

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2017-CA-000742-MR

THOMAS TAYLOR

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE PHILLIP J. SHEPHERD, JUDGE  
ACTION NO. 14-CI-00641

BOARD OF TRUSTEES, KENTUCKY  
RETIREMENT SYSTEMS

APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \* \* \* \*

BEFORE: LAMBERT, MAZE, AND TAYLOR, JUDGES.

MAZE, JUDGE: Thomas Taylor appeals from a judgment of the Franklin Circuit Court affirming the denial of his application for hazardous duty disability retirement benefits. Because we concur in the circuit court's assessment that substantial evidence supported the denial of Taylor's claim, we affirm.

After a period of employment in construction, Thomas was employed by the Pikeville Fire Department as a firefighter and emergency medical technician commencing in 1996. Between 1996 and his last date of paid employment on September 19, 2009, Taylor accrued 154 months of service credit in the County Employees Retirement System. On November 6, 2009, Taylor filed for hazardous duty disability retirement benefits alleging that lumbago, back pain, depression, and anxiety prevented him from being able to perform his job duties. Taylor's claim for benefits based upon these conditions was denied twice by a medical review panel, twice by an administrative hearing officer, by the disability appeals committee of the Kentucky Retirement Systems, and ultimately by the Franklin Circuit Court which affirmed the administrative denial of benefits. Taylor now argues in this appeal that the decision to deny benefits is not supported by substantial evidence, is arbitrary and capricious, and does not comport with applicable law concerning pre-existing disability.

We commence by citing the standard by which we review decisions of administrative agencies: "Where 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). Because an administrative agency is "afforded

great latitude in its evaluation of the evidence heard and the credibility of witnesses,” *id.*, a “reviewing court is not free to substitute its judgment for that of an agency on a factual issue unless the agency’s decision is arbitrary and capricious.” *Kentucky Retirement Systems v Bowens*, 281 S.W.3d 776, 780 (Ky. 2009) (quoting *McManus*, 124 S.W.3d at 458). An agency’s decision is arbitrary and capricious when it lacks the support of substantial evidence, which has been defined as evidence “having the fitness to induce conviction in the minds of reasonable men.”

*Kentucky State Racing Comm’n v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972) (quoting *O’Nan v. Eckler Moore Express, Inc.*, 339 S.W.2d 466, 468 (Ky. 1960)).

With these principles in mind, we turn to the facts underpinning Taylor’s claim.

In April 1996, prior to his employment as a firefighter/EMT, Taylor injured his back and hip in the course of his construction job when he was struck by a steel pipe and knocked into a creek. Shortly after beginning his employment as a firefighter/EMT, Taylor filed a worker’s compensation claim related to the steel pipe accident. The medical evidence in that proceeding indicated that because Taylor had suffered a lumbar strain with no suggestion of permanent impairment, he could return to work with no restrictions. Taylor suffered other back or lower abdominal injuries in his work as a firefighter/EMT in 2000, 2007,

and 2008. It is the 2008 injury to Taylor's lower back which gave rise to his application for disability retirement benefits.

In December 2008, after straining his lower back while lifting a patient onto a backboard, Taylor sought treatment at Pikeville Medical Center emergency room for a lumbosacral strain and was released back to work with lifting restrictions for one week. He subsequently treated with Dr. David W. Martin, Dr. Keith Hall, and Dr. Ronald Mann, from whom he received work releases until March 2009 when he was cleared to work. Taylor did not return to work, however, until August 2009. When he did return, Taylor worked only about one month before he suffered what he termed a "nervous breakdown" in September 2009. This breakdown forms the basis for the second prong of Taylor's application for disability retirement benefits.

Dr. David J. Jenkinson, an independent medical examiner requested by an adjuster processing Taylor's disability claim, evaluated Taylor and cleared him to work without restrictions in March 2009. Taylor was also examined by Dr. Joseph L. Zerga in 2011. Based upon a physical exam which produced a negative straight leg raising test and an EMG/NCV study showing normal results with no indication of radiculopathy, Dr. Zerga found that Taylor suffered no significant impairment by reason of the injury of December 2008. However, in a 2012 medical review, a Dr. Sexton assessed an 11% permanent impairment rating based

upon the results of a positive straight leg raising test and Taylor's report of "persistent radiculopathy" although EMG/NCV testing was normal.

