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**SUPREME COURT GRANTED DISCRETIONARY REVIEW:
DECEMBER 12, 2007
(FILE NO. 2007-SC-0509-D)**

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000941-MR

SANDRA BOWENS

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 05-CI-01140

KENTUCKY RETIREMENT SYSTEMS

APPELLEE

OPINION

AFFIRMING IN PART AND VACATING AND REMANDING IN PART

** ** * ** * **

BEFORE: COMBS, CHIEF JUDGE; MOORE AND NICKELL, JUDGES.

MOORE, JUDGE: Appellant Sandra Bowens appeals from an opinion and order of the Franklin Circuit Court denying her appeal for disability retirement benefits from the order of the Board of Trustees of the Kentucky Retirement Systems. After a careful review of the record, we affirm in part and vacate in part the Franklin Circuit Court's opinion and

order, and remand the reversed portions of the case for further proceedings consistent with this opinion.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellant was born in 1961. A.R., p. 2.¹ She began working for the Johnson County Health Department in July 1995, and her last day of paid employment, according to her employer's records, was on May 26, 2004. Id. at pp. 150 and 302. Appellant then went on leave under the Family Medical Leave Act (FMLA).

Although Appellant was still working at the time, she applied for disability retirement benefits on March 21, 2003. Id. at pp. 4-5. In her application, Appellant alleged that she was disabled due to a neck and back injury, pain in her shoulder, headaches, arthritis in her back, and breast cancer. Id. at p. 4. Her injuries were caused by a car accident she had while performing her job in July 1997. Appellant further asserted that she had permanent lifting restrictions, but Appellant did not allege whether these restrictions resulted from her injuries, her arthritis, or a combination of both. Id. Reports from Appellant's doctors indicate that she had another car accident in 2002 which resulted in a tear in the medial meniscus of her right knee. Id. at pp. 141 and 273. In 2004, Appellant complained of additional ailments, including headaches, dizziness,

¹ "A.R." denotes references to the administrative record.

unsteadiness, and ataxia,² and her medical records revealed that she has asthma. Id. at p. 246.

As previously mentioned, Appellant was involved in a job-related car accident in 1997. At that time, she was working as a nurse's aid for Johnson County Home Health. As a result of the accident, Appellant “sustained a flexion-hyperextension injury to her neck.” Id. at p. 209. Appellant's head, back and arm were injured in the accident. Id. at p. 211. On July 30, 1999, Appellant's treating physician, Dr. T. Robert Love, filled out an addendum to Appellant's medical records opining that Appellant had preexisting degeneration and that Appellant's current complaints most likely resulted from her preexisting degenerative and arthritic problems. Id. at p. 201. Appellant filed a worker's compensation claim concerning her 1997 car accident, but she alleged during the disability hearing that her employer did not want her to collect such benefits. Thus, she was reassigned to office work. Id. at pp. 210-15, 353; (Disability hearing, 06/24/04, 1:46:40).

Upon reassignment, Appellant worked in Senior Support Services for the Johnson County Health Department. A.R., p. 6. Her job responsibilities included: entering data, routing the mail, visiting doctors' offices to obtain the signatures necessary for agency compliance and for billing, performing typical receptionist duties, and keeping records of the checks and cash received. Id. at p. 9. Appellant was required to sit for four hours per work day and to lift up to ten pounds occasionally during the work day.

² Although the parties do not provide the definition of “ataxia,” it appears that people who suffer from ataxia have difficulty coordinating their “voluntary bodily movements.” New World Dictionary of the American Language 87 (2d ed. 1978).

Id. at pp. 6, 14. Appellant testified during her disability hearing that she also made coffee for her co-workers and she was expected to cook lunch for up to ten of her co-workers every work day. (Disability hearing, 06/24/04, 1:47:50, 2:02:45, 2:05:10). She attested that cooking lunch for her co-workers was not in her job description, but if she did not cook, her co-workers and the company director became very angry with her. Id. at 2:03:14. Appellant also attested that she had to drive to the doctors' offices to obtain the requisite signatures and that she was responsible for ensuring that all of the company vehicles were serviced. This involved driving the vehicles to the place where they were serviced and returning them to her employer. Id. at 2:00:20.

