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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-002027-MR

BETTY STOLLGER

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 09-CI-01687

KENTUCKY RETIREMENT SYSTEMS; AND
THE BOARD OF TRUSTEES OF KENTUCKY
RETIREMENT SYSTEMS

APPELLEES

OPINION AND ORDER
AFFIRMING AND GRANTING
THE APPELLEES' MOTION TO STRIKE

** ** * ** * ** *

BEFORE: ACREE, CHIEF JUDGE; KELLER, AND MOORE, JUDGES.

KELLER, JUDGE: Betty Stollger (Stollger) appeals the circuit court's order affirming the Kentucky Retirement Systems' (KERS) order denying her application for disability benefits. In her brief on appeal, Stollger enumerates twelve issues.

We believe those twelve issues can be consolidated into the following: (1) whether

the initial recommendation by KERS's medical examiners to deny a claim is a denial of benefits; (2) whether KERS is entitled to participate in its administrative hearings; (3) whether KERS's administrative hearings are adversarial; (4) whether KERS is obligated to have all medical evidence reviewed by a physician; (5) whether reports from KERS's medical examiners are objective medical evidence; and (6) whether KERS failed to rebut Stollger's *prima facie* case that she is disabled and that her disability is not related to pre-existing conditions. KERS argues that the majority of the issues raised by Stollger were not properly preserved. However, KERS does address the issues raised by Stollger, asserting that her arguments are without merit; therefore, we address the issues. Having reviewed the record and the parties' briefs, we affirm.

FACTS

Stollger began working at Eastern Kentucky University (EKU) in 1995. She was last a paid employee at EKU in September 2005. In the summer of 2005, Stollger, who was sixty-one years of age at the time, filed for disability retirement benefits. In her application, Stollger stated that she could not continue working because of low back pain, which she related to degenerative disc disease of the lower back, degenerative scoliosis, and lumbar bone spurs. Stollger also stated that she had suffered from back pain for several years - "at least ten" - particularly after doing work that required lifting and bending.

At the request of KERS, three physicians reviewed the medical records Stollger submitted with her application. Dr. Strunk stated that Stollger's

scoliosis, which contributed to her degenerative disc disease, likely pre-existed her employment at EKV. That fact, coupled with the fact that Stollger performed sedentary work, led Dr. Strunk to recommend that her claim be denied. Dr. Keller¹ stated that Stollger had suffered from back pain for many years that gradually worsened. He noted that diagnostic test results showed degenerative scoliosis and degenerative disc disease and stated that "[i]n light of [Stollger's] age of 61 years there appears to be a very strong likelihood that she did in fact have preexisting disease which very probably preexisted her time of employment." Dr. Keller also recommended denial of Stollger's claim. Dr. McElwain noted that no "objective medical information" was submitted "to document pre-existence" and that there was an "absence of a description of total and permanent disability." Therefore, he also recommended denial of Stollger's claim.

Stollger then submitted additional medical information and the three physicians again reviewed her claim. Based on that second review, Dr. Strunk stated that he continued to believe that Stollger's condition was not disabling and that it pre-existed her employment. Dr. Keller stated that:

[T]he adult human begins to show significant degenerative changes that are consistent from the third decade of life onward. While there are some people who are documented to show evidence of earlier or later changes than others, virtually all adult humans by age 50 have documentable evidence of significant degenerative skeletal changes. The notion that the claimant did not have pre-existing degenerative change before her time of employment with Eastern Kentucky University is naïve.

¹ Dr. William H. Keller is not related to Judge Michelle M. Keller.

He again recommended denial. Finally, Dr. McElwain again indicated that the record had little objective medical information and no medical information describing total and permanent disability. Therefore, he too recommended denial of Stollger's claim, and KERS notified Stollger that her claim was being denied.

