SUPREME COURT OF KENTUCKY
2008-SC-000898-DG
(2007-CA-002591-MR)

KENTUCKY RETIREMENT SYSTEMS, APPELLANT

VS. **RESPONSE BRIEF ON BEHALF OF APPELLEE**

TAMMY SIZEMORE, APPELLEE

AND

2009-SC-000174-DG
(2007-CA-002591-MR)

TAMMY SIZEMORE, APPELLANT

VS. **BRIEF ON CROSS MOTION ON BEHALF OF APPELLANT**

KENTUCKY RETIREMENT SYSTEMS, APPELLEE

*** *** *** *** *** *** *** *** *** *** *** *** *** *** *** *** *** *** *** ***

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Brief for Tammy Sizemore has this day been mailed, postage prepaid, to: Hon. Leigh A. Jordan, Legal Counsel, 1260 Louisville Road, Frankfort, KY 40601, Attorney for Kentucky Retirement Systems, Hon. Phillip Shepherd, Judge, Franklin Circuit Court, P.O. Box 678, Frankfort, KY 40602, Hon. Samuel P. Givens, Jr., Court of Appeals Clerk, 360 Democrat Drive, Frankfort, KY 40601-9229, and that the original and ten copies have been mailed via registered mail, return receipt, to: Hon. Susan Stokley Clary, Clerk, Supreme Court of Kentucky, Room 209, State Capitol, 700 Capital Ave., Frankfort, KY 40601-3488, all this 11th day of September, 2009.

I further certify that the Record on Appeal from the Clerk of the Court of Appeals was not withdrawn by counsel for Respondent.

WINTER R. HUFF, Counsel for Tammy Sizemore

## INTRODUCTION

This is a matter before the Supreme Court of Kentucky on Cross Motions for Discretionary Review, such Review being granted both as to Tammy Sizemore and the Kentucky Retirement Systems. The issues concern whether Ms. Sizemore's disability pre-existed her membership in the Kentucky Retirement System, and whether she met her burden to establish total and permanent incapacity of her entitlement to retirement benefits.

## STATEMENT CONCERNING ORAL ARGUMENT

Ms. Sizemore, by counsel, believes that oral argument would be helpful to clarify the issues in this matter.

## STATEMENT OF POINTS AND AUTHORITIES

## COMBINED STATEMENT OF THE CASE ON DISCRETIONARY REVIEW

Tammy Sizemore became a member in KERS on or about February 1, 2000. It was not until almost five (5) years later, in January of 2005, that she applied for disability retirement benefits on the basis of a diagnosed condition of multiple sclerosis. While the first evidence of *any* symptoms which *may* have been related to that condition occurred several months after her employment, in May of 2000, Ms. Sizemore was not told of even a provisional diagnosis of multiple sclerosis, however, until 2002. Her condition was not definitively diagnosed until the Fall of 2003. See Hearing Officer's Report and Recommended Order at pp. 1; 5-7 [KERS Appendix, Exhibit D].

Dr. Zerga, the treating neurologist of Ms. Sizemore, testified as follows:

> "If I can just reconstruct I think she might have had a few of the symptoms in May of 2000, which is probably the primary attack . . .".

Record, Exhibit 19, p. 34. However, Dr. Zerga could not say when Ms. Sizemore became afflicted with the disease. Id., pp. 31-34. Significantly, Dr. Zerga testified that there was no indication that Ms. Sizemore had multiple sclerosis prior to her membership in KERS. Id., p. 12. Indeed, none of the physicians who either examined or treated Ms. Sizemore testified that her multiple sclerosis pre-existed her membership in KERS.

Rather, the decision of the Hearing Officer, as affirmed by the Board, that Ms. Sizemore's multiple sclerosis pre-existed her membership in KERS rested solely upon medical journal data indicating an ***average*** time preceding onset of symptoms of multiple sclerosis of 11.4 years. Hearing Officer's Report and Recommended Order, pp. 7-8. [KERS Appendix, Exhibit D]. That article was published in November of 2000, some years before Ms. Sizemore was diagnosed with multiple sclerosis. Id.