Appellant had another car accident in 2002.³ Dr. David Jenkinson, an orthopedic doctor, recommended that Appellant have knee surgery following this accident. Specifically, he recommended arthroscopy, but Appellant did not believe that “her symptoms [were] bad enough to justify surgery.” A.R., p. 273. In May 2002, Dr. Jenkinson reported to Dr. Sarah Belhasen, one of Appellant's treating physicians, that Appellant's “[h]ead, neck and upper limb [were] normal,” and that his examination showed that Appellant had a “full range of motion of [her] hips and knees.” Id. Additionally, Dr. Jenkinson's December 2002, progress report concerning Appellant revealed that she had “a full range of motion of her knee with no swelling or deformity.” Id. at p. 271. Regarding her proposed knee surgery, Appellant testified at her disability hearing that her employer asked her not to have the surgery because she is the only

³ The record is unclear as to whether this car accident occurred while Appellant was performing her job.

employee who is able to obtain certain information off the computer, and her employer did not want her to take time off from work. (Disability hearing, 6/24/04, 1:52:20).

In January 2003, Appellant was diagnosed with breast cancer, and she underwent a partial mastectomy of her left breast. A.R., p. 91. She had three months of chemotherapy and thirty-four radiation treatments. (Disability hearing, 6/24/04, 1:49:25). She was unable to complete her chemotherapy treatment because she had “a bad reaction” to chemotherapy. Id. at 2:20:35. As a result of her chemotherapy and radiation treatments, Appellant suffered from fatigue, burns on her skin, difficulties with her memory, and frequent coughing. Id. at 1:49:32. She also had difficulty swallowing because her saliva production decreased as a result of the radiation, but she testified during her hearing that her ability to swallow had improved because she was again producing saliva. Id. at 2:07:10. Appellant further testified that she continued to work while she was undergoing chemotherapy. Id. at 2:11:39 - 2:12:34.

After receiving her breast cancer diagnosis, Appellant's employer informally accommodated her so that she could continue to work while she underwent radiation and chemotherapy. The accommodations were informal because they were not expressed to Appellant in writing. With the accommodations, Appellant was no longer required to drive to doctors' offices to deliver documents and she was no longer required to lift heavy objects, such as boxes of computer paper. Rather, she was only required to perform data entry and computer work, and to answer telephones. A.R., p. 302.

These informal accommodations ceased in July 2004, because Appellant no longer received radiation and chemotherapy. *Id.* at p. 306. As of July 2004, her job responsibilities again included going to doctors' offices to obtain their signatures on documents. *Id.* at p. 308.

In 2003, Dr. Belhasen completed a medical report for Appellant to include with her application for Social Security Disability Insurance Benefits. In her report, Dr. Belhasen opined that Appellant was “unable to sit, stand, or walk for long periods”; “unable to walk up stairs”; unable to lift more than ten pounds; and “unable to type,” due to her various ailments. *Id.* at p. 190.

In 2004, Appellant underwent an echocardiogram of her heart and the results showed that she had “normal LV systolic function[,] mild concentric LVH[,] decreased compliance[,] and a small pericardial effusion.” *Id.* at p. 283. Further, her medical records report that there was “[n]o convincing evidence of acute cardiopulmonary pathology.” *Id.* at p. 287.

Also in 2004, Appellant underwent a total-body bone scan and, with the exception of her arthritis, the test revealed “no evidence of skeletal metastases,” and the test was “unremarkable.” *Id.* at p. 289 (capitalization changed).

That same year, Appellant complained of headaches, dizziness, unsteadiness, and ataxia. An MRI was performed due to her headaches, but no physical explanation was found. *Id.* at p. 234. Appellant had a follow-up visit with Dr. Kirti K. Jain, one of her treating physicians. *Id.* at p. 246-47. Dr. Jain reported that Appellant had

asthma; she recently had undergone a breast biopsy, the results of which were negative; she was “being worked up” for carpal tunnel syndrome; she had no headaches; her unsteadiness had improved; and she had no respiratory complaints. Id. at p. 246.

