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SUPREME COURT

COMMONWEALTH OF KENTUCKY
SUPREME COURT
No. 2007-SC-000509-D

BOARD OF TRUSTEES OF THE
KENTUCKY RETIREMENT SYSTEMS APPELLANT

v.

On Appeal from
Court of Appeals Case No. 2006-CA-000941
Franklin Circuit Court Civil Action No. 05-CI-01140

SANDRA BOWENS APPELLEE

BRIEF FOR APPELLANT
KENTUCKY RETIREMENT SYSTEMS

Submitted by:
KENTUCKY RETIREMENT SYSTEMS

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CERTIFICATE REQUIRED BY CR 76.12(6)

The undersigned does hereby certify that copies of this brief were served upon the following named individuals by U. S. Mail, First Class on February 11, 2008: Hon. Judge Roger Crittenden c/o Hon. Judge Phillip Shepherd, Franklin Circuit Court, P.O. Box 678, Frankfort, Kentucky, 40602; Samuel P. Givens, Jr., Esq., Clerk of the Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; Hon. Michael S. Endicott, 225 Court Street, P. O. Box 181, Paintsville, Kentucky 41240. The undersigned does also certify that the Record on Appeal was not removed from the Clerk of the Franklin Circuit Court or the Clerk of the Court of Appeals.

Jennifer A. Jones
Counsel for Appellant

INTRODUCTION

This is an appeal of a judicial review of a final administrative decision regarding Appellee's eligibility for enhanced disability retirement benefits. The Court of Appeals reversed the decision of Franklin Circuit Court, which had affirmed the final administrative decision by Appellant.

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Exhibit 2- Franklin Circuit Court Opinion and Order entered April 5, 2006

4. Claimant alleges disability on the basis of arthritis, breast cancer and injury to her neck and back causing pain and restriction in her ability to lift.

5. The preponderance of the objective medical evidence contained of record indicates the Claimant is not disabled by any pulmonary problems. The tests closest in time to the Claimant's last day of paid employment revealed normal LV systolic function, mild concentric LVH, decreased compliance, and small pericardial effusion. A chest x-ray of May 4, 2004 was interpreted as showing no convincing evidence of acute cardiopulmonary pathology.

6. The preponderance of the objective medical evidence contained of record indicates the Claimant is not disabled by any orthopedic problems. Although MRI findings showed a meniscus tear in the Claimant's right knee, as of December 2002, Dr. Jenkinson found full range of motion with no swelling or deformity. A total body scan of April 29, 2004 showed no evidence of skeletal metastases and was noted to be unremarkable.

Claimant attended physical therapy for her neck and shoulder following chemotherapy in March 2003. She was released after seven sessions with increased range of motion.

Dr. Jain's office record of February 19, 2004 indicates possible carpal tunnel, unsteadiness, reduced memory, asthma and abnormal right mammogram. He completed a functional capacity evaluation indicating the Claimant can lift/carry 5 pounds or less, can stand/walk for a total of 4 hours per day and can sit for no more than 4 hours per day. Dr. Jain noted the Claimant could never climb, stoop, crouch or kneel. The reasons given were breast cancer, ataxia and carpal tunnel.

There is no evidence that the Claimant suffers from carpal tunnel syndrome and the most recent reports submitted reflect the Claimant no longer has breast cancer. The Claimant has reported memory loss and unsteadiness, but no objective testing has been submitted to confirm the presence of either condition or to what extent the Claimant is impaired by the conditions.

> 7. The records confirm the Claimant was diagnosed with breast cancer and subsequently underwent treatment. It is understandable that the Claimant may require a period to recover from the side effects of treatment, but in this case, the Claimant continued to work in her sedentary position even during treatment.
>
> Claimant finished her treatment in August 2003 and was able to continue working through May 4, 2004. There does not appear to be a specific incident that caused the Claimant to stop working on that day. Claimant's physicians have indicated she is unable to perform her job duties but have not submitted objective evidence to support their conclusory statements.
>
> Even considering the statement from Claimant's employer that she would be required to travel, the objective evidence does not reflect that the Claimant would be prohibited from traveling.

(A. R., pp. 412-415).

The Hearing Officer concluded, after a thorough and careful review of the entire administrative record, that Appellee's application for benefits should be denied. (A. R., at 415). The DAC also thoroughly considered the entire administrative record, including Appellee's exceptions to the Hearing Officer's Report and Recommended Order, and adopted the Hearing Officer's Report and Recommended Order as its final administrative decision. (A. R., p. 423).

Appellee applied for disability retirement benefits by application dated March 21, 2003. (A. R., p. 5). Appellee was previously employed as Senior Support Services for the Johnson County Health Department.

