

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-002028-MR

BARBARA GUTHRIE

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 12-CI-00203

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

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; JONES AND NICKELL, JUDGES.

ACREE, CHIEF JUDGE: At issue is whether the Franklin Circuit Court erred when it affirmed the final order of the Board of Trustees of the Kentucky Retirement Systems denying Appellant Barbara Guthrie's application for disability retirement benefits. Finding no error, we affirm.

I. Facts and Procedure

Guthrie worked as a licensed professional nurse (LPN) at Bluegrass Oakwood, Inc., a mental-health facility in Somerset, Kentucky, from April 16, 2002, to June 17, 2008. That position afforded Guthrie membership in the Kentucky Employees' Retirement System. Her last day of paid employment was June 17, 2008, and, as of that date, she had accrued at least 75 months of service.

As an LPN at Oakwood, Guthrie performed nurse-related duties under the supervision of a registered nurse (RN). She cared for ill or injured patients by administering medication and treatments, feeding and bathing patients, and responding to patient emergencies. She frequently lifted charts and supplies weighing 20 pounds, and occasionally lifted up to 50 pounds. Guthrie also claimed she occasionally lifted over 100 pounds, but Oakwood countered Guthrie's assertion and reiterated that she had co-worker assistance. Guthrie was further required to repetitively handle/finger/feel, reach/push/pull, bend/stoop/crouch, and frequently kneel/crawl and climb/balance. Her duties were deemed heavy work. She worked 7.5 hours per day, of which she was sitting 1 to 2.5 hours. The position required a great deal of walking in the various patient wards, and over grassy and uneven lawns. Guthrie never requested reasonable accommodations.

Guthrie applied for disability retirement benefits on November 27, 2008, pursuant to KRS¹ 61.600.² In her disability petition, she alleged total and

¹ Kentucky Revised Statutes.

² Guthrie also requested duty-related disability benefits, but later abandoned that claim.

permanent disability as a result of her knees being “worn out” with bone-to-bone contact, and also due to possible arthritis. A panel of medical examiners twice denied Guthrie’s application. The review physicians suspected Guthrie’s knee issues pre-dated her employment. Dr. Keller of the Medical Review Board, after examining Guthrie’s medical records, concluded that she likely has a long history of osteoarthritis and that, in all reasonable medical probability, it preceded her time of employment in April 2002.

Similarly, Dr. Growse of the Medical Review Board observed that Guthrie’s medical records indicate she has advanced degenerative joint disease in both knees without evidence of localized trauma; the degree of joint disease is very advanced with consistency of at least a 10-year history of chronic disease.

Guthrie then invoked her right to an administrative hearing pursuant to KRS Chapter 13B. Guthrie compiled her medical evidence and submitted it to the hearing officer. We have chosen to recount only the salient parts of those records.

Guthrie sustained several work-related injuries over the course of her career, some at her prior place of employment and some at Oakwood. The first injury, a hip contusion, occurred on March 2, 1998, when Guthrie fell in a hole in the ground while working for Family Home Health Care, Inc. Two months later, on May 24, 1998, Guthrie strained her back while lifting a resident. Both of these injuries occurred prior to Guthrie’s membership in the Retirement Systems.

On May 24, 2006, Guthrie injured her ankle when she stepped in a hole while responding to a patient emergency at Oakwood. She was cleared to return to work without restrictions. In January 2007, Guthrie fell while walking along Oakwood's campus, injuring her right knee, right hand, and the bridge of her nose. Another accident occurred on February 14, 2008, when Guthrie again stepped in a hole and fell, this time injuring her left knee. She was seen by her primary care physician. A treatment note indicates Guthrie's left knee had been swollen for four days, and she was experiencing decreased range of motion with moderate effusion, but the knee was not red or warm. She was referred to Dr. Charles P. Catron.

Dr. Catron examined Guthrie's left knee on March 17, 2008. The exam revealed trace effusion, mild medial joint line tenderness, and mild medial patella facet tenderness. An x-ray showed tri-compartmental degenerative changes and fairly significant narrowing of the medial joint space.³ Guthrie denied locking of the knee and stated that medication had significantly improved her symptoms. Dr. Catron concluded Guthrie had significant osteoarthritis of the left knee with medial compartmental arthritis primarily. In a report related to Guthrie's application for SSI Disability Benefits, Dr. Catron issued permanent restrictions consisting of lifting no greater than 40 pounds and walking on flat, level surfaces; noted Guthrie had undergone conservative treatment and responded fairly to the treatment; and opined that her prognosis was fair.