Dr. Zerga advised that Ms. Sizemore's condition was progressively worsening; that her condition is permanent; that by February of 2005 she was unable to perform her job duties or even sedentary work as a result of the disease. Id., pp. 4-6. By February of 2005, he specifically advised her not to return to work. Id., p. 5.

Ms. Sizemore's job duties required her to occasionally lift or carry up to ten pounds; to handle/finger/feel and to reach/push/pull for two-thirds or more of the day; to sit for 6 of 7.5 hours of the work day, and to interview persons to determine eligibility for food stamps and Medicaid. R., Exhibit 4. Ms. Sizemore was then on multiple prescription and non-prescription medications for pain, depression, hypertension, high cholesterol, blood thinning, and multiple sclerosis. R., Exhibit 5. Dr. Zerga was specifically asked about Ms. Sizemore's ability to perform her job duties. He stated:

> My opinion is I think she could sit if she didn't have to do anything else; if she didn't have to interact with people, if she didn't have to make cognizant processing decisions, if she didn't have to fill out paperwork, if she didn't have to do repetitive data entry. If the situation was not stressful, yes, she probably could sit. But, as far as being able to perform the functions of her job, no, sir.

Id., p. 17. Dr. Zerga testified that this incapacity is permanent. Id., p. 18.

The January 10, 2005 magnetic resonance imaging of the brain, Exhibit 1 to Dr. Zerga's deposition, reflected a new lesion. Her April 15, 2005 examination revealed decreased flexion of the lumbar sacral spine, and a tremor of her right arm with her hands outstretched as per Dr. Zerga's physical exam notes. Id. This was in addition to her complaints on that occasion of low back pain, and fatigue to the extent that she "has trouble making it through the day" (by this time, Ms. Sizemore's complaints of fatigue were not in connection with her employment as she was already on leave). Ms. Sizemore's difficulty with tremors in her right arm has persisted since the fall of

2003. R., Exhibit 7, pp. 50-54.[1]

Dr. Zerga testified that severe, constant fatigue is a common symptom affecting persons with multiple sclerosis. Id., pp. 7-9. He confirmed that fatigue is the primary cause of ending the work life of persons who suffer from that disease. Id., p. 8. Dr. Zerga explained that the fatigue of individuals with multiple sclerosis tends to worsen as the day progresses, can be aggravated by heat, and can come on suddenly and unpredictably.[2] The fatigue may be mental as well as physical. Id., pp. 8-9; p. 14.

In addition to Ms. Sizemore's fatigue, Dr. Zerga also noted that Ms. Sizemore has asymmetry on the right side of her body. R., Exhibit 19, p. 33. While Dr. Zerga believes that Ms. Sizemore's multiple sclerosis is of the relapsing/remitting type, he testified that in many patients this progresses into chronic, progressive multiple sclerosis. Id., pp. 26-27.

**History of Proceedings Below**

The Hearing Officer recommended that Ms. Sizemore's application for disability retirement be denied on the basis that Ms. Sizemore did not meet her burden to show that she did not have the condition of multiple sclerosis at the time her membership in KERS began. Ms. Sizemore filed Exceptions to the Recommended Order, and specifically noted that the Hearing Officer's reliance on the medical journal data as the sole evidence of pre-existing condition was improper. See

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[1]By September 7, 2005, Ms. Sizemore had complained of increasing numbness on her right side, as well as fatigue. Dr. Zerga noted on physical exam, "her examination is significant for a drift of the right arm." A repeat MRI was done, and the September 23, 2005 MRI exam showed worsening multiple sclerosis. R., Exhibit 19, p. 4; Exhibit 1.

[2]Dr. Zerga did rely in part upon articles from medical treatises in his discussion of fatigue. R. Exhibit 19, pp. 5-9; Exhibit 2. The statement that fatigue is a primary cause of early departure from the work force is from a publication of the National MS Society. Id., p. 8. This simply corroborated Dr. Zerga's findings upon examination and history of Ms. Sizemore.

Claimant's Exceptions to the Hearing Officer's Report and Recommended Order, Appendix hereto.

