RENDERED: OCTOBER 19, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001348-MR

PATRICIA CONLIN APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 14-CI-01087

BOARD OF TRUSTEES OF
KENTUCKY RETIREMENT SYSTEMS
AND KENTUCKY RETIREMENT
SYSTEMS APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE, JONES, AND THOMPSON, JUDGES.

JONES, JUDGE: Patricia Conlin appeals from an opinion and order of the Franklin Circuit Court affirming the final order of the Disability Appeals Committee of the Kentucky Retirement Systems Board (the "Board") denying her application for disability benefits from the Kentucky Retirement Systems

("Retirement Systems"). Following a thorough review of the record and applicable law, we REVERSE and REMAND.

I. BACKGROUND

Patricia has over twenty-two years of service as a Deputy Clerk. From June of 1988 through December of 2002 she was employed at the Boyd County Clerk's office. Most recently, Patricia was employed as a full-time Deputy Clerk for the Carter County Fiscal Court from March 13, 2003, through November 29, 2010. During her employment, Patricia was a member of the County Employees Retirement System ("CERS"), which is administered by the Kentucky Employees Retirement System. At the time Patricia left the Carter County Fiscal Court, she had accumulated 268 months of service credit with CERS, at least twelve months of which was current service credit.

As a Deputy Clerk, Patricia worked 37.5 hours per week. Approximately two hours of her work day was spent standing or walking; the remainder of the day was spent sitting. Patricia was responsible for customer service as well as taking inventory for her office. Thus, while the majority of her working time was spent performing work on a computer, she was occasionally required to lift boxes weighing up to twenty pounds.

On December 28, 2010, Patricia applied for disability retirement benefits pursuant to KRS[1] 61.600. In her application, Patricia listed a myriad of injuries and illnesses as the basis of her request for disability retirement: spinal compression fracture, back pain, degenerative spine disease, gastric ulcers, migraines, Meniere's disease, osteoporosis, and osteoarthritis of the lumbar spine. Patricia alleged that her back problems made it impossible to sit for more than a few hours at a time, or to stand for more than a few hours at a time. She stated that she could not sit at her computer for more than a few minutes without experiencing severe pain. While Patricia had medication for her back issues, she alleged that the medication worsened her ulcers. Additionally, Patricia alleged that the Meniere's disease caused dizziness to the point that she had difficulty seeing her computer screen, which would occasionally cause her to vomit.

Patricia indicated that she had been diagnosed with Meniere's disease in 1990, but that it had become progressively worse as she had aged. Her general back pain had worsened in February of 2009, when she fell on a patch of black ice and fractured her vertebrae. Patricia alleged that her condition had worsened to the point that she was unable to effectively perform her job.

Eleven pages of medical records were submitted to support Patricia's application for benefits. A letter dated February 18, 2010, from Patricia's primary

[1] Kentucky Revised Statutes.

care physician, Dr. Malcom King, indicated that Patricia had been under his care for lumbosacral strain, cephalgia, and Meniere's disease. Dr. King stated that Patricia was unable to return to work at that time, and that the date that she would be able to return to work was unknown. For treatment, Patricia was receiving bi-weekly injections of pain medication, which interfered with her ability to drive. Additionally, the letter indicated that Patricia had recently been diagnosed with fibromyalgia by her rheumatologist, Dr. Paul Goldfarb. A second letter from Dr. King, dated March 30, 2011, indicated that Patricia's numerous medical problems made her unable to sit or stand for more than three hours and unable to lift more than ten pounds. Dr. King stated that Patricia was in constant physical pain, which was eased only by bed rest. He stated that Patricia had undergone physical therapy and steroid injections in the spine, without improvement. Additionally, Dr. King stated that Patricia's various medications—Tramadol, Lortab, Doxepin, Valium, Antivert, Phenergan suppositories, Restoril, and bi-weekly injections of Nubain and Phenergan—prohibited her from employment and from operating a motor vehicle. Records from Dr. Wes Lewis dated February 13, 2009, indicated that Patricia had suffered a T10 compression fracture, which had caused her continued severe back pain despite conservative medical treatment. Accordingly, Patricia had had a T10 kyphoplasty done on February 11, 2009. The kyphoplasty was deemed "technically successful."

