

# Commonwealth of Kentucky

## Court of Appeals

NO. 2006-CA-001899-MR

NANCY JEAN STURGILL

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE THOMAS D. WINGATE, JUDGE  
ACTION NO. 06-CI-00256

KENTUCKY RETIREMENT SYSTEMS AND BOARD OF  
TRUSTEES OF KENTUCKY RETIREMENT SYSTEMS

APPELLEES

OPINION  
AFFIRMING

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BEFORE: THOMPSON AND WINE, JUDGES; HENRY,<sup>1</sup> SENIOR JUDGE.

HENRY, SENIOR JUDGE: Nancy Jean Sturgill appeals from an order of the Franklin Circuit Court, affirming the Board of Trustees of Kentucky Retirement Systems' denial of her application for disability retirement benefits.

Nancy Sturgill was employed as a Finance Director for the Boyd County Board of Education. Sturgill was in charge of accounts payable for the school district.

<sup>1</sup> Senior Judge Michael Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Her job was relatively sedentary: it required her to sit most of the day at a computer, writing reports and invoices, and answering the telephone. She also performed filing and record-keeping functions, and occasionally had to lift boxes of copy paper or file folders. Her employer estimated that the heaviest weight that she had to lift frequently was ten pounds; and that on rare occasions she would have to lift up to twenty pounds. Sturgill had commenced coverage under the Kentucky Retirement Systems on August 19, 1985. Her last day of paid employment was December 31, 2003. She has 218 months of service credit and is therefore eligible for disability retirement benefits.

Sturgill applied for disability retirement benefits on October 22, 2003,<sup>2</sup> claiming that the pain she suffered as a result of degenerative disc disease, osteoarthritis and fibromyalgia had grown so severe that she was unable to continue working. In her application, she provided the following description of how her disability prevented her from performing her essential job duties:

Chronic & severe pain of neck, shoulders, & back have decreased my flexibility & movement greatly. I have extremely limited flexion. The chronic pain, along with migraine headaches, are too intense & uncomfortable to work. The chronic pain, headaches & limited neck mobility do not allow me to perform my job duties. Any walking also causes great difficulty with severe pain in both hips, (R) leg, foot, ankle and neck.

She also provided a history of her disability, in which she stated:

In 1977, I had lumbar back surgery for herniated discs. I have been seen & treated numerous times for chronic pain

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<sup>2</sup> Sturgill initially applied for disability retirement benefits on August 22, 2001. Her application was denied by the Retirement Systems' Medical Review Board and she did not request a hearing.

experienced since the surgery. A few years ago I began to experience worsening pain in my back, hips, & neck. Approximately 3 years ago I was diagnosed with fibromyalgia & osteoarthritis. Within the last year my neck pain & limited flexion became unbearable. After hospitalization I was diagnosed with severe cervical stenosis, degenerative disc disease & bulging discs in lumbar area.

The Medical Review Board denied Sturgill's application for benefits and she appealed. An administrative hearing was conducted, following which the hearing officer recommended that her application be denied. Sturgill made a motion to remand her case for consideration of new evidence relating to a hip replacement procedure she had undergone in June 2005. This motion was unopposed by Retirement Systems. The hearing officer reviewed the new evidence but did not change his recommendation to deny the application. He filed a Report and Recommended Order on Remand which included an amendment consisting of an additional finding relating to the hip replacement surgery. The disability appeals committee of the Board of Trustees reviewed the evidence and accepted the hearing officer's recommendation to deny Sturgill's application for disability benefits. The Board rejected the hearing officer's additional finding of fact, however, and issued its own finding regarding the significance of the hip replacement surgery. Sturgill filed an appeal in the Franklin Circuit Court, which upheld the decision of the Board. This appeal followed.

Essentially, Sturgill's claim was denied because the hearing officer found that her condition had not changed substantially from what was recorded in medical examinations dating back to 1996, after which she was able to continue working for

another six years with the accommodation provided by her employer, which included a new desk chair, permission to stand and walk in order to provide relief from pain, and having other employees perform actions for her such as lifting and filing below waist level. The hearing officer also relied on evidence provided by a behavioral psychologist who believed that Sturgill tended to overreact emotionally to episodes of pain exacerbation with resulting excessive physical and functional disability. The hearing officer also noted that Sturgill had failed to follow the treatment recommended by one of her physicians, and that there were inconsistencies in two reports submitted by the same physician regarding Sturgill's work restrictions.

