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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001976-MR

KENTUCKY RETIREMENT SYSTEMS

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 08-CI-01040

CAROLYN MCGREW

APPELLEE

OPINION REVERSING AND REMANDING

** ** * * * * *

BEFORE: TAYLOR, CHIEF JUDGE; DIXON, JUDGE; HENRY,¹ SENIOR JUDGE.

HENRY, SENIOR JUDGE: Kentucky Retirement Systems appeals from a decision of the Franklin Circuit Court which reversed the denial of benefits as determined by the Board of Trustees. After our review of the law and facts of this

¹ Senior Judge Michael L. Henry 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.

case, we reverse the decision of the Franklin Circuit Court and remand this matter for actions consistent with the following opinion.

Carolyn McGrew was employed as a school bus driver by the Grayson County School System for 23 years. As of her last date of employment on September 20, 2006, she had accrued a service credit of 240 months with Kentucky Retirement Systems. In March or April of 2006, she began to manifest symptoms of anxiety and depression which she alleges reached disabling severity. These may have been related to a fall she suffered while she was hospitalized for an unrelated illness. She used all of her accumulated sick leave and annual vacation time but was unable to return to work when she had exhausted those options. She then filed for disability retirement benefits with Kentucky Retirement Systems.

She submitted approximately 500 pages of medical records, some of which detailed other medical ailments but a large portion of which related to treatment for the anxiety and depression. The retirement system's Medical Review Board, which is comprised of three physicians, determined she did not meet the standard for disability retirement. Two physicians recommended denial while a third was unable to render an opinion without additional information. That doctor recommended McGrew receive an evaluation by Dr. Ebbens, a retirement systems contract psychiatrist. McGrew submitted approximately 100 pages of additional information but was again denied disability retirement status.

An administrative hearing officer issued a recommended order denying disability benefits on March 13, 2008, after conducting a hearing on the matter. The Board of Trustees adopted the recommended order and denied disability retirement benefits. McGrew then sought a review of that decision in the Franklin Circuit Court, which was charged with acting as a court of review. That court reversed the determination of the Board of Trustees and this appeal followed.

McGrew, the claimant, had the burden of proof before the Board. KRS 13B.090(7). “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). If the record contains substantial evidence to support the agency’s findings, that decision must be affirmed even if there is conflicting evidence. *Kentucky Commission on Human Rights v. Fraser*, 625 S.W.2d 852, 856 (Ky. 1981) (internal citations omitted). “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* at 458-59. The circuit court found the agency decision “blatantly erroneous” and suggested it was only by “taking isolated evidence from the record, and relying on it out of context, without consideration of the record as a whole” that it could deny McGrew was disabled and entitled to disability benefits. The circuit court misstated the applicable standard of review.

It is the quality of the evidence and not the amount that determines the outcome of any decision. “Substantial evidence’ is not simply some evidence or even a great deal of evidence[.]” *Commonwealth, Revenue Cabinet v. South Hopkins Coal Co.*, 734 S.W.2d 476, 479 (Ky. App. 1987). The trier of fact “is afforded great latitude in its evaluation of the evidence heard and the credibility of witnesses appearing before it.” *Bowling v. Natural Resources and Environmental Protection Cabinet*, 891 S.W.2d 406, 409-10 (Ky. App. 1995). “[T]he trier of facts in an administrative agency may consider all the evidence and chose the evidence that he believes.” *Id.* at 410, quoting *Commonwealth, Transportation Cabinet v. Cornell*, 796 S.W.2d 591, 594 (Ky. 1990). Evaluating all the evidence and making an informed judgment based upon its relative credibility and persuasiveness is what is required of hearing officers, not a mechanical weighing of the volume of proof presented by each side. The administrative hearing officer is in the best position to evaluate the quality of the evidence regardless of the quantity of conflicting evidence that may be submitted. A reviewing 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).

Subject to the conditions listed in Kentucky Revised Statutes (KRS) 61.600, a person is entitled to disability retirement benefits if they meet the burden of proof showing they are permanently disabled. The person must first receive “a satisfactory determination” from the three doctor panel assigned to evaluate the

claim. KRS 61.600(1)(d); KRS 61.665. McGrew did not meet this requirement.

One doctor recommended she receive an evaluation from Dr. Ebbens but she failed to comply with this request.

Further requirements of the KRS 61.600 include:

(3) Upon examination of the objective medical evidence by licensed physicians pursuant to KRS 61.665, it shall be determined that:

(a) The person, since his last day of paid employment, has been mentally or physically incapacitated to perform the job, or jobs of like duties, from which he received his last paid employment . . .

(b) The incapacity is a result of bodily injury, mental illness, or disease. For purposes of this section, “injury” means any physical harm or damage to the human organism other than disease or mental illness;

(c) The incapacity is deemed to be permanent;

KRS 61.600(3). McGrew’s last date of paid employment, after exhausting all of her accrued personal leave and sick days was September 20, 2006.

