

RENDERED: JULY 15, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001533-MR

SHARON KIRKLAND

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 07-CI-01916

KENTUCKY RETIREMENT SYSTEMS; AND
BOARD OF TRUSTEES OF THE KENTUCKY
RETIREMENT SYSTEMS

APPELLEES

OPINION
AFFIRMING

** ** *

BEFORE: DIXON, KELLER AND VANMETER, JUDGES.

KELLER, JUDGE: Sharon Kirkland (Kirkland) appeals from the circuit court's order affirming the order of the Board of Trustees of the Kentucky Retirement Systems (the Board) denying Kirkland's application for retirement disability benefits. On appeal, Kirkland argues that she made a *prima facie* case of

disability, which the Board failed to rebut, thus compelling the Board to find in her favor. For the following reasons, we disagree and affirm.

FACTS

The parties do not dispute the underlying facts. Kirkland began working for the Lexington Fayette Urban County Government (LFUCG) as an equipment operator in 2002. Her primary duties involved operating a street sweeper, which required her to occasionally lift up to fifty pounds; to climb stairs, ramps, or ladders; to use vibratory equipment; and to sit and stand throughout an eight-hour day. In addition to operating the street sweeper, Kirkland performed basic maintenance that involved changing the brushes and cleaning the vehicle. Kirkland's job description indicated that she could also be called on to operate a dump truck, backhoe, lawn mower, and other equipment.

On October 26, 2004, Kirkland stepped in a hole near a fire hydrant. She testified that she went into the hole up to her left knee and, as a result, injured her left knee, left shoulder, and low back. In the following two years, Kirkland underwent surgeries to her knee, back, and shoulder. Believing that she is totally disabled, Kirkland sought workers' compensation and retirement disability benefits. The medical review board recommended denial of Kirkland's request for retirement disability benefits, and she requested a hearing. The hearing officer also recommended denial of benefits and the Board, through the disability appeals committee, adopted the hearing officer's recommendation. Kirkland then sought review by the circuit court. The circuit court, after conducting a thorough review

of the administrative record and the law, affirmed the Board's denial. This appeal followed.

We note that Kirkland settled her workers' compensation claim based on an agreed total permanent disability, and the record from the Department of Workers' Claims is part of the administrative record herein. We set forth additional facts as necessary to address the issues raised by Kirkland on appeal.

STANDARD OF REVIEW

The Board, through the hearing officer, is the trier of fact and is entitled to choose what evidence to believe. *Bowling v. Natural Resources and Environmental Protection Cabinet*, 891 S.W.2d 406, 410 (Ky. App. 1994). If the party with the burden of proof is denied relief by the fact-finder, "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 Retirement Systems*, 124 S.W.3d 454, 458 (Ky. App. 2003). We reverse the Board's findings of fact only upon a showing that the Board acted arbitrarily. *See Bowling*, at 409. As long as the Board's decision is supported by evidence that "has sufficient probative value to induce conviction in the minds of reasonable persons," and is not arbitrary, we cannot disturb it on appeal. *Hughes v. Kentucky Horse Racing Authority*, 179 S.W.3d 865, 871 (Ky. App. 2004).

With these standards of review in mind, we analyze the issues raised by Kirkland on appeal.

ANALYSIS

Kentucky Revised Statute(s) (KRS) 61.600 provides that a person must have sixty months of service before she qualifies for retirement disability benefits. Because Kirkland has less than sixty months of service, she is foreclosed from receiving benefits under that provision of the Act.

However, Kirkland is not foreclosed from receiving benefits. KRS 61.621 provides benefits to employees who become "totally and permanently disabled to engage in any occupation for remuneration or profit as a result of a duty-related injury." The statute defines duty-related injury as a single work-related "traumatic event" that produces "a harmful change in the human organism evidenced by objective medical findings." KRS 61.621(2). Therefore, to be entitled to disability retirement benefits, Kirkland was required to show that she is totally and permanently disabled as the result of a work injury. The hearing officer, the Board, and the circuit court found that she failed to meet her burden of proof on those issues. We agree, at least as to the issue of total permanent disability.