In February 2004, Dr. Jain conducted a functional capacity evaluation that revealed Appellant had lifting restrictions of no more than five pounds; standing and walking restrictions of no more than four hours total in a work day, with no more than two hours uninterrupted; and sitting restrictions of no more than four hours per work day, with no more than one hour uninterrupted. Id. at p. 188. Additionally, Dr. Jain reported that Appellant could never climb, stoop, crouch, or kneel, and that she could balance or crawl infrequently. Id. at p. 189. He further opined that Appellant's ability to reach, push, and pull were affected by her impairments. Id. Finally, Dr. Jain reported that Appellant was restricted from moving machinery, among other environmental restrictions. Id. Dr. Jain explained that the various types of restrictions placed on Appellant were due to her breast cancer, carpal tunnel syndrome, and ataxia.

During her disability hearing, Appellant testified that her primary or worst complaint was not knowing where the cancer was at that time. (Disability hearing, 6/24/04, 1:56:05). She attested that her worst physical complaint concerned her chest and her arm. Id. at 1:56:16. She also complained of fatigue. Id. at 1:56:25. She testified that she was taking numerous medications for her various ailments. Id. at 1:57:15.

Appellant's daughter, Tonya Spradling, lives next door to Appellant and testified during the hearing that she helps Appellant cook and clean. Id. at 2:23:08.

Appellant's husband, Hubert Lee Bowens, testified that Appellant complained primarily of knee, back, arm, and chest pain. *Id.* at 2:25:50. He further testified that Appellant's memory had worsened. *Id.* at 2:26:40.

Appellant's disability retirement benefits application has been denied three times by the Medical Review Board. *A.R.*, pp. 142-181. Appellant thereafter requested a disability hearing, and the hearing was held, wherein the aforementioned testimony was introduced.

At the end of Appellant's disability hearing, the record was closed because the parties stated that they did not anticipate the necessity to file any other documents. (Disability hearing, 6/24/04, 2:27:08); *see also* *A.R.*, p. 355. However, Appellant subsequently moved to supplement the record, and her motion was granted in July 2004. *A.R.*, p. 358. On October 19, 2004, the hearing officer granted Appellant another thirty days, until November 18, 2004, to supplement the record with the results of recent diagnostic testing she had undergone. After the thirty days passed, the hearing officer's order provided that the record would be closed, and that the “matter [would] stand submitted for final recommendation.” *Id.* at p. 386.

Nevertheless, in February 2005, Appellant submitted for filing a January 28, 2005, letter from her treating physician, Dr. Belhasen, stating that Appellant “continue[d] to have multiple medical problems stemming from her breast cancer and subsequent mastectomy[,]” and opining, without providing specific facts to support her opinion, that Appellant “continue[d] to be disabled.” *Id.* at p. 341. Appellant also

submitted for filing the decision that she had received from the Social Security Administration, granting her disability benefits. Id. at pp. 392-94. The hearing officer denied Appellant's motion to file the decision of the Social Security Administration on the basis that it was “untimely filed” and “irrelevant.” Id. at p. 396. Thus, the document was stricken from the record. Id. Appellant moved to amend, alter, vacate and reconsider the hearing officer's order denying her motion to file the decision of the Social Security Administration, but her motion was denied. Id. at pp. 397, 401.

The hearing officer issued his report and recommended order denying Appellant's application for disability retirement benefits. Id. at pp. 404-416. In doing so, he found that Appellant “had 104 months of KERS service time as of February 2004[,] and is eligible to apply for retirement benefits pursuant to KRS Chapter 61 et seq.” Id. at p. 404. The hearing officer found that Appellant had timely filed her application and noted that Appellant had the burden of proof in establishing that she was disabled. Id. at pp. 405, 412. He found that Appellant's job duties fell “within the category of sedentary to light work activity as defined by KRS 61.600.”⁴ Id. at p. 412. He noted that

⁴ KRS § 61.600 provides, in pertinent part, as follows:

- (1) Any person may qualify to retire on disability, subject to the following conditions:
 - (a) The person shall have sixty (60) months of service, twelve (12) of which shall be current service credited under KRS 16.543(1), 61.543(1), or 78.615(1);
- (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 as provided in 42

Appellant's "job duties as of her last day of paid employment in May 2004 were entirely sedentary with no traveling requirement."⁵ Id. at pp. 412-13.