Patricia's application was reviewed by three physicians—Drs. Strunk, Patrick, and Holbrook—pursuant to KRS 61.665; each of those physicians recommended a denial of Patricia's application. Dr. Strunk found that there was no compelling evidence that Patricia's compression fracture, as treated with time to recover, would be disabling for her job. He additionally found that there was no significant documentation that Patricia's Meniere's disease, migraines, osteoporosis, or osteoarthritis would be disabling for her job. Dr. Holbrook declined to consider Patricia's peptic ulcer disease, Meniere's disease, or migraines, as he found the associated symptoms were intermittent. He concluded that Patricia's osteoarthritis would not be disabling for the mobility required for her job. Dr. Patrick simply concluded that a review of Patricia's records did not indicate that her complaints rose to the level of a permanent disability.

On June 27, 2011, Patricia received written notice that her claim for benefits had been denied. Patricia requested a formal hearing on her application for benefits on October 25, 2011. In April of 2011, Patricia had applied for Social Security disability benefits; she was approved for those benefits on March 21, 2013. The records from her Social Security application were made a part of the record in the administrative proceeding.

Records from Dr. Leon Briggs indicated that Patricia began receiving SI joint injections in May of 2009, which had given her some relief. In January of

2010, Patricia complained that her pain was worsening, and SI injections resumed in April of 2010. A memo dated May 6, 2010, indicated that Patricia felt that the SI joint injections were helping her pain; however, her pain-scale number remained relatively high. Patricia had X-rays of her thoracic, cervical, and lumbar spine done in August of 2010, following complaints of generalized spine pain. The X-ray of Patricia's thoracic spine noted the T10 vertebroplasty and identified no acute fracture. The X-ray of her cervical spine showed narrowed C5-C6 disc space, and the X-ray of her lumbar spine showed no acute or significant abnormalities. When Patricia continued to complain of severe back pain, Dr. Briggs ordered a bone scan of her entire body. The results of that scan showed some mild uptake in Patricia's extremities related to arthritic changes, but no abnormalities in her spine.

In December of 2010, Patricia again reported to Dr. Briggs with complaints of worsened back pain and associated neck pain. Dr. Briggs noted that he believed Patricia's complaints to be legitimate. While her scans showed some abnormalities, there was nothing severe. Follow ups with Dr. Briggs in April and July of 2011 indicated that Patricia continued to complain of low-back pain radiating to bilateral hips and legs. On both occasions, Dr. Briggs noted that Patricia exhibited decreased range of motion, tenderness, bony tenderness, deformity, and pain.

Additional records from Dr. Lewis following Patricia's 2009 spinal fracture were submitted. An exam performed on February 24, 2009, indicated that Patricia had osteopenia, not osteoporosis, but was recommended for treatment consistent with osteoporosis. In July of 2009, Patricia had complained of an increase in low-back pain and bilateral leg numbness following the kyphoplasty. An MRI was done, which demonstrated mild abnormalities and changes, but nothing of significance.

A memo from Dr. Goldfarb to Dr. King documented Patricia's rheumatology consultation in February of 2011. Dr. Goldfarb noted that Patricia complained of pain along her entire spine, reaching the base of her head. The pain worsened with sitting. She had additionally complained of numbness at the top of her left leg, which occasionally occurred throughout the entire leg. Patricia reported that the pain would awaken her in the night and that it occasionally caused her to have difficulty seeing. Dr. Goldfarb expressed his belief that the pain Patricia was experiencing was "mostly involved with her fibromyalgia[,] although certainly chronic back pain with chronic compression fractures is seen." A.R. 110. Another memo from Dr. Goldfarb, dated April 6, 2011, indicated that Patricia was doing a bit better and had been able to do some aerobic exercises.

