COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
NO. 2008-SC-000326
(2006-CA-000296)

KENTUCKY RETIREMENT SYSTEMS — APPELLANT

v.

DILLARD WAYNE BROWN,
INDIVIDUALLY AND AS EXECUTOR OF
THE ESTATE OF BARBARA FAYE
REED BROWN, DECEASED — APPELLEE

BRIEF FOR APPELLANT

KENTUCKY RETIREMENT SYSTEMS

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Brief for Appellant has been mailed, postage prepaid, or hand delivered on this the 13th day of April 2009 to: Hon. William L. Graham c/o. Hon. Thomas Wingate, Franklin Circuit Court, P.O. Box 678, Frankfort, Kentucky, 40602; Hon. Joseph H. Mattingly, 104 West Main Street, Box 678, Lebanon, Kentucky 40033; and Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601.

I further certify that the Record on Appeal, from the Clerk of the Court of Appeals, was not withdrawn by counsel for Appellant.

Katherine Rupinen
Katherine Rupinen
Attorney for Appellant

INTRODUCTION

This is an appeal of a decision of Franklin Circuit Court overturning an administrative decision denying Appellee disability retirement benefits. This decision was erroneously upheld by the Court of Appeals.

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Appellant respectfully requests the opportunity to present oral arguments on this matter.

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MAY IT PLEASE THE COURT:

STATEMENT OF THE CASE

The case at bar is an appeal of the decision of the Court of Appeals which improperly upheld a decision of Franklin Circuit Court. Franklin Circuit Court incorrectly reversed Kentucky Retirement Systems' (hereinafter Appellant) administrative decision to deny Barbara Brown's (hereinafter Appellee) application for enhanced disability retirement benefits.

Appellee became a member of the County Employees Retirement System (hereinafter CERS) on March 2, 1992. Appellee filed for disability retirement benefits under KRS 61.600 in April 2003 based on her diagnosis of Emphysema with Chronic Obstructive Pulmonary Disease (COPD). Her application and the objective medical evidence obtained from Kentuckiana Pulmonary Associates, Dr. Mark Abram and Flaget Memorial Hospital were reviewed by two independent medical examiners under contract with Appellant for the purposes of reviewing disability retirement applications pursuant to KRS 61.665. Both medical examiners recommended denial of disability retirement benefits. Dr. William Keller noted in relevant part:

> After reviewing all of the claimant's records it is clearly evident that this patient who is a 30 year smoker has long sense set the stage for ultimate pulmonary disease by virtue of her 3 decade smoking habit. On the basis of reasonable medical probability the claimant did have significant pulmonary disease at and prior to the onset of her employment in 1992.

(Appendix D, Administrative Record (hereinafter A.R.), p. 176).

Dr. William P. McElwain noted in relevant part:

> Review of the claimant's medical records indicate the oldest record we have is dated January of 1993. At that time, she had cough and congestion. In 1996 she was noted to be smoking two packs of cigarettes a day, and was advised to discontinue the smoking because of the

> dilaterius (sic) effects on her health. She has continued to smoke, until the present time, and now the medical records indicate the presence of end stage emphysema. Tobacco abuse is noted to have been present for over 30 years. This would appear to establish the presence of chronic obstructive pulmonary disease, at the time of her employment, and she has less than 16 years of service credit.

(Appendix D, A.R., p. 178).

Appellee then filed a request for an administrative hearing appealing this decision to deny enhanced benefits under KRS 61.600. After a full administrative hearing, a Hearing Officer issued a recommended order to deny Appelle's application for disability retirement benefits under KRS 61.600; in relevant part, due to Appellee's failure to provide objective medical evidence that would prove by a preponderance of the evidence that her COPD did not exist prior to her membership in the Kentucky Retirement Systems. (Appendix D, A.R., pp. 366-385). The Hearing Officer also noted there was insufficient objective medical evidence to support a finding of disabling impairment. Both Appellee and Appellant filed exceptions to this recommended order.

The Disability Appeals Committee of the Board of Trustees of the Kentucky Retirement Systems remanded this matter back to the Hearing Officer for further consideration based upon the law governing the Kentucky Retirement Systems only. The Hearing Officer was specifically instructed to not apply or consider law governing another administrative agency. (A.R., p. 401). The Hearing Officer then issued another Recommended Order, again recommending denial of disability retirement benefits under KRS 61.600. (Appendix D, A.R., pp. 403-419). Exceptions were again filed by both parties. The Exceptions filed by the Appellant requested a clarification in the language in the Hearing Officer's Recommended Order. (A.R., p. 421-422). The Disability Appeals

Committee then issued a Final Order adopting the Hearing Officer's Recommended Order on remand as the Final Order of the Kentucky Retirement Systems. (Appendix D, A.R., p. 433).

