COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CIVIL DIVISION

Selina Perryman,	:	
Appellant,	:	CASE NO. 12CVF11-14505
-vs-	:	**JUDGE DAVID W. FAIS**
Ohio Department of Administrative Services,	:	
Appellee.	:	

DECISION AND ENTRY ON MERITS OF APPEAL

FAIS, JUDGE

I. INTRODUCTION

The above-styled case is before the Court on an appeal under R.C. 119.12 from an Order of the Ohio Department of Administrative Services (hereinafter "the Department").

Appellant Selina Perryman (hereinafter "Appellant") has brought this appeal under the provisions of R.C. 119.12 from an Adjudication Order by the Department dated November 8, 2012. That Order adopted the Report and Recommendation of its Hearing Officer, and denied disability benefits to Appellant for the period from September 9, 2010 to December 27, 2011, as well the period subsequent to December 27, 2011.

II. FACTUAL AND PROCEDURAL BACKGROUND

Appellant Selina Perryman (hereinafter "Appellant") was employed as an Account Examiner 2 with the Ohio Rehabilitation Services Commission. She was a member of the OSCEA Collective Bargaining Unit #09. Appellant's last day of work was June 30, 2010, and she did not return to the Ohio Rehabilitation Services Commission after that time. (Tr. 10).

Appellant filed an initial disability application for a mental health condition, which was approved. Benefits were granted for the period of July 14, 2010 through September 8, 2010.

Subsequently, benefits were terminated based upon notification from the Ohio Rehabilitation Services Commission regarding Appellant's work-related surgery, which resulted in temporary total disability benefits being awarded from the Ohio Bureau of Workers' Compensation (hereinafter "BWC"). (Tr. 10). By law, Appellant was precluded from receiving disability benefits while receiving lost time wages from the BWC. See O.A.C. 123:1-33-03(A)(1).

Next, Appellant submitted additional applications for disability leave benefits on December 20, 2011 and January 9, 2012. (Tr. 11). The Department denied further disability benefits to Appellant. The basis for denial was: (1) the receipt of workers' compensation lost time wages precludes disability leave benefits ; and (2) Appellant had been engaging in an occupation for wage or profit during the relevant period that she failed to disclose. Specifically, the claim was denied after finding that Appellant engaged in fraud and misrepresentation concerning wages and profits earned from business websites named Goundbre8kers Forward and Coffee Millionaires. *Id*.

Appellant appealed the denial, and requested a hearing. On August 22, 2012, an administrative hearing took place before a hearing officer for the Department. Appellant and her counsel participated at the hearing by phone and presented testimony. A Benefit Management Representative appeared on behalf of the Department.

The hearing officer issued a September 27, 2012 Report and Recommendation, which concluded that Appellant's claim for disability benefits should be denied. On November 8, 2012, the Director of the Department issued an Adjudication Order. The Order provided that after the consideration of the Report, the Director adopts the Report and orders that Appellant's claim for disability benefits be denied. Appellant responded by filing the instant appeal. The record of proceedings has been submitted and briefs have been timely submitted by the parties.

III. STANDARD OF REVIEW

Pursuant to R.C. 119.12, a reviewing trial court must affirm an order of the Department if it is supported by reliable, probative and substantial evidence and is in accordance with law. *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St. 2d 108, 111; *Henry's Cafe, Inc. v. Board of Liquor Control* (1959), 170 Ohio St. 233.

That quality of proof was articulated by the Ohio Supreme Court in *Our Place v. Liquor Control Comm*. (1992), 63 Ohio St. 3d 570 as follows:

> (1) "Reliable" evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true. (2) "Probative" evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue. (3) "Substantial" evidence is evidence with some weight; it must have importance and value. *Id*. at 571.

The common pleas court's review of the administrative record is neither a trial de novo nor an appeal on questions of law only, but consists of "a hybrid review in which the court must appraise all the evidence as to the credibility of the witnesses, the probative character of the evidence and the weight thereof." *Marciano v. Liquor Control Comm.* (Apr. 22, 2003), Franklin App. No. 02AP-943, unreported, citing *Lies v. Veterinary Med. Bd.* (1981), 2 Ohio App.3d 204, 207. In undertaking such a review, the court must give due deference to the administrative agency's resolution of evidentiary conflicts, but the findings of the agency are not conclusive. *Id*.

IV. ANALYSIS AND FINDINGS OF THE COURT

In her brief, Appellant insists that the Department erred by determining that she was engaged in an occupation for wage or profit, and such a conclusion is not supported by reliable, probative and substantial evidence. As a preliminary matter, Appellant does not dispute that she is not entitled to disability leave benefits for the period she collected BWC benefits. It is

submitted that the issue that is the subject of this appeal centers solely around her right to benefits after December 27, 2011.

