RENDERED: DECEMBER 28, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

DISCRETIONARY REVIEW GRANTED BY SUPREME COURT:
FEBRUARY 11, 2009
(FILE NO. 2008-SC-0326-D)

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000296-MR

KENTUCKY RETIREMENT SYSTEMS, BOARD OF TRUSTEES — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 04-CI-01106

DILLARD WAYNE BROWN, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF BARBARA FAYE REED BROWN, DECEASED — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, DIXON, AND KELLER, JUDGES.

ACREE, JUDGE: Kentucky Retirement Systems (the Systems) appeals from the Franklin Circuit Court's reversal of a decision of the Disability Appeals Committee of the Board of Trustees of the Kentucky Retirement Systems (the Board) that Barbara Brown did not

qualify for disability retirement benefits under KRS[1] 61.600. Mrs. Brown passed away from her disabling condition, chronic obstructive pulmonary disease or COPD, before the Franklin Circuit Court rendered its decision in this case. Her husband, Dillard Wayne Brown, chose to continue this action as executor of her estate. Because the evidence in Mrs. Brown's favor is so compelling that no reasonable person could have failed to be persuaded by it, we affirm the Opinion and Order of the Franklin Circuit Court.

Mrs. Brown became a member in the Systems on March 31, 1992, through her employment with the Lincoln Trail District Health Department (Lincoln Trail). Her job duties involved light work including working with children and lifting or carrying up to ten pounds.

During the course of her employment at Lincoln Trail, Mrs. Brown experienced normal medical ailments. Her personal physician was Dr. Mark Abram. He was also, coincidentally, Lincoln Trail's medical director.

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.

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.

---

[1]Kentucky Revised Statutes.

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 than 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.

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.

Mrs. Brown continued in her employment with Lincoln Trail even while being treated by Dr. Abram and later by a pulmonologist. By September 2001, her condition had worsened to the point that her pulmonologist recommended use of oxygen "with all activities and at nighttime." In May, 2003, he recommended that Mrs. Brown be permitted to use oxygen on the job as an accommodation to allow her to continue working. Her use of oxygen while she worked was not permitted. However, Linda Sims, Lincoln Trail's Director, stated in a letter to Mrs. Brown dated May 13, 2003:

At this time, accommodations may be granted as follows:

> When there is a need to use oxygen, you will need to advise your supervisor that you would be implementing your need for Family/Medical Leave. You should go to an office and initiate an oxygen treatment for [the] amount of time needed before returning to regular duties. Time should be coded to sick and/or vacation if available. Otherwise, you will be FML without pay.

When Mrs. Brown's condition worsened to the point that she was in need of oxygen virtually around the clock, she found this accommodation unworkable and meaningless. Her last date of paid employment was May 31, 2003.

Mrs. Brown subsequently filed for disability retirement benefits as authorized by KRS 61.600. Pursuant to that statute, a member of the Systems may qualify to retire based on a disability subject to certain conditions. Two conditions were of particular relevance to Mrs. Brown's application.

First, to qualify for benefits, Mrs. Brown's disabling condition must not have "result[ed] directly or indirectly from . . . disease, or condition which pre-existed membership[.]" KRS 61.600(3)(d).[2]

Second, Mrs. Brown would not be entitled to retire as disabled if she were able to perform her job, or a "job of like duties," taking into consideration "any reasonable accommodation by the employer as provided in 42 U.S.C.[3] sec. 12111(9) and 29 C.F.R.[4] Part 1630[.]" KRS 61.600(3)(a). The federal statute defines "reasonable

---

[2] 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). Consequently, we cite to the current version of the statute for ease of future research, though the circuit court cites to the former subsection (2).

[3] United States Code.

[4] Code of Federal Regulations.

accommodation," and the federal regulations more fully articulate what measures may or may not constitute a "reasonable accommodation."

The Systems' Medical Review Board examined Mrs. Brown's application and denied her benefits, concluding that her 30-year smoking habit was a "condition which pre-existed membership."

