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TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000868-MR

MARSHA JETT

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 15-CI-00310

KENTUCKY RETIREMENT SYSTEMS AND
THE BOARD OF TRUSTEES OF THE
KENTUCKY RETIREMENT SYSTEMS

APPELLEES

OPINION REVERSING AND REMANDING

** ** * * * * *

BEFORE: DIXON, J. LAMBERT AND STUMBO, JUDGES.

STUMBO, JUDGE: Marsha Jett appeals from an order of the Franklin Circuit Court which affirmed a decision of the Kentucky Retirement Systems (hereinafter referred to as “Systems”) to deny her application for disability retirement benefits. We believe the Kentucky Retirement Systems incorrectly denied Ms. Jett disability retirement benefits; therefore, we reverse and remand.

Ms. Jett worked for the Eastern Kentucky Veterans Center. Her last day of paid employment was on November 25, 2011. She applied for disability retirement benefits on February 24, 2012. In her application, she alleged that she was disabled due to major depression and post-traumatic stress disorder (“PTSD”).¹ Ms. Jett argued that it was the cumulative effects of the depression and PTSD that disabled her from returning to work.

The Systems’ medical examiners reviewed Ms. Jett’s application and medical records and denied her benefits. Ms. Jett appealed and an administrative hearing was held. Ms. Jett was the only person to testify. A hearing officer rendered a recommended order in which she found that Ms. Jett suffered from depression and PTSD for over a year after her last day of paid employment. The hearing officer also found that while Ms. Jett’s conditions were disabling, the disability was not permanent because she did not properly comply with treatment recommendations by taking anti-depressants, going regularly to counseling, and cutting off contact to people who were exacerbating her condition. The hearing officer recommended that the Board of Trustees of the Kentucky Retirement Systems (hereinafter referred to as “Board”) deny her application for benefits. The Board then adopted the hearing officer’s recommended order and denied Ms. Jett disability retirement benefits.

Ms. Jett then appealed the decision to the Franklin Circuit Court. The court affirmed the decision of the Board and held that while Ms. Jett suffered from

¹ Ms. Jett alleged that she suffered from other maladies, but those are not at issue on appeal.

PTSD and depression, her disability was not permanent because she did not follow through with her treatment plan during the year following her last day of employment. This appeal followed.

Ms. Jett argues on appeal that the trial court and Board erred in denying her disability benefits based on lack of permanency. Ms. Jett claims that the disability retirement statutes do not require one to obey treatment recommendations in order for a disability to be deemed permanent, but that the disability only need last for 12 months or more. Ms. Jett's argument is well taken and we believe Ms. Jett should be awarded disability benefits.

This Court's standard of review for an administrative adjudicatory decision is the clearly erroneous standard. *Stallins v. City of Madisonville*, 707 S.W.2d 349, 351 (Ky. App. 1986). A decision is clearly erroneous if it is not supported by substantial evidence. *Id.*

Substantial evidence is defined as evidence, taken alone or in light of all the evidence, that has sufficient probative value to induce conviction in the minds of reasonable people. If there is substantial evidence to support the agency's findings, a court must defer to that finding even though there is evidence to the contrary. A court may not substitute its opinion as to the credibility of the witnesses, the weight given the evidence, or the inferences to be drawn from the evidence. A court's function in administrative matters is one of review, not reinterpretation.

Thompson v. Kentucky Unemployment Ins. Comm'n, 85 S.W.3d 621, 624 (Ky. App. 2002) (footnotes omitted).

Kentucky Revised Statute (KRS) 61.600 states in relevant part:

(3) Upon the 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; and

(d) The incapacity does not result directly or indirectly from bodily injury, mental illness, disease, or condition which pre-existed membership in the system or reemployment, whichever is most recent. For purposes of this subsection, reemployment shall not mean a change of employment between employers participating in the retirement systems administered by the Kentucky Retirement Systems with no loss of service credit.

. . .

(5) (a) 1. An incapacity shall be deemed to be permanent if it is expected to result in death or can be expected to last for a continuous period of not less than twelve (12) months from the person’s last day of paid employment in a regular full-time position.

In the case at hand, the decisions of the hearing officer and the Board were clearly erroneous as not being supported by substantial evidence. Here, the hearing officer found that Ms. Jett was disabled due to her depression and PTSD and that the disability had lasted for over one year after her last day of paid employment; however, the hearing officer found that her disability was not

permanent because she did not regularly take anti-depressants, regularly attend counseling, and continued to have contact with people who exacerbated her condition.