Appellant maintains that there is no evidence whatsoever in the record that she earned any wages or profits selling products on the internet, or anywhere else during the subject period. Relying on the testimony of the Department's representative at the hearing, Ms. Thomas, Appellant states that Appellee's own witness admits that there is no evidence of any earnings from any of the cited sources, being Goundbre8kers Forward, Coffee Millionaires or Mary Kay Cosmetics. Moreover, Appellant directs the Court to the concession by Ms. Thomas that she made no additional inquires to supplement or dispute this finding of no wages or income, and that only Appellant has affirmatively produced records verifying no income was received in response to the Department's request.

With respect to Coffee Millionaires, Appellant relies on her hearing testimony that she bought this company's products only for personal use, as it contains healing properties that she hoped would give relief from migraine headaches. This required "joining" in order to buy at a reduced price. Appellant claims that the evidence she introduced shows she made three purchases from the company over a few months that total $291.95. According to Appellant, there is no evidence that she ever resold any of these items or how much product she received. Appellant equally cites to records from the company to corroborate that no commissions were ever paid. As to comments contained on the Coffee Millionaires web page, Appellant emphasizes that she did not create these statements and nothing suggests that a reader can buy products from her.

Moving to Groundbre8kers Forward, Appellant asserts that all the evidence demonstrates that this is a registered not-for-profit corporation, and her activities consisted strictly of volunteer work. Appellant relies upon her testimony and the supporting evidence that she never charged anyone for the work she performed under the auspices of Goundbre8kers Forward. It is her contention that even Ms. Thomas admitted there was no evidence that Appellant made money from Goundbre8kers Forward, or that the entity itself made any money. Thirdly, Appellant submits that purchases of Mary Kay Cosmetics were also only for her own use, and any involvement as a "consultant" was only to buy at discount prices. Taken together, Appellant submits that this evidence fails to rise to the level of probative or substantial, and the case should be remanded to the Department to calculate the period of disability leave benefits remaining owed. Lastly, Appellant seeks for an award of attorney's fees as the prevailing party.

In response, Appellee insists that the Order of the Department is supported by reliable, probative, and substantial evidence. Appellee asserts that the evidence is the record constitutes the requisite "some evidence" for the Department to rely upon, as it establishes that Appellant failed to disclose that she is the owner of a company named Goundbre8kers Forward and pursued a financial business opportunity for Coffee Millionaire.com. It is argued that Ms. Thomas adequately identified information from the Internet concerning Appellant's business ventures and showed that she was deceitful in failing to disclose outside business ventures. According to the Department, the activity with Coffee Millionaire meets the definition of E-commerce, as Appellant's webpage solicits a sale.

It is next argued that as the finder of fact, the hearing officer was entitled to access the credibility and weight to assign to a witness' testimony. Appellee indicates that the Report

generated specifically confirms that Appellant was not credible in testifying that the products were for personal use, or that this was not a form of employment. Regarding the request for attorney's fees, the Department claims that this should be disregarded by the Court as it is not contemplated under an R.C. 119 review.

It is from these arguments that the Court reviews the instant appeal by Appellant. As a gateway matter, it should also be noted that the Court will not devote any discussion to the Department's decision to deny Appellant benefits for the period from September 9, 2010 to December 27, 2011, as it has been stipulated that this disposition was proper pursuant to O.A.C. §123:1-33-03(A)(1).

Ohio Administrative Code (hereinafter "O.A.C.") §123:1-33-11(A) provides the following in pertinent part:

> 123:1-33-11. Notice of disqualification from receipt of disability leave benefits.
> (A) An employee's benefits will be terminated if the employee:
>
> (2) Engages in any occupation for wage or profit except as provided in rule 123:1-33-07 of the Administrative Code;
>
> (3) Engages in any act of fraud or misrepresentation involving the disability claim; [***]

The Court has reviewed the record in this matter. The basis of the Department's Order, which adopted the hearing officer's Report and Recommendation, was the finding that Appellant failed to disclose that she began working in an occupation for wage or profit with Coffee Millionaire, with the purchase of her membership kit on September 17, 2011. The supporting Findings of Fact state the following in relevant part:

> 7. DAS presented credible evidence that Ms. Perryman sold coffee through an online organization known as "Coffee Millionaire." Although Ms. Perryman claimed that she only purchased products

for her own use and did not resell them, as the trier of fact, I did not find that evidence credible. The file contains documentation showing that Ms. Perryman purchased a membership kit on September 17, 2011 for $49.95. This was followed by two orders for fairly large amounts of coffee products. One order totaled $166.50 and another order totaled $112.50. [***]. Ms. Perryman's explanation that she bought all this coffee for her own use because it contained the reishi mushroom which has healing properties for her health conditions was not credible. This is especially true in light of the printout showing Ms. Perryman's picture and her statement "I am a public service worker who has a passion for helping others. When the opportunity presented itself for me to share health and wealth, I just had to jump in. [***] I enjoy all the products and have personal testimonies about changes in my health and income." [***] Although Ms. Perryman claimed that the company writes such a listing for everyone who purchases its products, she must have provided her photograph and the information about her role as a "public service worker", since its information that would not apply to every purchaser. Although Ms. Perryman argues that the State cannot prove that she made any money from that venture, I find that the State has made a prima facie case that she had a form of employment during this time. It does not have the burden to prove that how much income, if any, she actually made from that activity.

8. Ms. Perryman may have had other forms of employment during this time, as well. The State presented evidence that she is listed as a Mary Kay Cosmetics Beauty Consultant, and that she is listed as the principal in a corporation, Groundbre8kers Forward. Although this entity is chartered as a not-for-profit corporation with the Ohio Secretary of State's Office, non-profit corporations do sometimes have a net profit in any given year, and the State presented a printout of an online ad stating that Ms. Perryman worked at Groundbre8kers Forward, which had a staff of 2, and an annual revenue of $75,000.00. [***]

9. [***] Ms. Perryman answered "no" on her application for disability leave benefits when she was asked if she had engaged in any occupation for work or profit since the outset of her disability. Because of the evidence that she had other forms of employment at least since September 17, 2011, I find that she made a misrepresentation on her application.

After a thorough review, the Court finds that the record simply fails to contain a sufficient basis or factual predicate to support a finding of disqualification.

Although there is a dearth of authority interpreting O.A.C. §123:1-33-11(A)(2), the Tenth District Court of Appeals has provided some guidance in clarifying the controlling burden of proof and production, as well as the definition assigned to the included term "occupation." *Burroughs v. Ohio Dep't of Admin. Servs*., 2013-Ohio-3261 (Ohio Ct. App., Franklin County July 25, 2013). In *Burroughs*, the Court of Appeals stated the following:

> The usual and customary usage of the term occupation "relates to the habitual or regular occupation that the party was engaged in with a view to winning a livelihood or some gain." *Zurcher v. Jones*, 9th Dist. No. 99CA0055, 2000 Ohio App. LEXIS 5535 (Nov. 29, 2000), quoting *Dewey v. Niagara Fire Ins. Co*., 16 Ohio Misc. 297, 242 N.E.2d 692 (C.P.1968), quoting *Marsh v. Groner*, 258 Pa. 473, 102 A. 127 (1917). The common dictionary definition of "occupation" is "ones usual or principal work or business, esp. as a means of earning a living." *See, e.g., Webster's Encyclopedic Dictionary of the English Language* (Rev.Ed.1996); *Random House Dictionary of the English Language* (2d Ed.1983). In the rule at issue, the adjective "any" amplifies the noun "occupation." Therefore, it is reasonable to interpret "occupation" as broadly as the terms "work" or "employment."
>
> In this context, there can be little doubt that paid employment as a college level instructor is an occupation. [***] The language of the rule places no quantitative limitations on the phrase "engages in any occupation for wage or profit." Consequently, the director's position that the rule prohibits engaging in part-time and/or intermittent employment is reasonable.

Id. at ¶¶35-36.

Upon review, this Court finds that it was effectively shown in the record that Appellant did not seek to be engaged with a view to winning a livelihood or some gain from the sale of coffee, nor did she attempt to make it her usual or principal work or business.

While the Court aims to defer to the Department's expertise in quantifying "some evidence" to support its conclusions, as well as interpreting its own disability rules, the Court is equally precluded from doing so when the relied-upon evidence is based almost entirely on hearsay and conjecture. This type of evidence fails to meet the recognized definition of evidence that is reliable and probative. *Our Place v. Liquor Control Comm*. (1992), 63 Ohio St. 3d 570; *Bartchy v. State Bd. of Educ*., 120 Ohio St. 3d 205 (Ohio 2008).

