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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000309-MR

KENTUCKY RETIREMENT SYSTEMS

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 11-CI-00900

DIANNE CARSON

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KRAMER, TAYLOR, AND VANMETER, JUDGES.

VANMETER, JUDGE: Under KRS¹ 61.600, a Kentucky Employees Retirement Systems member may file a second application for benefits, following an initial denial, if accompanied by new medical evidence. The issue we must resolve in this case is whether the Franklin Circuit Court erred in its decision to remand this

¹ Kentucky Revised Statutes.

case to the agency based on the court's determination that the agency failed to reconsider all the medical evidence, including that presented with the first application. We hold that the court did not err, and therefore affirm its Opinion and Order.

I. Factual Background

Dianne Carson, born April 28, 1951, became a member of Kentucky Employees Retirement Systems (KERS)² in August 1997. Her most recent job was Disability Adjudicator I in the state office of Disability Determination Services. All parties agree that her work was sedentary. Her last day of paid employment was in March 2008.

Carson filed an initial application for disability retirement benefits in November 2007 based on "congestive heart failure."³ This application was referred to a three-member medical review board. KRS 61.600(3), 61.665. The medical review board unanimously recommended denial, and KERS denied the application. Carson then requested a second review by the medical review board. The medical review board again recommended denial, and KERS denied the application. Following an administrative hearing requested by Carson, a Hearing Officer entered Findings of Fact, Conclusions of Law, and Recommended Order

² KERS is one of several retirement plans administered by the Board of Trustees of Kentucky Retirement Systems. KRS 61.510, 61.645. The other two retirement plans are State Police Retirement System, KRS 16.640, and County Employees Retirement System. KRS 78.780. The appellant in this case is the Kentucky Retirement Systems. For ease of reference, we will refer to KERS or the agency.

³ Carson, in her application, stated "heart attack in April has left me weak and I continue to have overall muscle pain and extreme fatigue."

denying disability retirement benefits. Basically, the denial was based on Carson's ability to return to work on a limited basis, despite her cardiac condition, with limitations on the physical efforts required of her employment and reasonable accommodation. Carson filed exceptions, and the agency issued a final order in August 2009 denying Carson's application. Carson did not appeal that order.

Two months later, Carson filed another application for disability benefits. In addition to her heart condition and fatigue, Carson alleged fibromyalgia.⁴ This reapplication included 183 pages of medical records, including information from Dr. Elmer Dunbar at Pain Control Network, Dr. David Mann at CardioVascular Associates, P.S.C., and Dr. Gary Crump at Rheumatology Associates. This reapplication, including medical records, was submitted to a medical review board comprised of three different doctors: Dr. Nancy Mullen, Dr. William Keller and Dr. Roger Strunk. Two of the three doctors recommended denial.

Dr. Mullen stated:

In summary, data submitted by Ms. Carson reveal recent follow up with her pain physician who documents that she is progressing well on her current regimen and that her fibromyalgia was abating. In addition, a recent cardiology follow up indicated that she had improvement on her echocardiogram from an ejection fraction of 15-

⁴ Fibromyalgia, also known as "fibromyositis," is defined as "[a] group of common nonspecific illnesses characterized by pain, tenderness, and stiffness of joints, capsules, and adjacent structures. Focal 'trigger points' may be identified. Systemic symptoms such as fatigue, insomnia, and depression may be present." Taber's Cyclopedic Medical Dictionary, 16th Ed. (F.A. Davis Co., 1989), 670.

20% in July 2008 to 35%. He did not feel that her cardiomyopathy was severe enough to warrant transplant. Because of improvement in her cardiomyopathy as well as fibromyalgia, the applicant is DENIED for disability.

Dr. Keller remarked that “[e]vidence of permanent disability is not convincing.” His more detailed notes acknowledge her heart disease, and provide:

The claimant’s current statement of disability indicates that she has severe left ventricular dysfunction secondary to myocarditis. She also alleges fibromyalgia and chronic fatigue syndrome. The claimant states that she is constantly tired and short of breath and that she has flu like pain throughout her body. She indicates that she has difficulty walking or standing for any length of time. She states that she was diagnosed with myocarditis in April 2007, fibromyalgia in October 2007, and chronic fatigue syndrome in October 2007.

