

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-001488-MR

CAROLYN HOWARD

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 10-CI-00384

KENTUCKY RETIREMENT SYSTEMS

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, DIXON AND STUMBO, JUDGES.

STUMBO, JUDGE: Carolyn Howard appeals from the Franklin Circuit Court's judgment affirming the Kentucky Retirement Systems' denial of her disability retirement benefits. We find no error and affirm.

This is Howard's second appeal concerning the denial of her disability retirement benefits; therefore, we will use the recitation of facts set forth by the previous panel of this court.

In August 1992, Howard began employment with the Kentucky River District Health Department as a community health nurse; as a result of her employment, she became a member in the Kentucky Employees Retirement System (KERS). She maintained her employment until January 29, 2007, when she claims she was forced to retire due to a variety of medical ailments, the onset of which she dates to 2001. Howard filed an application for disability retirement benefits in accordance with KRS 61.600 on the basis of depression, non-restorative sleep, anxiety, panic attacks, fibromyalgia, chronic fatigue syndrome, irritable bowel syndrome, and social anxiety.

Following rejection of her application by two panels of medical examiners, Howard requested and was granted an administrative hearing on her claims. Prior to the hearing, and at the Board's request, Howard underwent an independent psychological evaluation conducted by Dr. Paul A. Ebben, who submitted a report detailing his conclusions. A hearing officer of the Kentucky Retirement Systems weighed the evidence presented and concluded as follows: (1) Howard failed to prove by a preponderance of the evidence that she was disabled; and (2) the onset of Howard's depression predated her membership in the Kentucky Employees Retirement System. On those bases, the hearing officer recommended denying Howard's request for benefits. The Board agreed and adopted the hearing officer's recommended order.

Howard appealed the administrative ruling to the Franklin Circuit Court. The circuit court affirmed, concluding substantial evidence supported the denial of disability retirement benefits.

Howard v. Kentucky Retirement Systems, 2012 WL 2620543, 1 (Ky. App. 2012).

The previous panel of this Court found that Howard was not permanently disabled and affirmed the circuit court.

While her first appeal was still pending, Howard filed a second application for disability retirement benefits. She listed her ailments as fibromyalgia, chronic fatigue, major clinical depression, panic attacks, memory problems and forgetfulness, problems concentrating or staying focused, and anxiety disorder. In support of her new application, Howard submitted more medical evidence. The Retirement System's Medical Review Board reviewed her medical evidence and again recommended that her application for disability retirement benefits be denied. Howard requested another administrative hearing. The hearing officer ultimately recommended that her application be denied. The Board of Trustees of the Kentucky Retirement Systems reviewed the evidence of record and accepted the hearing officer's recommendation. The Board held that Howard's complaints were not permanently disabling and that they pre-existed her employment. Howard appealed to the Franklin Circuit Court, which affirmed. This appeal followed.

A claimant seeking disability retirement benefits must demonstrate he or she is disabled from performing her job duties by a preponderance of evidence and any such claim must be supported by objective medical evidence. Kentucky Revised Statute (KRS) 13B.090(7); KRS 61.600; KRS 61.665.

An appellate court plays a limited role in reviewing an administrative agency's findings of fact and may reverse such a finding only if it was unsupported by substantial evidence. KRS 13B.150(2)(c). More specifically, "[w]here 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) (citations omitted). In the case at hand, the Franklin Circuit Court was permitted to reverse the Board's conclusions that Howard was not disabled and that her ailments predated her employment only if the evidence was overwhelmingly in her favor, and this Court is bound by the same standard. We must therefore give considerable deference to the agency's findings, particularly on matters of witness credibility and balancing of evidence. *Kentucky State Racing Comm'n v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972).

Furthermore, "a reviewing court, whether it be one of the circuit courts, the Court of Appeals, or [the Kentucky Supreme Court], should refrain from reversing or overturning an administrative agency's decision simply because it does not agree with the agency's wisdom." *Kentucky Unemployment Ins. Comm'n v. Landmark Community Newspapers of Kentucky, Inc.*, 91 S.W.3d 575, 582 (Ky. 2002) (citation omitted). It must also be noted that because this is Howard's second application for benefits, *res judicata* applies; therefore, we only review the

denial of benefits as it relates to the new evidence submitted with the second application.