Our standard of review in administrative proceedings accords great deference to the finder of fact:

Where the fact-finder'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. 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. . . . 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 v. Kentucky Retirement Systems*, 124 S.W.3d 454, 458-59 (Ky.App. 2003).

Sturgill first argues that the Board applied the wrong standard of review to her case when it stated that she had “failed to set forth **objective medical evidence** to support her application for disability retirement benefits.” Under Kentucky Revised

Statutes (KRS) 61.665(3)(d), “[a] final order of the board shall be based on **substantial evidence** appearing in the record as a whole . . . .” Sturgill contends that the Board committed reversible error by basing its decision solely on “objective medical evidence,” rather than on “substantial evidence,” which would include such evidence as Sturgill’s own testimony, and other non-medical evidence such as statements from her supervisors, co-workers, and family members.

We disagree that the Board employed the wrong standard of review. The statement merely indicates that the medical portion of the evidence was deemed insufficient to support a finding that Sturgill was entitled to disability benefits. Moreover, Sturgill’s own testimony was not disregarded or overlooked; the hearing officer’s opinion as adopted by the Board fully summarizes the description of her symptoms which she provided at the hearing. The hearing officer also clearly recognized, in his findings of fact, her assertion that she suffers from pain.

Sturgill further argues that even if “objective medical evidence” was the standard applied, she had provided sufficient evidence to warrant the award of benefits. She relies specifically upon the reports of Dr. Kevin Bayes and Dr. Lisa McCoy, both of whom filled out forms detailing work restrictions that they advised for Sturgill. Dr. Bayes opined in a report of June 12, 2004, that Sturgill was unable to sit for more than a total of two hours during a regular eight-hour work day, and was unable to sit for more than one hour without interruption. Dr. McCoy, in completing a similar report form on June 1, 2004, judged Sturgill to be unable to sit for more than a total of one to two hours

during a regular eight hour work day, and unable to sit for more than one hour without interruption. Although we agree that these physicians' reports contain evidence that supports Sturgill's claim, our standard of review is only whether the evidence as a whole is so compelling that no reasonable person could have failed to be persuaded by it. The evidence contained in these reports is not of this caliber. Inconsistencies between Dr. Bayes' report of June 12, 2004, and a report which he submitted less than a month later cast doubt on the credibility of his evidence. On the later form, for example, he stated that Sturgill could sit for only thirty minutes per day. There were other inconsistencies between the reports as to the length of time Sturgill was able to stand or walk, the amount of weight she is able to lift, and with what frequency. Dr. Bayes did not appear to have performed a medical examination to support his assertions in the second report. "[I]t must be borne in mind that it is the exclusive province of the administrative trier of fact to pass upon the credibility of witnesses, and the weight of the evidence." *Bowling v. Natural Resources and Environmental Protection Cabinet*, 891 S.W.2d 406, 410 (Ky.App. 1994) (citations omitted). The hearing officer's decision to award less weight to this evidence as a result of these indicators of possible unreliability was neither arbitrary nor capricious.

Sturgill's next argument focuses on specific findings of fact which were used to support the hearing officer's conclusion that her condition had not changed substantially since 1996. Sturgill contends that these findings are not supported by substantial evidence.

Finding of fact # 6 states as follows:

The record reflects that the Claimant does have some cervical degenerative disc/spondylosis and stenosis. However, there is little change from the 1996 examination set forth in Exhibit 22 from that of the August 2003 examination set forth in Exhibits 24 and 25.

Sturgill maintains that this finding is totally unsupported by the evidence. Exhibit 22 contains the result of an MRI performed on Sturgill's cervical spine, dated May 29, 1996.

It states in pertinent part:

FULL RESULT: There is loss of the normal cervical lordosis with decrease in the disc space and disc desiccation at C5/C6 and C6/C7 indicating degenerative disc disease.

Canal stenosis is present at C6/C7 and C5/C6 with mild left neural foramen narrowing at both levels and minimal anterior compression upon the cervical cord slightly greater along its left aspect.

Minimal central disc protrusion is present at C4/C5 without mass effect.

IMPRESSION: Degenerative disc disease at C5/C6 and C6/C7 with canal stenosis at both levels with the canal measuring 10 to 11 mm and mild left neural foraminal narrowing at both levels due to hypertrophy of the facets and uncal vertebral joints.

There is minimal anterior compression upon the cervical cord slightly greater along its left aspect.

Small central disc protrusion, C4/C5 without mass effect.

