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

KENTUCKY RETIREMENT SYSTEMS **APPELLANT**

VS.

DILLARD WAYNE BROWN, Individually and as Executor of the Estate of BARBARA FAYE REED BROWN, deceased **APPELLEE**

BRIEF FOR APPELLEE

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, pursuant to CR 76.12(3)(a), he has filed ten copies of this Brief for Appellee with the Kentucky Supreme Court by transmitting same by United States Registered Mail to Hon. Susan Stokley Clary, Clerk, Kentucky Supreme Court, 700 Capitol Avenue, Room 235, Frankfort, Kentucky 40601-3415, and that pursuant to CR 76.12(5), he has served true and correct copies of this Brief of Appellee upon Hon. Katherine Rupinen, Kentucky Retirement Systems, 1260 Louisville Road, Frankfort, Kentucky 40601, Counsel for Appellant; Hon. Thomas Wingate, Judge, Franklin Circuit Court, P. O. Box 678, Frankfort, Kentucky 40602; and Hon. Samuel Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601-9229, all on this 11th day of June, 2009.

JOSEPH H. MATTINGLY III

STATEMENT CONCERNING ORAL ARGUMENT

The Appellee concurs with Appellant and believes that oral argument would be helpful to the Court in deciding the issues presented because counsel could then more fully explain the issues raised in this appeal and respond to any questions of the Court with respect to those issues.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

This matter is before the Court on Discretionary Review of the Opinion of the Kentucky Court of Appeals affirming an Opinion and Order of the Franklin Circuit Court which reversed the decision of the Board of Trustees of the Kentucky Retirement Systems (hereinafter "Retirement Systems"), denying disability retirement benefits to the Appellee, Barbara Brown. (R. 77-84; AR. 403-417).[1]

The Retirement Systems denied benefits to Brown because it determined that Brown's smoking habit was a "condition" pre-existing her membership in the Retirement Systems and that this "condition" developed into "chronic obstructive pulmonary disease" (hereinafter "COPD"). (AR. 403-417). Brown claimed that COPD caused her disability.[2] (AR. 3-5). In light of the "pre-existing condition" perceived by the Retirement Systems, and because Brown had not earned at least sixteen years of service prior to her claimed disability,[3] the Retirement Systems determined that Brown was not eligible for disability retirement benefits pursuant to KRS 61.600. (AR. 407).

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[1]References to the record are to the specific pages set forth in the Clerk's certification as "R. __" and to the specific pages of the Certified Administrative Record included as item 25 of the Record on Appeal as "AR. __".

[2]Brown died of COPD on October 6, 2004. (R. 37). Brown's husband and Executor, Dillard Wayne Brown, elected to revive the action following her death because the decision on Brown's entitlement to disability retirement benefits directly affects her beneficiary's rights to receive distributions under her Retirement Systems account.

[3]KRS 61.600(2)(d), in effect at the time this matter was decided at the administrative level, required that where a claimant has less than sixteen (16) years' current or prior Retirement Systems employment, the objective medical evidence must show that her incapacity, "does not result directly or indirectly from bodily injury, mental illness, disease, or condition which pre-existed membership in the system . . . ." As the Court of Appeals correctly pointed out, "In 2004, the General Assembly amended KRS 61.600, 2004 Ky.Acts Ch. 36 § 15, eff. 7-13-04. The effect, in the context of this case, is merely that subsection (2) was renumbered as subsection (3)." The Court of Appeals cited to the current version of the statute for ease of future research even though the Franklin Circuit Court cited to the former subsection (2). As did the Court of Appeals, the Appellee will cite to the current version of the statute in this Brief.

Before her retirement, Brown was a clinical assistant for the Lincoln Trail District Health Department at its Nelson County, Kentucky, clinic. (AR. 407). In conjunction with her employment, Brown became a Retirement Systems' member with her initial membership beginning March 31, 1992. (AR. 407).

Prior to Brown's employment with Lincoln Trail, and her enrollment in the Retirement Systems, Brown suffered from no adverse health condition or illness. (AR. 414). In fact, other than regular visits to her gynecologist, Brown had not sought treatment from a physician for over ten years prior to her initial membership in the Retirement Systems. (AR. 414). Significant to the issues involved in this case, Brown's gynecological records revealed that during her December 1, 1976, and her October 11, 1978, examinations, her lungs were clear. (AR. 282-283). A chest x-ray conducted at the Methodist Evangelical Hospital on April 22, 1987, also found Brown's lungs clear. (AR. 273). Those records further confirmed Brown was physically very active prior to her enrollment in the Retirement Systems. Office notes of January, 1990, substantiate Brown's own testimony to the Hearing Officer that she walked four miles nearly every day. (AR. 266). Brown testified that she never experienced shortness of breath or felt inhibited in any way from engaging in an extremely active lifestyle prior to her enrollment in the Retirement Systems.

