

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-001570-MR

H. TIMOTHY MORRIS

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE WILLIAM L. GRAHAM, JUDGE  
ACTION NO. 00-CI-00290

KENTUCKY RETIREMENT SYSTEMS; BOARD  
OF TRUSTEES OF THE KENTUCKY RETIREMENT  
SYSTEMS and KENTUCKY EMPLOYEES  
RETIREMENT SYSTEMS

APPELLEES

OPINION

AFFIRMING

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BEFORE: EMBERTON, CHIEF JUDGE; KNOPF AND SCHRODER, JUDGES.

EMBERTON, CHIEF JUDGE. Timothy Morris appeals from an opinion and order of the Franklin Circuit Court affirming a decision of the Kentucky Retirement Systems denying his application for disability benefits. He alleges that he was not provided a factual basis of the administrator's position in advance of the hearing as require by KRS<sup>1</sup> 13B.050. He also alleges that the

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<sup>1</sup> Kentucky Revised Statutes.

administrator failed to establish that Morris's pre-existing condition substantially contributed to his disability and that his injury was not work related. We affirm.

Morris was employed by the Eastern Kentucky University Department of Justice as a General Training Police Instructor with his most recent employment date in the Kentucky Retirement System being October 1, 1992. The last date of paid employment was on August 15, 1996, and he was thirty-nine years of age.

Morris has been in three automobile accidents. The first occurred in December 1988, when he suffered a severe injury that was diagnosed as a fracture of the cervical spine. As a result of his injury, in August 1990 he underwent a fusion of the C3-4 vertebrae. The fusion was a bone bank graft that, according to medical testimony in the record, may be brittle and not work as well as an autologous graft. As a result of the accident, Morris also underwent psychiatric treatment for post-traumatic stress disorder.

In 1993, Morris was involved in a second motor vehicle accident. An MRI performed at that time did not reveal any substantial problems with the previous cervical fusion and he was diagnosed with a sprain of his earlier cervical injury. He was also treated for pain, anxiety and depression.

The third accident occurred at approximately 7:30 a.m., on August 29, 1994, after Morris dropped his child off at

a babysitter's home and was en route to work on the Eastern campus. He was approximately one mile from the babysitter's residence when the accident occurred. Morris testified that he had varied his route that morning to fill a container with distilled water from the science building for use at the police training complex.

After the accident, Morris underwent a second cervical fusion this time having an autologous graft using the iliac crest bone. Following the surgery, Morris continued to complain of pain, anxiety and depression.

Morris filed an application for benefits claiming disability due to his cervical injury and mental illness. The Medical Review Board denied his application and Morris requested, and received, a hearing. The hearing officer found that Morris's disability predated his membership in the retirement system and that the pre-existing conditions were not substantially aggravated by an injury or accident, arising out of, or in the course of, employment. After the Kentucky Retirement Systems adopted the hearing officer's recommendation, Morris appealed to the circuit court which affirmed.

The function of the court when reviewing actions of an administrative agency is to ensure that the agency did not act

arbitrarily and that it correctly applied the law.<sup>2</sup> Even where the evidence is conflicting, the court must affirm the agency's findings if supported by substantial evidence.<sup>3</sup> The party seeking a benefit before an administrative agency has the burden of persuading the fact-finder of the party's entitlement to benefits.<sup>4</sup>

KRS 61.600(2) provides for disability retirement to a qualified member of KERS:

- (2) Upon the examination 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;
  - (b) The incapacity is a result of bodily injury, mental illness, or disease;
  - (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 pre-existed

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<sup>2</sup> Kentucky Unemployment Insurance Commission v. King, Ky. App., 657 S.W.2d 250 (1983).

<sup>3</sup> Kentucky Commission on Human Rights v. Fraser, Ky., 625 S.W.2d 852 (1981).

<sup>4</sup> See Energy Regulatory Commission v. Kentucky Power Co., Ky. App., 605 S.W.2d 46 (1980).

membership in the system or  
reemployment, whichever is  
most recent.

The agency found that Morris's cervical injury and psychological disability pre-existed his membership in KERS and excluded him from benefits under KRS 61.600(2)(d).

Prior to his employment with the Department of Criminal Justice, Morris was involved in a major automobile accident. There is ample medical evidence in the record that following his accident in 1988, Morris had both physical and psychological trauma. Dr. Pursley, who performed a neurological examination on Morris after his 1994 accident, specifically concluded that Morris's current problems are the result of the dislodging of his original bone graft. Dr. Edward Bunch, who treated Morris for his psychological condition, confirmed that his condition first manifested itself following the 1988 accident. There is sufficient evidence to support the finding that Morris's physical and mental conditions at least indirectly resulted from the 1988 accident and predated his membership in the retirement system.<sup>5</sup>

KRS 61.600(2)(d) does not apply if:

The incapacity is a result of bodily injury, mental illness, disease, or condition which has been substantially aggravated by an injury or accident arising out of or in the course of employment;. . .<sup>6</sup>

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<sup>5</sup> KRS 61.600(2)(d).

Morris claims that his 1994 injury arose "out of or in the course of his employment" because he was on his way to the campus to fill a water bottle to be used at work when the accident occurred. We agree with the trial court that there is substantial evidence to support the agency's finding that the 1994 injury did not arise out of Morris's employment. We recite with approval the circuit court's holding:

Morris argues that his condition was substantially aggravated by his injury or accident arising out of or in the course of his employment. KRS 61.600(3)(a). This is a conclusion of law which the Court may review de novo. Halls Hardwood Floor Co. v. Stapleton, Ky. App., 16 S.W.3d 327, 330 (2000). However, we agree with KERS the accident did not "arise out of or in the course of employment." Id. The record indicates that Morris had traveled merely a mile from the babysitter and was not on Eastern Kentucky University's campus. An individual on his way to work does not necessarily create a work situation. The fact that he had a container in his car to fill with water for work purposes does not persuade the Court. The record indicates that he could have filled the container after arriving at his office. The fact that he thought it more convenient to take the container home, then fill it prior to coming to work does not make his action work-related as a matter of law. Morris had yet to reach any part of campus where he was employed. Finally, we note that no accident report was filed with the University or a Workers' Compensation claim signifying an accident in the course of employment. We cannot find as a matter of law his accident

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<sup>6</sup> KRS 61.600(3)(a).

arose in the course of employment as required by KRS 61.600(3)(a).

We find the remaining errors raised to be without merit. Morris was sent a form letter advising him of the date and place of the hearing and was further provided a copy of the administrative record including complete medical records and the disability determinations made by the medical review physicians. Although not expressly stated in the form letter, the review physicians recommended that benefits be denied because of his pre-existing cervical fusion and mental condition.

The judgment of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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