

RENDERED: OCTOBER 26, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000018-MR

KENTUCKY RETIREMENT SYSTEMS

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 09-CI-00189

ELLA PHILBECK

APPELLEE

AND

NO. 2011-CA-000165-MR

ELLA MAE PHILBECK

CROSS-APPELLANT

v.

CROSS-APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 09-CI-00189

KENTUCKY RETIREMENT SYSTEMS;
BOARD OF TRUSTEES OF THE KENTUCKY
RETIREMENT SYSTEMS; DISABILITY
APPEALS COMMITTEE OF THE KENTUCKY
RETIREMENT SYSTEMS; AND KENTUCKY
EMPLOYEES RETIREMENT SYSTEM

CROSS-APPELLEES

OPINION
AFFIRMING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, LAMBERT AND STUMBO, JUDGES.

STUMBO, JUDGE: The Kentucky Retirement Systems appeals from an opinion and order of the Franklin Circuit Court, which vacated its decision to deny Ella Philbeck disability retirement benefits and remanded the matter back to the agency for further proceedings. The Kentucky Retirement Systems argues that the circuit court erred in aspects of its analysis and that there was substantial evidence supporting its decision to deny Ms. Philbeck disability retirement benefits. Ms. Philbeck cross-appeals arguing that the trial court should not have remanded the case to the agency, but should have ordered that the Kentucky Retirement Systems pay her the disability retirement benefits she requested. We find that the Kentucky Retirement Systems improperly denied benefits to Ms. Philbeck. We therefore affirm the trial court's judgment in vacating the agency's decision, but remand with instructions to approve Ms. Philbeck's disability retirement benefits as requested by Ms. Philbeck's cross-appeal.

Ms. Philbeck became a member of the Kentucky Retirement Systems in July of 1995 when she first began working for the state of Kentucky. Her last day of paid employment was October 31, 2006. As of Ms. Philbeck's last day of paid employment, she was employed as a field coordinator for the Administrative Office of the Courts. This position is sedentary in nature and requires a great deal

of sitting and driving. Ms. Philbeck quit the job due to pain in her back, knees, hips, neck, and shoulders. She filed her first application for disability retirement benefits on December 9, 2006, alleging she was disabled due to arthritis, degenerative disc disease, sleep apnea, fibromyalgia, high blood pressure, and severe allergies.

Ms. Philbeck's application for disability benefits was denied three times by the Kentucky Retirement Systems. An administrative hearing was held which also denied her application. The hearing officer denied Ms. Philbeck's application because he found her sleep apnea, high blood pressure, and allergies were stable and being controlled by medication. The hearing officer also found that there was no objective medical evidence to support a diagnosis of fibromyalgia. Finally, the hearing officer found that Ms. Philbeck's arthritic conditions were either pre-existing due to her being overweight¹ prior to joining the Kentucky Retirement Systems or that there was no objective medical evidence to show her arthritic conditions would prevent her from performing her duties.

Ms. Philbeck then appealed to the Franklin Circuit Court. That court found that the hearing officer only considered evidence of each medical condition individually and based his decision on the limitations caused by the each, rather than considering the cumulative effect of all the ailments on Ms. Philbeck. The court also found that the Kentucky Retirement Systems' analysis of the pre-existing condition issue was flawed. It held that Ms. Philbeck only needed to

¹ At the time of the administrative hearing, Ms. Philbeck was obese. She claims she was not obese at the time she joined the Kentucky Retirement Systems.

provide “minimal” evidence to prove a lack of a pre-existing condition. The circuit court remanded on these two issues. This appeal and cross-appeal followed.

Kentucky Revised Statute(s) (KRS) 61.600 provides for disability retirement to members of the Kentucky Employees Retirement System. It reads 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:

(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.

(5) (a) 1. An 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.

2. The determination of a permanent incapacity shall be based on the medical evidence contained in the member's file and the member's residual functional capacity and physical exertion requirements.

(b) The person's residual functional capacity shall be the person's capacity for work activity on a regular and continuing basis. The person's physical ability shall be assessed in light of the severity of the person's physical, mental, and other impairments. The person's ability to walk, stand, carry, push, pull, reach, handle, and other physical functions shall be considered with regard to physical impairments. The person's ability to understand, remember, and carry out instructions and respond appropriately to supervision, coworkers, and work pressures in a work setting shall be considered with regard to mental impairments. Other impairments, including skin impairments, epilepsy, visual sensory impairments, postural and manipulative limitations, and environmental restrictions, shall be considered in

conjunction with the person's physical and mental impairments to determine residual functional capacity.

(c) The person's physical exertion requirements shall be determined based on the following standards:

1. 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.

KRS 61.600(3)-(5)

The burden of proof is on Ms. Philbeck to prove that she is entitled to disability benefits. KRS 13B.090(7); *McManus v. Kentucky Retirement Systems*, 124 S.W.3d 454, 457-458 (Ky. App. 2003).