Brown's first visit to a physician in over a decade, other than her gynecologist, occurred when Brown complained of an earache and cold-type symptoms on January 22, 1993, nearly one year after she enrolled in the Retirement Systems. (AR. 43). At her initial visit, nothing in that appointment provided any evidence, objective or otherwise,

that Brown suffered from any lung condition or illness. (AR 43). In fact, Dr. Mark Abram, the physician she chose, noted her lungs were normal. Over the following three years, Brown treated with Dr. Abram on only five additional occasions for nothing more serious than cold-type symptoms. (AR. 43-44). According to Dr. Abram, no objective evidence existed through early 1996 suggesting Brown suffered from any lung condition or illness. (Deposition of Dr. Mark Abram taken September 30, 2003, hereinafter "Dr. Abram Depo.," at 12; AR. 295).

The Court of Appeals reviewed the relevant evidence leading up to the diagnosis that Brown suffered from COPD as follows:

> Dr. Abram first saw Mrs. Brown as a patient on January 22, 1993. He testified that she did not exhibit "any indication that would provide any objective medical evidence that at that point in time Ms. Brown had COPD, emphysema, or any related condition[.]" At that time, Dr. Abram specifically evaluated the condition of her lungs. Her respiration rate and the condition of her lungs were both normal.
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> Dr. Abram saw her again, medically, in June 1993 when she complained of sinus congestion. She exhibited signs of rhinitis or nasal congestion, but there was no indication of COPD or emphysema.
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> More than a year later, in September 1994, the doctor saw her again. "The only thing that she had at that time was a few expiratory wheezes and again I thought that was related more to irritated airway secondary to a bronchitis[.]" He later testified that, even if he could have seen the future and known she would develop COPD and emphysema, he would not have changed his diagnoses on these occasions. He further testified that people who work in health-related fields often see a physician much more frequently that did Mrs. Brown. "[I]t's not uncommon for them to have three, four or five episodes per year of acute bronchitis, sinusitis, especially if they deal with small children." Mrs. Brown, who often assisted with immunizations and sick-child and well-child checks, was exposed to "bacteria and viruses" regularly during the course of her work at Lincoln Trail Health Department.

> Dr. Abram testified, "[f]rom '93 until roughly about '95 or early '96 I didn't think that this is what she had. In other words, I didn't think she met any criteria for COPD[.]" In fact, Dr. Abram never diagnosed Mrs. Brown with COPD. However, while reviewing her medical file during his deposition in September 2003, he speculated that "the approximate onset date for the emphysema and COPD for Ms. Brown was around March 1996[.]" That is four years after she became a member of the Systems.
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> There is not the first mention of COPD or emphysema in any of Mrs. Brown's medical records until March 22, 1998, when she presented herself to Dr. Laura McKay at the Flaget Healthcare Emergency Room in Bardstown, Kentucky, complaining of shortness of breath and trouble sleeping because of a cough. Dr. McKay noted that "[s]he has no prior history of lung problems" but ordered x-rays. Radiologist Greg Walton, M.D., noted that her x-ray indicated "[c]hanges suggesting chronic obstructive pulmonary disease with moderate bilateral upper lobe emphysema." Though changes in her lungs *suggested* COPD, there was not yet a firm diagnosis of COPD or emphysema. Instead, Dr. McKay's impression was that Mrs. Brown was suffering from "[a]cute bronchitis" and was "given prescript for Robitussin DAC. [She was] to return if she has worsening shortness of breath or any other problems."
>
> Apparently, no worsening of her condition or further problems immediately presented themselves because she did not return for any medical reason for a substantial span of time. She resumed her normal physical routine which included walking up to four miles a day and mowing her own lawn with a push mower.
>
> When Mrs. Brown did return to Flaget Healthcare in June of 2000, Dr. Walton compared the new chest x-ray of her lungs with the one he had taken in 1998 and noted "lungs are clear . . . no active disease." A few months later, in September 2000, a medical exam was again "suggestive of COPD" but there was still no firm diagnosis. Finally, on February 1, 2001, after presenting herself at Flaget Healthcare complaining of shortness of breath, she was first diagnosed with COPD.

(Court of Appeals' Opinion Affirming at 2-4).

Brown continued in her employment with the Lincoln Trail Health Department even while being treated by Dr. Abram and later by a pulmonologist. In May, 2003, Brown's pulmonologist recommended she be permitted to have oxygen as needed in her

work place in order for her to continue employment. (AR. 221). However, Brown's employer refused to accommodate Brown's need for oxygenation in the work place and Brown's employment ended May 31, 2003. (AR. 1-2, 185).

Subsequently, Brown filed an application for disability retirement benefits pursuant to KRS 61.600. (AR. 3-5). Thereafter, the Retirement Systems requested Dr. William P. Keller and Dr. William P. McElwain to evaluate Brown's application. (AR. 175-178). Although neither physician disputed Brown's total and permanent incapacity, Brown's application for disability retirement benefits was denied based upon the evaluating doctors' determination that her incapacity resulted directly or indirectly from a disease or condition which pre-existed her initial membership in the Retirement Systems.[4] (AR. 175-183).

