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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000116-MR

KENTUCKY RETIREMENT SYSTEMS — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 15-CI-00691

SUSAN RHODUS — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, D. LAMBERT AND SMALLWOOD,[1] JUDGES.

COMBS, JUDGE: Appellant, Kentucky Retirement Systems, appeals from an opinion and order of the Franklin Circuit Court reversing a final order of the Board

[1] Judge Gene Smallwood concurred in this opinion prior to the expiration of his term of office. Release of the opinion was delayed by administrative handling.

of Trustees of the Kentucky Retirement Systems that denied benefits. After our review, we affirm.

Appellee, Susan Rhodus (Rhodus), was employed by the Richmond Police Department as a Senior Patrol Officer. Her job was classified as hazardous duty; the physical requirements were classified as medium duty under KRS[2] 16.582(4)(c)(3). Her membership date in the County Employees Retirement System (CERS) was August 4, 1997. Her last date of paid employment was February 22, 2012, and she accrued 175 months of service credit.

On November 29, 2011, Rhodus filed for hazardous in-line-of-duty disability retirement benefits stating that she was disabled from chronic migraines, functional dyspepsia, anemia, anxiety attacks, and gastrointestinal bleeds. After the Medical Review Board twice denied her application, Rhodus requested an administrative hearing. On October 25, 2013, at a telephonic prehearing, Rhodus also alleged post-traumatic stress disorder (PTSD) and depression. A hearing was conducted on March 20 and December 23, 2014.

On April 27, 2015, the hearing officer issued findings of fact, conclusions of law, and a recommendation. The hearing officer determined that Rhodus had proven from a preponderance of the evidence that she suffers from anemia, anxiety, PTSD, and depression resulting in her total incapacity to continue

[2] Kentucky Revised Statutes.

as a regular full-time officer. However, she was not deemed to be totally and permanently incapable of engaging in other occupations (KRS 16.582(1)(b)). The hearing officer also determined that she had shown -- by a preponderance of the evidence -- that her PTSD and depression were a direct result of activity that flowed from her performance in the line of duty. Rhodus and the Retirement Systems filed exceptions.

By final order issued May 26, 2016, the Board of Trustees of the Kentucky Retirement Systems (the Board) rejected the hearing officer's recommended order and denied Rhodus's application for disability benefits. The Board concluded that Rhodus was not incapacitated from her job, and that based upon her statements to the Kentucky Division of Unemployment Insurance, she was capable of working. The Board found that Rhodus's migraines were pre-existing and not permanently disabling as required by statute. It found that the migraines were at most intermittently disabling. The Board determined that Rhodus's functional dyspepsia/GI symptoms also predated her membership, noting that she had undergone hernia repair surgery on December 15, 2011.

The Board noted evidence that Rhodus's anemia was thought be related to heavy menstruation and that she underwent a hysterectomy to address this problem on August 28, 2012. The Board reasoned that: "[t]his means the source of blood loss has permanently ceased. Furthermore, even if [Rhodus's] intermittent anemia results from GI bleeds alone, this condition has also been

successfully treated with surgery . . . ." The Board also referred to Exhibit 7 that showed Rhodus's "anemia was not a constant state of affairs. Rather it 'waxed and waned[.]'" The Board concluded that "[t]he underlying blood loss that caused [Rhodus's] anemia has been addressed by two (2) successful surgical procedures. However, even before these surgeries occurred, the anemia would not have been considered a permanent incapacity under the statute." (Underline original).

The Board determined that Rhodus was symptomatic and that she was treated for anxiety in 1991. It concluded that: "[a] preponderance of the objective medical evidence proves that the Claimant's anxiety is chronic and was symptomatic well prior to her membership date. Thus, it is barred as a basis for disability."

With respect to the GI bleeds, the Board noted that endoscopy revealed a large paraesophogeal hernia and a Cameron's ulcer for which Dr. Harris performed a Nissen fundoplication procedure on December 15, 2011. "Therefore, the source of the Claimant's GI bleeds was removed even before her last date of paid employment."

The Board determined that Rhodus's PTSD was a "post-existing condition" because it was diagnosed on July 12, 2012, almost six months after Rhodus's last date of employment of February 22, 2012. Thus, the Board held that she was not eligible for consideration on this claim. Further, the Board ruled that

on July 14, 2014, Dr. Robert Elliot attributed Rhodus's symptoms of depression and anxiety to a recent divorce.

