

RENDERED: DECEMBER 18, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-001594-MR

PATTY JEAN CLAXON

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 10-CI-01278

THE KENTUCKY RETIRMENT SYSTEMS;
THE BOARD OF TRUSTEES OF THE KENTUCKY
RETIRMENT SYSTEMS; THE DISABILITY APPEALS
COMMITTEE OF THE KENTUCKY RETIRMENT SYSTEMS;
AND THE COUNTY EMPLOYEES RETIRMENT SYSTEMS APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, DIXON AND D. LAMBERT, JUDGES.

COMBS, JUDGE: Patti Jean Claxon appeals from an opinion and order of the
Franklin Circuit Court that affirmed the denial of her application for disability

retirement benefits by the Board of Trustees of the Kentucky Retirement Systems.

After our review, we affirm.

This case has had a complicated procedural history. Claxon filed an application for disability retirement benefits on May 11, 2001. In her application, Claxon stated that she could no longer perform her job duties as a cafeteria worker in the local public school system. She indicated that she suffered with severe pain in her hands, wrists, arms, and elbows due to carpal tunnel syndrome. She also said that she suffered with bulging disks and spurs and with osteoarthritis in her knees.

Her application for benefits was denied by the physicians of the Kentucky Retirement Systems' Medical Review Board. Claxon then requested an administrative hearing, which was conducted on November 5, 2002.

Claxon testified at the hearing as did Debbie Kibbey, a substitute cafeteria worker who had observed Claxon at work. Exhibits numbered 1 through 28 were made part of the record during the administrative hearing. Exhibits 29 and 30 were admitted by the hearing officer's order of January 29, 2003.

Two exhibits (27 and 29) are at the center of this dispute. Exhibit 27 contains material from proceedings initiated by Claxon before the Workers' Compensation Board. Included in this exhibit is the report of Dr. Shraberg, who undertook an independent medical evaluation on November 7, 2001. Following his examination and a review of Claxon's medical records, Dr. Shraberg found that Claxon exhibited symptom magnification and that she had falsely attributed her

symptoms to work since there was nothing ergonomically, or otherwise, to suggest a repetitive motion injury.

Exhibit 29 is the deposition of Dr. Ronald Burgess. Attached to his deposition testimony is a medical report prepared by him following his independent medical evaluation of Claxon on April 26, 2001. This evaluation was also conducted during the course of the workers' compensation proceedings. Dr. Burgess concluded that there were no objective findings that would cause him to limit Claxon's work activities.

After considering the evidence, the hearing officer concluded that Claxon's subjective complaints of pain did not support her application for disability retirement benefits. He recommended that the application be denied. On July 10, 2003, the Board of Trustees of the Kentucky Retirement Systems issued a final order denying Claxon's application for disability.

Claxon filed a petition for review in the Franklin Circuit Court. She argued that the evidence concerning the evaluations undertaken by Dr. Burgess and Dr. Shraberg should not have been considered since it was not submitted on a timely basis. The Franklin Circuit Court concluded that "although there may be some merit to that claim, and the Court takes no position on that issue," the assertion did not compel reversal of the Retirement Systems' denial of disability retirement benefits. The court based its conclusion on two determinations: first, that Claxton had failed to meet her burden of proving entitlement to benefits based on the evidence submitted; second, that the remedy she requested for an untimely

submission of evidence -- an award of benefits -- was inappropriate. In an opinion and order entered July 18, 2006, the Franklin Circuit Court denied Claxon's petition for review and affirmed the decision of the Kentucky Retirement Systems.

By order entered on August 15, 2006, the Franklin Circuit Court denied Claxon's motion to alter, amend, or vacate. The court observed that the hearing officer recommended that benefits be denied based upon objective medical evidence. It also rejected Claxon's contention that the medical evaluations undertaken during the course of the worker's compensation proceedings should not have been admitted after the date of the administrative hearing. The court concluded that pursuant to the provisions of Kentucky Revised Statute[s] (KRS) Chapter 13B.090(1), the hearing officer had authority to consider all evidence that "reasonable and prudent persons would rely on in their daily affairs. . . ." Claxon appealed to this Court.

In an opinion rendered on February 1, 2008, we reversed and remanded the order of the Franklin Circuit Court. We noted that the provisions of KRS 13B.090(3) gave every party "the right to inspect, at least five (5) days prior to the hearing, a list of all witnesses every other party expects to call at the hearing, and the available documentary or tangible evidence" We observed that it was unclear from the record when the reports and records of Dr. Burgess and Dr. Shraberg had been submitted and whether Claxon was given adequate time to inspect or respond to them. We concluded that it was the role of the circuit court to make a finding as to whether this evidence was properly admitted and whether

Claxon had been given her statutory right to inspect and respond to it. We also concluded that an opinion of a treating physician -- if based on sufficient medical data -- should be accorded greater weight than that of non-treating physicians.

In April 2009, the Supreme Court of Kentucky rendered its decision in *Kentucky Retirement Systems v. Bowens*, 281 S.W.3d 776 (Ky. 2009). In *Bowens*, the court held that the opinions of treating physicians are *not* entitled to greater weight than the opinions of non-examining physicians for purposes of claims for disability retirement benefits. Since this rationale had been part of our decision to remand, the Supreme Court of Kentucky granted the motion of the Retirement Systems for discretionary review, vacated our opinion rendered February 1, 2008, and remanded Claxon's appeal to us for further consideration in light of *Bowens*.

In December 2009, we rendered our opinion on remand. We concluded that that it remained appropriate to reverse and remand the case to the Board of Trustees of the Kentucky Retirement Systems. We again directed the Board to determine whether the statements of Drs. Burgess and Shraberg had been improperly admitted into evidence at the hearing conducted by its hearing officer and whether Claxon had been given an opportunity to inspect and respond to those statements.

