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

KENTUCKY RETIREMENT SYSTEMS — APPELLANT

v. **REPLY BRIEF FOR APPELLANT**

TAMMY SIZEMORE — APPELLEE

AND

NO. 2009-SC-000174-DG
(2007-CA-002591-MR)

TAMMY SIZEMORE — CROSS-APPELLANT

v. **BRIEF FOR CROSS-APPELLEE**

KENTUCKY RETIREMENT SYSTEMS — CROSS-APPELLEE

KENTUCKY RETIREMENT SYSTEMS

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Reply Brief for Appellant/Brief for Cross-Appellee has been mailed, postage prepaid, on this the 13th day of November, 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I further certify that the Record on Appeal, from the Clerk of the Court of Appeals, was not withdrawn by counsel for Appellant/Cross-Appellee.

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Attorney for Appellant/Cross-Appellee

Appellee/Cross-Appellant (hereinafter referred to as "Sizemore") has misstated an issue for consideration by this Honorable Court. The issue present before this Honorable Court is whether substantial evidence supported the determination by the Appellant/Cross-Appellee (hereinafter referred to as "Retirement Systems" or "Systems"), not whether Sizemore presented sufficient evidence of incapacity as she states in her Brief.

As noted by the Court of Appeals in its opinion:

> This Court, like the circuit court, is required to determine if the hearing officer's findings of fact, as adopted by the Board, are supported by substantial evidence of probative value and if the Board applied the correct rule of law to the facts. *Southern Bell Telephone & Telegraph Co. v. Kentucky Unemployment Insurance Commission*, 437 S.W.2d 775,778 (Ky. 1969); *Kentucky Board of Nursing v. Ward*, 890 S.W.2d 641, 642-43 (Ky. App. 1994). As long as there is substantial evidence in the record to support the Board's decision, this Court must defer to the Board, even if there is conflicting evidence. *Kentucky Commission on Human Rights v. Fraser*, 625 S.W.2d 852, 856 (Ky. 1981).

(Court of Appeals' Opinion, pp. 9-10).

In reviewing an agency decision, the Court may overturn the decision if the agency acted arbitrarily 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). 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).

I. REPLY TO SIZEMORE'S RESPONSE TO RETIREMENT SYSTEMS' BRIEF

The crux of Sizemore's argument against the Retirement Systems' brief appears to be that the Retirement Systems should not have considered medical journal articles or treatises in its determination and that such articles do not constitute objective medical evidence. (Appellee/Cross-Appellant's Brief, pp. 5-6). She goes on to argue that such medical information cannot constitute substantial evidence. (Appellee/Cross-Appellant's Brief, pp. 8). However, while recognizing the case elsewhere in her brief, Sizemore fails to recognize that McManus v. Kentucky Retirement Systems, 124 S.W.3d 454 (Ky. App. 2003) clearly addresses this issue. In the McManus case, the Court of Appeals held specifically that KRS 13B.090 permitted the admission of hearsay evidence as long as it is the type of evidence that reasonable and prudent persons would rely on in their daily affairs, such as medical journal articles. The case went on to note that there was no error by the Hearing Officer in that case considering such medical information. As such, Sizemore's argument fails. There was no error by the Retirement Systems in considering this evidence of the development of multiple sclerosis.

Sizemore next argues that Dr. Zerga's "speculation" that her symptoms in May 2000 "might" have been the primary attack is not objective medical evidence. (Appellee/Cross-Appellant's Brief, pp. 6). This is clearly erroneous. First, Sizemore misquotes Dr. Zerga who actually stated that the May 2000 symptoms were probably the primary attack. His testimony was not speculative, but was based upon his treatment

records that note that Sizemore's symptoms of numbness on one side of her body began in May 2000, just three months after she began working, and that these were the same symptoms that she has continued to complain of during episodes of active symptoms to the present. (A.R., pp. 38, 75). As such, this testimony and these records are clearly objective medical evidence and there was no error by the Systems' reliance upon them.

Sizemore states that the information from the journal articles is not specific to her. (Appellee/Cross-Appellant's Brief, pp. 6). However, Dr. Zerga's testimony of how her particular condition progressed is specific to her, and the journal articles provide context for the doctors' comments regarding how individuals, Sizemore in particular, progress with this condition.

As previously noted by the Systems, Dr. Zerga testified 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. Dr. Zerga then spoke to Sizemore'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 Sizemore's symptoms began in her own slow-progressing disease, she had already had the disease process for some time. Since Sizemore was already having symptoms only three months after beginning her

employment, her disease progression clearly began long prior to that, as the destruction of myelin is a long developing process according to medical research.

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.

Sizemore next states that the Court of Appeals was correct in noting that she had no symptoms of multiple sclerosis prior to her membership. (Appellee/Cross-Appellant's Brief, pp. 6-7). However, there is no requirement that a condition be symptomatic prior to membership to be pre-existing, as the Court of Appeals seems to hold. In Lindall v. Kentucky Retirement Systems, 112 S.W. 3d 391 (Ky. App. 2003), the Court specifically held that the lower 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. In the present matter, the medical evidence showed that Sizemore's disease was already actively developing prior to her membership, even though she had not yet sustained enough damage to be symptomatic.