As is her right, Mrs. Brown challenged that denial of benefits by requesting a hearing. Following the hearing, the hearing officer issued a recommended order denying her claim. That recommendation included these conclusions of law:

1. Mrs. Brown failed to prove she was totally and permanently disabled;

2. Mrs. Brown failed to take advantage of her employer's reasonable accommodation that allowed her time off to use oxygen to facilitate her breathing;

3. Mrs. Brown's emphysema and COPD were, or resulted directly or indirectly from, a pre-existing condition.

The Board subsequently adopted the recommended order and Mrs. Brown filed a petition for review with the Franklin Circuit Court.

Judge William Graham of the Franklin Circuit Court reversed the Board's Final Order on the following grounds. First, he concluded that the Board's finding that Mrs. Brown was not totally and permanently incapacitated was not supported by substantial evidence. Second, he found, as a matter of law, that allowing an employee to take time off, a benefit to which the employee was already entitled, is not a reasonable accommodation. Finally, he found as a matter of law that Mrs. Brown's smoking behavior that pre-existed her employment with Lincoln Trail was not a pre-existing

condition precluding disability retirement benefits. The Systems appeals the Franklin Circuit Court Opinion and Order reversing the Board's Order.

The Board contends that the circuit court improperly substituted its judgment for that of the Board's and that substantial evidence did support the Board's finding that Mrs. Brown was not disabled. We disagree.

In *McManus v. Kentucky Retirement Systems*, 124 S.W.3d 454 (Ky.App. 2003), the Court of Appeals set out the standard for review of the Board's denial of a claimant's right to disability benefits.

> Where the fact-finder's decision is to deny relief to the party with the burden of proof or persuasion, the issue on appeal is whether the evidence in that party's favor is so compelling that no reasonable person could have failed to be persuaded by it.

Id. at 458. This standard applies equally to the circuit court and to this court.

We note, and agree with the circuit court's assessment of the evidence, that "Brown's diagnosis is undisputed. By the time she left her employment, she suffered from severe COPD." The two physicians employed by the Systems to review Mrs. Brown's records acknowledged this fact in their separate reports. There is simply no evidence to the contrary.

In fairness, the recommended order should be interpreted as concluding that Mrs. Brown failed to prove she was permanently disabled because two statutory exceptions negated any finding that she was permanently disabled: (1) her disability could be reasonably accommodated; and (2) the disability pre-existed her membership in the Systems. We therefore turn to those exceptions.

The Franklin Circuit Court addressed the reasonable accommodation issue as follows. The Board

> adopted two inconsistent conclusions that go to the heart of this issue. In its Findings of Fact, [the Board] stated, "No finding is made, nor is any required by this proceeding, that reasonable accommodations were provided." However, the Conclusions of Law state, "Claimant requested reasonable accommodations and the employer provided them."
>
> Brown argues that her employer was unable to accommodate her need for oxygen thus she was forced to leave her employment. Retirement Systems responds that Linda Sims' letter that allowed Brown to take sick leave or Family Medical Leave without pay was a reasonable accommodation. **We hold that allowing a person to take sick leave or leave without pay is not a reasonable accommodation.** Linda Sims' letter did not grant Brown any additional accommodation for which Brown was not already entitled. State employees are entitled to take sick leave when they are sick. The Conclusion of Law that stated the employer provided reasonable accommodations is incorrect. [Emphasis supplied]

Our focus is drawn to one particular statement by the circuit court: "We hold that allowing a person to take sick leave or leave without pay is not a reasonable accommodation." The scope of this sweeping statement is too broad and, therefore, we must correct it.

As noted, KRS 61.600 incorporates the concept and definition of "reasonable accommodation" from federal law, including 29 C.F.R. Part 1630. Section 1630.2(o) of Title 29, entitled "Reasonable Accommodation," lists examples of the most common types of accommodation that an employer may be required to provide. While the accommodation made by Mrs. Brown's employer – time off – is not contained in that

list, we find the following statement in the "Appendix to Part 1630 – Interpretive Guidance on Title I of the Americans With Disabilities Act."