Appellee appealed this final administrative decision to the Franklin Circuit Court.[1] Franklin Circuit Court erroneously overturned the Appellant's decision. (Appendix B). Appellant then appealed Franklin Circuit Court's decision to the Court of Appeals. The Court of Appeals erroneously upheld the decision of Franklin Circuit Court. Appellant filed a Petition for Rehearing with the Court of Appeals, which was denied. (Appendix A). A Motion for Discretionary Review was then filed by Appellant and granted by this Honorable Court.

Appellee's own doctors have repeatedly linked Appellee's COPD diagnosis to Appellee's history of tobacco abuse and dependence. In April 1996, Appellee had a cough, cold, and congestion and she was "advised to quit smoking." (Appendix D, A.R., p. 43). In September 1999, Appellee was again being treated for upper respiratory infection and bronchitis. Appellee's doctor noted, "once again counseled on smoking cessation." (Appendix D, A.R., p. 44)(sic). In April 2001, Appellee's physician stated, "She still continues to smoke cigarettes and that is disturbing and disconcerting." (Appendix D, A.R., p. 46).

On June 26, 2001, Appellee's doctor noted that he "talked a lot about her need to quit smoking today. She understands her problem." (Appendix D, A.R., p. 47). Again on November 11, 2002, Appellee's doctor stated, "Ms. Brown is a 54 year old female

with severe COPD who sadly continues to smoke." (Appendix D, A.R., p. 31). On March 13, 2003, Dr. Mark Abram clearly stated, "She continues to have some decline in her lung function related to steroid dependent asthma and chronic obstructive pulmonary disease **secondary to years of cigarette abuse**." (Appendix D, A.R., p. 49)(emphasis added). Dr. Abram reiterated this statement on a form he completed for Appellee's application for disability retirement benefits from the Kentucky Retirement Systems. On the form titled, "Form 8045" Dr. Abrams was asked to provide the history of Appellee's symptoms, her diagnosis, the date of onset of symptoms and diagnosis, the etiology of the condition, current treatment and prognosis. On this form, Dr. Abram indicated that the etiology of Appellee's condition was "use of cigarettes." (Appendix D, A.R., p. 42).

Appellee abused and obviously was addicted to tobacco for many years prior to her membership in CERS. On December 29, 1999 Appellee reported smoking a pack per day since the age of 18. (Appendix D, A.R., p. 45). On April 18, 2001 Appellee gave a history of smoking up to two packs a day for the last 40 years. (Appendix D, A.R., p. 88). On September 13, 2001, Appellee reported smoking a pack and a half for the last 30 years. Significantly the same treatment note recorded that Appellee was "interested in smoking cessation but not sure she is able to quit." (Appendix D, A.R., p. 18). On June 10, 1996 Appellee was noted to be smoking a pack a day. (Appendix D, A.R., p. 43). On March 18, 1998 Appellee indicated she was down to a half a pack a day from her previous pack and a half a day. (Appendix D, A.R., p. 44). Four days later, on March 22, 1998, Appellee indicated she was smoking a pack a day. (Appendix D, A.R., p. 107).

[1] Appellee passed away before the Franklin Circuit Court rendered its decision in this case. Appellee's

Two days later, on March 23, 1998, Appellee stated she smoked a pack to a pack and a half each day. (Appendix D, A.R., p. 44). **Appellee also admitted to continuing to smoke even while on oxygen therapy for her emphysema and COPD**. (Administrative Hearing Tape, 01:33:16)(emphasis added).

These reports show that Appellee smoked extensively over a long period of time. Appellee was obviously and admittedly unable to quit her tobacco abuse even when necessary for her health condition. Nicotine dependency, which resulted from and then perpetuated Appellee's extensive tobacco use, is a well known psychiatric malady and is even noted in the Diagnostic and Statistical Manual of Mental Disorders Fourth Edition. Undersigned counsel requested in her Motion for Discretionary Review that this Honorable Court take judicial notice of this fact and has attached the relevant pages from the Diagnostic and Statistical Manual of Mental Disorders Fourth Edition for the Court's convenience. (Appendix C). Appellee did not object to this request for judicial notice in her Response to Motion for Discretionary Review. Although Appellee was not given the formal diagnosis of nicotine or tobacco addition, addiction is commonly known to be a condition in which an individual's dependence on a substance leads them to continue to abuse the substance even knowing it is at the expense of their health. (Appendix C, Diagnostic and Statistical Manual of Mental Disorders Fourth Edition, pp. 264-265). Appellee's behavior and the comments of her treating physicians, as well as the statements of Dr. William McElwain and Dr. William Keller, clearly indicate that Appellee was suffering from tobacco or nicotine abuse and addiction.

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husband, Dillard Wayne Brown, chose to continue this action as executor of her estate.

