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

REPLY 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 April 24, 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

STATEMENT OF POINTS AND AUTHORITIES

MAY IT PLEASE THE COURT:

In her brief, Appellee only cites to her own testimony during the administrative hearing and she fails to make any citation to the objective medical evidence in the administrative record in her brief. Appellee's omission of citations to the administrative record makes it difficult to understand and respond to her arguments.

Much of Appellee's testimony is not supported by the objective medical evidence of record. For example, Appellee notes in her brief that "[s]he suffers from cognitive difficulties and loss of memory" and makes further statements that her memory loss has gotten worse since she stopped taking chemotherapy. (Appellee's brief, p. 3). However, there is absolutely no evidence of record establishing that Appellee has cognitive difficulties or memory loss, much less that these conditions would be so severe as to functionally incapacitate her. Appellee submitted an article entitled "Lost in the Fog: Breast Cancer and Chemobrain," which describes cognitive dysfunction that occurs while the patient is on chemotherapy. (Administrative Record [A. R.], p. 173). However, the article is written by a breast cancer survivor, Kathy La Tour, who is not noted to be a physician or a psychiatrist and the article implies that "chemobrain" goes away after chemotherapy is completed. (A. R., p. 173). Appellee has completed chemotherapy and there is no evidence of record establishing that Appellee has any permanent cognitive dysfunction or memory loss.

Appellee also states in her brief and in her testimony that she cannot drive. (Appellee's brief, p. 3). There is no evidence of record establishing that any physician has restricted her from driving. Appellee may choose not to drive, but that is not the same as being unable to drive.

Appellee states that she was forced to cook for the other employees in the office. (Appellee's brief, p. 2). Cooking is not one of the duties listed on Appellee's official job description, nor does Appellee list cooking as a job duty on the Form 8035, Employee's Job Description, that she completed and submitted to Appellant as part of her application for enhanced disability retirement benefits. (A. R., pp. 8-12, 14-15). Although Appellee may have cooked for her co-workers, cooking was clearly not a job duty for which she was paid and has no relevance to Appellee's application for enhanced disability retirement benefits.

Appellee does not discuss in her brief why she left her employment when she did. Appellee applied for enhanced disability retirement benefits in March 2003, not long after her diagnosis of breast cancer, but she continued to work throughout her radiation and chemotherapy treatment. (A. R., pp. 2-5, Hearing CD-R, 2:12:58). It is unclear from the record exactly when Appellee actually stopped working and started using her accumulated leave, but Appellee apparently worked through the radiation and chemotherapy treatment and then stopped working.

What is clear from the record is that Appellee had difficulties with her co-workers and felt like her job was not secure. Appellee testified throughout the hearing that her co-workers and employers were resentful of having to assist her with her job. Appellee noted on her job description that she "could not move forward in her job" and she testified that she applied for another job at the agency, but was told she could not do the job. (A. R., p. 15, Hearing CD-R, 2:16:14-02:18:30). The job was given to a person from outside the agency who Appellee had to train, even though Appellee had been told she could not do the job. (A. R., p. 15, Hearing CD-R, 2:16:14-02:18:30). The new job

would have meant a higher salary for Appellee, but the new person received the higher salary and was being paid more than Appellee. (A. R., Hearing CD-R, 2:16:14-02:18:30).

I. APPELLANT CORRECTLY ADMINISTERS KRS 61.510, KRS 61.600, AND KRS 61.665.

Appellee erroneously argues that Appellant is unfairly applying the statutory scheme it has been assigned to administer by the General Assembly. (Appellee's brief, p. 5). Appellee also erroneously argues that Appellant thinks it can make decisions regarding disability "without regard to input in any judicial court or without any safeguards to the hearing procedures." (Appellee's brief, p. 5). With regard to Appellee's allegations regarding the hearing procedures and judicial review, Appellant conducts the administrative appeal process in compliance with KRS Chapter 13B. Judicial review of Appellant's administrative decisions is also conducted in compliance with KRS Chapter 13B and the established case law regarding judicial review of final administrative decisions. While Appellee may not agree with KRS Chapter 13B and the established case law, she cannot argue in good faith that Appellant or Franklin Circuit Court failed to comply with KRS Chapter 13B and the established case law.