> There are any number of other specific accommodations that may be appropriate for particular situations but are not specifically mentioned in this listing. This listing is not intended to be exhaustive of accommodation possibilities. For example, **other accommodations could include permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment**[.]

29 C.F.R. Pt. 1630, App.(Emphasis supplied). Therefore, in proper circumstances, allowing a disabled employee to utilize his or her available leave, paid or unpaid, can be a reasonable accommodation. Examples of such proper circumstances can be found in *Criado v. IBM Corp.,* 145 F.3d 437, 441 (1st Cir. 1998), decided under the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 *et seq*. However, *Criado* itself and each of the examples it cites involved a *recuperative* leave of absence that facilitated the employee's eventual return to productive employment. *Id.* at 443-44, *citing Rodgers v. Lehman*, 869 F.2d 253, 259 (4th Cir.1989)(leave of absence a reasonable accommodation for alcohol detoxification); *Kimbro v. Atlantic Richfield Co.*, 889 F.2d 869, 878-79 (9th Cir.1989)(interpreting an analogous state statute; leave appropriate to accommodate employee's periodic cluster migraine attacks); 29 C.F.R. § 1630.2(o)(Department of Labor regulations announcing that a reasonable accommodation may require an employer "to grant liberal time off or leave without pay when paid sick leave is exhausted and when the disability is of a nature that it is likely to respond to treatment of hospitalization"); 29 C.F.R. Pt. 1630, App. (EEOC interpretive guidance on the ADA stating that a reasonable accommodation "could include permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment"); *Ralph*

v. Lucent Technologies, Inc., 135 F.3d 166, 172 (1st Cir. 1998)(employer may be required to grant additional accommodations beyond a 52-week leave with pay for employee who suffered a mental breakdown); *Evans v. Federal Express Corp.*, 133 F.3d 137, 140-41 (1st Cir.1998)(leave of absence sought by employee to receive treatment for alcohol abuse).

The only logical construction of the term "reasonable accommodation" in the context of KRS 61.600(3)(a), as illustrated by examples from federal law, is that accommodation which enables the employee's immediate or eventual return to work at an acceptable level of proficiency. Recuperative leaves of absence fit this definition. Mrs. Brown's circumstance did not.

As the Franklin Circuit Court noted,

> The record contains multiple references to Brown's need for oxygen. On September 13, 2001, Dr. Chamberlain stated that Brown was to use oxygen, "with all activities and at nighttime." Brown testified that she was on virtually continuous oxygenation by the time she left her employment.
>
> . . . .
>
> If the accommodation was to take time off work for oxygen treatments and Brown needed oxygen continuously, then Brown could not work.

All objective medical and other evidence supported the fact that Mrs. Brown needed oxygen continuously, or virtually continuously. Consequently, *recuperative* time off was not an option. The only kind of leave that would have met her disability needs was a *permanent* leave of absence. Offering permanent unpaid time off to accommodate her employment is the same as proposing termination of the employment

itself as a solution. Such a gesture is therefore anathema to the concept of reasonable accommodation embraced by KRS 61.600(3)(a).

As the Systems states in its brief, "[t]here is no question that Appellee has [*sic*] COPD." Nor can it be said that there was any evidence of substance in the record that she was not "physically incapacitated to perform the job, or jobs of like duties," KRS 61.600(3)(a), without some kind of reasonable accommodation. Consequently, we believe the evidence in Mrs. Brown's favor, that she was disabled and that her employer made no reasonable accommodation for her disability that would have allowed her to continue working, was so compelling that no reasonable person could have failed to be persuaded by it.

