RENDERED: JANUARY 22, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000315-MR

KENTUCKY RETIREMENT SYSTEMS — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 06-CI-01244

ROSIETTA BECKNER — APPELLEE

OPINION
REVERSING

** ** ** ** **

BEFORE: CAPERTON AND STUMBO, JUDGES; KNOPF,[1] SENIOR JUDGE.

CAPERTON, JUDGE: The Appellant, Kentucky Retirement Systems, appeals the February 2, 2009, opinion and order of the Franklin Circuit Court, overruling the decision of the Disability Appeals Committee of the Board of Kentucky Retirement Systems (hereinafter the Board), to deny the application of Appellee,

[1] Senior Judge William Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Rosietta Beckner, for disability retirement benefits pursuant to KRS 61.600, on the ground that Beckner's incapacitating mental illness was the direct or indirect result of her mental condition prior to employment. Having reviewed the record, the arguments of the parties, and the applicable law, we reverse.

Beckner began working with the Caldwell County School Board on September 2, 1997. It is undisputed by the parties that Beckner has a mental illness which has totally and permanently disabled her from employment since her last day of paid employment on September 20, 2003. At issue between the parties was whether Beckner's mental illness is the result of a condition or illness which pre-existed her employment with the School Board in September of 1997. KERS asserts that Beckner's mental illness began in 1995, while Beckner asserts that she had no mental problems prior to beginning employment with the Board. Beckner argues that the onset of her mental illness was on November 1, 1998, when she had a mental breakdown at church.

As noted, Beckner applied for disability retirement benefits from KERS pursuant to KRS 61.600. Beckner was denied by the KERS Medical Review Board, and appealed her denial. An administrative hearing was conducted, and on June 12, 2006, the hearing officer recommended that Beckner's application be denied. In so doing, the officer found, among other things, that Beckner had depression which was totally and permanently disabling, but which pre-dated her employment with the School Board. Further, the hearing officer found that

Beckner had neither alleged nor shown that her disability was the result of a single traumatic event which occurred while she was performing her job duties.

In so finding, the hearing officer also determined that Beckner's attempts to establish a 1998 onset date for her depression were insufficient and not entirely credible. The hearing officer found that records of more than one source indicated that Beckner herself reported that her depression probably began as early as 1995, and predated her panic attacks. While acknowledging that the panic attacks themselves post-dated her employment at the School Board, the hearing officer found that they were linked to her depression throughout the medical records and, as previously stated, her depression pre-dated her employment. Accordingly, the hearing officer found that Beckner failed to meet her burden of showing that she was totally and permanently disabled within twelve months of her last day of paid employment in a regular full-time position.

Thereafter Beckner appealed the hearing officer's denial to the Board. The Board accepted the hearing officer's report and recommended order in its entirety. Beckner then appealed to the Franklin Circuit Court. In appealing to the circuit court, Beckner disputed the medical records and statements upon which the hearing officer relied in denying her application. Beckner asserts that statements she made in May and June of 2002, which dated her depression to 1995, were made during the course of psychiatric evaluation interviews in which she was psychotic and hallucinating.

More specifically, Beckner states that the first record containing the 1995 onset date of depression was that of Dr. David Meyer dated May 31, 2002. Dr. Meyer had apparently been treating Beckner since February of 2002, after her admission to a mental hospital for contemplations of suicide. At that time, Dr. Meyer diagnosed Beckner with chronic major depression. Beckner notes that in making his diagnosis, Dr. Meyer found that Beckner had once been active in her church, but that she "had something like a panic attack, and has not been back for 4 to 5 years."[2] In a subsequent report dated May 31, 2002, Dr. Meyer noted that Beckner's symptoms "began in 1995 – 'blacked out at church' couldn't move my arms, and screamed, fighting people, 'woke up in hospital'".[3] Beckner states that this was the first mention of a 1995 onset date in any of Beckner's records.

The second of the records mentioning a 1995 onset date of depression was from Cumberland Hall Hospital, where Beckner was admitted on June 6, 2002, for psychiatric evaluation following recurrent suicidal attempts and thoughts. At that time, Beckner was diagnosed with major severe depression, and it was noted that Beckner had been depressed for "about 6-12 months", and also, "a long time, since 1995", when her daughter was involved with drugs and alcohol.[4] Beckner now argues that these two statements were the only evidence in the record

[2] *See* A.R. pp. 30 and 68.

[3] *See* A.R. p. 27.