In an order entered on March 8, 2010, the chairman of the Disability Appeals Committee of the Board of Trustees remanded the case to its hearing officer for the specific and limited purposes of determining: (1) whether the statements of Dr. Burgess and Dr. Shraberg were properly admitted into evidence;

and (2) whether Claxon was given an opportunity to inspect and respond to those statements as required by the provisions of KRS Chapter 13B.

On May 11, 2010, the hearing officer submitted his report and recommended order to the Board of Trustees. The hearing officer found that the information contained in Exhibit 27 (including the report of Dr. Shraberg) had been properly admitted into evidence prior to August 30, 2002, and that Claxon had been afforded an opportunity both to review and to object to the information at issue. With respect to the deposition testimony of Dr. Burgess, the hearing officer found that the evidence had been properly submitted on November 22, 2002, and that Claxon had had an adequate opportunity to inspect and respond to the evidence. The hearing officer found also that Claxon had not raised a timely objection to the admission of the disputed evidence.

By its final order entered July 13, 2010, the Disability Appeals Committee of the Board of Trustees accepted the findings of its hearing officer. It found that the information from Dr. Shraberg and Dr. Burgess had been properly admitted into evidence and that Claxon had been afforded an adequate opportunity to inspect and object to the evidence. It found, specifically, that the information contained in Exhibit 27 (including Dr. Shraberg's report) had been submitted in July 2002 – before the deadline established during the pre-hearing conference and more than five (5) days in advance of the hearing. It found that the information contained in Exhibit 29 (Dr. Burgess's deposition testimony) had not been submitted prior to the hearing but that Claxon had not objected to the hearing

officer's receipt of it two weeks after the hearing. Furthermore, it found that Claxon had been given an adequate opportunity to inspect and respond to the disputed evidence. Finally, the Board of Trustees found that Claxon had been given an opportunity to supplement the record with additional medical information and that she had done so by submitting a report prepared by Dr. Goodwin. It reaffirmed its prior denial of Claxon's application for disability retirement benefits.

Claxon filed a petition for review in the Franklin Circuit Court. The court concluded that the provisions of KRS 13B authorized the inclusion of the disputed evidence because that evidence was necessary for the full disclosure of the relevant facts and issues. It also concluded that inclusion of the disputed evidence had not substantially prejudiced Claxon's interests. The circuit court determined that the provisions of 13B.090 did not exclude the admission of evidence following the hearing (provided that the opposing party was given an opportunity to inspect, object, and/or respond to it) but merely provided for the adequate opportunity to review the evidence before the administrative hearing. The court concluded that Claxon had been provided her statutory right to inspect and to respond to the disputed evidence; that the decision to deny benefits was based on the opinion of two examining physicians; and that the evidence did not compel a decision in her favor. The court's opinion and order were entered on September 3, 2014. This appeal followed.

On appeal, Claxon argues that the circuit court erred by failing to conclude that the statements of Dr. Burgess and Dr. Shraberg were inadmissible. We disagree.

Upon review of an administrative decision, our role is not to reconsider the merits of the claim -- nor to substitute our judgment for that of the administrative agency with respect to the weight of the evidence or the inferences to be drawn from it. *500 Associates, Inc., v. Natural Resources and Environmental Protection Cabinet*, 204 S.W.3d 121 (Ky. App. 2006). We may alter or reverse an administrative decision only where it can be shown: that the agency has acted arbitrarily or outside the scope of its authority; that the agency applied an incorrect rule of law; or that its decision is not supported by substantial evidence. *Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298 (Ky. 1972).

In an order prepared after the evidentiary hearing, the hearing officer noted that the agency's attorney had requested (at the conclusion of the hearing) that Claxon produce a copy of Dr. Burgess's deposition for the hearing officer. While Exhibit 27 included material from the workers' compensation record including a reference to the report of Dr. Burgess, a copy of his actual deposition testimony had not been included in that material. The hearing officer authorized the agency's attorney to obtain the deposition and afforded Claxon the opportunity to raise an objection to the evidence. The hearing officer also noted that Claxon had received a copy of the material forwarded from the Workers' Compensation Board (Exhibit 27) on a timely basis (a hand-written notation so indicated).

Claxon eventually filed a motion requesting an extension of time to submit additional evidence and to file objections to the evidence submitted post-hearing. The motion was granted. However, Claxon did not file a written objection to the submission of Dr. Burgess's deposition testimony, nor did she file any further motion for relief.

KRS Chapter 13B places control of an administrative hearing with the hearing officer:

To the extent necessary for the full disclosure of all relevant facts and issues, the hearing officer shall afford all parties the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence, except as restricted by limited grant of intervention or a prehearing order. KRS 13B.080(4).

It was within the hearing officer's discretion to permit the admission of the contested evidence on a basis that insured the "full disclosure of all relevant facts and issues[.]"

Claxon does not allege that she was ambushed by the evidence. In fact, she was well aware of the disputed deposition testimony and the entirety of workers' compensation record. Claxon was permitted to file her objections and was given an opportunity to submit any contradictory medical evidence. She was given the opportunity to present her case and to attack the agency's evidence. Claxon has not demonstrated how she was prejudiced by the admission of the disputed evidence. She has not claimed that the reports or deposition testimony were unreliable or that they were based upon incorrect information. Consequently,

we find no error in the hearing officer's reliance upon the disputed medical records. The hearing officer's decision did not fail to comport with the requirements of the administrative procedure act, and there was no denial of Claxon's right to procedural due process.

We affirm the decision of the Franklin Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

James P. Benassi
Henderson, Kentucky

BRIEF FOR APPELLEE:

Katherine Rupinen
Frankfort, Kentucky