

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000365-MR

VERONICA STIVERS

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 08-CI-00490

KENTUCKY RETIREMENT
SYSTEMS

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: LAMBERT AND VANMETER, JUDGES; HARRIS,¹ SENIOR
JUDGE.

HARRIS, SENIOR JUDGE: Veronica Stivers appeals from an opinion and order
of the Franklin Circuit Court entered on February 11, 2009, which affirmed the

¹ Senior Judge William R. Harris sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

denial of disability retirement benefits by the Board of Trustees of the Kentucky Retirement Systems. Stivers argues that the trial court erred by affirming the decision of the Board because the Board's decision was arbitrary and capricious and not supported by substantial evidence. After careful review of the briefs and record, we affirm.

Stivers was employed as an administrative specialist by the Kentucky Board of Nursing from March 16, 1987, to January 31, 2006. Her job duties included opening mail, entering data, filing, faxing, and answering the phones. Stivers' job required her to sit 6 hours a day, lift up to 50 pounds occasionally, and walk extensively. In January 2006, Stivers sought medical attention for persistent left hip and thigh pain. An MRI examination revealed a cancerous lesion. In February 2006, Stivers underwent surgery to remove the lesion and to reconstruct her left femur. Following the surgery, Stivers was required to walk with a cane, although the cancer has apparently not recurred as of the date of the denial of disability benefits.

Stivers applied for disability retirement benefits, which were denied by the medical review board on two occasions. On Stivers' request pursuant to KRS 61.665(3)(a), a formal administrative hearing was conducted on September 5, 2007. The hearing officer issued a recommended order containing findings of fact and conclusions of law, which recommended denial of disability retirement benefits. The Board adopted the hearing officer's recommended order, as

modified,² as its final order entered on February 29, 2008. Stivers appealed the decision of the Board to the Franklin Circuit Court. The trial court entered an opinion and order on February 11, 2009, which affirmed the decision of the Board. This appeal followed.

Stivers argues that the trial court erred by affirming the decision of the Board because the Board's decision was arbitrary and capricious and not supported by substantial evidence.

The applicable standard of review was set forth in *McManus v. Kentucky Retirement Systems*, 124 S.W.3d 454, 458 (Ky. App. 2003), as follows:

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." Causation generally is a question 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.

(Internal citations omitted).

KRS 61.600 sets forth the qualifications for disability retirement benefits and provides in pertinent part:

(3) Upon the examination of the objective medical evidence by licensed physicians pursuant to KRS 61.665, it shall be determined that:

² The Board corrected a typographical error in the hearing officer's report concerning the date Stivers first experienced hip pain.

(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. In determining whether the person may return to a job of like duties, any reasonable accommodation by the employer as provided in 42 U.S.C. sec. 12111(9) and 29 C.F.R. Part 1630 shall be considered;

(b) The incapacity is a result of bodily injury, mental illness, or disease. For purposes of this section, “injury” means any physical harm or damage to the human organism other than disease or mental illness;

(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. For purposes of this subsection, reemployment shall not mean a change of employment between employers participating in the retirement systems administered by the Kentucky Retirement Systems with no loss of service credit.

(4) Paragraph (d) of subsection (3) of this section 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

(b) The person has at least sixteen (16) years’ current or prior service for employment with employers participating in the retirement systems administered by the Kentucky Retirement Systems.

Based upon our review of the record and given the deference owed to the finder of fact, we cannot conclude that the evidence compels a finding that Stivers is permanently physically incapacitated to perform the job, or like duties, from which she received her last paid employment. Although the evidence demonstrated that Stivers underwent a radical operation to reconstruct her left femur following the removal a cancerous lesion, the evidence also demonstrated a successful recovery. Stivers has not experienced a recurrence of the cancerous lesion. She is not currently taking any prescription pain medications nor is she currently receiving physical therapy. As of August 21, 2007, although she still required the use of a cane, Stivers' treating physician reported that she had reached maximum medical improvement. There is no medical evidence which corroborates her belief that she will not be able to perform her work duties.

Stivers takes issue with alleged misstatement of applicable law and fact in the reports of the medical examiners. However, there is no indication that these alleged misstatements were in any way adopted as findings by the Board. As stated above, this Court does not review the evidence *de novo*. Although there is some conflicting evidence in the record and Stivers presents a sympathetic case, we cannot conclude that the evidence compels a ruling in her favor.

Accordingly, the opinion and order of the Franklin Circuit Court entered on February 11, 2009, is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

W. Kenneth Nevitt
Louisville, Kentucky

BRIEF FOR APPELLEE:

Katherine Rupinen
Frankfort, Kentucky