The pertinent portions of a CT reconstruction and cervical myelogram performed in August 26, 2003, which is found both in Exhibit 24 and 25, state as follows:

At C4-5, there is mild anterolisthesis of 1-2 mm resulting in a kyphotic angulation of the spine.

At C4-5, there are osteophytes encroaching upon the anterior spinal canal and associated disc bulging resulting in mild to moderate spinal stenosis.

At C6-7, there is also osteophyte encroachment upon the anterior spinal canal causing mild to moderate bony spinal stenosis.

IMPRESSION: Spinal stenosis as detailed above.

The mild anterolisthesis at C4-5 noted on CT is not demonstrated on the lateral view of the conventional cervical myelogram as lateral view is done in hyperextension. There is a small anterior extradural defect anteriorly at C4-5 on the basis of osteophytes.

At C5-6 and C6-7, there are anterior extradural defects consistent with osteophyte encroachment upon the spinal canal causing mild to moderate spinal stenosis.

IMPRESSION: Multi-level spinal stenosis.

These results support the hearing officer's finding that there was little change in Sturgill's condition during the period between these two tests, with the stenosis being described as mild in the first test, and mild to moderate in the second test. Sturgill nonetheless goes on to quote from the hearing officer's description of other evidence contained in Exhibit 24 as proof of the alleged inconsistency. It should be noted that Exhibit 24 is voluminous, containing over seventy pages of medical records from different physicians dating from various periods. Specifically, the hearing officer cited a report from Dr. James Powell who noted more involved cord compression in MRIs dating from 2000 and 2003. The hearing officer also cited Dr. Joseph Bajorek's comment in a July 1, 2003, examination that Sturgill suffered from moderate stenosis and "a question of cord lesion, possibly



secondary to a fall at the club two months ago.” Finally, the hearing officer noted an MRI of July 2, 2003, which showed evidence of disc degeneration spondylosis. Apart from the fact that these comments relate to other documents in Exhibit 24, not to the myelogram performed in August 2003, they do not compel a different conclusion from that arrived at by the hearing officer: that there was little significant change in the condition of Sturgill’s cervical spine.

She makes a similar objection to finding of fact #9, which states:

The Claimant’s complaints are very similar to her previous complaints and there has been no showing that there has been a change in her condition that would prevent her from performing her previous sedentary work.

Again, Sturgill claims that this finding is absolutely refuted by the reports of Drs. Bayes and McCoy, who opined that she was only able to sit or stand for very limited periods. We have already discussed the inconsistencies between Dr. Bayes' reports of June and July 2004. Moreover, the hearing officer was not bound to accept the evidence contained in these reports. “To put it simply, the trier of facts in an administrative agency may consider all of the evidence and choose the evidence that he believes.” *Bowling*, 891 S.W.2d at 410 (citations and internal quotation marks omitted).

Sturgill's next argument concerns findings of fact # 7, #8, #10, #11 and #13, which she contends do not support the conclusions of law made by the hearing officer. Finding of fact #7 was based on reports by Dr. Howard Feinberg, who diagnosed early fibromyalgia as well as degenerative disc disease. Feinberg did not believe, however, that

Sturgill's disc problems were a predominant cause of her pain. Sturgill maintains that Dr. Feinberg's report supports a conclusion that she was incapacitated. We disagree. If we accept Dr. Feinberg's diagnosis that the predominant cause of Sturgill's pain was the fibromyalgia rather than the disc disease, it discredits all the other evidence that her pain was caused by disc disease. As to the fibromyalgia, Sturgill appears to have stopped treatment with Dr. Feinberg in March 2003, and did not follow his advice to participate in aerobic exercise and water therapy at her health club. Sturgill argues that the "Appeals Committee seemingly takes the position that if Ms. Sturgill had only partaken in aerobic exercise and water therapy that she would have been good to go as far as her job is concern[ed]." This was not the position taken in the opinion. Feinberg's evidence was cited as casting doubt on whether Sturgill's disc condition is disabling, and also to suggest that she did not take the necessary steps to alleviate the pain caused by her fibromyalgia.

Finding of Fact #8 concerned a letter from Dr. Phillip Tibbs, in which he stated that Sturgill has degenerative disc disease, but no evidence of nerve root or cord compression, and recommending conservative treatment. Sturgill argues that this letter could not be used as evidence that her condition is not permanently incapacitating because only a medical expert could know the significance of nerve root or cord compression. We disagree. The letter does not stand for the proposition, nor does the hearing officer treat it as such, that it is a medical certainty that a person with degenerative disc disease cannot be incapacitated unless he or she suffers from nerve root or cord compression. It can certainly be taken as evidence by a layperson that, since her

nerves were not involved and conservative treatment recommended, that her condition was not severe. The hearing officer is permitted to make reasonable inferences from the medical evidence. If we adopt the appellant's line of reasoning, the evidence in Dr. Tibbs' letter could not support a finding of disability either, because it contains no explicit medical explanation that degenerative disc disease can cause pain or disability.

