

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000340-MR

DARLENE JONES

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 06-CI-01141

KENTUCKY RETIREMENT
SYSTEMS

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON AND STUMBO, JUDGES; KNOPF,¹ SENIOR JUDGE.

KNOPF, SENIOR JUDGE: Darlene Jones appeals from an opinion and order of the Franklin Circuit Court entered on October 31, 2008, affirming a denial of Jones's application for disability retirement benefits by the Board of Trustees of

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.

the Kentucky Retirement Systems (KRS). The Board concluded that Jones had failed to establish that she was permanently disabled from performing her job or a job of like duties for a continuous period of over twelve months after her last day of paid employment. Jones argues that the circuit court erred by affirming the decision of the Board because the Board's decision was not supported by substantial evidence. However, after our review, we affirm.

FACTS AND PROCEDURAL HISTORY

Jones was born on December 17, 1954, and was previously employed as an account clerk by the Montgomery County Health Department. Her membership date in the Kentucky Employees Retirement System was March 5, 1990, and her last date of paid employment was April 11, 2004, giving her fourteen years of service credit. Jones's actual last day of work was December 13, 2003; after this date she was placed on extended medical leave by her treating physician and never returned to work. She eventually resigned.

For the first six years of her employment, Jones was stationed at the health department's school-based health clinic at Montgomery County High School. She was then transferred to the department's primary clinic site. Jones initially functioned as a clerical employee in the department's clinical section before becoming an account clerk and purchasing agent in the department's administrative section.

The administrative record reflects that Jones's job duties as an account clerk were sedentary to occasionally light in nature and involved tasks such as data

entry, filing, and computer work. Jones was also responsible for maintaining a filing system, assisting the health department's program coordinator with billing and financial reports, assisting with the overall management and processing of patient accounts receivables, and performing a number of duties relating to environmental permits. The job description provided by the health department indicated that Jones sat for approximately 6.5 hours per day, stood for approximately one hour per day, and had the ability to alternate between sitting and standing. Both Jones and the health department indicated that the heaviest weight lifted by Jones was fifty pounds on a seldom/rare basis. The health department further noted that Jones's position required "minimal physical effort" and that various accommodations and assistance were available to her.

Jones applied for disability retirement benefits with the Kentucky Retirement System on May 4, 2004.² She alleged that she was disabled due to major depressive disorder (recurrent and severe without psychotic features), anxiety disorder (not otherwise specified), a ganglion cyst, and a hand tremor. She also noted that she "cannot function when under pressure or stress or when my hands are shaking" and that she began experiencing her disabling conditions in September 2003 as the result of "increased scrutiny of my work" and "constant reprimands and criticism." Jones later submitted medical records in support of a claim that she was disabled due to issues with carpal tunnel syndrome and her cervical spine.

² During this same period of time, Jones also applied for Social Security disability retirement benefits and was awarded such in July 2004.

The medical evidence reflects that beginning in March 2000, Jones's primary care physician, Dr. Ronald Humphrey, began treating her for depression and anxiety, as well as for complaints of neck pain and spasms. By May of that year, Jones's depression and anxiety had worsened to the point that Dr. Humphrey placed her on medical leave from work for one week and referred her to another doctor for psychotherapy. Dr. Humphrey's records from May 18, 2000 note:

[Jones] comes in today. She is very upset, crying and tearful. She feels overwhelmed. She says she sleeps a lot but she does not think she is depressed. She has trouble concentrating. . . . She does not describe any particular work stressors. She is tired all of the time. She does wake up wanting to go but just does not have the energy to go. She just overall feels overwhelmed.... Affect is one that is strongly suggestive of depression as well as a great deal of anxiety. . . . There is a profound sense of her trying to cope and not being able to cope. . . . I think she has been trying to deny the fact that she is depressed. She certainly has all of the evidence and all of the symptoms that one would expect to see. I think she is totally overwhelmed.