The hearing officer concluded that Appellant was not disabled due to any pulmonary problems because "[t]he tests closest in time to [Appellant's] last day of paid employment revealed normal LV systolic function, mild concentric LVH, decreased

U.S.C. § 12111(9) and 29 C.F.R. Part 1630 shall be considered;

(b) The incapacity is a result of bodily injury, mental illness, or disease. For 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 pre-existed membership in the system

(4) Paragraph (d) of subsection (3) of this section shall not apply if:

(a) 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.

. . . .

(5) (a) 1. An 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 (12) months from the person's last day of paid employment in a regular full-time position.

2. The determination of a permanent incapacity shall be based on the medical evidence contained in the member's file and the member's residual functional capacity and physical exertion requirements.

(b) The person's residual functional capacity shall be the person's capacity for work activity on a regular and continuing basis. The person's physical ability shall be assessed in light of the severity of the person's physical, mental, and other impairments. The person's ability to walk, stand, carry, push, pull, reach, handle, and other physical functions shall be considered with regard to physical impairments. The person's ability to understand, remember, and carry out instructions and respond appropriately to supervision, coworkers, and work pressures in a work setting shall be considered with regard to mental impairments. Other impairments, including skin impairments . . . postural and manipulative limitations, and environmental restrictions, shall be considered in

compliance, and small pericardial effusion. A chest x-ray of May 4, 2004[,] was interpreted as showing no convincing evidence of acute cardiopulmonary pathology.” Id. at p. 413.

Additionally, the hearing officer found that Appellant was not disabled due to any orthopedic problems because although Appellant had a torn medial meniscus in her knee, she had a “full range of motion with no swelling or deformity” in that knee as of December 2002. Id. Also, her April 2004, total body scan revealed no “skeletal metastases and was noted to be unremarkable.” Id. The hearing officer found that, after chemotherapy in March 2003, Appellant attended physical therapy for problems she was having with her neck and shoulder, and she was released from physical therapy after

conjunction with the person's physical and mental impairments to determine residual functional capacity.

(c) The person's physical exertion requirements shall be determined based on the following standards:

1. Sedentary work shall be work that involves lifting no more than ten (10) pounds at a time and occasionally lifting or carrying articles such as large files, ledgers, and small tools. Although a sedentary job primarily involves sitting, occasional walking and standing may also be required in the performance of duties.

2. Light work shall be work that involves lifting no more than twenty (20) pounds at a time with frequent lifting or carrying of objects weighing up to ten (10) pounds. A job shall be in this category if lifting is infrequently required but walking and standing are frequently required, or if the job primarily requires sitting with pushing and pulling of arm or leg controls. If the person has the ability to perform substantially all of these activities, the person shall be deemed capable of light work. A person deemed capable of light work shall be deemed capable of sedentary work unless the person has additional limitations such as the loss of fine dexterity or inability to sit for long periods.

⁵ Although Appellant's last day of paid employment was in May 2004, her employer inexplicably withdrew the informal accommodations of Appellant two months later in July 2004. A.R., p. 306.

multiple sessions “with increased range of motion.” Id. at p. 414. Further, although Dr. Jain's record after completing the February 2004, functional capacity evaluation on Appellant indicated that Appellant's functional capacity was limited due to breast cancer, carpal tunnel syndrome, and ataxia, the hearing officer noted that “[t]here is no evidence that [Appellant] suffers from carpal tunnel syndrome and the most recent reports submitted reflect [Appellant] no longer has breast cancer.” Id. The hearing officer also reported that although Appellant complained of unsteadiness and memory problems, “no objective testing [was] submitted to confirm the presence of either condition or to what extent [Appellant is] impaired by the conditions.” Id.

Regarding Appellant's arguments that she continued to suffer from the side effects of the treatment she received for her breast cancer, the hearing officer acknowledged “[i]t is understandable that [Appellant] may require a period to recover from [such side effects], but in this case, [Appellant] continued to work in her sedentary position even during treatment.” Id. Furthermore, the hearing officer noted that Appellant completed her treatment “in August 2003 and was able to continue working” until May 2004. Id. at p. 415. He explained that “[t]here does not appear to be a specific incident that caused [Appellant] to stop working on that day. [Appellant's] physicians have indicated she is unable to perform her job duties but have not submitted objective evidence to support their conclusory statements.” Id. The hearing officer further reasoned that even if Appellant was going to be “required to travel, the objective evidence does not reflect that [she] would be prohibited from traveling.” Id.

