

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000119-MR

FREDA HOLLEN

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 05-CI-01287

KENTUCKY RETIREMENT
SYSTEMS

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON AND STUMBO, JUDGES; KNOPF,¹ SENIOR JUDGE.

KNOPF, SENIOR JUDGE: Freda Hollen appeals from an opinion and order of the

Franklin Circuit Court entered on December 17, 2008, affirming a denial of

Hollen's application for disability retirement benefits by the Board of Trustees of

the Kentucky Retirement Systems (KRS). Hollen argues that the trial court erred

¹ Senior Judge William L. Knopf 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.

by affirming the decision of the Board because the Board's decision was arbitrary and capricious and not supported by substantial evidence. After our review, we affirm.

FACTS AND PROCEDURAL HISTORY

As an initial matter, we note that Hollen's briefs fail to include specific references and citations to the record as required by Kentucky Rules of Civil Procedure (CR) 76.12(4)(c)(iv) and (v). This failure is particularly notable in this case because the administrative record is nearly 700 pages in length and has made verification of Hollen's factual assertions exceedingly difficult. Although noncompliance with the provisions of CR 76.12 is not automatically fatal to a party's appeal, this Court would be well within its discretion to strike Hollen's briefs for these omissions. *See* CR 76.12(8)(a). We decline to do so, however, and choose to address Hollen's appeal on the merits.

Hollen was formerly employed by the Clay County Board of Education as a cook/baker at Hacker Elementary School. Her membership date in the County Employees Retirement System was November 2, 1989, and her last date of paid employment in a full-time position with the System was January 1, 2002. Accordingly, she had 131 months of total service credit. Hollen's duties as a cook/baker were classified as "medium" in nature and included preparing and serving food, stocking frozen food and other grocery items, and cleaning the kitchen area. According to Hollen, her job required her to be on her feet for seven hours a day and involved such physical activities as kneeling, crawling, reaching,

pushing, pulling, bending, and lifting and carrying weights of up to fifty pounds.

KRS notes, however, that handcarts were made available for transporting food and stock and that Hollen could ask coworkers for help with any heavy lifting.

Hollen first filed an application for disability retirement benefits on February 18, 2002. Hollen submitted a number of medical records from her treating physicians to support her position that she was disabled because of “severe pain and weakness in her neck, back, and right arm” that she had begun experiencing while employed with the Board of Education. Hollen alleged that this pain was debilitating to the point that it rendered her unable to perform her job duties.

The medical records reflect that Hollen first saw Dr. Suzanne Dansereau of the Parkway Medical Clinic in Manchester, Kentucky, in October 1999 and told her that she had begun having pain in her back after trying to lift a box of cheese at work.² Dr. Dansereau ultimately diagnosed Hollen with such ailments as cervical disc spurs, chronic lower-back and neck pain, fibromyalgia, right-arm pain, mild right-sided carpal tunnel syndrome, and depression. However, Dr. Dansereau noted on at least one occasion that previous MRI scans of Hollen’s spine were “unremarkable.” In a form submitted to KRS in July 2002, Dr. Dansereau indicated that Hollen’s ailments were such that she would be unable to perform her job duties.

² The record does not reflect that Hollen ever filed a workers’ compensation claim.

Hollen also submitted medical records from Dr. William Brooks, a neurologist in Lexington, Kentucky. Those records reflect that Hollen suffered from a mild-to-moderate case of carpal tunnel syndrome on her right side and a mild case on her left side. However, a bone scan of Hollen conducted in January 2002 was normal, as were an MRI taken of her lumbar spine in April 1999 and a CT scan of her pelvis conducted in March 1999. In a letter dated January 10, 2002, Dr. Brooks acknowledged Hollen's complaints of neck, back, and right-arm pain but then noted:

After reviewing her cervical and lumbar MRI films, she does indeed have some arthritis and stenosis in her low back, but there is no nerve root impingement. The cervical MRI is fairly unremarkable and also shows no evidence of nerve root impingement, stenosis, or a bulging disc. At this point I am really not sure what is causing Ms. Hollen's particular symptoms, especially the right arm pain. I find it unusual that the right arm began sometime before the neck pain and does not seem to radiate down the arm as one would expect it to do with some type of nerve root impingement either from stenosis or herniated disc.

Dr. Brooks also identified degenerative osteoarthritis as a possible cause for some of Hollen's complaints. He further noted that physical therapy had helped Hollen's neck pain and increased her range of motion, but it had done nothing for her arm pain and numbness.

Records from Dr. Rahul Dixit reiterated Hollen's diagnoses of fibromyalgia, mild right-sided carpal tunnel syndrome, DDD of the cervical spine without neurological impingement, and a small posterior spur on her spine. Dr.

