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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000437-MR

KENTUCKY RETIREMENT SYSTEMS

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 07-CI-00557

LINDA ROBB

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, DIXON, AND THOMPSON, JUDGES.

DIXON, JUDGE: Kentucky Retirement Systems (“KERS”) appeals a decision of the Franklin Circuit Court reversing KERS’s Board of Trustees’ (“the Board”) final order denying Linda Robb’s application for disability retirement benefits. We affirm.

Robb, who was employed as a preschool bus driver for the Kenton County Board of Education, applied for disability retirement benefits in July 2005,

when she was 62 years old. In her application, Robb stated she suffered from lumbar disc disease and bilateral osteoarthritis of the knees. Robb opined that she had decreased mobility, and she experienced chronic pain exacerbated by prolonged sitting, standing, or walking.

On September 15, 2005, KERS notified Robb that two of the three KERS medical review physicians recommended denial of her application.¹ A short time later, Robb requested a second review and submitted additional medical records to support her claims. On March 18, 2006, KERS again notified Robb that two of the three physicians had denied her application. Thereafter, Robb requested a formal administrative hearing.

An evidentiary hearing was held August 4, 2006, where Robb was the only witness. Robb testified that she was required to have a Commercial Driver's License (CDL) to drive the school bus, and she was responsible for assisting preschool students on the bus. Robb stated she began having knee pain in 1995 or 1996, which was treated with cortisone injections for several years. In 2005, Robb experienced increasing pain in her knees, and in July 2005, she was unable to renew her CDL because of her mobility issues. On cross-examination, Robb stated that, although her doctor recommended a total knee replacement, she would have to lose weight before she could have the procedure. Robb also acknowledged that

¹ Pursuant to KRS 61.665(2)(d), three licensed physicians evaluate a claimant's medical records and recommend whether to approve or deny disability benefits.

she had experienced arthritis in her hands in the late 1980s while working at a bakery, and in 1991, she had swelling in her left lower leg.

The medical evidence submitted by Robb included: 1) more than 400 pages of medical records chronicling her medical care since 1989; and 2) an independent medical examination report from Dr. Roger Meyer, an orthopedic surgeon. The record also included the medical reports of the KERS medical review physicians, Drs. Strunk, Kimball, and McElwain. KERS also tendered, without objection, three articles from the internet regarding osteoarthritis.

On December 5, 2006, the hearing officer rendered a report and recommended order denying Robb's request for disability benefits. The hearing officer concluded that the objective medical evidence did not support a finding that Robb was disabled due to her lumbar disc disease.² The officer further concluded that Robb's arthritis was a pre-existing condition, which precluded disability retirement benefits. Both Robb and KERS tendered exceptions to the hearing officer's report. On March 16, 2007, the Board adopted the recommended order, in part, and substituted its own finding of fact on the issue of Robb's osteoarthritis claim:

The medical records reflect that the Claimant was being treated for arthritis and degenerative joint disease as early as 1989, prior to her membership. Notations from May 1991 indicate the Claimant had swelling in her left lower extremity, had been treated for a blood clot and was suffering from venous insufficiency. Clearly the Claimant was having difficulty with her lower

² This finding is not contested on appeal.

extremities prior to her membership. Further, the records indicate the Claimant weighed approximately 250 pounds as of her membership date. At 5'3" tall, the Claimant would be classified as morbidly obese. It is well established that excess weight causes stress and wearing of the joints, especially in the knee. In fact, Claimant's physicians have repeatedly advised her to lose weight in order to reduce the pain and swelling in her knees. The objective medical evidence confirms that the Claimant's knee problems are directly or indirectly related to preexisting conditions.

Robb then appealed the Board's decision to Franklin Circuit Court.

On February 11, 2009, the circuit court reversed the Board, concluding that the medical evidence compelled a finding that Robb did not have a pre-existing condition that precluded an award of retirement disability benefits. This appeal followed.

“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.” *McManus v. Ky. Ret. Sys.*, 124 S.W.3d 454, 458 (Ky. App. 2003), *quoting Aubrey v. Office of Attorney Gen.*, 994 S.W.2d 516, 519 (Ky. App. 1998). As Robb was unsuccessful before the Board, she is entitled to prevail on appeal only if the evidence in her favor was “so compelling that no reasonable person could have failed to be persuaded by it.” *Id.*

Kentucky Revised Statutes (KRS) 61.600 sets forth the criteria for disability retirement. The statute requires a determination, based on objective medical evidence, as to whether “[t]he person, since his last day of paid

employment, has been permanently mentally or physically incapacitated to perform the job, or jobs of like duties, from which he received his last paid employment.” KRS 61.600(3)(a)-(c). However, the claimant’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).

