

RENDERED: OCTOBER 12, 2007; 2:00 P.M.

**ORDERED NOT PUBLISHED BY KENTUCKY SUPREME COURT:
APRIL 16, 2008
(FILE NO. 2007-SC-0837-D)**

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001719-MR

CAROLYN RICHARD

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE SAM G. MCNAMARA, JUDGE
ACTION NO. 99-CI-01211

KENTUCKY RETIREMENT SYSTEMS

APPELLEE

OPINION AFFIRMING

** ** * * * **

BEFORE: THOMPSON AND WINE, JUDGES; HENRY,¹ SENIOR JUDGE.

THOMPSON, JUDGE: Carolyn Richard appeals from a July 18, 2006, opinion and order of the Franklin Circuit Court affirming the decision of the Disability Appeals Committee of the Board of Trustees of the Kentucky Retirement Systems (Board) to deny Richard disability retirement benefits. For the reasons stated hereafter, we affirm.

¹ Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

Carolyn Richard was employed as a bookkeeper by the Adair County Board of Education for more than sixteen years. Her job duties included counting money, creating financial reports, lifting money bags, writing checks, maintaining internal financial accounts, organizing fund-raisers, and issuing purchase orders. Although she spent the majority of her workday sitting, she was required to stoop, kneel, and crawl to complete some of her tasks.

Richard's last day of paid employment was January 19, 1998, and she submitted her letter of resignation on February 6, 1998. Subsequently, she applied for disability retirement benefits on February 20, 1998, claiming that she was unable to return to work due to constant pain and headaches as a result of a neck ailment stemming from a car accident in 1995. Her application was denied twice by the Kentucky Retirement Systems' Medical Review Board, and she thereafter requested an administrative hearing.

At the hearing, Richard testified that she suffered constant pain that interfered with her quality of life and her ability to perform her job. Specifically, she testified that her condition caused her constant headaches, sometimes migrainous, which prevented her from concentrating enough to perform the mental aspects of her job. Additionally, she testified that her chronic neck pain prevented her from physically doing her job as well as completing routine household chores. Her husband, Johnny Richard, also testified about his wife's limitations as a result of her condition.

In addition to their testimony, the record before the hearing officer contained numerous documents from several doctors who were involved in Richard's treatment or the analysis of her disability claim. Dr. Phil Aaron, Richard's primary care physician, submitted extensive documentation and is the medical expert that Richard primarily relies upon to support her claim. Dr. Aaron opined that Richard was mentally or physically incapacitated and could not perform her job as a bookkeeper.

According to Dr. Aaron, Richard had severe headaches and cervical spine pain that radiated down her right shoulder and hand. He further stated that Richard was "totally incapacitated" on most days and was unable to leave her home. In a letter, sent after the filing of his first report, Dr. Aaron stated that Richard was "unable to do anything with her right arm. She cannot even open a bottle of cola with a twist off top." Finally, Dr. Aaron wrote that Richard had a seventeen-percent whole person impairment rating according to a test conducted at Elizabethtown Physical Therapy. He further wrote that "I am of the medical opinion that this 17% translates into 100% occupational impairment."

Another treating physician, Dr. Joseph Oropilla, submitted a report that documented Richard's neck pain and headaches. However, he stated that there was no weakness in her upper or lower extremities. Dr. Gregory Nazar, another treating physician, opined that Richard suffered severe neck pain and headaches. Dr. Nazar prescribed her medication and instructed her on her posture and positioning.

Dr. Thomas Loeb performed an orthopedic examination on Richard, at the request of the Medical Review Board, in order to obtain an independent report of her medical condition. Although he diagnosed her with cervical sprain syndrome, Dr. Loeb stated that there were no objective findings that substantiated her claim of pain.

Further, Richard's physical tests indicated that her “[r]ange of motion of the cervical spine is essentially normal other than flexion, which is limited to 50%.” Dr. Loeb also opined that she was “able to shoulder shrug without difficulty and all motor groups tested both upper and lower extremities are normal.” Dr. Loeb further opined that there were no signs of structural abnormalities other than mild disk bulging at C5-6 and 6-7. Finally, Dr. Loeb opined that she had a five-percent impairment to the whole person.

