

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000663-MR

BELINDA BARNETT

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 03-CI-01469

KENTUCKY RETIREMENT SYSTEMS AND
BOARD OF TRUSTEES OF KENTUCKY
RETIREMENT SYSTEMS

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: ACREE, DIXON AND KELLER, JUDGES.

ACREE, JUDGE: Belinda Barnett appeals from the judgment of the Franklin Circuit Court upholding the Kentucky Employee Retirement Systems' (KERS) decision to deny her disability benefits. The Disability Appeals Committee of the Board of Trustees denied her claim on the basis that objective medical evidence did not establish by a preponderance of the evidence that she is disabled. Barnett claims the Board acted arbitrarily by using the wrong standard of review in evaluating the evidence supporting

her claim and, further, that the record compels a finding in her favor. Having reviewed the evidence and the orders in question, we affirm.

Barnett was an employee of the Cabinet for Families and Children. Her job as a family support case worker was classified as sedentary in nature with duties which included interviewing clients and processing requests for K-Tap, food stamps, and medical assistance. She was required to sit for six hours out of a seven and one-half hour day, but had the option to alternate between sitting and standing as needed. She was occasionally required to lift up to ten pounds. Barnett applied for disability retirement benefits on July 23, 2001, alleging concentration and memory problems, pain, depression, and chronic fatigue. She requested reasonable accommodations which the Cabinet attempted to furnish. Nevertheless, she ceased work on August 31, 2002.

After the medical review physicians denied her application for disability, Barnett requested an evidentiary hearing which was held April 24, 2003. She testified, along with two of her co-workers, and presented numerous medical reports as evidence. Barnett and KERS each submitted a position statement, but neither submitted additional records after the hearing. The hearing officer recommended denial of her claim on the basis that the objective medical evidence did not establish that Barnett was disabled. Barnett filed exceptions to the hearing officer's recommended order. The Board of Trustees adopted the recommended order in its entirety, and Barnett appealed to the Franklin Circuit Court. The circuit court issued an opinion and order upholding the Board. This appeal followed.

We review an administrative agency's exercise of adjudicative authority by applying KRS 13B.150. That statute articulates specific grounds upon which an agency's final order may be reversed. The constitutional basis of each of these grounds is Section 2 of Kentucky's Constitution prohibiting the government's exercise of “[a]bsolute and arbitrary power[.]” The exercise of arbitrary power occurs whenever an agency acts outside the scope of its authority, fails to afford procedural due process, or makes a decision which is not supported by substantial evidence. *Commonwealth, Transportation Cabinet v. Cornell*, 796 S.W.2d 591, 594 (Ky.App. 1990). “In cases where an administrative agency acts in its capacity as a trier of the facts, we have held that the findings of the agency are conclusive if supported by substantial evidence.” *Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 307 (Ky. 1972). “In this jurisdiction, substantial evidence means evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men.” *Owings-Corning Fiberglass Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998)(citations omitted). The appellate court is not authorized to substitute its judgment as to the credibility of the witnesses and/or the weight of the evidence concerning questions of fact. KRS 13B.150(2); *see also, Kentucky Board of Nursing v. Ward*, 890 S.W.2d 641, 642 (Ky.App. 1984).

Barnett first argues that the Board acted arbitrarily and outside the scope of its authority by using the wrong standard to determine whether or not she was disabled. The hearing officer recommended denying her claim because

The objective medical evidence does not establish by a preponderance of the evidence that [Barnett] is totally and permanently incapacitated from her job duties by reason of any physical or mental condition, nor is she expected to remain so incapacitated for a period of twelve months from her last date of paid employment.

Barnett cites Kentucky Revised Statute (KRS) 61.665(3)(d) which says that a “final order of the board shall be based on *substantial evidence appearing in the record as a whole* and shall set forth the decision of the board and the facts and law upon which the decision is based.” (Barnett's emphasis). She asserts that the “objective medical evidence” standard only applies to the initial examination conducted by the medical review physicians. KRS 61.600. Consequently, she argues the Board erred when it failed to consider evidence other than the objective medical evidence, including the testimony of her co-workers and her own subjective complaints, in making its final determination.

KERS asserts that Barnett failed to raise this issue prior to submitting her brief to this Court. We reviewed the record and believe Barnett's argument presented here is a reasonable, if somewhat generous, interpretation of her sixth exception to the recommended order. That exception stated that despite the uncontradicted “testimony by Ms. Barnett and two co-workers, the hearing officer, nevertheless ruled in favor of the Retirement Systems.”¹

¹ On the other hand, Barnett failed to comply with Kentucky Rule of Civil Procedure (CR) 76.12(4)(c)(v) which states that each argument “shall contain at the beginning . . . a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner.” All 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.”).

We cannot agree at all with Barnett's position that the hearing officer failed to consider her and her friends' testimony. The recommended order summarizes the testimony of all three. Nor can it be said that the hearing officer failed to consider the evidence presented by her treating physicians. That too was described in detail.

