

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002591-MR

KENTUCKY RETIREMENT SYSTEMS

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 06-CI-00815

TAMMY SIZEMORE

APPELLEE

OPINION
AFFIRMING IN PART,
VACATING, AND REMANDING IN PART

** ** * ** * ** *

BEFORE: KELLER AND WINE, JUDGES; LAMBERT,¹ SENIOR JUDGE.

KELLER, JUDGE: Tammy Sizemore (Sizemore) applied for disability retirement benefits through Kentucky Retirement Systems (KERS). The hearing officer recommended denial of Sizemore's application, and the KERS Board of Trustees (the Board) adopted the hearing officer's recommendation. The Franklin Circuit Court reversed the Board's order, and it is from the circuit court's order that KERS

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

appeals. On appeal, KERS argues that Sizemore's condition was pre-existing, she was not totally and permanently incapacitated, and the Franklin Circuit Court substituted its opinion of the evidence for that of the fact finder. For the reasons set forth below, we affirm in part and vacate and remand in part.

FACTS

Sizemore worked as a Family Support Specialist II for the Department of Community Based Services (the Department). Sizemore's initial membership date in KERS was February 1, 2000, and her last date of paid employment in a regular full-time position was February 28, 2005. She had sixty-one months of credit.

As a Family Support Specialist II, her primary duties involved interviewing clients to determine their eligibility for Food Stamps and Medicaid. Sizemore on rare occasions had to lift or carry up to ten pounds. The job also required Sizemore to handle/finger/feel and to reach/push/pull for two-thirds of the day or more. Sizemore sat for six hours out of a seven and one-half hour work day.

Sizemore first experienced symptoms in May, 2000,² at which time she suffered lightheadedness and numbness on the entire right side of her body. Her medical records, beginning on December 14, 2001, indicate she had experienced episodic numbness on her right side for a year. When an episode

² This was only three months after beginning her employment with the Department.

occurred, Sizemore reported numbness, reduced grip strength, and a feeling she described “as foolish in the head.”

Initially, Sizemore sought treatment from her primary care physician, Dr. Claudia Bocado. Pursuant to Dr. Bocado’s recommendation, Sizemore began seeking treatment from a neurologist, Dr. Joseph Zerga. Dr. Zerga informed Sizemore of his suspicion of multiple sclerosis in January, 2002. However, neither Dr. Zerga nor Dr. David Blake, a neurologist from whom Sizemore sought a second opinion, was able to definitively diagnose Sizemore with multiple sclerosis until September 9, 2003. At that time, Dr. Zerga diagnosed Sizemore with relapsing-remitting multiple sclerosis.

Throughout 2003, Dr. Zerga examined Sizemore multiple times. The office notes indicate the exams were generally benign or unremarkable, and during the last months of 2004 and the first months of 2005, Sizemore’s condition seemed stable. For instance, Dr. Zerga’s November 5, 2004, office note states that Sizemore had some tremulousness of her right arm, but otherwise was doing well. That office note also documented that Sizemore had a normal gait and was sitting without difficulty.

In January 2005, an MRI revealed improvement in previously discovered white matter lesions in Sizemore’s right frontoparietal region and left subcortical parietal regions, but a new lesion in the right frontoparietal region.

Dr. Zerga noted Sizemore had complaints of fatigue and occasional numbness, but he found no cranial nerve symptoms and no significant upper extremity symptoms. He determined the examination to be benign other than old right arm tremors.

A January 17, 2005, nerve conduction study revealed very mild carpal tunnel, with no evidence of major entrapment. Dr. Zerga noted in his office notes that Sizemore's condition was unchanged from her previous examination. He altered her medication to see if he could improve her sleep and decrease her fatigue. Dr. Zerga also stated Sizemore was toying with the idea of disability.

Sizemore's last date of paid employment in a regular full-time position was February 28, 2005.³ As of that time, Sizemore was on several prescription and nonprescription medications for pain, depression, multiple sclerosis, hypertension, high cholesterol, and a blood thinner. While still working, Sizemore requested reasonable accommodations and was provided with a special chair for her back⁴ and a large computer screen.

