

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001066-MR

BRENDA MARTIN

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 11-CI-01775

KENTUCKY RETIREMENT
SYSTEMS and the BOARD OF
TRUSTEES OF THE KENTUCKY
RETIREMENT SYSTEMS

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: MOORE, TAYLOR, AND VANMETER, JUDGES.

MOORE, JUDGE: Brenda Martin appeals a decision of the Franklin Circuit Court affirming the Kentucky Retirement Systems' ("Systems") denial of her application for disability retirement benefits. Upon review, we affirm.

FACTUAL AND PROCEDURAL HISTORY

Martin was 65 years old and had 133 months of Kentucky Employees Retirement System (“KERS”) service when she applied for disability retirement benefits on May 1, 2007,¹ due to the condition of her back.² Her application indicated that eight or nine months earlier she had begun seeking treatment for pain associated with diagnoses of kyphosis at 67 degrees with multiple levels in the mid thoracic region consistent with osteoporotic or osteopenic compression deformities; a disc bulge at T8/T9; multiple degenerative disc disease affecting C3/4, C4/5, C5/6, and C6/7; and foraminal stenosis at C5/6.

It is undisputed that the condition of Martin’s back is attributable to a disease or condition that has rendered her totally and permanently disabled.³ Accordingly, the issue presented was whether Martin’s incapacitating condition “result[ed] directly or indirectly from bodily injury, mental illness, disease or condition which pre-existed membership in the system or reemployment, whichever is most recent. . . .” *See* Kentucky Revised Statute (KRS) 61.600(3)(d).

¹ Martin’s membership in the Systems was intermittent. She had an initial membership date of September 1, 1974, with a last date of paid employment on January 23, 1974; a re-employment date of September 1, 1974, with a last date of paid employment on June 22, 1979; and a re-employment date of July 31, 2002, with a last date of paid employment on August 16, 2007.

² Martin’s application also asserted disability due to sleep apnea. However, the Systems rejected sleep apnea as a basis for awarding Martin disability retirement benefits. Martin has not appealed in that respect.

³ *See* KRS 61.600(3)(a) (requiring as a prerequisite to benefits “physical or mental incapacity to perform the job, or jobs of like duties, from which [the claimant] received his last paid employment”); (b) (requiring the incapacity to result from “bodily injury, mental illness, or disease. . .”); and (c) (requiring the incapacity to be deemed “permanent”).

Because Martin had fewer than 16 years of service and because Martin did not claim that her condition arose out of or in the course of her qualifying employment, Martin carried the burden of proof and the risk of non-persuasion in this regard. *See* KRS 61.600(4)(a) and (b); *Kentucky Ret. Sys. v. West*, 413 S.W.3d 578, 581 (Ky. 2013).

With that said, the Systems ultimately denied Martin's application for disability retirement benefits because the medical records Martin produced indicated that she had suffered from back pain on several occasions prior to July 31, 2002 (her most recent re-employment date). Specifically, one of her treating physicians, Dr. Nancy West, noted that Martin had "bursitis R side neck & shoulder" on August 22, 1986; Martin came in for a "revisit" on August 29, 1987, and was prescribed Motrin and muscle relaxers after complaining "muscles in shoulders & neck still bothers—low back pain"; and, that in a subsequent appointment of July 21, 1988, Martin had complained of "backache off & on." Also, Martin had adduced no objective medical evidence (*i.e.*, MRIs or X-rays) to illustrate what the condition of her back had been prior to July 31, 2002.

Martin subsequently contested the Systems' denial of her application by filing an original action in Franklin Circuit Court. The circuit court found no error and affirmed the Systems. This appeal followed. To the extent that

additional information becomes relevant, it will be discussed below in the context of our analysis.

STANDARD OF REVIEW

In administrative proceedings, “[w]here 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 v. Kentucky Ret. Sys.*, 124 S.W.3d 454, 458 (Ky. App. 2003). Great deference is afforded the determinations made by the administrative fact-finder. *Kentucky State Racing Comm’n v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972). However, we review issues of law and the legal conclusions of administrative agencies *de novo*. *Aubrey v. Office of Att’y Gen.*, 994 S.W.2d 516, 519 (Ky. App. 1998).

ANALYSIS

The upshot of Martin’s argument on appeal is that she proved by a preponderance of the evidence that the condition of her back did not pre-exist July 31, 2002. In support, Martin relies upon *Kentucky Ret. Sys. v. Brown*, 336 S.W.3d 8 (Ky. 2011), in which the Kentucky Supreme Court held, for the purpose of determining eligibility for disability retirement benefits, that a claimant may offer his or her own medical history to prove the negative described in KRS 61.600(3)(d). If the claimant’s medical history shows no indication of the condition or disease until after the date of re-employment, a permissible inference is that the condition or disease was either not pre-existing, or was “dormant” and

“asymptomatic” and nonetheless compensable. *Id.* at 15. Essentially, Martin contends that because the medical history she presented (spanning from 1986 to 2009) does not include a diagnosis of osteoporosis or kyphosis prior to July 31, 2002, and demonstrates that she actively sought treatment for these conditions after that date, it necessarily proves that she either did not have these conditions or that these conditions were dormant and asymptomatic prior to that time.