Finally, the hearing officer concluded that Appellant had “failed to provide objective evidence of a condition that would permanently prevent her from performing her usual work activity.” Thus, the hearing officer recommended denying Appellant's application for disability retirement benefits. *Id.*

Appellant filed exceptions to the hearing officer's report and recommendation, arguing that his findings of fact and conclusions of law were arbitrary and capricious; that Appellant was found by the Social Security Administration to be disabled; and that the hearing officer failed to consider the cumulative effects of all of her ailments. *Id.* at pp. 418-19. The Disability Appeals Committee of the Board of Trustees of the Kentucky Retirement Systems reviewed the hearing officer's report and recommendation, as well as Appellant's exceptions thereto, and adopted “the hearing officer's recommended order as the final order of Kentucky Retirement Systems.” *Id.* at p. 423. Therefore, Appellant's application for disability retirement benefits was denied. *Id.*

Appellant then appealed the Board's decision to the Franklin Circuit Court, and the circuit court denied her appeal. *T.R.* at p. 51.⁶ In reaching this decision, the circuit court noted that an “agency's decision should be given great deference.” *Id.* at p. 53. The court explained that in order to render a decision in Appellant's favor, the evidence she submitted “must be so compelling that no reasonable person could fail to find in her favor.” *Id.* at p. 54. The circuit court found that Appellant “failed to produce such overwhelming evidence that a result should be compelled in her favor.” *Id.*

⁶ “T.R.” denotes references to the circuit court's record.

Next, the circuit court found that the Board's decision was not arbitrary and capricious because the record did not reveal that “the Board acted outside the scope of its authority or applied an incorrect rule of law.” *Id.* at p. 56. The court reasoned that there was substantial evidence in the administrative record to support the Board's decision. *Id.*

Regarding Appellant's claim that the hearing officer should have considered the Social Security Administration's disability finding, the circuit court noted that “the Social Security decision has no controlling effect on the disability retirement determination.” *Id.* (discussing 105 K.A.R. 1:210 § 8).

As for Appellant's assertion that the hearing officer should have considered the cumulative effect of all of her ailments in determining whether she was entitled to disability benefits, the circuit court explained that “KRS 61.600 requires only a finding based on the examination of objective medical evidence. The hearing officer's findings of fact were based on a careful examination of all of the objective medical evidence presented. This is all that the statute requires.” *Id.* at p. 57.

Regarding Appellant's argument that the hearing officer favored the opinions of non-examining physicians over those of her treating physicians, the circuit court found that upon review of the hearing officer's report and recommendation, it was apparent “that reports and evaluations from [Appellant's] treating physicians . . . were carefully considered in deciding her case.” *Id.* Therefore, the circuit court affirmed the Board's decision denying Appellant's application for disability retirement benefits and dismissed Appellant's appeal. *Id.*

Appellant now appeals the circuit court's order and opinion and raises the following claims: (1) the hearing officer erred when he did not consider the combined effect of all of Appellant's ailments when determining whether she was disabled; (2) the hearing officer erred when he did not consider the disability finding of the Social Security Administration in rendering his decision; and (3) the hearing officer erred when he failed to consider the opinions of Appellant's treating physicians and instead considered the opinions of non-examining physicians. The parties agree that there is a lack of authority concerning Appellant's first claim.

II. STANDARD OF REVIEW

Pursuant to KRS § 13B.090(7),⁷ Appellant had the burden of proof during her disability hearing. *See also McManus v. Kentucky Ret. Sys.*, 124 S.W.3d 454, 457-58 (Ky. App. 2003) (discussing how KRS § 61.600 and § 13B.090 should be read in conjunction with one another). Where, as in the present case, “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. “In its role as the finder of fact, an

⁷ KRS § 13B.090(7) provides, in relevant part, as follows:

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 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.

administrative agency is afforded great latitude in its evaluation of the evidence heard and the credibility of witnesses, including its findings and conclusions of fact.” *Id.* (internal quotation marks and citation omitted). “A reviewing court is not free to substitute its judgment for that of an agency on a factual issue unless the agency’s decision is arbitrary and capricious.” *Id.* at 458-59.

