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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001989-MR

JANET LOUISE LOY

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 06-CI-01324

KENTUCKY RETIREMENT SYSTEMS,
WILLIAM P. HAYNES, EXECUTIVE DIRECTOR

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: CAPERTON AND COMBS, JUDGES; LAMBERT,¹ SENIOR
JUDGE.

CAPERTON, JUDGE: The Appellant, Janet Loy, appeals the September 22, 2009,
opinion and order of the Franklin Circuit Court, which upheld the decision of the

¹ Senior Judge Joseph E. Lambert 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.

Board of Trustees of the Kentucky Retirement Systems (KRS) to deny Loy's application for disability retirement benefits pursuant to KRS 61.600. Having reviewed the record, the arguments of the parties, and the applicable law, we reverse and remand for additional proceedings not inconsistent with this opinion.

Loy was a full-time merit employee of the Kentucky Transportation Cabinet, Department of Highways, where she worked as an Administrative Specialist II. Loy's initial membership date in KRS was July 1, 1993, and her last date of paid employment was May 30, 2005. Loy was initially employed at a toll plaza on the Cumberland Parkway, but relocated from that employment to an office position in Somerset, Kentucky, when the toll booth was removed from the Parkway. Loy continued to work in that capacity until September 14, 2004, on which date she was severely injured in a motor vehicle accident. As a result of that accident, Loy sustained head trauma, including skull fractures, mandibular penetration of the ear canal, dizziness, severe headaches, numbness, personality changes, and depression. She also sustained nerve damage to her eyes, as well as a herniated lumbar disc and deformation of her left hand.

Loy's job description provided for 4.5 hours sitting, 3 hours standing or walking, repetitive handling, frequent reaching, pulling, pushing, and occasionally lifting and carrying up to ten pounds. It also required frequent lifting and carrying, walking, standing, occasional bending and reaching, and occasional

lifting of 25 pounds. Following her accident, Loy requested accommodations, but was told they were not available. During the course of the hearing, Loy testified that her office job required that she carry computer paper that was very heavy once or twice per week. Loy also testified that she was required to carry other supplies to the office from a storage location which was approximately a quarter-mile walk. Loy further stated that she was required to carry garbage consisting of 2 to 3 bags on a weekly basis, as well as mop buckets weighing up to 5 pounds, and various bathroom supplies. The hearing officer found that the physical exertion requirements of Loy's job fell into the category of "light" to "medium" as listed in KRS 61.600(5)(c).

As noted, Loy filed a claim with the Kentucky Retirement Systems for disability retirement benefits on January 14, 2005. On July 17, 2005, Loy received a letter from Kentucky Retirement Systems denying her application for benefits. Pursuant to Loy's request, a hearing was held on May 2, 2006. When asked to describe her current physical status at the hearing, Loy stated that the back of her head still has "places" on it, that her arms hurt, that she has no grip in her left hand, and that she had a pinched nerve and pain in her right arm.

Loy's primary treating physician is Dr. Phil Aaron of Columbia, Kentucky. At the time of the hearing, Loy remained under Dr. Aaron's care, as well as Dr. Kathy Carleton, and Dr. Nazar, a neurosurgeon. Loy testified that she continues to have extremely bad headaches, double vision, and very little memory of the actual accident itself. She also stated that she suffers from photophobia, and

is required to wear sunglasses when outside. Loy stated that she has pain in her back and right leg, and that her bulging discs dramatically restrict her ability to sit, walk, lift, bend, push, and pull. Loy estimated that she could lift a maximum of 6 pounds. She also stated that she has difficulty with fine motor skills, including an inability to clutch anything. According to Loy, she also has problems with confusion and concentration, as well as ringing in her ears and double vision and bladder and bowel problems.

Subsequently, on June 30, 2006, the hearing officer issued a report recommending denial of benefits. In doing so, the hearing officer found that the objective medical evidence indicated only mild injury to Loy's spine or back, and no permanent dizziness or damage to Loy's eyes. The hearing officer further found that the objective medical evidence submitted did not establish depression, personality changes, or memory loss, nor did the record contain objective medical evidence that the skull fracture or scalp laceration caused sufficient injury to prevent Loy from performing her former job duties. Accordingly, the hearing officer found that Loy had not met her burden of proof with respect to any of her allegedly disabling conditions, nor that they resulted in permanent and total disability as of her last day of paid employment.

