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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-002098-MR

SHIRLEEN WILSON — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 11-CI-01387

KENTUCKY RETIREMENT SYSTEMS; AND
THE BOARD OF TRUSTEES OF THE KENTUCKY
RETIREMENT SYSTEMS — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, DIXON, AND STUMBO, JUDGES.

DIXON, JUDGE: Shirleen Wilson[1] appeals from the decision of the Franklin Circuit Court, which affirmed the denial of her claim for disability benefits by the

[1] In the body of the Notice of Appeal, Wilson's last name is spelled "Wilsom." The record and briefs indicate "Wilson" is the correct spelling; accordingly, we will use that spelling in this Opinion.

Disability Appeals Committee of the Board of Trustees of the Kentucky Retirement Systems. We affirm.

Wilson was employed as an office support supervisor with the office of Kentucky Public Health and Vital Statistics. She retired from that position on June 27, 2007, with sixteen years of membership in the retirement system. Wilson sought disability retirement benefits based on a mental health condition, including anxiety and depression. The Medical Review Board physicians denied Wilson's application, and Wilson requested an evidentiary hearing. Wilson testified at the hearing, and she submitted the medical records of Dr. Terry Hagan, Dr. William Kirk, and Dennis Sprague, Ph.D., to support her claim that she was permanently disabled. Additionally, Paul Ebben, Psy.D., reviewed Wilson's medical records and subsequently conducted an independent psychological evaluation. The hearing officer recommended granting Wilson's claim. The Board declined to adopt the officer's recommendation and issued its own findings of fact. The Board concluded that Wilson had failed to establish that she was permanently incapacitated by a psychiatric condition for a continuous period of at least twelve months following her last date of employment. The Board stated, in relevant part:

> 7. . . . Claimant complained of chronic anxiety and depression on: January 5, 2007; February 9, 2007, February 15, 2007; March 8, 2007; March 20, 2007; and April 10, 2007. However the resulting treatment notes indicate that she was alert and oriented, with memory, mood, and affect intact. Her mental status was noted on all of these occasions to be 'within normal limits.' A treatment note dated April 24, 2007 did note that the Claimant presented with a 'depressed affect' on that day.

However, the very next treatment note in the record (dated June 6, 2007) documented that the Claimant's mental status was 'within normal limits.' The next treatment note (dated June 25, 2007, just two days before the Claimant quit work) stated that Claimant was dealing with some work stress, but she had: '**no sleep disturbance, depression, or anxiety**.' (emphasis added) Her mental status was noted to be completely within normal limits. On August 23, 2007, the Claimant self reported to a medical provider that she 'had a nervous breakdown.' However, the objective observation of that medical provider was that the Claimant was 'alert and oriented, with memory, mood, and affect intact.' It was also noted that her mental status was within normal limits. In October of 2008, the Claimant's treating physician noted that the Claimant was doing much better, because her elderly mother had been released from the hospital, and the care giving demands kept her busy and depression at bay. On November 19, 2008, her treating physician noted that the Claimant was not experiencing any significant mental health issues. She was not seeing a therapist and she was better with her depression and had no suicidal ideation. In contrast to her subjective reporting of severe depression and an alleged 'nervous breakdown' and suicide attempt, the Claimant testified under oath that she has never been hospitalized for psychiatric reasons and does not avail herself of psychotherapy, pastoral counseling, etc. She just sees her treating physician (Dr. Hagan) fifteen (15) minutes a month for her medication refills. And, as noted by Dr. Growse of the Medical Review Board, Dr. Hagan has consistently characterized the claimant's issues as purely 'situational' in nature rather than attributable to any organic psychiatric disorder. . . .

8. Not only are the Claimant's alleged mental issues not 'permanent,' as that term is defined by statute, there is significant evidence that they do not incapacitate the Claimant. By her own account, the Claimant drives, shops, attends church three (3) times a week, stepped up to become a fulltime caregiver for her ailing mother, and has been on at least two (2) out of state trips since she quit working. . . .

. . . .

> 10. There is definitive evidence in the record that the Claimant did not terminate her employment due to psychiatric factors. The Claimant pursued a case with the Personnel Board, and the Settlement Agreement stemming from that case . . . clearly states that the Claimant had to tender her retirement as a condition of the settlement.

(Internal citations to administrative record omitted). The Franklin Circuit Court affirmed the Board's decision to deny benefits to Wilson. This appeal followed.