(A. R., Exhibits 3 and 4). Appellee's membership date in the Kentucky Employees Retirement System (KERS) is July 3, 1995. Appellee was only 43 years old as of her last day of paid employment on May 26, 2004. Appellee accumulated 104 months (8 years, 8 months) of service credit as of February 2004. Appellee alleged disability due to a number of conditions including breast cancer, a neck and back injury, shoulder pain, headaches, arthritis, and upper and lower back pain. (A. R., p. 4)

Appellee's job duties were correctly found to be sedentary to light duty. (A. R., p. 412). Appellee completed a Form 8035, Employee's Job Description, dated March 21, 2003, on which she indicated that she only had to lift up to 10 pounds on a seldom/rare basis and never had to lift up to 20, 50, 100, or over 100 pounds. (A. R., p. 14). Appellee also indicated that she had to handle/finger/feel, reach/push/pull, and bend/stoop/crouch repetitively (2/3 or more of the work day) but she only had to kneel/crawl and climb/balance occasionally (up to 1/3 or more of the work day). (A. R., p. 14).

Appellee was responsible for data entry, the mail log, filing medical records, taking documents to doctors' offices and pick up orders from doctors, lifting billing charts. (A. R., p. 14). Appellee indicated that she sat 50% of her workday and stood/walked 50% of her workday and that she had the ability to alternate between sitting and standing/walking. (A. R., p. 14). Appellee indicated that she had asked co-workers to help

her, but also indicated that "[she] cannot move forward on my job. The (sic) give office billing to a new girl not me." (A. R., p. 15). When asked about this statement during the hearing, Appellee explained that a job had come open which would not require her to travel. Appellee asked for the job, but was told she could not have the job because the only reason she was in the office was because she got hurt in 1997 and she could not do the job. According to Appellee, a new girl who knew nothing about the computers was brought in to take the new job. Appellee trained the new girl even though she had been told that she could not do the job and the new girl got a raise with the new job. Appellee testified that she would have felt more secure in her job if she had been given the job she requested. (A. R., Hearing CD-R, 2:16:14-02:18:30). Appellee testified throughout the hearing that her co-workers and employers were resentful of having to assist her with her job.

Appellee received a "meets requirements" on her evaluation dated March 11, 2003 and was recommended to receive an increment [pay raise]. (A. R., p. 16). Appellee also received many "meets requirements," some "exceeds requirements" and an "outstanding" on her performance elements. (A. R., p. 17).

Appellee's employer completed a Form 8030, Employer's Job Description, dated April 28, 2003, on which her employer indicated that she only had to lift up to 10 pounds on an occasional basis and never

had to lift up to 20, 50, 100, or over 100 pounds. (A. R., p. 6). Appellee's employer indicated that she sat 4 hours of a 7.5 hour workday and stood/walked 3.5 hours of a 7.5 hour workday and that she had the ability to alternate between sitting and standing/walking. (A. R., p. 6). Appellee's employer also indicated that she had to handle/finger/feel, and reach/push/pull occasionally (up to 1/3 or more of the work day), but she only had to bend/stoop/crouch seldom/rarely. (A. R., p 6). Appellee's employer indicated that she had to climb/balance on both an occasional and seldom/rare basis. (A. R., p. 6). Finally, Appellee's employer indicated that she never had to kneel/crawl. (A. R., p. 6). Appellee's employer indicated that Appellee was still working and that she had assistance available from co-workers who would "pull and carry heavy patient records and change out printers ect. (sic)." (A. R., p. 7). Appellee's employer also submitted a letter dated May 8, 2003 indicating that it had accommodated Appellee by not requiring her to go to doctor's offices for signed orders. (A. R., p. 13).

Both Appellee and her employer attached the official job description for her position to the completed forms. (A. R., pp. 8-12, 19-23). Fifty percent of Appellee's time was spent doing data entry. (A. R., pp. 9, 20). Appellee testified she was more knowledgeable on the OASIS database system than most other employees. Twenty five percent of Appellee's time was spent logging and tracking mail. This requirement

included driving to physicians' offices to obtain signatures needed for home health service billing requirements. (A. R., pp. 9, 20). Fifteen percent of the time Appellee spent answering the phone and performing general secretarial duties. (A. R., pp. 9, 20). Five percent of the time Appellee spent attending meetings and training. (A. R., pp. 9, 20). An additional five percent of her time is spent on other duties as assigned. (A. R., pp. 9, 20).

The essential physical demands were listed as standing 10% of the time, walking 30% of the time, and sitting 50% of the time. (A. R., pp. 11, 22). The other physical demands did not have a percentage of time indicated, but for climbing and balancing, it was listed that she had to climb stairs to medical records. For stooping, kneeling, crouching, crawling, reaching, and handling, it was listed that all those activities involved working with the medical records and record maintenance. (A. R., pp. 11, 22).