The administrative record contains a number of medical records/reports, the most salient of which are summarized below.

Dr. Vaughan performed a discectomy on Kirkland's herniated L4-5 disc in May 2005. In November 2005, Dr. Vaughan noted that Kirkland suffered from some residual back and leg pain, but stated that she had reached maximum medical improvement. Dr. Vaughan assigned Kirkland a 13% impairment rating

and stated that she should avoid lifting more than 25- to 30 pounds and repetitive bending and twisting.

Dr. D'Angelo began treating Kirkland in November 2004 for her complaints of left knee pain and shoulder pain. When conservative treatment failed to provide any significant relief, Dr. D'Angelo performed left knee arthroscopic surgery in March 2005. Dr. D'Angelo treated Kirkland until July 2005, noting continued complaints of left knee and shoulder pain. We note that Dr. D'Angelo did not address impairment or restrictions.

In part because she was unhappy with her failure to improve under Dr. D'Angelo's care, Kirkland began treating with Dr. Corbett for her shoulder and knee complaints in August 2005. Dr. Corbett performed left shoulder arthroscopic surgery in October 2005 and treated Kirkland's knee conservatively. We note that Dr. Corbett did not perform any knee surgery, presumably because two MRIs he ordered revealed surgical changes and degenerative changes but no significant pathology. In February 2006, Dr. Corbett stated that Kirkland had reached maximum medical improvement from the shoulder surgery and noted that Kirkland's knee was her only source of significant pain. In March 2006, Dr. Corbett assigned Kirkland a 7% impairment rating for her shoulder and a 1% impairment rating for her knee. Furthermore, Dr. Corbett stated that Kirkland should avoid: lifting more than 30 pounds with her left arm; prolonged standing and walking; repetitive squatting, kneeling, and crawling; pushing/pulling with her left arm; and more than occasional use of her left arm above shoulder level.

Because of ongoing complaints of back pain, Kirkland received pain management treatment from Dr. Douglas from September 2005 through February 2006. That treatment appears to have consisted of a series of epidural steroid injections, which provided only partial temporary relief. We note that Dr. Douglas did not address impairment rating or restrictions.

Dr. Troutt¹ performed an independent medical evaluation of Kirkland for her workers' compensation claim. In his report, Dr. Troutt noted that Kirkland continued to complain of left shoulder, left knee, and low back pain with decreased sensation in the left thigh, leg, and foot. Following his examination, Dr. Troutt assigned Kirkland an 8% impairment rating for her knee, an 11% impairment rating for her shoulder, and an 18% impairment rating for her low back.

Furthermore, Dr. Troutt stated that Kirkland should lift no more than fifteen pounds with her left shoulder; should avoid climbing, running, jumping, crawling, squatting, repetitive bending and twisting at the waist; should not push/pull more than ten pounds; and should sit and stand as dictated by her pain. He concluded that, with these restrictions, Kirkland is totally disabled. We note that, although Dr. Troutt conducted a records review, he only reviewed records post-dating Kirkland's October 2004 injury.

Dr. Crystal, who performed a vocational evaluation for Kirkland's workers' compensation claim, stated that, with her education, training, experience,

¹ We note that Kirkland refers to a "Dr. Terry" in her brief. We can find no Dr. Terry in the record. However, because Dr. Troutt's first name is Terry, we presume that Kirkland's references are to Dr. Troutt.

and restrictions, Kirkland would qualify for fewer than 2- to 4% of the jobs in the economy. According to Dr. Crystal, after factoring in Kirkland's low aptitude and intelligence test scores, she is totally disabled.

Dr. Kimbel preformed a medical records review on March 29, 2006, and noted Kirkland's complaints and multiple surgeries. Dr. Kimbel stated that he found no evidence of any significant post-surgery complications and that Kirkland's restrictions would keep her from heavy lifting, stooping, squatting, and frequent bending. Based on his file review, Dr. Kimbel concluded that Kirkland was not totally disabled, and he recommended denial of her application for benefits.

