

RENDERED: December 30, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2003-CA-002569-MR

ERMA TERRY

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 01-CI-01046

KENTUCKY RETIREMENT SYSTEMS AND
BOARD OF TRUSTEES OF THE KENTUCKY
RETIREMENT SYSTEMS

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: JOHNSON, KNOPF, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Erma Terry (Terry) appeals a decision of the Franklin Circuit Court which affirmed a decision of the Board of Trustees of the Kentucky Retirement System which denied disability retirement benefits. Terry was found to have a mental impairment which would not allow her to perform her job.

However, the prognosis was that with treatment, she should be well enough to go back to work within a year, hence benefits were denied. The fact of the matter proved the disability has lasted over twelve months. Therefore, the disability retirement benefits should have been approved. We therefore reverse and remand.

Erma Terry was 47 years of age when she sought disability retirement benefits under KRS 61.600. Terry had been employed as an instructional assistant with the McCreary County Board of Education. It was a sedentary to light duty position requiring walking, sitting, and lifting up to ten pounds. Her alleged disability was based on multiple conditions, both physical and mental. Her claim was reviewed and denied. Her administrative appeals were denied as well as her appeal to circuit court. On appeal to this Court, she has dropped that part of the claim for physical disability, contesting only the finding of no permanent mental impairment.

This case presents a question of fact as to whether Terry is totally and permanently disabled, which requires us to review the extensive record of evidence presented. Erma Terry's last day of employment was November 9, 1999. She was 47 years old at that time and had worked six years (actually 62 months) as an instructional assistant which involved mostly working one-on-one with the children. She filed her claim for disability

benefits on December 3, 1999. As mentioned earlier, the claim originally was for both physical and mental disability.

However, after being denied benefits for both, she concentrated her appeal on the mental disability aspect of this claim.

Terry's evidence of mental illness consists of the reports of two mental health experts. Terry had seen Carrie Schultz, Licensed Clinical Social Worker, on September 22, 1999, for counseling for growing depression and anxiety. Ms. Schultz diagnosed severe depression (296.23) and anxiety (300.02) with complaints of multi-physical problems, and found Terry to be totally disabled, with a "poor" prognosis. Dr. Martin Siegel, a psychiatrist, first saw Terry on October 19, 1999. His diagnosis was also major depression which was permanent and total. His prognosis listed only "Insight and judgment is fair."

Dr. Esten Kimbel, a member of the Medical Review Board, reviewed the reports and recommended denying benefits. As to the depression, he noted: "[t]here is some evidence that this claimant may be having a moderately severe depression at this time. The history of this is not very clear. There is one statement in the file that she has [sic] depressed possibly for as long as 6 years." and "In regard to her depression, there is no objective evidence at this time to substantiate a claim of depression or anxiety of such severity that would preclude

normal work activity for one year from November 9, 1999. There is also some question of this being a pre-existing condition."

Dr. William McElwain, another member of the Medical Review Board, reviewed the reports and also recommended denying benefits. Dr. McElwain concluded that although the patient was diagnosed with depression, appropriate treatment was given, and "[t]here is no description of cognitive limitations." Dr. McElwain acknowledged Terry gave numerous subjective symptoms but opined that there was no demonstration of physical or mental limitations.

Dr. Manoochehr Jorjani was the third member of the Medical Review Board, and also recommended rejecting Terry's claim based on the workups from the different physicians as being normal. Dr. Jorjani made no specific finding as to the depression, commenting only on the physical tests.

On March 30, 2000, Terry's claim was denied. The reasons given for denial of the mental impairments were: "There is some evidence that this claimant may be having a moderately severe depression at this time. The history of this is not very clear. There is one statement in the file that she has [sic] depressed possibly for as long as 6 years." and "In regard to her depression, there is no objective evidence at this time to substantiate a claim of depression or anxiety of such severity that would preclude normal work activity for one year from

November 9, 1999. There is also some question of this being a pre-existing condition." Terry was given the opportunity to appeal, and "If this claimant appeals this, she must submit documented evidence of the severity of her depression and also a detailed history of this illness to determine whether or not she had any evidence of similar symptoms prior to her date of employment in 1993."

On April 3, 2000, Terry, pro se, sent a letter requesting an appeal. Included in the record are what appears to be the handwritten notes of Dr. Siegel, the psychiatrist, on his follow-up visits with Ms. Terry. The notation for December 29, indicated she was "a little better," still complaining of insomnia and anxiety. It was noted that she was still down but less down. On the 1/24/00, visit, the chart stated she was "So So This month." The notes for 2/23/00 reflected her grandson had surgery for scoliosis and that she was off Effexor, doing well but nervous about grandson. The 4/6/00 notes reflected anxiety & depression, and that she admitted paranoia. On April 6, 2000, Dr. Siegel also wrote a work excuse for 60 days. No further report or evidence was forwarded concerning her mental illness.