Dr. Humphrey's records from the following week, however, reflect that Jones had made some progress after seeing a psychologist: "[Jones] is seeing the psychologist. She says she feels somewhat more in control. She still feels down. She did not realize that she was depressed and now understands that she has been for awhile. She is quite hopeful of working things out." Similar progress was documented after a visit on June 26, 2000: "[Jones] is seeing the psychologist. She still reports feeling somewhat down at times but overall she is doing much better."

For the next three years, Jones continued to receive treatment for depression and anxiety, and those conditions appear to have been managed fairly well. Jones continued to perform her duties at work in a competent manner and there is no indication that her issues were substantial enough to be considered disabling. However, in September 2003, following a departmental reorganization and resulting reassignment to a new job in which she was “overwhelmed with responsibilities,” Jones’s levels of depression and anxiety began to escalate. Dr. Humphrey’s medical records reflect a worsening of those conditions and note that Jones presented “essentially out of control, with intense crying, tremulousness, nausea, gasping, [and a] sense of hopelessness.”

Jones asserts that the quality of her work environment deteriorated rapidly from September 2000 to mid-December 2003 and that she received a barrage of complaints and job demands that only furthered her stress and anxiety. The record reflects a notable lack of organizational structure at the health department during this time. For example, Jones had three supervisors and they all often asked her to perform different duties at the same time. Jones also did not have appropriate training for a number of those duties. On December 12, 2003, Jones was placed on three-day suspension, without pay, for bad behavior and unsatisfactory job performance. This personnel action followed verbal admonishments in October 2003 and a written reprimand in November 2003.

Jones describes this suspension as “the straw that broke the camel’s back” in terms of her mental health.³

On December 15, 2003, Dr. Humphrey referred Jones to Dr. Dan Welch at Pathways, Inc. for a psychiatric evaluation and outpatient treatment due to “extreme depression” after she reported “feeling hopeless” because of issues at work. Records from Pathways reflect that Jones’s psychological issues had been exacerbated by an escalation of work-related stress but that she had probably been experiencing depressive symptoms for most of her life on a milder level. Jones indicated that she became “physically ill each morning at the thought of having to return to work” and that she frequently just sat on her couch and cried. After consulting with Dr. Humphrey, Dr. Welch placed Jones on an extended medical leave beginning December 16, 2003 and ordered her to attend individual and group psychotherapy sessions to help cope with her high levels of depression, anxiety, and stress. The record reflects that Jones continued attending these sessions – the group sessions, in particular – through September 2004 and that she behaved and participated in an appropriate manner during these sessions. However, there is also documentation from Pathways indicating that Jones was admitted as an inpatient with Pathways’ Crisis Stabilization Unit from January 6, 2005, through January 8, 2005. It is unclear why Jones was admitted or what treatment she received. An

³ Jones’s suspension was eventually reversed upon review by the Health Services Administrative Hearings Branch of the Cabinet for Health and Family Services Division of Administrative Hearings in Case No. AHB DPH 04-002. The lack of organizational structure at the health department and a lack of proper training for Jones were primary factors in the decision.

August 22, 2005 letter from Pathways indicates that Jones was continuing to attend individual psychotherapy sessions and therapeutic rehabilitation.

In June 2004, after Jones's application for disability benefits had been filed, she was referred to Dr. Timothy Coleman, a neurologist, because she was experiencing a tingling feeling and numbness in her arms, along with neck spasms and hand tremors. Jones notes that she had begun experiencing these conditions while she was still employed with the health department. An EMG/NCV performed on July 16, 2004, indicated that Jones suffered from mild right carpal tunnel syndrome with no evidence of generalized neuropathy or radiculopathy. An X-ray of Jones's cervical spine performed that same day indicated moderate degenerative changes but no nerve root compression, severe spinal stenosis, or other disabling condition. Dr. Coleman ultimately diagnosed Jones with carpal tunnel syndrome, thoracic outlet syndrome, and cervical spondylosis and attributed these conditions to Jones's employment.