The Systems argues, however, that even if we affirm the Franklin Circuit Court's determination regarding Mrs. Brown's disability and the absence of a reasonable accommodation, we must still reverse the circuit court and reinstate the Board's Order. This is because, argues the Systems, Mrs. Brown's COPD pre-existed her employment at Lincoln Trail. Again, we find the Franklin Circuit Court's description of the facts in evidence worthy of our adoption.

> 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.

In essence, the Board argues that "[i]t was well within the [hearing officer's and the Board's] right to give no weight to the x-ray results presented by Appellee[.]" This is a technically correct statement of law. It is the agency's function as fact-finder to "judge the credibility of witnesses and the evidence adduced by the parties, and to determine the weight of the evidence[.]" *Kentucky State Racing Commission v. Fuller,* 481 S.W.2d 298, 308 (Ky. 1972)(Citations omitted). Furthermore, if the circuit court had afforded the evidence different weight, we would be required to reverse. KRS 13B.150(2)("The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact."). But that is not what the circuit court did.

In order to fully explain why the Systems' argument fails, we must revisit an issue addressed by this Court in *McManus v. Kentucky Retirement Systems*, 124 S.W.3d 454 (Ky.App. 2003). That issue is the allocation of the burden of proof and the burden of going forward with evidence in claims before the Board.

In *McManus,* the claimant argued that the Systems should bear the burden of persuasion with regard to the issue of any pre-existing condition that would disqualify him from a disability award. The Court acknowledged the claimant's point that of the four conditions contained in KRS 61.600(3)[5], three require a claimant to establish the affirmative of the condition. However, the last – absence of a pre-existing condition – requires proof of a negative. Consequently, the claimant argued that the presence of a pre-existing condition is an affirmative defense that must be asserted and proved by the Systems. The Court in *McManus* disagreed, stating that the legislature's "placement of the pre-existing condition factor alongside and in the same subsection as other threshold

[5]*McManus* refers to KRS 61.600(2). The statute was subsequently renumbered.

factors such as the existence of incapacity and permanency militates against treating it as a full-scale affirmative defense." *Id.* at 458. *McManus* did hold, however, that "the Systems is obligated to raise the issue of causation based on a pre-existing condition" but not to prove it as an affirmative defense.

While our decision in *McManus* is arguably draconian and improvident, it is not necessary to revisit that question now. However, what *McManus* did not address, and what we must address in this case, is the follow-up question: What quantum of evidence of the absence of a pre-existing condition is necessary to require the Systems to present objective medical evidence to the contrary?

Requiring a party to prove a negative is contrary to jurisprudential instinct. In our courts, we reject the concept by rule. CR[6] 43.01(1)("The party holding the affirmative of an issue must produce the evidence to prove it."); *see also Boyd v. Withers,* 20 Ky.L.Rptr. 511, 46 S.W. 13, 14 (Ky. 1898)("It is true that in the vast majority of instances the burden of proving any fact lies upon the party who substantially asserts the affirmative of the issue."). The underlying rationale is obvious; "it is difficult, if not impossible, to prove a negative." *Fankhauser v. Cobb,* 163 S.W.3d 389, 402 (Ky. 2005). Consequently, 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)(with the mere statement that a hit-and-run driver could not be located, claimants "met their burden to show that there was no applicable liability insurance, and the burden shifted to Safe Auto to prove otherwise").

[6]Kentucky Rules of Civil Procedure

Where, as here, a claimant comes forward with evidence of the non-existence of a pre-existing condition in the form of pre-employment x-rays indicating the absence of COPD or its symptoms, as well as medical proof that for the first six years of her employment there is no mention of COPD and no diagnosis for nine years, a rebuttable presumption is created.

> Such a presumption shifts the burden of going forward with evidence to rebut or meet it to the party against whom it is directed, but it does not shift the burden of proof (i.e., the risk of nonpersuasion) from the party upon whom it was originally cast. If a presumption is not rebutted, the party with the burden of proof prevails on that issue by virtue of the presumption. If a presumption is rebutted, it is reduced to a permissible inference.

