement. *See* KRS 61.510(21).

(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 [. . .]

(Emphasis added.) As the parties acknowledge, the phrase “since the last day of paid employment,” emphasized above, anticipates that the totally disabling condition exists from the last day of paid employment forward. For parity of reasoning, *see, e.g., Rains v. Kentucky Retirement Systems*, No. 2010-CA-000441-MR, 2011 WL 2693972 at *2 (Ky. App. July 8, 2011).²

Taylor’s argument on appeal is that she is entitled to disability retirement benefits because she produced substantial evidence which she believes supports that pain attributable to coccydynia disabled her from performing her job on or going forward from July 29, 2010, her last date of paid employment; and because KERS did not produce substantial evidence to the contrary.

In making this argument, Taylor misapprehends what her burden was at the administrative level, and what our standard is for reviewing the decision of an administrative agency. In administrative proceedings, the claimant bears the burden of proving entitlement to a benefit by a preponderance of the evidence, and the claimant likewise carries the risk of non-persuasion. *See* KRS 13B.090(7). Where the fact-finder’s decision is to deny relief to the party with the burdens of

² We find *Rains* to be persuasive authority in this case and proper to cite as it fulfills the criteria of Civil Rule (CR) 76.28(4).

proof and persuasion, the issue on appeal is not whether the fact-finder's denial is supported by substantial evidence; rather, "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." *McManus v. Kentucky Ret. Sys.*, 124 S.W.3d 454, 458 (Ky. App. 2003).

Because Taylor initiated administrative proceedings to secure benefits under KRS 61.600, Taylor (the claimant) had the burden of proving—and persuading the Board (the fact-finder)—not only that she had a disabling condition, but that her condition has been disabling since her last day of paid employment. KERS had no reciprocal obligation to disprove either of those points, present any evidence in rebuttal, or otherwise challenge evidence Taylor presented which it deemed unconvincing. *Kentucky Retirement Systems v. West*, 413 S.W.3d 578, 581 (Ky. 2013). Accordingly, it is irrelevant whether Taylor produced substantial evidence supporting that she was disabled due to coccydynia, or that her coccydynia rendered her unable to work since her last day of paid employment on July 29, 2010. The dispositive issue on review is whether that evidence was "so compelling that no reasonable person could have failed to be persuaded by it." *McManus*, 124 S.W.3d at 458.

With that said, the evidence Taylor presented to support she has been unable to work since July 29, 2010, due to coccydynia, consists of the following:

- Testimony she provided during the March 23, 2013 administrative hearing regarding her application for benefits. Taylor explained she was repeatedly

absent from work beginning March 2010, due, either in part or in whole, to progressively increasing tailbone pain. She stood for the duration of the hearing and further explained that the pain in her tailbone made it impossible for her to sit for any length of time.

- A September 15, 2010 note from Taylor's colorectal surgeon, Dr. John Fox. Dr. Fox stated Taylor had been experiencing continuous and progressive pain in her tailbone since approximately May 2010, and that her tailbone pain was attributable to coccydynia.
- Treatment records from Taylor's neurosurgeon, Dr. John Vaughan. In particular, a note from December 30, 2010, states that Taylor "developed tailbone pain" several months before that date, and that Taylor stood or leaned against the exam table during her visit because, as she explained, it was too painful to sit for any amount of time. Dr. Vaughan's other notes regarding Taylor's visits to his office during February, 2011, also describe Taylor refusing to sit for any length of time due to complaints of tailbone pain.
- A May 17, 2013 note from her treating physician, Dr. William Childers. There, Dr. Childers recalled Taylor had complained of pain in her tailbone during a July 13, 2010 visit to his office, and that the pain had "made it nearly impossible for her to sit." Taylor's tailbone pain was so great, he added, that he disabled her from work on that date and for a number of days thereafter.

However, in determining whether this evidence is compelling, much less substantial, whatever in the record fairly detracts from its weight must be taken into consideration. *See Kentucky Bd. of Nursing v. Ward*, 890 S.W.2d 641, 643 (Ky. App. 1994).

Regarding Taylor's testimony that she was repeatedly absent from work beginning in March of 2010, either in part or in whole due to tailbone pain, nothing of record supports that proposition. The first medical record to indicate Taylor complained of tailbone pain is a treatment note from Dr. Childers dated August 18, 2010, in which Dr. Childers ordered an x-ray of Taylor's coccyx. While Taylor had accrued several doctor-excused absences from work between April and July, 2010, the doctor who provided her excuses, Dr. Childers, attributed those absences to Taylor's gastrointestinal problems and her recovery from a subsequent gallbladder surgery.

Dr. Fox's statement in his September 15, 2010 treatment note, to the effect that Taylor had been suffering from tailbone pain since approximately May of 2010, is at most a transcription of what Taylor told him during her appointment, not a medical opinion. Dr. Fox had never treated or otherwise met with Taylor prior to September 15, 2010. Nor, for that matter, could he have reviewed any records pre-dating August 18, 2010, indicating Taylor had been suffering from tailbone pain. No such records exist.