The Final Order of the Board of Trustees adopted the Hearing Officer's Recommendation and Recommended Order, and further found that Ms. Sizemore had not met her burden to establish total and permanent incapacity from her job duties. [KERS Appendix, Exhibit C].

Ms. Sizemore timely appealed to the Franklin Circuit Court. The Franklin Circuit Court appropriately addressed the standard of review, including citations to McManus v. Kentucky Retirement Systems, 124 S.W.3d 454 (Ky. App. 2003) and Lindall v. Kentucky Retirement Systems, 112 S.W.3d 391 (Ky. App. 2003). The Franklin Circuit Court reversed the Final Order of the Board on both issues, determining that the substantial evidence supported that Ms. Sizemore was totally and permanently disabled, and that her condition was not pre-existing. [KERS Appendix, Exhibit B].

The Kentucky Retirement Systems appealed the Circuit Court Opinion and Order. The Kentucky Court of Appeals reinstated the Board's Order determining that Ms. Sizemore did not meet her burden to show total and permanent incapacity of Ms. Sizemore to perform her job duties, but, affirmed the Franklin Circuit Court determining that there was insufficient evidence that condition was pre-existing. Judge Lambert dissented from the Court of Appeals' reversal on incapacity, stating that the Circuit Court had properly analyzed and applied the correct legal standard to find her disabled. [KERS Appendix, Exhibit A].

The questions under review on this Motion and Cross Motion for Discretionary Review are these: (1) whether Ms. Sizemore's condition pre-existed her membership in KERS, and (2) whether she presented sufficient evidence of permanent incapacity pursuant to the requirements of KRS Chapter 61.600 et seq.

## ARGUMENT IN RESPONSE TO KENTUCKY RETIREMENT SYSTEM

### The Court of Appeals correctly determined that Ms. Sizemore's condition did not pre-exist her employment

The Kentucky Retirement System's argument that the Court of Appeals erroneously changed the burden of proof is without merit. Ms. Sizemore met her burden of proof to show that her disabling condition did not pre-exist her employment. The Kentucky Retirement Systems produced no objective medical evidence to rebut or refute her proof, and the evidence on which it otherwise relies, from a medical journal article, does not meet the "substantial evidence" standard.

The determination for disability retirement under KRS 61.600 must be based upon objective medical evidence by licensed physicians pursuant to KRS 61.665. KRS 61.600(3). This determination requirement specifically includes the determination of whether the incapacity results from a pre-existing condition. KRS 61.600(3)(d).[3]

"Objective medical evidence" is a defined term in the relevant statutes. Specifically, KRS 61.510(33) defines "objective medical evidence" as ". . . reports of examinations or treatments; medical signs which are anatomical, physiological, or psychological abnormalities which can be observed; psychiatric signs which are medically demonstrable phenomena indicating specific abnormalities of behavior, affect, thought, memory, orientation, or contact with reality; or laboratory findings which are anatomical, physiological, or psychological phenomena that can be shown by medically acceptable laboratory diagnostic techniques, including, but not limited to chemical tests,

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[3]In the proceedings below, Kentucky Retirement Systems argued for a narrow interpretation of "objective medical evidence" as it applied to the question of permanent and total incapacity. Now, Kentucky Retirement Systems seemingly wants to read the requirement of a determination based on objective medical evidence out of the statute as it concerns the determination of whether the condition pre-existed membership in the system.

electrocardiograms, electroencephalograms, X-rays, and psychological tests."

Significantly, nowhere in that definition is there a reference to a treatise or anything else which could be construed as an article from a medical journal not specific to the Claimant.

KRS 61.665(3)(d) requires that "A final order of the board shall be based on substantial evidence appearing in the record as a whole and shall set forth the decision of the board and the facts and law upon which the decision is based." An administrative agency's decision is given due deference as to findings of fact, but conclusions of law are reviewed *de novo*. *E.g.,* Board of Commissioners of City of Danville v. Davis, 238 S.W.3d 132 (Ky. App. 2007). The agency's determination must be supported by "substantial evidence" or it is otherwise invalid as arbitrary. Id., p. 135. "Substantial evidence" is defined as "that which, when taken alone or in light of all of the evidence has sufficient and probative value to induce conviction in the mind of a reasonable person." Id., *citing* Bowling v. Natural Resources Environmental Protection Cabinet, 891 S.W.2d 406, 409 (Ky. 1994).