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

Sizemore's own disease development by her treating neurologist, it was not an error for the Systems to find that the Sizemore's multiple sclerosis pre-existed her membership.

Sizemore then states that the "objective medical evidence and the substantial evidence necessary to support the decision were consistent with Ms. Sizemore's burden under McManus." (Appellee/Cross-Appellant's Brief, pp. 7). However, as noted above and in Retirement Systems' Appellant's brief, substantial evidence supports the determination by the Retirement Systems that Sizemore's condition pre-existed her membership. While Sizemore may argue that her own doctor's testimony regarding the development of her condition and the scientific evidence presented do not constitute either objective medical evidence or substantial evidence, it is clear under the McManus case that this evidence is certainly substantial, as discussed above.

Sizemore further attempts to argue that the journal article was utilized alone and that this is impermissible; however, as correctly noted by the Court of Appeals, the Systems also utilized Dr. Zerga's testimony as support for its findings. (Court of Appeals' Opinion, p. 19). Such evidence was substantial and supported the determination by the Retirement Systems.

Sizemore next argues that the Systems misconstrues Dowell v. Safe Auto Ins. Co. 208 S.W.3d 872, 878 (Ky. 2006), cited by the Court of Appeals for its proposition that the quantum of evidence to prove a negative is minimal. (Appellee/Cross-Appellant's Brief, pp. 9). The Retirement Systems did not misconstrue this case. The ruling in Dowell revolved around the meaning of 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.

In her brief, Sizemore also attempts to utilize a 1934 case regarding service of process to show that "quantum of proof" is not limited to insurance coverage. (Appellee/Cross-Appellant's Brief, pp. 10).

However, the Court of Appeals fails to apply, and Sizemore fails to acknowledge, that there is published case law and statutory authority that is directly on point with regard to the burden of proof in the present matter. McManus and KRS 13B.090 clearly establish that Sizemore had the burden of proof to prove that her condition of multiple sclerosis did not pre-exist her membership. As previously noted in the Systems' brief, 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.

KRS 61.600, KRS 61.665, and KRS 13B.090 firmly establish that Sizemore 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 her membership. Sizemore did not prove this fact by a preponderance of the evidence. She 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 Sizemore 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' 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. As such, the Court of Appeals' determination on the issue of pre-existing condition should be reversed.

II. RESPONSE TO SIZEMORE'S BRIEF ON CROSS-APPEAL

The Court of Appeals correctly held that there was substantial evidence to support the final administrative decision by the Retirement Systems that Sizemore retained the residual functional capacity to work in her sedentary position. (Court of Appeals' Opinion, p. 15).

Substantial evidence supported Kentucky Retirement's decision to deny disability benefits to Sizemore. As noted by the Court of Appeals, while Sizemore relies almost exclusively on Dr. Zerga's deposition testimony, his actual treatment records and the medical examiners' opinions of the records show that Sizemore was not incapacitated. (Court of Appeals' Opinion, p. 14).

As noted by the Court of Appeals, on March 4, 2005, just four days after her last day of paid employment, Dr. Zerga's office note indicated that Sizemore was doing well. "She is a bit depressed and doesn't like her job and is on leave right now. No evidence of any attacks." Physically, her examination was normal. (A.R., p. 203; Court of Appeals' Opinion, p. 14).

The objective medical evidence as submitted does not support a finding of disability, since the test results in the record show no evidence of disabling conditions as of Sizemore's last day of paid employment.

Sizemore argues that the substantial evidence shows that she has persistent tremors. (Appellee/Cross-Appellant's Brief, p. 2). However, the Court of Appeals noted the lack of symptoms in her January 2005 records, a month prior to her last day of paid employment. (Court of Appeals' Opinion, p. 14). On January 10, 2005, Sizemore was complaining of occasional numbness and easy fatigue. She had no cranial nerve

symptoms and no significant upper extremity symptoms. Her examination was benign. (A.R., p. 49). In a January 17, 2005 office note, Dr. Zerga noted that Sizemore's main complaint was fatigue, with an unchanged physical examination from her previous visit. He noted that she was "toying with the idea of disability" and that they were going to think about this. He altered her medication level of Topamax at bedtime to see if that helped her sleep and to lessen her feelings of fatigue. (A.R., pp. 42-43). The Court noted that Dr. Kimbel's review of these records noted no objective evidence that showed "any loss of cognitive function, any functional impairment imposed by multiple sclerosis consisting of any weakness, extreme dizziness, visual impairment, or loss of function of her upper and lower extremities." (Court of Appeals' Opinion, p. 14).