The claimant’s job description reveals that she has been employed as a Disability Adjudicator for Disability Determinations. Her job appears to have been clerical and mildly exertional. The claimant did request accommodations. She did submit a current list of medications which she takes for anticoagulation, heart problems, pain, anxiety, diuresis, hypertension, angina, potassium replacement, sleep problems, bone replacement, and heart issues.

Medical records from the Pain Control Network PSC in Louisville dated October 7, 2009 indicate that the claimant was experiencing pain from the top of her head to the soles [sic] of her feet. While the claimant was found to have complaints of tenderness in several evaluated muscle groups, her fibromyalgia test that day was negative. I do not know what that test consisted of because there is no description of a test or lab sheet submitted.

Review of the claimant’s cardiac records reveal that she is under current care of a cardiology group in Louisville, Kentucky. Her most recent visit there seems to have

been November 10, 2009. The medical records seem to indicate that she was feeling generally better but had some flu like episodes periodically. She was recognized to have had an ejection fraction of 35% which was improved from an earlier study. She was not found to have any evidence of cyanosis, sweating, there was no clubbing of fingernails, etc. Her musculoskeletal exam was described as normal movements in all extremities. Her defibrillator incision was well healed and her pacemaker appeared to be functioning appropriately.

After review of the claimant's medical records there does appear to be clear evidence that the claimant has chronic cardiovascular disease. I find no statement by the claimant's cardiologist indicating that the claimant is unable to work at her relatively sedentary job.

As for the claimant's allegations of fibromyalgia and chronic fatigue syndrome I do not find objective evidence in these records to indicate that the claimant is disabled from the causations. It is the opinion of this reviewer that the claimant has not presented convincing and objective evidence of permanent disability. I recommend DENIAL of this claim.

Dr. Strunk recommended approval of Carson's claim. He reported the following:

The claimant alleges disability due to nonischemic cardiomyopathy, fibromyalgia and chronic fatigue.

The medical information consists of 183 pages and previously submitted information. The information indicates that the claimant was diagnosed with nonischemic cardiomyopathy in 2007. Her ejection fraction has improved some since that time. She has a pacemaker defibrillator and has developed chronic pain syndrome, felt similar to or related to fibromyalgia, possibly related to the replacement of the pacemaker defibrillator. She continues to have an ejection fraction

as low as 35%. She has congestive heart failure due to her cardiomyopathy with atrial fibrillation and given the nonischemic cardiomyopathy, I would conclude that she is disabled for her job as described, even though it is mostly sedentary, due to the chronic fatigue and lack of stamina that the cardiomyopathy results in. I do not feel the fibromyalgia like syndrome would be considered disabling.

I would therefore, recommend **APPROVAL** of this claim for disability based on the claimant's nonischemic cardiomyopathy with a review in 1 year.

Cardiomyopathy, such as these sometimes improve with time and if there is substantial improvement with time the claimant may be able to return to her job as described at some point in the future.

KERS thereupon denied Carson's reapplication, and Carson timely requested an administrative hearing which was held in October 2010. The Hearing Officer filed his Findings of Fact, Conclusions of Law and Recommended Order in March 2011.

In his Findings of Fact, as noted by the trial court, the Hearing Officer recited verbatim the Findings of Fact from the hearing of the initial application. However, the Hearing Officer proceeded to then discuss in detail the copious medical records submitted with Carson's reapplication, including records and notes from Dr. Crump, Dr. Dunbar, and Dr. Mann, a chest x-ray, and a heart catheterization. The most recent note, dated October 7, 2010, from Dr. Dunbar indicated that Carson's current pain rated 0 out of 10 (with 10 being the worst), and Carson "was treating her 'diffuse body pain consistent with fibromyalgia' with Cymbalta and Gabapentin with good results" and her "condition was progressing

‘very well,’ and that ‘(h)er fibromyalgia pain is abating.’” Similarly, the last note from Dr. Mann, dated November 10, 2009, indicated Carson was “actually doing very well[.]” The Hearing Officer then recited portions of the reports of each of the medical review board doctors. The Hearing Officer also recited a number of additional items not considered by the medical review doctors:

1. An office note from Dr. Crump to the effect that studies of Carson’s spine did not explain her pain and that a physical exam was inconsistent with fibromyalgia, and submitting that perhaps Carson had an imbalance in her central nervous system.