Dr. Esten Kimbel reviewed the file for the Kentucky Retirement Systems and recommended that the claim be denied again, recognizing there was some depression, but opined the

depression existed before her employment in April of 1993. Dr. McElwain reviewed the record and again concluded Terry was not disabled, noting:

The psychiatric report notes the presence of anxiety and depression along with the diffused acting with the fibromyalgia. There is no description of cognitive difficulties or psychosis. In the absence of description of physical and or mental limitations of such severity as to prevent the claimant from continuing with her usual occupation, it is recommended the application be REJECTED.

Dr. Manoochehr Jorjani also recommended the application for benefits be rejected. On May 18, 2000, the request was again denied.

Subsequently, Terry sent a letter from a medical group in Whitley City (her family physicians) stating it issued Mrs. Terry her first prescription for Prozac on 12/19/97, and previously she was not on any anti-depressant from their facility. She sent another letter dated June 23, 2000, from Carrie Schultz, the Licensed Clinical Social Worker, stating she was of the opinion Terry's disability would extend beyond six weeks. A report from the psychiatrist, Dr. Siegel, dated April 13, 2000, was forwarded also. In this report, Dr. Siegel revised his diagnosis from major depression to major depression recurrent with psychotic symptoms, and he gave her a medical excuse to be off work through June 6, 2000. His prognosis long

term was "good, despite the fact that the patient now appears to have 'treatment resistant' depression complicated by chronic pain and inability to afford certain medications." He stated later in his report, "[i]mprovement is expected and it is possible patient will be able to return to work prior to 6/6/00, but that is my present estimate of a return to work date."

Again, the additional evidence was presented to the Medical Review Board physicians. Dr. Kimbel, Dr. McElwain, and Dr. Jorjani all recommended denying benefits, and her claim was again denied on August 10, 2000.

Subsequently, a Dr. John A. Patton, by letter dated November 14, 2000, stated, "Erma Terry stopped working on 11-9-1999 due to fibromyalgia, restless leg syndrome, and depression. This condition is expected to continue indefinitely. She is totally disabled due to this condition." There was no workup included, test results, or prognosis. Also, another letter from Carrie Schultz was included that was similar to her last except that she noted the condition was now over 12 months old. Dr. Siegel also included a note dated 11/14/00, that patient remains seriously depressed and unable to return to work. By letter dated November 14, 2000, Dr. Siegel estimated the disability would most likely continue for 3-6 additional months and it is truly impossible to predict with accuracy when she will be able to return to work.

A hearing was held on November 15, 2000. Terry and her sister, Madeline Baker, both testified. The sister testified that the only time Terry had similar episodes of depression was when she had her kids. The hearing officer gave Terry 20 days to supplement the record with Dr. Siegel's records. After reviewing all the evidence, the hearing officer made this finding as to the mental illness of Terry:

5. The evidence from Dr. Siegel and Carrie Schultz is uncontradicted that the Claimant has been disabled since November 1999 as the result of depression. There is no evidence that she suffered similar problems prior to commencing her employment with the Commonwealth.

The hearing officer recommended approval of Terry's application for disability retirement benefits. The Retirement Systems filed exceptions, contending depression is a treatable illness, and the illness was not disabling as to the claimant. The hearing officer again recommended approval of disability retirement benefits.

The Disability Appeals Committee of the Board of Trustees rejected the hearing officer's recommendation and denied benefits. The Board relied on the April 13, 2000, report from Dr. Siegel which excused Terry from work through June 6, 2000, and gave a good prognosis from treatment and recovery. No mention was made of Dr. Siegel's November 14, 2000, report which painted a similar picture, one of hope, but still a disabled

Terry. Subsequently, the Board remanded the case for additional information, seeking Terry's entire medical file from her family physicians (Drs. Winchester, Patton, and Burgess).

The hearing officer reviewed the materials and again recommended approval of the disability claim. On July 3, 2001, the Board again denied Terry's application for disability benefits. As to Terry's mental illness, the Board found:

7) Dr. Siegel, psychiatrist, and Carrie Schultz, LCSW, gave Terry a diagnosis of Major Depression. Dr. Siegel reported Terry denied any hallucinations, delusions, or suicidal ideation. Terry did express that she felt the people at her school did not like her. Terry's insight and judgment were noted as "fair." Terry was continued on Prozac and Klonopin. Over a period of treatment, Terry's mental condition showed steady improvement and she was reported as "doing well."