On March 4, 2005, approximately four days after Sizemore's last date of paid employment, Dr. Zerga noted that she was doing well; although she was feeling a bit depressed and did not like her job. Dr. Zerga also documented he found no evidence of any attacks and her examination was normal.

³ It is unclear to this Court whether Sizemore decided to quit working and Dr. Zerga later authorized it or if Dr. Zerga told her to quit working. The records indicate Dr. Zerga took Sizemore off work on March 4, 2005, four days after Sizemore stopped working. However, the testimony of Sizemore is to the contrary, and Dr. Zerga testified that he believes he took her off work in February 2005. Regardless, this is not a decisive factor in this Court's opinion.

⁴ The parties disagree about whether the special chair was provided; however, both parties agree the large computer screen was supplied as an accommodation for Sizemore.

Dr. Zerga's April 15, 2005, office note revealed decreased flexion of the lumbosacral spine and a tremor of Sizemore's right arm while her hands were outstretched. Dr. Zerga considered Sizemore to be stable; although he noted that her fatigue was a limiting factor.

In September 2005, Sizemore's test results showed prolonged latencies in both of her eyes. Dr. Zerga noted in the September 7, 2005, office note that "her examination is significant for a drift of the right arm," but her "gait is normal." Dr. Zerga suggested there was evidence of a possible repeat multiple sclerosis attack. Sizemore's September 23, 2005, MRI exam confirmed a slight worsening of abnormal T2 signal foci, which is consistent with worsening multiple sclerosis.

Dr. Zerga's October 21, 2005, office note revealed continued fatigue with a mild tremulousness of the right arm, but none of the previously noted drifting. Dr. Zerga continued his diagnosis of multiple sclerosis and noted that Sizemore suffered from "significant fatigue."

Sizemore applied to KERS for disability benefits on January 11, 2005, alleging disability on the basis of multiple sclerosis. KERS asked three physicians to review Sizemore's application. All three physicians, Dr. Esten Kimbel, Dr. William McElwain, and Dr. William Keller, recommended denial of Sizemore's application on March 1, 2005, and again on July 1, 2005.

In his March 1, 2005, Disability Determination Report, Dr. Kimbel stated that he found no objective evidence establishing any loss of cognitive

function, or any functional impairment as a result of multiple sclerosis, such as weakness, extreme dizziness, visual impairment, or loss of function of the upper and lower extremities. Additionally, Dr. Kimbel found no current medical evidence that Sizemore's multiple sclerosis caused symptoms severe enough to preclude Sizemore from performing the type of work she had performed for the Department.

Drs. McElwain and Keller stated that they did not recognize any convincing objective evidence that Sizemore was disabled and unable to work at that time. Dr. Keller acknowledged the difficulty of fatigue, but stated, "In the event the claimant's disease entity appears to be showing significant and objective evidence of progression, I would be very willing to review the case again."

The doctors reviewed Sizemore's records a second time on July 1, 2005. Again, all three doctors found that Sizemore had not presented evidence of any neurological impairment that would be disabling or any objective medical evidence establishing a disability. Dr. Kimbel noted in his report that fatigue is a largely subjective complaint and its severity is difficult to evaluate. Furthermore, Dr. Kimbel stated:

[I]n reviewing the claimant's previous job requirements there is no evidence that she had to do any physical exertion and there is no documentation from her normal daily activities that would indicate that her fatigue is of such severity that it would preclude doing this type of work activity.

In his December 6, 2005, deposition, Dr. Zerga testified that he found no indication that Sizemore had multiple sclerosis prior to her qualified employment. When asked about Sizemore's ability to perform her job duties, Dr. Zerga stated he believed she could work if she just sat and did not have to interact with people, make cognizant processing decisions, fill out paperwork, or perform repetitive data entry.

Sizemore requested an administrative hearing after being denied disability retirement benefits by the medical examiners. At the hearing, Sizemore testified that on an average day at the Department, she assisted ten to twelve people. However, on the day of the hearing, Sizemore said that, with her fatigue, she could have assisted only five. Sizemore also stated that, out of the preceding five days, she could have worked only three to four days. In the course of a normal eight hour work day, Sizemore testified she sleeps or is resting four to five hours.

