

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
AFFIRMING

** **

BEFORE: DIXON, LAMBERT, AND SPALDING, JUDGES.

SPALDING, JUDGE: Upon granting the motion of appellee the Kentucky Retirement Systems' for discretionary review, the Supreme Court of Kentucky remanded this appeal for reconsideration in light of its opinions in *Bradley v. Kentucky Retirement Systems*, 567 S.W.3d 114 (Ky. 2018), and *Kentucky*

Retirement Systems v. Ashcraft, 559 S.W.3d 812 (Ky. 2018). Having undertaken that review, we now affirm the judgment of the Franklin Circuit Court.

Appellant Marsha Jett was employed as a graduate account supervisor by the Commonwealth of Kentucky, Department of Veteran Affairs, between August 16, 2001, and her last day of paid employment on November 5, 2011. On February 24, 2012, she filed a claim for disability retirement alleging that the effects of major depression and post-traumatic stress disorder disabled her from returning to work. Ms. Jett also alleged that she suffered other maladies which are not at issue in this appeal. After the Systems' medical examiners denied her claim for benefits, Ms. Jett appealed. An administrative hearing was conducted at which she was the only person to testify. Ms. Jett stated at the hearing that her major stressors centered upon her boyfriend's gambling, bad behavior, and that he had dated her immediate supervisor. She stated that a confrontation with that supervisor in June of 2011 led to her taking a leave of absence and the eventual filing of this disability claim. The hearing officer found that Ms. Jett did not request reasonable accommodations which might have enabled her to return to work.

Concluding that the pivotal issue was that of permanency, the hearing officer found that although Ms. Jett's mental health conditions were disabling, she had failed to prove that those conditions had rendered her permanently disabled

because she had failed to comply with treatment recommendations by not taking prescribed antidepressants; failed to regularly attend counseling sessions; and failed to cut off contact with people who were exacerbating her condition. The hearing officer ultimately denied Ms. Jett's claim stating that he could not find that her mental health conditions permanently prevented her from performing her job or one with like duties:

The medical records indicate that Claimant could most likely return to a job of like duties if she took anti-depressants and other related medications on a regular basis, if she had counseling on a regular basis, and if she did not have contact with the people who were most closely associated with her nervous breakdown in June 2011, and if she had a different supervisor. Since Claimant did not properly comply with the treatment recommendations of her mental health providers, it is not possible for the Hearing Officer to make a finding that she is permanently disabled by reason of her mental health conditions.

Thereafter, the Systems' Board of Trustees entered a final order adopting the hearing officer's recommended order which denied Ms. Jett's application for standard disability retirement benefits.

The Franklin Circuit Court subsequently affirmed the Board's denial of benefits, agreeing that Ms. Jett's mental health conditions could not be construed to constitute a permanent disability, and stating: "it is not enough for the Petitioner to be diagnosed with a condition in order to receive disability benefits;

she must also do the hard work of treatment as prescribed by her treating physicians in order to be eligible.” This appeal followed.

In our prior opinion, we reversed and remanded the decision of the circuit court based upon our conclusion that Ms. Jett must be awarded disability benefits:

KRS^[1] 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.

Reviewing the matter on the clearly erroneous standard for administrative proceedings factual findings set forth in *Stallings v. City of Madisonville*, 707 S.W.2d 349 (Ky. App. 1986), this Court held “that the decision of the Board was not based on substantial evidence and ran contrary to statute.”

The Supreme Court of Kentucky granted the Systems’ motion for discretionary review and, as previously noted, remanded this appeal for further consideration in light of its opinions in *Bradley v. Kentucky Retirement Systems*, *supra*, and *Kentucky Retirement Systems v. Ashcraft*, *supra*. Each of these cases centers on the process of judicial review of decisions of the Kentucky Retirement Systems. In *Ashcraft*, the Supreme Court explicitly adopted the standard set out in

¹ Kentucky Revised Statutes.

McManus v. Kentucky Retirement Systems, 124 S.W.3d 454, 458 (Ky. App. 2003), stating that “the *McManus* standard captures how courts properly assess arbitrariness, capriciousness or abuse of discretion by the agency fact-finder in cases where the party with the burden of proof has lost.” 559 S.W.3d at 820. The Supreme Court further explained:

We reaffirm the wisdom and applicability of the *McManus* statement because it properly reflects the deference to be given to the fact-finder. *See* KRS 13B.150(2) (“The court *shall not* substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.” (emphasis supplied)). Realistically, there are cases where the record can fairly be read as containing substantial evidence in favor of both sides. However, Kentucky law is clear that the fact-finding agency is charged with making the “call” in those difficult cases and outlining the grounds for the result reached. Simply put, the agency is the decider on issues of fact. **Thus, under the *McManus* standard, a court cannot substitute its judgment on those contested issues of fact but if the appealing party has not met his burden of proof with the fact-finder, the court can properly, indeed must, consider whether that party’s proof was so compelling that no reasonable person could have failed to be persuaded.** If this high standard is met, so is KRS 13B.150(2)(d) which allows for reversal when a final order is “[a]rbitrary, capricious, or characterized by an abuse of discretion.”

