

COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO.: 2007-SC-000509-D

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CLERK
SUPREME COURT

BOARD OF TRUSTEES OF THE
KENTUCKY RETIREMENT SYSTEMS,

APPELLANT

VS:

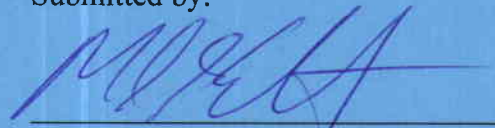
BRIEF FOR APPELLEE, SANDRA BOWENS

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

SANDRA BOWENS,

APPELLEE

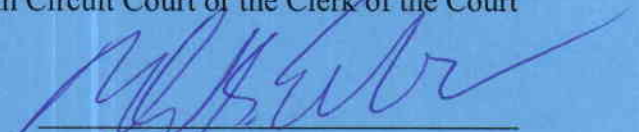
Submitted by:



MICHAEL S. ENDICOTT
Counsel for Appellee
225 Court Street
P.O. Box 181
Paintsville, Ky 41240
(606) 789-8232

CERTIFICATE REQUIRED BY CR 76.12(6)

The undersigned does hereby certify that one (1) original and nine (9) copies of this brief has been mailed to: Susan Stokley Clary, Clerk of the Supreme Court of Kentucky, Room 209, State Capitol, 700 Capital Avenue, Frankfort, Kentucky 40601; and that a true and correct was served upon the following named individuals by U.S. Mail, First Class on the 8 day of April 2008, to the following: Judge Roger Crittenden c/o 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. Jennifer A. Jones, 1260 Louisville Road, Frankfort, Kentucky 40601. The undersigned does also certify that the Record of Appeal was not removed from the Clerk of the Franklin Circuit Court or the Clerk of the Court of Appeals.



MICHAEL S. ENDICOTT
Counsel for Appellee

INTRODUCTION

This is an appeal regarding disability retirement benefits taken by the Kentucky Retirement System.

STATEMENT CONCERNING ORAL ARGUMENTS

The issues have been well briefed and oral argument is not necessary.

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STATEMENT OF THE CASE

The Appellee, Sandra Bowens, was a dedicated employer of the Johnson County Home Health for approximately nine and a half (9 ½) years (Record on Appeal, 1:45:18). She was approximately forty-three (43) years of age and had been married for twenty-nine (29) years to her husband and the father of her child (Record on Appeal, 1:45:34; 1:46:50). Having only a sixth grade education, Mrs. Bowens attained her GED and began working for the Johnson County Home Health originally as a home health aid (Record on Appeal, 1:45:34; 1:46:50).

As a home health aid, Mrs. Bowens performed duties that a nurse did not perform in the homes of the patients (Record on Appeal, 1:45:34). She would wash the patients' hair, cook their food, clean their home, bath them, etc (Record on Appeal, 1:45:40). Mrs. Bowens reported great self-satisfaction with her required duties (Record on Appeal, 1:45:34).

While a home health aid, Mrs. Bowens was involved in a motor vehicle accident, which changed her job duties (Record on Appeal, 1:45:18). After the motor vehicle accident, Mrs. Bowens was transferred to the office and she began to answer the phones, learned to make charts and to do the mail log, and soon she was inputting the data into the OASIS system (Record on Appeal, 1:46:38). Mrs. Bowens was the only worker capable of retrieving some data from this system for home health (Record on Appeal, 1:52:34). These duties are extremely important to home health because if the data is input improperly, home health could lose its license (Record on Appeal, 1:52:40; 1:53:45).

She was also given the duties of ensuring maintenance of company vehicles, as well as transporting documents to and from doctors' offices (Record on Appeal, 2:00:24). Soon Mrs.

Bowens was being required to fix coffee and dinner for the office as well (Record on Appeal, 1:47:53). She still performed her office duties while cooking dinner for her fellow employees (Record on Appeal, 2:04:57). She answered the phones in the kitchen and directed the calls while cooking. Other times she would prepare the food at her home in a crock-pot and bring it to work with her.

Around March 10, 2002, Mrs. Bowens was involved in second motor vehicle accident while on the job (Record on Appeal, 1:51:34). This accident resulted in Mrs. Bowens suffering from a severely torn medial meniscus, which would require surgery to correct (Record on Appeal, 1:52:20). Even with surgery however, there is no guarantee that the problem can be corrected and the pain alleviated (surgery could not be completed due to chemotherapy treatments).