Loy filed timely exceptions to that report and it was reviewed by the Board of Trustees of the Kentucky Retirement Systems who issued a final order on August 21, 2006, adopting the hearing officer's recommended order of denial of benefits. In so doing, the Board found that Loy failed to establish by credible

objective medical evidence that she was permanently disabled from her previous job as of her last day of paid employment. Loy then filed a petition in the Franklin Circuit Court requesting review and reversal of the final order of the Board. As noted, on September 22, 2009, the Franklin Circuit Court issued an opinion and order affirming the decision of the Board. It is from that opinion and order that Loy now appeals to this Court.

At the outset, we note that in reviewing an agency decision, the court may only overturn that 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 was not supported by substantial evidence. *Kentucky State Racing Comm'n v. Fuller*, 481 S.W.2d 298, 300-301 (Ky. 1972). Thus, if the record includes substantial evidence to support the agency's findings, the court must defer to that finding even though there is evidence to the contrary. See *Kentucky Comm'n on Human Rights v. Fraser*, 625 S.W.2d 852, 856 (Ky. 1981). If the court finds the correct rule of law was applied to the facts supported by substantial evidence, the final order of the agency must be affirmed. *Brown Hotel Company v. Edwards*, 365 S.W.2d 299, 302 (Ky. 1963). In so stating, we further note that the trier of fact in an administrative agency is afforded great latitude in its evaluation of the evidence heard, and the credibility of witnesses appearing before it. See *Bowling v. Natural Resources*, 891 S.W.2d 406 (Ky. App. 1994). Accordingly, this Court shall not substitute its judgment for that of the agency as to the weight of the

evidence on questions of fact. *Louisville Edible Oil Products, Inc. v. Revenue Cabinet Commonwealth of Kentucky*, 957 S.W.2d 272, 273 (Ky. App. 1997).

On appeal, Loy argues that the circuit court erred in finding that substantial evidence supported the decision of KRS to deny disability benefits. In support of that argument, Loy asserts that the functional capacity assessment of Dr. Aaron was objective medical evidence to support her claim. Loy draws this Court's attention to *Kentucky Retirement Systems v. Bowens*, 281 S.W.3d 776 (Ky. 2009), and KRS 61.600(5)(a)(2), which provides that, "The determination of a permanent incapacity shall be based on the medical evidence contained in the member's file and the member's residual functional capacity and physical exertion requirements." She argues that Dr. Aaron's functional capacity assessment addressed these very issues and that, accordingly, the court erred in rejecting that assessment by stating there was no objective medical evidence to support it.

Loy also argues, in reliance upon *Bowens, supra*, that the hearing officer failed to consider the cumulative effect or combination of effects of her injuries and disabilities. She argues that the hearing officer went through her injuries individually, but did not consider their total effect. Finally, Loy asserts that the hearing officer was arbitrary in assessing the evidence submitted. In support of that argument, she again reasserts that if the evidence in this case were considered cumulatively, it would compel a finding of disability. She argues that there are voluminous medical records to support her subjective complaints, that the officer arbitrarily assigned the same weight to the opinion of a nurse's aide as to

that of the physicians,² and that it erred in finding that Dr. Aaron's report was not objective medical evidence.

In response, KRS asserts that when the evidence of record is reviewed, it reveals numerous subjective complaints, but substantially normal objective test results and observations. KRS also argues, concerning Dr. Aaron's functional capacity assessment, that the hearing officer reviewed the assessment and simply chose to give it little credence. Further, KRS notes that in making his assessment, Dr. Aaron failed to indicate what testing he specifically relied upon to reach his conclusion, and failed to give a specific diagnosis. With respect to Loy's argument that the hearing officer placed too much emphasis on the statements of the University of Kentucky Medical Center nurse's aide, KRS notes that these instructions were also noted in the discharge summary issued by Dr. Paul Kearney.³ Finally, KRS asserts that the hearing officer did consider the cumulative effect of Loy's injuries in finding that "Claimant had not met the burden of proof with respect to any of her alleged disabling conditions."