Based on the above evidence, the hearing officer recommended denial of Sizemore's claim. In doing so, the hearing officer noted Sizemore's complaints and the above listed medical records and reports. Specifically, the hearing officer noted Sizemore did not meet her burden of proof that she did not have the condition at the time her membership in KERS began.

Both parties timely filed exceptions to the hearing officer's report and recommended order. In her exceptions, Sizemore primarily complained that it was error for the hearing officer to find that she had not met her burden of proof and that a medical journal article should not have been admitted as evidence. KERS

also filed exceptions because the hearing officer failed to make a finding that Sizemore had not met her burden to establish a total and permanent incapacity from her job duties as of her last date of paid employment.

The Board adopted the hearing officer's report and recommended findings and denied Sizemore's claim. The Board also found that Sizemore had not met her burden of establishing total and permanent incapacity from her job duties as of her last date of paid employment, February 28, 2005. The Board cited Dr. Zerga's January 10, 2005, and March 5, 2005, evaluation notes and January 17, 2005, nerve conduction study in support of its finding.

Sizemore appealed the Board's denial to the Franklin Circuit Court. The circuit court reversed the Board's order, determining that none of the reviewing physicians made a finding that Sizemore's multiple sclerosis was pre-existing and that the sole piece of evidence cited for that conclusion was an inadmissible medical journal article. The court also found that incapacity, for retirement disability benefits purposes, does not require "that the level of severity of the symptoms of the disease remain constant." Finally, the court found that the evidence supports that relapsing-remitting multiple sclerosis has the constant symptom of fatigue, which is disabling. KERS appeals this order.

STANDARD OF REVIEW

On appeal, this Court must determine if a circuit court's findings reversing an administrative decision are clearly erroneous. The circuit court is to review the administrative decision, not reinterpret or reconsider the merits of the

case, nor substitute its judgment for that of the agency as to the weight of the evidence. *Johnson v. Galen Health Care, Inc.*, 39 S.W.3d 828, 833 (Ky. App. 2001); *Kentucky Unemployment Insurance Commission v. King*, 657 S.W.2d 250, 251 (Ky. App. 1983); and *Kentucky Racing Commission v. Fuller*, 481 S.W.2d 298, 309 (Ky. 1972). This Court, like the circuit court, is required to determine if the hearing officer's findings of fact, as adopted by the Board, are supported by substantial evidence of probative value and if the Board applied the correct rule of law to the facts. *Southern Bell Telephone & Telegraph Co. v. Kentucky Unemployment Insurance Commission*, 437 S.W.2d 775, 778 (Ky. 1969); *Kentucky Board of Nursing v. Ward*, 890 S.W.2d 641, 642-43 (Ky. App. 1994). As long as there is substantial evidence in the record to support the Board's decision, this Court must defer to the Board, even if there is conflicting evidence. *Kentucky Commission on Human Rights v. Fraser*, 625 S.W.2d 852, 856 (Ky. 1981). Evidence is substantial if "it has sufficient probative value to induce conviction in the minds of reasonable men." *Blankenship v. Lloyd Blankenship Coal Co., Inc.*, 463 S.W.2d 62, 64 (Ky. 1970). With this standard in mind, we will address the issues raised by KERS.

ANALYSIS

KERS argues that: (1) Sizemore's condition was pre-existing; (2) she was not totally and permanently incapacitated; and (3) the circuit court substituted its opinion of the evidence for that of the factfinder. We will not separately address this third argument as it is intertwined with the first two and disposed of in

their analysis of the same. Sizemore contends that her multiple sclerosis was not pre-existing and her incapacity is total and permanent.