In August 2007, Stollger re-applied for benefits and filed additional medical records with this application. Those records included a report from Dr. Gillespie, records and a report from Dr. Cassas, records from Dr. Micek, and a functional capacity evaluation report. In his May 16, 2006 report, Dr. Gillespie stated that Stollger's degenerative disc disease and degenerative scoliosis impaired her abilities to lift and to stand for extended periods of time. Furthermore, Dr. Gillespie stated that Stollger's pain would impede her ability to perform her ECU job or any similar job. Finally, Dr. Gillespie stated that he found "no evidence to suggest that there was [a] pre-existing condition. There is not a pre-existing condition that resulted in degenerative disease of her spine."

Dr. Cassas's records reveal that he treated Stollger for complaints of right foot, low back, and right hip pain. He noted that Stollger suffered from lumbar degenerative disc disease and scoliosis, with X-ray evidence of those conditions dating to February 25, 1999. In his August 8, 2007 report, Dr. Cassas stated that Stollger cannot perform full-time sedentary work that would require walking and standing for more than two hours a day and sitting for more than six hours a day. Dr. Cassas also stated that Stollger's pain would impair her ability to perform work

activities and that these restrictions are permanent and have persisted since September 1, 2005.

Dr. Micek's records reveal that he made diagnoses of degenerative scoliosis with associated right-sided nerve root inflammation and/or impingement. He performed at least one injection, which provided Stollger with some temporary relief. However, Stollger did not want to undergo any additional injections, and Dr. Micek noted that Stollger might not be able to continue working without active treatment.

A functional capacity evaluation performed at the request of Dr. Cassas revealed that Stollger could perform sedentary and some light work activity. Specifically, the evaluation indicated that Stollger could sit constantly and could stand frequently.

At the request of KERS, three different physicians reviewed the records Stollger attached to her second application. Dr. Kimbel stated that Stollger's condition was "chronic [and] progressive," that it "had its origin . . . prior to . . . 2/25/1995 with no evidence of work related aggravation," and that it "may not have been essentially symptomatic prior to her date of employment." Dr. Kimbel also noted Stollger's functional capacity evaluation and recommended denial of her claim. Dr. Mullen noted Stollger's degenerative scoliosis and severe degenerative disc disease were evident on her February 1999 X-ray, which indicated that the degenerative disc disease pre-existed her employment with ECU. Additionally, Dr. Mullen noted that Stollger's functional capacity evaluation showed she could

perform her job duties as an administrative assistant. Dr. Growse noted that there were no medical records pre-dating Stollger's employment with ECU. However, based on the post-employment records showing diffuse and focally severe degenerative disc disease of the lumbar spine dating to 1999, Dr. Growse concluded that this condition likely had been present "for several decades before it became disabling." Like Drs. Kimbel and Mullen, Dr. Growse recommended that Stollger's claim be denied.

Stollger then filed additional medical records/reports from Drs. Cassas and Gillespie. In his July 8, 2008, report, Dr. Cassas reiterated his opinion that Stollger is incapacitated from her work as an administrative assistant. As to the issue of when her condition arose, Dr. Cassas stated:

I do feel, based on her current medical findings, that these issues did not pre-exist her membership date of August 31, 1995, because in my discussions with her she reports that she did not have any significant back disorders or limitations in the past. But I do not have records to review prior to this.

Dr. Gillespie's records indicate, in pertinent part, that Stollger complained of "recurring left low back pain" in September 1998, that she underwent treatment for complaints of back pain in the spring of 1999, and that she continued to complain of low back pain in November 1999, February 2001, June 2002, and August 2003.

On February 9, 2009, Stollger attended an administrative hearing. At the hearing, Stollger testified that she had not worked since June 2005 and that she did not believe she could perform even sedentary work because she cannot sit for

extended periods of time. When questioned about the functional capacity evaluation, which indicated she could perform sedentary and some light work, Stollger stated the evaluation tested only her ability to lift, not her ability to sit or stand. Furthermore, she stated that her pain reached a nine on a scale of ten by the end of the evaluation. When questioned about her statement that her back pain dated to the mid-1990s, Stollger indicated she made that statement before looking at her medical records. Based on those records, she testified her back pain and/or related treatment dated to 1999, not to the mid-1990s.