With regard to Appellee's argument that Appellant is unfairly applying its controlling statutes, Appellee repeatedly argues that Appellant did not consider the "whole man" when issuing its final administrative decision and "piece mealed the evidence instead of considering all of Mrs. Bowens ailments together." (Appellee's brief, pp. 6, 7, 8, and 9). This is incorrect. Appellee's reasoning that Appellant allegedly did not consider the effects of all of her conditions together is based on how the Hearing

Officer's report and recommended order is written. The first part of the Hearing Officer's report and recommended order contains a thorough written review of all of the evidence submitted to the record. (A. R., pp. 404-412). In the findings of fact, the Hearing Officer discusses each of the conditions that Appellee alleges incapacitates her, and notes the degree, if any, that the condition causes functional incapacity. (A. R., pp. 412-415). In Appellee's case, none of her alleged conditions caused any degree of functional incapacity; therefore, considered together the conditions did not cause Appellee to be functionally incapacitated in order to qualify for enhanced disability retirement benefits. Appellee may not like how the Hearing Officer wrote the order, but that does not mean that the Hearing Officer did not consider the overall effect of all of her conditions. This argument comes down to a question of writing style, rather than law.

Furthermore, the evidence of record clearly establishes that Appellee was not functionally incapacitated as of her last day of paid employment. 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:

> 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, omitted]. 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 supported in the record by test results regarding the extent of these conditions.

(Appendix, Exhibit 1, pp. 4-5).

Appellant considered the total effect of all of Appellee's conditions and properly found that she did not qualify for enhanced disability retirement benefits pursuant to KRS 61.600 and Franklin Circuit Court correctly affirmed Appellant's final administrative decision.

II. APPELLANT IS NOT REQUIRED TO GIVE GREATER WEIGHT TO THE OPINIONS OF TREATING PHYSICIANS OVER THE OPINIONS OF NON-EXAMINING PHYSICIANS.

Appellee argues that KRS 61.510(33) allows for the opinions of treating physicians to be given greater weight than the opinions of non-examining physicians and that, as a matter of public policy, this Honorable Court should judicially create a "treating physician" rule similar to Social Security. 20 C.F.R. §404.1527(d)(2). Appellee is incorrect. KRS 61.510(33) does not mention treating physicians versus non-treating or non-examining physicians but rather simply lists what is considered to be objective medical evidence without assigning greater weight to any type of objective medical evidence or source of the objective medical evidence. There is no public policy that would necessitate this Honorable Court to add language to the statute that the General Assembly did not intend.

Appellee proposes the Court adopt the following rules in order "to ensure compliance with the legislative intent:"

> (1) A treating physician's opinions, if supported by objective medical evidence, should be given greater weight; and
> (2) The whole person should be considered as an entirety when defining physical functional incapacity to work, not separately as the hearing officer did.

(Appellee's brief, pp. 9-10).

Appellee is incorrect about the legislative intent of the General Assembly. The General Assembly has not enacted legislation to provide that the opinions of treating physicians should be given greater weight, which the General Assembly would have done if it intended such a thing. The General Assembly has reviewed and approved the regulation governing disability retirement benefits, 105 KAR 1:210, and did not require that language be added giving the opinions of treating physicians greater weight. Furthermore, the General Assembly approved the requirement that statements from physicians must be accompanied by objective medical evidence supporting the opinion or they would not be considered objective medical evidence. 105 KAR 1:210 Section 4(5). The legislative intent of the General Assembly is clearly that all of the evidence of record be considered and weighed on its own merits rather than by the source of the evidence.

Appellant previously set forth its legal arguments in detail that establish that the statutes governing Appellant do not provide for the opinions of treating physicians to be given greater weight than non-treating, non-examining physicians. Appellant requests that this Honorable Court review the complete argument contained in Appellant's brief previously filed in this matter.

Additionally, Appellant would also ask that this Honorable Court take note that under the Appellee's proposed rule number 1 above, Appellee still would not have prevailed because the opinions of Appellee's treating physicians were not supported by

the objective medical evidence of record and the medical examiners' opinions were not the sole basis of the Hearing Officer's report and recommended order.

Appellee repeatedly argues that the Hearing Officer's report and recommended order was based solely on the opinions of the medical examiners who performed reviews of the evidence pursuant to KRS 61.665. This is not the case. The medical examiners only reviewed the evidence through page 174 of the administrative record. The medical examiners' last reports are found on pages 175 through 185 of the administrative record. Appellee requested a hearing by letter found on page 186 of the administrative record. The remainder of the medical evidence of record, pages 187 through 343, was never reviewed by the medical examiners. The Hearing Officer did not merely rely on the medical examiners because the medical examiners did not review the evidence submitted after their last review and the Hearing Officer clearly did so. The Hearing Officer's report and recommended order considered all of the evidence of record and was based on all of the objective medical evidence of record.