Although neither evaluating doctor cited any objective medical evidence to support his opinion, both concluded that because Brown was a smoker, she had a condition pre-existing her membership in the Retirement Systems which precipitated her incapacity. (AR. 175-178). Dr. Keller contended, incorrectly, that Brown was diagnosed with end-stage COPD in March, 1986. (AR. 176). He contended that Brown's history of smoking, "had long sense [sic] set the stage for ultimate pulmonary disease by virtue of her 3 decade smoking habit." (AR. 176). Likewise, Dr. McElwain cited Brown's long use of tobacco and then leaped to the conclusion that, "this would appear to establish the

[4]Unfortunately, Brown's gynecological records and the April 22, 1987, chest x-ray from Methodist Evangelical Hospital were not reviewed by the evaluating physicians prior to rendering their decisions. Instead, those records were filed in the administrative record at Brown's request following the administrative hearing.

presence of chronic obstructive pulmonary disease at the time of her employment." (AR. 178).

Following a hearing on Brown's application for disability retirement benefits, the Hearing Officer issued a Recommended Order dated December 31, 2003, denying Brown's application. (AR. 366-385). After exceptions to that Recommended Order were filed, on March 22, 2004, the Retirement Systems refused to adopt the Recommended Order. Instead, the Retirement Systems remanded the matter to the Hearing Officer because he utilized the wrong legal standard for determining the issues before him. (AR. 401). However, on remand the Hearing Officer essentially reissued the same Recommended Order under virtually the same improper standards. (AR. 403-419). Although exceptions were again filed, the Retirement Systems adopted the Hearing Officer's Recommended Order on Remand *in toto* by Final Order of July 14, 2004. (AR. 433).

Brown filed a Petition for Review with the Franklin Circuit Court. (R. 1). On December 20, 2005, the Franklin Circuit Court granted Brown's Petition for Review and reversed and set aside the decision of the Retirement Systems which denied disability retirement benefits to Brown. (R. 77-84). The Franklin Circuit Court agreed with Brown, finding that Brown's proof was compelling and noting that no substantial evidence existed to support the decision of the Retirement Systems that Brown's disability was caused by a condition which pre-existed her enrolment in the Retirement Systems. (R. 77-84)

The Franklin Circuit Court also agreed with Brown that "smoking" is not a "pre-

existing condition" as contemplated by KRS 61.600(3)(d), so as to preclude disability retirement benefits. In fact, the Franklin Circuit Court noted, "The record is void of objective medical evidence to prove that Brown's COPD pre-existed her membership in the Kentucky Retirement Systems." (R. 82). To the contrary, the only "objective medical evidence" proved otherwise. (R. 82). According to the Franklin Circuit Court, "The only evidence that Brown's COPD was a condition that pre-existed membership is conjecture by the Retirement Systems' doctors." (R. 83).

The Retirement Systems appealed to the Court of Appeals which affirmed the Franklin Circuit Court's Opinion, explaining that neither it nor the Franklin Circuit Court substituted its judgment for that of the Retirement Systems. Rather, according to the Court of Appeals, the evidence in Brown's favor, "is so compelling that no reasonable person could have failed to be persuaded by it. . . ." (Court of Appeals' Opinion Affirming at 2).

On February 11, 2009, this Court granted discretionary review. In this proceeding the Retirement Systems abandons its initial claim that Brown was not disabled and focuses solely on the issue of whether Brown's disability, "result[ed] directly or indirectly from . . . disease, or condition which pre-existed membership . . . ."

ARGUMENT

A. The Court of Appeals and the Franklin Circuit Court Were Correct That the Administrative Record Contains Compelling Evidence Demonstrating That the Retirement Systems' Denial of Benefits to Brown Was Arbitrary and Unsustainable.

Despite the Retirement Systems' protestations and dire predictions as to the

sweeping impact of the Court of Appeals' Opinion Affirming, holding that the Brown met her burden of proving that she suffered no pre-existing condition which would disqualify her from disability retirement benefits, the Court of Appeals' opinion is entirely consistent with existing precedent and certainly does not "diminish" the holdings in prior cases. Instead, the Court of Appeals took pains to point out that in *McManus v. Kentucky Retirement Systems*, 124 S.W.3d 454 (Ky.App. 2003), the issue of the allocation of the burden of proof and the burden of going forward with evidence in claims before the Board was addressed and this case was evaluated consistent with that precedent, no matter how "draconian" or "improvident" that decision may have been.

Regardless of the Court of Appeals' discussion about "proving a negative" or "rebuttable presumptions," the bottom line is that the Court of Appeals agreed with the Franklin Circuit Court that the evidence in Brown's favor, "is so compelling that no reasonable person could have failed to be persuaded by it. . . ." (Court of Appeals' Opinion Affirming at 2). While the Court of Appeals articulates a workable formula for evaluating disability claims where the Retirement Systems suggests that a pre-existing condition caused or contributed to the claimant's disability, its decision and that of the Franklin Circuit Court are entirely consistent with those precedents that the Retirement Systems now argues are being "diminished."

There can be no dispute that the foundation for any disability determination is the "objective medical evidence" related to the claimant and her claim. KRS 61.600. "Objective medical evidence" is defined by KRS 61.510(33) as:

[R]eports of examinations or treatments; medical signs which are

> anatomical, physiological, or psychological abnormalities that can be observed . . . 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[.]