During her testimony at the evidentiary hearing, Benefit Management Representative Thomas testified that she discovered several business opportunity websites that Appellant was "trying to work for profit." (Tr. 13-14). However, the only witness for the Department admitted that none of the evidence she reviewed shows that any particular amount of money was earned, and she did not further inquire as to this possibility. (Tr. 30). When confronted directly with the records supplied by Appellant, and from the entities themselves, Ms. Thomas conceded that Appellant derived no income whatsoever from either Goundbre8kers Forward, Coffee Millionaires or Mary Kay Cosmetics. (Tr. 34, 41, & 42).

It is true that statements or documents that might constitute inadmissible hearsay where stringent rules of evidence are followed must be taken into account in administrative proceedings where relaxed rules of evidence are applied. *Simon v. Lake Geauga Printing Co.* (1982), 69 Ohio St.2d 41, 44; *Reynolds v. Ohio State Bd. of Examiners of Nursing Home Adm'rs,* 2003 Ohio 4958 (Ohio Ct. App., Franklin County 2003); *Black v. State Bd. of Psychology* (2005), 160 Ohio App. 3d 91, relying on *Haley v. Ohio State Dental Bd.* (1982), 7 Ohio App.3d 1, 6. Notwithstanding the permissible nature of this evidence, when viewing the hearsay evidence introduced by the Department in this matter, which consists of a number of internet page

printouts that were not authored by either Appellant or Ms. Thomas, there is an insufficient independent basis to simply say Appellant was not truthful when telephonically denying that she engaged in any occupation for wage or profit. If that alone was the standard, a slippery slope is created allowing for arbitrary rulings and potential abuse.

At the hearing, Appellant testified that she never made any money from the sale of OrganoGold coffee and never intended to do so. (Tr. 53). She added that the documents introduced by the Department reference seven ways that money can apparently be made if pursued as a business, and she made no efforts to engage any of them. (Tr. 54). In her goal to obtain relief with the advertised therapeutic benefits of the reishi mushroom contained in the coffee, Appellant indicated that the product actually worked, which explained her additional purchases for personal use. (Tr. 55). Lastly, it was offered that her only reason to become a representative or member was to obtain more affordable prices, rather than for product resale. (Tr. 57).

When there is probative evidence in conflict contained in the record, the Court is not in a superior position to alter the conclusions reached at the hearing and Commission level. *Tzangas, Plakas & Mannos v. Ohio Bur. of Emp. Ser.* (1995), 73 Ohio St.3d 694, 696. In this instance, while extending deference to resolve evidentiary conflicts, this Court presently is obligated to conclude that the information regarding Appellant's so-called occupation business opportunities is not sufficiently conflicting. See *Diso v. DOC*, 2012-Ohio-4672, ¶26 (Ohio Ct. App., Delaware County 2012). What the record reveals is an unverified inference that the Department seeks to make regarding CoffeeMillionaire that is predicated entirely hearsay evidence, along with a lack of foundation concerning the internet documents referenced by the Department's sole witness.

Even if these documents are to be believed for the truth of the matters asserted and contained therein, they read more like an endorsement of the product, rather than an explicit solicitation that a reader can buy products from Appellant.

The Court is further mindful that when viewing documents obtained only by way of internet browsing, information that involves social networking, blogging, solicitation and online feedback can often intersect; and therefore, must be viewed on a case-by-case basis. However, a principle form of evidence pertinent to this inquiry should always consist of any associated records of sales, transactions and commissions attributed to any alleged e-commerce. Here, Appellant has offered uncontroverted and conclusory testimony attesting that she made no money whatsoever from sales of OrganoGold, and it was solely for personal therapeutic use. The records sought by the Department itself corroborates this testimony. *Record*, 192-193. To merely conclude that Appellant is not credible, without any competing or affirmative evidence to the contrary, fails to address the lack of probative and reliable evidence needed to find that she intentionally made misrepresentations on her disability application.

At its essence, the disposition of this appeal centers around the obligations associated with the burden of proof. As reinforced by the Tenth District in *Burroughs*, the burden of proof never leaves the Department. *Id. supra*, at ¶20. However, the hearing officer here clearly found that after viewing these unverified internet postings, the burden of production duly shifted to Appellant. As reminded by the Court of Appeals, this shift in the burden of production is only permissible once the party assigned the burden is able to "come forward with evidence to support a particular proposition." *Id*.

In reviewing the evidence in this case, the Court disagrees with the hearing officer's assessment and finds that it was not appropriate to shift the burden of production under these facts. The necessary preliminary inference made by the Department is not reliably demonstrated by the evidence, and Appellant's testimony to the contrary was not effectively impeached or contradicted. In the alternative, and if a reviewing court finds otherwise, Appellant adequately responded at the hearing and the Department's case file by providing rebuttal evidence to defeat any so-called prima facie evidence of misrepresentation.