Howard argues on appeal that the substantial evidence of the record compels a finding in her favor that she is totally and permanently incapacitated and that she is entitled to disability retirement benefits. The evidence Howard presented with her second application for disability benefits included numerous medical records demonstrating a history of depression, anxiety, and fibromyalgia.¹ Although Howard stated in her application that she was afflicted with other disabling ailments, the substantial majority of her medical records concern depression, anxiety, and fibromyalgia; therefore we will focus on these three conditions. It is also worth noting that the medical records also reflect that all of her ailments are either related to or exacerbated by her depression.

The medical records submitted by Howard reflect thoroughly documented cases of depression, anxiety, and fibromyalgia. The records span the timeframe of December of 2007 to June of 2009. Of specific note are two reports from July of 2008. These reports, one written by Dr. Rosa Kathleen Riggs (a psychiatrist who

¹ In Howard's first appeal, this Court chastised Howard's counsel for not bolstering the factual representations made with citations to the record as is required by CR 76.12(4)(c). At that time, the record contained over 600 pages of evidence, mainly medical records. In this appeal, Howard's counsel again failed to make any citations to the record, this despite the fact that the record has now ballooned to over 1,000 pages of evidence.

Our options when an appellate advocate fails to abide by the rules are: (1) to ignore the deficiency and proceed with the review; (2) to strike the brief or its offending portions, CR 76.12(8)(a); or (3) to review the issues raised in the brief for manifest injustice only, *Elwell v. Stone*, 799 S.W.2d 46, 47 (Ky. App. 1990).

Hallis v. Hallis, 328 S.W.3d 694, 696 (Ky. App. 2010). Even though this is the second time Howard's counsel has failed to cite to the record on appeal in this case, we choose to ignore the error and review the case on the merits.

personally evaluated Howard and reviewed her medical records) and the other written by Julia Lynn States (Howard's counselor), both state that Howard should not return to work due to her depression and anxiety. The rest of the medical reports submitted are primarily regular monthly reports from Ms. States and Howard's primary psychiatrist, Dr. Raquel Vasquez. These reports detail the symptoms of her depression, anxiety, and fatigue. They show that Howard has good days and bad days, but mostly bad days. They also show that her medication sometimes helps. There are a few medical documents related to her fibromyalgia, but they generally state that the condition is doing "poorly". These reports do not definitively state that the fibromyalgia prevents her from returning to work.

While these medical records would seem to support Howard's argument that she is permanently disabled, at least due to her depression and anxiety, other records dispute this conclusion. A report dated October 29, 2008, by Dr. David Shraberg, who was retained by the Retirement Systems to review Howard's medical records, states that there is no evidence that the fibromyalgia or the mood disorders would be exacerbated by her employment.

Additionally, records from Cumberland River Comprehensive Care Center dated April 28, 2009, show that Howard was diagnosed with bipolar disorder and her medication changed to treat the new diagnosis. These records detail how Howard's mood had gotten better since the switch to the bipolar medication. Howard reported having no depression, more energy, and no panic attacks. A record dated May 15, 2009, also from Cumberland River Comprehensive Care

Center, details that there has been much improvement in Howard's mood. She stated that the new medication was working well. The records also state that Howard reports she is sleeping better and getting out of the house more.

Finally, a report dated June 4, 2009, from Dr. Jeffery Neal, Howard's rheumatologist who was treating her fibromyalgia, states that after being put on the bipolar medication, Howard has reported that her fibromyalgia, anxiety, and depression are remarkably better. Also, it states that her chronic fatigue has improved.

"The rule in Kentucky is that if there is substantial evidence in the record to support an agency's findings, the findings will be upheld, even though there may be conflicting evidence in the record." *Kentucky Comm'n on Human Rights v. Fraser*, 625 S.W.2d 852, 856 (Ky. 1981). In this case, there is conflicting evidence as to whether Howard's conditions are permanently disabling or not. We find that there is substantial evidence to support the conclusion that Howard is not permanently disabled and that the evidence is not so compelling that we must find in her favor.

For the foregoing reasons we affirm the judgment of the Franklin Circuit Court.

ALL CONCUR.

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