Following the hearing, the hearing officer found that Stollger had failed to prove by a preponderance of the evidence that she is totally and permanently disabled and that her disabling conditions were not pre-existing. Therefore, the hearing officer recommended denial of her claim, a recommendation the KERS Board of Trustees adopted. Stollger then filed an appeal to the Franklin Circuit Court. That court, after reviewing the record, affirmed the Board of Trustees. Stollger filed a motion to alter, amend, or vacate, which the court denied. Stollger then filed this appeal. We set forth additional facts as necessary below.

STANDARD OF REVIEW

Stollger raises factual issues regarding the adequacy of KERS's decision and the circuit court's opinion and order, and legal issues regarding statutory construction. As to the factual issues, we note that Stollger, as the person seeking retirement disability benefits, was required to prove entitlement to those benefits by a preponderance of the evidence. KRS 13B.090(7). We afford KERS, through

its hearing officers, a great deal of latitude in evaluating the evidence, judging the credibility of the witnesses, and making findings of fact. We will not substitute our judgment unless KERS acted arbitrarily or capriciously. Furthermore, because Stollger's request for benefits was denied by the fact-finder, to be successful on appeal, she must show that the evidence in her "favor is so compelling that no reasonable person could have failed to be persuaded by it." *McManus v. Kentucky Retirement Systems*, 124 S.W.3d 454, 458 (Ky. App. 2003). While we grant significant deference to KERS regarding factual issues, we review legal issues of statutory construction *de novo*. *Kentucky Employees Retirement Systems v. Foster*, 272 S.W.3d 198, 200 (Ky. App. 2007).

ANALYSIS

1. Whether the Initial Recommendation by KERS's Medical Examiners to Deny a Claim Is a Denial of Benefits

Stollger argues that a recommendation of denial by a KERS's evaluating physician does not amount to a denial of benefits. We disagree.

After a claimant files a claim for retirement disability benefits, KERS "shall select three (3) medical examiners to evaluate the medical evidence submitted by the" claimant. KRS 61.665(2)(d). "If two (2) or more of the three (3) medical examiners recommend that the [claimant] be denied disability retirement, [KERS] shall send notice of this recommendation" to the claimant. The claimant then has 180 days to provide additional medical documentation to support the claim or to request a formal hearing. KRS 61.665(2)(f). If, after reviewing the additional

medical documentation, two or more of the three medical examiners recommend denial, the claimant has 180 days to request a hearing. KRS 61.665(2)(h). We note that in both KRS 61.665(2)(f) and (h), the 180 day time period runs "from the day that the system mailed the notice . . . [of] denial of disability retirement." (Emphasis added.) Furthermore, we note that KRS 61.665(3)(a) states that "[a]ny person whose disability benefits have been reduced, discontinued, or denied pursuant to subsection (2)(f) or (2)(h)" (emphasis added) may file a request for a formal hearing. Finally, we note that "[f]ailure . . . to request a formal hearing within the period of time specified shall preclude the [claimant] from proceeding any further with the application for disability retirement" While KRS 61.665 may not be the most well-drafted statute, it is clear from a reading of the entire statute that the legislature intended a recommendation of denial to act as a denial. Therefore, we discern no error in the circuit court's statement to that effect.

2. Whether KERS is Entitled to Participate in Its Administrative Hearings

Once a claim has been denied, a claimant may seek a formal hearing.

Formal hearings are conducted pursuant to KRS 13B. KRS 61.665(3)(a). KRS 13B.010(3) defines "party" as:

- (a) The named person whose legal rights, duties, privileges, or immunities are being adjudicated in the administrative hearing;
- (b) Any other person who is duly granted intervention in an administrative hearing; and

(c) Any agency named as a party to the adjudicatory proceeding or entitled or permitted by the law being enforced to participate fully in the administrative hearing.

Stollger argues that KERS should not be permitted to participate in its administrative hearings because KERS is not a party under the preceding definitions and there are no other specific statutory or regulatory provisions that permit its participation. We agree that KERS does not directly fall within the definition of "party" in KRS 13B.010(3)(a) or (b). However, there are no specific provisions prohibiting KERS from participating in its administrative hearings.