As an initial matter, we must address the deficiencies contained in Wilson's appellate brief. CR 76.12(4)(c)(v) requires ". . . at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner." Wilson enumerated six arguments on appeal; however, she failed to include a statement of preservation at the beginning of each argument. Instead, on the first page of Wilson's brief, following the "Statement Regarding Oral Argument," is a "Statement of the Preservation of Issues," which simply provides a general reference to the brief submitted to the circuit court. Unfortunately, it appears this is at least the third time counsel has failed to comply with the procedural rules governing the format of an appellate brief. In *Booker v. Kentucky Retirement Systems*, 2009–CA–001888–MR (Apr. 8, 2011), this Court stated:

> We begin with a comment about a significant flaw in Booker's brief. . . . Booker's brief fails to comply with the rule as it contains no statement of preservation for any argument. Booker's counsel was previously warned of the importance of complying with this rule in *Barnett*

> *v. Kentucky Retirement Systems*, 2007 WL 3317803, No.2006–CA–000663–MR (Nov. 2007, unpublished), wherein we wrote in pertinent part,
>
> > [a]ll counsel would be well-advised to take heed of this simple but important rule. Compliance assists the Court in finding the claim of error. Noncompliance places the case at the mercy of a Court that must perform not only its own function, but part of the function of counsel. *See also*, CR 76.12(8)(a) (A 'brief may be stricken for failure to comply with any substantial requirement of this Rule 76.12.').
>
> While we would be well within our authority to impose sanctions, doing so would punish Booker, not her counsel. Therefore, we reiterate the directive contained in *Barnett*, and state that we will not hesitate to impose sanctions for future noncompliance.

Booker, at 1-2.

In the case at bar, counsel for Wilson has again ignored the requirement to include a specific statement of preservation at the beginning of each argument. We have wide latitude to determine the proper remedy for a litigant's failure to follow the rules of appellate procedure. *Age v. Age*, 340 S.W.3d 88, 97 (Ky. App. 2011). "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 . . . [.]" *Hallis v. Hallis*, 328 S.W.3d 694, 696 (Ky. App. 2010) (citation omitted).

In considering the available options, we are not inclined to simply disregard the procedural deficiencies. *See id*. Rather than strike the brief, we elect to review the issues for manifest injustice, which occurs if "the error so seriously affected the fairness, integrity, or public reputation of the proceeding as to be shocking or jurisprudentially intolerable." *Commonwealth v. Jones*, 283 S.W.3d 665, 668 (Ky. 2009) (internal quotation marks and citation omitted).

The Board, as the fact-finder, is entitled to wide latitude in its evaluation of the evidence and witnesses. *McManus v. Kentucky Retirement Systems*, 124 S.W.3d 454, 458 (Ky. App. 2003). In light of the Board's discretion, judicial review is limited to determining whether the Board's findings were arbitrary, i.e., unsupported by substantial evidence. *Aubrey v. Office of Attorney General*, 994 S.W.2d 516, 518-19 (Ky. App. 1998). Even though the record may contain conflicting evidence, a reviewing court must uphold the agency's findings if they are supported by substantial evidence. *Kentucky Commission on Human Rights v. Fraser*, 625 S.W.2d 852, 856 (Ky. 1981).

Kentucky Revised Statutes (KRS) 61.600 sets forth the criteria for disability retirement. The statute requires a determination, based on objective medical evidence, as to whether the claimant has been permanently incapacitated by injury, disease, or mental illness from performing his prior job or a job of like duties. KRS 61.600(3)(a)-(c). A claimant's incapacity is permanent if it is expected to last for a continuous period of at least one year from the last day of paid employment. KRS 61.600(5)(a)1.

Essentially, Wilson contends she presented objective medical evidence of psychiatric impairment, which rendered her permanently incapacitated from performing her job as a support supervisor. Wilson relies on the opinions of Dr. Hagan and Dr. Sprague, arguing that the Board failed to weigh the evidence in her favor. We disagree.

The administrative record included the report of Dr. Ebben, in which he questioned Wilson's truthfulness and suspected that she attempted to exaggerate her problems. Given Wilson's unreliability, Dr. Ebben concluded he was unable to state with any degree of certainty that Wilson suffered an incapacitating psychological condition. Some of the medical records also indicated that Wilson's subjective mental health complaints did not correspond with her physician's objective observations of her condition. It was also established that Wilson pursued a personnel action due to a conflict with her supervisor, and she retired as part of an agreed settlement. Dr. Mullen, a reviewing physician, succinctly noted, "It appears from the record that Ms. Wilson left her job because of personality conflicts[,] not due to inability to perform her job duties from a disability." Faced with conflicting evidence, the Board was free to weigh the evidence and choose what evidence to believe. *Bowling v. Natural Resources and Environmental Protection Cabinet*, 891 S.W.2d 406, 410 (Ky. App. 1994). We conclude that the Board's decision denying disability benefits was supported by substantial evidence. Based upon our review of the record, we are satisfied that manifest

injustice did not occur; accordingly, we decline to further address the procedurally deficient arguments raised by Wilson.

For the reasons stated herein, we affirm the decision of the Franklin Circuit Court.

ALL CONCUR.

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BRIEF FOR APPELLEES
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