Dixit also concluded that Hollen was suffering from depression with secondary anxiety. Following an examination conducted on May 14, 2002, Dr. Dixit noted that Hollen's cervical spine range of motion was decreased in all directions by 20 percent and that she also suffered from decreased range of motion and tenderness in her lumbar spine.

Hollen's application for disability retirement benefits was denied on September 10, 2002, after her medical records were reviewed – and denial of her claim recommended – by both the primary and secondary Medical Review Board physicians. Those doctors found that the records presented by Hollen did not reflect a “permanently disabling process” and that her claims of being permanently disabled were not explained or justified by objective medical evidence. Hollen did not file any further appeals from this decision.

Instead, Hollen subsequently filed a second application for disability retirement benefits on January 14, 2003. Hollen identified degenerative spine disease, depression, fibromyalgia, osteoarthritis, and heavy lifting as the causes of her disability. She further noted that she was no longer able to lift anything, bend over, reach, climb, concentrate, or sit for more than twenty minutes because of her ailments. Hollen's application further provided that she injured her back for the first time when she attempted to remove a box of cheese from a freezer at work and that she twisted it again at work while serving food. Hollen also claimed that her depression had increased as a result of her physical issues.

Hollen's second application was accompanied by many of the same medical records submitted originally along with some new information. A report dated March 14, 2002, from Dr. Brooks reflected his belief that Hollen suffered from fibromyalgia. However, he could not find "an isolated abnormality that would lend itself to surgical correction" and noted that Hollen did not suffer from any mental or emotional instability. Dr. Brooks further recommended that Hollen be limited to lifting ten to twenty pounds, but he offered no comments on the question of whether she could return to her former work. Another report submitted by Dr. Cary L. Twyman recognized that Hollen suffered from dual-sided carpal tunnel syndrome.

Hollen also submitted new (and largely illegible) medical records from her psychiatrist, Dr. Cecilia A. Carpio-Carigaba, who diagnosed her with major depressive disorder (chronic, recurrent, moderate) and gave her a poor prognosis. Dr. Carpio-Carigaba opined that because of her depression, Hollen was unable to engage in any gainful employment, but she failed to elaborate on this conclusion. Hollen also submitted records from Dr. Elmer C. Maggard which contained extensive discussion about her depression. Notably, an intake note from July 3, 2003, indicated that Hollen had attempted suicide on two occasions prior to her employment with the Clay County Board of Education. The first occurred when she was in high school and felt "worthless" and "embarrassed by her stuttering." The second attempt occurred after the birth of her youngest child.

Hollen also submitted a number of other X-rays and MRIs taken at the Parkway Medical Clinic. An X-ray report from January 25, 1999, showed “mild osteopenia” but “no significant bony or joint abnormality[.]” Subsequent X-ray reports from October 13, 1999, and March 15, 2000, reflected “very mild positional scoliosis” but were otherwise unremarkable. An MRI of Hollen’s cervical spine conducted on September 21, 2000, revealed a straightening of the spine and resulting muscle spasms along with some disc bulging and marginal spur formation. Another MRI of Hollen’s lumbar spine performed on November 26, 2001, produced an “essentially normal” impression. An MRI of her cervical spine performed that same day showed some “mild posterior spurring” but no significant narrowing of the spinal canal or cord. Hollen also submitted a number of other medical records that are essentially repetitive of what has been said above or involve unrelated medical issues.

Hollen’s second application for disability retirement benefits was denied on May 5, 2003, upon the recommendations of the Medical Review Board, who again found no “objective evidence of a permanently disabling problem.” The doctors specifically dismissed the idea of fibromyalgia being an objectively disabling condition. Hollen’s subsequent appeals to the Board were also denied despite the submission of additional information. On July 26, 2004, Hollen requested a full administrative hearing before a hearing officer in order to contest the denial of her application. A hearing was held on December 9, 2004.

At the hearing, Hollen testified on her own behalf and described in detail the nature of her former job duties. She also discussed her physical and mental ailments, noting that she was never completely pain-free, that she had trouble sitting, and that she often had to rest and change places when she was lying down. Hollen further testified that she was unable to do much housework anymore because of the pain that she continued to experience in her neck, back, knees, and arm. She also indicated that she often could not sleep or eat and felt worthless because she was unable to do anything. She further noted that she wore a cervical collar and used a cane to walk while at home and that she had difficulty using her hands. Hollen presented no other testimony at the hearing, but she did provide the hearing officer with all of the medical records discussed above.