Appellee attached her application for worker's compensation benefits in regard to an automobile accident that occurred on July 11, 1997. (A. R., pp. 25-27). At that time Appellee was a Home Health Aide. (A. R., p. 27). Dr. T. Robert Love submitted a letter dated September 28, 1998, addressed to Appellee's attorney for the Worker's Compensation injury in which he indicated that Appellee had a 5% permanent impairment due to her neck injury and that she would have permanent

lifting restrictions, although he did not indicate what those lifting restrictions were. (A. R., p. 32). Dr. Love also indicated that Appellee had arthritis at C-4-C-7. (A. R., p. 32). An MRI of Appellee's cervical spine performed on January 9, 1998, indicated mild spinal stenosis at C4/5 through C6/7 without any cord compression. (A. R., p. 68).

An MRI of Appellee's right knee performed on April 8, 2002 was positive for a severe tear of the right medial meniscus. (A. R., p. 141). Office notes from Dr. David J. Jenkinson indicated that Appellee had intermittent pain in her right knee and had scheduled surgery, but it was cancelled due to some confusion regarding the surgical booking. (A. R., p. 271). On December 23, 2002, there was no swelling or deformity in the right knee and Appellee had full range of motion of the right knee. (A. R., p. 271). Appellee indicated that she wanted to proceed with the arthroscopy due to intermittent pain. (A. R., p. 271).

On January 22, 2003, Appellee was referred to Dr. Jain of the Cancer Clinic. (A. R., p. 36). Appellee had a sentinel node biopsy plus left partial mastectomy on February 7, 2003 which confirmed the diagnosis of infiltrating ductal adenocarcinoma of the left breast. (A. R., pp. 41-44). A Port-A-Cath was inserted on February 25, 2003, to assist with Appellee's chemotherapy. (A. R., pp. 59-60). Appellee had a total body bone scan on January 22, 2003, which found no evidence of metastatic disease. (A. R., p. 107). Appellee was referred to physical

therapy to improve her range of motion in her left upper extremity after her surgeries beginning on March 18, 2003. (A. R., pp. 129-131). Appellee also underwent chemotherapy and radiation. (A. R., pp. 236-260). Appellee testified that she continued to work, even during the time she received radiation and chemotherapy for breast cancer.

A lump was found in Appellee's right breast in early 2004, but the lump was only fibrocystic and negative for malignancy as noted by Dr Jain on March 25, 2004. (A. R., pp. 246-247, 300-301). Another total body bone scan performed on April 29, 2004 showed no evidence of skeletal metastases. (A. R., p. 289).

Another lump was found in Appellee's left breast in August 2004. (A. R., pp. 313-325). An MRI of Appellee's breasts was performed on October 16, 2004, and indicated no evidence to suggest breast neoplastic process and the findings were consistent with BIRADS code 3, which is likely benign in nature. (A. R., pp. 328-329). There is a preregistration document scheduling Appellee for a PET Scan on December 2, 2004, but there is no information in the administrative record regarding the results of the PET Scan or even if the PET Scan was actually performed. (A. R., p. 335).

Appellee had other testing around the time of her diagnosis of breast cancer. A chest x-ray performed on January 22, 2003 was normal. (A. R., p. 106). Appellee had a normal left ventricular ejection

fraction of 61% with normal global and regional wall motion on March 21, 2003. (A. R., p. 90). A chest x-ray performed on May 4, 2004 showed no convincing evidence of acute cardiopulmonary pathology. (A. R., p. 287). An echocardiogram performed on May 20, 2004 was essentially normal with small pericardial effusion. (A. R., p. 283). A chest x-ray performed on November 6, 2004, showed mild cardiomegaly with no acute process. (A. R., p. 338).

A pulmonary function test performed on November 7, 2003, indicated moderate restrictive lung disease. (A. R., pp. 169-170, 337). Appellee had some dysplasia on her cervix discovered on July 15, 2003. (A. R., pp. 154-155). Appellee's bone density was normal as shown on her bone density test performed on March 29, 2004. (A. R., pp. 231-233). An MRI of Appellee's brain performed on March 16, 2004 was negative. (A. R., p. 234).

Appellee submitted a standard form for listing restrictions completed by Dr. K. Jain on February 19, 2004. (A. R., pp. 188-189). Dr. Jain indicated that Appellee was restricted to lifting/carrying 5 pounds or less due to carcinoma of the breast and carpal tunnel syndrome. (A. R., p. 188). Dr. Jain further indicated that Appellee's standing/walking was limited to 4 hours of an 8 hour workday, 2 hours without interruption, due to ataxia. (A. R., p. 188). Dr. Jain limited Appellee's sitting to 4 hours of an 8 hour day, 1 hour without

interruption, due to carpal tunnel syndrome and ataxia. (A. R., p. 188). Dr. Jain also indicated that Appellee could never climb, stoop, crouch, or kneel and only occasionally balance or crawl. (A. R., p. 189). It should be noted that there are no records of any nerve conduction studies or other testing or treatment for carpal tunnel syndrome in the administrative record, so it is unclear what medical evidence Dr. Jain is basing the diagnosis of carpal tunnel syndrome on.