There was no objective medical evidence as defined under the applicable law to support the finding that Ms. Sizemore's condition pre-existed her membership in KERS. Dr. Zerga's speculation that her symptoms in May of 2000 "might" have been the primary attack it is certainly not such evidence, nor is a medical journal article which relies upon unrelated data regarding average times, which data was not specific to Ms. Sizemore.

The Court of Appeals correctly noted that the substantial evidence to support an agency's determination that the disabling condition pre-existed must pertain to Ms. Sizemore herself, not other patients or unspecified data. [KERS Appendix, Exhibit A, p. 17]. The Court of Appeals stated that "no evidence was presented at the hearing that Sizemore had symptoms of or was diagnosed with

multiple sclerosis prior to her membership in KERS." Id.

The Court of Appeals further stated:

> 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. *See* Dowell v. Safe Auto Ins. Co., 208 S.W.3d 872, 878 (Ky. 2006). Sizemore met the burden by providing her medical records. The absence of any noted symptom is sufficient to meet the minimal burden of proving a negative.
>
> If we were to follow KERS's position to its logical conclusion that Sizemore must have had multiple sclerosis prior to her membership because of the progressive nature of the disease, then any degenerative condition that arises out of repetitive motion or any degenerative genetic condition would be barred. Clearly, this is neither the intent nor the purpose of the statute.
>
> While we agree that agency factual determinations are given a high degree of deference, we believe Sizemore proved by a preponderance of the evidence that her multiple sclerosis was not a pre-existing condition. Furthermore, the factual determinations of the hearing officer and the Board were not supported by substantial evidence as there is no objective medical evidence in the record establishing that Sizemore's condition pre-existed her membership.

Id., p. 18. The Opinion of the Court of Appeals on this point is unassailable, because both the objective medical evidence and the substantial evidence necessary to support the decision were consistent with Ms. Sizemore's burden under McManus, supra.

The KERS cannot properly contend, consistent with the applicable statutes and law, that "well known scientific evidence regarding the development of multiple sclerosis and the testimony of her treating neurologist regarding the development of this condition" constituted either objective medical evidence or substantial evidence as otherwise required. As noted, Dr. Zerga testified only that Ms. Sizemore's symptoms in May of 2000 ***might*** have been the primary attack, but he elsewhere testified that there was ***no*** indication Ms. Sizemore had multiple sclerosis prior to her membership. Ms. Sizemore certainly did not know that she had multiple sclerosis prior to her membership in

KERS.

The only other evidence that Ms. Sizemore's condition pre-existed was the hearsay from the treatise. As a matter of law, that cannot constitute "substantial evidence." While the Court of Appeals commented, that "[a]t the beginning of the administrative hearing Sizemore's counsel had the opportunity to object to the admission of the treatise as evidence and failed to do so . . . this form of hearsay evidence which is not objected to, does not rise to palpable error and is admissible. Regardless, the treatise is not the only evidence upon which KRS relied in that it also used Dr. Zerga's deposition testimony as support for its position. However, this is a moot issue as we have determined Sizemore's condition was not pre-existing." Id., p. 19.

With due respect to the Court of Appeals, that analysis is erroneous both as to the hearsay treatise evidence and Dr. Zerga's deposition testimony. Dr. Zerga's testimony cannot be stretched to constitute objective medical evidence, as he merely speculated that the May, 2000 symptoms might have been the primary attack, but elsewhere testified there was not an indication that her condition pre-existed her employment.

As to the admissibility of the medical journal article, the objections about sole reliance on the medical journal article could not have been apparent until the Hearing Officer issued the Recommended Order that the Hearing Officer was relying ***only*** on that medical article, without other evidence, to determine the condition pre-existed. This was not appropriate under KRS 13B.090(1) as the Franklin Circuit Court duly held. While KRS 13B.090 permits the admission of hearsay evidence, such hearsay ". . . shall not be sufficient in itself to support an agency's findings of fact unless it would be admissible over objections in civil actions." KRS 13B.090(1).