2. A Behavioral Health Intervention Progress note, dated September 10, 2009, from James Thompson, reporting Carson’s improved pain relief, and more physical and social activity.

3. A Cardiac Residual Functional Capacity Questionnaire response from Dr. Mann, dated May 14, 2010, explaining Carson’s cardiologic diagnosis, her symptoms, her work limitations, and his opinion that Carson could not work full time.

4. A Chronic Fatigue Syndrome Residual Functional Capacity Questionnaire response from Dr. Jeffrey Berg, dated May 14, 2010, explaining Carson’s fatigue and pain diagnosis, that her fatigue would constantly interfere with attention and concentration, and his opinion that Carson could not perform low-stress jobs.

The Hearing Officer summarized all the evidence from both hearings, and recommended denial, as follows:

9. Claimant has filed for disability retirement for the condition of Severe Left Ventricular Dysfunction Secondary to Myocarditis. This condition was also raised and considered in her first application for disability retirement benefits, and the condition was not found to be disabling by the Hearing Officer or the Board of Trustees at that time. It is clear from the Administrative Record that Claimant suffers from various subjective limitations from this alleged condition, and her treating physicians have given her recommended limitations in her physical abilities to perform job duties. The additional evidence submitted in the second application shows that Claimant continues to suffer limitations from her heart condition, but the objective medical evidence does not indicate Claimant's heart condition has deteriorated. In fact, it appears Claimant's ejection fraction has improved since her first application was reviewed. The work limitations on Claimant's physical abilities outlined by Dr. David Mann on April 21, 2009 were still within the limitations the Board of Trustees considered when denying Claimant's first application, and are compatible with the accommodations Claimant's employer had previously put in place for her. Therefore, based on the previous decision of the Board of Trustees and a review of the medical evidence submitted with the current application, it is the finding of this Hearing Officer that Claimant has failed to meet her burden of proof by a preponderance of the evidence that she is permanently disabled due to Severe Left Ventricular Dysfunction Secondary to Myocarditis and the subjective symptoms arising there from that is expected to last for a continuous period of not less than twelve months from Claimant's last day of paid employment.

10. Claimant has raised the condition of Fibromyalgia/Chronic Pain Syndrome as disabling. What little objective medical testing exists in the Administrative Record concerning this condition is

contradictory. Dr. Dunbar originally found Claimant's pain presentation inconsistent with Fibromyalgia, and could find no specific reason to explain Claimant's subjective complaints of pain. Dr. Dunbar later listed Fibromyalgia and/or Chronic Pain Syndrome as a diagnosis. Claimant's pain management provider listed her diagnosis as Chronic Pain Syndrome. Regardless, the medical records indicate that Claimant's chronic pain is controlled with treatment. Claimant reported she feels much better with treatment and is now more physically active and able to exercise. None of the doctors of the Medical Review Board found that Claimant's Fibromyalgia/Chronic Pain Syndrome would disable her from her previous job. Therefore, based on a review of the medical evidence submitted, it is the finding of this Hearing Officer that Claimant has failed to meet her burden of proof by preponderance of the evidence that she is permanently disabled due to Fibromyalgia/Chronic Pain Syndrome that is expected to last for a continuous period of not less than twelve months from Claimant's last day of paid employment.