The Board determined that Rhodus's hypertension was diagnosed in 1995 prior to her membership date, finding that it is a medically manageable condition that would not keep Rhodus from working with proper treatment.

The Board also determined that the hearing officer's cumulative effect analysis was contradictory and that an accurate analysis did not show Rhodus to be disabled. Furthermore, the Board determined that Rhodus did not meet the statutory requirements for in-line-of-duty enhanced benefits pursuant to KRS 16.505(19)[3] because the statute requires a single act or event and was "never intended as a remedy for cumulative trauma or repetitive use type injuries."

Rhodus appealed to the Franklin Circuit Court, which reversed the Board in an opinion and order entered on December 21, 2017. The circuit court agreed with Rhodus's argument that the Board erred in concluding that her anemia had been surgically treated successfully by a hysterectomy and the Nissen fundoplication because there was no medical evidence to support that conclusion; that the record was devoid of objective medical evidence that Rhodus's depression

[3] The statute provides in relevant part that: "For employees in hazardous positions under KRS 61.592, an "act in line of duty" shall mean an act occurring which was required in the performance of the principal duties of the position as defined by the job description[.]"

and anxiety pre-existed her employment; that the Board's decision that Rhodus's PTSD "post-dated" her last date of employment was not supported by substantial evidence because the "only objective medical evidence" on the issue came from Dr. Elliott and established that the date of the onset of her PTSD symptoms occurred long before her last date of employment. The circuit court further determined as follows:

> The cumulative effect of Rhodus' PTSD, anemia, anxiety and depression prevents her from being an effective police officer. Rhodus' disabling condition cannot be accommodated by the City of Richmond. The position of a Senior Patrol Officer is a high stress job . . . . Rhodus has proven by a preponderance of the evidence that PTSD, anemia, anxiety and depression hinder her from successfully fulfilling her job requirements.

On January 22, 2018, Kentucky Retirement Systems filed a notice of appeal to this Court.

On appeal, Kentucky Retirement Systems contends that the circuit court "plainly made significant errors" because it referenced KRS 61.600, which governs non-hazardous-duty employment, instead of KRS 16.582, which governs hazardous disability and in-line-of-duty benefits. It also argues that the error "significantly undermines the legal correctness of the circuit court's opinion." We do not agree.

The circuit court stated that Rhodus was employed by the Richmond Police Department, that she had filed her application for hazardous in-line-of-duty

retirement benefits, and that the Board had concluded that Rhodus failed to establish that she was entitled to hazardous benefits or in-line-of-duty benefits. However, the circuit court did refer to KRS 61.600, at page 7 of its opinion and order. The circuit court also referred to KRS 16.582 in discussing the Board's argument. At page 9 of its opinion and order, the circuit court determined that the cumulative effect of Rhodus's PTSD, anemia, anxiety, and depression prevented her from being a police officer and that she had proven by a preponderance of the evidence that these conditions hindered her from successfully fulfilling the job requirements of a Senior Patrol Officer. That language comports with KRS 15.582(1)(b), which provides that:

> Hazardous disability means a disability which results in the member's total incapacity to continue as a regular full-time officer or as an employee in a hazardous position, as defined in KRS 61.592, but which does not result in the member's total and permanent incapacity to engage in other occupations for remuneration or profit.

The Board contends that the circuit court applied the wrong standard of review on appeal and impermissibly shifted the burden of proof to the Board. Once again, we disagree. The circuit court properly identified the issue as: "whether substantial evidence supports the Board's conclusion … that Rhodus failed to establish by objective medical evidence that she was entitled to disability benefits and [that] her medical conditions pre-existed her CERS membership date."

The circuit court applied the correct standard of review on appeal, citing, *inter alia*, *McManus v. Kentucky Retirement Systems*, 124 S.W.3d 454 (Ky. App. 2003) (KRS Chapter 13B places the burden of proof on claimant seeking benefits. Where the fact-finder decides against party with burden of proof, the standard of review on appeal is whether evidence compels a contrary finding). We discuss the issue further below as it pertains to Appellant's remaining arguments.