Finally, Dr. Jain indicated that Appellee's reaching, handling, feeling, pushing/pulling were affected, but it is unclear what limitation, if any, this would put on Appellee's physical activity. (A. R., p. 189). There were environmental restrictions listed also, but Appellee worked in an indoor office environment so those restrictions should not affect her ability to work. (A. R., p. 189).

There is no evidence of record of the testing used by Dr. Jain to determine Appellee's physical restrictions. The standing/walking/sitting limitations prescribed by Dr. Jain are well within the physical demands listed on Appellee's and her employer's descriptions of her job. (A. R., pp. 6, 14, and 188). Dr. Jain listed a lifting maximum of 5 pounds; however, both Appellee and her employer indicated that she only lifted up to 10 pounds, the lowest category of lifting available on the Forms 8030 and 8035, so it is not clear if the 5 pounds weight limit was within the lifting requirements of her job. (A. R., pp. 6, 14, and 188). Dr. Jain does not

provide the medical records for any of the conditions Dr. Jain lists as severe and disabling and Dr. Jain does not provide an adequate basis for her assessment of Appellee's limitations. (A. R., p. 188-189). It should be noted that Appellee was still working at the time of the assessment by Dr. Jain.

Dr. Sarah Belhasen completed an "Adult Medical Report for Social Security or SSI Disability Benefits" on behalf of Appellee dated December 10, 2003. (A. R., p. 190). Dr. Belhasen listed Appellee's various ailments, then noted that Appellee is unable to sit, stand, or walk for long periods, unable to walk upstairs, cannot lift more than 5-10 pounds, cannot ride in car for long periods, left ankle swells, unable to type, stays nervous and depressed and has trouble concentrating. (A. R., p. 190). Dr. Belhasen does not provide the medical records for many of the conditions she lists as severe and disabling and she does not provide an adequate basis for her assessment of Appellee's limitations. (A. R., p. 190). Although Dr. Belhasen indicated that Appellee could not type, a finding the Court of Appeals relied upon in its Opinion, Appellee was working and typing at the time of this assessment. (Appendix, Exhibit 1, p. 18). Dr. Belhasen provided no basis for her claim that Appellee could not type, nor did she attach any objective testing establishing any of the limitations she listed in her report.

Dr. Belhasen later sent a note dated January 28, 2005, on a prescription pad that indicated that Dr. Belhasen believed that Appellee was disabled due to her "multiple medical problems stemming from her breast cancer." (A. R., p. 341). Again, this mere statement was not supported by any accompanying objective medical evidence.

Appellee was asked at the hearing to describe her "worst complaint." She responded, "The worst complaint I have is not knowing where the cancer is now." (emphasis added.) (A. R., Hearing CD-R. 1:56:00-1:56:15). She described her chest and left arm as the worst locations for physical discomfort. (A. R., Hearing CD-R. 1:56:15-1:56:30).

As previously noted, the Hearing Officer considered all of the evidence of record and recommended that Appellee's application for enhanced disability retirement benefits be denied. (A. R., pp. 404-416). The DAC adopted the Hearing Officer's Report and Recommended Order as its final administrative decision denying Appellee's application for enhanced disability retirement benefits.

Appellee filed a petition for judicial review at Franklin Circuit Court. Franklin Circuit Court affirmed the final administrative decision of Appellant and found that Appellee's other arguments were without merit as will be discussed more thoroughly later in this brief. (Appendix, Exhibit 2).

Appellee then filed an appeal to the Court of Appeals, which affirmed in part and vacated and remanded in part the decision of Franklin Circuit Court as will also be discussed more thoroughly later in this brief. (Appendix, Exhibit 1). Appellant filed a Motion for Discretionary Review of the decision of the Court of Appeals with this Honorable Court, which was granted on December 12, 2007.

THE LAW

KRS 61.600 (2003) provides for disability retirement to members of KERS and reads in pertinent part as follows:

> (1) Any person may qualify to retire on disability, subject to the following conditions:
>
> * * *
>
> (2) Upon 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 shall be considered;
>
> (b) The incapacity is a result of bodily injury, mental illness, or disease. For the 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 preexisted membership in the system or reemployment, whichever is most recent.

All references in this Brief are to the version of KRS 61.600 in effect at the time of Appellee's application for enhanced disability retirement benefits.

ARGUMENT

I. THE COURT OF APPEALS ERRONEOUSLY FOUND THAT "THE HEARING OFFICER ERRED WHEN HE SO FRAGMENTIZED [APPELLEE'S] MULTIPLE AILMENTS AND THE MEDICAL OPINIONS CONCERNING THEM THAT HE FAILED TO PROPERLY EVALUATE THEIR COMBINED EFFECT UPON [APPELLEE]."