On October 25, 2004, Dr. Coleman assessed Jones with a 6% whole-body impairment and recommended that Jones be restricted from work that requires repetitive motion with her hands. He further opined that Jones did not have the capacity to return to the type of work performed at the time of her injuries.⁴ However, there is no indication from the report that Dr. Coleman obtained any information regarding the status of Jones's treatment for carpal tunnel syndrome in determining her impairment rating.

⁴ This opinion was set forth in a medical evaluation provided in response to a request for medical records filed in Jones's claim before the Department of Workers' Claims.

Jones was also treated by Dr. Mark Einbecker, a hand surgeon, for these issues, and he diagnosed her with bilateral thoracic outlet syndrome with mild bilateral carpal tunnel syndrome. Dr. Einbecker treated Jones's carpal tunnel syndrome with injections and splints. Jones also attended a number of physical therapy sessions but was discharged from physical therapy at her request on October 25, 2004, without completing her prescribed program. In November 2004, Dr Anup Chatta performed successful carpal tunnel release surgery on Jones's right hand. Follow-up notes reflect that Jones experienced much less numbness and tingling in the hand and that there was good resolution of her symptoms. Similar surgery on Jones's left hand was scheduled for December 2004; however, it is unclear from the record whether this surgery was ever performed.

Jones also submitted an independent medical examination conducted by Dr. Terry Trout, who ultimately assessed a 27% impairment of Jones's upper extremity and a 16% whole body impairment. As to Jones's ability to return to work, Dr. Trout noted:

Ms. Jones shows evidence of numerous musculoskeletal conditions with associated pain and functional loss as described on my physical examination findings and associated diagnoses. She also suffers from a psychiatric disorder noted by and treated by psychiatrist, Dr. Welch. Combination of these findings diminished Ms. Jones' functional capacity in stress-related work environments and also in repetitive tasks with the bilateral upper extremities. Based upon this information and my physical examination findings, Ms. Jones does not have the capacity to return back to baseline level of gainful employment at the Montgomery County Health Department. Repetitive nature of these job tasks would

only aggravate her current clinical findings of the above noted diagnoses.

An MRI of Jones's cervical spine was performed in September 2005 in order to evaluate her continuing upper extremity pain and numbness. The MRI report indicates "[s]evere right-sided stenosis and moderate severe left-side stenosis and neural foraminal encroachments at C5-6," "central disc herniation and bulge resulting in moderate severe stenosis at C4-5 and severe right-sided neural foraminal narrowing at C4-5," and "moderate to severe neural foraminal encroachment at C4-5 on the left." As a result of these issues, Jones underwent an anterior cervical discectomy and fusion with instrumentation on November 7, 2005. The operating surgeon, Dr. John Vaughn, opined that Jones's issues were work-related due to fourteen years of lifting weights ranging from fifty to one hundred pounds and that she was disabled and incapable of returning to work. However, there is no indication in the record that Jones ever regularly lifted such heavy weights. On December 5, 2005, Jones advised Dr. Vaughn that her pain was much improved and that she was able to move her upper extremities well.

Jones's application for disability retirement benefits was denied multiple times on initial consideration and requests for reconsideration by the KRS Medical Review Board physicians because the evidence submitted by Jones in support of her claim was found to be unconvincing. Jones subsequently requested an administrative hearing, and one was held on September 23, 2005.

At the hearing, Jones testified that since she had stopped working she had been attending physical therapy three or four days a week. Her family let her drive to therapy, but she was not able to drive to other places because of her right hand becoming numb when she drove. Jones indicated that she had occasional panic attacks and recently had had one a few days before the hearing. She further testified that she was unable to perform her duties as an account clerk because she was unable to concentrate and when she touched a computer she felt swelling in her head, her blood pressure went up, and she became sick to her stomach. Jones noted that she used to love doing her job and that she was a perfectionist.