Sturgill next addresses the conflict we have already discussed regarding the inconsistencies in Dr. Bayes' two reports. Although we agree that the differences are not dramatic, it was not unreasonable for the hearing officer to find that the inconsistencies in reports filed so close in time raise legitimate doubts regarding their trustworthiness.

Sturgill next addresses Finding of Fact #11, which states as follows:

While the Claimant has asserted she has pain, her assertions have continued since her first application, and she has failed to follow the treatment recommended by Dr. Feinberg and has failed to show that there is any significant change in her condition which would prevent her from performing her Financial Director duties for the Boyd County Board of Education, which were accommodated as to lifting and walking and standing.

Sturgill argues that this finding is contrary to the evidence because Dr. Feinburg had concluded that she was not physically able to perform exercises and Dr. Harry Bell had noted "will hold PT as this has been tried multiple times in the past with aggravation of symptoms." We have attempted to locate the citations to the record provided by the appellant, and find no mention of Dr. Feinburg's conclusion that she was physically unable to do aerobic exercises or water therapy. As to Dr. Bell's report, it is

dated August 13, 2001, and so does not describe her condition at the time she stopped work. Dr. Feinburg's later report, of December 9, 2002, for example, states that he stressed to the patient the importance of aerobic exercise. Also, Sturgill fails to explain if there is any difference between the effect of physical therapy and aerobic exercise. Physical therapy may well have aggravated her symptoms, but there is no citation to evidence showing that this was true of aerobic exercise.

Her next argument concerns Finding of Fact #13, which summarized a letter of November 16, 2001, from Dr. Herb Steger, a behavioral psychologist, which stated: "I believe Mrs. Sturgill tends to overreact emotionally to episodes of pain exacerbations with resulting emotional crisis and excessive physical and fundamental disability." Sturgill argues that this evidence supports her disability claim because Dr. Steger did not deny that she experiences pain. But Dr. Steger also stated that her reactions to pain led to excessive physical disability. The presence of some pain is not necessarily sufficient to support a finding of disability. The hearing officer did not err in interpreting this evidence to mean that some of her physical disabilities were due to her psychological reactions. Certainly Dr. Steger's letter is not compelling evidence that she is permanently disabled due to pain.

Finally, Sturgill addresses the issue of her hip replacement surgery. The Board found that her first consultation with a physician regarding the hip replacement surgery occurred in April, 2005, more than a year after her last day of paid employment. It concluded that "while the Claimant may have had pain in her hip prior to her last day of

paid employment, the condition was not incapacitating at that time.” Sturgill argues that the fact she had hip replacement surgery proves that she had incapacitating pain in her hip prior to her last day of paid employment. Although she may well have suffered from hip pain, the evidence does not compel a conclusion that this pain was incapacitating.

Finally, Sturgill argues that the evidence in the record as whole compels a contrary decision to that arrived at by the Board. In summary, she argues that the record shows that she had complained of pain in her head, neck, shoulders and hips for at least four years prior to her application for retirement disability benefits. She produced medical evidence that she suffers from degenerative disc disease and that she has muscle spasms in two different locations in her back. She notes that one physician concluded that her problems are severe enough that they may actually lead to paralysis in the future. Finally, she contends that the fact that she eventually underwent hip replacement surgery further supports a conclusion that her pain was so severe that it was incapacitating and prevented her from continuing her job.

Although the record does contain this evidence, the Board agreed with the hearing officer that it did not support a conclusion that her pain was sufficiently incapacitating as to prevent her from continuing her employment, particularly in light of the accommodations that had been made by her employer. And, while the record may contain sufficient evidence to support a contrary result if our review was *de novo*, the cases require that our review of the factual determinations of administrative bodies must be highly deferential to their findings. *Bowling* at 410. “If there is any substantial

evidence to support the action of the administrative agency, it cannot be found to be arbitrary and will be sustained.” *Bowling*, 891 S.W.2d at 409 (citations omitted).

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

ALL CONCUR.

BRIEFS FOR APPELLANT:

John H. Gray  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Katherine Rupinen  
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