Given Sizemore's membership in KERS,⁵ her claim for disability retirement benefits is decided under KRS 61.600, which sets out the qualification requirements for disability retirement benefits. The burden of proof in administrative hearings is set out in KRS 13B.090(7), and a claimant must prove her claim by a preponderance of evidence in the record. This Court has held that KRS 61.600 and KRS 13B.090 should be read in conjunction with one another. *McManus v. Kentucky Retirement Systems*, 124 S.W.3d 454, 457-58 (Ky. App. 2003). Therefore, Sizemore had the burden of proving her disability claim by a preponderance of the evidence.

Based on the statutory language of KRS 61.600, we agree with KERS that the issues are: (1) whether Sizemore's condition was pre-existing; and (2) whether there was any objective evidence that Sizemore's condition was permanently and totally disabling. While we determine that the circuit court improperly disturbed the Board's finding that Sizemore was not totally and permanently incapacitated from her job duties as of her last day of paid employment, we hold that the circuit court was correct in its finding that Sizemore's multiple sclerosis was not a pre-existing condition. We will address each issue below.

⁵ Member is defined as any employee who is included in the membership of the system or any former employee whose membership has not been terminated under Kentucky Revised Statute (KRS) 61.535. KRS 61.510(8).

After finding that Sizemore is qualified for benefits under KRS 61.600(1),⁶ the first step in determining whether Sizemore is entitled to retirement disability benefits is establishing with objective medical evidence that since her last day of paid employment, she has been mentally or physically incapacitated to perform her job. KRS 61.600(3)(a). The incapacity must be deemed permanent and cannot result from a disease or condition pre-existing membership in the system. KRS 61.600(3)(c)-(d).

To determine whether Sizemore is entitled to retirement disability benefits, medical examiners must examine the objective medical evidence to decide if the above factors have been met. Objective medical evidence is defined in KRS 61.510(33) as

reports of examinations or treatments; medical signs which are anatomical, physiological, or psychological abnormalities that can be observed; psychiatric signs

⁶ To qualify for benefits, the following conditions must be met:

- (a) The person shall have sixty (60) months of service, twelve (12) of which shall be current service credited under KRS 16.543(1), 61.543(1), or 78.615(1);
- (b) For a person whose membership date is prior to August 1, 2004, the person shall not be eligible for an unreduced retirement allowance;
- (c) The person's application shall be on file in the retirement office no later than twenty-four (24) months after the person's last day of paid employment, as defined in KRS 61.510, in a regular full-time position, as defined in KRS 61.510 or 78.510; and
- (d) The person shall receive a satisfactory determination pursuant to KRS 61.665.

KRS 61.600(1). Sizemore qualified to receive benefits as long as she met the remaining requirements of total and permanent incapacitation.

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. . . .

Incapacity is deemed permanent if it is expected to result in death or can be expected to last for a period of not less than twelve months from the person's last date of paid employment. KRS 61.600(5)(a)(1). In addition to the medical evidence in the file, the determination of permanent incapacity must also be based upon the member's ability to perform work activity on a regular and continuing basis and the member's ability to stand, sit, walk, lift, and carry various weights. *See* KRS 61.600(5)(a)(2), (b), and (c).

1. Total and Permanent Incapacitation to Perform Job Duties

Sizemore failed to prove by a preponderance of the evidence that she was totally and permanently incapacitated and unable to perform her job or job like duties as of her last day of paid employment.⁷ The incapacity is deemed permanent if it is expected to result in death or last for a period of not less than twelve months from the person's last date of paid employment. While Sizemore produced Dr. Zerga's deposition testimony as evidence of her incapacity and its permanency, Dr. Zerga's records and the reviewing physicians' opinions of the records indicate Sizemore was not totally and permanently incapacitated. In fact, Dr. Zerga noted

⁷ While the Board found that Sizemore was not totally and permanently incapacitated, it used the hearing officer's findings in her recommendations to support its own finding of fact on this issue.

in his records approximately four days after Sizemore's last date of paid employment, that Sizemore was doing well, although she was feeling a bit depressed and did not like her job. In addition, Dr. Zerga found no evidence of any attacks and noted that Sizemore's examination was normal. In January 2005, approximately one month before Sizemore stopped working, Dr. Zerga stated that she was fatigued but had no cranial nerve symptoms or significant upper extremity symptoms and her examination was benign other than right arm tremors. Dr. Kimbel, a reviewing physician, determined "no evidence objectively existed proving any loss of cognitive function, any functional impairment imposed by multiple sclerosis consisting of any weakness, extreme dizziness, visual impairment, or loss of function of her upper and lower extremities."