In determining whether an agency’s action was arbitrary, the reviewing court should look at three primary factors. The court should first determine whether the agency acted within the constraints of its statutory powers or whether it exceeded them. . . . Second, the court should examine the agency’s procedures to see if a party to be affected by an administrative order was afforded his procedural due process. The individual must have been given an opportunity to be heard. Finally, the reviewing court must determine whether the agency’s action is supported by substantial evidence. . . . If any of these three tests are failed, the reviewing court may find that the agency’s action was arbitrary.

Bowling v. Natural Res. and Env’tl. Prot. Cabinet, 891 S.W.2d 406, 409 (Ky. App. 1994) (internal quotation marks and citation omitted). “‘Substantial evidence’ means evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men.” *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998).

However, KRS 13B.150(2) provides, in pertinent part, that on review of the final order of an administrative agency, a court

may reverse the final order in whole or in part, and remand the case for further proceedings if it finds the agency’s final order is: (a) In violation of constitutional or statutory provisions; . . . (c) Without support of substantial evidence on

the whole record; [or] (d) Arbitrary, capricious, or characterized by abuse of discretion. . . .

We review the agency's conclusions of law *de novo*. See *Aubrey v. Office of Attorney Gen.*, 994 S.W.2d 516, 519 (Ky. App. 1998).

III. ANALYSIS

A. COMBINED EFFECT OF ALL OF APPELLANT'S AILMENTS

Appellant first claims that the hearing officer erred when he did not consider the combined effect of all of her ailments when determining whether she was disabled. To qualify for disability retirement benefits, Appellant's alleged incapacity must be based on the objective medical evidence, as well as her "residual functional capacity and physical exertion requirements." KRS § 61.600(5)(a)(2).

"Objective medical evidence" means reports of examinations or treatments; medical signs which are anatomical, physiological, or psychological abnormalities that 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, electrocardiograms, electroencephalograms, X-rays, and psychological tests.

KRS § 61.510(33).

This Court has previously held in a Workers' Compensation case that because "we [saw] nothing in the . . . statute which prevents the [Administrative Law Judge] from considering the cumulative effects of a work-related injury and an occupational disease such that they may combine to render a claimant totally disabled."

Ashland Exploration, Inc. v. Tackett, 971 S.W.2d 832, 834 (Ky. App. 1998). We believe that the same logic applies here: we see nothing in the relevant statutes that prevents the administrative agency from considering the cumulative effects of a disability benefits claimant's ailments and whether, in combination, those ailments render a claimant totally disabled.

Furthermore, in a Social Security Disability Benefits case, the United States Court of Appeals for the Sixth Circuit has noted that another federal appellate court held that "the examiner so fragmented [the claimant's] several ailments and the medical opinions regarding each of them that he failed properly to evaluate their effect in combination upon this claimant." *Dillon v. Celebrezze*, 345 F.2d 753, 757 (4th Cir. 1965), *quoted in Jenkins v. Gardner*, 430 F.2d 243, 305 (6th Cir. 1970).

Moreover, KRS 61.600(5)(a)(2) shows a legislative intent for the cumulative effects of a disability claimant's ailments to be considered in assessing the claimant's eligibility for benefits. Thus, the cumulative effect of Appellant's ailments should have been considered by the hearing officer.

Appellant has submitted reports of functional capacity examinations from two of her treating physicians, and such reports constitute "objective medical evidence." Dr. Belhasen's 2003 medical report for Appellant submitted with her application for Social Security Disability Insurance Benefits opined that Appellant was "unable to sit, stand, or walk for long periods"; "unable to walk up stairs"; unable to lift more than ten pounds; and "unable to type," due to her various ailments. A.R., p. 190.

