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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001285-MR

KENTUCKY RETIREMENT SYSTEMS
AND BOARD OF TRUSTEES OF KENTUCKY
RETIREMENT SYSTEMS

APPELLANTS

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 10-CI-00830

MICHAEL T. COX

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: LAMBERT, STUMBO AND VANMETER, JUDGES.

STUMBO, JUDGE: Kentucky Retirement Systems and its Board of Trustees (collectively referred to as Kentucky Retirement Systems) appeals from an Opinion and Order of the Franklin Circuit Court reversing a Final Order of the Kentucky Retirement Systems. The Franklin Circuit Court reinstated Michael

Cox's disability retirement benefits upon determining that the Kentucky Retirement Systems' decision to discontinue those benefits was not supported by substantial evidence. We find no error, and accordingly affirm the Opinion and Order on appeal.

The facts are not in controversy. Beginning in February, 1990, Michael T. Cox was employed as a school bus driver for the Taylor County Board of Education. On December 9, 2003, he applied for disability retirement benefits citing chronic chest pain, diabetes, a nerve disorder, panic attacks and hypertension. He alleged that the panic attacks caused his body to become nonfunctional, which caused him to constantly fear that the attacks would cause him to wreck the school bus.

Cox submitted medical records in support of the application, including psychiatric records. After his initial application for benefits was denied, he submitted additional medical records and was approved to receive disability retirement benefits. The primary basis of the approval centered on Cox's psychiatric rather than physical condition, and Cox began receiving the benefits.

In March, 2008, the Kentucky Retirement Systems conducted an annual medical review to determine if Cox continued to qualify for the benefits. Cox submitted new and updated medical records, including a functional capacity assessment conducted by Dr. Hortillosa and additional therapy notes. Dr. Hortillosa determined that Cox's occupational functioning was seriously limited,

that Cox was emotionally unstable and unable to deal with stress, and that he had a limited capacity to perform daily living activities.

Dr. McElwain served as the Kentucky Retirement Systems' medical reviewer. Upon reviewing the record, Dr. McElwain determined that Cox failed to submit any evidence of an ongoing disability regarding the condition relied upon to approve Cox's initial application for benefits; therefore, the decision was made to terminate Cox's benefits.

After being notified of the decision, Cox requested and received an administrative hearing. Prior to the hearing, he underwent an independent medical evaluation by Dr. Ebben, who concluded that Cox exaggerated his symptoms on three of the five tests administered. Dr. Ebben determined that there was no objective, scientific evidence to suggest that Cox continued to suffer from a psychological condition that prevented him from returning to employment. Cox was also evaluated by Dr. Allen, who found that Cox had extreme symptomology and had not improved since his initial evaluation in 2005. At the administrative hearing, Cox testified that he was serving as Taylor County Constable. This is an unpaid position and involves activities such as using his vehicle with emergency lights at school crossings.

The matter proceeded before a hearing officer, who recommended that Cox's benefits be terminated. As a basis for the recommendation, the officer found that 1) Cox failed to provide evidence of his cardiac condition to indicate a continued disability from that condition; 2) Cox failed to return for mental health

treatment between 2006 and 2008, and that his excuse of insufficient funds was unpersuasive; 3) Cox's exaggerated responses and symptoms invalidated his test results; and 4) Cox's election as Taylor County Constable revealed his subjective belief that he is able to engage in employment or otherwise be involved in the community.

On April 23, 2010, the Kentucky Retirement Systems issued a Final Order terminating Cox's disability retirement benefits. Cox then appealed to the Franklin Circuit Court, where he argued that the Kentucky Retirement Systems did not sustain its burden of proof that his disability has ceased. On July 17, 2012, the Franklin Circuit Court rendered an Opinion and Order reversing the Kentucky Retirement Systems' Final Order terminating Cox's benefits. As a basis for the Opinion and Order, the court determined that the Kentucky Retirement Systems had an affirmative statutory duty to demonstrate that Cox's psychiatric condition had improved and that he was no longer incapacitated and unable to perform his previous work. The court concluded that the Kentucky Retirement Systems had not met this burden as there was no substantial evidence of record to support the decision. It reversed the Kentucky Retirement Systems' Order terminating Cox's benefits, and this appeal followed.

The Kentucky Retirement Systems now argues that the Franklin Circuit Court erred in concluding that the Kentucky Retirement Systems' Order terminating Cox's benefits was not supported by substantial evidence. It notes that while Cox submitted numerous medical records, only a small portion related to the

condition for which he was originally approved for benefits - that is, the panic attack disorder. Additionally, the Kentucky Retirement Systems directs our attention to three psychological evaluations which each noted that Cox appeared to be exaggerating his symptoms. For example, Dr. Paul Ebben concluded that Cox “exaggerated his symptoms to a substantial degree” and that Cox’s information “should be considered potentially unreliable and invalid.” The Kentucky Retirement Systems also notes that Cox discontinued psychiatric treatment from about 2006 - 2008, and it refutes Cox’s contention that his failure to engage in psychiatric treatment was largely due to a lack of insurance or ability to pay. Finally, the Kentucky Retirement Systems points out that Cox was elected to the public office of Constable for Taylor County, Kentucky, which evinced Cox’s ability to interact with the public and live a normal life. In sum, the Kentucky Retirement Systems argues that these factors constitute substantial evidence to support its conclusion that Cox is no longer disabled and is therefore not entitled to ongoing disability benefits.

