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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-000558-MR

NEWELLYNN FERRELL

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 13-CI-00622

BOARD OF TRUSTEES OF THE
KENTUCKY RETIREMENT SYSTEMS
OF THE COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: MAZE, TAYLOR, AND VANMETER, JUDGES.

TAYLOR, JUDGE: Newellynn Ferrell brings this appeal from a March 20, 2015, Opinion and Order of the Franklin Circuit Court affirming a Final Order of the Board of Trustees of the Kentucky Retirement Systems that denied Ferrell disability retirement benefits. We affirm.

Starting in July 21, 1997, Ferrell was employed as a staff assistant with the Lexington-Fayette Urban County Government. In her position, Ferrell was a member of the County Employees Retirement System (CERS). CERS is administered by the Kentucky Retirement Systems (Retirement Systems). Due to alleged disability, Ferrell claims that she was forced to resign from her position as staff assistant effective December 31, 2010. At the time of her resignation, Ferrell had amassed 162 months of service credit with CERS.

On March 8, 2011, Ferrell filed an application for disability retirement benefits with Retirement Systems. Ferrell alleged that she lacked the capacity to perform the duties of staff assistant due to: stroke complications with dementia, diabetes, seizure disorder, eye disorder, depression, severe migraines, severe allergies, high cholesterol, chronic bronchitis, asthma, sinusitis, chronic neck and back pain, memory and concentration problems, irritable bowel syndrome, chronic fatigue, fibromyalgia, and significant side effects from medications. Subsequently, medical examiners employed by Retirement Systems reviewed Ferrell's application for disability benefits and denied same. Kentucky Revised Statutes (KRS) 61.665. Ferrell then requested a hearing; the hearing was conducted by a hearing officer. KRS 13B.110. By Findings of Fact, Conclusions of Law, and Recommended Order (Recommended Order) rendered February 11, 2013, the hearing officer recommended that Ferrell's disability retirement benefits be approved. The hearing officer found that Ferrell proved by a preponderance of the evidence to be physically and mentally incapacitated from performing the duties of

staff assistant. However, by Final Order rendered April 22, 2013, the Disability Appeals Committee of the Board (Board) rejected the hearing officer's Recommended Order. KRS 61.665; KRS 13B.120. Instead, the Board denied Ferrell's claim for disability retirement benefits. Ferrell appealed the Board's decision to the Franklin Circuit Court, which as noted, affirmed the Board's denial of benefits. This appeal follows.

To begin, judicial review of an administrative agency's decision is limited.

KRS 13B.150(2) outlines the parameter of our review:

(2) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the final order or it may reverse the final order, in whole or in part, and remand the case for further proceedings if it finds the agency's final order is:

- (a) In violation of constitutional or statutory provisions;
- (b) In excess of the statutory authority of the agency;
- (c) Without support of substantial evidence on the whole record;
- (d) Arbitrary, capricious, or characterized by abuse of discretion;
- (e) Based on an ex parte communication which substantially prejudiced the rights of any party and likely affected the outcome of the hearing;
- (f) Prejudiced by a failure of the person conducting a proceeding to be disqualified pursuant to KRS 13B.040(2)[.]

Our review proceeds accordingly.

Ferrell initially contends that the Board erred by failing to give “deference to the hearing officer’s adjudicatory experience and presence at trial in judging the credibility of the witnesses.” Ferrell’s Brief at 8. Ferrell argues that the Board is required to defer to the hearing officer’s findings as to credibility of witnesses and weight of evidence.

KRS 13B.120 empowers the “agency head” to accept, modify, or reject, in whole or part, the recommended order of the hearing officer upon entry of a final order. If rejected or modified, KRS 13B.120(3) mandates that the final order “shall include separate statements of findings of fact and conclusions of law.” Recently, our Court has further clarified the separate findings of fact and conclusions of law mandate of KRS 13B.120(3). In *Commonwealth v. RiverValley Behavior Health*, 465 S.W.3d 460, 468 (Ky. App. 2014), the Court of Appeals held:

Although the Secretary is not required to refute every finding of fact and conclusion of law made in the recommended order, the final order must articulate a rationale for departing from the recommendation which is sufficient to explain the reasons for the deviation and to allow meaningful appellate review.

Additionally, the final order of an administrative agency must include a cogent “rationale” elucidating the reasons for rejecting or modifying a recommended order. *Id.* This rule, of course, would also encompass the Board’s rejection of the hearing officer’s rulings upon credibility of witnesses. Yet, we are mindful that the

final order need not “refute every finding of fact and conclusion of law made in the recommended order.” *Id.* at 468.