Appellant argues that the circuit court erred in stating that the Board offered no evidence to conclude that Rhodus's surgeries resolved her anemia, impermissibly shifting the burden of proof to Appellant. Appellant contends that the court disregarded *Kentucky Retirement Systems v. West*, 413 S.W.3d 578 (Ky. 2013), which holds that the claimant's burden of proving entitlement to benefits includes establishing by a preponderance of the evidence that the condition did not pre-exist the claimant's membership in the Systems.[4] We disagree.

[4] *West*, which the circuit court notes at page 7 of its opinion and order in discussing the Board's position, is factually distinguishable. In *West*, the claimant's employment began in 1991. He was a heavy smoker and alleged disability, *inter alia*, due to "breathing problems." West's primary care physician had retired and medical records prior to 1998 had been destroyed; therefore, the date of onset of his chronic obstructive pulmonary disease (COPD) could not be determined. In a 4-3 decision, our Supreme Court held that West failed to prove when he began to suffer from COPD. Although the Court recognized the difficulty with respect to the destroyed medical records, it declined to "relax the burden of persuasion in response. To do so would encourage concealment of relevant medical records by claimants. The hearing officer was presented virtually no evidence upon which to conclude that West's COPD was not a pre-existing condition. As such, the hearing officer's conclusion was reasonable and must be affirmed." *Id.* at 582-83.

The circuit court correctly stated the burden of proof, citing *Kentucky Retirement Systems v. Brown*, 336 S.W.3d 8, 14 (Ky. 2011) ("[T]he person seeking the entitlement determination must prove to the trier of fact that his or her condition was not pre-existing membership by a preponderance of the evidence."). However, it appears that Appellant misconstrued the circuit court's analysis. The Board concluded that "the underlying blood loss that caused the Claimant's anemia has been addressed by two (2) successful surgical procedures." (Underline original). The circuit court determined that the Board's conclusion was not supported by substantial evidence, because the "Board offered no ***medical*** evidence [upon which] to conclude that Rhodus' hysterectomy and Nissen fundoplication resolved her anemia." (Emphasis added). We agree. *See Mengel v. Hawaiian-Tropic Northwest and Central Distributors, Inc.*, 618 S.W.2d 184 (Ky. App. 1981) (Where causation not apparent to the layman, medical testimony required).

The references to the administrative record (A.R.), which Appellant provides at pages 10-11 of its brief, do not persuade us otherwise. A.R. 115-117 is the December 15, 2011, operative report for the hernia repair. It does not address anemia. A.R. 102 is a January 10, 2012, office record from Bluegrass Surgical Group/Dr. Harris for a post-op visit, which stated that Rhodus "looks great" and discussed wound care and diet -- but noting nothing about resolution of anemia.

According to that office record, medications include "Feraheme[5] treatments Active." A.R. 2674 is not a medical record; rather, it is a page from the Board's final order. The next reference is A.R. 1889, which is a page from Baptist Lexington Oncology Associates' May 24, 2012, office note. Appellant contends that it indicates Rhodus had a "corrected iron deficiency." The record states that "Rhodus continues to remain stable with a corrected iron deficiency **at this time**" (emphasis added); however, the "Assessment" on that date is still iron deficiency anemia, and the office note reflects that since her last visit, Rhodus had had one episode of melena[6] following severe anxiety.

Appellant also refers to records which it states indicate no current blood loss, citing A.R. 1793. That is a page from an October 8, 2012, Baptist Physicians progress note, which is somewhat difficult to read. Under the review of symptoms, "A" for "Abnormal" is checked in the column next to "Heme/Lymph" followed by the handwritten notation, "Ø current **visible** blood loss." (Emphasis added).

The same progress note at A.R. 1795 includes anemia under the "Major Diagnosis/Problem List." Appellant notes that 2013 blood tests reveal

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[5] "Feraheme is used to treat iron deficiency anemia." https://www.drugs.com/feraheme.html.

[6] Melena is "the passage of dark tarry stools containing decomposing blood that is usually an indication of bleeding in the upper part of the digestive tract and especially the esophagus, stomach, and duodenum[.]" https://www.merriam-webster.com/medical/melena.

normal levels of iron and refer to A.R. 1877. That is a LabCorp test result for blood collected on February 13, 2013. The results for iron are within a normal range on that date. However, we cannot agree with Appellant that it confirms "that [Rhodus's] surgical procedures addressed the causes of her anemia as the Board found[.]" That determination lies within the province of the medical experts. *See McCain v. Director, Office of Workers Compensation Programs,* 58 Fed. Appx. 184, 193 (6th Cir. 2003) ("'By independently reviewing and interpreting the laboratory reports the ALJ impermissibly substitute[s] his own judgment for that of a physician . . . .'" (Quoting *Ferguson v. Schweiker,* 765 F.2d 31, 37 (3d Cir.1985))).