Having reviewed the record, we are compelled to agree with Loy that the hearing officer failed to apply the cumulative effect analysis required both implicitly in KRS 61.600, and explicitly in the recent holding of our Kentucky Supreme Court in *Bowens*. In that case, which is very similar to the situation in the

² Specifically, Loy asserts that the hearing officer placed too much emphasis on the opinion of a nurse's aide included in the discharge notes of the University of Kentucky Medical Center, which stated that she was told to "return to her normal activities."

³ Having reviewed the record, we note that the statements of the nurse's aide were indeed adopted by Dr. Kearney in his report. Accordingly, we do not believe that this argument merits further consideration herein.

matter *sub judice*, the claimant was involved in two motor vehicle accidents in which she sustained numerous injuries, in addition to being diagnosed with and undergoing treatment for breast cancer. In addressing the opinion of the hearing officer in that matter, the Court stated:

[I]n considering Appellee's claim for disability benefits, the hearing officer evaluated the effect of each insular injury on Appellee's ability to perform her job duties and determined that no one injury rose to the level of disabling Appellee. He did not evaluate the *cumulative effect* of Appellee's multiple ailments on the "whole person." At a minimum, Appellee produced sufficient evidence of disability due to her various ailments that she was entitled to a determination of whether the *cumulative effect* of her ailments rendered her unable to work. However, by analyzing each ailment singularly, the hearing officer "so fragmentized [Appellee's] several ailments and the medical opinions regarding each of them that he failed to properly evaluate their effect in combination upon this claimant." *Dillon [v. Celebrezze]* 345 F.2d 753, 757 (4th Cir. 1965). The hearing officer's review and findings regarding Appellee's injuries thus failed to consider her multiple ailments in accordance with the "residual functional capacity" standard in KRS 61.600(5)(a)(2), which clearly, in instances such as this, supports an additional "cumulative effects" analysis.

Kentucky Retirement Systems v. Bowens, 281 S.W.3d at 783. A review of the hearing officer's findings in this matter indicates that they are substantially similar to those made by the hearing officer in *Bowens*. Each individual condition alleged was addressed in the report, but the cumulative effect of the conditions was absent. We believe, in accordance with *Bowens*, that this is required by KRS 61.600(5)(a)(2), and that reversal for the reconsideration of the evidence under such an analysis is appropriate.

Having so found, we briefly address Loy's arguments concerning the residual functional capacity report of Dr. Aaron. Concerning this report, we note that the hearing officer found that, "On March 22, 2006, Dr. Aaron reported that the Claimant has memory loss, profound melancholic depression, in addition to the head numbness, headaches, diplopia accompanied by dizziness and vertigo. (Exhibit 14). He fails to provide, however, any objective testing of memory loss or depression." Consistent therewith the circuit court found that the "residual functional capacity evaluation appears to support a finding of disability."

However, our review of the record reveals that the hearing officer considered the report of Dr. Aaron but simply decided to give the opinions contained therein little weight. Certainly, this was a determination within the sole province of the hearing officer, who has the right as the 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 at 132 (Ky. App. 2006). We believe the hearing officer had the authority to determine the amount of weight to be given to the report of Dr. Aaron, and that the hearing officer's decision in that regard was not arbitrary. As the circuit court correctly stated, the report of Dr. Aaron was but one piece of evidence for the hearing officer to consider in making a decision on Loy's application. Accordingly, we decline to reverse on this basis.

Wherefore, for the foregoing reasons, we hereby reverse the September 20, 2009, opinion and order of the Franklin Circuit Court, upholding the

decision of the Board of Trustees of the Kentucky Retirement Systems to deny Loy's application for disability retirement benefits pursuant to KRS 61.600, and remand this matter to the circuit court for entry of an order remanding it to the Board for further review of the evidence under the "cumulative effect" standard consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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