COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
NO. 2008-SC-000898-DG
(2007-CA-002591-MR)

KENTUCKY RETIREMENT SYSTEMS — APPELLANT

v.

TAMMY SIZEMORE — 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, on this the 13TH day of July, 2009 to: Hon. Winter Huff, P.O. Box 616, Somerset, Kentucky, 42502-0616; Hon. C. Graham Martin, P.O. Box 790, Salyersville, Kentucky 41465; Hon. Phillip Shepherd, Franklin Circuit Court, Franklin County Courthouse, P. O. Box 678, Frankfort, Kentucky 40601; and Hon. Sam Givens, Clerk of the 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I further certify that the Record on Appeal, from the Clerk of the Court of Appeals, was not withdrawn by counsel for Appellant.

Leigh A. Jordan
Attorney for Appellant

INTRODUCTION

This is an appeal by Appellant, Kentucky Retirement Systems, of the Opinion and Order of Franklin Circuit Court which erroneously overruled the decision of the Board of Trustees of the Kentucky Retirement Systems to deny Appellee's application for disability retirement benefits pursuant to KRS 61.600. The Court of Appeals correctly reversed Franklin Circuit Court on the issue of disability, but erroneously affirmed the findings of Franklin Circuit Court on the issue of pre-existing condition.

STATEMENT CONCERNING ORAL ARGUMENTS

Appellant believes that oral arguments on this matter may be helpful for the Court's understanding of the issues.

STATEMENT OF POINTS AND AUTHORITIES

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 portion of the decision of Franklin Circuit Court on the issue of pre-existing condition. Franklin Circuit Court incorrectly reversed Kentucky Retirement Systems' (hereinafter Appellant) administrative decision to deny Tammy Sizemore's (hereinafter Appellee) application for enhanced disability retirement benefits.

Appellee became a member of the Kentucky Employees Retirement System (hereinafter KERS) on February 1, 2000. She was employed as a Family Support Specialist by DCBS, Department of Family Support. Appellee first began complaining of symptoms of numbness on one side of her body in May 2000, just three months after she began employment with the Systems. (A.R., pp. 38, 75). Appellee filed for disability retirement benefits under KRS 61.600 in January 2005 based on her diagnosis of multiple sclerosis. Her application and the objective medical evidence submitted at that time were reviewed by three independent medical examiners under contract with Appellant for the purposes of reviewing disability retirement applications pursuant to KRS 61.665. All three medical examiners recommended denial of disability retirement benefits.

Appellee then filed a request for an administrative hearing appealing the decision to deny enhanced benefits under KRS 61.600. Deposition testimony and medical evidence submitted through the hearing process confirm that multiple sclerosis is a long developing condition where an inflammatory response causes damage to a nerve prior to a patient becoming symptomatic. (Appendix E attached hereto; A.R., pp. 172-174, 246-277 generally).

After a full administrative hearing, a Hearing Officer issued a recommended order to deny Appellee's application for disability retirement benefits under KRS 61.600 because Appellee failed to prove by a preponderance of the evidence that her condition did not exist prior to her membership in the Kentucky Retirement Systems. (Appendix D attached hereto; A.R., pp. 310-318). The Disability Appeals Committee carefully reviewed all the evidence of record and adopted the Hearing Officer's Report and Recommended Order, with an additional finding that the Appellee did not establish by objective medical evidence that she was totally and permanently disabled as of her last day of paid employment. The Disability Appeals Committee entered a Final Order denying Appellee's application for enhanced disability retirement benefits. (Appendix C attached hereto, A.R., pp. 329-330).