Furthermore, we note that, pursuant to KRS 61.650(1)(c)4, KERS has a fiduciary duty to invest and distribute funds "taking into account any differing interests of members and beneficiaries." KRS 61.650(1)(c)4. Because of this duty, KERS has an interest in and is entitled to participate in the administrative hearing process. Holding otherwise would impermissibly limit KERS's ability to fulfill its fiduciary duty, essentially gutting that statutory provision.

We also find support for KERS's ability to participate in its administrative hearings in 105 KAR 1:215 Section 4. That regulation provides that, at a prehearing conference, the parties should attempt to "dispose of controversies, to narrow and define issues, and to facilitate prompt settlement of the claim." If Stollger is the only party, there should be no controversies to dispose of and there would be no one with whom she could settle her claim. Thus, based on the regulation, KERS is an appropriate party to the administrative hearing process.

We note Stollger's argument that, by interpreting 105 KAR 1:215 Section 4 as conferring party status on itself, KERS has co-opted authority "that has not been conferred upon it by statute." However, we are not persuaded by that argument. KRS 61.645(9)(g) provides that KERS's Board of Trustees "shall do all things, take all actions, and promulgate all administrative regulations . . . necessary or proper in order to carry out the provisions of" various portions of KRS Chapter 61 and KRS Chapter 78. Providing that KERS can participate in administrative hearings, even if only by implication, is within the purview of the powers granted by KRS 61.645(9)(g).

Finally on this issue, we note Stollger's argument that KERS cannot be a party because she never named KERS as a party. However, KERS became a "named" party when this matter was referred to the hearing officer, apparently by administrative fiat. Stollger was within her rights to move to have KERS removed as a participating party in the administrative hearing; however, as noted above, she has pointed to nothing that mandated KERS's removal. Furthermore, in light of KERS's fiduciary duty, we discern no abuse of discretion in the hearing officer's denial of Stollger's motion.

3. Whether KERS's Administrative Hearings are Adversarial

The circuit court stated that the administrative hearing process is adversarial. However, Stollger argues that the hearing process is not adversarial for two reasons: (1) a recommendation of denial by the examining physicians is not a denial of benefits; and (2) KERS is not a proper party to the proceedings. As noted

above, a recommendation of denial is a denial of benefits, and KERS is a proper party to the proceedings. Therefore, this argument is unpersuasive.

4. Whether KERS is Obligated to Have All Medical Evidence Reviewed By a Physician

As noted above, Stollger submitted medical records and reports with her two applications for benefits. Six examining physicians reviewed those medical records/reports on behalf of KERS. Nine days before the hearing KERS filed records from Dr. Gillespie. Seven days before the hearing, Stollger filed records from Dr. Cassas. Six days after the hearing, KERS filed records from Dr. Micek. No examining physicians reviewed those records on behalf of KERS. As we understand her argument, Stollger is contesting any use or reliance on these records from Drs. Gillespie, Cassas, and Micek by the hearing officer because they were not reviewed by an examining physician. We disagree.

Initially, we note that Stollger did not properly preserve this issue for review. Stollger states that she preserved this issue by raising it before the circuit court at pages 43-44 of the court's record. A review of those pages reveals that Stollger did raise an issue regarding the hearing officer's ability to review medical records. However, she did not raise an issue regarding KERS's obligation to have medical evidence submitted at or near the hearing for review by KERS's medical examiners. Because this issue is not properly preserved, we need not address it. However, we do so below.

The hearing officer denied Stollger's claim based on his finding that she could perform sedentary and light duty work and that her degenerative disc disease and scoliosis pre-existed her employment. His finding regarding Stollger's ability to perform work is based on her functional capacity evaluation results. Those results were submitted by Stollger with her second application for benefits and were reviewed by KERS's medical examiners. The hearing officer's finding that her conditions pre-existed her employment is based on the reports of the medical examiners. There is no indication in the hearing officer's report that he relied on any of the medical evidence submitted immediately before or immediately after the hearing. Therefore, whether that evidence was or should have been reviewed by KERS's medical examiners is irrelevant.