It was upon the "objective medical evidence" that *McManus* was decided and the "objective medical evidence" controls the disposition of this case as well. However, the quality of the "objective medical evidence" produced by the claimant in *McManus* differs significantly from that produced by Brown in the case at bar. In *McManus* it was undisputed that the claimant suffered from a significant adverse health condition prior to his employment with the Retirement Systems. The claimant was unable to present ***any*** "objective medical evidence" supporting his claim that the adverse health condition was unrelated to his disability. Because he bore the ultimate burden of going forward with evidence as to that issue and was unable to submit any "objective medical evidence" in his favor, the Court of Appeals correctly held that his claim failed.

In contrast, the only "objective medical evidence" in this case shows a complete absence of any adverse medical condition prior to Brown's enrollment in the Retirement Systems. Thus, the Court of Appeals was called upon to take the *McManus* reasoning to the next logical step. In other words, where the claimant is able to produce significant "objective medical evidence" showing that no adverse medical condition existed prior to her enrollment in the Retirement Systems, may the Retirement Systems simply "stand pat" or is it instead compelled to produce ***some*** "objective medical evidence" to the contrary in support of the issue of causation it has raised?

The parameters of judicial review of the decision of an administrative agency denying relief to one carrying the burden of proof was defined in *Bourbon County Board of Adjustment v. Currans*, 873 S.W.2d 836, 838 (Ky. 1994), where this Court instructed that in such circumstances the agency's decision, "is arbitrary if the record compels a contrary decision in light of substantial evidence therein." Therefore, "attention should be directed to the administrative record in search of compelling evidence demonstrating that the denial of the relief sought was arbitrary. The argument should be that the record compels relief." *Id.* In this case, both the Franklin Circuit Court and the Court of Appeals had no trouble finding that the administrative record contained "compelling evidence" demonstrating that the Retirement Systems' denial of benefits to Brown was arbitrary.

In reaching their respective decisions finding the Retirement Systems acted arbitrarily in denying benefits to Brown, the Franklin Circuit Court and the Court of Appeals specifically measured the "objective medical evidence." In other words, the lower courts scanned the administrative record to find reports of examinations or treatments, anatomical or physiological medical signs and anatomical or physiological laboratory findings shown by diagnostic techniques such as X-rays. KRS 61.510(33).

When the lower courts examined the administrative record for "objective medical evidence," they found that Brown's pre-employment gynecological records included reports of examinations and treatments that confirmed that at each time her respiratory function was evaluated her physicians concluded that her lungs were clear. In further evaluating the administrative record for "objective medical evidence," the lower courts

found the report of a chest X-ray conducted at the Methodist Evangelical Hospital only a few years prior to Brown's employment which likewise confirmed that Brown's lungs were clear. The Court of Appeals adopted the Franklin Circuit Court's summary of its review of the objective medical evidence as follows:

> The record is void of objective medical evidence to prove that Brown's COPD pre-existed her membership in the Kentucky Retirement Systems. The only objective medical evidence regarding the condition of Brown's lungs prior to her membership in Retirement Systems was gynecological records in 1976 and 1978 indicating that her lungs were clear and an x-ray from 1987 with the same indication. Retirement Systems responds that x-rays are a poor indicator of COPD but cannot point to objective medical evidence that Brown's condition actually existed prior to her membership.

(Court of Appeals Opinion Affirming at 12).

However, the Retirement Systems claims that the "objective medical evidence" produced by Brown was "not probative." (Appellant's Brief at 20). The Retirement Systems essentially argues that this Court should ignore the definition of "objective medical evidence" contained in KRS 61.510(33) based upon testimony of Dr. Mark Abram taken completely out of context. In his deposition testimony, Dr. Abram explained that x-rays, while a good marker for progression of COPD, are not a good marker for initiation of the disease. The Retirement Systems then jumps to the conclusion that x-rays cannot detect the presence of COPD and thus a negative x-ray finding is not probative evidence that a patient does not have COPD. Therefore, according to the Retirement Systems, Brown's x-ray of April 22, 1987, showing Brown's lungs to be clear, should be disregarded. Clearly, however, Dr. Abram's testimony does not support the Retirement Systems' argument.

Dr. Abram clearly meant a physician may not be able to view an x-ray which shows the presence of COPD and determine how long the patient has had the condition. He did not say, as the Retirement Systems implies, that x-rays are unable to detect COPD. In fact, his testimony was to the effect that x-rays are useful to measure progression of COPD. If x-rays are useful in measuring progression, they must necessarily be able to show the presence of the condition in a patient. If the condition had been present on April 22, 1987, it would have been revealed by the Methodist Evangelical Hospital x-ray of that date.[5]

Nothing in the report of Dr. Abram's examination and treatment of Brown during her first post-employment office visit on January 22, 1993, suggests that Brown suffered from any lung condition or illness. Dr. Abram explained there was no objective medical evidence suggesting that Brown suffered from an illness or condition prior to March, 1992, which directly or indirectly contributed to her ultimate diagnosis and physical incapacity.