Dr. McElwain, who also performed a medical records review on March 29, 2006, stated that the records contained variances between Kirkland's complaints and the physicians' objective findings. Dr. McElwain also noted that Kirkland's examination findings varied "with and without diversion." Because of these inconsistencies, Dr. McElwain could not render an opinion and recommended an independent medical evaluation.

Dr. Keller,² who performed a medical records review on April 4, 2006, noted that Kirkland's work had been "moderately strenuous." Furthermore, Dr. Keller noted that, although Kirkland continued to complain of back and leg pain, she could perform less strenuous work. Finally, Dr. Keller stated that, with

² Dr. Keller and Judge Keller are not related.

additional recovery, Kirkland might be able to return to her job as an equipment operator.

The remaining pertinent records from Kirkland's workers' compensation claim indicated that she filed a claim for benefits related to a 1991 back injury. Dr. Patrick, who examined Kirkland during the litigation of that claim, assigned her a 1% impairment rating and limited her to lifting no more than twenty pounds. Dr. Bailey, who treated Kirkland for her injury, assigned her a 40- to 50% impairment rating and stated that he did not believe she would be able to work in a job that required lifting, bending, carrying, climbing, twisting, or stooping. Dr. Twyman, who appears to have conducted an independent medical exam, assigned Kirkland a 20% impairment but did not address restrictions. Kirkland settled her claim based on a 30% permanent partial disability. It does not appear that Kirkland received any significant medical treatment following that settlement.

Finally, the record reflects that Kirkland received treatment for a work-related low back injury in 1996, for a foot injury in 1998, and for a chest injury in 2000.

Based on the above evidence, the hearing officer found that Kirkland's conditions had been surgically corrected and that there was "no evidence of remaining disabling conditions for her knee, back, or shoulder." She then concluded that Kirkland was not permanently and totally disabled and that the conditions for which she sought benefits preexisted her membership in the

retirement system. The Board adopted the hearing officer's findings and, on appeal, the circuit court affirmed the Board.

In affirming the Board, the circuit court noted that Kirkland had argued the incorrect standard for determining entitlement to benefits. As noted by the circuit court, because Kirkland did not have sufficient service time, she was obligated to prove that she is totally and permanently disabled from any occupation, not just from returning to her preinjury job. KRS 61.621. Using that standard, the court concluded the Kirkland failed to present evidence sufficient to compel a finding in her favor. We agree.

As noted above, several physicians placed restrictions on Kirkland. She argues that, absent rebuttal evidence, the Board was compelled to find in her favor. We recognize that, in certain circumstances, the Board may be required to put forth rebuttal evidence to overcome a claim for benefits. However, the Board is not required to do so until the claimant has met her burden, i.e., proven her disability by a preponderance of the evidence. *See Personnel Board v. Heck*, 725 S.W.2d 13, 17 (Ky. App. 1986).

If Kirkland were correct and her only burden were to establish that she is permanently disabled, the Board may have had the obligation to come forth with rebuttal evidence. However, as noted by the circuit court, Kirkland has not framed the issue correctly. Because of Kirkland's limited years of covered service, the issue is not whether she is simply permanently disabled; rather the issue is whether she is permanently disabled from engaging in any occupation. KRS 61.621(1).

Based on the restrictions from Drs. Corbett and Vaughan, Kirkland can perform sedentary, light, and some medium work as defined by KRS 61.600(5)(c). Thus, there was substantial evidence in the record to support the Board's denial of Kirkland's claim for benefits, and the Board had no obligation to offer any "rebuttal evidence." Furthermore, in light of the restrictions from Drs. Corbett and Vaughan, Kirkland's argument that the evidence compelled a finding in her favor is without merit.

CONCLUSION

For the foregoing reasons, we affirm the circuit court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEES:

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