What Martin overlooks, however, is that the claimant in *Brown* introduced what the Supreme Court twice characterized as a “plethora” of evidence so compelling that no reasonable person could have failed to be persuaded by it. *Id.* at 11 and 16. Among other things, that evidence included testimony from a physician that the claimant’s disabling condition did not pre-exist his membership; it also included a comprehensive medical history that did not include “any indication” to the contrary. *Id.* at 11-12.

Here, no medical expert offered an opinion regarding when Martin’s back conditions became symptomatic and active. As noted, no objective medical evidence demonstrates what the condition of her back was prior to July 31, 2002. And, based upon a review of Martin’s post-July 31, 2002 medical records and what they indicated were the advanced and severe nature of Martin’s condition, two of the Systems’ non-examining physicians (Drs. Esten Kimbel and Michael Growse) estimated that Martin’s back condition and associated symptoms had been gradually and actively progressing for a period of at least ten years prior to July 2007.

Furthermore, there are ambiguities in the medical history Martin presented. These ambiguities include an approximately four-year gap in her medical history from 1998 to 2002. They also include Dr. West's above-described notations from 1986, 1987, and 1988. Each of Dr. West's notations are less than a sentence in length; aside from a reference to "bursitis," they offer no explanation or objective medical findings with respect to why Martin was suffering from back pain.⁴

As an aside, much of Martin's argument is that these gaps and ambiguities do not prove that she *was* suffering from the symptoms of osteopenia, kyphosis, or degenerative disc disorder prior to July 31, 2002; they could, as she asserts, simply mean that she was suffering from something else at those times.

Martin also argues that the Systems failed to introduce evidence that indicates her

⁴ It appears that what Dr. West categorized as "bursitis" evolved into what Dr. West later recognized, following the interpretations of various X-rays and MRIs, was degenerative disc disease, osteoporosis, and kyphosis. Dr. West later examined Martin on November 26, 2004; she similarly diagnosed Martin with "bursitis of L shoulder" after noting "tender in L shoulder-unable to elevate to horizontal"; but, in a letter of January 26, 2009 (written in support of Martin's application for disability retirement benefits in this matter), Dr. West omitted the term "bursitis" and stated in relevant part:

To Whom It May Concern:

I have been seeing Brenda for complaints related to her neck, shoulders, upper and lower back since November 2004. She has a burning, stinging pain in her upper back, pain with movement, pain in right shoulder and is unable to elevate it above horizontal level. She wakes several times of [sic] the night with numbness and tingling of the right thumb and index finger. She has low back pain if she lifts, after riding in the car, sleeps or sits too long. X-rays and MRIs of the cervical, thoracic, and lumbar region of her back show generalized osteoporosis, degenerative changes, kyphosis at about 67 degrees, wedging of the thoracic region draping the spinal cord significantly against the spinal column. . .

condition preexisted July 31, 2002, or evidence that contradicts testimony she gave to the effect that her symptoms did not arise until after that date.

Even the uncontradicted testimony of an interested witness such as Martin is not binding on a fact-finder. *See Grider Hill Dock, Inc. v. Sloan*, 448 S.W.2d 373 (Ky. 1969). More to the point, the breadth of Martin's arguments ignores who had the burden of proof in this matter. As noted in *West*, 413 S.W.3d at 581, "the Systems does not bear the burden of proof and may choose not to challenge evidence it deems unconvincing. The sufficiency of the claimant's showing is not wholly calculated by whether or not the Systems presents evidence in rebuttal."

Stated differently, Martin's application for benefits was not denied because the Systems offered evidence proving that her condition was pre-existing. Rather, Martin's application was denied because the Systems took into account gaps and ambiguities that detracted from the weight of the evidence she presented. *See, e.g., Kentucky Bd. of Nursing v. Ward*, 890 S.W.2d 641, 643 (Ky. App. 1994) ("In determining whether the evidence is substantial, the court must take into account whatever in the record fairly detracts from its weight." Internal quotation marks omitted). And, while Martin's medical records do indicate she began actively *treating* the symptoms of her back condition after July 31, 2002, this does not mean, as the Systems explained below, that her symptoms did not pre-date her re-employment. In short, Martin's evidence was not so compelling that the Systems should have found in her favor as a matter of law.

CONCLUSION

In light of the foregoing, we AFFIRM.

ALL CONCUR.

BRIEF FOR APPELLANT:

Roy Gray
John Gray
Frankfort, Kentucky

BRIEF FOR APPELLEES:

Carrie Bass
Frankfort, Kentucky