On April 8, 2005, the hearing officer submitted his “Report and Recommended Order” concluding that Hollen’s claim for disability retirement benefits should be denied. The hearing officer classified Hollen’s occupation as “medium” work³ and noted that her application was based on claims of degenerative spine issues, depression, fibromyalgia, and osteoarthritis. After setting forth in extensive detail the substance of the testimony and medical records presented as evidence, the hearing officer ultimately recommended denial of Hollen’s application on the following grounds:

5) The Claimant claims that she has various conditions which prevent her from performing the duties of a

³ KRS 61.600 defines “medium” work as “work that involves lifting no more than fifty (50) pounds at a time with frequent lifting or carrying of objects weighing up to twenty-five (25) pounds.” KRS 61.600(5)(c)(3).

Cook/Baker. However, the objective medical evidence of record does not support her claim for disability. She has mild to moderate carpal tunnel syndrome. No evidence of disc herniation or internal disc disruption of the cervical spine based on the MRI. While she has some small posterior spurs, there is no neurological impingement. She had a normal bone scan. (See Dr. Dixit's May 2002 report, Exhibit 20, p. 103)

6) The Claimant has been diagnosed with major depression. As the Systems points out, however, she had episodes of attempted suicide prior to her initial membership date.

7) While the Claimant has pain and has complained of problems with lifting and carrying, the objective evidence does not support this complaint.

8) As to her depression, it has not been shown that the depression would prevent her from performing her duties but, because of the suicide attempts prior to her initial membership date, it is found that her emotional condition is a pre-existing condition.

9) As to the Claimant's mild to moderate carpal tunnel syndrome, no surgery has been recommended.

10) The Claimant has failed to set forth objective medical evidence to show that she would be unable to perform her duties as a Cook/Baker for the Clay County Board of Education.

11) The Claimant does not have sixteen years of service, nor has there been a showing of an accident or injury in the course of employment that has aggravated her condition.

The Disability Appeals Committee of the KRS Board of Trustees adopted the Hearing Officer's "Report and Recommended Order" and denied Hollen's

application for disability retirement benefits in a “Final Order” entered on August 25, 2005.

Hollen subsequently filed a petition for review in the Franklin Circuit Court pursuant to Kentucky Revised Statutes (KRS) 61.665(5) and KRS 13B.140. She specifically disagreed with the Retirement Systems’ conclusion that she had failed to provide objective evidence to show that she was unable to perform her job duties as a cook/baker. On December 17, 2008, the circuit court entered an “Opinion and Order” in which it affirmed the denial of Hollen’s application for disability retirement benefits. As to Hollen’s claimed physical ailments, the court justified its decision as follows:

Ultimately, the Board based its rejection of Plaintiff’s appeal upon a lack of objective medical evidence of disabling injury. Plaintiff did present objective medical evidence that she experienced some degenerative disc disease and osteoarthritis; however, treating physicians consistently referred to these conditions as substantially normal. There was no indication that those slight spinal abnormalities were disabling. Further, although the Board recognized that Plaintiff did, in fact, have fibromyalgia, there was very little supplemental or objective information about the extent to which that should have disabled Plaintiff. Given the whole record, the Board’s decision as to Plaintiff’s physical condition was based upon substantial evidence.

As to Hollen’s claim of disabling depression, the court found no error with the Board’s conclusion that her depression was a condition that predated her employment with the Clay County Board of Education:

Plaintiff also submitted medical records from doctors who treated her depression. These records include

doctors' observations of her emotional state, the stressors Plaintiff encountered, Plaintiff's reports of hopelessness and crying spells, medications Plaintiff took to regulate her mental state, and some largely illegible records provided by one mental health professional. Also included in these records are intake forms and preliminary interviews with Plaintiff, which document two suicide attempts that occurred before Plaintiff began working for the Clay County Board of Education. Based upon those two incidents, it was certainly permissible for the Board to conclude that Plaintiff's depression predated

her membership in CERS, which made her ineligible for disability retirement benefits.

This appeal followed.

DISCUSSION

On appeal, Hollen argues that the circuit court erred in affirming the administrative decision denying her application for disability retirement benefits and claims that that decision went against the evidence. Pursuant to KRS 13B.090(7), the burden of proof rests on the party who is seeking benefits from the agency. *McManus v. Kentucky Retirement Systems*, 124 S.W.3d 454, 457-58 (Ky. App. 2003). In cases where a party seeking disability retirement benefits was denied such, "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." *Id.* at 458. "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." *Aubrey v. Office of Attorney General*, 994 S.W.2d 516, 519 (Ky. App. 1998). Accordingly, "[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*, 124 S.W.3d at 458. Ultimately, this court’s role “is to review the administrative decision, not to reinterpret or reconsider the merits of the claim.” *Lindall v. Kentucky Retirement Systems*, 112 S.W.3d 391, 394 (Ky. App. 2003).