In contrast to the uncontradicted *objective* medical proof, the Retirement Systems' decision denying benefits to Brown, and its argument before this Court, relies upon pure speculation. It speculates that since Brown was a smoker it was possible for Brown to have had a developing lung condition that may have predated her enrollment in the Retirement Systems and contributed to her disability.

The Retirement Systems cites the opinions of Drs. McElwain and Keller to the

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[5]Interestingly, when Brown visited the emergency room at Flaget Hospital on March 22, 1998, complaining of shortness of breath, the diagnostic technic ordered by the physician which for the first time resulted in the suggestion that Brown had COPD was a chest x-ray.

effect that since Brown was a smoker, her COPD must have preceded her enrollment in the Retirement Systems.[6] According to the Retirement Systems, the opinions of Drs. McElwain and Keller "implicitly acknowledge the well known scientific facts regarding the course of development of COPD." (Appellant's Brief at 8). The "well-known scientific facts" referred to by the Retirement Systems are purportedly contained within a medical article authored by Dr. Dennis E. Doherty filed by the Retirement Systems over Brown's objection. (AR at 189-216). While KRS 13B.090(1) permits introduction of hearsay evidence such as the medical article relied upon by the Retirement Systems, it is only admissible if it is of the type of evidence that reasonable and prudent persons would rely on in their daily affairs. No qualifying support for admissibility of the Doherty article was produced by the Retirement Systems. While it attempted to elicit testimony from Dr. Abram as to whether or not the article was considered authoritative or of the type he would rely upon, Dr. Abram declined, explaining that he was unfamiliar with the article. (AR at 307).

In fact, The Retirement Systems persists in relying upon the Doherty article even though the Hearing Officer ruled that admission of the article was deficient and that the article, "was not relied upon by this hearing officer at all in reaching findings herein." (AR. 46).

The Retirement Systems then cites testimony of Dr. Abram discussing the

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[6]While the Retirement Systems claims that the opinions of Drs. McElwain and Keller were expressed, "within the realm of reasonable medical probability," nothing in those written reports describes with what degree of certainty, if any, those opinions are expressed. The Court of Appeals correctly pointed out that their, "subjective retrospective diagnoses are not couched in any degree of medical certainty . . . ." (Court of Appeals Opinion Affirming at 15).

possibility that in some patients the presence of COPD may be non-symptomatic for long periods of time, disregarding Dr. Abram's testimony directly addressing Brown's case and his opinion that she suffered from no pre-enrollment condition that caused or contributed to her disability.

The retrospective opinions of Drs. McElwain and Keller, the Dougherty medical article and the discussion by Dr. Abram of the possibility of a lengthy progression of COPD in some patients are not "objective medical evidence" as defined in KRS 61.510(33). At most the opinions of the Retirement Systems' doctors, the testimony of Dr. Abram cited by the Retirement Systems and the medical literature it produced establish no more than COPD ***may be*** caused by smoking and ***may*** develop over a period of years. As the Court of Appeals and the Franklin Circuit Court pointed out, without evidence of specific causation, the opinions of Drs. McElwain and Keller are unhelpful. *Cf., Knight v. Kirby Inland Marine, Inc.*, 482 F.3d 347, 351-352 (5th Cir. 2007) ("General causation is whether a substance is capable of causing a particular injury or condition in the general population, while specific causation is whether a substance caused a particular individual's injury. . . . First, the district court must determine whether there is a general causation. Second, if it concludes that there is admissible general-causation evidence, the district court must determine whether there is admissible specific-causation evidence.") (citations omitted).

Where, as here, the "objective medical evidence" compels a finding that Brown had no condition which preceded her enrollment in the Retirement Systems which caused or contributed to her disability, it was improper for the Retirement Systems to have

speculated that her incapacity may have been caused by a pre-existing condition. The judicial review and reversal of the Retirement Systems' decision was entirely consistent with existing precedent and should be affirmed.

B. Although the Court of Appeals' Opinion Can Be Affirmed Based on Existing Precedent and the Compelling Nature of Brown's Proof, This Court Should Take the Opportunity to Adopt the Court of Appeals' Burden-shifting Approach.

Citing the strength of the "objective medical evidence" produced by Brown, the Court of Appeals held that the Retirement Systems was required to come forward with some evidence in rebuttal at the risk suffering an adverse decision. (Court of Appeals Opinion Affirming at 15). Because the Retirement Systems produced ***no*** "objective medical evidence" on the issue of whether Brown's disability resulted from a condition which preceded her enrollment in the Retirement Systems, Brown's "compelling" evidence carried the day.

KRS 61.600, "does not explicitly allocate the legal burden of proof, but it should be construed in conjunction with other statutes and case law." *McManus v. Kentucky Retirement Systems*, 124 S.W.3d 454, 457 (Ky.App. 2003). In this regard, KRS 13B.090(7) places the burden of proof upon "the party proposing the agency take action or grant a benefit." Further, "The party having the burden of proof before an administrative agency must sustain that burden, and it is not necessary for an agency to show the negative of an issue when a prima facie case as to the positive has not been established." *City of Louisville, Div. Of Fire v. Fire Service Managers Assoc.*, 212 S.W.3d 89, 94 (Ky. 2007)(citing *Pers. Bd. v. Heck*, 725 S.W.2d 13, 17 (Ky.App.