Furthermore, with regard to the opinions of Appellee's treating physicians being given greater weight, Appellee argues in her brief that Dr. Belhasen's treatment notes were already in the record, that "her records are complete and well documented, the reasons for her medical prescriptions are well documented. . ." and the Hearing Officer ignored those records. (Appellee's brief, p. 9). However, Appellee fails to list any citations to the administrative record for the records the Hearing Officer allegedly ignored to enable this Honorable Court to locate these records. Likely, the records were not cited because Dr. Belhasen's treatment records are not in the administrative record.

Appellee emphasizes certain notes from Dr. Belhasen such as an "Adult Medical Report for Social Security or SSI Disability Benefits" completed on behalf of Appellee dated December 10, 2003. (A. R., p. 190). Dr. Belhasen does not provide the medical records for the conditions she lists as severe and disabling, nor does she provide an adequate basis for her assessment of Appellee's limitations. (A. R., p. 190).

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.

The only documents from Dr. Belhasen other than those listed above are as follows: On May 26, 2003, Dr. Belhasen completed a Form 8045 regarding Appellee's condition on which she indicated that Appellee's prognosis was guarded and at the time Appellee was undergoing chemotherapy. (A. R., p. 139). Attached to the Form 8045 was the result of a biopsy performed on January 16, 2003, which indicated Appellee had "well differentiated ductal carcinoma." (A. R., p. 140). The physicians noted on the biopsy request were Allen Bond M. D. and William Dunlop M. D. and the results were faxed to Dr. William Dunlop, who most likely sent the results to Dr. Belhasen. (A. R., p. 140). Also attached to the Form 8045 was the result of an MRI of Appellee's right knee performed on April 8, 2002, indicating that she had a severe tear in her right medial meniscus. (A. R., p. 141). Those are the only two pages of medical records submitted by Dr. Belhasen. (A. R., pp. 140-141). No actual treatment records from Dr. Belhasen were submitted to the administrative record or attached to the Form 8045, as the records actually attached were from other physicians.

Within Exhibit 6 was a note from Dr. Belhasen dated October 29, 2001, indicating that she was treating Appellee for chronic pain resulting from injuries in a work related auto accident and that she never had problems with her back prior to the auto accident. (A. R., p. 80).

Dr. Belhasen wrote another note for disability on a prescription pad dated September 21, 2004, in which she discussed a new solid mass that had been found in Appellee's left breast and indicated that Appellee is concerned about recurrent malignancy. (A. R., pp. 313-314). Fortunately, the mass turned out to be benign, according to an MRI performed on October 16, 2004, after Dr. Belhasen's note dated September 21, 2004. (A. R., pp. 328-329).

On May 7, 2004, September 21, 2004, and January 28, 2005, Dr. Belhasen filled out "Certification to Return to Work or School" forms on behalf of Appellee, with the May 2004 note indicating that Appellee was in the hospital and the September 2004 and January 2005 notes indicating that that Appellee cannot return to work. (A. R., pp. 286, 322, and 342). Dr. Belhasen completed FMLA forms for Appellee. (A. R., pp. 264-266). The last record Appellee attributed to Dr. Belhasen is actually a treatment note from Dr. Ayesha M. Sikder dated November 5, 2004. (A. R., pp. 339, 343). This is the sum total of information from Dr. Belhasen in the administrative record. Obviously, Dr. Belhasen's actual treatment and office records are not part of the administrative record. Therefore, in accordance with 105 KAR 1:210 Section 4(5), Appellant correctly gave little credit to Dr. Belhasen's notes that stated Appellee was disabled without any accompanying supporting documentation and no such information in the administrative record.

Appellant already considers the whole person as discussed in Appellee's proposed rule number 2 above, so it is unnecessary for this Honorable Court to consider the proposed rule or Appellee's arguments regarding consideration of the "whole man."

CONCLUSION

Appellee's arguments are not based on the objective medical evidence of record and are not based on the controlling statutes enacted by the General Assembly. Appellee argues about "public policy" and blatantly misstates the legislative intent behind the statutes governing Appellant. If the General Assembly wanted the opinions of treating physicians to be given greater weight than the opinions of non-treating or non-examining physicians, the General Assembly would have enacted statutory language providing that, and it would not have enacted KRS 61.665. There is no legal basis for using statutes and regulations administering a federal administrative agency to change and add language to the enabling statutes of a state agency.

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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