On May 23, 2006, the hearing officer submitted his “Report and Recommended Order” concluding that Jones was entitled to disability retirement benefits pursuant to KRS 61.600. The hearing officer also found that Jones did not meet the qualifications for enhanced benefits under the Fred Capps Memorial Act pursuant to KRS 61.621.⁵ On July 18, 2006, the Disability Appeals Committee of the KRS Board of Trustees issued a “Final Order” rejecting the Hearing Officer’s “Report and Recommended Order” in accordance with KRS 13B.120 and denying Jones’s application for disability retirement benefits. The Board provided the following bases for its decision:

- 4) The Claimant made her application on major depressive disorder, recurrent, severe without psychotic features, anxiety disorder not otherwise specified, ganglion cyst and hand tremor.

⁵ This particular ruling is not at issue in this appeal.

5) Although the Claimant did not allege any incapacity related to a cervical condition, records submitted indicate the Claimant underwent anterior cervical discectomy and fusion on November 11, 2005, well more than a year after her last day of paid employment. Follow up records indicate the operation was successful and the Claimant was limited in her lifting, bending and twisting for three months following the surgery. As of the Claimant's last day of paid employment, April 2004, the records related to her cervical spine condition reflect that she was suffering from spurring at various levels and degenerative changes and was not incapacitated from her sedentary to occasional light work activity. Even assuming the Claimant was incapacitated by her cervical condition as of her last day of paid employment, she underwent successful surgery and her only limitations were in lifting, bending and twisting for three months. There has been no functional capacity evaluation submitted to indicate the Claimant would be unable to perform her usual primarily sedentary work activity.

7) The Claimant also did not make application for disability based upon carpal tunnel syndrome. The Claimant has not established that she was permanently incapacitated by carpal tunnel as of her last day of paid employment or even at the present time. The July 17, 2004 nerve conduction study revealed mild right carpal tunnel syndrome with no evidence of generalized neuropathy. The Claimant underwent a right carpal tunnel release on November 12, 2004 and Dr. Chattha reported that the numbness and tingling were "much, much better" and that the Claimant had good resolution of her symptoms. A left carpal tunnel release was scheduled for December 10, 2004. Reports of this operation were not submitted. However, Dr. Coleman reported in his independent medical examination that nerve conduction studies taken May 9, 2005 were normal.

8) The Claimant's application was made based on her mental condition. There are various records from

Pathways concerning her anxiety and depression, which appear to be related to her employment situation. Specifically, being assigned new and additional tasks and the subsequent disciplinary actions taken against her. The records indicate that Claimant is attending group and individual therapy sessions. Notations are made that the Claimant is improving, is in good spirits and feeling relieved that she resigned from her position. Ms. Arthur, licensed psychological assistant, submitted a letter dated August 22, 2005 indicating the Claimant was being treated with medication and counseling and was not able to return to her former employment because of extreme stressors at work, as reported by the Claimant. While the claimant may suffer from some degree of anxiety and depression, there has been no objective evidence submitted to establish a permanent incapacity related to her psychiatric conditions. The Claimant must establish that she is incapacitated from her job or a job of like duties, not that she is having situational conflicts at work that cause her stress.

Jones subsequently filed a petition for review in the Franklin Circuit Court pursuant to KRS 13B.140. On October 31, 2008, the circuit court entered an “Opinion and Order” in which it affirmed the denial of Jones’s application for disability retirement benefits. The court justified its decision as follows:

The basis for Petitioner’s claim for disability retirement benefits stems primarily from her diagnosis of several mental health conditions before her last day of work. KRS properly rejected the Hearing Officer’s Report and Recommended Order, as it contained contradictory statements and clearly erroneous conclusions of law. KRS issued its own Final Order, which denied Plaintiff’s claim. The Final Order of KRS is based upon substantial evidence on the record, and thus this Court cannot find that it is arbitrary and capricious, as required to reverse the decision of KRS in this matter.

KRS cites significant evidence in the record to indicate that Mrs. Jones’ mental health conditions were in large

part caused or exacerbated by her work environment. In particular, the variety of duties she was required to perform and the lack of organizational structure which led to Mrs. Jones having three (3) direct supervising employees, each demanding the performance of different duties within the same periods of time likely contributed to her decision to resign from her position and apply for disability retirement benefits.

