

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001294-MR

MICHELLE WILSON

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 05-CI-00130

KENTUCKY RETIREMENT SYSTEMS

APPELLEE

OPINION REVERSING

** ** *

BEFORE: MOORE AND STUMBO, JUDGES; ROSENBLUM,¹ SENIOR JUDGE.

MOORE, JUDGE: Michelle Wilson appeals a denial of disability retirement benefits from the Kentucky Retirement Systems, which was affirmed by the Franklin Circuit Court. Upon review, we reverse.

Michelle Wilson was employed for nearly sixteen years by the Cabinet for Families and Children, Department for Community Based Services, performing work as a

¹ Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5) of the Kentucky Constitution and KRS 21.580.

Social Services Clinician, starting in 1986. Her job duties included investigating child and adult abuse and neglect reports; assessing risk of harm; taking steps to protect individuals on her caseload; preparing written reports and documents; and wearing a beeper after hours on a rotating basis.

After an incident wherein a badly abused child, who had been in the Cabinet's care and who was on Wilson's caseload, died in her arms in 2000, Wilson claims to have suffered from Post Traumatic Stress Disorder, commonly referred to as PTSD. No one disputes that Wilson is to be commended for dedication to her job and in particular to this child. She claims that this incident "broke her" and that she suffered an emotional breakdown approximately six months later but continued to work.

During the months from March through October 2001, the record is not precise as to how many full days Wilson worked. She did not, however, work a regular full-time schedule during these months and for some periods of time her physician put her on leave.

In March of 2001, Wilson requested accommodations, which the Cabinet granted. She testified at her disability hearing that during the period of accommodations, she was on "light duty." She testified there was a significant difference in her job responsibilities while she was on light duty, including not having to wear a beeper after hours. However, she also testified that beginning around October, she was required to do intake, but not for high risk cases; nevertheless, she continued to work. She submitted

her letter of resignation on November 5, 2001, and her last day of employment was December 28, 2001.

Wilson applied for disability retirement with the Kentucky Retirement Systems, first alleging disability because of physical and mental impairment. However, later she dismissed her claim for disability based on physical impairment² and relied solely on mental impairment, namely PTSD.

Wilson's claim was denied based on the Administrative Law Judge's (ALJ) findings that (1) conditions for which she complained pre-existed her membership in the Kentucky Retirement Systems and (2) the objective evidence established that Wilson was not totally and permanently disabled from her job duties.

As to the ALJ's finding that Wilson's condition pre-existed her employment with the Cabinet, the ALJ reviewed many of Wilson's health conditions resulting from her 1980 automobile accident when she was eighteen years of age. Additionally, the ALJ found that Wilson's medical records “show a long history of stress related treatment dating prior to the death of the child in claimant's care.” The ALJ further stated that “[a]lthough [Wilson] did not seek psychiatric or therapeutic care, her treating medical doctors recognized and treated her stress, anxiety and depression symptoms, (see, for example, records at pages 156, 158, 413, 498, 512, 678).”

² When Wilson was eighteen years old, she was in a severe automobile accident, requiring between thirty and thirty-five surgeries. Because of the severity of her injuries after this accident, her medical record contained in the administrative record is quite lengthy. However, as previously mentioned, she did not rely on these injuries and resulting impairments for her claim of disability. Accordingly, they will not be recounted herein.

A review of these records, however, does not support the ALJ's statements.

At page 156 in the administrative record are notations made during office visits with Wilson's treating physician after her automobile accident. These records are dated 6/20/89, 7/14/89, and 8/15/89, and do not indicate depression, stress or PTSD. The closest reference to stress is in the 8/15/89 notation wherein Wilson's doctor noted that

Patient returns. She is doing better. She has some tenderness along the trapezious and along the scapular border on the right. When she really gets tense and tired, she has increased pain. She has good wrist and elbow and shoulder motion. When she really gets tired, she gets discomfort. She has been having some right flank pain. . . . As far as the shoulder, arm and neck, it is doing better. When she gets really tired and tense[,] she will be bothered by this.

No mention is made by Wilson's treating physician in 1989 of her suffering from stress, depression or PTSD, nor was she treated for such. The only reference is that Wilson got tired and tense.

Regarding the ALJ's reference to page 158, it is again a reference to Wilson's 1989 treatment after the automobile accident. The report by her treating doctor references much pain in her right trapezius area, with marked tenderness in that area. Due to this condition, Wilson was prescribed Valium "as a muscle relaxant." There is no mention in this cited page to stress, depression or PTSD on Wilson's part.