After the closing of the administrative record, the hearing officer recommended that Richard's claim be denied because she had not established by objective medical evidence the existence of a permanent mental or physical impairment which would prevent her from performing her job duties. After Richard appealed this decision, the Board adopted the hearing officer's findings, report, and recommended order, and denied Richard's application for disability retirement benefits.

Richard then filed a timely appeal to the Franklin Circuit Court. In an order affirming the Board, the trial court ruled that the Board's decision was supported by substantial evidence, and that Richard's evidence was not so compelling that no reasonable person could fail to be persuaded by it. This appeal follows.

Before reviewing Richard's allegation, we set forth the standard of review for appeals from decisions of the Disability Appeals Committee as stated in *McManus v. Kentucky Retirement Systems*, 124 S.W.3d 454 (Ky.App. 2003). In *McManus*, this Court stated that where an administrative agency'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." *Id.* at 458.

Moreover, the appellate court must afford an administrative agency great deference in its evaluation of the evidence heard and the credibility of witnesses, including its findings and conclusions of fact. *Id.* Stated differently, a reviewing court is not free to substitute its judgment for that of an agency on a factual issue unless the agency's decision is arbitrary and capricious. *Id.* The agency's decision must be upheld if it is supported by substantial evidence. *Kentucky Unemployment Insurance Commission v. Landmark Community Newspapers of Kentucky, Inc.*, 91 S.W.3d 575, 578 (Ky. 2002).

Richard alleges that the Board's decision was not based upon substantial evidence in the record; thus, it was arbitrary, capricious, and an abuse of discretion. She alleges that the Board's decision ignored her testimony and her medical treatment history provided in the report of her primary care physician, Dr. Aaron.

After reviewing the record and applying the applicable standard of review, we conclude that the Board's decision to deny Richard's disability claim was not clearly erroneous. Although Richard's primary physician opined that she was unable to perform

her job due to severe pain, other medical evidence in the record indicated that she was not mentally or physically incapacitated and thus not disabled.

The record demonstrates that Dr. Loeb, who performed an independent medical examination on Richard, could not find any structural abnormalities that would substantiate her pain and thus her disability. Moreover, after completing Richard's physical examination, Dr. Loeb opined that her motor skills and muscular tone were normal except for a flexion which was limited to fifty percent. Consequently, Dr. Loeb did not find Richard permanently disabled.

While Dr. Aaron disagreed with Dr. Loeb's conclusion, the Board was free to consider all the evidence and choose the evidence that it believed. *Commonwealth Transportation Cabinet Department of Vehicle Regulation v. Cornell*, 796 S.W.2d 591, 594 (Ky.App. 1990). Even when there is conflicting evidence in the record, if supported by substantial evidence, an administrative agency's decision will be upheld despite the conflict in the record. *Danville-Boyle County Planning Com'n v. Centre Estates*, 190 S.W.3d 354, 359 (Ky.App. 2006).

Although there is conflicting evidence in the record as to the validity of Richard's claim, the Board's decision to deny Richard's claim for benefits was supported by substantial evidence. Particularly, the evidence provided by Dr. Loeb's report which indicated that Richard was not permanently disabled. Accordingly, after review of the record, this Court concludes that Richard has not demonstrated that the evidence in the

record was so compelling that no reasonable person could have failed to grant her application for disability retirement benefits. *McManus*, 124 S.W.3d at 458.

Finally, because we conclude that the Board's decision was supported by substantial evidence, we conclude that the trial court's order affirming the Board's decision was not clearly erroneous. Because reviewing courts cannot disturb the decision of an administrative agency if the decision was supported by substantial evidence, the trial court properly affirmed the denial of Richard's claim for disability retirement benefits.

For the foregoing reasons, the opinion and order of the Franklin Circuit Court are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Danny Butler
Greensburg, Kentucky

BRIEF FOR APPELLEE:

Katherine Rupinen
Frankfort, Kentucky