Determination of the burden of proof also impacts the standard of review on appeal of an agency decision. When the decision of the fact-finder is in favor of the party with the burden of proof or persuasion, the issue on appeal is whether the agency's decision is supported by substantial evidence, which is defined as evidence of substance and consequence when taken alone or in light of all the evidence that is sufficient to induce conviction in the minds of reasonable people. 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.

McManus at 458.

Here, because the hearing officer ruled against Ms. Philbeck, 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.* Both parties make numerous arguments on this appeal and cross-appeal; however, because we ultimately find that the Kentucky Retirement Systems should have approved Ms. Philbeck’s disability retirement, only two issues need to be discussed.

The first issue concerns an alleged pre-existing condition. We find that the circuit court used the wrong standard when it discussed Ms. Philbeck’s alleged pre-existing condition. The court stated that “the burden to prove a negative – the absence of a pre-existing condition – must necessarily be construed to be minimal.” The court went on to say that the burden then shifts to the agency to “present some evidence that [Ms. Philbeck’s] obesity pre-existed her employment.” We must first point out that the Kentucky Retirement Systems did not claim that Ms. Philbeck’s obesity was a pre-existing condition. The agency claimed that because it was likely she was obese when she first began her employment with the state, then the arthritis in her knees was pre-existing.² In other words, the Kentucky Retirement Systems is claiming the arthritis in Ms. Philbeck’s knees was pre-existing due to her weight.

The correct standard for determining the existence of a pre-existing condition is that “the person seeking the entitlement determination must prove to the trier of fact that his or her condition was not pre-existing membership by a

² Kentucky Retirement Systems and its doctors argue that obesity can lead to or exacerbate arthritic problems in the knees.

preponderance of the evidence.” *Kentucky Retirement Systems v. Brown*, 336 S.W.3d 8, 14 (Ky. 2011). Ms. Philbeck will meet the preponderance of the evidence standard if she provides sufficient evidence to show that it is more likely than not her condition was not pre-existing. *See Baird v. Baird*, 234 S.W.3d 385, 387 (Ky. App. 2007)(using the preponderance of the evidence standard to sustain the entry of a domestic violence order.).

The trial court used the incorrect standard in this instance, but we do not need to reverse on this issue. We find that the Kentucky Retirement Systems’ conclusion that Ms. Philbeck’s arthritis in her knees was pre-existing to be mere speculation and that Ms. Philbeck proved, by a preponderance of the evidence, that the arthritis in her knees was not pre-existing. The Kentucky Retirement Systems argues that the arthritis in her knees was pre-existing because she was most likely obese at the time she became a member. The issue is whether her arthritis was pre-existing, not her weight. *Arguendo*, even if we were to assume that her weight is the pre-existing condition, there is no evidence it caused her arthritic conditions.

First, Ms. Philbeck provided photographic evidence to show that she was not obese in 1995. Secondly, assuming she was obese at the time she joined the Kentucky Retirement Systems, this is not proof that her arthritis was pre-existing. Even though obesity can be linked to arthritis, without some proof that this was the case with Ms. Philbeck, it is pure speculation and cannot be the reason for a declaration that her arthritic condition was pre-existing. *See Kentucky Retirement Systems v. Sisk*, 2012 WL 246450 (Ky. App. 2012)(holding that absent some

evidence of causation, evidence of obesity does not prove pre-existing diabetes.); *Board of Trustees of Kentucky Retirement System v. Bonner*, 2011 WL 5419723 (Ky. App. 2011)(holding that absent some evidence of causation, evidence of obesity does not prove pre-existing foot and ankle disorders.); *Kentucky Retirement Systems v. Robb*, 2009 WL 4060881 (Ky. App. 2009) (holding that 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.).³

Additionally, Ms. Philbeck provided evidence that the arthritis in her knees was not pre-existing. Ms. Philbeck's medical records from her primary physician, Dr. Herbert Long, show that her first complaint of knee pain was in 1999, four years after she became a member of the Kentucky Retirement Systems. Both Ms. Philbeck and Dr. Long stated that this was an acute problem and not degenerative.⁴ Ms. Philbeck did not complain of knee pain again until 2004. Also, hospital records for the years 1998 and 2000 show that Ms. Philbeck was not taking any medication for pain or arthritis.

The Kentucky Retirement Systems' primary argument concerning Ms. Philbeck's knee arthritis is that it had to be pre-existing because she was most

³ These unpublished cases are being cited pursuant to Kentucky Rule(s) of Civil Procedure (CR) 76.28.