Appellee failed to provide any relevant and/or probative medical evidence regarding her COPD immediately prior to her membership date in CERS of March 2, 1992. The only evidence Appellee provided regarding her medical condition prior to her membership was two pages of notes from gynecologist examinations in 1976 and 1978 and a 1987 chest x-ray. (Appendix D , A.R., p. 354-356) The gynecologist examination notes were not probative, considering they were produced fourteen to sixteen years prior to Appellee's membership date in the County Employees Retirement Systems and indicated nothing but a cursory evaluation of Appellee's lung sounds. The chest x-ray was also not probative. Appellee's own treating physician, Dr. Mark Abram, was asked during a deposition about the usefulness of x-rays for purposes of diagnosing COPD. Dr. Abram stated in relevant part that, "Chest x-rays are crude. They won't tell - - they're a good marker for progression but not a good marker for the initiation. . ." (Appendix D, A.R., p. 315) Dr. Abram explained that chest x-rays can track the progression of COPD after this disease has become severe enough to otherwise be diagnosed. However, chest x-rays are not sensitive enough to be used as an early diagnostic tool for the beginning stages of this disease. The 1987 chest x-ray simply did not prove that Appellee was free of COPD at that time.

Appellant filed in the administrative record a scholarly article from a peer reviewed medical journal that demonstrated that COPD has a well known and documented course of development that has been proved by medical science. COPD takes decades to be symptomatic enough to be diagnosed and furthermore, tobacco abuse is the primary cause of COPD. Dr. Dennis E. Doherty clearly explained the long term

process by which COPD develops in his article, "Early detection and management of COPD" in the June 2002 edition of Postgraduate Medicine. (Appendix D, A.R., pp. 189-216). In this article, Dr. Doherty states:

> COPD, which encompasses the common diagnosis of chronic bronchitis and emphysema, is an indolent process that develops over decades. Fully developed lungs have a tremendous reserve that is not called upon during routine daily activities or even with mild exertion. Because the airway obstruction occurs slowly, persons with early COPD tend to gradually modify their daily lifestyle, decreasing the intensity of their activities to the degree that less lung capacity is needed to routinely function "asymptomatically." They often do not realize that they have made these modifications, because the changes have occurred over years.
>
> More than 90% of cases of COPD are caused by tobacco smoke; the remainder are attributable to genetic (α□-antitrypsin deficiency), occupational, or environmental causes. People who smoke tend to ignore early symptoms (cough, mucus production, and wheeze) that can warn them of the potential development of COPD. They attribute these symptoms to the habit, accepting that their bothersome cough and clearing of the throat are "part of smoking." They often do not understand that permanent lung damage and chronic airway obstruction can occur. Additionally, spirometry – the best test to detect COPD during its early silent period – is not being used to its full potential in the primary care setting. . . .
>
> The majority of patients with or at risk for COPD do not seek medical care until they acknowledge the presence of dyspnea that is interfering with their lifestyle. By the time they experience dyspnea on mild exertion, about 50% of their lung capacity has been lost. At this point, patients may retrospectively acknowledge other cardinal symptoms of COPD (cough, mucus production, and wheeze) on careful questioning by their healthcare professional.

(Appendix D, A.R., pp. 200-201).

When Appellee's application for disability retirement benefits was initially reviewed by Dr. Keller and Dr. McElwain, these doctors recommended denial of disability retirement benefits based on the pre-existing nature of Appellee's condition.

Both doctors noted Appellee's long history of tobacco abuse. Dr. McElwain also cites the early onset of symptoms of COPD, cough and congestion, shortly after Appellee's membership date. (Appendix D, A.R., p. 178). Dr. Keller noted that given Appellee's history of decades long tobacco abuse, it was within the realm of reasonable medical probability that Appellee had COPD at and prior to her employment date in 1992. (Appendix D, A.R., p. 176). Both doctors' statement implicitly acknowledge the well known scientific facts regarding the course of development of COPD.

Appellee's treating physician, Dr. Mark Abram, admitted during a deposition that individuals may have COPD for a significant period of time before their symptoms are severe enough to be noticed. Dr. Abram stated specifically:

> We are built with lungs that have tremendous over-capacity to what we truly need. That's a good thing. That means that certain amounts of lung can be damaged, disease or ruined and we may not necessarily know or feel slighted about it. So in other words, when patients come in with their symptoms that would be consistent and typical with emphysema, for instance, it's a good possibility, but not always, that a fair amount of the lung has been irritated or damaged. The problem with emphysema is that it's insidious and people may not necessarily always know that they have it, but that's also a problem with diagnosis. In other words, that just because, for instance, say someone smokes or is exposed to coal mine dust, you know, and they're not having any symptoms with it, I'm not necessarily going to be looking for it.

(Appendix D, A.R., p. 304-305).