The gist of Barnett's argument is that the hearing officer failed to give more weight to the evidence she presented. Her argument that the wrong standard was applied is merely a more creative way of arguing that the final order is not supported by substantial evidence. We believe she is wrong. The test is not whether evidence she presented might have resulted in a decision in her favor. The test is whether there was substantial evidence in the record to deny her claim of benefits. Clearly there was, and this leads to Barnett's next argument – that the final order is not supported by the evidence in the record as a whole – that is, by substantial evidence.

At her disability hearing, Barnett introduced depositions from her treating physicians, Dr. Brooks and Dr. Meyers. The hearing officer recognized that Dr. Myers considered her fatigue disabling and that Dr. Brooks believed she would have difficulty performing “duties at a desk-type job, due to fatigue” brought on by a combination of maladies from which Barnett suffered. The recommended order also set forth this testimony and the report of a psychological evaluation of Barnett.

On May 22, 2002, Claimant underwent a psychological examination by Dr. Paul Ebben. He found her to be nicely groomed, alert and cooperative. Her speech was fluent and goal directed, and thought content was relevant and clear. She did not show signs of emotional distress and her mood was stable. He determined through testing that she was not

malingering or exaggerating. Dr. Ebben's conclusion was that Claimant suffers from adjustment disorder with depressed mood completely as a result of her medical condition. She did not reveal any specific functional impairments secondary to her depression alone. He believes that her adjustment disorder with depressed mood will interfere with her job performance to a mild or moderate degree, but he does not feel that this condition is incapacitating or disabling, and that but for her medical problems, she would not be experiencing any emotional distress.

On March 21, 2003, Dr. Meyers gave a deposition in conjunction with Claimant's application for disability retirement benefits. He stated that although her thyroid tests were exactly where he wanted them to be, she still reported fatigue. He believes there to be many factors contributing to her fatigue, including leukopenia, anemia and hypothyroidism, although the main risk factor from leukopenia is increased susceptibility to infection. He was asked whether Claimant's condition would be considered a disability, and he replied, "This severe degree of fatigue, I think so, yes. To be honest, this is not a simple situation. . . . This is trying to put together a lot of soft data. . . it's just a whole constellation of things. . . ."

The deposition of Dr. Brooks was taken in conjunction with Claimant's application for disability retirement benefits on April 16, 2003. . . . He stated that no functional capacity exams had been performed on Claimant to the best of his knowledge, nor any sleep studies. He stated that both anemia and hypothyroidism can contribute to fatigue, and that medications for both can help to control fatigue. He stated that there were no restrictions placed on Claimant's activities.

(Citations to the record omitted).

After reviewing all the evidence, the hearing officer concluded that Barnett's claim of disability was unsupported.

Claimant alleges disability due to concentration and memory problems, pain and depression and chronic fatigue.

There is no substantial evidence in the record with regard to any memory or concentration problems. Dr. Ebben noted in his evaluation of Claimant that her recent and remote memory was intact. There is also not substantial evidence in the record to support a finding that Claimant is disabled due to depression. None of her treating doctors offered the opinion that she is unable to work due to depression, and Dr. Ebben's conclusion that her depression is the sole result of her medical condition is supported by the medical records and his evaluation of her.

Claimant's complaints of pain and fatigue have been variously attributed to fibromyalgia, leukopenia, hyperthyroidism, anemia chronic fatigue syndrome, and a sleep disorder. There is no objective evidence to support Dr. Brooks' diagnosis of narcolepsy or any other sleep disorder. Leukopenia is a disorder affecting white blood cells, and its most serious risk factor is an increased risk of infections. According to Dr. Myers, Claimant's anemia is mild and the hyperthyroidism is well controlled.

Dr. Brooks continues to give Claimant a diagnosis of fibromyalgia and chronic fatigue, but he has offered no objective basis for these findings other than Claimant having multiple trigger points and continuing subjective complaints of fatigue. Her findings on physical exam have been normal throughout her history with Dr. Brooks other than complaints of pain. He places no restrictions on her activities, and has never done or requested a functional capacity evaluation or a sleep study. Dr. Myers stated that he considers her disabled only due to her description of fatigue.

Without objective findings to support Claimant's complaints of pain and fatigue, she is not entitled to disability retirement benefits pursuant to KRS 61.600.

(Citation to the record omitted.) As previously pointed out by the circuit court, Barnett had the burden to prove her entitlement to disability benefits, and the standard of review is whether the evidence compelled a different result. *McManus v. Kentucky Retirement*

Systems, 124 S.W.3d 454, 458 (Ky.App. 2004). This Court must affirm the board “whenever the claimant's evidence is not sufficiently persuasive to *require* a favorable finding as a matter of law.” *Dawson v. Driver*, 420 S.W.2d 553, 555 (Ky.1967)(emphasis supplied).

There was certainly evidence of Barnett's many health issues. However, there was also evidence that some of her symptoms were easily treatable and that she was able, physically and mentally to carry on with the activities of her daily life. Dr. Ebben specifically said “as long as she receives appropriate treatment, she should be able to function both socially and occupationally.” Finally, the lack of objective medical evidence supporting her claims and her treating physician's failure to place restrictions on her must be considered. Taking into account all of the evidence presented, we are unable to conclude that a different outcome was compelled.

For the foregoing reasons, the order of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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