However, because this was not a civil action, it would have been useless for Ms. Sizemore

to have objected to the admissibility of the medical article in the course of the hearing; Ms. Sizemore could not have known of the improper ***sole*** reliance on this hearsay evidence until the Hearing Officer issued the Recommended Order, at which time Exceptions were duly taken. See Appendix. Obviously, the relevant provision of KRS 13B.090(1) cannot be applied in advance of the agency's findings of fact. Ms. Sizemore did not waive anything by failing to make a contemporaneous objection to the proffer of hearsay evidence since this was an administrative hearing in which hearsay may be considered; it just cannot be the sole basis of a finding.

The ultimate question is whether this evidence alone would support a finding of pre-existence. Even under the Court of Appeals' mistaken analysis, if the evidence could be considered, the question remains whether the evidence was of sufficient probative weight to support the finding. Big Sandy Community Action Program v. Chaffins, 502 S.W.2d 526, 530 (Ky. App. 1973). It was not.

Kentucky Retirement Systems also takes issue with the Court of Appeals' discussion of the quantum of evidence required to prove a negative. Kentucky Retirement Systems misconstrues Dowell, supra. While it is true that Dowell involved interpretation of an insurance policy, this Court also had to consider the quantum of proof necessary to establish that a hit and run driver did not have liability insurance. This Court stated:

> . . . proving a negative is always difficult and frequently impossible and that, consequently, the quantum of proof must merely be such as will convince the trier of facts that all reasonable efforts have been made to ascertain the existence of an applicable policy and that such efforts have proven fruitless. In such an event, and absent any affirmative proof by the petitioner (the insurance company), the inference may be drawn that there is in fact no insurance policy in force which is applicable.

Id., p. 878.

This discussion of the quantum of proof to establish a negative proposition is neither novel nor limited to consideration of insurance coverage. In 1934, the highest Appellate Court of Kentucky considered the question of proof of service of process on a necessary party, at a time when the Court records had been moved during construction and otherwise not carefully handled. The Court said:

> . . . the plaintiff in this suit was called upon to prove a negative fact. Concerning the degree of proof of such matters, it is said in section 43 of Moore on Facts: "It is not necessary nor, in general, feasible for the party having the burden of proof to produce such full and clear evidence of a negative fact as where proof of an affirmative is required. Frequently a negative fact can be established only by proving some affirmative fact or state of facts which is inconsistent with the affirmative of the proposition to be negatived, and which, therefore, raises a presumption that the negative is true. Any evidence which creates a fair and reasonable presumption of the existence of the negative is sufficient until overcome by some evidence to the contrary, especially where the affirmative fact is peculiarly within the knowledge of the opposite party so that he can easily prove it if necessary to establish his contention."

Walker v. Perkins, 256 Ky. 442, 76 S.W.2d 251 (1934).

Ultimately, however, any issue of the burden of proving a negative is not determinative in this case. Accepting that Ms. Sizemore had the burden to show the disabling condition did not pre-exist, the simple fact is that she met that burden. She met that burden through objective medical evidence as attested by Dr. Zerga. She met that burden by presenting the only evidence which can be considered as "substantial" evidence sufficient to support an administrative decision.

The Kentucky Retirement Systems did not and could not overcome Ms. Sizemore's evidence that her condition was not pre-existing. At most, Dr. Zerga ***speculated*** that the initial onset was in May of 2000, which was still several months **after** her employment. While it is ***possible*** that the disease existed prior to that date, this is not objective medical evidence that Ms. Sizemore had

multiple sclerosis before her employment. A medical journal article which did not consider any information germane to Ms. Sizemore herself is obviously incompetent to prove a specific date of onset for her.

The Kentucky Retirement Systems's contention that the burden of proof was misapplied is simply untenable. Ms. Sizemore met her burden by objective medical evidence. The Kentucky Retirement Systems presented ***no*** objective evidence contrary to Ms. Sizemore's evidence, and thus Ms. Sizemore's objective medical evidence was unrefuted. The Court of Appeals' determination is entirely consistent with McManus, supra, as the only evidence meeting the "substantial evidence" standard was that the condition did not pre-exist. Thus, Ms. Sizemore met her burden on causation. Id., pp. 457-458.

