

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002536-MR

BRENDA COUCH

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 01-CI-00179

BOARD OF TRUSTEES,
KENTUCKY RETIREMENT SYSTEM

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: EMBERTON, CHIEF JUDGE; SCHRODER, AND TACKETT, JUDGES.

SCHRODER, JUDGE: This is an appeal from a judgment affirming a decision of the Board of Trustees of the Kentucky Retirement Systems denying disability retirement benefits to appellant. Appellant argues that the Board did not provide her an unbiased hearing and the Board's decision was not supported by substantial evidence. We disagree on both counts and, thus, affirm.

Appellant, Brenda Couch, was employed by the Boone County Board of Education as a school bus driver for nearly fourteen years. In the last few years of her employment, she drove a bus for special needs children. In addition to driving

the bus, her job duties included inspecting and performing maintenance on the bus and assisting with the lifting, carrying, boarding, and restraining of children with disabilities. However, Couch was provided with two assistants on the bus who helped with the loading and unloading of the children. On February 25, 1999, Couch slipped and fell on ice and snow that had been tracked onto the stairs of her bus. She fell onto her hip, banging down on each step and finally landing on the ground. She was thereupon taken by ambulance to the emergency room at St. Luke Hospital. After receiving medical treatment, including physical therapy, for her injuries, Couch was released to go back to work. Couch then worked for three weeks, but had to stop working again because of pain. Couch returned to work once more for five weeks, but again claimed she could not perform her job because of severe pain. Couch's employer offered her a job as a transportation aide, but Couch declined the offer due to the physical restrictions placed on her. Couch's last date of paid employment was May 31, 1999.

Couch applied for disability retirement benefits pursuant to KRS 61.600 on October 20, 1999. After the third denial of her claim by the Retirement System's Medical Review Board, Couch sought an administrative hearing. After a hearing on the matter, the hearing officer recommended that the claim be denied, finding that:

The preponderance of the objective medical evidence contained in the record indicates that Claimant, since the date of last paid employment, the same being May 31, 1999, has not been physically or mentally incapacitated to perform the job, or jobs of like duties,

from which she received her last paid employment as a result of her low back pain and her depression and anxiety. KRS 61.600(2)(a).

The Board adopted the hearing officer's decision and denied Couch disability retirement benefits. Couch then appealed to the Franklin Circuit Court which affirmed the Board. This appeal by Couch followed.

In order to qualify for disability retirement benefits pursuant to KRS 61.600:

(2) Upon examination 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;

(b) The incapacity is a result of bodily injury, mental illness, or disease;

(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.

(3) Paragraph (d) of subsection (2) 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

. . .
(4) 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. . . .

In reviewing an agency's decision, this Court can overturn that decision only if the agency acted arbitrarily or

outside the scope of its authority, if the agency applied the incorrect rule of law, or if the decision is not supported by substantial evidence in the record. Kentucky State Racing Commission v. Fuller, Ky., 481 S.W.2d 298 (1972). Substantial evidence is "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." Owens-Corning Fiberglas Corp. v. Golightly, Ky., 976 S.W.2d 409, 414 (1998).

We shall first address Couch's argument that the Board's findings were not supported by substantial evidence. The evidence in the case consisted of the medical records from St. Luke Hospital, the reports and/or opinions of six physicians, the testimony of Couch, and a functional capacity evaluation (FCE).

The records from St. Luke Hospital indicate that when Couch was taken to the emergency room, she had tenderness in the sacral region, S1 to S3 with no bruising noted, no deformity palpable, and a negative straight leg raising bilaterally. Her x-rays were unremarkable. Couch was diagnosed with a sacral contusion and strain and a right wrist contusion and strain. Couch's rehabilitation potential was described as "good." Couch subsequently presented for physical therapy at St. Luke Hospital from June 2, 1999 to June 10, 1999 and in September, 1999. A CT scan of the lumbosacral spine dated July 1, 1999 showed minimal discogenic changes and no evidence of herniation, spinal stenosis, or other significant abnormality. A whole body bone scan performed on July 1, 1999 was normal.

On an RS-22 form completed by Dr. William Putnam on October 20, 1999, Dr. Putnam notes that Couch's CT scan of her lumbar spine showed no disc herniation and that her right sciatica is new in nature. Dr. Putnam diagnosed Couch with lower back pain with radiculopathy. Dr. Putnam stated that Couch was mentally or physically incapacitated to engage in her present job or a job of like duties and that such incapacity was expected to continue for not less than twelve months from her last date of paid employment.

Dr. Bradley Mullen, a neurologist, examined Couch on December 30, 1999, and found that there was no abnormality of her lumbar spine and that the EMG was normal in terms of any radicular peripheral nerve or lumbar plexus lesion. He further stated:

She continues to complain of back, leg, and hip pain. There is some possibility that she has a problem with the right hip and it may be in her best interest to have her evaluated by an orthopedist from a neurologic perspective though I cannot find any abnormality to explain her current symptomatology. (emphasis added.)

A report from Dr. John Larkin, an orthopedist, dated February 17, 2000, indicates that Couch's hip films were normal and that a physical examination of Couch revealed no focally localized radiculopathy. Dr. Larkin opined that Couch suffers from low back pain that is not of neurologic or peripheral neuropathy etiology. Based on a functional capacity evaluation (FCE) ordered by Dr. Larkin, Dr. Larkin subsequently stated:

Ms. Couch . . . [has a] permanent functional capacity capability of 10 pounds in all planes. In regard to specifically lower

range of motion, she is limited and does not meet the adequacy of her job requirements for kneeling, squatting, stooping, bending, crouching, or work on ladders, etc. . . . These restrictions based upon the functional capacity evaluation represent a permanent basis and permanent limitations for her regarding her employment.