[4] *See* A.R. pp. 14-24.

which contained any reference to a possible 1995 onset date for her mental problems.

Beckner also argued that despite the hearing officer's finding that she made insufficient attempts to establish a 1998 onset date for her depression, she presented substantial evidence that such was the case. Specifically, Beckner states that she submitted records from the Eddyville Medical Clinic from 1974 to 1998 showing no pre-1998 mental condition, and records from Wyetha Woods, ARNP, showing that the blackout in church occurred in November of 1998, thereby dating her first complaint or treatment for mental condition. It also included the testimony of Becker and her husband, and the testimony of Gail Davis, Beckner's former supervisor.[5] Further, Beckner submitted a statement from Dr. Meyer, correcting his previous statement that her mental condition had its onset in 1995, and confirming that the actual onset date was 1998, as shown by her medical records and statements from family members.

On the basis of the foregoing evidence, the circuit court reversed the decision of the Board. In so doing, the court found that Beckner had no pre-existing condition, and that the hearing officer's findings were not supported by substantial evidence. It is from that decision that KERS now appeals to this Court.

In *McManus v. Kentucky Retirement Systems*, 124 S.W.3d 454(Ky.App. 2003), this Court held that:

[5] Davis testified that she had known Beckner for many years prior to her employment with the School Board in 1997, and that Beckner was always stable, sweet, and easy to get along with, and further, that Beckner had a mental breakdown at church which occurred after she began working for the county.

> Determination of the burden of proof also impacts the standard of review on appeal of an agency decision. When the decision of the fact-finder is in favor of the party with the burden of proof or persuasion, the issue on appeal is whether the agency's decision is supported by substantial evidence, which is defined as evidence of substance and consequence when taken alone or in light of all the evidence that is sufficient to induce conviction in the minds of reasonable people. 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 Retirement Systems, 124 S.W.3d 454, 458 (Ky.App. 2003). Further, in *Bowling v. Natural Resources*, 891 S.W.2d 406 (Ky.App. 1994), we held that the trier of facts in an administrative agency is afforded great latitude in its evaluation of the evidence heard and the credibility of witnesses appearing before it. Indeed, it is the exclusive province of the administrative trier of fact to pass upon the credibility of witnesses and the weight of the evidence. *See 500 Associates, Inc. v. Natural Resources and Environmental Protection Cabinet*, 204 S.W.3d 121, 132 (Ky.App. 2006).

The law of this Commonwealth is clear that the circuit court cannot consider new or additional evidence, nor substitute its judgment as to the credibility of the witnesses, or the weight of the evidence concerning questions of fact. *See Mill Street Church of Christ v. Hogan*, 785 S.W.2d 263 (Ky.App. 1990). Likewise, this Court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. *See Louisville Edible Oil*

Products, Inc. v. Revenue Cabinet Commonwealth of Kentucky, 957 S.W.2d 272, 273 (Ky.App. 1997).

As established by KRS 13B.090(7), Beckner had the burden to prove entitlement to the benefits she sought, and she was to do so by a preponderance of the evidence standard. Thus, according to *McManus*, the issue on appeal is whether the evidence in Beckner's favor is so compelling that no reasonable person could have failed to be persuaded by it. Stated otherwise, if the agency's determination that Beckner failed to meet her burden of proof was supported by substantial evidence, the circuit court was bound to affirm. *See Kentucky Comm'n on Human Rights v. Fraser*, 625 S.W.2d 852 (Ky. 1981).

On appeal, KERS argues that the circuit court misapplied the law governing judicial review of administrative decisions, and improperly reweighed the evidence and the credibility of the witnesses in reversing the Board. KERS asserts that it was the role of the circuit court to review the administrative decision, and not to reinterpret or reconsider the merits of the claim. More particularly, KERS argues that the circuit court erred in its finding that "the conclusion that Petitioner's disabling depression predated her membership in the CERS is not supported by substantial evidence."[6] In response, Beckner argues that the court below correctly determined that the agency's denial of Beckner's application for

[6] We believe that this issue was troubling to the circuit court in that the circuit court stated twice, on pp. 3 and 6 of its opinion and order, that the record contained substantial evidence to conclude that Beckner's depression predated her employment with the school system, and by stating that the Board's decision to deny benefits to Beckner was based upon substantial evidence.

disability retirement benefits was not supported by substantial evidence, and that it properly reversed the agency's decision.

