

RENDERED: AUGUST 1, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-000706-MR

JANET TUCKER

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 12-CI-00065

KENTUCKY RETIREMENT SYSTEMS

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, COMBS, AND VANMETER, JUDGES.

COMBS, JUDGE: Janet Tucker appeals from an opinion and order of the Franklin Circuit Court affirming the denial of her application for disability retirement benefits by the Board of Trustees of the Kentucky Retirement Systems. After our review, we affirm.

Tucker was employed as a housekeeping supervisor at Lake Cumberland State Resort Park in June 1997. Her duties included maintaining linen, soap, shampoo, and toilet tissue inventories and cleaning supplies; scheduling housekeeping services; hiring and training personnel; and directing employees in their various cleaning duties. In December 2006, Tucker suffered a work place injury to her back while attempting to remove a housekeeping cart from a storage closet. Eventually, she underwent two surgeries: an artificial disc replacement on December 7, 2007, and a post-anterior cervical discectomy and fusion on September 4, 2008. She did not resume her position following the second surgery.

On January 29, 2009, Tucker filed a notification of retirement with the Kentucky Retirement Systems seeking retirement disability benefits pursuant to Kentucky Revised Statute[s] (KRS) 61.600 and duty-related benefits pursuant to KRS 61.621. Tucker's application and medical records were reviewed on three separate occasions by members of the Medical Review Board. A majority recommended denial after the first two reviews. Upon the third review, all three of the doctors recommended a denial of benefits based upon: a lack of objective evidence that Tucker suffered a single, traumatic injury in the performance of her job that rendered her totally and permanently disabled; a lack of objective evidence that she was disabled by the cumulative effect of her conditions; and a determination that her cervical spine condition pre-existed her employment date.

Tucker appealed, and an administrative hearing was conducted on November 17, 2010. On October 14, 2011, the hearing officer issued his report and recommended order. The hearing officer summarized the medical records indicating that Tucker had been released back to full-time work on June 5, 2008, following her disc replacement. She worked with restrictions of no lifting, pushing, or pulling over twenty pounds and a requirement that she be allowed to alternate sitting, standing, and walking every hour. Her surgeon had assessed Tucker with a 13% whole-person impairment due to her lumbar spine condition.

Records from a 1990 workers' compensation settlement indicated that Tucker had suffered a significant work-related cervical spine injury in April 1989. Also received were three other workers' compensation first-report-of-injury documents from October 16, 2002; December 27, 2005; and August 3, 2006. Each of these incident reports described work-related, lower back injuries.

The hearing officer found that Tucker was not a credible witness as to the original onset of her lumbar and cervical conditions. He found that she had failed to show that her lumbar spine injury of December 27, 2006, resulted in a total and permanent disability. He found that the evidence demonstrated that Tucker's cervical spine condition resulted directly or indirectly from degenerative changes and injuries that pre-existed her membership in the Kentucky Employees Retirement Systems. Finally, the hearing officer found that Tucker had failed to meet her burden of proof by a preponderance of the evidence. She failed to establish that she suffers a permanent disability from the cumulative effects of her

medical conditions that is expected to last for a continuous period of not less than twelve months from the day of her paid employment. The hearing officer recommended that Tucker's application be denied because she had failed to sustain her burden of proof of establishing the requirements to qualify for retirement disability. On December 16, 2011, the Board of Trustees of Kentucky Retirement Systems adopted the hearing officer's recommendation denying disability.

Concluding that the Board's decision was supported by substantial evidence, the circuit court upheld the Board's denial of Tucker's application for disability retirement benefits. This appeal followed.

In her brief, submitted *pro se*, Tucker argues that Kentucky Retirement Systems erred by concluding that she did not qualify for disability retirement disability benefits. However, in light of the evidence presented, we have no basis to disturb the administrative decision.

Our role upon review of an administrative decision is not to reconsider the merits of the claim, nor to substitute our judgment for that of the agency with respect to the weight of the evidence or the inferences to be drawn from it. *500 Associates, Inc., v. Natural Res. & Env'tl. Prot. Cabinet*, 204 S.W.3d 121 (Ky. App. 2006). We may disturb the decision only where: the administrative agency has acted arbitrarily or outside the scope of its authority; the agency applied an incorrect rule of law; or the decision is not supported by substantial evidence. *Kentucky State Racing Comm'n v. Fuller*, 481 S.W.2d 298 (Ky. 1972). The administrative agency is "afforded great latitude in its evaluation of the evidence

heard and the credibility of witnesses appearing before it.” *Bowling v. Natural Res. & Envtl. Prot. Cabinet*, 891 S.W.2d 406, 409-410 (Ky. App. 1994).

Having reviewed the record in this case, we conclude that the evidence adequately supports the agency’s decision that Tucker’s cervical spine condition pre-existed her membership in the system. Consequently, in light of her term of service, benefits based upon that condition were barred by statute. The decision to deny benefits based upon Tucker’s cervical spine condition was not arbitrary. Instead, it represented a correct application of the law.

The evidence also adequately demonstrates that Tucker was not incapacitated by her lumbar spine injury. Tucker was released to return to work by her treatment providers following surgery, and she was wholly accommodated by her employer. She retained the residual functional capacity -- as accommodated -- to continue to perform her essential job functions notwithstanding her lumbar spine condition. As a result, benefits based upon that condition were properly denied as well.

We affirm the decision of the Franklin Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Janet Tucker, *pro se*
Jamestown, Kentucky

BRIEF FOR APPELLEE:

Joseph W. Bowman
Frankfort, Kentucky