Since there was conflicting evidence, the trier of fact determined which evidence she found more credible. An administrative agency is afforded great latitude in its evaluation of the evidence heard and the credibility of witnesses. Although a reviewing court may have arrived at a different conclusion than the trier of fact, this does not negate the agency's decision if it is supported by substantial evidence. *Bowling v. Natural Resources & Environmental Protection Cabinet*, 891 S.W.2d 406, 409-10 (Ky. App. 1995). As a reviewing Court, we can only decide whether the trier of fact had substantial evidence to determine whether Sizemore is permanently incapacitated or not. We are not permitted to substitute our judgment for that of the trier of fact.

In addition to the medical evidence in the file, the determination of permanent incapacity must also be based upon the member's ability to perform work activity on a regular and continuing basis and the physical requirements of the member's job. *See* KRS 61.600(5)(a)(2), (b), and (c). Based on Sizemore's testimony, her work activity would fall into the sedentary work category as defined by KRS 61.600(5)(c).⁸ The hearing officer and Board had substantial evidence to find that Sizemore retained the residual functional capacity to work. Supporting this is the determination by Dr. Kimbel that multiple sclerosis did not preclude Sizemore from performing her duties.

While we may have found differently than the hearing officer and Board, the evidence is not so overwhelming that their conclusions were unreasonable. The hearing officer's recommendation is supported by Dr. Zerga's medical notes, namely the January 17, 2005, January 10, 2005, and March 4, 2008 records. In addition, the reviewing physicians twice issued declarations explaining why they recommended denial of Sizemore's claim. The hearing officer's findings of fact, as adopted by the Board, are supported by substantial evidence of probative value and the Board applied the correct rule of law to the facts. Therefore, the Franklin Circuit Court's order pertaining to Sizemore's incapacity is vacated and remanded for reinstatement of that portion of the Board's order.

2. Pre-existing Condition

⁸ Sedentary work shall be work that involves lifting no more than ten (10) pounds at a time and occasionally lifting or carrying articles such as large files, ledgers, and small tools. Although a sedentary job primarily involves sitting, occasional walking and standing may also be required in the performance of duties. . . .

KERS argues the Franklin Circuit Court erred in finding Sizemore did not have a pre-existing condition. This issue is important because, if Sizemore suffered from a pre-existing condition, she would be ineligible for benefits since she had fewer than sixteen years of service credit. *See* KRS 61.600(4)(b). In order to be eligible for retirement disability benefits, an individual's incapacity must not 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 determination of when and under what conditions a claimant's disability arises is a factual one and agency factual determinations are given a high degree of deference by the Court. *Caudill v. Commonwealth*, 240 S.W.3d 662, 665 (Ky. App. 2007).

Here, the hearing officer and Board determined Sizemore's multiple sclerosis was a pre-existing condition because, within all reasonable medical probability, Sizemore suffered from multiple sclerosis prior to her membership in KERS. Sizemore counters that multiple sclerosis cannot be a pre-existing condition because she did not have symptoms until three months after becoming a member of KERS and was not diagnosed until approximately three years after becoming a member.

In *Caudill*, the Court held that, where it is clearly possible the injury arose from previous employment and/or work at home, it could not overturn a KERS decision. However, *Caudill* is distinguishable from the case at hand. In *Caudill*, office notes from two physicians indicated that Caudill's injury pre-existed his membership in KERS. Furthermore, Caudill testified that his injury

occurred prior to his membership in KERS. There is no such clear cut evidence here. In fact, the only proof KERS can present to support its position is the treatise it submitted and Dr. Zerga's testimony.