Having reviewed the record in this matter, we are compelled to agree with KERS. Our review of the circuit court's order indicates that it failed to acknowledge the burden Beckner carried on appeal, which was to present such evidence that her depression and anxiety did not pre-date her employment and that no reasonable person could believe otherwise. Further, having reviewed the order in detail, we are of the opinion that the circuit court engaged in an impermissible reweighing of the evidence in this matter.

Stated simply, the record contains medical evidence from not one, but two physicians, who state that Beckner's depression began in 1995. While Beckner argues that these records should be discredited because they include statements which she made in a state of hallucination and psychosis, the records themselves reveal otherwise. Indeed, the records in which Beckner herself reported the onset of her symptoms in 1995 indicate that at the time, her intellectual functioning was "within normal limits," and that she was alert, and oriented to time, place, person, and situation.

While our review of the record confirms that Dr. Meyer did recant his statement concerning the onset of Becker's depression, he did so only after her application for benefits had been denied.[7] Further, our review of the

[7] Repeatedly, we have held that the recanted testimony of a trial witness is viewed with suspicion, and does not normally require the granting of a new trial. Fitzgerald, 8 *Ky.Prac.* § 933 (1978); and *Hensley v. Commonwealth*, 488 S.W.338 (Ky. 1972). We view the situation concerning the medical records of Dr. Meyer in the matter *sub judice* no differently. Although

"contemporaneous medical evidence" upon which Dr. Meyer apparently relied in recanting his statement reveals said evidence is contradictory. Additionally, our review of the record indicates that there was no evidence submitted to refute Dr. Bhaghani's medical record, which contained the same 1995 date of onset as did the initial record of Dr. Meyer.

Stated simply, it was Beckner's burden to present evidence that would persuade a reasonable person that her condition did not pre-exist her employment. While one could certainly look at the evidence and make the conclusion that her condition arose after employment, one could also look at the record and conclude that it arose before her employment. Certainly sufficient evidence exists in the record for one to argue that Beckner began to experience symptoms of depression and anxiety in 1995, which was at the time her daughter began having problems with drugs.

While it is certain that Beckner's condition progressed over time, evidence as to the initial date of onset is conflicting. This being the case, it was the province of the administrative fact-finder to review the evidence, and to make a determination as to its weight and credibility. This the hearing officer did. Having reviewed the record, we cannot conclude that the hearing officer erred in

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he may have recanted his statement made in his earlier medical records, we consider this as new or additional evidence, not as evidence which in some manner negates or outweighs the statements made in the records as initially submitted.

A recanted statement presents the trier of fact with two factual scenarios. The fact that a witness gave inconsistent statements does present credibility concerns but we must keep a recanted statement in perspective, it is both a prior inconsistent statement and substantive evidence. See *Shepherd v. Commonwealth*, 251 S.W.3d 309 (Ky. 2008).

assessing the evidence. Accordingly, we are compelled to reverse the circuit court, and reinstate the previous order of the hearing officer as affirmed by the board.

In so finding, we briefly address the issue raised by the circuit court considering the severity of Beckner's condition. We note that in its opinion and order, the circuit court explained that people use the word depression in a number of ways which do not rise to the level of clinical depression and are not permanently disabling. The court relies upon this reasoning in further support of its finding that Kentucky Retirement Systems should not have relied upon Beckner's assertions that she began suffering depression in 1995.

We are of the opinion that the circuit court misinterpreted the mandates of KRS 61.600. That provision does not require that a condition be "disabling" prior to the applicant's employment date in order for the condition to be considered pre-existing. Certainly, if the condition were already disabling prior to employment, the employee would likely not have taken the employment in the first place.

Finally, we address the circuit court's findings concerning Beckner's panic attacks. The circuit court found that none of Beckner's medical records indicated that her panic disorder was merely an element of her depression. However, to the contrary, we note that there is no evidence that the doctors treated the panic disorder separate from the depression. In fact, contrary to the "separateness" theory, the record refers to Beckner's condition as "depression with panic symptoms" in more than one instance. Thus, we cannot conclude that the

two conditions were distinctly separate. Further, and critically, we note that there is no evidence in the record to establish that the panic attacks, in and of themselves are disabling. Accordingly, even if that condition were found not to be pre-existing, benefits could not be awarded on that basis alone.

Wherefore, for the foregoing reasons, we hereby reverse the February 2, 2009, opinion and order of the Franklin Circuit Court, and order that the June 12, 2006, order of the hearing officer be reinstated in its entirety.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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