Appellee appealed this final administrative decision to the Franklin Circuit Court. Franklin Circuit Court erroneously reversed the Appellant's decision. (Appendix B attached hereto). Appellant then appealed Franklin Circuit Court's decision to the Court of Appeals, which correctly reversed the findings of the Franklin Circuit Court on the issue of disability and ordered the case to be remanded for reinstatement of that portion of the agency's final order. However, the Court of Appeals erroneously affirmed the findings of Franklin Circuit Court on the issue of pre-existing condition. (Appendix A attached hereto). A Motion for Discretionary Review was then filed by Appellant specifically on the issue of the pre-existing condition, which was granted by this Honorable Court. In that Order granting Discretionary Review, this Honorable Court

ordered that this case be heard with the case of Kentucky Retirement Systems v. Dillard Wayne Brown, et al, 2008-SC-000326-DG, which addresses substantially the same issue.

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

THE LAW

KRS 61.600 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:
>
> * * *
>
> (3) 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.

* * *

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." IN SO DOING, THE COURT OF APPEALS FAILED TO APPLY McMANUS V. KENTUCKY RETIRMENT SYSTEMS AND ESSENTIALLY NULLIFIED THE EFFECT OF THIS PUBLISHED CASE.

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 to prove that her condition of multiple sclerosis did not pre-exist her membership. The burden of proof in an administrative appeal is set forth 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.

The Court of Appeals in McManus affirmed it was the applicant's burden to prove each element of her claim, including that of pre-existing condition:

> 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 multiple sclerosis 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 no evidence that would contradict well-known scientific evidence regarding the development of multiple sclerosis and the testimony of her treating neurologist regarding the development of this condition.

The Court of Appeals erroneously failed to apply the correct legal standard established in KRS 13B.090 and McManus, which provides that 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 Court of Appeals has attempted to diminish the effect of the published case of McManus. In the case at bar, the Court of Appeals' Opinion stated in relevant part:

> 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. 18).

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 is not a "minimal" amount, but is actually a 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 a 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 published opinion in an unrelated case 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. 18). 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). In this case, the Court of Appeals makes the burden of proof on an applicant so low as to shift the real burden of proof on the issue of a pre-existing condition back to the Appellant. 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 one published case 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. 18). 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. The applicable standards for the present matter are set forth in KRS Chapter 13B and KRS 61.600. Dowell is clearly distinguishable and should not be applied here, as that case addresses insurance contracts, not the applicable standards set forth in KRS 13B and case law governing the statutory scheme of the Retirement Systems.

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.

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.

The Court of Appeals also ruled that because Appellee's condition was not symptomatic prior to her membership date, this was "sufficient to meet the minimal burden of proving a negative." (Appendix A, p. 18).

The Court of Appeals' ruling effectively changes the burden of proof established by statute and lessens it 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 lessened the plain language of the statute. McManus and KRS Chapter 13B require that the applicant prove that their condition does not pre-exist membership and the Court of Appeals' opinion in this matter is eroding that statutory requirement.

II. THE COURT OF APPEALS ERRED BY SUBSTITUTING ITS JUDGMENT FOR THAT OF THE FACT FINDER, BY REWEIGHING THE EVIDENCE AND DISREGARDING EVIDENCE THAT SHOWS THE LONG-DEVELOPING NATURE OF MULTIPLE SCLEROSIS. IN SO DOING, THE COURT OF APPEALS FAILS TO RECOGNIZE THE PUBLISHED CASE OF LINDALL V. KENTUCKY RETIREMENT SYSTEMS.

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. The Court of Appeals' holding completely disregards the statements by Appellee's neurologist, acknowledging that Appellee's specific condition had not progressed as quickly as others of his patients, and the well known and accepted scientific evidence regarding the progression of multiple sclerosis.