On December 1, 2011, Patricia was examined by Dr. Kathleen Monderewicz. Dr. Monderewicz reported Patricia's complaints of constant sharp

pain in her spine, making it difficult to perform daily tasks. Patricia complained that she had headaches at least five times per week, which could last from one hour to days at a time. The headaches were accompanied by nausea, photophobia, and phonophobia. Dr. Monderewicz noted that Patricia had some decreased hearing in her right ear due to the Meniere's disease, but that this did not seem to affect her ability to converse with others. Patricia's main complaint associated with the Meneire's disease was the occurrence of vertigo. In reviewing Patricia's symptoms, Dr. Monderewicz noted that Patricia ambulated with an antalgic gait, but did not appear to require the assistance of a cane. She found that Patricia seemed stable and comfortable in the sitting position, but very uncomfortable in a supine position. Patricia was noted to have mild diffuse tenderness in her upper extremities, and diffuse tenderness up and down her spine. In summary, Dr. Monderewicz noted that prolonged sitting and standing, as well as walking, bending, stooping, squatting, kneeling, crawling, and lifting were limited by Patricia's chronic back pain and findings on a knee exam. She additionally found that Patricia's use of her upper extremities was limited due to pain.

A medical statement from Dr. King dated October 26, 2012, expressed his opinion that Patricia suffers from severe pain. He recommended that Patricia not work, stand less than two hours in an eight-hour day, and sit less than two hours in an eight-hour day. A medical statement from Dr. Randall James

dated January 28, 2013, indicated that Patricia could work up to one hour a day, could stand less than two hours in an eight-hour day, and could sit less than two hours in an eight-hour day. Dr. James expressed his belief that Patricia was at risk of sustaining additional fractures if she returned to work.

An administrative hearing was held on November 7, 2013, at which both Patricia and her husband, John Conlin, testified about the effect Patricia's condition had on her work-life and home-life. On May 22, 2014, the hearing officer issued a recommended order denying Patricia's claim for benefits. The hearing officer determined that Patricia's job as a Deputy Clerk was best classified as light work duty under KRS 61.600(5)(c). He found that Patricia had discussed reasonable accommodations with her employer shortly after she filed her application for disability benefits. The combination of Patricia's medications and medical restrictions of bed rest every three hours meant that there were no accommodations available to allow Patricia to continue her employment. However, the hearing officer noted that Patricia had previously been granted a reasonable accommodation in the form of a lifting restriction of no more than ten pounds. The hearing officer summarized Patricia's medical records as found in her original application for benefits and those submitted with her application for Social Security disability benefits.

The hearing officer found that Patricia was not an entirely reliable witness, as he believed her subjective claims of pain and the limitations caused by that pain were exaggerated. He found that Patricia's level of fibromyalgia pain was not supported by any of the medical records submitted for review. Additionally, the hearing officer noted that Patricia remained seated throughout the hearing without noticeable problems, frequently swung her chair from side to side, and made frequent hand gestures and head/neck movements. The hearing officer believed that these actions belied Patricia's claims of severe pain in her spine or from fibromyalgia. The hearing officer noted that no formal functional capacity testing had been submitted for consideration, and found that the objective medical records did not support the extreme limitation of functional capacity that Patricia alleged. Specifically, he noted that: Patricia testified that she did have the ability to alternate between sitting and standing at her job; in April of 2011, Patricia had told Dr. Goldfarb that she was doing some aerobic exercise and the two discussed additional aerobic exercises that Patricia could do; Patricia's kyphoplasty was considered a successful procedure; none of Patricia's X-ray or MRI scans showed any issues of such magnitude as would cause Patricia's subjective claims of pain and limitation; and Patricia was able to rotate her chair during the hearing.

The hearing officer noted that Patricia had presented evidence that she had been diagnosed with fibromyalgia, migraine headaches, Meniere's disease, and

gastric ulcers; but had failed to present any objective evidence that those conditions prevented her from performing her job duties. He noted that Dr. Goldfarb had never stated that Patricia's fibromyalgia limited her ability to work. Further, he found that there had been no evidence demonstrating that any of those conditions were individually disabling. The hearing officer concluded that Patricia's subjective claims of pain were unsupported, and that she had failed to show that she suffered a permanent disability from the cumulative effects of her medical conditions.