Dr. Abram was also asked in his deposition:

> Q. I have done some research in this case on the issue of COPD and I found a couple of articles. They reference that it is possible to have COPD for 10 to 30 years before developing symptoms. Is that common in your medical experience?
>
> A. . . . . yes, it is possible to go all that time, you know, to be totally asymptomatic and have a disease like this. . . .

(Appendix D, A.R., p. 306-307).

As previously noted, Dr. Abram reported on a Kentucky Retirement Systems "Form 8045" that Appellee's initial onset of symptoms and date of diagnosis was March 1996. (Appendix D, A.R., p. 42). However, it is medically clear that Appellee had to have had COPD for a significant period of time before March 1996, as COPD must be in existence for a significant period of time before it is symptomatic enough to be diagnosed.

The records Appellee provided to the Appellant obviously demonstrated a repeated pattern of treatment for cough and congestion shortly after Appellee's membership in CERS. Perpetual congestion and coughing are symptoms of COPD and lead to the diagnosis of COPD. Dr. Abram's treatment records showed Appellee had been treated for cold, cough or congestion on January 22, 1993, less than ten months after Appellee's membership date. These symptoms were treated again on June 14, 1993, September 6, 1994, September 12, 1994, August 29, 1995, October 25, 1995, April 23, 1996 and on and on after that. (Appendix D, A.R., pp. 43-48). It should be noted that this treatment history only reflects Dr. Abram's records; not the records of any additional medical providers which may not have been provided to the Kentucky Retirement Systems.

The information in the administrative record demonstrates that Appellee did not produce all of her medical treatment records. A May 23, 2003 record from Kentucky Pulmonary Associates, PLLC stated that Appellee had been treated at that office for approximately five years. (Appendix D, A.R., p. 221). This would place Appellee's first

treatment with Kentucky Pulmonary Associates some time in 1998. However, Appellee did not produce any medical records from this facility prior to 2000 or 2001. This obviously raises questions of how many times Appellee was treated for symptoms of COPD, such as cough, cold and congestion which were not submitted to the administrative record and what history Appellee provided to Kentucky Pulmonary Associates, as well as what testing was originally performed and/or reviewed when Appellee began her course of treatment there.

Appellee had less than sixteen years of service credit with the County Employees Retirement System. Pursuant to KRS 61.600, Appellee had the burden of proving that her emphysema and COPD did not result directly or indirectly from bodily injury, mental illness, disease, or condition which pre-existed her membership in CERS. Appellee did not provide evidence to meet this burden of proof.

THE LAW

KRS 61.600 (2003) provides for disability retirement to members of Kentucky Retirement Systems 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 CHANGED THE BURDEN OF PROOF IMPOSED UPON APPELLEE WHEN IT FOUND THAT "IN THOSE INFREQUENT CIRCUMSTANCES IN WHICH WE IMPOSE UPON A PARTY THE BURDEN OF PROVING A NEGATIVE, THE QUANTUM OF EVIDENCE NECESSARY TO MEET THE BURDEN IS MINIMAL."

KRS 61.600 and McManus v. Kentucky Retirement Systems, 124 S.W.3d 454 (Ky.App. 2003) clearly establish that Appellee had the burden of proof regarding the non-pre-existing nature of her pulmonary condition. The burden of proof in an administrative appeal is clearly established in KRS 13B.090(7) as preponderance of the evidence. KRS 61.600 requires an applicant for disability retirement benefits to establish by objective medical evidence that the incapacity for which the applicant is seeking benefits shall not result directly or indirectly from a bodily injury, mental illness, disease, or condition which preexisted membership in the system or reemployment, whichever is most recent. An applicant establishes that the incapacity did not result directly or indirectly from bodily injury, mental illness, disease, or condition which pre-existed

membership in the systems by submitting a complete collection of medical records from the time period before the membership date. Appellee failed to submit the necessary records. The Court of Appeals in McManus affirmed it was the applicant's duty to produce this evidence:

> In all administrative hearings, unless otherwise provided by statute or federal law, the party proposing the agency take action or grant a benefit has the burden to show the propriety of the agency action or entitlement to the benefit sought. The agency has the burden to show the propriety of a penalty imposed or the removal of a benefit previously granted. The party asserting an affirmative defense has the burden to establish that defense. The party with the burden of proof on any issue has the burden of going forward and the ultimate burden of persuasion as to that issue. The ultimate burden of persuasion in all administrative hearings is met by a preponderance of evidence in the record. Failure to meet the burden of proof is grounds for a recommended order from the hearing officer.
>
> See also Brown Hotel Co. v. Edwards, 365 S.W.2d 299 (Ky. 1962); Dawson v. Driver, 420 S.W.2d 553 (Ky.1967); cf. Burton v. Foster Wheeler Corp., 72 S.W.3d 925 (Ky. 2002)(claimant bears burden of proving every essential element of a workers' compensation claim); Whittaker v. Rowland, 998 S.W.2d 479 (Ky.1999)(same). McManus has cited a plethora of cases in other areas of the law such as insurance contracts that are not applicable to the current situation. He also asserts that the pre-existing condition factor could be considered an affirmative defense with the burden of proof on the Kentucky Retirement Systems.
>
> While the Kentucky Retirement Systems may be obligated to raise the issue of causation based on a pre-existing condition as part of its review procedure that includes a written report of conclusions and recommendations by the group of medical examiners, the placement of the pre-existing condition factor alongside and in the same subsection as other threshold factors such as the existence of incapacity and permanency militates against treating it as a full-scale affirmative defense. Additionally, KRS 61.665(3) provides for a hearing challenging a determination of the Kentucky Retirement Systems "in accordance with KRS Chapter 13B," which places the burden of proof on the claimant seeking benefits. We cannot say the hearing officer erred in assigning McManus the burden of proof on the issue of causation related to a pre-existing condition.

McManus, at 457-458.

If an applicant is denied disability retirement benefits under KRS 61.600, an appeals process is provided in KRS 61.665. KRS 61.665 specifically states that, if there is an appeal, a formal hearing is to be conducted in accordance with KRS Chapter 13B. KRS Chapter 13B.090(7) clearly establishes that the applicant must meet her burden of proof by a preponderance of the evidence. This was clearly acknowledged in the decision in McManus.

KRS 61.600, KRS 61.665, and KRS 13B.090 firmly establish that Appellee had to prove by a preponderance of the evidence that her COPD did not result directly or indirectly from a condition that existed prior to Appellee's membership. Appellee did not prove this fact by a preponderance of the evidence. Appellee provided a chest x-ray from five years prior to her membership date; however, as was previously explained, chest x-rays are not suitable for diagnosis of the onset of COPD. Appellee provided no probative evidence regarding her pulmonary condition from the time immediately prior to her membership in CERS. Appellee provided no evidence that would contradict the well known scientific evidence regarding the development of COPD. Appellee provided no evidence to contradict the causal links her own physicians made between her COPD and her years of smoking. Furthermore, the information in the Administrative Record clearly indicates that Appellee did not provide a complete collection of her medical records.

The Court of Appeals erroneously failed to apply the correct legal standard established in KRS 13B.090 and McManus, which is Appellee must establish by a

preponderance of the evidence that her incapacity did not result from a condition that pre-existed her membership date in the Kentucky Retirement Systems, to the case at bar. The current makeup of the Court of Appeals apparently disfavors the McManus determination by the previous court and has now chosen to attempt to diminish the effect of McManus. In the case at bar, the Court of Appeals' Opinion stated in relevant part:

> While our decision in *McManus* is arguably draconian and improvident, it is not necessary to revisit that question now. However, what *McManus* did not address, and what we must address in this case, is the follow-up question: What quantum of evidence of the absence of a pre-existing condition is necessary to require the Systems to present objective medical evidence to the contrary?

(Appendix A, p. 14).

This Opinion clearly failed to note that the Court in McManus actually stated, "[t]he ultimate burden of persuasion in all administrative hearings is met by a preponderance of evidence in the record." McManus obviously establishes the "quantum of evidence" that must be provided, preponderance of the evidence. Furthermore, the Court of Appeals' ruling effectively changes the burden of proof established by KRS 13B.090 and impermissibly alters the statutory language by holding that the claimant who bears the burden of proof must only show a "minimum" of proof, rather than the "preponderance" that is required by statute. The Court of Appeals has impermissibly altered the plain language of the statute.

In the case at bar, the Court of Appeals misconstrued a series of published opinions to reach the conclusion that "in those infrequent circumstances in which we impose upon a party the burden of proving a negative, the quantum of evidence necessary

to meet that burden is minimal." (Appendix A, p. 14). While not outright stating that it is reversing McManus, the Court of Appeals has erroneously altered the proof required in KRS 13B.090, which was noted in McManus, and shifted the burden of proof on the issue of a pre-existing condition back to the Appellant in direct contradiction of KRS 13B.090(7). The Court of Appeals cannot ignore statutory authority enacted by the legislature. Furthermore, the Court of Appeals cannot overturn existing case law, published by the Supreme Court, in such a circuitous manner.

The Court of Appeals cited several published cases in its effort to render the McManus opinion hollow. The Court of Appeals cited Dowell v. Safe Auto Ins. Co. 208 S.W.3d 872, 878 (Ky. 2006) for the proposition that the when a party must prove a negative the quantum of evidence is minimal. (Appendix A., p. 14). However, the ruling in Dowell revolved around the meaning to the word "applies" appearing in an insurance policy and around the "fundamental rule in the construction of insurance contracts that the contract should be liberally construed and any doubts resolved in favor of the insured." Dowell, at 878. As the Court of Appeals correctly noted in McManus, the rules regarding insurance contracts are not applicable in disability retirement cases under KRS 61.600. McManus at 457.