The Court of Appeals attempts to explain away the evidence submitted that shows the long-developing nature of multiple sclerosis. Appellee first began complaining of symptoms of numbness on one side of her body in May 2000, just three months after she began employment with the Systems. (A.R., pp. 38, 75). In deposition testimony, Dr. Zerga stated that multiple sclerosis develops when an inflammatory response causes

damage to a nerve, which then results in the formation of plaque on the nerve. He indicated that plaque is an indication of the damage that had been done. When then asked about how long it would take after the inflammatory response before an individual developed symptoms, he indicated that different people are affected to different degrees. Some might never know that they have MS and some might be more severely affected. Dr. Zerga then spoke to the Appellee's condition in particular and noted that her disease had not progressed as severely as he had seen some patients progress. (A.R., pp. 172-174). Medical evidence suggests that the disease process begins long before symptoms ever begin, and that by the time symptoms do begin, damage has already been done in the form of brain and spinal cord atrophy. (A.R., pp. 246-277 generally). Consequently, when Appellee's symptoms began in her own slow-progressing disease, she had already had the disease process for some time. Since Appellee was already having symptoms only three months after beginning her employment, Appellee's disease progression clearly began long prior to that, as the destruction of myelin is a long developing process according to medical research.

The medical information submitted by the Retirement Systems addressing the long developing nature of multiple sclerosis constitutes substantial evidence and should not have been disregarded by the Court of Appeals. In the previously cited McManus case, the Court there noted:

> there is substantial evidence in the record to support a finding that McManus's coronary artery disease directly or indirectly resulted from his pre-existing diabetes. Despite stating that causation is impossible to determine, Dr. Hogancamp acknowledged that diabetes is generally considered a major risk factor for coronary artery disease. . .

Clearly, in McManus the court accepted generally-known medical principals as substantial evidence regarding the causation and development of a condition. Thus, it was clear error for the Court of Appeals to disregard medical information that discusses the long development of multiple sclerosis prior to the condition becoming symptomatic.

In its Opinion, the Court of Appeals stated that if it followed the agency's reasoning, degenerative genetic conditions would be barred and that was not the intent of the statute. (Appendix A; Court of Appeals Opinion, p. 18). However, the Court of Appeals has erred by ignoring the very plain language of the statute addressing the issue of pre-existing conditions. KRS 61.600(3)(d) provides that the condition that the individual is alleging is incapacitating must not "result directly or indirectly from bodily injury, mental illness, disease, or condition which pre-existed membership in the system or reemployment, whichever is more recent."

Clearly, the statute contemplates the possibility of long-developing or degenerative genetic conditions or diseases because it specifically provides that if the individual's condition that they are alleging is disabling results directly or indirectly from a condition or disease that pre-exists their membership, then that condition is excluded from consideration. The Court of Appeals erred by failing to consider the plain language of the statute that discusses this very issue. In Lindall v. Kentucky Retirement Systems, 112 S.W. 3d 391 (Ky. App. 2003), the Court of Appeals noted that courts are not at liberty to add or subtract enacted language, nor to discover meaning not reasonably ascertainable from the plain language used. Id at 394, citing Beckham v. Board of

Education of Jefferson County, 873 S.W.2d 575, 577 (Ky., 1994). In the present matter, the medical evidence showed that Appellee's disease was already actively developing prior to her membership, even though she had not yet sustained enough damage to be symptomatic.

Furthermore, there is no requirement that a condition be symptomatic prior to membership to be pre-existing, as the Court of Appeals seems to hold. The Lindall case provides specifically that the court was precluded from adding language to the statute that would exclude dormant or asymptomatic conditions from the pre-existing condition exemption. Id at 394.

Given the medical evidence submitted on the long-developing nature of multiple sclerosis before it becomes symptomatic and the acknowledgement of the speed of the Appellee's own disease development by her treating neurologist, it was not an error for the Appellant to find that the Appellee's multiple sclerosis pre-existed her membership.

Thus, the Court of Appeals erred by reweighing the evidence and failing to recognize the published case of Lindall v. Kentucky Retirement Systems, 112 S.W. 3d 391 (Ky. App. 2003) and its decision on this issue should be overturned.

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 an effort to shape public policy by altering the legal requirements for an award of disability retirement benefits from the Appellant in direct contravention to the intent of the General Assembly as evidence by the clear language of Appellant's

enabling statutes. 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 that burden 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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