1986)(emphasis omitted). The "burden of proof" is described in KRS 13B.090(7) as including the "burden of going forward and the ultimate burden of persuasion as to that issue." While the "burden of going forward" and the "ultimate burden of persuasion" are not more specifically defined, those terms are not unfamiliar to Kentucky jurisprudence. Thus, the General Assembly is presumed to have been aware of the construction of those terms as developed in the common law when it chose them for use in KRS 13B.090(7). *Lewis v. Jackson Energy Co-op. Corp.*, 189 S.W.3d 87, 93 (Ky. 2005).

These concepts are best described by Professor Robert Lawson in his treatise, Lawson, *The Kentucky Evidence Law Handbook*, Fourth Ed. There, Professor Lawson describes "burdens of proof" as follows:

> The term "burden of proof" is used to describe two separate and distinct concepts related to the process of persuasion. They are most often labeled as follows:
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> > The term "burden of proof" is used commonly as applying to two kinds of situations. First, the risk of nonpersuasion; second, the duty of going forward with evidence.
>
> Other labels are frequently used to describe one or the other of the two obligations. "Burden of persuasion" is a common substitute for risk of nonpersuasion, and "prima facie evidence" is used sometimes to mean the same thing as burden of going forward with evidence.
>
> The burden of going forward is an obligation owed by litigants to the trial judge. It is normally brought into operation by a motion for directed verdict or a request for a peremptory instruction. . . . The risk of nonpersuasion is an obligation owed by litigants to the ultimate trier of fact (the jury or, in a bench trial, the judge). In most cases, it imposes on the parties an obligation to prove factual propositions material to a clam or defense by a "preponderance of evidence." Properly used, it merely provides the trier of fact with a rule that resolves controverted issues as a matter of law in those rare instances when the mental conviction of the trier is in perfect balance (the existence of a disputed fact is believed to be

as probable as its nonexistence).

> The burden of going forward with evidence is used to determine if a litigant will gain access to a jury for final resolution of the claim or defense. The risk of nonpersuasion comes into play only after the burden of going forward has served its purpose and disappeared from the scene.

Id. at §9.00[1](citations omitted).

Particularly relevant to this case is Kentucky's longstanding recognition that while reference to the "burden of going forward" squarely places upon the party saddled with the "burden of proof" the initial obligation of producing evidence, it also incorporates by its definition certain burden shifting characteristics. Professor Lawson explains:

> The law on allocation of burdens of going forward with evidence determines the order in which parties must commence to produce evidence on given issues. It is the law, for example, that requires a plaintiff to bear the burden of going forward with respect to negligence and a defendant to bear the same burden with respect to contributory negligence or comparative fault. If a case proceeds in a normal course, the parties will produce enough evidence to make jury issues on those elements for which they bear the burden of going forward.
>
> In proceeding toward this objective, some parties do more than merely convince the judge that reasonable jurors *could* find in their favor. They may introduce sufficient evidence on a given element to persuade the judge that no reasonable juror *could fail* to find in their favor. When this happens, the burden of going forward with evidence on the element in question shifts to the opponent. This means that, in the absence of countervailing evidence, the party originally having the burden is entitled to a directed verdict or peremptory instruction. If the litigant to whom the burden has shifted responds to the obligation by introducing sufficient proof to convince the trial court that no reasonable juror could fail to find in his or her favor, then, with respect to that element, the burden of going forward may shift back to the party who originally had it.
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> This so-called shifting process is well established in the law of Kentucky. An initial shift of the burden of going forward with the evidence has been described as follows:

> A defendant always runs the risk of a directed verdict against him if he fails to come forward with defensive proof; it depends simply on how strong a showing has been made by the plaintiff's evidence, standing unexplained would it be clearly unreasonable for the jury not to be convinced by it? If so, what is to all intents and purposes a "rebuttable presumption" has been created.

Id. at §9.00[2][f] (citing *Lee v. Tucker*, 365 S.W.2d 849, 851 (Ky. 1963) and *Wadkins' Adm'x v. Chesapeake & O. Ry. Co.*, 298 S.W.2d 7, 9-10 (Ky. 1956)).

The Retirement Systems primarily complains that in finding that Brown's proof that her disability was not caused by a pre-existing condition was so strong as to compel a finding in her favor, the Court of Appeals cited cases in other legal contexts holding that where a party is imposed with the burden of proving a negative, "the quantum of evidence necessary to meet that burden is minimal." (Court of Appeals Opinion Affirming at 14)(citing *Dowell v. Safe Auto Ins. Co.*, 208 S.W.3d 872, 878 (Ky. 2006). However, nothing in the Court of Appeals' opinion can be read as characterizing the quantum of evidence produced by Brown as "minimal." To the contrary, the Court of Appeals agreed with the Franklin Circuit Court that the evidence was so compelling that no reasonable person could have failed to be persuaded by it. Rather than abrogating the burden of proof placed upon Brown by KRS 13B.090(7), those Courts simply applied well-established principals requiring the Retirement Systems to come forward with *some* evidence to counter the substantial proof introduced by Brown. Rather than do so, the Retirement Systems simply stood pat.