Finally, as set forth above, KRS 61.665(2)(a) provides that a claimant shall file with her application for benefits "supporting medical information" regarding her physical and mental condition. KERS then selects three medical examiners "to evaluate the medical evidence submitted by the" claimant. KRS 61.665(2)(d). The examiners then either recommend acceptance or denial of the claim. If they recommend denial, the claimant is given the opportunity to submit additional medical evidence, which the medical examiners then review. Following that review, the medical examiners may then recommend either acceptance or denial. If they recommend denial, the claimant may then request a hearing before a hearing officer. Once a hearing has been requested, the statute does not provide for any additional review of the medical evidence by a medical examiner. The

medical evidence Stollger submitted was reviewed three times by six different medical examiners. She could have submitted additional medical records to Drs. Kimbel, Mullen, and Growse and requested an additional review by those physicians. However, she chose to ask for a hearing. KERS cannot be faulted for not having medical records/reports reviewed when Stollger did not request such a review.

5. Whether Reports From KERS's Medical Examiners Are Objective Medical Evidence

Although Stollger does not specifically frame her evidentiary issues as set forth above, we believe that her primary complaint is that the examining physician reports submitted by KERS are not objective medical evidence. We disagree.

KRS 61.510(33) defines objective medical evidence as:

[R]eports 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[.]

While KERS's examining physicians did not examine or treat Stollger, the preceding does not state that a report must come from a physician who did.

Rather, the preceding states that evidence must be based on reports of examinations or treatments, etc. The KERS's examining physicians herein based

their opinions on diagnostic test results and on records from physicians who did examine and treat Stollger. Therefore, the examining physicians' reports are objective medical evidence, and the hearing officer could rely on them in making his recommendation.

6. Whether KERS Failed to Rebut Stollger's *Prima Facie* Case That She Is Disabled and That Her Disability Is Not Related to Pre-Existing Conditions.

Stollger argues that, despite the circuit court's statement to the contrary, she presented objective medical evidence that her condition did not pre-exist her employment. She also argues that she presented objective medical evidence that she is incapable of returning to any type of work. Finally, Stollger argues that KERS did not offer any objective medical evidence to rebut the evidence she filed. We address each argument below.

With regard to whether her condition pre-existed her employment, the diagnostic test results indicate that Stollger had degenerative disc disease and scoliosis dating to February 1999. KERS's examining physicians, based on those results, Stollger's age, and the fact that she performed primarily sedentary work, opined that her degenerative disc disease and scoliosis existed long before she began working at ECU in 1995.

In opposition to those opinions, Stollger offered the opinion of Dr. Gillespie that "[t]here is not a pre-existing condition that resulted in degenerative disease of her spine." She also offered the opinion of Dr. Cassas that, "based on [Stollger's] current medical findings, . . . these issues did not pre-exist her membership date of

August 31, 1995, because in . . . discussions with her she reports that she did not have any significant back disorders or limitations in the past." However, Dr. Cassas noted that he did not have any records to review "prior to this."

As set forth above, KERS, through its hearing officers, is afforded a great deal of latitude in evaluating the evidence, judging the credibility of the witnesses, and making findings of fact. *McManus*, 124 S.W.3d at 458. Causation is a finding of fact and neither we nor the circuit court may substitute our judgment unless the agency's opinion is "arbitrary and capricious." *Id.*

The reports of KERS's examining physicians are evidence on which the hearing officer could rely. Therefore, his determination that Stollger's degenerative disc disease and scoliosis pre-existed her employment is not arbitrary or capricious. Furthermore, we note that Dr. Gillespie stated that Stollger did not have "a pre-existing condition that resulted in degenerative disease of her spine." However, the issue was whether she had pre-existing degenerative disc disease and scoliosis, not a pre-existing condition that resulted in degenerative disease. Dr. Cassas stated that "these issues" did not pre-exist Stollger's membership in KERS. However, it appears that Dr. Cassas was referring to Stollger's complaints of pain as "these issues," not her underlying degenerative conditions. Therefore, nothing in either of these physicians' reports/records would have compelled the hearing officer to reach a different conclusion.