Patricia filed exceptions to the hearing officer's recommended order on June 6, 2014; however, the Board entered a final order adopting the hearing officer's recommended order on July 29, 2014. Patricia appealed to the Franklin Circuit Court, which affirmed by order entered July 28, 2017. The circuit court noted that none of the providers who treated Patricia had indicated that her conditions made her mentally or physically incapacitated on a permanent basis. While Patricia had been taken off work for a brief period following her fall in 2009, the record indicated that she had returned to work following a successful treatment. Further, the circuit court found that the record indicated that Patricia had been responding well to her additional treatments for her degenerative disc disorder and for her compression fracture. Accordingly, the circuit court found that the Board's final order was supported by substantial evidence.

The circuit court additionally concluded that the Board had properly considered the cumulative effect Patricia's conditions had on her ability to perform her job. The circuit court noted Patricia's claim that the hearing officer had completely ignored her primary care physician's opinions. The circuit court found that this could not be grounds for overturning the Board's decision, as the hearing officer is not entitled to give more weight to a primary care physician's opinion during a disability determination.

This appeal followed.

II. Standard of Review

"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 v. Kentucky Ret. Sys.*, 124 S.W.3d 454, 458 (Ky. App. 2003) (citations omitted). A reviewing court "shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." KRS 13B.150(2). "So long as the agency's decision is supported by substantial evidence of probative value, it is not arbitrary and must be accepted as binding by the appellate court." *Aubrey v. Office of Att'y Gen.*, 994 S.W.2d 516, 519 (Ky. App. 1998) (citing *Starks v. Kentucky Health Facilities*, 684 S.W.2d 5 (Ky. App. 1984)). "Substantial evidence is defined as evidence of substance and relevant

consequence, having the fitness to induce conviction in the minds of reasonable persons." *Id.* (citing *O'Nan v. Ecklar Moore Express, Inc.*, 339 S.W.2d 466 (Ky. 1960)). If the Board's findings are supported by substantial evidence, we must next determine whether it correctly applied the law to those facts. *Kentucky Unemployment Ins. Comm'n v. Landmark Cmty. Newspapers of Kentucky*, 91 S.W.3d 575, 578 (Ky. 2002). Issues of law are reviewed *de novo*. *Aubrey*, 994 S.W.2d at 519 (citing *Mill Street Church of Christ v. Hogan*, 785 S.W.2d 263, 266 (Ky. 1990)).

III. ANALYSIS

To prevail on her application for an award of disability benefits, Patricia had the burden to prove all the threshold elements in KRS 61.600 by a preponderance of the evidence. *Kentucky Ret. Sys. v. Brown*, 336 S.W.3d 8, 14 (Ky. 2011). Accordingly, Patricia was required to present objective medical evidence that: (1) she had been mentally or physically incapacitated to perform her job duties, as reasonably accommodated, since the last day of paid employment; (2) her incapacity resulted from bodily injury, mental illness, or disease; and (3) her incapacity was permanent.[2] KRS 61.600(3). "Objective medical evidence" is

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[2] Because Patricia has more than sixteen years of service with an employer participating in the Kentucky Retirement Systems, KRS 61.600(3)(d)—which requires a claimant to show that the incapacity does not result from a condition that pre-existed membership in the system—is inapplicable. KRS 61.600(4)(b).

defined in KRS 61.510(33) to include, *inter alia*, "reports of examinations or treatments," *or* "laboratory findings." *Id.*

Patricia contends that, contrary to the Board's conclusion, she presented substantial objective evidence sufficient to meet her burden. She contends the Board's erroneous conclusion was caused by the fact that the Board failed to consider evidence she presented in the form of reports and opinions from her treating physician, Dr. King.

"[I]t is well-settled that the trier of fact may evaluate the evidence presented and give the evidence the weight the fact-finder deems appropriate." *Kentucky Ret. Sys. v. Bowens*, 281 S.W.3d 776, 784 (Ky. 2009) (citing *McManus*, 124 S.W.3d at 457-58). Accordingly—as aptly noted by Retirement Systems—the hearing officer and the Board were not required to give *more* weight to evidence from Patricia's treating physicians. *Id.* In the instant case, however, it does not appear that the hearing officer determined that the reports of Patricia's treating physicians were less credible than other evidence and should therefore be given less weight. Rather, it appears that reports from Patricia's treating physicians were disregarded.