Following the work related motor vehicle accidents, Mrs. Bowens was diagnosed with cancer around February of 2003 (Record on Appeal, 1:48:20). This diagnosis resulted in a left mastectomy of her left breast near February 7, 2003. Rounds of radiation and chemotherapy treatments then followed this mastectomy (Record on Appeal, 1:48:50).

During the radiation and chemotherapy treatments, Mrs. Bowens would often come into work before the other employees and work until she had to have her cancer treatments, leave to take her treatments and then return to the office for the rest of her day (Record on Appeal, 2:12:58). This took a great toll on Mrs. Bowens, resulting in her being unable to drive herself home from work on days. These days she would call her husband crying to ask him to pick her up from work.

In addition to the physical stress from manipulating her hours in order to attend her chemotherapy and radiation treatments, there are multiple side effects of the radiation and chemotherapy. Mrs. Bowens has difficulties with decreased mobility and swelling of her arm

(Record on Appeal, 1:49:48). She suffers from fatigue (Record on Appeal, 1:49:40). She suffers from cognitive difficulties and loss of memory. She has also had her lymph nodes removed and suffers from radiation burn (Record on Appeal, 1:49:38; 1:49:42). She gets hoarse often and coughs chronically (Record on Appeal, 1:50:23). She also has problems taking and remembering vital notes for the nurses (Record on Appeal, 1:50:41). Furthermore, she suffers from arthritis in her right knee from the torn medial meniscus (Record on Appeal, 1:51:34).

Mrs. Bowens was granted an informal work accommodation during the time of her chemotherapy (Record on Appeal, 1:56:53; 1:59:45). This accommodation limited the amount of time that Mrs. Bowens had to spend picking up documents and the weight amount that she had to lift (Record on Appeal, 1:59:58). These accommodations were revoked when her chemotherapy ended, despite ongoing side effects of the treatments (Record on Appeal, 1:59:58).

Mrs. Bowens had to forego the last five treatments of chemotherapy due to a severe reaction (Record on Appeal, 2:08:18). In addition, her memory loss has gotten worse since the end of the chemotherapy (Record on Appeal, 2:24:01). She is also unable to clean her own home, often relying upon her daughter and husband to help her with these tasks (Record on Appeal, 2:23:17). Her daughter stated that before she was diagnosed with cancer, Mrs. Bowens was able to complete any task with her daughter that other mothers could (Record on Appeal, 2:23:34).

After being diagnosed with cancer and receiving chemotherapy and radiation treatments Mrs. Bowens was unable to perform her hobbies (Record on Appeal, 2:26:27). Mrs. and Mrs. Bowens no longer able to go on vacation together due to an inability to travel the long distances. Mrs. Bowens cannot go to the flea market as she once had (Record on Appeal, 2:26:27). If Mrs. Bowens and her daughter go to the store, Mrs. Bowens' daughter has to drive because Mrs. Bowens cannot (Record

on Appeal, 2:23:49). Mrs. Bowens also cannot spend great deal of time shopping because of her fatigue (Record on Appeal, 2:23:49).

Before being diagnosed with breast cancer, Mrs. Bowens had approximately three hundred (300) hours of sick time and in between two hundred seventy and two hundred ninety (270-290) hours of annual leave (Record on Appeal, 1:54:28). After being diagnosed with breast cancer, Mrs. Bowens had to begin using her sick leave, vacation time, and annual leave (Record on Appeal, 1:55:17). By the time of the hearing, she had used all of these hours and received approximately fourteen (14) hours of donated time from her co-workers, and had taken leave pursuant to the Family Medical Leave Act (Record on Appeal, 1:54:44).

At the time of the hearing, Mrs. Bowens was on numerous medications, including the following:

<u>Medicine Name</u>	<u>Dosage</u>	<u>Times/Day</u>	<u>Reason for Medicine</u>	<u>Prescribing Physician</u>
Proventil	2 puffs	2xdaily	Breathing	Dr. S. Belhasen
Accupril	10 mg	1xdaily	Blood Pressure	Dr. S. Belhasen
Ultram	50 mg	4xday	Pain	Dr. S. Belhasen
Valium	5 mg	2xday	Nerves	Dr. S. Belhasen
Lortab	10/500	4xday	Pain	Dr. Dunlop
Warfarin Sodium	1 mg	1xday	Blood Thinner	Dr. Jain
Kytril	1 mg	1 ever 12 hr	Nausea	Dr. Jain
Adrianjein	x4 cycle	Q3 weeks	Breast Cancer	Dr. Jain
Etozan	x4 cycle	Q3 weeks	Breast Cancer	Dr. Jain
Taxol	x4 cycle	Q3 weeks	Breast Cancer	Dr. Jain
Radiation Treatment	x8 weeks		Breast Cancer	Dr. Jain
Vitamin	1000	1xday	Immune System	Dr. Jain