With regard to Taylor's psychological impairment claim, the record indicates that he began informally seeing a counselor during his 2005 divorce and formally treating for depression with a psychiatrist, Dr. Corazon Chua, in the spring of 2006. It was Dr. Chua who first diagnosed Taylor's depression and his notes indicate that by September 2007, Taylor had improved significantly. In his deposition testimony, Taylor estimated that he had been seeing a psychiatrist for four to five years prior to his 2008 injury, stating that after a year in Dr. Chua's care, his symptoms had resolved and he stopped treatment. Taylor also testified that he was not being treated by any mental health professional on December 11, 2008, the date of the injury precipitating his claim. Taylor's medical records reflect psychotherapy treatment from March 2006 to January 2008, after which he stopped treatment for any mental health conditions.

Taylor resumed mental health treatment following an event on September 1, 2009, which he described as a "nervous breakdown." On that date he was admitted to the Mountain Comprehensive Care Center's Adult Crisis Stabilization Unit due to suicidal ideation. After his discharge, he continued mental health treatment on an outpatient basis at the Mountain Comprehensive Care Center with Karen Lewis, LPCC. Lewis diagnosed Taylor with recurrent and

severe major depressive disorder. By October 9, 2009, however, Lewis noted substantial improvement in Taylor's overall mood and diminished depression and suicidal thoughts. Concurrent with his treatment with Lewis, Taylor sought treatment with Dr. Mann for his mental health issues beginning on September 17, 2009, and eventually stopped seeing Lewis.

As part of the proceedings below, Dr. Robert Granacher evaluated Taylor's mental health in June 2011. After spending approximately five and one-half hours evaluating Taylor, Dr. Granacher concluded that he was in fact depressed and that the depression was a pre-existing condition. Dr. Granacher specifically noted that Taylor's mother suffers from depression and highlighted the possibility of a genetic component in causation. Ultimately, Dr. Granacher deemed Taylor psychologically fit for work without restriction. During the evaluation, however, Dr. Granacher noticed a tremor and referred Taylor to Dr. Zerga for further evaluation.

Although Dr. Zerga was examining Taylor solely for the purpose of evaluating his tremor and back issues, Taylor volunteered information relevant to the state of his mental health as well. As Dr. Zerga was taking Taylor's patient history, he told Dr. Zerga that anxiety and "jitters" had been a lifelong struggle for him and that he has always startled easily. Dr. Zerga included these details in his evaluation report.

The final mental health professional to evaluate Taylor was psychologist Eric Johnson, Ph.D. Dr. Johnson noted that his testing produced results similar to those found by Dr. Granacher. Dr. Johnson's diagnostic impressions included major depressive disorder and anxiety disorder, noting that Taylor's prognosis was "fair" and that he needed sustained treatment to control his depression. Dr. Johnson ultimately concluded that Taylor's depression would not permanently impair his ability to perform his job duties and that he had not reached maximum medical improvement for depression.

After the medical review board unanimously denied Taylor's application for disability retirement benefits on the basis of this evidence, Taylor requested an administrative hearing which resulted in the introduction of additional medical evidence. The review board again considered Taylor's application, along with the new medical evidence, and again denied his claim. Taylor then presented his case in a hearing before an administrative hearing officer. In her findings, conclusions, and recommended order, the hearing officer found Taylor's testimony to be less than credible, citing inconsistencies in his testimony with the medical records particularly in relation to the date of onset of his conditions. The hearing officer concluded that Taylor's back issues were the result of the 1996 injury which pre-dated his employment and were thus pre-existing conditions. Relying on the reports of Drs. Granacher and Zerga, the hearing officer concluded that

Taylor's mental health issues also existed prior to his membership in the County Employees Retirement System.

Taylor then filed exceptions to the disability appeals committee which remanded for clarification as to whether the hearing officer had adequately addressed the issue of substantial aggravation of his pre-existing conditions. After the hearing officer issued a second recommended order which emphasized certain portions of the prior order relating to the pre-existing conditions and substantial aggravation, the disability appeals committee entered a final order fully adopting the second recommended order.