The next cited page by the ALJ is 413, which is dated August 4, 1982, and appears to relate to one of Wilson's thirty or so operations after the automobile accident. There are no notations that Wilson suffered from stress, depression or PTSD. There is,

however, a notation that she was given a Valium at 7:30 a.m., presumably prior to the surgery as only local anesthesia was used during the surgery. Wilson was released at 10:30 a.m., and there are no notations that she was given a prescription for Valium at this time.

Page 498, referenced by the ALJ, appears more recent but is undated. It is apparent, however, that at the time this medical note was made that Wilson was working for the Cabinet. Nothing on this page suggests that she suffered depression, stress or PTSD prior to her employment with the Cabinet. At most the record states that Wilson “had severe trauma when she was 18 yrs old with fractured pelvis, right foot, right ankle, fractured jaw, facial fractures, fractured right [illegible] on the right were pretty much demolished and she has chronic headache problems from post [illegible] headaches, probably some component of sinus headaches.” Wilson's past medical history is noted but does not include depression, stress or PTSD.

Page 512 of the administrative record is also a more recent medical record but is not dated. It states that Wilson “came in through Triage with a complaint of neck pain. Usually it occurs on the right side of her neck. Right now it is in both shoulders and the left side of her neck and is quite bothersome. Other things are going okay except when she tried to take Celebrex again for her arthritis. . . .” Later in this record, the doctor, Polly LeBuhn, M.D., included in her conclusions “depression/anxiety improved but she is having weight gain from Paxil. They are tapering her off Paxil and trying

Zoloft.” However, this medical record is undated and does not indicate that Wilson's depression and anxiety pre-dated her employment with the Cabinet.

The final reference to the record by the ALJ is at page 678, which includes notations made on two different days by the office of Charles D. Tucker, M.D., in 1993. Included in these notations are that Wilson has been under a lot of stress recently and that she has had a “racing of her heart for several days” and that “[s]he is under a tremendous amount of stress with her work at Marshall Co.” Of course, during this time, she had been working for the Cabinet since 1986. There is no notation that the stress-related conditions are connected to her automobile accident in 1980.

Remarkably, most of the ALJ's report focused on physical problems pre-dating Wilson's employment with the Cabinet. But, in the Findings of Fact, the ALJ found that Wilson's “mental health condition pre-dates her membership in the retirement system.”

Upon review by the Board, it adopted the ALJ's recommended order as the final order of the Kentucky Retirement Systems. Thereafter, Wilson timely appealed pursuant to KRS³ 13B.120 to the Franklin Circuit Court. In its opinion, the Franklin Circuit Court noted that the record supported that Wilson suffered from post-traumatic stress “to a mild degree” but that her prognosis was excellent. Moreover, the circuit court noted that a functional capacity assessment, on which the ALJ also relied, indicated that “Wilson's ability to work on a sustained basis is 'not significantly limited' with respect to

³ Kentucky Revised Statute.

the vast majority of the mental activities assessed and was not determined to be 'markedly limited' with respect to any single mental activity.”

The circuit court also noted that the Cabinet had accommodated Wilson with a “light duty” position and that Wilson had failed to prove that she is unable to perform her duties as accommodated on her last date of employment. Accordingly, the circuit court concluded that because Wilson

failed to establish by objective medical evidence the existence of a permanent physical or mental impairment that would prevent her from performing her job or job of like duties as of her last day of employment, this Court need not address the issue of whether or not Wilson's impairments preexisted her membership in the Retirement Systems.

Pursuant to KRS 13B.090, when a claimant proposes that an agency grant a benefit, the claimant has the burden of proof to show entitlement to the benefit sought.

McManus v. Kentucky Retirement Sys., 124 S.W.3d 454, 457 (Ky. App. 2003).

Accordingly, Wilson has the burden of proof to show that she should receive disability retirement benefits.

Regarding factual issues, an agency is given great deference. *Id.* (citing *Aubrey v. Office of Attorney General*, 994 S.W.2d 516, 519 (Ky. App. 1998) (citing *Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 309 (Ky. 1972))).

“Unless action taken by an administrative agency is supported by substantial evidence it is arbitrary.” *American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Com'n*, 379 S.W. 2d 450, 456 (Ky. 1964) “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.” *McManus*, 124 S.W.3d at 458. (citing *Johnson v. Galen Health Care, Inc.*, 39 S.W.3d 828, 832 (Ky. App. 2001)). Substantial evidence is defined as “that which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person.” *Bowling v. Natural Resources and Environmental Protection Cabinet*, 891 S.W. 2d 406, 409 (Ky. App. 1994). In other words, “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.” *Id.*

Pursuant to KRS 61.600(3),

[u]pon 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. In determining whether the person may return to a job of like duties, any reasonable accommodation by the employer as provided in 42 U.S.C. sec. 12111(9) and 29 C.F.R. Part 1630 shall be considered;

(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.