Some of these medications she could only take sparingly such as the valium and lortab because it makes her too drowsy and sleepy to function properly (Record on Appeal, 1:58:38).

Mrs. Bowens applied for disability retirement on March 21, 2003, based on disability from

arthritis, breast cancer and injuries sustained from two car accidents she was involved in during her employment. When her application was denied, an administrative hearing was held. Evidence and testimony was presented before the hearing officer on June 24, 2004. Prior to the hearing officer making his decisions and recommendations, Mrs. Bowens was granted a fully favorable decision for her Social Security Disability Benefits as being totally and permanently disabled (Social Security Opinion, September 19, 2003).

Counsel submitted and requested to supplement the record of the Social Security Opinion of February 1, 2005. The hearing officer then overruled the motion and determined it to be "irrelevant." (Board Decision, January 5, 2004).

The hearing officer made the recommendations that Mrs. Bowens be denied disability retirement benefits under KRS 61.600 and the Kentucky Retirement Systems Board adopted these recommendations (Board Decision, January 5, 2004). Appeal was sought in the Franklin Circuit Court and an Order and Opinion was entered April 5, 2006 denying appeal.

ARGUMENT

I. DETERMINING DISABILITY MUST BE VIEWED WITHIN THE ENTIRE STATUTORY SCHEME AS A WHOLE.

Kentucky Retirement System will have you believe that the law is written so that they have complete discretion, as to how, when, what decision should be made as to disability without regard to input in any judicial court or without any safeguards to the hearing procedures. The Retirement System essentially argues that if there is any medical evidence to support the conclusions of the hearing officer, then their decision must stand as a matter of law.

The statutory scheme has to be applied fairly to all members and citizens of our community

and it is designed to get the correct, accurate result as best as possible. KRS 61.600 outlines when one would apply for disability benefits. KRS 61.600(b) outlines what must be considered when considering a person's ability to work:

“The person's residual functional capacity shall be the person's capacity for work activity on a regular and continuing basis. The person's physical ability shall be assessed in light of the severity of the person's physical, mental, **and other impairments**. The person's ability to walk, stand, carry, push, pull, reach, handle, and other physical functions shall be considered with regard to physical impairments. The person's ability to understand, remember, and carry out instructions and respond appropriately to supervision, coworkers, and work pressures in a work setting shall be considered with regard to mental impairments. Other impairments, including skin impairments, epilepsy, visual sensory impairments, postural and manipulative limitations, and environmental restrictions, shall be considered in conjunction with the person's physical and mental impairments to determine residual functional capacity.”

In other words, any hearing officer or any medical person must consider the entire physical package, i.e., a whole man. Common sense tells us that you must look at the entire person to see if she can work or not, not one specific minor issue or one specific ailment as the hearing officer did. Consider the hearing officer's conclusions, Paragraph Five of his recommendation:

“Preponderance of the objective medical evidence contained of record indicates the Claimant is not disabled by any pulmonary problems.”

The hearing officer further states, in Paragraph Six of his recommendations:

“Preponderance of the objective medical evidence contained of record indicates the Claimant is not disabled by any orthopedic problems.”

Paragraph Seven of the hearing officer's recommendation states:

“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.”

In other words, the hearing officer was incorrect, arbitrary, and capricious in his application of the rules, regulations and statutes as written. The Court of Appeals correctly states in its opinion, the interpretation of the statute as written:

“Moreover, KRS 61.600(5)(a)(2) shows a legislative intent for the cumulative effects of a disability claimant’s ailments to be considered in assessing the claimant’s eligibility for benefits. Thus, the cumulative effect of Appellant’s ailments should have been considered by the hearing officer.”

Why would the statute read otherwise? How can it be interpreted in any other way when it states again:

“The person’s physical ability shall be assessed in light of the severity of the person’s physical, mental and other impairments.” Id.