Appellee argued to both Franklin Circuit Court and the Court of Appeals that Appellant failed to consider the combined effect of all of Appellee's medical problems to determine disability. Franklin Circuit Court found in response to Appellee's argument:

> Ms. Bowens argues that it was error for the hearing officer to fail to consider the combined effect of her medical problems in making the disability determination. However, KRS 61.600 requires only a finding based on the examination of objective medical evidence. The hearing officer's findings of fact were based on a careful examination of all of the objective medical evidence presented. This is all that the statute requires.

(Appendix, Exhibit 2, p. 7).

Franklin Circuit Court agreed with the analysis of the cumulative evidence by the hearing officer as shown by Franklin Circuit Court's

careful review of all of the evidence in the administrative record, as shown in the quote below:

> Upon examining the record, evidence shows that Ms. Bowens' breast cancer is in remission. Her radiation and chemotherapy treatments were concluded by the fall of 2003. The record indicates that many of her symptoms resulting from these treatments, (coughing, difficulty swallowing, etc.) have improved. Additionally, the record indicates that Ms. Bowens continued to work even during the period when she was receiving radiation and chemotherapy treatments. (Footnote 1). The record also indicates that while Ms. Bowens has a right knee injury, the most recent examination showed no swelling or deformity in the knee, and a good range of motion. (A. R., p. 271). A letter from Dr. David Jenkinson states that Ms. Bowens does not believe that her knee symptoms are serious enough to justify surgery. (A. R., p. 273). He states that she has only intermittent pain in the knee. (A. R., p. 271). Ms. Bowens has tightness in her left arm and difficulty raising it. However, the record shows improvement after she attended physical therapy. (A. R., p. 128-131). Several other conditions are described in the record as 'mild' or not sufficiently severe as to be disabling. Dr. Jain places limitations on Ms. Bowens' physical abilities based on carpal tunnel syndrome, and ataxia, in addition to breast cancer. However, these diagnoses are not support in the record by test results regarding the extent of these conditions.
>
> Footnote 1. Ms. Bowens argues that she was only able to work during the period of receiving treatments because of informal accommodations (no driving and no heavy lifting) provided by her employer. She offers a letter from her employer dated July 13, 2004. The letter states that the accommodations granted Ms. Bowens are no longer in effect since she is no longer receiving chemotherapy and radiation treatments. Ms. Bowens argues that since the accommodations are no longer in effect, she would not be able to work. The hearing officer, after determining that Ms. Bowens' job duties were substantially the same both during and after treatment, concluded that the informal

> accommodations are still in effect, despite the employer letter. Ms. Bowens claims that it is 'clearly erroneous' and 'an abuse of discretion' for the hearing officer to reach this conclusion since the employer letter clearly states the accommodations are no longer in effect. Regardless of whether the informal accommodations are or are not in place, they were only given in response to Ms. Bowens' radiation and chemotherapy treatments. They were not granted to compensate other medical problems or conditions Ms. Bowens may be suffering from. Since Ms. Bowens is no longer undergoing chemotherapy and radiation treatment, she should be able to resume her position regardless of whether the accommodations are in place or not.

(Appendix, Exhibit 2, pp. 4-5).

The Court of Appeals erroneously found Appellant's findings regarding the combined effect of Appellee's ailments were arbitrary and capricious and that the circuit court had erred in determining that Appellee's argument was without merit. (Appendix, Exhibit 1, p. 19).

In the case at bar, the Hearing Officer carefully considered the evidence from Appellee's doctors regarding the combined effect of Appellee's conditions. For example, the Hearing Officer considered the statement of Dr. Sarah Belhasen, who wrote on a prescription pad a two sentence handwritten note dated January 1, 2005, stating: 1) Bowens has "multiple medical problems stemming from breast cancer and mastectomy" and 2) "In my opinion she continues to be disabled." (A. R., p. 341). Dr. Belhasen provided no analysis, rationale, or objective medical evidence whatsoever to support her opinion. 105 KAR 1:210

Section 4(5) requires that mere statements from physicians must be accompanied by objective medical evidence supporting the opinion; therefore, a physician cannot simply write a note saying a person is disabled, as happened in the case at bar. Dr. Belhasen cited no testing or objective evidence. She references the combined effect of Appellee's multiple ailments, a statement that was considered by the Hearing Officer, but there was no objective medical evidence in the administrative record to support a finding that Appellee is permanently functionally incapacitated. The Court of Appeals has erred by usurping the fact-finder's role of weighing the facts in order to favor physician statements of very little value, like the notepad statement of Dr. Belhasen.

Furthermore, there is a provision for residual functional capacity in KRS 61.600(4)(b), which provides for the consideration of the applicant's residual functional capacity from all the medical conditions; therefore, current law provides for "combined effect" assessment of medical conditions. There was no need for the Court of Appeals to look to cases interpreting statutes governing other administrative agencies.