Next, Appellant argues that the circuit court improperly re-weighed the evidence when it determined that the record was devoid of objective medical evidence that Rhodus's anxiety and depression preexisted her membership. KRS 16.582 governing hazardous disability retirement provides that:

> (2) Any person may qualify to retire on disability, subject to the following:
> …
> (3) Upon the examination of the objective medical evidence by licensed physicians pursuant to KRS 61.665, it shall be determined that:
> …
> (c) The incapacity does not result directly or indirectly from:
> …
> 2. Bodily injury, mental illness, disease, or condition which pre-existed membership in the

> system or reemployment, whichever is most recent, unless:
>
> a. The disability results from bodily injury, mental illness, disease, or a condition which has been substantially aggravated by an injury or accident arising out of or in the course of employment; or
>
> b. The person has at least sixteen (16) years' current or prior service for employment with employers participating in the retirement systems administered by the Kentucky Retirement Systems.

Rhodus has fewer than sixteen (16) years of service. KRS 61.600 governing non-hazardous duty similarly bars preexisting conditions as a basis for disability if "[u]pon the examination of the objective medical evidence by licensed physicians pursuant to KRS 61.665, it shall be determined … [that the incapacity results] directly or indirectly from bodily injury, mental illness, disease, or condition which pre-existed membership in the system or reemployment, whichever is most recent. . . ." KRS 61.600(3)(d). Unless "the incapacity is a result of bodily injury, mental illness, disease, or condition which has been substantially aggravated by an injury or accident arising out of or in the course of employment; or [t]he person has at least sixteen (16) years'. . . service for employment . . . . KRS 61.600(4)(a) & (b). In determining whether a condition is pre-existing, the Kentucky Retirement Systems must base its decision upon objective medical evidence as defined in KRS 61.510(33). *Brown*, 336 S.W.3d at 14. KRS 61.510(33) provides that:

> "Objective medical evidence" means reports 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[.]

Appellant cites Berea Hospital records to support its argument. Those records (Exhibit 22, A.R. 2245-55) reflect the following: On December 27, 1990, Rhodus (then Casteel) was seen for "mild bilat LQ pain." She had a history of vomiting associated with nervousness, diarrhea with stress intermittently and constipation. The diagnosis was irritable bowel syndrome, and instructions were high fiber diet and "return if worse." On August 29, 1991, Rhodus was seen for chest pain with a history of MVP.[7] The diagnosis was mitral valve prolapse, and history reflects that she had been under stress that week because a friend was involved in a motor vehicle accident. Twenty Vistaril were prescribed for anxiety NR.[8] Rhodus was not seen again until December 4, 1991, when she presented with complaints of sore throat and fever; the diagnosis included anxiety, fever, URI, and

[7] Mitral valve prolapse.

[8] NR is the abbreviation for no refill. https://www.empr.com/clinical-charts/common-medical-abbreviations/article/123360/.

pharyngitis. However, nothing was prescribed for anxiety on that visit or thereafter in those hospital records. The next and last two dates of service are July 26, 1993, and February 2, 1999. Rhodus had no complaint, symptom, or diagnosis of anxiety or depression or any mental health condition on either of those dates.

Appellant also contends that the circuit court "further erred in reweighing the evidence" when it relied on Rhodus's testimony that she had to undergo a pre-employment psychological examination "when the examination itself was never submitted to the administrative record." The circuit court noted Rhodus's testimony, but we are not convinced that it was the basis for the court's determination or that the court reweighed the evidence. Nonetheless, Appellant's reliance on *Gaida v. Kentucky Retirement Systems*, 2012-CA-000019-MR, 2013 WL 1488994 (Ky. App. Apr. 12, 2013), is misplaced. In *Gaida*, the claimant argued that her disability did not pre-exist her membership with CERS. She did not present any medical records before 1995, but she asserted that she underwent a pre-employment psychological exam in 1994, which showed no evidence of any active mental illness or condition. There was no documentary evidence that psychological tests were performed, nor were there any results. This Court held that "[w]hile the Board could have accepted the testimonial evidence on this matter **without supporting documentation**, the Board did not clearly err in reaching a contrary conclusion." *Id.* at *2. (Emphasis added).