Furthermore, the Supreme Court in Dowell also noted that in order to meet the burden of proving a negative, the proof must be such that it would convince the trier of fact that all reasonable efforts had been made by the Appellee to ascertain the existence of an applicable policy. This is far different dicta than the "minimal quantum" that the Court of Appeals cites the case to hold. By its holding, the Court of Appeals has

attempted to utilize a completely unrelated case, which does not stand for the proposition the Court of Appeals espouses in the case at bar. However, the Court of Appeals fails to apply published case law and statutory authority that is directly on point with regard to the burden of proof when it fails to apply McManus and KRS 13B.090 to the case at hand.

The Court of Appeals also cited Boyd v. Withers, 46 S.W. 13 (Ky. 1898) for the proposition that "[t]he party holding the affirmative of an issue must produce the evidence to prove it." (Appendix A., p. 14). However, Boyd also states that "[t]his is a rule of convenience, adopted, **not because it is impossible to prove a negative**, but because the negative does not admit of the direct and simple proof of which the affirmative is capable." (emphasis added). This case also significantly notes that "[w]hen a fact is more particularly within the knowledge of one party than the other, the burden of proof is on such party, as the law will not force a party to show a fact which by intendment of law is not within his knowledge." This point of law is very significant because Appellee was the only party to this action to have knowledge of her medical providers and treatments and her physical condition prior to her membership in CERS.

By imposing the "minimal burden" standard espoused in the case at bar, the Court of Appeals is, in essence, destroying the ruling in McManus and the standard of proof established in KRS 13B.090 and the requirement in KRS 61.600 that a condition not pre-exist a person's membership in Kentucky Retirement Systems. A person would merely have to deny that a condition directly or indirectly related to a condition that pre-existed her membership in Kentucky Retirement Systems and then deny that they went to the

doctor regularly. Then, the applicant would produce an insular and obscure medical record from the time period prior to her membership date that did not reference the disabling condition. Kentucky Retirement Systems would have no way of knowing or proving if this were or were not the truth.

The Court of Appeals also ruled that because Appellee came forward with the necessary minimal quantum of evidence of the non-existence of a pre-existing condition, this created a rebuttable presumption shifting the burden to the Appellant. In support of this proposition, the Court of Appeals cited Jefferson County Public Schools/Jefferson County Bd of Educ. v. Stephens, 208 S.W.3d 862, 866 (Ky. 2006). The ruling in Jefferson County Public Schools regarding the shifting burden of going forward is specifically based on KRE 301. However, KRE 301 only applies "[i]n all civil actions and proceedings when not otherwise provided for by statute . . ." The burden of proof and standards for production are provided for by KRS 13B.090(7) in cases involving Appellant. As was previously explained, KRS 61.600, KRS 61.665, KRS 13B.090, and McManus establish the burden of proof in this matter. As Appellee did not meet her burden of proof by a preponderance of the evidence, Appellee did not qualify for enhanced disability retirement benefits under KRS 61.600.

II. THE COURT OF APPEALS ERRED BY SUBSTITUTING ITS JUDGMENT FOR THAT OF THE FACT FINDER, WHEN DETERMINING THE WEIGHT TO BE GRANTED TO THE EVIDENCE.

There is a significant amount of case law establishing the fact finder's right to make determinations on issues of credibility and weight given to evidence. As long as

there is substantial evidence in the record supporting the agency's finding, the Court must defer to that finding, even if there is evidence to the contrary. Kentucky Comm'n on Human Rights v. Frasier, 625 S.W.2d 852 (Ky. 1981). The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence. Kentucky State Racing Comm'n v. Fuller, 481 S.W.2d 298 (Ky. 1972). As long as substantial evidence exists to support the agency's decision, that decision cannot be overturned.

In reviewing an agency decision, the Court may overturn the decision if the agency acted arbitrary or outside the scope of its authority, if the agency applied an incorrect rule of law, or if the decision itself is not supported by substantial evidence on the record. Kentucky State Racing Comm'n v. Fuller, 481 S.W.2d 298 (Ky. 1972). Substantial evidence "means evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." Owens-Corning Fiberglass v. Golightly, 976 S.W.2d 409, 414 (Ky. 1998). As long as there is substantial evidence in the record to support the agency's finding, the Court must defer to that finding, even if there is evidence to the contrary. Kentucky Comm'n on Human Rights v. Fraser, 625 S.W.2d 852 (Ky. 1981). The Court's role is to review the administrative decision, not to reinterpret or reconsider the merits of the claim. Kentucky Unemployment Ins., Comm'n v. King, 657 S.W.2d 250 (Ky. App. 1983).