11. Claimant has also raised the condition of Chronic Fatigue Syndrome as permanently disabling. While there is reference to the diagnosis of Chronic Fatigue Syndrome in the records submitted, there is no indication of any testing having been performed to reach the diagnosis. There is no medical evidence in the record that Chronic Fatigue Syndrome, in and of itself, is disabling. The fatigue that Claimant suffers as a result of her heart condition was considered by the Board of Trustees in their denial of Claimant's first application. There is no new evidence submitted with Claimant's second application that would indicate her fatigue condition is any more debilitating than was previously determined in her first application. Therefore, based on the previous findings of the Board of Trustees and a review of the medical evidence submitted, it is the finding of this Hearing Officer that Claimant has failed to meet her burden of proof by a preponderance of the evidence that she is permanently disabled due to Chronic Fatigue Syndrome that is expected to last for a

continuous period of not less than twelve months from Claimant's last day of paid employment.

12. The objective medical evidence does not support a finding that Claimant is permanently disabled from the cumulative effects of her conditions. Claimant has failed to present objective medical evidence supporting the contention that the conditions of Severe Left Ventricular Dysfunction Secondary to Myocarditis, Fibromyalgia, or Chronic Fatigue Syndrome are disabling individually; and these conditions taken together do not demonstrate total and permanent disability, given the objective medical evidence presented for consideration.

Claimant's heart condition and subsequent fatigue issues where [sic] previously considered in Claimant's first application for disability retirement benefits, and were not found disabling. While subjectively Claimant suffers from pain and limitations based her physical and mental status, there is no objective medical evidence to support a finding of disability for Claimant's alleged conditions. Therefore, it is the finding of this Hearing Officer that Claimant has failed to meet her burden of proof by a preponderance of the evidence that she suffers a permanent disability from the cumulative effects of her medical conditions that is expected to last for a continuous period of not less than twelve months from Claimant's last day of paid employment.

The Board of Trustees of the agency accepted the Hearing Officer's recommended order and denied Carson's application. This appeal now follows.

II. Standard of Review

An appellate court's role in a KRS Chapter 13B appeal is to review the administrative decision, not to reinterpret or reconsider the merits of the claim, nor to substitute its judgment for that of the agency as to the weight of the evidence. *500 Assocs., Inc. v. Natural Res. & Env'tl. Prot. Cabinet*, 204 S.W.3d 121, 131 (Ky. App. 2006). The reviewing court may only overturn the decision if

the agency acted arbitrarily or outside the scope of its authority, if the agency applied an incorrect rule of law, or if the decision itself is not supported by substantial evidence on the record. *Kentucky State Racing Comm'n v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972). As long as substantial evidence in the record supports the agency's finding, the reviewing court must defer to that finding, even if evidence to the contrary exists. *Kentucky Comm'n on Human Rights v. Fraser*, 625 S.W.2d 852, 856 (Ky. 1981).

III. Analysis

KERS first argues that the trial court erred by rejecting the doctrine of administrative *res judicata* as it applies to determinations by KERS. Under the statute governing disability retirement benefits for KERS, KRS 61.600(2), if an application for disability is denied, the applicant may reapply and submit a second application if the application is timely and predicated upon "new" evidence.

Specifically, KRS 61.600(2) states:

A person's disability reapplication based on the same claim of incapacity shall be accepted and reconsidered for disability if accompanied by new objective medical evidence. The reapplication shall be on file in the retirement office no later than twenty-four (24) months after the person's last day of paid employment in a regular full-time position.

KERS argues that the trial court erred in its final opinion and order when it rejected the applicable doctrine of administrative *res judicata*. Under this doctrine, *res judicata* applies when a prior administrative proceeding afforded the participants a full and fair opportunity to litigate the issues and the agency made a final order as

to its findings. *Kentucky Comm'n on Human Rights v. Lesco Mfg. & Design Co.*, 736 S.W.2d 361 (Ky. App. 1987). In *Lesco*, the court stated:

In order for one administrative decision to preclude further litigation, certain threshold requirements must exist. In *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 86 S.Ct. 1545, 16 L.Ed.2d 642 (1966), the court held that the earlier administrative proceedings must actually have litigated an issue and that the proceedings must have afforded a full and fair opportunity for the litigants. Relevant factors for determining whether a full and fair hearing had occurred would include a judicial-type adversary proceeding, with testimony taken under oath, with witnesses being available for cross-examination, and with a record of the proceedings, including any written and documentary evidence which was presented at the hearing.