In the case before us, the Berea Hospital records predate Rhodus's employment and establish that she was ***not*** symptomatic and was ***not*** treating for anxiety or depression in 1993 -- four years ***before*** her membership date -- nor in 1999 shortly thereafter. We agree with the circuit court that the Board erred in focusing on an isolated incident rather than upon objective medical evidence. As our Supreme Court explained in *Brown*, 336 S.W.3d at 15:

> We do not believe it the intent of the legislature in drafting KRS 61.600 to deny benefits to those individuals who suffer from unknown, dormant, asymptomatic diseases at the time of their employment, ailments which lie deep within our genetic make-up, some of which may not yet be known to exist. Rather, we believe the legislature intended to deny benefits to individuals whose diseases are symptomatic and thus were known or reasonably discoverable. Why else would the legislature have referred to "objective medical evidence" in KRS 61.600(3)?

Next, Appellant contends that the circuit court erred in disregarding the statutory requirement that Rhodus was required to prove by objective medical evidence that she was continuously incapacitated for at least one year following her last day of paid employment.[9] KRS 16.582(4)(a)1. provides that "[a]n incapacity shall be deemed to be permanent if it is expected to result in death or can be expected to last for a continuous period of not less than twelve (12) months

[9] KRS 61.600(5)(a)1., governing non-hazardous disability retirement also provides that "[a]n incapacity shall be deemed to be permanent if it is expected to result in death or can be expected to last for a continuous period of not less than twelve (12) months from the person's last day of paid employment in a regular full-time position."

from the person's last day of paid employment in a position as regular full-time officer or a hazardous position." In particular, Appellant argues that the circuit court erred in holding that substantial evidence does not support the Board's decision regarding the onset date of her PTSD. We disagree. The circuit court determined that:

> Rhodus presented medical evidence regarding the onset date of her PTSD, and as noted above, this evidence was not refuted by the opinion of any licensed physician through objective medical evidence. Though Rhodus was diagnosed with PTSD on July 25, 2012, Dr. Robert Elliott stated that he believed that Rhodus' PTSD symptoms had been present for eighteen (18) months prior to her diagnosis. Dr. Elliot cited nightmares of events that happened while Rhodus was in the line of duty which started occurring eighteen (18) months prior to [the] July 25, 2012 diagnosis. . . . [I]n addition to the nightmares, Rhodus experienced recurring intrusive recollections of post traumatic events during the day. With these recollections, Rhodus experienced physical symptoms such as shaking, crying, increased heart rate, and hyperventilation. These recollections also led Rhodus to avoid the public. The only objective medical evidence on the issue of the onset date of Rhodus' PTSD condition show the date being well before her last date of paid employment on February 22, 2012.

Appellant argues that the circuit court erred in disregarding Dr. Nancy Mullen's review. Dr. Mullen's report does not address the onset date.[10] Therefore, it simply has no bearing on the issue. We find no error.

[10] In her January 13, 2012 report, Dr. Mullen stated that "new data submitted by Ms. Rhodus include a Psychiatric Evaluation performed by Dr. Elliott on July 25, 2012. She has a new diagnosis of post-traumatic stress disorder and obsessive compulsive characteristics. These

Appellant also contends that the circuit court erred in disregarding the evidence that it presented regarding Rhodus's application for unemployment benefits to indicate that she was capable of working. The circuit court did not disregard that evidence. On the contrary, the court discussed it at page 6 of its opinion and order. However, the circuit court concluded that Rhodus had submitted evidence so compelling that no reasonable person could deny her benefits. KRS 16.582(1)(b) defines hazardous disability as "disability which results in the member's total incapacity to continue as a regular full-time officer … but which does not result in the member's total and permanent incapacity to engage in other occupations for remuneration or profit." The circuit court concluded that "cumulative effect of Rhodus' PTSD, anemia, anxiety and depression prevent her from being an effective police officer." Rhodus's applying for clerical or similar type work in the context of her claim for unemployment benefits is not inconsistent with that determination.

Therefore, we affirm the December 21, 2017, opinion and order of the Franklin Circuit Court.

ALL CONCUR.

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diagnoses were made in July of 2012; however, her last date of paid employment was 2/28/12." (A.R. 1807).

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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