However, it appears that since leaving her position, Mrs. Jones has had significant improvement in her condition. Multiple reports cited in the record indicate that treatment has had a substantial positive impact on her condition, and that the depression and anxiety disorders may have been, in large part, a result of her working conditions and occupational stress. This evidence supports a finding that she was not mentally or physically incapacitated from performing her job or a job of like duties for a period of one year from her last day of paid employment. Rather, the record suggests that Mrs. Jones may have been able to undertake jobs with like duties within one year, or may even have been able to return to her job with the help of reasonable accommodations, such as a more structured work environment in terms of duties and supervisory hierarchy.

Mrs. Jones' testimony and the evidence of record do not compel a finding of disability, as is required for this Court to overturn the decision of KRS. Quite to the contrary, the evidence seems to support a finding that with treatment and either a lateral move to another similar position or reasonable accommodations by her employer, she would have been able to return to work without the stress that seems to have precipitated many of her physical and mental symptoms.

Jones filed a motion for reconsideration that was denied on February 3, 2009. This appeal followed.

DISCUSSION

On appeal, Jones argues that the circuit court erred in affirming the administrative decision denying her application for disability retirement benefits and claims that that decision went against the evidence. Pursuant to KRS 13B.090(7), the burden of proof rests on the party who is seeking benefits from the agency. *McManus v. Kentucky Ret. Sys.*, 124 S.W.3d 454, 457-58 (Ky. App. 2003). In cases where a party seeking disability retirement benefits was denied such, “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.” *Id.* at 458. “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.” *Aubrey v. Office of Attorney Gen.*, 994 S.W.2d 516, 519 (Ky. App. 1998). Accordingly, “[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.” *McManus*, 124 S.W.3d at 458. Ultimately, this court’s role “is to review the administrative decision, not to reinterpret or reconsider the merits of the claim.” *Lindall v. Kentucky Ret. Sys.*, 112 S.W.3d 391, 394 (Ky. App. 2003).

KRS 61.600 provides members of the County Employees Retirement System with disability retirement benefits when certain conditions are met. That statute provides, in relevant part, as follows:

- (1) Any person may qualify to retire on disability, subject to the following conditions:

(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;

(c) The incapacity is deemed to be permanent; and

(d) The incapacity does not 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. For purposes of this subsection, reemployment shall not mean a change of employment between employers participating in the retirement systems administered by the Kentucky Retirement Systems with no loss of service credit.

(4) Paragraph (d) of subsection (3) of this section shall not apply if:

(a) The incapacity is a result of bodily injury, mental illness, disease, or condition which has been substantially aggravated by an injury or accident arising out of or in the course of employment; or

(b) The person has at least sixteen (16) years' current or prior service for employment with employers participating in the retirement systems administered by the Kentucky Retirement Systems.⁶

Essentially, then, a person seeking benefits is required to show, via “objective medical evidence,” a permanent⁷ inability – because of bodily injury, mental illness, or disease – to perform her old job duties. Moreover, these incapacitating conditions cannot have existed prior to the applicant’s membership in the system.

After reviewing the administrative record and the parties’ arguments, we cannot say that they compel reversal of the administrative decision since “[t]he evidence is not so overwhelming that the hearing officer’s decision was unreasonable.” *McManus*, 124 S.W.3d at 459. The fact that we might disagree with the administrative decision or that there is some evidence in the record that would support a different result is of no consequence. As to Jones’s claim of permanent disability as the result of depression and/or mental anxiety, the KRS Board of Trustees and the circuit court concluded that these conditions were greatly exacerbated by the particular working conditions at the health department and that given better training and a better work environment, Jones would be able to perform her job duties given reasonable accommodations. We cannot say that

⁶ KRS 61.600 also requires preliminary qualifications such as length of service and timely filings, but these appear to have been satisfied.