³ Dr. Catron's office was unable to locate the 2008 x-rays of Guthrie's knee. Consequently, the x-rays were not made part of the record in this case.

Guthrie returned to her primary care facility with continuing complaints of knee pain. A treatment note indicated Guthrie's left knee had good range of motion and mild swelling. She was instructed to use moist heat, placed on extended medical leave for ten weeks, and referred to Dr. Michael Swank, an orthopedic surgeon, for a second opinion.

Dr. Swank saw Guthrie on July 7, 2008. Dr. Swank found Guthrie had a grade 1 effusion on the left knee, and probable degenerative meniscus tear and perhaps early medial compartment arthritis. Guthrie reported to Dr. Swank that she had difficulty working 10-16 hours per day. Dr. Swank recommended conservative treatment, noting the condition of Guthrie's knee was not severe enough to warrant surgery, and recommended an MRI to assess the current state of her knee.

Around this same time, Guthrie applied for social security benefits. She was evaluated by Dr. Nicole Yarber on October 27, 2008. Dr. Yarber found Guthrie had balance difficulty, limb weakness due to knee pain, swelling in both knees, and pain to palpation of the bilateral knees. Dr. Yarber also observed that Guthrie had no difficulty moving about the exam room and getting on and off the exam table, no difficulty dressing and undressing, no muscle atrophy, full range of motion throughout, and the ability to squat 50% of the way down. Dr. Yarber concluded there was physical evidence supporting moderate restrictions in Guthrie's ability to climb, balance, stoop, and kneel secondary to pain in her bilateral knees, swelling, and decreased squat, but no difficulty in her ability to

travel and no significant evidence and restrictions in her ability to reach, lift, move about, carry, or handle objects.

Dr. Catron re-evaluated Guthrie in 2010. His examination yielded a diagnosis of osteoarthritis of the knee as well as osteochondral defects of the knee. Dr. Catron noted that her “exam was unchanged from prior visits,” and that “really at this time she is not having a great deal of discomfort. She is still responding fairly well to the Celebrex.” He opined it was very difficult to attribute her knee pain to the 2006 work-related injury due to the significant passage of time since the accident and, while it was plausible that the injury might have contributed to her current condition, it was impossible to say to what degree.

Guthrie had an MRI in July 2010. It showed signs of osteoarthritis as well as osteochondral defects along the articular surface of the medial femoral condyle with no evidence of a meniscal tear.

Dr. Powell examined Guthrie in July 2010, and yet again in July 2011. Both times Guthrie reported pain in her left knee. In 2011, Dr. Powell observed arthritic changes, decreased range of motion, and tenderness in her left knee. He opined Guthrie will probably now need surgery. Further, in a letter dated July 6, 2011, Dr. Powell stated:

I have reviewed the job description for Ms. Guthrie’s former position as an LPN at Oakwood, and it is my strong belief that she was not capable of performing many of the required duties and physical activities of her former position.

Specifically, due to the severe swelling and pain caused by the osteoarthritis in her knee, as confirmed by x-rays and clinical examination, . . . Ms. Guthrie's lower extremity limitations would have seriously limited such activities as standing, kneeling, crouching, walking, and lifting, all of which appear to have been required of her job. . . . Ms. Guthrie has been a patient of my medical practice since the early 1990s and I am personally well aware of her medical history and conditions through the years. Our medical records are only maintained for seven years and the earliest of Ms. Guthrie's medical records we still have are those from 2004. . . .

In summary, it is my opinion that Ms. Guthrie did not have any active, symptomatic condition of her knees when she commenced employment with Oakwood in June 2002. It is also my opinion that given her condition of her left knee, which x-rays reveal to be almost bone on bone, she was unable to perform the required physical activities and exertions required of the position of [LPN] at the Oakwood facility as of her last day of paid employment in June 2008 and that she has remained unable to perform those duties to the current time.

After weighing the evidence, a hearing officer concluded: (1) Guthrie failed to prove by a preponderance of the evidence that she was totally and permanently incapacitated from her former job duties as an LPN; and (2) Guthrie had not carried her burden of proving that her condition did not pre-exist her employment. On those bases, the hearing officer recommended Guthrie's application for benefits be denied. The Board agreed and adopted the recommended order, except for one typographical error, in its entirety.