In reviewing the evidence, the hearing officer assessed the impact of Patricia's individual ailments. The hearing officer concluded that Patricia's claimed level of fibromyalgia pain and limitations was not supported by objective

evidence and noted that no physician had determined that Patricia was disabled because of her fibromyalgia. He found that Patricia's pain and limitations caused by her compression fracture and osteoarthritis were unsupported because the kyphoplasty procedure was considered successful and none of Patricia's X-ray or MRI scans showed issues of significant magnitude.

There was no discussion, however, of the numerous statements in records from Patricia's physicians as to the severity of her pain, the doctors' beliefs that these complaints were legitimate, and the restrictions that Patricia's physicians had placed on her. The hearing officer did not consider Patricia's documented complaints of severe dizziness caused by the Meniere's disease and worsened by her back pain and medication for that pain. There was no consideration of Dr. King's opinion—based on both the effect of her conditions and the effect the medications prescribed to Patricia for her treatment had on her—that Patricia was totally and completely disabled. There was no discussion of Dr. Goldfarb's opinion that Patricia's severe pain, which he believed was legitimate, was caused by a combination of her fibromyalgia and chronic back pain. In fact, it appears that this evidence was simply disregarded by the hearing officer because it documented Patricia's subjective claims of pain and made recommendations based on those complaints.

Retirement Systems contends Patricia's subjective complaints of pain, as documented in medical records from Patricia's treating physicians, cannot be considered objective medical evidence. We disagree. As noted above, "[t]reating physicians' reports are clearly objective medical evidence." *Kentucky Ret. Sys. v. Lowe*, 343 S.W.3d 642, 646 (Ky. App. 2011). "[S]imply 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." *Id.*at 647. "The opinion and conclusions of a treating physician must be considered objective medical evidence for purposes of KRS 61.600." *Id.* In sum, to the extent that the Board completely disregarded the opinions and conclusions of Patricia's treating physicians because they were based on Patricia's subjective claims of pain, it acted in contravention of statute.

Patricia additionally argues that the Board failed to consider the cumulative effect of her conditions. KRS 61.600 implicitly requires that the cumulative effects of a claimant's condition be considered during the disability benefits hearing process. *Bowens*, 281 S.W.3d at 784. It is unclear from the order whether the hearing officer actually considered the cumulative effect of Patricia's conditions. The hearing officer analyzed the individual effect of Patricia's various conditions, and then stated in one sentence—without accompanying analysis—that the cumulative effect of her conditions was not disabling. To the extent that the

hearing officer and the Board failed to consider the effect all of her conditions, considered together, had on Patricia's "residual functional capacity and physical exertion requirements" it is instructed to do so on remand. KRS 61.600(5)(a)(2).

Lastly, Patricia contends that the Board erred in failing to give any weight to the fact that she was approved for Social Security disability benefits. We disagree. Applicants for disability retirement benefits are, of course, permitted to introduce evidence of an award of Social Security disability benefits into the administrative record. However, "the hearing officer may not consider the *award* in making his determination, but may only consider objective medical records contained within the determination of the award." *Lowe*, 343 S.W.3d at 644, n.2 (citing 105 KAR[3] 1:210) (emphasis added).

IV. CONCLUSION

Based on the foregoing, we REVERSE and REMAND. On remand, all objective medical evidence, including the opinions and reports of Patricia's treating physician, shall be taken into consideration. Additionally, the cumulative effect of Patricia's numerous conditions shall be considered and analyzed.

ACREE, JUDGE, CONCURS.

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[3] Kentucky Administrative Regulations.

THOMPSON, JUDGE, DISSENTS WITHOUT FILING A SEPARATE OPINION.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEES:
M. Kevin Lett Ashland, Kentucky	Carrie B. Slayton Frankfort, Kentucky