The Retirement Systems also makes a passing complaint to the Court of Appeals' reference to the creation of a "rebuttable presumption." (Appellant's Brief at 17).

Perhaps the Court of Appeals' reference to a "rebuttable presumption" was imprecise but if so it is one of many "misnomers" used in the law of Kentucky when struggling with articulation of burdens of proof, burdens of going forward with evidence, risk of nonpersuasion and the role of presumptions. *See, generally,* Lawson, *The Kentucky Evidence Law Handbook*, Fourth Ed. at § 10.00[2]. While in its most technical sense, the production of evidence so compelling as to shift the burden of going forward with evidence as to a particular issue to the other party does not *create* a "rebuttable presumption," its effect is to do so "as to all intents and purposes." *See, Lee v. Tucker*, 365 S.W.2d 849, 851 (Ky. 1963).

Curiously, the Retirement Systems complains that a shift of the burden of going forward with evidence to the Retirement Systems where a claimant produces evidence as compelling as did Brown would promote fraud upon the Retirement Systems by unscrupulous claimants who would refuse to disclose information relevant to their medical condition or make false statements to promote their cause.[7] (Appellant's Brief at 16-17). The Retirement Systems' broad disparagement of potential claimants assumes that those claimants will willfully ignore their obligation under KRS 61.665 to furnish relevant medical information -- an assumption this Court should not indulge. Further, the

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[7]To make its point, the Retirement Systems accuses Brown of this very fraud. It takes an obscure estimate by her pulmonologist that he had treated Brown for "approximately five years" prior to May 23, 2003, points out that the earliest pulmonary records supplied were from 2000, and jumps to the accusation that Brown, "did not produce all of her medical treatment records." (Appellant's Brief at 9, 12-13, 16-17, 19-20). At no time during the administrative hearing process or before the Franklin Circuit Court did the Retirement Systems complain that it did not have a complete set of Brown's pulmonary records. The Retirement Systems' unfounded accusation is disturbing, particularly since Brown's pulmonary records clearly contain notes from her *initial* visit in 2000, making it obvious that the physician's estimate as to the length of her pulmonary treatment was simply inaccurate. Allegations of fraud should not be leveled so lightly and when made without the slightest basis, should not be tolerated from a governmental agency.

Retirement Systems' position is premised upon the notion that neither the adversarial system and its inherent ability to reach the truth nor the hefty authority of the Retirement Systems' representatives to obtain relevant information by compulsion pursuant to KRS 61.665 and KRS 61.685 are adequate. This position is likewise unavailing.

Contrary to the Retirement Systems' arguments, the holdings of the lower courts are logical and reasoned applications of long-standing precedent and certainly do not "destroy" those precedents or any of the requirements of KRS 61.600 or KRS 13B.090. Thus, the "burden-shifting" approach articulated by the Court of Appeals should be explicitly adopted by this Court.

C. The Franklin Circuit Court and the Court of Appeals Correctly Interpreted KRS 61.600(3) as Referring Only to Medically and Psychiatrically Diagnosable Maladies.

The Retirement Systems takes issue with the Court of Appeals' interpretation of the phrase "bodily injury, mental illness, disease, or condition" contained in KRS 61.600(3)(d) as referring only to medically and psychiatrically diagnosable maladies and not to "behavior" such as smoking.[8] On the one hand, the Retirement Systems claims that the Court of Appeals improperly limited the definition of "condition" and, on the other, argues that smoking is a "well known psychiatric malady" which is included in the definition of "condition" even as that term is construed by the Court of Appeals.

Simply because Brown exercised a lifestyle choice the Retirement Systems does

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[8]The Retirement Systems also complains that the Court of Appeals improperly relied upon the non-discrimination provisions of KRS 344.040 in construing KRS 61.600(3)(d). While an interesting point of public policy, the Court of Appeals' citation to KRS 344.040 was clearly not the fundamental basis for its decision. Because the Court of Appeals' decision is clearly justified without reliance upon KRS 344.040, its application to the construction of KRS 61.600(3)(d) will not be further addressed in this Brief.

not agree with, *i.e.* smoking, it should not be able to ignore the requirement that its decision be based upon objective medical evidence and instead jump to conclusions not supported thereby.[9] The test is not whether Brown made the most healthy lifestyle choices prior to her disability. Instead, the test is whether the *objective medical evidence* shows that Brown had no lung illness or condition which pre-dated her enrollment in the Retirement Systems in 1992.