⁷ Under KRS 61.600, “[a]n incapacity shall be deemed to be permanent if it is expected to result in death or can be expected to last for a continuous period of not less than twelve (12) months from the person’s last day of paid employment in a regular full-time position.” KRS 61.600(5)(a)(1).

this conclusion is unsupported by the evidence. Although Jones clearly suffered from depression and other mental issues, those issues were indisputably manageable and non-disabling prior to the health department's reorganization in September 2003. It was at this point that Jones's mental health began to deteriorate to a significant extent. The record reflects that once Jones left the health department, she experienced significant improvement in her condition and was able to manage it with treatment and medication.⁸ The circuit court ultimately concluded:

This evidence supports a finding that [Jones] was not mentally or physically incapacitated from performing her job or a job of like duties for a period of one year from her last day of paid employment. Rather, the record suggests that Mrs. Jones may have been able to undertake jobs with like duties within one year, or may even have been able to return to her job with the help of reasonable accommodations, such as a more structured work environment in terms of duties and supervisory hierarchy.

In light of our limited role as a reviewing court in these cases, we cannot say that this conclusion was unreasonable and that reversal is required.

Jones also claims permanent disability due to her issues with carpal tunnel syndrome and pain in her cervical spine. However, the record reflects that Jones recovered well from carpal tunnel release surgery on her right hand and also from cervical spine surgery that took place well more than a year after her last day

⁸ The record does reflect one "flare-up" of Jones's mental health issues in January 2005 when she was admitted into Pathways' Crisis Stabilization Unit for three days. However, it is unclear what the cause of this incident was or how Jones was treated. Without such, it is difficult, if not impossible, to conclude that it was an indication of continuing permanent disability.

of paid employment. There is also no indication that these issues were disabling as of that date. As noted by the KRS Board of Trustees:

As of the Claimant's last day of paid employment, April 2004, the records related to her cervical spine condition reflect that she was suffering from spurring at various levels and degenerative changes and was not incapacitated from her sedentary to occasional light work activity. Even assuming the Claimant was incapacitated by her cervical condition as of her last day of paid employment, she underwent successful surgery and her only limitations were in lifting, bending and twisting for three months. There has been no functional capacity evaluation submitted to indicate the Claimant would be unable to perform her usual primarily sedentary work activity.

Moreover, Jones reported significant improvement in her carpal tunnel issues once surgery was performed on her right hand. Consequently, once again we cannot conclude that the evidence in Jones's favor on these issues is "so compelling that no reasonable person could have failed to be persuaded by it." *McManus*, 124 S.W.3d at 458. Thus, reversal is not merited.⁹

Jones next argues that the hearing officer, the KRS Board of Trustees, and the circuit court failed to consider the "cumulative effect" of her impairments in denying her disability benefits application. In *Kentucky Retirement Systems v. Bowens*, 281 S.W.3d 776 (Ky. 2009), our Supreme Court held that KRS is required to consider the "cumulative effect" of all of an applicant's medical problems in

⁹ We also note that the circuit court never actually addressed the issue of whether Jones was disabled for reasons other than her depression and mental anxiety. Thus, it is doubtful that these issues have even been preserved for our review. Generally, "[t]he Court of Appeals is without authority to review issues not raised in or decided by the trial court." *Reg'l Jail Auth. v. Tackett*, 770 S.W.2d 225, 228 (Ky. 1989).

making its disability determination. *Id.* at 783. Jones argues that such has not occurred here.

Bowens was not rendered until April 23, 2009 – after the circuit court entered its decision – which raises the question of whether that decision should apply here. However, a new precedent cannot be applied retroactively unless the subject issue was preserved for review. *Burns v. Level*, 957 S.W.2d 218, 222 (Ky. 1997). Our review of the record fails to show that the issue was ever raised below, and Jones has provided us with no statement of preservation on the matter, as required by CR 76.12(4)(c)(v). Therefore, we decline to consider her argument.

CONCLUSION

For the foregoing reasons, the judgment of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Darlene Jones, *pro se*
Jeffersonville, Kentucky

BRIEF FOR APPELLEE:

Jennifer A. Jones
Frankfort, Kentucky