Further, as alluded to by the Court of Appeals, the purpose and policy of the disability retirement statutes should be considered. It is one thing to disqualify someone from disability retirement benefits who knew or should have known of a disabling condition prior to membership in KERS. It is entirely different proposition, however, to penalize someone who did not and could not have known of a disabling condition prior to such membership.

## ARGUMENT IN SUPPORT OF TAMMY SIZEMORE'S ISSUE ON REVIEW

### Ms. Sizemore did meet her burden to establish total and permanent incapacity for entitlement to retirement benefits

Without question, Tammy Sizemore suffers from a progressive debilitating disease. As Dr. Zerga testified, Ms. Sizemore's multiple sclerosis has been of the relapsing remitting type, but is episodic and recurring. Dr. Zerga's testimony that Ms. Sizemore could not perform the functions of her job, and that her incapacity is permanent, was unequivocal and unrefuted.

The fallacy that Ms. Sizemore is not permanently and totally disabled seems to be based upon some records indicating that at times she was asymptomatic. However, this is consistent with Dr. Zerga's explanation of this type of multiple sclerosis. This does not mean that her problems are not ongoing. "Doing well" is a relative term.

The Court of Appeals misapplied KRS 61.600(5)(a)(1), providing that "[a]n incapacity shall be deemed to be permanent if it is expected to result in death or can be expected to last for a continuous period of not less than twelve months from the person's last day of paid employment." As the Franklin Circuit Court noted, the "continuous" requirement pertains to the disease, not the level of the severity of the symptoms of the disease. Otherwise, virtually any disease could be excepted since treatments may alleviate symptoms temporarily, or symptoms of some diseases wax and wane.[4] As the Franklin Circuit Court noted, even to the extent that Ms. Sizemore's symptoms of multiple sclerosis were episodic, the evidence was undisputed that she suffered the constant symptom of fatigue. Franklin Circuit Court Opinion, p. 6. [KERS Appendix, Exhibit B]. Her problems with vision and tremors of her right arm were ongoing also.

The Court of Appeals fell into the same trap as did the Board, merely because Dr. Zerga noted on a particular visit that Ms. Sizemore was doing well and had no recent attacks shortly before she quit work. However, just a month before Ms. Sizemore quit working, she was fatigued and had

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[4]The Franklin Circuit Court used the analogy of a projectionist at a theater with severe epilepsy triggered by flashing lights; under the misapplication of KRS 61.600(5)(a)(1) such an epileptic projectionist would not be considered disabled simply because he was not constantly undergoing seizures; that even though problems could arise at any moment, any dormancy during the twelve month period would disqualify the employee from benefits. The Franklin Circuit Court noted, "[t]his result would be erroneous. In requiring that a claimant's incapacity be continuous, the legislature was clearly requiring that the disease that causes one's inability to work be continuous, and not that the level of the severity of the symptoms of that disease remain constant." Opinion, p. 6. [KERS Appendix, Exhibit B].

right arm tremors.

KRS 61.665(3)(d) requires that the final determination be based upon substantial evidence appearing in the record as a whole. It is respectfully submitted that the Court of Appeals failed to properly apply that legal standard. The substantial evidence demonstrates that Ms. Sizemore has persistently suffered from tremors, fatigue and visual problems. Dr. Zerga's testimony about the frequency of fatigue with individuals who have multiple sclerosis is uncontroverted. The fatigue is not only specific to Ms. Sizemore, but is also a severe, constant, and common symptom of persons with multiple sclerosis. It was Dr. Zerga himself who advised Ms. Sizemore to cease working. The focus of the reviewing physicians, and of the Board and Court of Appeals, on Ms. Sizemore's normal findings and days without attacks is not the substantial evidence in the record as a whole.

## CONCLUSION

WHEREFORE, it is respectfully submitted that the decision of the Franklin Circuit Court be reinstated in its entirey.

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