This Court could find no case law interpreting KRS 61.600 to require compliance with treatment recommendations as a prerequisite to finding a disability is permanent. We did, however, find two cases that persuade us that Ms. Jett's argument is correct.

In *Bd. of Trustees of Kentucky Ret. Sys. v. Estate of Chaney*, 253 S.W.3d 67 (Ky. App. 2008), Systems appealed an order of the Franklin Circuit Court which set aside an order of the Board which suspended Daisy Chaney's disability retirement benefits. Ms. Chaney had been awarded disability retirement benefits based on depression and anxiety. Sometime later, Systems sought to terminate her benefits because it believed she was no longer incapacitated by her condition. Like Ms. Jett, Ms. Chaney did not attend regular counseling sessions or properly manage her condition with medication. The Board terminated her benefits because Dr. Paul Ebben, a forensic psychologist, opined that her condition is treatable and with regular counseling and medication, she should improve enough to be able to return to work.

The circuit court reversed the decision of the Board by finding that the Board "is not authorized to discontinue benefits on the basis that an employee *may* no longer be incapacitated at a future date prior to regular retirement if she continues on a certain treatment." *Id.* at 71 (emphasis in original). The Board then

appealed to this Court. It argued that because Ms. Chaney stopped going to counseling, it can be inferred that she recovered from her disability. The Board also claimed that if Ms. Chaney were to return to counseling, her condition would not be disabling. This Court held that Ms. Chaney's lack of regular counseling was not substantial evidence that she was no longer incapacitated. This Court also held that while Dr. Ebben did say Ms. Chaney might improve with regular counseling, nowhere was it stated that she was no longer incapacitated.

In *Terry v. Kentucky Ret. Sys.*, No. 2003-CA-002569-MR, 2004 WL 3015649 (Ky. App. Dec. 30, 2004),² Erma Terry was denied disability retirement benefits by the Board. The Board found that even though she was disabled due to mental impairment, with proper treatment she should be able to return to work within a year. Stated another way, the Board found that her disability was not permanent. The circuit court affirmed this decision.

On appeal, this Court reversed and remanded the judgment of the circuit court. The Court found that even though Ms. Terry's doctors had high hopes for her recovery and that they believed she could improve with further treatment, the fact remained that her mental impairment had lasted for more than 12 months and her doctors continued to find that she was unable to return to work in her impaired condition.

While not directly on point, we find the cases of *Chaney* and *Terry* persuasive as to the issue at hand. The evidence in the record shows that Ms. Jett

² This case is cited pursuant to Kentucky Rule of Civil Procedure (CR) 76.28(4)(c).

treated with two psychologists, Drs. Sarah Cox and Robert Genthner, and one licensed clinical social worker, John Jones, during the years of 2011 to 2013. These professionals unanimously found that she suffered from depression and PTSD. They also believed that her ability to do work was poor. In fact, the hearing officer stated in her recommended order that the objective medical evidence proved that Ms. Jett was disabled from her job for over a year.

Even though the hearing officer, Board, and circuit court found that Ms. Jett's disability lasted for over a year, which satisfies the definition of permanent set forth in KRS 61.600(5), Ms. Jett's application for benefits was denied due to lack of permanency. While the hearing officer, Board, and trial court may believe her disability is not permanent due to her failure to adhere to her treatment recommendations, there was no medical evidence that her condition would definitely improve with proper treatment. The objective medical evidence presented to, and relied upon by, the hearing officer indicated that Ms. Jett was permanently incapacitated from her job at the Eastern Kentucky Veterans Center or from jobs with like duties. Similar to the employees in *Chaney* and *Terry*, Ms. Jett was incapacitated due to mental illness at the time of the hearing and that disability had lasted for over a year.

KRS 61.600 does not require a person to follow all recommendations from medical professionals in order to be deemed permanently disabled. In addition, even though depression and PTSD can be treated, it is uncontroverted that Ms.

Jett's disability lasted for over one year; therefore, her mental impairment is permanent pursuant to statute.

Based on the foregoing, we find that the decision of the Board was not based on substantial evidence and ran contrary to statute; therefore, we reverse and remand.

ALL CONCUR.

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