In its efforts to expand the existing statutory language, the Court of Appeals relied upon cases interpreting Kentucky Workers' Compensation statutes and federal Social Security statutes. See *Ashland Exploration, Inc., v. Tackett*, 971 S.W.2d 832 (Ky. App. 1998) interpreting

KRS 342.730(1)(b); *Jenkins v. Gardner*, 430 F.2d 243 (6th Cir. 1970), citing *Dillon v. Celebrezze*, 345 F.2d 753 (4th Cir. 1965) interpreting 42 U.S.C.A. § § 416(i) and 423.

The Court of Appeals' reliance on the aforementioned cases is misplaced. It is well understood that statutes governing administrative agencies other than the administrative agency that is a party to the case and case law interpreting those statutes cannot be considered when conducting a judicial review of a final administrative decision. The Court of Appeals can only consider Appellant's enabling statutes and administrative regulations and case law interpreting Appellant's enabling statutes and administrative regulations. Administrative agencies are creatures of statute and they can only act to the extent that statutes have given them power. *500 Associates, Inc. v. Natural Resources and Environmental Protection Cabinet*, 204 S.W.3d 121, 132 (Ky. App. 2006); *Dept. of Natural Resources and Environmental Protection v. Stearns Coal and Lumber Co.*, 563 S.W.2d 471 (Ky. 1978); *Kerr v. Ky. State Bd. of Registration for Professional Engineers and Land Surveyors*, 797 S.W.2d 714 (Ky. App. 1990); *Curtis v. Belden Electronic Wire and Cable*, 760 S.W.2d 97 (Ky. App. 1988). It is improper for the Court of Appeals to apply case law interpreting the statutes governing the Department of Workers' Claims and federal Social Security statutes to a judicial review

of a final administrative decision by Appellant made in accordance with KRS 61.600.

Furthermore, *Ashland Exploration, Inc.*, a case cited by the Court of Appeals on this proposition, did not involve a question of the combined effects of the worker's conditions, but actually concerned the applicability of KRS 342.730(1)(b) to a situation where a worker attempted to return to work twice. The issue was the amount of the recovery due for the work injury. *Ashland Exploration, Inc., v. Tackett,* 971 S.W.2d 832 (Ky. App. 1998). Tackett had received an occupational disease impairment rating of 15% based on hearing loss and an 85% occupational disability due to work injuries sustained on February 21, 1995. *Id.* at 833. The Court found:

> We also believe that the statute [KRS 342.730(1)(b)] assumes that the worker is less than totally disabled-otherwise he could not continue in his prior job or his new position at his pre-injury, or greater, wage. The ALJ found Tackett totally, not partially, disabled. We see nothing in the amended statute which prevents the ALJ from considering the cumulative effect of a work-related injury and an occupation disease such that they may combine to render a claimant totally disabled.

Id. at 834.

Not only is it improper for the Court of Appeals to apply the *Ashland Exploration, Inc.* case to a decision made under KRS 61.600, but the findings of the case are not even analogous to the facts of the case at bar.

The Court of Appeals also cited the dissent in *Jenkins v. Gardner*, 430 F.2d 243 (6th Cir. 1970) for the legal principle that Appellant's hearing officer allegedly failed to consider the cumulative effect of Appellee's ailments. (Appendix, Exhibit 1, p. 18). The actual point of law relied upon by the Court in *Jenkins* is cited in the case of *Dillon v. Celebrezze*, 345 F.2d 753 (4th Cir. 1965). See *Jenkins* at 305. The Court in *Dillon* was interpreting 42 U.S.C.A. § § 416(i) and 423 and found:

> Viewing the record in this case as a whole, we do not think it contains substantial evidence to support the examiner's conclusion that the combination of Dillon's ailments had not reached such a stage of severity on March 31, 1960 that he was precluded from engaging in any substantial gainful activity.

Dilllon at 757.

The *Dillon* Court noted:

> The examiner's treatment of these reports [relying on the physicians who dealt primarily with Dillon's heart condition], however, reveals the error we think he committed in deciding this case. We note parenthetically that we have no quarrel with the law upon which the examiner relied; it was in his application of the proper legal standards to the facts of this particular case that we feel he erred. We think the examiner so fragmentized Dillon's several ailments and the medical opinions regarding each of them that he failed properly to evaluate their effect in combination upon this claimant. It was not even questioned that Dillon had lung and back conditions which would qualify as 'medically determinable physical or mental impairment(s),' and although there is some conflict in it, there is ample evidence in this record to support an assertion that the claimant's heart condition likewise was a medically determinable physical impairment. Furthermore, the question of whether a claimant is disabled,

> as that term is used in the Act, is an inquiry which must be directed to that particular individual not to a theoretical average man or even to an average claimant. (citation and footnote omitted).

