

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2008-CA-000320-MR

KENTUCKY RETIREMENT SYSTEMS,  
BOARD OF TRUSTEES

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE THOMAS D. WINGATE, JUDGE  
ACTION NO. 06-CI-01240

JOHN GENTRY

APPELLEE

OPINION  
REVERSING AND  
REMANDING

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BEFORE: STUMBO AND THOMPSON, JUDGES; GUIDUGLI,<sup>1</sup> SENIOR  
JUDGE.

THOMPSON, JUDGE: The Disability Appeals Committee of the Board of  
Trustees of the Kentucky Retirement Systems (Board) appeals from an opinion and

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<sup>1</sup> Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

order of the Franklin Circuit Court reversing its decision to discontinue John Gentry's disability retirement benefits. For the reasons set forth herein, we reverse and remand.

In 2000, Gentry, a heavy equipment operator for the City of Louisville, filed for disability retirement benefits, citing his newly diagnosed prostate cancer as the basis for his claim. On September 6, 2000, Kentucky Retirement Systems (Retirement Systems) notified Gentry that his request for disability retirement benefits was denied. After requesting a review, Gentry was again denied benefits for his prostate condition. After a third review wherein Gentry submitted evidence of depression, Retirement Systems granted Gentry disability retirement benefits due to his psychiatric condition.

Subsequently, Gentry, who was being treated by mental health professionals, terminated his psychiatric treatment sessions. After an annual review, Retirement Systems notified Gentry that his disability retirement benefits were being discontinued. According to the record, two of the three doctors who reviewed Gentry's file, Drs. Esten Kimbel and William McElwain, recommended the discontinuation because Gentry failed to submit medical evidence of an ongoing psychiatric disability. Gentry then requested an appeal, arguing that there was ample medical evidence of a psychiatric disability.

On January 13, 2004, Dr. William James performed a psychiatric evaluation on Gentry and opined that he had major depression and antisocial

personality disorder traits. However, Dr. James observed that Gentry's thought processes, thought content, perceptions, and abstractive ability were fine. Later, medical records, created between 1974 and 1976, were submitted which detailed Gentry's voluntary admission into a mental health facility for emotional problems. The medical records indicated that Gentry was depressed but that his condition did not require prolonged hospitalization.

On July 15, 2004, Dr. Paul Ebben, a licensed clinical psychologist, conducted an independent psychological examination on Gentry. Dr. Ebben opined that Gentry attempted to exaggerate or malingering psychiatric problems. Although Gentry may have suffered from a mood or an anxiety disorder, Dr. Ebben opined that Gentry was not a "reliable informant," so he could not objectively determine if Gentry was psychiatrically impaired. Accordingly, Dr. Ebben concluded that Gentry did "not possess a psychiatric condition that is disabling in any sense."

Following an evidentiary hearing, the hearing officer issued a report and recommended order stating that Gentry had failed to present objective medical evidence to support the continuation of his disability retirement benefits. On May 12, 2005, the Board adopted the hearing officer's report, findings of fact, conclusions of law, and recommended order to terminate Gentry's disability benefits. Subsequently, after another appeal and the submission of additional evidence, Gentry's case was the subject of an evidentiary hearing on March 3, 2006.

At the hearing, Gentry testified that, during the period before his benefits were terminated, he ceased treating with mental health professionals because his insurance company terminated coverage for his treatment. However, he testified that his primary care physician prescribed him anti-depressants for his mental condition. Glenda Elam, a licensed clinical social worker, testified, by telephone, that she works with Gentry every two weeks and that a doctor prescribes medication for him. She further testified that he was not capable of returning to work because of his depression. After the hearing and the submission of briefs, the hearing officer issued a report and recommended order. He found that Gentry was no longer mentally incapacitated to perform his former job and, thus, recommended the discontinuation of his benefits.

After Gentry appealed the hearing officer's decision, the Board adopted the hearing officer's findings, report, and recommended order, and denied the reinstatement of Gentry's disability retirement benefits. Gentry then appealed to the Franklin Circuit Court. In its order reversing, the trial court found that the Board's order was not based on substantial evidence. The trial court found that "it [was] clear that Petitioner continues to suffer from a significant psychiatric condition." This appeal followed.

The Board's sole contention is that the trial court incorrectly applied the administrative standard of judicial review. Specifically, it contends that the trial court impermissibly substituted its judgment in place of the judgment of the proper finder of fact, the hearing officer. Contending that its decision to

discontinue Gentry's disability retirement benefits was supported by substantial evidence, the Board argues that the trial court's opinion and order must be reversed. We agree.

We review an administrative agency's factual findings with great latitude because it is in the best position to evaluate the credibility of witnesses and to weigh conflicting evidence. *Energy Regulatory Commission v. Kentucky Power Co.*, 605 S.W.2d 46, 50 (Ky.App. 1980). "A reviewing court is not free to substitute its judgment for that of an agency on a factual issue unless the agency's decision is arbitrary and capricious." *McManus v. Kentucky Retirement Systems*, 124 S.W.3d 454, 458 (Ky.App. 2003).

When relief has been denied to the party bearing 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." *Id.* at 458. If a reasonable person could have agreed with the fact-finder's decision, the decision is supported by substantial evidence and, thus, cannot be overturned on judicial review. *Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 308-09 (Ky. 1972).

After reviewing the record, we conclude that there was substantial evidence to support the Board's finding that Gentry was no longer mentally incapacitated due to depression. While we certainly recognize that Gentry's testimony and his statements to his doctors regarding his mental disposition were symptomatic of depression, the record contains multiple reports of doctors who

reviewed Gentry's file and concluded that he had not established his mental incapacity. These evidentiary conflicts persist throughout the entire record.

Although we must ensure that agencies adhere to evidentiary standards, judicial review of an administrative agency's factual findings is not *de novo*. *American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission*, 379 S.W.2d 450, 456 (Ky. 1964). Rather, our review is limited to determining whether there was substantial evidence to support the agency's factual findings. *Kentucky Commission on Human Rights v. Fraser*, 625 S.W.2d 852, 856 (Ky. 1964). With this standard in mind, we believe that the trial court weighed the substance and credibility of the evidence and, thereby, improperly substituted its judgment for that of the hearing officer, who was the appropriate finder of fact.

While we sympathize with the trial court's position in this case because of the underlying difficult challenges facing Mr. Gentry, we conclude that the evidence in the record does not compel a reasonable person to conclude that Gentry was mentally incapable of returning to his former job or a job of like duties. Stated another way, there was substantial evidence to support the conclusion that Mr. Gentry was no longer mentally incapacitated due to depression.

Although there was substantial evidence in the record to support the hearing officer's and Board's findings, for clarification, we will address Gentry's discussions regarding his prostate cancer in his brief. Gentry's original disability retirement benefits claim was based on his prostate cancer but was denied. He then

submitted medical records regarding his medical health problems and, consequently, was awarded benefits solely based on his psychiatric condition.

After his prostate claim had been repeatedly denied but his psychiatric claim was granted, the administrative record has been limited to the consideration of Gentry's mental capacity. Moreover, the trial court's opinion and order was limited to considering Gentry's "psychiatric condition, namely depression." Thus, we cannot address whether prostate cancer, which has been associated with a high mortality rate, has caused a physical incapacity. We greatly appreciate the significance of Mr. Gentry's prostate condition but the issue is not before us on appeal.

For the foregoing reasons, the Franklin Circuit Court's opinion and order is reversed and remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Katherine Rupinen  
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BRIEF FOR APPELLEE:

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