⁴ A notation on the medical chart for the 1999 appointment with Dr. Long stated that Ms. Philbeck's knee had been giving her problems for "20 years." Ms. Philbeck testified that her statement to that effect was an exaggeration. Dr. Long stated that Ms. Philbeck's knee pain at this time was not degenerative and was resolved. Even assuming this statement were true, it would only be some evidence of a pre-existing condition, not substantial evidence.

likely obese when she became a member. As stated above, this is not evidence. We therefore find that Ms. Philbeck proved by a preponderance of the evidence that the arthritis in her knees was not pre-existing.

We now move to the main issue. Should Ms. Philbeck have been granted disability retirement benefits? We answer this question in the affirmative. We will first note that we agree with the Kentucky Retirement Systems' conclusion that Ms. Philbeck's sleep apnea, high blood pressure, and allergies are not disabling. The medical records show that these conditions are stable or are being successfully treated with medication. It is with the Kentucky Retirement Systems' findings concerning Ms. Philbeck's degenerative arthritis and osteoarthritis conditions that we disagree.

The Kentucky Retirement Systems held that Ms. Philbeck did not provide objective medical evidence that her conditions were disabling. This holding is incorrect. The medical records in this case show that the arthritic conditions in Ms. Philbeck's back, hips, and knees are disabling. Ms. Philbeck provided the medical records of three doctors, Dr. Long,⁵ Dr. Rita Egan,⁶ and Dr. Saroj Dubal.⁷ All three of these doctors found Ms. Philbeck to be disabled due to her arthritic conditions and the pain they cause. As stated in *Kentucky Retirement Systems v. Lowe*, 343 S.W.3d 642, 647 (Ky. App. 2011):

⁵ Her primary physician.

⁶ Her rheumatologist.

⁷ Her pain management doctor.

The Retirement System suggests that the findings of each of [Philbeck's three] physicians do not constitute "objective medical evidence" because they were heavily based upon [Philbeck's] subjective complaints of pain. This argument cannot stand. Treating physicians' reports are clearly objective medical evidence. While the Retirement System is at liberty to point to other objective medical evidence to contradict the findings of treating physicians when denying a claim, and while the Retirement System is at liberty to give greater weight to its own reviewing physicians if it so chooses, it may not discount treating physicians' reports as failing the standard of objective medical evidence. *Kentucky Ret. Sys. v. Bowens*, 281 S.W.3d 776 (Ky. 2009). Indeed, simply because a physician's diagnoses are based in part upon the subjective complaints of a patient (such as pain) does not remove them from the realm of objective medical evidence. The opinions and conclusions of a treating physician must be considered objective medical evidence for purposes of KRS 61.600.

All three of these doctors submitted medical reports setting forth their opinions that Ms. Philbeck was disabled. These reports also set forth significant work restrictions. Examples include: Dr. Long stated that Ms. Philbeck could only sit for 10 to 15 minutes at a time and for 4 hours total in a day; Dr. Egan stated Ms. Philbeck could only sit for 30 minutes without interruption and for 3 hours total; and Dr. Dubal stated Ms. Philbeck could only sit for 20 to 30 minutes a day and 3 to 4 hours total. The reports also restrict the amount of weight she can carry and the amount of time she can stand or walk.

These reports are also supported by the additional medical records submitted. The medical records of Dr. Long and Dr. Egan show that beginning in 2004 and through 2006, Ms. Philbeck was suffering from lower back pain, hip

pain, and knee pain. Ms. Philbeck was diagnosed with trochanteric bursitis,⁸ cervical and lumbar spine degenerative arthritis, and degenerative arthritis of the knees. As time went on, the medications prescribed stopped managing her pain. Also, MRIs and X-rays showed degenerative disk disease at the C4/C5 and C5/C6 levels with bony neural narrowing and loss of normal cervical lordosis,⁹ lumbar facet arthropathy¹⁰ at the L3/L4 and L4/L5 levels, lumbar facet arthropathy at the L4/L5 and L5/S1 levels, degenerative changes of the knees, trochanteric bursitis, narrowing of hip joints, and knee joint space narrowing with spurs.

Because the original fact-finder in this case denied Ms. Philbeck relief, we must decide “whether the evidence in that party’s favor is so compelling that no reasonable person could have failed to be persuaded by it.” *McManus* at 458. We find that the objective medical evidence in this case, consisting of medical reports, MRI’s, and X-rays, is so compelling that Ms. Philbeck should have been granted disability retirement benefits.

Based on the foregoing, we affirm the judgment of the trial court, but remand with instructions to approve Ms. Philbeck’s application for disability retirement benefits.

LAMBERT, JUDGE, CONCURS.

CLAYTON, JUDGE, CONCURS IN RESULT ONLY.

⁸ An arthritic inflammation of the hip.

⁹ Cervical lordosis is the natural curve of the spine.

¹⁰ Facet arthropathy is degenerative arthritis of the facet joints in the spine. This is a common cause of lower back pain.

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