KERS contends the circuit court impermissibly re-weighed the evidence and substituted its judgment for that of the fact-finder. KERS specifically points out the circuit court addressed issues not raised by either party, including the admissibility of hearsay evidence. The court disregarded the medical review physician reports and the internet articles as inadmissible hearsay and relied on a non-final opinion³ of this Court in its decision.

KERS’s procedural complaints are well-taken, since, “[i]n an appeal of an administrative action by an agency, the circuit courts are to provide review, not reinterpretation.” *Johnson v. Galen Health Care, Inc.*, 39 S.W.3d 828, 833 (Ky. App. 2001). Nevertheless, under the circumstances presented here, although the court may have exceeded the scope of its review, we agree that the evidence compelled a decision in Robb’s favor.

In its specific findings, the Board asserted that Robb had been “treated” for arthritis and degenerative joint disease in 1989, prior to her membership. The full medical record indicates, though, that Robb’s complaint of

³ *Kentucky Retirement Systems v. Sizemore*, 2007-CA-002591-MR (Nov. 7, 2008), discretionary review granted March 11, 2009.

arthritis in 1989 was an isolated event, and there is no correlation between her complaint of arthritis in 1989 and the subsequent onset of bilateral osteoarthritis of the knees more than eight years later. Although the medical records from her 1989 office visit lacked specificity as to her arthritic symptoms, Robb testified that, during that time, she experienced arthritis in her hands due to her employment as a cake decorator.

Furthermore, the Board noted that Robb sought treatment for a venous insufficiency in May 1991, and the Board believed that indicated Robb had suffered “difficulty with her lower extremities prior to her membership.” The Board is clearly mistaken in this instance, as Robb’s date of membership was January 1, 1991, and there is no other indication of lower extremity “difficulty” prior to that date.

Finally, the Board specifically concluded that Robb was morbidly obese at the time her membership began, which contributed to her subsequent “knee problems.” Despite the Board’s conclusion that Robb’s obesity constituted a pre-existing “condition” within the meaning of KRS 61.600(3)(d), there was no objective medical evidence to support that conclusion. KRS 61.510(33) defines “objective medical evidence” 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[.]

At the hearing, Robb acknowledged that she gained weight while taking anti-depressants and beta-blockers, and she conceded that her treating physicians encouraged her to lose weight. The record indicates that two of the three medical review physicians opined that obesity was the causative factor for Robb's osteoarthritis, with Dr. Strunk noting Robb's problems were "almost certainly due to her severe morbid obesity . . . [.]" However, the record also indicates that several factors exist in the development of osteoarthritis including gender, age, weight, heredity, and activity level. Although two of the medical review physicians inferred that Robb's weight contributed to the development of osteoarthritis, we are not persuaded that Robb's obesity constituted a pre-existing condition that resulted in her eventual physical incapacity from work pursuant to KRS 61.600(3)(d).

The record shows that Robb had no complaints of knee pain until 1996, and she began cortisone injections for knee pain in December 1999. Ultimately, in November 2004, she was diagnosed with end-stage degenerative arthritis in her right knee and moderate-severe arthritis in her left knee. In *Kentucky Convalescent Home v. Henry*, 463 S.W.2d 328 (Ky. 1971), a workers' compensation decision, the Court addressed whether obesity constituted a pre-existing "disease" for the purpose of apportioning liability to an employer.

Although workers' compensation and Kentucky employees' disability retirement benefits are governed by two distinct statutory schemes, we nevertheless find the logic of the *Henry* Court illuminating:

Common human experience demonstrates that [obesity] can and does accentuate the consequences of injury in given situations, but the same experience also establishes that the same accentuation of ordinarily expectable consequences of injury may be caused by general bone structure or body frame or statu[re].

Id. at 330.

We conclude that, because osteoarthritis may be caused by several different factors, obesity cannot constitute a pre-existing condition to preclude retirement disability benefits where there is no objective evidence that Robb suffered osteoarthritis of the knees prior to her employment in January 1991. Accordingly, the circuit court properly reversed the Board's decision, as the evidence compelled a finding that Robb did not suffer a pre-existing condition, and she was physically incapacitated from performing her job or a job of like duties.

For the reasons stated herein, we affirm the decision of the Franklin Circuit Court.

ALL CONCUR.

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