736 S.W.2d at 363.

In this case, KERS disability hearings conducted under KRS Chapter 13B satisfy the threshold requirements set forth in *Lesco*. The disability claims are litigated under full and fair hearings, in a judicial-type adversary proceeding, testimony taken under oath, witnesses cross-examined, and a record made.

In our view, however, administrative *res judicata* does not apply because the statute very clearly permits the filing of a “reapplication based on the same claim of incapacity . . . and reconsidered for disability if accompanied by new objective medical evidence.” KRS 61.600(2). The legislature, by the language in the statute, has modified the traditional concept of *res judicata* which would otherwise prohibit the refiling of a claim based on the same incapacity. KRS 61.600(2) specifically allows Carson to file a second application for benefits

based on new objective medical evidence. The statute does not require that Carson first appeal the denial of the first application. Instead, it simply provides a mechanism for her to file a second application based on new objective medical evidence. Thus, we find no merit in KERS's argument that Carson was somehow prevented from filing this second application.

We acknowledge KERS's citation to two recent unpublished cases, *Howard v. Kentucky Ret. Sys.*, 2012 WL 5603579 (Ky. App., Oct. 11, 2013) (2012-CA-001488-MR), and *Hoskins v. Kentucky Ret. Sys.*, 2011 WL 112147 (Ky. App., Jan. 14, 2011)(2009-CA-000905-MR). Based on our reading of KRS 61.600(2) and our review of the record in this case, those cases do not compel a different result.

KERS next argues that irrespective of whether the reapplication was barred by *res judicata*, the agency's final order was supported by substantial evidence from the record as a whole. In this regard, the trial court held the following:

The Hearing Officer stated that he was, "bound by the findings of the Board of Trustee's (sic) Report and Order as to all evidence considered in the course of the first application concerning Claimant's job and conditions(s)." . . . The Hearing Officer then copied word-for-word the Findings of Fact and Conclusions of Law from the initial Recommended Order regarding Ms. Carson's first application, and only considered the new evidence submitted with the second application. . . .

. . . .

The Court finds that in order for [the agency] to comply with the plain language and purpose of KRS 61.600(2), it must necessarily consider any new objective medical

evidence within the context of any previously submitted medical evidence of incapacity submitted with the previous application. To “reconsider” a claim “accompanied” by new medical evidence plainly directs the [agency] to reassess the claim based on the totality of evidence submitted. . . . The [agency] must make such a determination based on a comprehensive review of all relevant medical evidence.

Carson v. Kentucky Ret. Sys., Franklin Cir. Ct. 11-CI-00900, Opinion and Order, Feb. 4, 2013, pp. 5-7.

After careful review of the record, we agree with the trial court that the Hearing Officer erred in his legal conclusion as to Carson’s failure to appeal the initial application, and its impact on the Findings of Fact and Conclusions of Law entered as to Carson’s reapplication. The Hearing Officer and the agency appear to treat each infirmity alleged by Carson as a separate and discrete illness as opposed to a more holistic, comprehensive approach set forth by Dr. Mann and Dr. Berg. In other words, the agency’s use of administrative *res judicata* was erroneous and seems to have affected its evaluation of the evidence. We acknowledge the Hearing Officer’s findings, set forth in his findings of fact, paragraph 12, above, purported to address “the cumulative effect of [Carson’s] conditions.” Notwithstanding these findings, the Hearing Officer noted, “[Carson’s] heart conditions and subsequent fatigue issues where [sic] previously considered [her] first application for disability retirement benefits, and were not found to be disabling.” Thus, we are unable to say that erroneous application of administrative *res judicata* did not creep into these findings on reapplication. We

therefore must conclude that the agency's findings were not supported by substantial evidence.

The Franklin Circuit Court's Opinion and Order is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Joseph P. Bowman
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Nathan M. Haney
Louisville, Kentucky