The administrative hearing officer made the following relevant findings of fact:

6. A neuropsychological evaluation completed by a licensed psychologist on October 2, 2006 – twelve days following Claimant’s last day of paid employment, included extensive objective testing which showed possible exaggeration of cognitive impairment and psychopathology on multiple tests. The profile was not felt to accurately represent her actual functional capabilities due to her high level of emotional distress. The psychologist determined that the examination did not

show definitive evidence of malingering but the possibility of some overemphasis of deficit, and did not rule out the possibility of secondary gain. This testing was never repeated, nor was it explained or disputed by any of claimant's treating mental health professionals.

7. Claimant was prescribed Lorazepam for nerves during an April 1, 2006 hospitalization for asthmatic bronchitis, and was reported to be getting depressed and was prescribed Lexapro in a second hospitalization a little more than two weeks later. When hospitalized on July 3, 2006 Claimant reported she had been going to Dr. Green for treatment of depression for months and had been put on Effexor. There is no documentation in the record to establish specifically when such treatment may have begun or the severity of depression that claimant reported to Dr. Green.

8. It was Claimant's sworn testimony that she could not go back to work after her hospitalization for asthmatic bronchitis because of medication which she could not specifically identify that made her dizzy; she didn't drive the school bus for the remainder of the school year following the hospitalization but had no psychological symptoms at that point – testifying only that it was hard to breathe; she didn't know the dates or how long she had had psychological symptoms but was home before they started; she stopped driving when she started passing out after she was hospitalized in July 2006. Claimant's husband testified that she tore a car mirror off of her private vehicle when she hit a mailbox, which happened within two weeks of Claimant's discharge from the hospital in April 2006. He also testified that the other incidents related to dizziness/passing out occurred within a two to three week periods (sic) although Claimant would not tell him when they occurred.

9. Following the hospitalization for asthmatic bronchitis between April 13 and 18, 2006 Claimant was unwilling to be discharged stating that she did not want to “get out and catch anything.” She expressed reluctance to return to driving the bus “until at least several days” but was released to return to work on April 24, 2006.

10. Although Claimant testified to multiple accidents or near accidents that occurred while she was driving, she never received a traffic citation, no litigation was initiated, none of the accidents were witnessed, and no objective evidence was provided including accident reports, photographs of damage to Claimant's vehicle or the mailbox allegedly hit, or documentation of repairs to the damaged mirror.

11. In July 2006 a mental status examination showed Claimant to have fair attention and concentration span, intact memory, and average intellectual functioning based on general fund of knowledge, word usage and abstraction, and fair judgment and insight.²

12. The record extensively documents Claimant's stressors to include marital difficulties/conflict with her husband. Claimant's family reported that the emergency room trip via ambulance on December 30, 2006 occurred after Claimant had an argument with her husband.

13. Assessments of the debilitating nature of Claimant's mental health condition have been based upon Claimant's subjective reporting of symptoms or of behaviors displayed by Claimant such as crying. The neuropsychological evaluation which showed possible exaggeration of cognitive impairment and psychopathology and the potential for secondary gain, as well as the inconsistencies in Claimant's testimony and statements made to medical professional render Claimant's subjective reporting unreliable.

14. The objective medical evidence fails to establish that Claimant was totally and permanently incapacitated to perform the duties of bus driver, or jobs of like duties, from which she received her last paid employment. Claimant has failed to maintain her burden to prove by a preponderance of the evidence that she is entitled to receive regular disability retirement benefits pursuant to KRS 61.600.

² We note the April and July 2006 dates are prior to McGrew's final paid day of employment yet the findings are relevant because of the ongoing and increasing nature of her alleged disability.

“[I]t is the exclusive province of the administrative trier of fact to pass upon the credibility of witnesses, and the weight of the evidence.” *500 Associates, Inc., v. Natural Resources and Environmental Protection Cabinet*, 204 S.W.3d 121, 132 (Ky. App. 2006), quoting *Bowling v. Natural Resources and Environmental Protection Cabinet*, 891 S.W.2d 406, 409-10 (Ky. App. 1995) (internal citation omitted). We have examined the evidence relied on by the administrative hearing officer and find it is substantial and sufficient to support the conclusion that McGrew failed to carry her burden of proof by a preponderance of the evidence that she was entitled to disability benefits. There is nothing in the record to suggest the agency acted arbitrarily or beyond the scope of its authority or that it applied an incorrect rule of law.

The judgment of the Franklin Circuit Court is reversed and this action is remanded to that court with directions to enter a judgment affirming the decision of the Board of Trustees in conformity with this opinion.

TAYLOR, CHIEF JUDGE, CONCURS.

DIXON, JUDGE, CONCURS IN RESULT ONLY.

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