Likewise, the Court may not substitute its own judgment as to the inferences to be drawn from the evidence of record for that of the administrative agency. Railroad Comm'n v. Chesapeake & Ohio Ry., 490 S.W.2d 763 (Ky. 1973). 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." Bowling v. Natural Resources and Envtl. Protection Cabinet, 891 S.W.2d 406, 409-410 (Ky. App. 1994). The Court of Appeals wrote, "[t]o put it simply the trier of facts in an administrative agency may consider all the evidence and chose the evidence that he believes." Id. at 410. The possibility of drawing two inconsistent conclusions for the evidence does not prevent an administrative agency's findings from being supported by substantial evidence. Kentucky State Racing Comm'n v. Fuller, 481 S.W.2d 298 (Ky. 1972). Kentucky Board of Nursing v. Ward, 890 S.W.2d 641 (Ky. App. 1994) and Starks v. Kentucky Health Facilities, 684 S.W.2d 5 (Ky. App. 1984) are cases, in a long line of cases, holding that administrative agency's findings, which are supported by substantial evidence, must be accepted by the reviewing court. Furthermore, "it is the ***exclusive province*** of the administrative trier of fact to pass upon the credibility of witnesses, and the weight of the evidence." 500 Associates, Inc. v. Natural Resources and Environmental Protection Cabinet, 203 S.W.3d 121 at 132 (Ky.App. 2006)(Emphasis added).

In the case at bar, the Court of Appeals ignored this case law and reweighed the evidence. Furthermore, when the Court of Appeals impermissibly reweighed this evidence, it ignored the substantial evidence that supported the determination of the Appellant. First, the Court of Appeals incorrectly found that Appellee provided contemporaneous objective medical records and x-rays that proved she did not have COPD at or before her membership date. As has been repeatedly explained, Appellee did not provide medical records that were contemporaneous with the time period

immediately before her membership date. The information regarding the chest x-ray taken several years prior to her membership date was not probative. Furthermore, it was the fact finder's right to determine if Appellee was credible when she asserted that she had no prior medical records. The Court of Appeals had no right to reweigh this determination of credibility.

Second, the Court of Appeals incorrectly held that the only evidence contradicting Appellee's testimony that her condition did not result directly or indirectly from a pre-existing condition were the statements of Dr. McElwain and Dr. Keller. This holding completely ignores the statements by Dr. Abram, Appellee's treating physician, acknowledging that Appellee could have been symptomatic for a number of years before her diagnosis and the well known and accepted scientific evidence regarding the progression of COPD.

Third, the Court of Appeals incorrectly stated in its Opinion that Appellee did not have a diagnosis of COPD until nine years after her membership. However, Dr. Abram clearly noted that Appellee's onset of symptoms and date of diagnosis was March 1996, less than three years after her membership in CERS. (Appendix D., A.R., p. 42). Furthermore Dr. Abram testified during his deposition that:

> We are built with lungs that have tremendous over-capacity to what we truly need. That's a good thing. That means that certain amounts of lung can be damaged, disease or ruined and we may not necessarily know or feel slighted about it. So in other words, when patients come in with their symptoms that would be consistent and typical with emphysema, for instance, it's a good possibility, but not always, that a fair amount of the lung has been irritated or damaged. The problem with emphysema is that it's insidious and people may not necessarily always know that they have it, but that's also a problem with diagnosis.

(Appendix D, A.R., pp. 304-305).

These two statements from Dr. Abram represent objective medical evidence that Appellee had a fair amount of lung damage before March 1996 when she began reporting symptoms. This would be less than four years after Appellee's membership in Kentucky Retirement Systems. Dr. Abram also testified that a person, such as Appellee, could have COPD for ten to thirty years before she becomes symptomatic. (Appendix D, A.R., pp. 306-307). There is clearly substantial evidence that Appellee failed to meet her burden of proof that her COPD did not exist prior to her membership in CERS. The Court of Appeals reweighing this evidence was improper and should be reversed by this Honorable Court.

III. THE COURT OF APPEALS ERRONEOUSLY INTERPRETED KRS 61.600(3)(d) WHEN IT STATED, "WE BELIEVE THE LEGISLATURE SPECIFICALLY USED THE PHRASE "BODILY INJURY, MENTAL ILLNESS, DISEASE, OR CONDITION" IN KRS 61.600(3)(d) TO INDICATE MEDICALLY AND PSYCHIATRICALLY DIAGNOSABLE MALADIES ONLY."

