

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002704-MR

MELANIE A. ALLEN

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 99-CI-01157

BOARD OF TRUSTEES,
KENTUCKY RETIREMENT SYSTEMS

APPELLEE

OPINION
REVERSING AND REMANDING
** ** * * * * *

BEFORE: COMBS, HUDDLESTON, AND MILLER, JUDGES.

MILLER, JUDGE: Melanie A. Allen brings this appeal from a November 3, 2000, opinion and order of the Franklin Circuit Court. We reverse and remand.

Allen worked at Western State Hospital from September 1985 to July 1998 as a licensed practical nurse (LPN). Allen filed an application for disability retirement benefits with the Kentucky Retirement Systems on July 7, 1998. Therein, she alleged permanent and total disability as a result of mental illness. The Medical Review Board Physicians denied Allen's claim for disability benefits. Allen requested a hearing. The

hearing officer issued a report and recommended order approving Allen's application for disability retirement benefits.

Reviewing the record de novo, the Board of Trustees (Board) rejected the hearing officer's recommendation and entered an order denying Allen disability benefits. Allen sought judicial review of the Board's opinion in the Franklin Circuit Court. The Franklin Circuit Court affirmed the Board's decision denying Allen benefits, thus precipitating this appeal.

Upon review, we step into the shoes of the circuit court and review the Board's decision for arbitrariness. American Beauty Homes Corporation v. Louisville and Jefferson County Planning and Zoning Commission, Ky., 379 S.W.2d 450 (1964). Arbitrariness has many facets, but relevant to this appeal is whether the Board's decision denying Allen disability benefits is supported by substantial evidence, and whether the Board misapplied the law.

In denying Allen's application for disability benefits, the Board concluded, in relevant part, as follows:

4) Exhibit 21 establishes that, on August 13, 1998, about six weeks after Claimant's last day of paid employment, she was voluntarily admitted to Western State Hospital. During the period from August 13, 1998 through August 18, 1998, Claimant was diagnosed, in part, as suffering from: alcohol abuse; major depressive disorder, recurrent, severe with psychotic features; and mood congruent psychotic features. The justification for the diagnosis reads in pertinent part: "...Has long history of depression. Has been suicidal since she was 17 years old...." The medical evaluation notes that Claimant's main problem is "episodes of drinking" and secondary problems include, in part, "depression" and "thoughts of self harm." Exhibit 20 confirms that Claimant has

suffered "a notable traumatic history of physical, psychological and sexual abuse beginning at age five and lasting to approximately age 16 when she left home." Claimant's testimony and Exhibits 8 and 21 establish that she was treated for drug detoxification in the early 1980s prior to her membership in the retirement system on September 1, 1985. Exhibits 8 and 21 also confirm that Claimant was hospitalized for alcohol abuse in 1996. As noted above, the Claimant was admitted to the hospital again for alcohol abuse in 1998.

The Board finds that Claimant's psychiatric problems, detailed by Exhibits 6, 8, 12, 20, and 21, relate directly, or at the very least indirectly, to a long history of alcohol and drug abuse and childhood abuse which pre-existed membership in the retirement system. Although Claimant's alcohol and drug usage remits from time to time, the recurrent condition is the central theme of the medical evidence of record. The evidence of record also details Claimant's suicidal thoughts going back to age 17 and long history of depression. The Board finds that the record is otherwise devoid of any evidence establishing that Claimant's psychiatric problems are separate, distinct, and completely unrelated to her long history of alcohol and drug abuse and childhood abuse problems.

5) In Exhibit 20, Dr. Wagner indicates that the Claimant's mental condition would improve with appropriate counseling. The Claimant testified that she has not received formal counseling except for evaluations by Dr. De La Rocha for continued prescription medication. The Board finds that Claimant's condition is expected to improve with appropriate counseling; therefore, she failed [sic] prove that her psychiatric problems are permanent as required by KRS 61.600.

Based upon the above, it appears the Board denied Allen disability benefits upon two bases: (1) Allen's alcohol abuse, drug abuse, and childhood abuse are directly or indirectly related to her present mental incapacity or disability; and

(2) Allen's mental incapacity is not permanent. We address these determinations seriatim.

Under Kentucky Revised Statutes (KRS) 61.600(2), there must be objective medical evidence that the claimant is unable to perform her job because of mental incapacity, and that such "incapacity does not result directly or indirectly from . . . mental illness, disease, or condition which pre-existed membership in the system. . . ." In the case at hand, the objective medical evidence indicated that in 1996 Allen was diagnosed as suffering major depressive disorder recurrent with severe psychotic features, alcohol abuse, relationship problem-marital. In 1998, Allen was diagnosed, by Dr. Manuel De La Rocha as suffering major depressive disorder, recurrent, moderate to severe, panic disorder with agoraphobia, post-traumatic stress disorder, and polysubstance abuse, by history. In 1999, Allen was diagnosed by Tom L. Wagner, Ph.D. as suffering from bipolar disorder, "**Alcohol Abuse (By History; In Remission)**. . . ."