Additionally, Dr. Jain completed a residual functional capacity evaluation of Appellant in 2004. In that evaluation report, Dr. Jain opined that Appellant could not lift more than five pounds; that she could not stand or walk for more than four hours total in a work day, with no more than two hours uninterrupted; and that she could not sit for more than four hours per work day, with no more than one hour uninterrupted. Dr. Jain also reported that Appellant could not climb, stoop, crouch, or kneel, and that she could balance or crawl infrequently. He further opined that Appellant's ability to reach, push, and pull were affected by her impairments and that she was restricted from moving machinery. Dr. Jain opined that these restrictions were due to Appellant's breast cancer, carpal tunnel syndrome, and ataxia.

Appellant also suffers from burns from her radiation treatments and the pain in her knee following the 2002 car accident. Furthermore, Appellant has asthma.

Based on the foregoing, Appellant showed by a preponderance of the evidence that her ailments rendered her disabled, particularly considering that she is no longer able to type, and typing was one of her primary job responsibilities. *See* KRS 13B.090(7). The hearing officer erred when he so fragmentized Appellant's multiple ailments and the medical opinions concerning them that he failed to properly evaluate their combined effect upon Appellant. *See Dillon*, 345 F.2d at 757.

Thus, the agency's findings on this issue were arbitrary and capricious because the agency did not consider the combined effect of Appellant's ailments. *See*

Bowling, 891 S.W.2d at 409. Consequently, the circuit court erred in determining that this claim was without merit.

B. DISABILITY FINDING BY THE SOCIAL SECURITY ADMINISTRATION

Appellant next argues that the hearing officer erred when he did not consider the Social Security Administration's disability finding in rendering his decision.⁸ The hearing officer did not consider such evidence because he found that it was untimely filed and that it was not relevant. Kentucky Administrative Regulations provide that “[t]he hearing officer may allow the applicant to introduce, among other evidence, the determination of [the] . . . Social Security Administration awarding disability benefits to the applicant.” 105 K.A.R. 1:210 § 8(1). However, when reviewing this evidence, “[t]he hearing officer shall consider only objective medical records contained within the determination and shall not consider vocational factors or be bound by factual or legal findings of other state or federal agencies.” 105 K.A.R. 1:210 § 8(2).

Because the regulation is permissive in nature, rather than mandatory, the decision whether to allow Appellant to introduce evidence of the Social Security Administration’s disability determination was within the hearing officer’s discretion. Further, the hearing officer may only consider objective medical evidence, and the Social

⁸ Appellant does not argue that the hearing officer erred in failing to consider the evidence submitted in support of her Social Security Disability Benefits Application. Rather, she claims only that the hearing officer erred when he did not consider the decision of the Social Security Administration.

Security Administration's decision does not qualify under this standard. *See* KRS §§ 61.510(33), 61.600. Thus, the hearing officer did not violate 105 K.A.R. 1:210 § 8, and the circuit court properly determined that this claim lacks merit.

C. TREATING PHYSICIAN OPINIONS

Finally, Appellant alleges that the hearing officer erred when he failed to consider the opinions of Appellant's treating physicians and instead considered the opinions of non-examining physicians. Although there is no Kentucky case on point, in a Social Security Disability context, the opinion of a treating physician is "given greater weight than that of the government's physician . . . [but] only if the treating physician's opinion is based on sufficient medical data." *Houston v. Secretary of Health & Human Servs.*, 736 F.2d 365, 367 (6th Cir. 1984). We find this logic persuasive, particularly considering that the physicians on the Medical Review Board who reviewed Appellant's application were non-examining physicians. It appears, based on the conclusions reached by the hearing officer, that he gave greater weight to the non-examining physicians' opinions than those of the treating physicians.

Therefore, adopting the logic of *Houston*, we find that the agency erred when it determined that the opinions of treating physicians are not entitled to more weight than the opinions of the non-examining physicians serving on the Medical Review Board. Consequently, the circuit court erred when it concluded that this claim lacked merit.

Accordingly, the opinion and order of the Franklin Circuit Court is affirmed in part, with respect to Appellant's claim concerning the decision of the Social Security Administration. Furthermore, the Franklin Circuit Court's opinion and order is vacated in part, with respect to Appellant's cumulative effects and treating physician opinion claims, and those parts of the case are remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Michael S. Endicott
Paintsville, Kentucky

BRIEF FOR APPELLEE:

Brown Sharp II
Frankfort, Kentucky