Kentucky Revised Statutes (KRS) 61.615(2) provides that the Kentucky Retirement Systems may terminate a former employee’s disability benefits “if the board’s medical examiner determines that a recipient of a disability retirement allowance is, prior to his normal retirement date, no longer incapacitated by the bodily injury, mental illness, or disease for which he receives a disability allowance[.]” The burden rests with the Kentucky Retirement Systems to demonstrate by a preponderance of the evidence that Cox is no longer entitled to

benefits. KRS 13B.090(7). Specifically, the Kentucky Retirement Systems must prove that Cox's disabling medical condition 1) has improved, and 2) that the improvement is such that he is no longer incapacitated within the meaning of KRS 61.600. *Board of Trustees of Kentucky Retirement Systems v. Estate of Chaney*, 253 S.W.3d 67 (Ky. App. 2008).

On review before the Circuit Court, the court shall not substituted its judgment for that of the administrative agency, or to reinterpret or reconsider the merits of the claim. *Kentucky Unemployment Ins. Com'n v. King*, 657 S.W.2d 250 (Ky. App. 1983). The circuit court must accept the agency's findings of fact as true, as long as they are supported by substantial evidence. *Bowling v. Natural Resources and Environmental Protection Cabinet*, 891 S.W.2d 406 (Ky. App. 1994). If it is determined that the agency's findings are supported by substantial evidence, the final question is whether the agency properly applied the correct rule of law. *Kentucky Bd. of Nursing v. Ward*, 890 S.W.2d 641 (Ky. App. 1994). If that question is answered in the affirmative, the agency's ruling must be affirmed. *Id.*

At issue is whether the circuit court properly determined that the record does not contain substantial evidence to support the Kentucky Retirement Systems' finding that Cox is no longer incapacitated by the disability for which he receives retirement benefits. Substantial evidence is evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men. *Kentucky State Racing Com'n v. Fuller*, 481 S.W.2d 298 (Ky. 1972). In

concluding that the record did not contain substantial evidence to support the Kentucky Retirement Systems' conclusion, the circuit court first noted that Cox did not bear the burden of demonstrating disability. Rather, the court recognized that the burden rested with the Kentucky Retirement Systems to prove that the disability resolved. In so doing, the court found that the primary medical evidence of record, i.e., the three psychiatric evaluations, did not demonstrate that Cox's disability had improved. Rather, the court determined that the evaluations, taken both individually and collectively, demonstrated that Cox was exaggerating his symptomology. In the circuit court's view, while this evidence supported the conclusion that Cox exaggerated his symptoms, it did not support the conclusion that Cox was no longer disabled. We find no error in this conclusion.

Moving forward with the evidence, the circuit court addressed the Hearing Officer's heavy reliance on Cox's failure to return to Adanta Mental Health Center for treatment from July 2006 to February 2008. However, the failure to engage in treatment, taken alone, does not constitute substantial evidence. *Chaney, supra*. Finally, the court found as unpersuasive the Hearing Officer's reliance on Cox's service as Taylor County Constable. The court noted that this was an unpaid position with almost no job responsibilities, and did not sustain the Kentucky Retirement Systems' burden of demonstrating that Cox was able to operate a school bus full of children. This conclusion is supported by the record and the law.

If the burden rested with Cox to demonstrate disability, his psychiatric examinations, failure to engage in treatment for two years, and limited community

service would likely be woefully insufficient. However, and as the parties are well aware, Cox was previously found to be disabled and the burden now rests with the Kentucky Retirement Systems to demonstrate that the disability has resolved. The psychiatric evaluations demonstrated that Cox exaggerated his symptoms, but did not constitute substantial evidence that his disability had improved or resolved. Similarly, his failure to engage in treatment for two years and his election as Constable do not constitute substantial evidence that Cox is no longer disabled.

The Kentucky Retirement Systems also contends that the Franklin Circuit Court's Final Order failed to correctly apply existing case law and relevant statutes. Specifically, it argues that 1) *Chaney, supra*, is distinguishable from the instant facts insofar as the decision in the instant case was based on multiple factors rather than a single factor as in *Chaney*; 2) that the circuit court failed to recognize that the Kentucky Retirement Systems may give greater weight to its own reviewing physicians if it so chooses; and 3) that the circuit court improperly characterized the Kentucky Retirement Systems as arguing that Cox's service as Constable was substantial evidence that he has been "cured." On this last assertion, the Kentucky Retirement Systems contends that it merely pointed to Cox's service as Constable to rebut his testimony of a disabling psychiatric condition and cast doubt on his credibility.

Arguendo, even if the Kentucky Retirement Systems is correct on each of these assertions - which we do not find to be the case - nothing therein demonstrates that its Final Order was supported by substantial evidence. That is to

say, even if we hold as true the Kentucky Retirement Systems' contention that *Chaney* is distinguishable, that the court improperly failed to recognize that the Kentucky Retirement Systems may give greater weight to the testimony of its reviewing physicians, and that Cox's service as Constable was not offered as substantial evidence of resolved disability, we still find no error in the Franklin Circuit Court's conclusion that the Kentucky Retirement Systems' Final Order was not supported by substantial evidence.

We find no error in the circuit court's conclusion that the Final Order of the Kentucky Retirement Systems was not supported by substantial evidence. Accordingly, we affirm the Opinion and Order of the Franklin Circuit Court.

LAMBERT, JUDGE, CONCURS.

VANMETER, JUDGE, DISSENTS.

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