8) Dr. Siegal [sic] noted in a letter dated April 13, 2000 that Terry's long-term prognosis was "good." Dr. Siegal [sic] noted future treatment would involve antidepressant, antipsychotic, and anxiolytic medication, as well as outpatient counseling. Dr. Siegal [sic] noted that improvement was expected and it was possible Terry could return to work. Dr. Siegal [sic] noted that no neuropsych evaluations, psychometrics, imaging studies, or outpatient laboratory studies were performed.

9) The Board finds that Terry is not totally and permanently incapacitated from a mental standpoint. Terry is under appropriate care and treatment for depression from a psychiatrist. Terry is being treated with psychotropic medication.

Terry is receiving conjunctive therapy from a licensed clinical social worker. Terry has never been hospitalized for depression or anxiety, or any other mental illness. There is no evidence that Terry's thought processes, judgment, and insight are distorted. Terry does not suffer from hallucinations, delusions, or suicidal ideation. Terry was given a long-term prognosis of "good."

The circuit court affirmed. As to Terry's mental illness, the circuit court noted:

[a]lthough Dr. Siegel diagnosed Terry with depression, there was no evidence that her thought process and judgment are distorted. In fact, Dr. Siegel reported Terry was responding well to treatment and gave her a long-term prognosis of "good." Ultimately, there is substantial evidence in the record to induce conviction in the minds of reasonable men that Terry is not totally and permanently incapacitated from work.

On appeal to this Court, Terry argues that the medical evidence of her mental illness is uncontroverted that she is totally and permanently disabled. We agree. Under KRS 61.600 total disability exists, if a person is "physically incapacitated to perform the job, or jobs of like duties, from which he received his last paid employment" id. at section (3)(a), and it is "deemed to be permanent if it is expected to . . . last for a continuous period of not less than twelve (12) months. . . ." Id. at section (5)(a)1. A detailed reading of the record reveals the great patience the Kentucky Retirement Systems and the Board of Trustees had with this case which

originally started out as a pro se application. Time after time Terry was given the opportunity to submit additional evidence for consideration, and the new evidence was reviewed. In the case for her mental illness, the Board had the social worker's evidence that indicated from the beginning that Terry could not work. More importantly, the medical evidence of her mental disability came from Dr. Siegel. The hearing officer, the Medical Review Board physicians, and even the Board relied on this evidence, often quoting from Dr. Siegel's files, especially the April 13, 2000, report. Dr. Siegel diagnosed major depression which would prevent Terry from working. However, Dr. Siegel was always optimistic that Terry could be treated and would eventually go back to work. But, the report dated November 14, 2000, showed Terry was still unable to go back to work, even though Dr. Siegel still had high hopes for Terry's treatment. Unfortunately, the Board does not consider the November 14, 2000, follow-up report, and as Terry's attorney points out, the reality is that although the total disability was not expected to last a year or more, it did. That is not to say that she will not get better, but at the time of the hearing, in November of 2000, according to the only medical evidence, Terry was mentally incapacitated so as to prevent her from performing her former job or job of similar duties, and the incapacity was expected to last for a continuous period of not

less than twelve months from her last date of paid employment. Under KRS 61.600, Terry meets the criteria with uncontroverted medical evidence. We acknowledge the optimism of Dr. Siegel's earlier reports wherein he consistently expressed his expectation that Terry would be able to go back to work before the year ended. However, this same doctor revised or updated his prognosis constantly, so that by November 14, 2000, he realized she still was not able to go back to work. The medical evidence is not conflicting per se. The diagnosis has remained consistent. The prognosis was constantly being revised until it exceeded the one-year requirement of the statute. Time proved the prognosis.

This Court can overturn an administrative decision when the agency's decision is not supported by substantial evidence. Kentucky State Racing Commission v. Fuller, Ky., 481 S.W.2d 298 (1972); Kentucky Commission on Human Rights v. Fraser, Ky., 625 S.W.2d 852 (1981). "The test of substantiality of evidence is whether when taken alone or in light of all the evidence it has sufficient probative value to induce conviction in the minds of reasonable men." Mollette v. Kentucky Personnel Board, Ky. App., 997 S.W.2d 492, 496 (1999) (citing Fuller, 481 S.W.2d at 307). Because the disability actually lasted more than twelve months, the Board erred in not granting disability benefits.

For the foregoing reasons, the judgment of the
Franklin Circuit Court is reversed and remanded.

ALL CONCUR.

BRIEF FOR APPELLANT:

Martha C. Gray
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BRIEF FOR APPELLEE:

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