Id. at 756-757.

Obviously, the finding in *Dillon* relied upon by the Court of Appeals is very fact-specific to that case and to the Social Security statutes

> as that term is used in the Act, is an inquiry which must be directed to that particular individual not to a theoretical average man or even to an average claimant. (citation and footnote omitted).

Id. at 756-757.

Obviously, the finding in *Dillon* relied upon by the Court of Appeals is very fact-specific to that case and to the Social Security statutes controlling the case. The examiner only focused on the reports regarding Dillon's heart condition and failed to consider the other medical information regarding Dillon's lungs and back, all of which were medically determinable physical or mental impairment(s) under the Social Security disability statutes.

The Hearing Officer carefully reviewed all of the objective medical evidence of record and determined that Appellee had no functional incapacity associated with <u>any</u> of the conditions she alleged to be disabling and correctly determined that Appellee was not entitled to benefits under KRS 61.600.

The Court of Appeals improperly applied statutes and case law of other administrative agencies to Appellant's final administrative decision rendered under KRS 61.600. The Court of Appeals also incorrectly substituted its judgment for the finder of fact on questions of fact and weight of the evidence. Because of these errors by the Court of Appeals,

this Honorable Court must reverse the decision of the Court of Appeals and affirm the decisions of Franklin Circuit Court and Appellant.

II. THE COURT OF APPEALS ERRED BY FINDING THAT THE HEARING OFFICER IS REQUIRED TO GIVE GREATER WEIGHT TO THE OPINIONS OF TREATING PHYSICIANS OVER THE OPINIONS OF NON-EXAMINING PHYSICIANS.

The Court of Appeals found that the Hearing Officer is required to give greater weight to the opinions of treating physicians over the opinions of non-examining physicians. [1] This is not provided for in any of the statutes governing KERS. KRS 61.600 provides that objective medical evidence is to be considered. KRS 61.510(33) defines "objective medical evidence" but it does not provide that any particular evidence is to be given any greater weight.

The fact-finder has the authority to review all the objective medical evidence of record and give the evidence the weight the fact-finder deems appropriate. It is a well-settled principle of law that the trier of fact may evaluate the evidence presented and the appellate court shall not substitute its judgment for that of the administrative agency regarding evaluations of evidence regarding questions of fact. See *500 Associates,*

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[1] It should be noted that the Court of Appeals subsequently ruled that the opinions of treating physicians should not be given greater weight in *Ledford v. Kentucky Retirement Systems*, Court of Appeals Case No. 2006-CA-001808, Supreme Court Case No. 2007-SC-00604-D Discretionary Review granted on December 12, 2007 (emphasis added), but more recently issued another opinion ruling that the opinions of treating physicians should be given greater weight in *Patti Jean Claxon v. Kentucky Retirement Systems*, 2006-CA-002037-MR, Opinion issued February 1, 2008.

Inc. v. Natural Resources and Environmental Protection Cabinet, 204 S.W.3d 121, 132 (Ky. App. 2006). In *Bowling v. Natural Resources*, 891 S.W.2d 406 (Ky. App. 1995), the Court held that the trier of facts in an administrative agency "is afforded great latitude in its evaluation of the evidence heard and the credibility of witnesses appearing before it." *Id.* at 409. The Court quoting said, "To put it simply the trier of facts in an administrative agency may consider all the evidence and choose the evidence that he believes." *Id.* at 410. The Court in *Louisville Edible Oil Products, Inc. v. Revenue Cabinet Commonwealth of Kentucky*, 957 S. W. 2d 272 (Ky. App. 1997), also found, "The Court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." *Id.* at 273.

The Court of Appeals relies on a federal case interpreting statutes and regulations governing the Social Security Administration to find that the opinions of treating physicians must be given greater weight than the opinions of non-examining physicians. The Court of Appeals found:

> . . . Although there is no Kentucky case on point, in a Social Security Disability context, the opinion of a treating physician is 'given greater weight than that of the government's physician . . . [but] only if the treating physician's opinion is based on sufficient medical data.' *Houston v. Secretary of Health & Human Services*, 736 F.2d 365, 367 (6th Cir. 1984). We find this logic persuasive, particularly considering that the physicians on the Medical Review Board who reviewed Appellant's application were non-examining physicians. It appears, based on the

> conclusions reached by the hearing officer, that he gave greater weight to the non-examining physicians' opinions than those of the treating physicians.
>
> Therefore, adopting the logic of *Houston,* we find that the agency erred when it determined that the opinions of treating physicians are not entitled to more weight than the opinions of the non-examining physicians serving on the Medical Review Board. Consequently, the circuit court erred when it concluded that this claim lacked merit.

(Appendix, Exhibit 1, p. 20).