Id. at 819-20 (emphasis added).

The original decision of this Court did not analyze the case in this manner. Applying the two-prong *McManus* standard to the facts of Ms. Jett’s case, we reach a conclusion at odds with our previous decision. Under the *McManus*

standard, we must defer to the Board's conclusion if substantial evidence supports the Board's finding that she had failed to prove her conditions were permanent. Under KRS 61.600(5)(a)(1), "[a]n 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." (Emphases added.) Although her symptoms may have lasted for twelve months, it was undisputed that Ms. Jett did not attend counseling sessions or take her medicine as directed, she did not end the relationship which she admitted was the primary stressor in her life, nor did she request any accommodations to alleviate her problems at work. Like the Board and the circuit court, we are convinced that any determination as to whether Ms. Jett is permanently incapacitated must consider whether she was taking reasonable steps to recover from her condition or alleviate her problems at her work. There was substantial evidence to support the findings that this condition could not have been expected to last twelve (12) months.

As to the second prong of the *McManus* inquiry, the evidence Ms. Jett produced cannot be construed to be compelling because there was no dispute as to her failure to follow the recommendations of her treating physicians. "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, 124 S.W.3d at 458. The appellant’s evidence was not so compelling that her condition was permanent.

KRS 61.600(5)(a)(2) provides that “[t]he determination of a permanent incapacity **shall be based** on the medical evidence contained in the member’s file and the member’s residual functional capacity and physical exertion requirements.” (Emphasis added.) Construing these subsections together, we are persuaded that the determination as to permanency is one of fact resolved by an examination of the medical evidence of record and considering the claimant’s functional capacity and physical exertion requirements. In our view, “permanent incapacity” is a status attained on the basis of these factual determinations. We are convinced that implicit in the determination of permanency is whether the claimants take reasonable steps to recover their capacity to work as is consistent with the statutory language “can be expected to last for a continuous period of not less than twelve (12) months[.]” KRS 61.600(5)(a)(1). Failure to follow a treatment plan or request work accommodations are facts the hearing officer could consider in arriving at a decision.

The concept that a plaintiff or claimant must take reasonable steps to recover normally functioning capacity is a consistent thread running across virtually all areas of the law. In the area of civil law, that concept requires a

plaintiff to take reasonable steps to mitigate his or her damages. In the context of workers' compensation law, the concept has been codified in KRS 342.035(3) which provides, in pertinent part, that no compensation shall be payable "for the death or disability of an employee if his or her death is caused, or if and insofar as his disability is aggravated, caused, or *continued*, by an unreasonable failure to submit to or follow any competent surgical treatment or medical aid or advice." (Emphasis added.) Although no comparable provision is explicitly set out in KRS 61.600, we nevertheless deem the concept of using one's best efforts to recover has a direct bearing upon KRS 61.600(5)(a)'s definition of "permanent incapacity" as one that "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." (Emphasis added.) Our review of the record in this case convinces us that from the medical evidence it could be concluded that had Ms. Jett complied with the advice of her treating physicians, her disability would not have been expected to continue for twelve continuous months.

Finally, in this regard, we turn to *Bradley, supra*, as to whether the duration of an incapacity for a period of twelve consecutive months satisfies the statutory definition of permanency. Reiterating its adherence to the *McManus* standard, the Supreme Court emphasized the high standard that must be met before

evidence can be construed to be compelling. The Court also instructed that KRS 61.600 does not limit medical evidence of incapacity to that garnered within the twelve-month window, rejecting the Bradley’s contention that “functional abilities or occupational capacity at any time after the disability period are immaterial and irrelevant to the determination of her permanent incapacity under the statute.” 567 S.W.3d at 125. The Supreme Court explained that:

KRS 61.665(3)(d) requires the Board to consider the record as a whole, and thus all credible evidence of record relevant to the issue of permanent disability is properly considered by the Board. Any artificial limitation to evidence from the twelve-month period immediately following the last day of the applicant’s employment is not supported by the statute and therefore unjustified.

Id. at 126. Viewing the totality of the evidence in this light, we are persuaded that Ms. Jett’s evidence did not rise to the level of requiring a decision in her favor.

In sum, having reconsidered this appeal in light of the holdings in *Ashcraft* and *Bradley*, the Board’s decision as to the permanency of Ms. Jett’s incapacity was supported by substantial evidence and that the evidence upon which she predicated her claim was not so overwhelming as to have compelled a result in her favor. Hence, the decision of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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