Applying the standard of review of an appellate court reviewing an agency decision under KRS 61.600, we determine that the ALJ's finding that the mental condition of which Wilson complains pre-existed her employment to be capricious. The record does not contain substantial evidence supporting a pre-existing condition. Based on our determination of capriciousness, it is therefore appropriate for us to substitute our judgment on this finding. *McManus*, 124 S.W.3d at 458 (citations omitted). The record pre-dating Wilson's employment is so lacking in evidence regarding depression or PTSD that no reasonable person could be persuaded that she suffered from PTSD prior to her starting date of employment with the Cabinet. However, this determination does not end our analysis.

Wilson still has the burden of proof to establish that she satisfies the requirements under KRS 61.600(3)(a). As earlier mentioned, our review is whether the evidence in Wilson's favor is so compelling that no reasonable person could have failed to be persuaded by it. *McManus*, 124 S.W.3d at 548 (citations omitted).

When Wilson left her employment with the Cabinet, she was on light duty, with accommodations and for at least the months from March to October, did not work a

regular full-time position. Our review includes whether she was capable of performing her duties with reasonable accommodations. KRS 61.600(3)(a). The record supports that Wilson's duties while on light duty included using a computer and keyboard and answering the telephone as necessary. She was not required to do telephone intakes, do investigations, make home visits, carry a beeper after hours and other duties which most social workers were expected to perform.

At her administrative hearing, Wilson testified that job duties after she requested accommodations in March of 2001 were much different than before. She was involved in training new employees on investigation and intake, but this did not involve physical abuse or any high risk cases. She did complain that in October of 2001, she was asked to do some intake telephone calls and investigations, but these were not high risk cases. She described them as “piddly little things.” On her last day of employment, she testified that she really did not do much other than “cleaning up stuff.”

Even with her accommodations, Wilson's supervisor, Lois Smith, in a report dated July 31, 2003, wrote that “[d]uring the last year of her employment, [Wilson] became anxious; was easily upset; had difficulty completing a task; unable to focus; became pre-occupied with the death of a child in her caseload; was no longer able to fulfill the job requirements.”

We note that although it was undisputed that Wilson requested and received accommodations, Smith, on the report, checked that Wilson had not done so.

Nonetheless, in response to the question of whether Wilson had assistance available from co-workers, Smith answered “[y]es, much assistance.”

Furthermore, in a report dated July 28, 2002, psychiatrist David Meyer, M.D., F.A.C.P., reported that Wilson was “unable to tolerate the stress of working in her profession, unable to cope with dysfunctional families, abuse cases.” In a letter dated January 30, 2004, Dr. Meyer wrote that Wilson's “post traumatic anxiety and depression have produced a level of symptomatology that it would be impossible for her to sustain gainful employment, especially in the realm of evaluating and working with abused children and their families.” Dr. Meyer again expressed his opinion that Wilson was not capable of sustaining gainful employment.

Dr. Bruce Amber, Ph.D., a consulting psychologist, in a report dated June 12, 2002, concluded that it was “unlikely that [Wilson] will ever be able to return to investigative employment as a social worker.” He further concluded that Wilson's “capacity to adapt to the pressures of day-to-day employment would appear to be impaired.”

Despite this evidence, the ALJ found that Wilson's records from her treating mental health caregivers did not establish a total and permanent nature of her psychological condition. We disagree and conclude that there is not substantial evidence to support the ALJ's conclusion; hence, it was arbitrary. Accordingly, we reverse and decide that Wilson has met her burden of proof for entitlement to disability retirement benefits.

STUMBO, JUDGE, CONCURS.

ROSENBLUM, SENIOR JUDGE, DISSENTS AND FILES SEPARATE
OPINION.

ROSENBLUM, SENIOR JUDGE, DISSENTING:

I respectfully dissent. There is substantial evidence by which the hearing officer found that the appellant did not meet her burden of proof to establish by objective medical evidence that she was totally and permanently disabled as of her last day of paid employment. Specifically, Dr. Stricklin noted in an April 5, 2001 office visit that appellant had an excellent prognosis. Furthermore, a functional capacity examination in October 2002 placed very minimal limitations on appellant's abilities to work with respect to understanding and memory, concentration and persistence, social interaction and adaptation. The majority opinion correctly notes that "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. 2004). Based upon the evaluations coupled with the accommodated position made available to the appellant, the evidence in appellant's favor is not "so compelling that no reasonable person could have failed to be persuaded by it." *McManus* at 458. Accordingly, I would affirm the judgment of the Franklin Circuit Court.

BRIEF AND ORAL ARGUMENT FOR
APPELLANT:

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BRIEF AND ORAL ARGUMENT FOR
APPELLEE:

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