As to the extent of her disability, Stollger again relies on the reports of Drs. Gillespie and Cassas. Both physicians opined that Stollger cannot return to any

type of work activity because of her pain. However, Stollger also filed a functional capacity evaluation, which indicates she can perform sedentary and some light duty work with no restrictions on her ability to sit or stand. It appears the hearing officer relied on that evaluation in concluding that Stollger is not permanently disabled. We recognize that Stollger testified she did not believe the evaluation was an accurate assessment of her physical capabilities. However, the hearing officer was free to weigh the evidence as he deemed appropriate and nothing in the record compelled him to do otherwise.

Finally, as we previously held, the reports from KERS's examining physicians are objective medical evidence. The hearing officer was permitted to rely on them in rendering his recommendation. Because the hearing officer's recommendation that Stollger's application be denied and the Board of Trustees's acceptance of the recommendation were based on evidence of substance, we may not disturb them on appeal. Therefore, we affirm the finding that Stollger is not permanently disabled and that her degenerative disc disease and scoliosis pre-existed her employment.

7. Summary

We believe that the preceding disposes of the issues raised by Stollger on appeal. However, for the sake of clarity, we briefly address below the issues as she framed them.

a. "The Retirement Systems had no right to participate as a party in Ms. Stollger's administrative hearing." See Number 2 above.

b. "The Circuit Court erred in deferring to the Retirement Systems' practice of participating in a claimant's administrative hearing." Because we agree with the circuit court that KERS is entitled to participate in its administrative hearings, whether the circuit court should have deferred to KERS is inconsequential.

c. "The Circuit Court erred in holding that a claimant requesting an administrative hearing is seeking a review of a determination that their claim has initially been denied." See Number 1 above.

d. "The Circuit Court erred in holding that hearings held pursuant to KRS 61.600 *et seq.* are adversarial." See Number 3 above.

e. "The Circuit Court erred in holding that the administrative process affords each party an opportunity to be heard on a decision that was rendered." See Numbers 1 through 3 above.

f. "The Circuit Court erred in holding that the administrative process is necessarily adversarial." See Number 3 above.

g. "The Circuit Court erred in holding that the Retirement Systems has a fiduciary duty to participate in administrative hearings." See Number 2 above.

h. "The Retirement Systems violated KRS 61.600(3) by failing to have the medical evidence that Ms. Stollger introduced at her administrative hearing examined by a licensed physician." See Number 4 above.

i. "The Circuit Court erred in holding that all of Ms. Stollger's medical evidence was examined by licensed physicians." Although the circuit court may have erred in using the word all, that error is inconsequential because the physicians reviewed the majority of the medical evidence. Furthermore, the evidence filed by Stollger at or near the time of the hearing was essentially duplicative, and the hearing officer does not appear to have based his recommendation on any of that evidence.

j. "Ms. Stollger established a *prima facie* case as to her disability which the Retirement Systems failed to rebut." See Number 6 above.

k. "The Circuit Court erred in holding that Ms. Stollger did not meet her burden of showing that her disabling condition was not related to a pre-existing condition." See Number 6 above.

l. "The Circuit Court erred in holding that Ms. Stollger did not meet her burden of showing that her disabling condition was not related to a pre-existing condition." See Number 6 above.

8. KERS's Motion to Strike

Finally, we note that KERS filed a motion to strike an inadvertently filed Authorization and Request for Medical and Psychological Records. Having reviewed the record, and noting that Stollger has not filed any response and/or objection, KERS's motion is hereby GRANTED. Said Authorization, which is located between Appendix C and Appendix D in KERS's brief, shall be STRICKEN.

ALL CONCUR.

ENTERED: January 18, 2013

/s/ Michelle M. Keller
JUDGE, COURT OF APPEALS

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