KRS 61.600 provides members of the County Employees Retirement System with disability retirement benefits when certain conditions are met. That statute provides, in relevant part, as follows:

(1) Any person may qualify to retire on disability, subject to the following conditions:

.....

(3) Upon the examination of the objective medical evidence 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. 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.⁴

Essentially, then, a person seeking benefits is required to show, via “objective medical evidence,” a permanent⁵ inability – because of bodily injury, mental illness, or disease – to perform her old job duties. Moreover, these incapacitating conditions cannot have existed prior to the applicant’s membership in the system.

⁴ KRS 61.600 also requires preliminary qualifications such as length of service and timely filings, but these appear to have been satisfied.

⁵ Under KRS 61.600, “[a]n 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.” KRS 61.600(5)(a)(1).

After reviewing the administrative record and the parties' arguments, we cannot say that they compel reversal of the administrative decision since "[t]he evidence is not so overwhelming that the hearing officer's decision was unreasonable." *McManus*, 124 S.W.3d at 459. The fact that we might disagree with the administrative decision is of no consequence. As noted by the hearing officer and the circuit court, Hollen was found by her treating physicians to suffer only from mild to moderate carpal tunnel syndrome in her left hand and did not recommend any sort of surgery. Moreover, bone scans, MRI scans, and CT scans of Hollen's spine and pelvic regions produced generally normal results and no neurological impingement was found. There was certainly evidence in the record indicating that Hollen suffered from pain, but the hearing officer concluded that it failed to adequately explain and justify how and why such pain was disabling in this case. Indeed, Hollen's physicians often appeared to be at a loss to explain her ailments. In light of our limited role as a reviewing court in such matters, we cannot say that this conclusion was entirely unreasonable. Hollen also notes that she received a favorable Social Security decision in which she was found to be disabled, but this determination does not compel a similar result in a case such as this one.

As to the matter of Hollen's depression, the hearing officer concluded that such was a condition that pre-existed her employment with the Clay County Board of Education because of her documented suicide attempts. Thus, it could not be considered as a basis for Hollen's application for disability retirement

benefits under KRS 61.600(3)(d). Under *McManus, supra*, Hollen had the ultimate burden of proof as to the question of whether her depression was a condition that preceded her employment with the Board. See *McManus*, 124 S.W.3d at 458. Her brief provides nothing of substance to refute the hearing officer’s conclusion and no medical records were produced prior to her employment with the Board that might have served to challenge this determination. Therefore, we once again cannot conclude that the evidence in Hollen’s favor was overwhelming to such a degree that reversal is merited.

Hollen next argues that the hearing officer, the KRS Board of Trustees, and the circuit court failed to consider the “cumulative effect” of her impairments in denying her disability benefits application. In *Kentucky Retirement Systems v. Bowens*, 281 S.W.3d 776 (Ky. 2009), our Supreme Court held that KRS is required to consider the “cumulative effect” of all of an applicant’s medical problems in making its disability determination. *Id.* at 783. Hollen argues that such has not occurred here.

Bowens was not rendered until April 23, 2009 – after the circuit court entered its decision – which raises the question of whether that decision should apply here. However, a new precedent cannot be applied retroactively unless the subject issue was preserved for review. *Burns v. Level*, 957 S.W.2d 218, 222 (Ky. 1997). Our review of the record fails to show that the issue was ever raised below, and Hollen has provided us with no statement of preservation on the matter, as required by CR 76.12(4)(c)(v). Therefore, we decline to consider her argument.

Citing to *Jones v. Board of Trustees of Kentucky Retirement Systems*, 910 S.W.2d 710 (Ky. 1995), Hollen finally offers a somewhat confusing contention that the Board’s decision denying her application for benefits was a “retroactive amendment that impairs the obligations of the inviolable contract of the Commonwealth created by KRS 60.510 to 61.705.” While our Supreme Court recognized in *Jones* that “the retirement savings system has created an inviolable contract between KERS members and the Commonwealth,” and that consequently “the General Assembly can take no action to reduce the benefits promised to participants,” *id.* at 713, nothing within that decision purports to limit the Board’s authority to deny disability retirement benefits where merited. We suspect that Hollen attempts to raise a contention that the pre-existing condition provisions of KRS 61.600 do not apply in her case, but she provides nothing of substance to support this position. Thus, this argument must also be rejected.

CONCLUSION

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

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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