Guthrie appealed to the Franklin Circuit Court. The circuit court affirmed the Board's decision in an order entered on September 24, 2013, and

subsequently denied Guthrie's CR⁴ 59.05 motion to alter, amend, or vacate that order. This appeal followed.

II. Applicable legal standards

A claimant seeking disability retirement benefits must demonstrate she is disabled from performing her job duties by a preponderance of evidence. KRS 13B.090(7); KRS 61.600; KRS 61.665. Any such claim must be supported by objective medical evidence, which is defined as

reports 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[.]

KRS 61.510(33).

An appellate court plays a limited role in reviewing an administrative agency's findings of fact and may reverse such a finding only if it is unsupported by substantial evidence. KRS 13B.150(2)(c). More specifically, "[w]here the factfinder'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."

McManus v. Kentucky Ret. Sys., 124 S.W.3d 454, 458 (Ky. App. 2003) (citations

⁴ Kentucky Rules of Civil Procedure.

omitted). Consequently, the Franklin Circuit Court was only permitted to reverse the Board's conclusion that Guthrie was not permanently disabled if the evidence was overwhelmingly in her favor, and we are bound by that same standard. We must therefore give considerable deference to the agency's findings, particularly on matters of witness credibility and balancing of evidence. *Kentucky State Racing Comm'n v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972). We will consider Guthrie's arguments with these principles in mind.

III. Analysis

KRS 61.600 identifies the standards for disability retirement benefits. A worker is entitled to benefits if it is determined that she is permanently incapacitated as a result of bodily injury, mental illness, or disease from performing her prior job duties. KRS 61.600(3)(a) – (c). However, the worker's physical incapacity cannot “result directly or indirectly from bodily injury, mental illness, disease, or condition which pre-existed membership in the system[.]” KRS 61.600(3)(d). The latter does not apply if the worker has at least sixteen years' current or prior service, or the incapacity resulted from 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. KRS 61.600(4)(a) – (b). “An 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.

Guthrie contends: (1) she established a *prima facie* case by objective, compelling, and uncontradicted medical evidence as to her permanent disability and the lack of a pre-existing condition; and (2) the Retirement Systems failed to rebut her medical evidence with objective medical evidence of its own. In light of this, Guthrie argues it was error for the circuit court to affirm the Board's final order denying her application for disability retirement benefits.

However, we choose to address Guthrie's second argument first. Guthrie asserts that once she satisfied her burden to show entitlement to disability retirement benefits, the burden shifted to the Retirement Systems to produce its own objective medical evidence to rebut her case. This is incorrect. In *Kentucky Retirement Systems v. West*, 413 S.W.3d 578 (Ky. 2013), the Kentucky Supreme Court stated, unequivocally, that "[t]he Systems may or may not present evidence to rebut the claimant's proof. Regardless, the burden does not shift to the Systems." *Id.* at 581. Explaining further:

[T]he Court of Appeals broadly states that the hearing officer may not reject uncontested evidence. On the contrary, the Systems does not bear the burden of proof and may choose not to challenge evidence it deems unconvincing. The sufficiency of the claimant's showing is not wholly calculated by whether or not the Systems presents evidence in rebuttal.

Id. We are aware that unpublished opinions of this Court might support Guthrie's position. However, those opinions must give way to the Supreme Court's decision in *West*. The Retirement Systems' decision not to introduce objective medical

evidence of its own does not prove fatal to the Board's order denying Guthrie's petition for disability-retirement benefits.

The Board concluded that Guthrie's injuries pre-existed her participation in the Kentucky Retirement Systems and, therefore, she is ineligible for disability retirement benefits. The evidence on which the Board's conclusion in this regard is substantial and we shall not disturb the order so finding.