The report from Dr. Reutman, Couch's primary care physician, states that Couch's bone scan was negative and her CT scan showed mild discogenic changes. His examination of her back revealed paraspinal muscle spasms in the mid and lower lumbar region bilaterally. He reports that he has prescribed various medication and physical therapy for Couch from which Couch has experienced no relief. He notes her continued reports of pain in her lumbar region, radiating into her legs and right thigh.

As to her mental state, one report of Dr. Gregory Rohs, who treated Couch for depression and anxiety attacks from 1997 - 2000, stated that her depression and anxiety were manageable with medication. Dr. Rohs later stated that he was unable to contrast Couch's pre-injury and post-injury status because of the overlap of her symptoms.

A psychological evaluation performed by Dr. Norman Berg revealed that Couch was moderately anxious and depressed. Dr. Berg reported that there appeared to be no organic brain dysfunction, psychosis or underlying decompensation processes and that her memory processes appeared fair with perhaps mild impairment related to anxiety and depression. He opined that her ability to maintain her attention and concentration while doing simple routine tasks appeared to be moderately impaired, which difficulty appears directly related to her complaint of physical

pain and discomfort, as well as her anxiety and depressive features. Dr. Berg felt that psychologically, Couch would have significant difficulty sustaining her level of activity because of her reported pain, her preoccupation with her injuries, and her anxiety and depression.

Couch testified that she hurt her right shoulder in 1996 or 1997 and, after that surgery and treatment, had no further problems at work until her 1999 injury. She claims she never had any problems with her back until the 1999 injury. She states that since the 1999 accident, she has pain in her lower back and in her right leg to her knee and from the inside of her leg to her big toe. She maintains that she needs help getting into the shower and doing her housework. Couch insisted that she can no longer perform her job duties as a bus driver because of the constant pain and because she can no longer lift the bus hood to inspect the engine, climb the bus stairs, and open or shut the bus doors.

The hearing officer found that based on objective medical evidence, Couch was not permanently physically or mentally incapacitated from performing her job. Couch contends that the hearing officer erred in forming his own medical opinion on whether she was incapacitated based on the various medical tests, and ignored the conclusions of the doctors who ordered these tests. It is true that the hearing officer based much of his opinion on the results of certain medical tests (CT scans, bone scan, X-rays, MRI, and EMG study) which, for the most part, showed no abnormality, and disregarded the opinions of some of

the doctors who also looked at these test results and nevertheless found her to be permanently incapacitated. However, it has been well established that the hearing officer "may consider all of the evidence and choose the evidence which he believes." Bowling v. Natural Resources & Environmental Protection Cabinet, Ky. App., 891 S.W.2d 406, 410 (1994) (quoting Commonwealth Transportation Cabinet Dept. of Vehicle Regulation v. Cornell, Ky. App., 796 S.W.2d 591, 594 (1990)). Further, the trier of fact in an administrative matter has great latitude in evaluating the evidence and the credibility of the witnesses. Kentucky State Racing Commission v. Fuller, 481 S.W.2d at 308.

The doctors who found Couch to be incapacitated despite no abnormality being shown on her medical tests (Dr. Putnam, Dr. Reutman, and Dr. Larkin) based their opinions primarily on Couch's subjective complaints of pain. The hearing officer apparently did not believe Couch's reports of pain or did not believe that said pain was incapacitating, which would also account for the hearing officer's failure to find her incapacitated due to her narcotics prescriptions.¹ Such was the prerogative of the hearing officer. Aside from the medical tests, the hearing officer also relied on the opinion of Dr. Mullen who stated that he could find no abnormality to explain her pain. Accordingly, we believe there was substantial evidence to support the hearing officer's finding that Couch was not

¹There was also evidence that suggested Couch was abusing her painkillers, as Dr. Putnam noted in his report that Couch was taking her pain pills too frequently and warned her that she would get no more prescriptions for the pain pills from him if she did not take them according to the prescription.

physically incapacitated. As to Couch's claim that she was mentally incapacitated, the reports from Dr. Rohs that Couch's condition was manageable with medication and that her condition was preexisting were substantial evidence to support the hearing officer's finding that she was not mentally incapacitated.

In a related argument, Couch asserts that the Board acted in excess of its statutory authority by failing to confine its deliberations to the evidence presented. Couch maintains that if the Board had considered the evidence presented, it would have had to find in favor of her. We disagree. As we previously discussed above, the Board/hearing officer did consider all of the evidence presented and was justified in finding that Couch was not permanently incapacitated.

Finally, Couch argues that she was denied due process when the Board/hearing officer failed to afford her an unbiased and fair hearing. Couch insists the hearing officer was biased when he disregarded the evidence of her narcotics prescriptions, the opinions of the doctors who found her incapacitated, her testimony, and the results of the FCE. As we have already recognized, the hearing officer was free to believe certain evidence and disregard other evidence. The hearing officer was not biased simply because he did not accept certain evidence favorable to Couch.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

James B. Galbreath
Newport, Kentucky

BRIEF FOR APPELLEE:

Jennifer A. Jones
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