As of the previously mentioned January 17, 2005 office visit, the objective medical evidence did not show that Sizemore's condition was disabling. EMG/NCV tests done on that date showed only very mild bilateral carpal tunnel. (A.R., p. 44). An MRI of the brain done on January 10, 2005 showed some white matter lesions, not definitely active, and some showing improvement. (A.R., pp. 42, 47).

Although Sizemore attempts to argue that Dr. Zerga advised her to stop working, his actual records from near her last day of paid employment do not support these statements. Dr. Zerga did not take Sizemore off work, according to his actual treatment records as noted above. (Appellee/Cross-Appellant's Brief, p. 2).

Sizemore did not meet her burden of proof and there was substantial evidence to support the Board of Trustees' decision as referenced by the Court of Appeals. No error was made by the Court of Appeals in upholding the determination.

The crux of Sizemore's argument appears to revolve around the definition of a permanent incapacity as set forth in KRS 61.600. She argues that the Board and the Court of Appeals misapplied KRS 61.600(5)(a)(1) based upon the Franklin Circuit Court's incorrect ruling on the "continuous" requirement for an incapacity. Sizemore argues that it is an individual's condition that must be continuous, not the severity of the symptoms. (Appellee/Cross-Appellant's Brief, p. 12). Sizemore's argument is a clear misapplication of the plain language of KRS 61.600.

The Court of Appeals correctly laid out the plain language of the statute in its opinion. KRS 61.600(3)(a) requires that an individual first show by the objective medical evidence of record that they are mentally or physically incapacitated from performing the duties of their former job or a job of like duties as of their last day of paid employment. The statute then requires that the incapacity shown be permanent. KRS 61.600(3)(c). By statute, an incapacity is deemed to be permanent when it is expected to result in death or can be expected to last for a continuous period of not less than 12 months after the person's last day of paid employment. KRS 61.600(5)(a).

The plain language of the statute requires that there first must be an incapacity and then, that the incapacity be expected to last for not less than 12 months. Sizemore's argument and Franklin Circuit Court's erroneous holding are in direct conflict with the plain language of the statute, which requires that there be an incapacity and that the incapacity be permanent.

Under the faulty logic proposed by Sizemore, if an individual had uncontrolled high blood pressure, and at some point it becomes regulated with medication, they would still be disabled because they still had the condition, despite the fact that it was not

incapacitating. This reasoning is faulty and is in direct conflict with the plain language of the statute.

If an individual's condition is dormant and not incapacitating as of the last day of paid employment, like Sizemore's relapsing-remitting MS, then that individual has not met their burden to show that the condition was incapacitating as of their last day of paid employment and that any incapacity was permanent. An incapacity must be expected to be continuous for 12 months following the last day of paid employment or be expected to result in death. If the individual's condition is dormant and not incapacitating, then it is not continuously incapacitating as is required.

Sizemore argues that she had a constant symptom of fatigue. (Appellee/Cross-Appellant's Brief, generally). She references her complaints of fatigue a month prior to her last day of paid employment, but fails to recognize the treatment record from just four days after her last day of paid employment, where Dr. Zerga noted that she was doing well, with no evidence of any attacks, and had a normal physical examination. (A.R., p. 203). As well, the Court of Appeals noted Dr. Kimbel's report where he noted that fatigue is a largely subjective complaint and that its severity is difficult to evaluate. As the Court noted, he went on to state that there was no evidence from Sizemore's job requirements that she had to do physical exertion and that there was no documentation from her daily activities that her fatigue was of such severity that would preclude her from being able to do this type of work. (Court of Appeals' Opinion, p. 7). Sizemore failed to show that she was permanently functionally incapacitated from her complaints as of her last day of paid employment and the substantial evidence as shown above supports the Retirement Systems' finding. There was no error by the Court of Appeals in

finding that the Retirement Systems' decision with regard to disability was supported by substantial evidence.

Sizemore did not meet her burden of proof to establish by objective medical evidence that she was permanently mentally or physically incapacitated since her last day of paid employment, so as to prevent her from performing her former primarily sedentary duties or a job of like duties. Substantial evidence exists to support the findings of the Retirement Systems and Sizemore is not entitled to disability retirement benefits pursuant to KRS 61.600.

Since there was substantial evidence in the record supporting the Retirement Systems' decision on the issue of disability, the Court of Appeals acted properly in its decision to uphold the Retirement Systems' decision.

CONCLUSION

The Court of Appeals correctly noted that there was substantial evidence to support the determination of the Retirement Systems with regard to the issue of disability and this decision should be upheld by this Honorable Court.

However, the Court of Appeals, in its determination on the issue of pre-existing condition altered the legal requirements for an award of disability retirement benefits from the Systems in direct contravention to the intent of the General Assembly as evidenced by the clear language of the Systems' 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 on the issue of pre-existing condition 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 Retirement Systems.

BASED ON THE FOREGOING, Kentucky Retirement Systems respectfully prays and demands that the decision of the Court of Appeals be reversed on the issue of pre-existing condition and upheld on the issue of disability.

Respectfully submitted,
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