Similarly, while Dr. John Vaughan noted Taylor had developed tailbone pain several months before December 30, 2010, this was also a

transcription of what Taylor told him. The first time Dr. Vaughan evaluated Taylor for tailbone pain was *on* December 30, 2010.

As discussed, Dr. Vaughan also observed in his December 2010 and February 2011 treatment notes that it was impossible for Taylor to sit for even brief periods of time during routine examinations, and that doing so appeared to cause her acute pain. Taylor also refused to sit over the entire course of the two-hour hearing before KERS regarding her benefits application on March 23, 2013, complaining it was too painful to do so even briefly. But, two other treatment notes of record from Capital Medical Group, another of Taylor's medical care providers, tend to undermine the notion that, closer in time to her last date of paid employment on July 29, 2010, sitting caused Taylor unbearable and debilitating pain. The August 31, 2010 note from Capital Medical Group states Taylor complained of "a little pain in the area of the coccyx." This same note, along with another from December 31, 2010, further states Taylor's blood pressure was measured "in the sitting position," and that "The rhythm is regular. Level of Distress-Awake/Alert, No Acute Distress, Happy/Smiling."

Dr. Childers' May 17, 2013 note, in which Dr. Childers describes what he recalled of Taylor's complaints of intense tailbone pain during a July 13, 2010 visit to his office, is also contradicted by other records of his treatment of Taylor. The note that he wrote to excuse Taylor from work on July 13, 2010, only excused Taylor for one day, and it was due to what he described as "illness." In actuality, August 18, 2010, is the first occasion Dr. Childers indicated in any

record that Taylor was suffering from tailbone pain, or that he had begun treating her for it. Moreover, Dr. Childers submitted a FMLA provider certification, dated September 13, 2010, indicating the duration of Taylor's incapacity, due to not being able to sit as a result of coccydynia, would be from August 18, 2010 until after she underwent surgery. He then submitted a second FMLA provider certification, dated December 1, 2010, again indicating the onset of Taylor's coccydynia was August 18, 2010, and estimating her period of incapacity to be from August 18, 2010, through March 31, 2011.

Additionally, following his appointment with Taylor on August 18, 2010, Dr. Childers ordered an MRI of Taylor's coccyx and sacrum, the parts of the body affected by coccydynia. The MRI was noted to be normal. No objective medical evidence of record indicates Taylor's coccyx and sacrum have ever been otherwise.

As an aside, Taylor has moved this Court to take judicial notice of several internet websites indicating that, in many instances, MRIs and other diagnostics will not reveal the presence of coccydynia. Even if this were true, however, it would not support Taylor's case. Her burden on appeal is to identify evidence of record that compels a finding that pain from coccydynia has rendered her unable to work since July 29, 2010. While the absence of any objective indication that she has coccydynia may not *disprove* that she has that condition and that she has been suffering from it, it also does not *prove* that she has that condition, or how long she has been suffering from it.

Taylor also points out that the pain in her coccyx is so great that none of the many attempts at relieving her pain—attempts specifically directed at her coccyx and surrounding joints, such as injections—have succeeded or offered her much in the way of relief. But even if this were true, it could just as easily support a conclusion that the pain she subjectively felt in her coccyx was actually coming from somewhere else. This was the theory of Dr. Saroj Dubal, one of Taylor's pain management physicians. On January 13, 2011, he wrote in relevant part:

[Taylor] did see Dr. Fox, colorectal surgeon who had nothing to offer her surgically. He did inject steroid locally into the sacrococcygeal joint which did not provide benefit. Patient is tender over bilateral lumbar facet joints, she is more tender over both SI joints. MRI does show evidence of central and lateral recess stenosis. There is evidence of disc protrusion at L3-4, L4-5, and L5-S1 levels. MRI of the sacrum and coccyx is normal. Faber's is positive on both sides for pain in the SI joints. Her pain is increased with sitting and standing, and decreased with lying down.

Impression: After the procedure the patient was monitored in the recovery area. Although the patient did get some relief in the sacroiliac joints, she did not get any relief in the facet mediate pain and in the tailbone region. This is telling me that most of her pain is facet mediated and that the tailbone pain may also be related to facet joint arthropathy. Patient does have MRI findings of facet joint arthropathy.

In sum, the only evidence Taylor produced to support that she suffers to any extent from coccydynia consists of her subjective complaints of pain and diagnoses from her various treating physicians based entirely upon her subjective complaints of pain. Accounts of when she began complaining of pain attributable

to coccydynia, and to what degree, vary. But, the evidence Taylor produced to support that coccydynia has rendered her unable to perform her job since July 29, 2010, is less than compelling. As such, the Board acted within its authority by according Taylor's evidence little weight and, thus, denying her application for benefits. We therefore AFFIRM.

ALL CONCUR.

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