In this case, we have reviewed the Final Order and believe the Board set forth an adequate rationale for rejecting the Recommended Order, including the hearing officer’s rulings upon the credibility of witnesses. In the Final Order, the Board explained in detail its reasons for rejecting the hearing officer’s assessment of the medical evidence. In particular, the Board viewed Dr. Ryan Owens’ report as persuasive and believed the hearing officer’s dismissal of same was erroneous. The Board specifically commented:

While it is true that Dr. Owens only addressed [Ferrell’s] psychological complaints, the fact is that these psychological complaints (depression, anxiety, and memory/concentration problems) are the essential elements of [Ferrell’s] application. . . . Dr. Owens addressed the most potentially debilitating allegations of [Ferrell’s] case and concluded that she can still complete a full workday.

Final Order at 5. Therefore, we conclude that the Final Order complied with KRS 13B.120(3) and that the Board gave proper deference to the hearing officer’s Recommended Order.

Ferrell also asserts that the Final Order is not supported by substantial evidence of a probative value and fails to consider the cumulative effect of her medical conditions. We initially note that Ferrell bore the burden of proof before the Board and was denied disability retirement benefits. In this appeal, Ferrell

must demonstrate that the record compels a finding in her favor. *See McManus v. Ky. Ret. Sys.*, 124 S.W.3d 458 (Ky. 2003).

Ferrell's allegations of error as to sufficiency of evidence and cumulative effect of her medical conditions were raised before the circuit court. In its Opinion and Order, the circuit court set forth an erudite analysis of these issues, and we adopt the analysis herein:

The [Board] considered the cumulative effects of Ferrell's conditions and properly applied the law in determining whether Ferrell was permanently incapacitated under KRS 61.600. KRS 61.600(5)(a)(1) requires that a claimant seeking disability retirement benefits must prove by objective medical evidence that:

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. In determining whether the person may return to a job of like duties, any reasonable accommodation by the employer . . . shall be considered.

As part of this determination, the board must consider the cumulative effect of the conditions that impact the applicant. The standard is outlined in *Kentucky Retirement Systems v. Bowens*, 218 S.W.3d 776 (Ky. 2009).

Ferrell presented evidence at the hearing that included cumulative medical conditions of anxiety, depression, memory loss, rashes, hypertension, diabetes, asthma, chronic neck, shoulder, and back pain, chronic fatigue, significant side effects due to her medication. The Final Order from the Board states that Ferrell's conditions were considered under a cumulative disability theory and were subsequently rejected. Findings of Fact

No. 8 specifically identifies each condition and makes the finding that Ferrell did not submit sufficient evidence to support a findings of disability either individually or collectively.

The [Board's] Final Order is supported by substantial evidence in the record as a whole. The trier of fact is afforded deference in its determination of whether Ferrell is disabled. The Board's Findings of Fact includes a finding that Ferrell did not produce sufficient objective medical evidence to substantiate many of Ferrell's subjective physical complaints. The Board relied on Ferrell's medical records from Ferrell's primary care physician as well as reports from physicians on the Medical Review Board in making its findings and determination. After reviewing the record, this Court does not find that the evidence in Ferrell's favor is so overwhelming to compel a finding in Ferrell's favor.

We agree with the circuit court that the Board aptly considered the cumulative effect of Ferrell's medical conditions and that the record does not compel a finding in her favor.

Ferrell lastly argues that Retirement Systems failed to timely file exceptions to the hearing officer's Recommended Order. We disagree.

KRS 13B.110(4) provides:

A copy of the hearing officer's recommended order shall also be sent to each party in the hearing and each party shall have fifteen (15) days from the date the recommended order is mailed within which to file exceptions to the recommendations with the agency head. Transmittal of a recommended order may be sent by regular mail to the last known address of the party.

Thereunder, a party must file exceptions to the hearing officer's recommended order within fifteen days from the date the recommended order was mailed.

In this case, the record reflects that the Recommended Order was mailed on February 12, 2013, and that Retirement Systems filed its exceptions on February 27, 2013. It is clear that the exceptions were filed within the fifteen-day time limit imposed by KRS 13B.110(4). And, Ferrell’s argument that the Recommended Order was “filed” at 8:51 a.m. on February 12 and the exceptions were filed two hours “late” at 11:42 a.m. on February 27 is simply without merit. There exists no hour or minute filing deadlines under KRS 13B.110(4), nor are there any such deadlines found in Kentucky statutes or relevant rules of procedure. Consequently, we hold that Retirement Systems timely filed its exceptions to the hearing officer’s Recommended Order under KRS 13B.110(4).

In summary, we are of the opinion that the circuit court properly affirmed the Board’s denial of disability retirement benefits to Ferrell.

For the foregoing reasons, the Opinion and Order of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT
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BRIEF AND ORAL ARGUMENT
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