Completely undermining its decision, the Retirement Systems misinterpreted Brown's smoking habit as a "pre-existing condition." In the Hearing Officer's sixth Finding of Fact, adopted by the Retirement Systems, the Hearing Officer concluded Brown's incapacity was caused, directly or indirectly, by a "condition" which pre-existed her membership in the system. Significantly, it did not find Brown suffered from COPD or any other physical ailment prior to her membership in the Retirement Systems. In fact, it is clear the Administrative Record is wholly devoid of any objective medical evidence supporting such a finding. Instead, the Hearing Officer and Retirement Systems attributed Brown's pulmonary problems, "to cigarette smoking that predates employment

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[9]If Brown had developed lung cancer, would the Retirement Systems be required to "speculate" that since she was a smoker and smoking is a leading cause of lung cancer that she must have had a lung illness or condition that at least indirectly caused her lung cancer, even if the objective medical evidence showed otherwise? Could "smoking" be considered a "pre-existing condition?" If a claimant's disability was scirrosis of the liver and he was a frequent consumer of alcohol, would the Retirement Systems "speculate" that a liver illness or condition existed from the onset of his regular consumption, even if the objective medical evidence showed no such illness or condition? Could "drinking" be considered a "pre-existing condition?" If a claimant suffers disability from a heart attack precipitated by lifelong consumption of fatty foods and maintenance of a sedentary lifestyle, must the Retirement Systems find that the claimant had a heart illness, even if the objective medical evidence indicates that no signs or symptoms of the illness were present when the claimant enrolled in the Retirement Systems? Can an "unhealthy diet" and "sloth" be deemed "pre-existing conditions" which would preclude a claimant from receiving disability retirement benefits? The answer to these questions is clear. Brown's application, as would be required of those of the three hypothetical claimants, was to be considered in light of the *objective medical evidence*, not upon speculation or objection to a claimant's lifestyle choices.

by many years," and found her lung problems were, "caused by and the culmination of a smoking habit." (AR. 415-416).

The Franklin Circuit Court and the Court of Appeals where correct when they found that when KRS 61.600(3)(d) refers to a pre-existing "condition" it means a *medical* condition, not a lifestyle choice. Although cigarette smoking, like many other lifestyle choices, may eventually cause a condition, it is not itself a condition contemplated by KRS 61.600(3)(d). The Retirement Systems could no more say that smoking is a pre-existing condition for one who later suffers from lung problems than it could say that consuming fatty foods is a pre-existing condition for one who later suffers from arterial blockage.

The Administrative Record demonstrates no "condition" pre-existed Brown's employment. The Franklin Circuit Court and the Court of Appeals correctly found the Retirement Systems misinterpreted the applicable law when it found cigarette smoking was the pre-existing "condition" which caused, directly or indirectly, Brown's pulmonary ailments and her incapacity.

Brown proved the entirety of the *objective medical evidence* existing prior to her enrollment in the Retirement Systems showed no lung illness or condition existed. Even further, the objective medical evidence for a period of nearly four years after her enrollment in the Retirement Systems showed no indication of such an illness or condition.

Nevertheless, the Retirement Systems implores this Court to take judicial notice that nicotine dependence is a "well known psychiatric malady," noted in the Diagnostic

Statistical Manual of Mental Disorders Fourth Edition ("DSM-IV").[10] This argument was never mentioned at the administrative hearing level, before the Franklin Circuit Court or before the Court of Appeals and thus should not be considered when presented for the first time before this Court.

Regardless of the impropriety of introducing arguments in a case having wound itself through three previous levels of adjudication for the first time before the Kentucky Supreme Court, the Retirement Systems fails to disclose that while "nicotine dependence" is noted in the DSM-IV, it has no specific diagnostic criteria and the authors of DSM-IV caution that many diagnostic categories are included only for clinical and research purposes rather than to confirm that a particular disorder constitutes mental disease, mental disorder or mental disability relevant to legal judgments. (DSM-IV at xxxvii).

The Retirement Systems asks this Court to construe the terms "bodily injury, mental illness, disease, or condition" so broadly as to encompass nearly any human factor having a tendency to affect a person's health. Under such an expansive definition, it would be a near impossibility for a state worker with less than sixteen years of credited service to qualify for disability retirement benefits.

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[10]It is certainly worth noting that the Hearing Officer, and the Retirement Systems by adoption of the Hearing Officer's decision, did not find that Brown suffered from "nicotine dependence." In its Brief, the Retirement Systems places much emphasis on post-enrollment admonitions by Brown's physicians to stop smoking. (Appellant's Brief at 4-5, 22). This emphasis is surely prompted by the note in DSM-IV to the effect that continued use of nicotine "despite knowledge of medical problems related to smoking is a particularly important health problem...." (DSM-IV at 265). Counter-intuitive is the Retirement Systems' emphasis on post-enrollment admonitions to prove nicotine dependence when the issue is the existence of a pre-enrollment condition. Not surprisingly, no pre-enrollment admonitions can be cited by the Retirement Systems.

The Franklin Circuit Court and the Court of Appeals were correct in excluding "lifestyle choices" from the definition of "conditions" which could potentially result in disqualification of a state worker from disability retirement benefits.

CONCLUSION

Based on all of the foregoing, the Appellee, Dillard Wayne Brown, Individually and as Executor of the Estate of Barbara Faye Reed Brown, deceased, respectfully requests that this Court affirm the Opinion of the Court of Appeals of Kentucky.

Respectfully submitted,

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