The Court of Appeals also improperly limited the definition of the term "condition" used in KRS 61.600. The Court of Appeals ruled in the case at bar that "[w]e believe the legislature specifically used the phrase "bodily injury, mental illness, disease, or condition" in KRS 61.600(3)(d) to indicate medically and psychiatrically diagnosable maladies only." (Appendix A, p 16). As discussed above, Appellee did not meet her burden to prove that her COPD did not pre-exist her membership in the CERS. Even if Appellee had met that burden of proof that her COPD was not a condition that pre-existed her membership in Kentucky Retirement Systems, which she has not, then

Appellee's obvious nicotine dependence disorder, evidenced by her prolonged history of tobacco abuse and her admitted inability to quit abusing tobacco, even while on oxygen and after being advised to quit by her doctor, was a pre-existing condition that directly led to her COPD. The Court of Appeals has ruled that Appellee's extensive tobacco abuse was only a behavior which could not be considered a "condition" under KRS 61.600. However, as has been previously explained, nicotine dependency is a well known psychiatric malady and is even noted in the Diagnostic and Statistical Manual of Mental Disorders Fourth Edition. (Appendix C).

The Court of Appeals has improperly limited what can be considered a "condition" under KRS 61.600 in an attempt to govern public policy. This ruling is not based on any legal precedent or facts in this case. This unsupported limitation should not be upheld. "[A]gencies are entitled to great deference in interpreting their own statutes and regulations, at least where those interpretations do not contravene the law." Morgan v. Natural Resources and Environmental Protection Cabinet, 6 S.W.3d 833 (Ky.App. 1999). Appellants' interpretation of this statute is correct, does not contravene the law, and should be given deference.

IV. THE COURT OF APPEALS ERRONEOUSLY FOUND THAT APPELLANT'S INTERPRETATION OF KRS 61.600 WOULD VIOLATE KRS 344.040.

The Court of Appeals has also asserted that the Appellant's interpretation of KRS 61.600 to include nicotine dependency and abuse as a condition subject to consideration under the pre-existing condition exclusion would be "entirely contrary to the legislature's policy prohibiting discrimination against employees merely 'because the individual is a

smoker[.]'" KRS 344.040. (Appendix A, p. 17). The Court of Appeals interpretation of KRS 61.600 and KRS 344.040 is clearly erroneous.

First, Appellant was not Appellee's employer. Appellee was employed by Lincoln Trail District Health Department. The Lincoln Trail Health Department was a member agency of CERS. Therefore, Appellee was a member of CERS as a benefit of her employment. Therefore, Appellant is not bound by KRS 344.040, which only applies to employers.

Second, even if Appellant were considered to be Appellee's employer under KRS 344.040, which it does not concede, it is clear that fringe benefits, such as health insurance and retirement benefits, can take into consideration pre-existing conditions, including smoking, for purposes of determining effective dates of eligibility and contribution rates. This was specifically done in the 2004 Extraordinary Session Ky. Acts ch. 1, sec. 4, where different employee contribution rates were set for the state health insurance plan for smokers and nonsmokers. In essence, the Court of Appeals is attempting to provide greater protection to individuals who smoke than what is provided for in KRS 344.040.

Third, KRS 61.600 is not discriminatory because it applies equally to all members of CERS and the other systems administered by Appellant regardless of the members protected status under KRS 344.040. If the member has a pre-existing condition, whether it is psychological, physical or a component of both, such as a substance addiction, the member cannot receive disability retirement benefits for that condition or a related condition unless the member has sixteen years of service credit or a substantial

aggravation of that condition from an accident or injury arising out of or in the course of employment. Members who smoke are not treated any differently from any other protected class under KRS 61.600. In essence, under the Court of Appeals' interpretation of this law, Appellant would be precluded from ever enforcing KRS 61.600(3) as it would always discriminate against an individual who had some type of mental or physical condition prior to membership. The Court of Appeals' interpretation would render KRS 61.600(3) a nullity. Appellant respectfully request that this Honorable Court reverse the decision of the Court of Appeals and find that KRS 344.040 does not apply to KRS 61.600.

CONCLUSION

The role of the Court of Appeals is to make certain that the standards established by the General Assembly are being administered correctly. The Court of Appeals has abandoned this role in its effort to shape public policy and legal requirements for an award of disability retirement benefits from the Appellant in a manner that is contrary to the intent of the General Assembly and the clear language of the statutes enacted by the General Assembly. KRS 61.600 requires objective medical evidence that an applicant's disabling condition did not result directly or indirectly from a condition that pre-existed the applicant's membership in the Kentucky Retirement Systems. KRS 61.665 and KRS 13B.090 establish that this burden of proof is on the applicant and must be met by a preponderance of the evidence. The General Assembly has made these requirements clear. Furthermore, McManus v. Kentucky Retirement Systems, which was ordered published by this Honorable Court, clearly affirms the requirements established in these

statutes. The Court of Appeals has improperly circumvented this law and ignored binding statutory authority.

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 decision of the Appellant.

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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