In addition, the Court is asked and directed to the definition of what objective medical evidence means under KRS 61.510(33), objective medical evidence is defined as:

“Objective medical evidence” means reports of examinations or treatments; medical signs which are anatomical, physiological, or psychological abnormalities that can be observed; psychiatric signs which are medically demonstrable phenomena indicating specific abnormalities of behavior, affect, thought, memory, orientation, or contact with reality; or laboratory findings which are anatomical, physiological, or psychological phenomena that can be shown by medically acceptable laboratory diagnostic techniques, including but not limited to chemical tests, electrocardiograms, electroencephalograms, X-rays, and psychological tests.”

Clearly, the legislative intent is to consider all the medical evidence for the person as a whole. The hearing officer pieced the evidence instead of considering all of Mrs. Bowens ailments together.

II. AS A MATTER OF PUBLIC POLICY AND STATUTORY LEGISLATIVE INTENT, A PERSON’S WHOLE DISABILITIES MUST BE CONSIDERED.

Taking into context the entire statutory scheme to determine a disability, i.e., the

objective medical evidence definition under KRS 61.510(33); and the KRS 61.600(5)(b) definition of residual functional capacity, the clear legislative intent can lead to no other judicial interpretation as to that rendered by the Kentucky Court of Appeals in the case at bar.

Consider the opposite view and the position of the Retirement System. The Retirement System's position in the case at bar, would allow the hearing officer to make statements because Mrs. Bowens pulmonary problems are not disabling by themselves or that her orthopedic problems are not disabling by themselves, her breast cancer and her treatment and side effects therein are not disabling of themselves; therefore, she cannot be awarded benefits.

Such a position that the Kentucky Retirement System is taking, clearly is a reason why there are so many appellate cases like Mrs. Bowens. Kentucky Retirement System's interpretation, as well as that of the hearing officer is clearly arbitrary and capricious, as defined by KRS 13b.090.

The Court of Appeals correctly ruled that the whole man theory has to be applied as the statutory legislative scheme so mandates. A human being does not act and work in parts or pieces. His or her whole body has to be considered as one part, that's the way life and human beings work and that is clearly what our legislature intended.

A. THE COURT OF APPEALS RULING TREATING PHYSICIAN SHOULD BE GIVEN GREATER WEIGHT IS CONSISTENT WITH THE STATUTORY SCHEME UNDER CHAPTER 61.

Again, KRS 61.510(33) defines the term objective medical evidence and specifically refers to treating physicians; although, not directly. Again, KRS 61.510(33) "states objective medical evidence means reports of examinations or treatments...." They must have provided

treatment to the patient or provided lab test or as the statute goes on....“**medical signs which are anatomical, physiological, or psychological abnormalities that can be observed.**”

In the case at bar, the hearing officer supposedly relied upon on the **non-treating, non-examining physician’s** conclusions and disregarded the treating physicians of Mrs. Bowens.

The hearing officer ignored Dr. Belhasen’s opinion because she gave a one line opinion. Yet, the hearing officer failed to mention that Dr. Belhasen’s treating notes and reports have already been provided and attached to the record in this case and her records are complete and well documented, the reasons for her medical prescriptions are well documented, as well as treating physician, Dr. Jain. Nevertheless, the hearing officer and the Franklin Circuit Court simply brushed these opinions aside and relied upon exclusively and I mean exclusively on the non-treating, non-examining physicians who never laid eyes on Sandra Bowens.

Such a position should not with stand the judicial scrutinize of the “arbitrary and capricious” standard.

The Court of Appeals and this Court should as a matter of public policy interpret KRS 61.510(33) and KRS 61.600(5)(b) to consider all the evidence and take into account the treating physician rule as being the most important, as did the Social Security Administration in the context of Dillon v. Celebrezze, 345 F.2d 753, 757 (4th Cir.1965). This Court should affirm the Kentucky Court of Appeals and require two simple rules. These rules are designed 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 capacity to work, not separately as the hearing officer did.

CONCLUSION

WHEREFORE, the Appellee prays that the Opinion of the Kentucky Court of Appeals be affirmed in its entirety.

A handwritten signature in black ink, appearing to read "Michael S. Endicott", written over a horizontal line.

MICHAEL S. ENDICOTT

Counsel for Appellee

225 Court Street

P.O. Box 181

Paintsville, Ky 41240

(606) 789-8232