We hold both Dr. Zerga's testimony and the treatise are not substantial evidence because the issue is Sizemore's condition, not other patients' conditions. Dr. Zerga testified in his deposition that Sizemore had not progressed as severely as he had seen some other patients progress, noting that the destruction of myelin is a long developing process. However, the issue here is not "some other patients," but *this* patient. No evidence was presented at the hearing that Sizemore had symptoms of or was diagnosed with multiple sclerosis prior to her membership in KERS. Sizemore's first documented symptoms were three months after her membership began. In those infrequent circumstances in which we impose upon a party the burden of proving a negative, the quantum of evidence necessary to meet that burden is minimal. *See Dowell v. Safe Auto Ins. Co.*, 208 S.W.3d 872, 878 (Ky. 2006). Sizemore met the burden by providing her medical records. The absence of any noted symptom is sufficient to meet the minimal burden of proving a negative.

If we were to follow KERS's position to its logical conclusion that Sizemore must have had multiple sclerosis prior to her membership because of the progressive nature of the disease, then any degenerative condition that arises out of repetitive motion or any degenerative genetic condition would be barred. Clearly, this is neither the intent nor the purpose of the statute.

While we agree that agency factual determinations are given a high degree of deference, we believe Sizemore proved by a preponderance of the evidence that her multiple sclerosis was not a pre-existing condition. Furthermore, the factual determinations of the hearing officer and the Board were not supported by substantial evidence as there is no objective medical evidence in the record establishing that Sizemore's condition pre-existed her membership. Therefore, we affirm the Franklin Circuit Court's order insofar as it determined that Sizemore's condition was not pre-existing.

Sizemore claims the only proof KERS provided was a treatise that was improperly admitted into evidence.

Hearsay evidence may be admissible, if it is the type of evidence that reasonable and prudent persons would rely on in their daily affairs, but it shall not be sufficient in itself to support an agency's findings of facts unless it would be admissible over objections in civil actions.

KRS 13B.090(1). At the beginning of the administrative hearing Sizemore's counsel had the opportunity to object to the admission of the treatise as evidence and failed to do so. In our opinion, this form of hearsay evidence which is not objected to, does not rise to palpable error and is admissible. Regardless, the treatise is not the only evidence upon which KERS relied in that it also used Dr. Zerga's deposition testimony as support for its position. However, this is a moot issue as we have determined Sizemore's condition was not pre-existing.

CONCLUSION

Based on the foregoing we vacate the circuit court's finding and remand to the circuit court for reinstatement of the Board's finding to the extent Sizemore was not totally and permanently incapacitated from her job duties as of her last day of paid employment. We affirm the circuit court's finding on the issue of pre-existing condition.

WINE, JUDGE, CONCURS.

LAMBERT, SENIOR JUDGE, DISSENTS AND FILES SEPARATE OPINION.

LAMBERT, SENIOR JUDGE, DISSENTING: I respectfully dissent from the majority opinion as to total and permanent incapacity.

In my view, the Franklin Circuit Court properly determined that the final decision of the KERS Board of Trustees was unsupported by substantial evidence. Despite acknowledging that Ms. Sizemore suffered from multiple sclerosis, the Board held that she was capable of performing her job and was not disabled within the meaning of the Act.

The circuit court properly analyzed Ms. Sizemore's acknowledged incapacity against the correct legal standard. The court believed the Board had erroneously required constant symptoms and failed to acknowledge that on occasions, symptoms would be dormant. Rather, the circuit court relied on evidence from Dr. Zerga that Ms. Sizemore's fatigue rendered her completely disabled. In summary, the trial court said:

Dr. Zerga observed fatigue in his patient and included it in his diagnosis and his report. These observations constitute objective medical evidence. While the

reviewing physicians discounted this objective medical evidence of fatigue resulting from MS, they offered absolutely no medical or factual basis for concluding that Dr. Zerga's medical diagnosis of fatigue was erroneous. Moreover, it now appears to be undisputed that the petitioner in fact suffers from MS, which all the physicians' testimony indicates is a degenerative disease. The Court finds that the conclusions of the Board both lack the support of substantial evidence and are based on an incorrect interpretation of KRS 61.600. The record compels a finding that Tammy Sizemore is totally and permanently disabled, and thus entitled to disability benefits.

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