Taylor sought review in the Franklin Circuit Court alleging that the final order of the appeals committee lacked the support of substantial evidence and failed to adequately address his exceptions concerning substantial aggravation. The circuit court affirmed holding that "when taken as a whole combining both a claim for disability based on lumbago, back pain, depression and anxiety does not compel a finding in Taylor's favor." Thus, the circuit court concluded that the final order denying Taylor's claim was supported by substantial evidence and could not be considered arbitrary or capricious.

Like the circuit court, we commence our analysis by citing the requirements for proving entitlement for disability retirement set out in Kentucky Revised Statutes (KRS) 61.600, as explained by our Supreme Court:



KRS 61.600 provides, in part, that upon the examination of the objective medical evidence by licensed physicians pursuant to KRS 61.665, it shall be determined that: 1) 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; 2) the incapacity is deemed to be permanent; and 3) 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.

*Kentucky Retirement Systems v. Bowens*, 281 S.W.3d 776, 781 (Ky. 2009). And, like the circuit court, we are convinced that Taylor did not meet his burden of proving entitlement to those benefits by establishing that he was mentally and/or physically incapacitated to perform the job from which he received his last paid employment; that the capacity was be deemed to be permanent; or that the incapacity did not result from conditions which pre-dated his membership in the system.

Although Taylor correctly asserts that the circuit court focused the majority of its review on the psychological component of his claim, it nevertheless considered the combined impact of his back and psychological problems in concluding that substantial evidence supported the order of the board. Furthermore, we are convinced that any shortcoming in the circuit court's analysis of the effect of his back injury does not hamper our review. As the Supreme Court emphasized in *Bradley v. Kentucky Retirement Systems*, 567 S.W.3d 114, (Ky.

2018), it is the duty of each reviewing court to examine the substantiality of the evidence supporting the decision of the board:

even where the applicant loses before the Board, it is appropriate on judicial review for the courts, **at every level, to first consider whether the denial is supported by substantial evidence.** If it is not so supported, the court is required to reverse pursuant to KRS 13B.150(2)(c) and KRS 61.665(3)(d). However, if there is substantial evidence supporting the Board's decision, the court should then consider, as explained in *McManus*, whether the applicant's evidence was so compelling that no reasonable person could fail to be persuaded.

*Id.* at 119 (emphasis added). Because our review of the evidence discloses the existence of substantial evidence supporting the board's decision, we direct our attention to the question of whether Taylor's evidence was so compelling that no reasonable person could fail to be persuaded by it.

In applying this "compelling evidence" standard to Taylor's claim of an incapacitating back injury, we again turn to *Bradley* which explains that standard's interaction with the preponderance standard:

As noted repeatedly, it is a high standard because of the deference owed the administrative fact-finder. If courts re-applied the preponderance of the evidence standard, they would be assessing the evidence and weighing it *de novo*, in direct violation of KRS 13B.150(2)'s directive that courts "shall not" substitute their judgment for the fact-finder on issues of fact.

*Id.* at 120. Viewing the evidence concerning Taylor's back problems in that light, we are convinced it falls short of compelling the conclusion he is permanently

physically incapacitated from performing his job. While undoubtedly there have been aggravations of his pre-existing construction injury, the flaw in Taylor's position stems from the fact that his back problems have resolved to the point they cannot be deemed to be permanently incapacitating. As previously noted, Taylor had been cleared to return to work without restriction when he suffered the "nervous breakdown" which forms the second component of his claim.

With regard to Taylor's psychological impairment, the circuit court determined that the finding of a pre-existing psychological impairment was supported by the evidence of two doctors and the finding that it had not been aggravated by the December 2008 injury was supported by the medical evidence of three doctors. More important, in our view, is the fact that the medical evidence confirmed that his depression could be managed with treatment and it was not, therefore, totally incapacitating.

Acknowledging the difficult nature of the job of Firefighter/EMT and accepting the fact that subsequent back injuries may have exacerbated or aggravated his pre-existing back injury, the fact remains that there is simply no substantial evidence to support the conclusion that Taylor is totally and permanently incapacitated from performing his job either by reason of his back injury or his psychological impairment. On this state of the record, we cannot say

that Taylor's evidence was so compelling that no reasonable person could fail to be persuaded by it.

Accordingly, the judgment of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Randy G. Clark  
Michael F. Johnson  
Pikeville, Kentucky

BRIEF FOR APPELLEE:

Katherine Rupinen  
Frankfort, Kentucky