The Court of Appeals erred because the Court in *Houston* was interpreting a specific federal regulation that requires that the opinion of a treating physician be given greater weight if it "is well supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in [the] case record." 20 C.F.R. §404.1527(d)(2). See *Houston v. Secretary of Health & Human Services,* 736 F.2d 365, 367 (6th Cir. 1984). There is no such statute or administrative regulation governing Appellant that would require that the opinion of treating physicians be given greater weight.

Although this argument has been made previously in this brief, it bears repeating that it is well understood that statutes governing administrative agencies other than the administrative agency that is a party to the case, and case law interpreting those statutes, cannot be considered when conducting a judicial review of a final administrative decision. The Court of Appeals can only consider Appellant's enabling

statutes and administrative regulations and case law interpreting Appellant's enabling statutes and administrative regulations. Administrative agencies are creatures of statute and they can only act to the extent that statutes have given them power. *500 Associates, Inc. v. Natural Resources and Environmental Protection Cabinet*, 204 S.W.3d 121, 132 (Ky. App. 2006); *Dept. of Natural Resources and Environmental Protection v. Stearns Coal and Lumber Co.*, 563 S.W.2d 471 (Ky. 1978); *Kerr v. Ky. State Bd. of Registration for Professional Engineers and Land Surveyors*, 797 S.W.2d 714 (Ky. App. 1990); *Curtis v. Belden Electronic Wire and Cable*, 760 S.W.2d 97 (Ky. App. 1988). It is improper for the Court of Appeals to apply case law interpreting the federal regulations governing the Social Security Administration to a judicial review of a final administrative decision by Appellant made in accordance with KRS 61.600.

Furthermore, the U. S. Supreme Court has declined to apply the Social Security Disability "treating physician rule" to other Acts. In *The Black & Decker Disability Plan v. Nord*, 123 S.Ct. 1965 (U.S. 2003), the U.S. Supreme Court held that treating physician's opinions were not to be given special weight in benefit determinations where there was no statutory or regulatory authority requiring special weight. The Code of Federal Regulations contains a provision that treating physicians should

be given some deference in Social Security Administration determinations. In *Nord*, the Supreme Court considered whether the SSA's "treating physician" rule should apply to ERISA benefit determinations. The Court concluded that ERISA law does not require that treating physician's opinions be given special weight. The Court wrote:

> Nothing in the Act itself [ERISA or the Secretary of Labor's ERISA regulations], however, suggests that plan administrators must accord special deference to the opinions of treating physicians. Nor does the Act impose a heightened burden of explanation on administrators when they reject a treating physician's opinion.

Id. at 1970.

Following the logic of the U. S. Supreme Court, it was improper for the Court of Appeals to apply the "treating physician" rule to Appellant when there is no statutory or regulatory authority requiring that that the opinions of treating physicians be given greater weight.

The Court of Appeals has again improperly applied case law interpreting statutes and regulations governing other administrative agencies to Appellant's final administrative decision rendered under KRS 61.600. Furthermore, the Court of Appeals has improperly attempted to create a requirement giving greater weight to the opinions of treating physicians, which is not found in KRS 61.600 or any of the enabling statutes and administrative regulations governing Appellant. The role of

the Court of Appeals is not to create or add to existing statutes, but rather is to make certain that the statutes are applied as written. Because of these errors, this Honorable Court must reverse the decision of the Court of Appeals and affirm the decisions of Franklin Circuit Court and Appellant.

CONCLUSION

Franklin Circuit Court clearly understood its role as a reviewing court as established in a footnote to its Order and Opinion:

> . . . This Court's role is not to determine what the standard for Kentucky's disability retirement should be. It is only to review decisions of the Board to ensure that the existing standards are applied in a permissible manner.

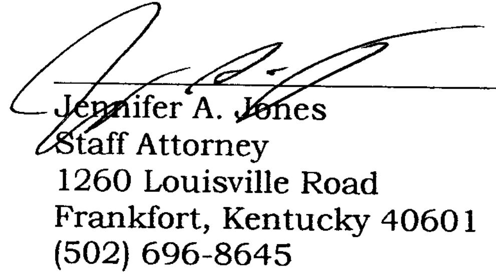
(Appendix, Exhibit 2, p. 7).

In its Opinion, the Court of Appeals is attempting to determine the standards for disability retirement, which is not the role of the Court. The General Assembly enacts the enabling statutes and standards for disability under KRS 61.600. The role of the Court of Appeals is to make certain the standards established by the General Assembly are being administered correctly.

Consequently, the opinion of the Court of Appeals must be reversed and this Honorable Court must issue an opinion correcting the errors of the Court of Appeals and affirming the decisions of the Appellant and the Franklin Circuit Court.

BASED ON THE FOREGOING, Kentucky Retirement Systems respectfully prays and demands that the decision of the Court of Appeals be reversed.

Respectfully submitted,
Kentucky Retirement Systems



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