(emphasis added). Dr. Wagner concluded that "Ms. Allen would have notable psychological limitations in her ability to engage in full-time, competitive work activity."

Although she no longer abused alcohol or drugs in 1999, Dr. Wagner concluded that Allen still suffered a mental illness resulting in work incapacity. His medical conclusion is uncontroverted; we find no other medical evidence assessing Allen's mental incapacity after her cessation of alcohol and drug abuse in 1999. Indeed, the hearing officer observed that the "alcohol is in remission", but Allen was nevertheless mentally

incapable of work. We believe such evidence pivotal. Allen's mental incapacity continued even though the alcohol and drug abuse has been discontinued. As such, it can hardly be said that Allen's mental incapacity is directly or indirectly related to her alcohol or drug abuse under KRS 61.600(2)(d).

The Board also concluded that child abuse is a pre-existing "disease" or "condition" under KRS 61.600(2)(d). We disagree with the Board's interpretation. We simply do not think child abuse constitutes a disease or condition within the meaning of KRS 61.600(2)(d). We view the Board's inclusion of childhood abuse as a disease or condition under that statute as untenable. As a matter of law, we are of the opinion that childhood abuse is not a disease or condition pursuant to KRS 61.600(2)(d).

The objective medical evidence indicated that Allen suffers from mental illness. She was diagnosed with major depressive disorder recurrent with severe psychotic features or bipolar disorder. In Allen's last hospitalization at Western State, the discharge summary noted:

Patient was initially feeling very depressed and lonely, helpless, hopeless, and worthless. She told us that she has been drinking heavily, and she has a long history of alcohol abuse. She also told us that she has been hearing voices which bother her all the time. Sometimes it gets louder, and she cannot even follow the conversation. She admits that she feels paranoid at times. Patient told us that whenever she drinks the voices will go away

The record fully evidences Allen's erratic behavior and supports the diagnosis of major depressive disorder recurrent with severe psychotic features or bipolar disorder. Indeed, the objective

medical evidence, coupled with the uncontroverted facts, compels a conclusion that Allen's mental incapacity is caused by the above diagnosed mental illness. Furthermore, Allen's mental incapacity could not be related to alcohol or drug abuse. As hereinbefore concluded, the uncontroverted medical evidence demonstrated that Allen's mental incapacity continued after cessation of alcohol and drug abuse. As such, we are of the opinion that Allen is not precluded from disability retirement benefits by operation of KRS 61.600(2)(d). We shall now consider whether Allen's mental incapacity was permanent as required by KRS 61.600.

In determining that Allen's mental incapacity was not permanent, the Board relied upon the opinion of Dr. Wagner. From Dr. Wagner's medical opinion, the Board found Allen's mental condition "would improve with appropriate counseling. . . .[and that Allen's mental condition] is expected to improve with appropriate counseling. . . ." Dr. Wagner diagnosed Allen as suffering from bipolar disorder and alcohol abuse by history in remission. Dr. Wagner offered a Medical Assessment of Ability to Do Work-Related Activities for Allen. On the bottom of page 1 of that assessment, Dr. Wagner, in his own handwriting, states as follows:

Ms Allen is not receiving counseling/psychotherapy & is not expected to substantially improve without . . . intervention. One would expect a minimum of 6 mo - 1 yr. for notable improvement.

From the above, Dr. Wagner indicated that Allen was not receiving appropriate counseling or psychotherapy, and without same was not

expected to substantially improve. He further stated that "one" would expect a minimum of six months to a year for notable improvement. It is important to point out that Dr. Wagner did not state that Allen would, in fact, improve in six months to a year, but only that one would "expect" improvement.

The Board infers from Dr. Wagner's handwritten note: (1) Allen will, in fact, improve with therapy; and (2) such improvement will render her mentally capable to perform her duties as LPN. It is well established that an inference upon an inference is impermissible as a matter of law. See Briner v. General Motors Corporation, Ky., 461 S.W.2d 99 (1970). An inference upon an inference is merely too speculative and remote to support a finding of fact. See Le Sage v. Pitts, 311 Ky 155, 223 S.W.2d 347 (1949). From Dr. Wagner's note, the Board impermissibly draws an inference upon an inference to support its finding. As such, we view the Board's finding that Allen's mental incapacity was not permanent under KRS 61.600 to be arbitrary.

We perceive Allen's remaining arguments moot.

In sum, we are of the opinion that the Board erred in denying Allen retirement disability benefits.

For the foregoing reasons, the opinion of the Franklin Circuit Court is reversed and this cause remanded for proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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