In another related appellate case, questions arose over whether a disability applicant was working for pay at a family restaurant while receiving benefits. *Settlemire v. Ohio Dep't of Admin. Servs*., 2000 Ohio App. LEXIS 5016, at 10 (Ohio Ct. App., Franklin County Oct. 31, 2000). Given the uncertainly of precisely how much was earned through this employment opportunity or whether it was for rehabilitation purposes, the Court of Appeals ultimately remanded the matter for a determination of the amount of money the appellant actually earned at the restaurant, as it was not sufficient to simply raise an inference of employment. Accordingly, the determination by the trial court that a violation of the law was held to be premature. In the matter at bar, such a remand is unnecessary and inconsistent with the adduced facts, as the administrative record is unchallenged that no earnings accrued to Appellant from the sale of coffee.

Based on the foregoing, the Court determines that the Department did not sufficiently justify its conclusion that a prima facie case of misrepresentation was established that Appellant had a form of employment during this time through sales/solicitation of OrganoGold.

Finally, the Court does not intend to provide much discussion as to the other two purported occupations, being Goundbre8kers Forward and Mary Kay Cosmetics. The hearing officer herself conceded that these only "may" have taken place. Such a finding falls short of a preponderance of the evidence or the required standard of proof to constitute probative evidence, and is better characterized as mere speculation. There is ample support in the record that Groundbre8kers Forward is a registered not-for-profit corporation, and Appellant's activities consisted strictly of volunteer work. Once again, there is no affirmative evidence to suggest she ever charged anyone for the work she performed for Goundbre8kers Forward. Similarly, Appellant testified that all purchases of Mary Kay Cosmetics were for her own use, and any involvement as a "consultant" was only to buy at discount prices. Furthermore, in the hearing officer's Report and Recommendation, which was adopted nearly verbatim via the Department's Adjudication Order, it is clear that the import of these other two activities do not contribute to the conclusion that Appellant made misrepresentations in her application. See *Conclusions of Law*, ¶¶ 3-4.

As a separate matter, the Department is correct that Appellant's accompanying request for attorney's fees falls outside of the province of this Court's review of the present appeal, pursuant to R.C. 119.12. See *Carruthers v. O'Connor*, 121 Ohio App. 3d 39 (Ohio Ct. App., Franklin County 1997).

After a thorough review, this Court finds that the assigned error by Appellant is well-taken, and the Order of the Department is not supported by reliable, probative and substantial evidence, and is not in accordance with applicable law. Therefore, the Department's November

8, 2012 Order is hereby **REVERSED**. The matter is further **REMANDED** to the Department, with instructions to calculate the remaining disability benefits owed to Appellant.

Rule 58(B) of the Ohio Rules of Civil Procedure provides the following:

> **(B) Notice of filing.** When the court signs a judgment, the court shall endorse thereon a direction to the clerk to serve upon all parties not in default for failure to appear notice of the judgment and its date of entry upon the journal. Within three days of entering the judgment on the journal, the clerk shall serve the parties in a manner prescribed by Civ. R. 5(B) and note the service in the appearance docket. Upon serving the notice and notation of the service in the appearance docket, the service is complete. The failure of the clerk to serve notice does not affect the validity of the judgment or the running of the time for appeal except as provided in App. R. 4(A).

The Court finds that there is no just reason for delay. This is a final appealable order.

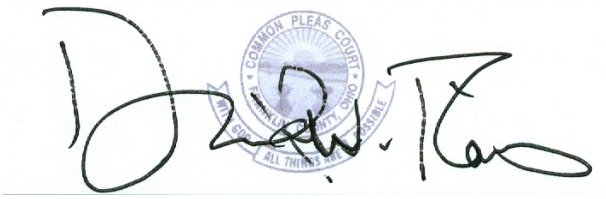
The Clerk is instructed to serve the parties in accordance with Civ. R. 58(B) as set forth above.

COPIES TO:
Catherine H. Killam, Esq., Counsel for Appellant
Summer A. Moses, Esq., Counsel for Appellee

Franklin County Court of Common Pleas

Date:	07-16-2014
Case Title:	SELINA PERRYMAN -VS- OHIO STATE DEPARTMENT ADMINISTRATIVE SER
Case Number:	12CV014505
Type:	DECISION/ENTRY

It Is So Ordered.



/s/ Judge David W. Fais

Court Disposition

Case Number: 12CV014505

Case Style: SELINA PERRYMAN -VS- OHIO STATE DEPARTMENT ADMINISTRATIVE SER

Case Terminated: 18 - Other Terminations

Final Appealable Order: Yes