Jefferson County Public Schools/Jefferson County Bd. of Educ. v. Stephens, 208 S.W.3d 862, 866 (Ky. 2006).

We do not believe this presumption was rebutted. However, even if we accept the Systems' argument that it rebutted Mrs. Brown's objective medical evidence with the subjective opinions of its own two physicians, we still believe the record, taken as a whole, compels the finding that there was no pre-existing condition.

In the summer of 2003, the Systems' physicians did review Mrs. Brown's medical records and opined that in 1992 she had COPD. Dr. McElwain said "[t]obacco abuse . . . would appear to establish the presence of chronic obstructive pulmonary disease [COPD], at the time of her employment[.]" Dr. Keller said "[t]his patient who is a 30 year smoker had long sense [*sic*] set the stage for ultimate pulmonary . . . disease at or prior to the onset of her employment in 1992." These subjective retrospective diagnoses are not couched in any degree of medical certainty and, more importantly, they

are directly contradicted by the contemporary objective medical records, x-rays and diagnoses by her attending physicians. Their conclusions are clearly based on nothing other than the fact that Mrs. Brown smoked before she started work at Lincoln Trail.

Looking at the record as a whole, it is clear that the Board's conclusion that Mrs. Brown's emphysema or COPD was a pre-existing condition is without support of substantial evidence. KRS 13B.150(2)(c). The Franklin Circuit Court was correct to reverse that determination.

The Board argues in the alternative that even in the complete absence of medical evidence that Brown suffered with COPD prior to her membership in the Systems, the unrefuted fact that she was a long-time smoker was a sufficient pre-existing condition in its own right to disqualify her. We cannot agree.

First, we cannot interpret the word "condition" contained in KRS 61.600(3)(d) as broadly as does the Systems. The "conditions" of the claimants in all prior cases addressing the pre-existing condition issue were capable of medical or psychiatric diagnosis. *See, e.g., McManus* (diabetes); *Lindall v. Kentucky Retirement Systems*, 112 S.W.3d 391 (Ky.App. 2003)(bipolar disorder). We believe the legislature specifically used the phrase "bodily injury, mental illness, disease, or condition" in KRS 61.600(3)(d) to indicate medically and psychiatrically diagnosable maladies only.

While one may question the wisdom of Mrs. Brown's continued use of a legal tobacco product, such use is not a medical or psychiatric malady and therefore not a "condition" as that term is used in KRS 61.600(3)(d). It is simply behavior. We will not broaden the definition of "condition" to include an employee's behavior, even an employee's bad habits.

Second, we agree with the circuit court that while the medical journal articles presented by the Systems generally "link smoking and COPD, they do not link it in this case." As the Franklin Circuit Court further stated, besides lacking any evidentiary quality, "Dr. McElwain's statement [that Mrs. Brown's tobacco use caused her COPD before she was employed] would lead to the conclusion that every person that [*sic*] smoked prior to their state employment has COPD and cannot receive benefits. Even the articles cited by Retirement Systems fail to support that hypothesis." If we were to endorse this view, the Systems would be able to deny disability benefits to every applicant whose disability could be linked to smoking simply by presenting evidence that they smoked prior to employment.

Third, we believe interpreting the word "condition" to include pre-employment smoking behavior would run entirely contrary to the legislature's policy prohibiting discrimination against employees merely "because the individual is a smoker[.]" KRS 344.040.

In summary, (1) the finding that Mrs. Brown failed to prove she was totally and permanently disabled is not supported by substantial evidence, (2) based on facts not controverted, the accommodation offered by Lincoln Trail was not reasonable as a matter of law, and (3) the finding that Mrs. Brown's disabling condition pre-existed her membership in the Systems is not supported by substantial evidence.

For the foregoing reasons, the Opinion and Order of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANT:

Katherine Rupinen
Frankfort, Kentucky

BRIEF AND ORAL ARGUMENT FOR APPELLEE:

Joseph H. Mattingly III
Lebanon, Kentucky