In her second argument, Guthrie asserts that she established a *prima facie* case by objective medical evidence that she is both permanently disabled and that her disability is not related to a pre-existing condition. Adopting for the moment Guthrie's choice of nomenclature, the record indicates she did, in fact, present objective medical evidence as to her disability. Dr. Powell opined in his 2011 letter that Guthrie's knee condition was so disabling that it prevented her from performing the required physical demands of her prior position as a LPN at Oakwood as of her last day of paid employment in 2008. But this alone does not *automatically* entitle her to a favorable decision. We again turn to *West, supra*, wherein the Kentucky Supreme Court explained:

KRS 13B.090(7) plainly states that the *claimant* bears the burden of proving his entitlement to a benefit by a *preponderance of the evidence*. In claims brought under KRS 61.600, this includes the burden of establishing that the condition did not exist at the time the claimant became a member of the Systems. *There is nothing in either statute to support the conclusion that the claimant must only make a threshold showing.*

West, 413 S.W.3d at 581 (emphases added). While Guthrie perhaps made a “threshold showing,” of disability, the hearing officer was not satisfied that Guthrie proved her entitlement to benefits by a preponderance of the evidence. A threshold showing of entitlement to retirement disability benefits simply is not enough to compel a finding in a claimant’s favor.

In the case before us, the hearing officer was not convinced that Guthrie was permanently incapacitated by injury or disease from performing her prior job duties. First, the hearing officer found Dr. Powell’s opinion of disability suspect, noting his records relate to Guthrie’s condition in 2011, almost three years past her last day of paid employment in 2008. Credibility determinations are reserved to the trier of fact. *Bowling v. Natural Res. & Env’tl. Prot. Cabinet*, 891 S.W.2d 406, 409-10 (Ky. App. 1995) (“[A] reviewing court must hold fast to the guiding principle that the trier of facts is afforded great latitude in its evaluation of the evidence heard and the credibility of witnesses appearing before it.”). We may not displace the fact finder’s evaluation of evidence or credibility with our own. *Kentucky Ret. Sys. v. Bowens*, 281 S.W.3d 776, 784 (Ky. 2009).

Additionally, the hearing officer identified other objective medical evidence in the record suggesting that Guthrie was not permanently and totally incapacitated. There was certainly evidence that Guthrie suffered from knee pain and had sustained degenerative changes in her knee. Drs. Catron, Powell, and Swank’s medical opinions and records confirm this. However, none of those physicians stated, at the time of their respective exams in 2008, how Guthrie’s

knee pain affected her ability to perform her job duties, or that Guthrie was disabled or unable to perform her job duties. The medical evidence also suggested Guthrie's condition, at the time of her last date of paid employment in 2008, had not yet reached severe status such that she was totally incapacitated. Dr. Catron found Guthrie had mild tenderness, no redness or warmth, and responded well to medication. He recommended conservative treatment and issued moderate restrictions. The treatment note from her primary care physicians also stated that, in 2008, Guthrie's left knee had good range of motion and mild swelling. Dr. Swank, like Dr. Catron, also recommended conservative treatment and stated Guthrie's knee did not yet warrant surgery. Further, Dr. Yarber noted Guthrie had no difficulty moving about the exam room, getting on or off the exam table, or dressing, and observed Guthrie's knee was not red or warm and retained full range of motion. Dr. Yarber issued only moderate restrictions related to Guthrie's ability to climb, balance, stoop, and kneel, and issued no restrictions related to her ability to travel, reach, lift, move about, carry, or handle objects. In light of this evidence, the hearing officer was not convinced that Guthrie had proved by a preponderance of the evidence that she was permanently physically incapacitated. We cannot say that the record compels a different result.

It was also Guthrie's burden to prove by a preponderance of the evidence that her disabling condition did not result directly or indirectly from bodily injury, disease, or condition that predated her membership. *Kentucky Ret. Sys. v. Brown*, 336 S.W.3d 8, 14 (Ky. 2011). Guthrie was unable to produce

medical records related to her 1998 injuries. “While we recognize [Guthrie’s] difficult circumstance with respect to [her] destroyed medical record, we cannot relax the burden of persuasion in response.” *West*, 413 S.W.3d at 582-83. Based on the absence of the medical records, the hearing officer concluded that Guthrie failed to prove by a preponderance of the evidence that the prior injuries did not cause or contribute to her current disabling conditions as the accidents were similar to the ones for which she now seeks benefits. The hearing officer again questioned the veracity of Dr. Powell’s statements in his 2011 letter that Guthrie had no active, symptomatic condition of her knees when she commenced employment with Oakwood in 2002, noting Dr. Powell was recalling Guthrie’s status, without the benefit of medical records, from almost ten years prior. It was certainly reasonable for the hearing officer to find Dr. Powell’s statement lacked credibility.

IV. Result

For the foregoing reasons, we affirm the Franklin Circuit Court’s September 24, 2013 Opinion and Order.

ALL CONCUR.

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