

RENDERED: DECEMBER 4, 2009; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2006-CA-002037-MR

PATTY JEAN CLAXON

APPELLANT

APPEAL FROM FRANKLIN CIRCUIT COURT  
ON REMAND FROM THE SUPREME COURT OF KENTUCKY  
v. HONORABLE THOMAS D. WINGATE, JUDGE  
ACTION NO. 03-CI-00988

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

APPELLEES

OPINION  
REVERSING AND REMANDING WITH DIRECTIONS

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BEFORE: ACREE AND NICKELL, JUDGES; HARRIS,<sup>1</sup> SENIOR JUDGE.

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<sup>1</sup> Senior Judge William R. Harris sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

HARRIS, SENIOR JUDGE: This case is before us<sup>2</sup> on remand from the Kentucky Supreme Court, which has vacated our unpublished opinion<sup>3</sup> rendered on February 1, 2008, and directed that we reconsider that opinion in light of *Kentucky Retirement Systems v. Bowens*, 281 S.W.3d 776 (Ky. 2009). After reconsidering the record and briefs in light of *Kentucky Retirement Systems v. Bowens*, *supra*, we conclude that it is appropriate for us to reverse and remand this case to Board of Trustees of the Kentucky Retirement Systems with directions to determine whether or not the statements of Drs. Burgess and Shraberg were improperly admitted into evidence at the hearing before Hearing Officer (“HO”) Fauri, and whether the appellant was given her statutory right to inspect and respond to those statements, and thereafter to enter an amended Final Order consistent with those determinations.

The procedural history and factual background of this case was set out in the first five paragraphs of our 2008 opinion, which we quote:

Patti Jean Claxon (“Claxon”) appeals the August 15, 2006, Order of the Franklin Circuit Court. That order denied her motion to alter, amend or vacate the Franklin Circuit Court’s July 18, 2006, Opinion and Order affirming the decision of the Kentucky Retirement System to deny Claxon disability retirement benefits. We reverse and remand.

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<sup>2</sup> The panel which rendered the February 1, 2008, opinion was comprised of Senior Judge Daniel P. Guidugli and Judges Acree and Nickell. Senior Judge Harris has now replaced Senior Judge Guidugli on the panel.

<sup>3</sup> *Claxon v. Kentucky Retirement Systems*, 2006-CA-002037-MR (Ky. App. Feb. 1, 2008). We will refer to this opinion as “our 2008 opinion”.

Claxon was employed as a cook/baker with the Greenup County School System. She became a member of the County Employees Retirement System on March 1, 1988. Her last day of claimed employment was August 18, 2000. She had accumulated 116 months of service credit. On May 11, 2001, Claxon applied for disability retirement benefits, citing pain in her hands, wrist, arms and elbows due to carpal tunnel syndrome; severe neck and back pain due to bulged disks and spurs; and pain in her knees due to osteoarthritis.

Claxon's application was denied on initial consideration and reconsideration by the Medical Review Board physicians of Kentucky Retirement Systems. A hearing was requested and was held on November 5, 2002. During her testimony, Claxon indicated that she suffered from carpal tunnel, a bulging disc in her back, fibromyalgia, osteoarthritis of the knees, migraine headaches and rheumatoid arthritis.

On May 19, 2003, the Hearing Officer ("HO"), Paul Fauri, submitted his Report and Recommended Order. In this report, the HO recommended that Claxon's application for disability retirement benefits should be denied. In support of his recommendation, the HO concluded that Claxon had failed to establish by objective medical evidence the existence of a mental or physical impairment which would prevent her from performing her former job or a similar job from which she received her last paid employment.

On July 10, 2003, Disability Appeals Committee Chairman, Susan Horne, submitted a Final Order adopting the recommendations of the HO as the final order of the Kentucky Retirement Systems. This final order denied Claxon's claim for benefits. On August 11, 2003, Claxon filed a Complaint and Petition for Judicial Review with the Franklin Circuit Court. After Kentucky Retirement Systems filed an answer, each party was ordered to file a brief with the circuit court. On July 18, 2006, the circuit court entered an Opinion and Order denying Claxon's petition for review and affirming the

decision of the Kentucky Retirement Systems. This appeal followed.

*Claxon v. Kentucky Retirement Systems*, slip op. at 2-3.

In the sixth paragraph of our 2008 opinion, we outlined the appellant's arguments on appeal:

Claxon makes the following arguments on appeal: 1) the administrator did not consider the entire record or give any reason for rejecting treating physicians Dr. Bansal and Dr. Kleykamp; 2) the statements of one time examining worker's compensation defense evaluation physicians Dr. Burgess and Dr. Shraberg are not admissible; 3) and Dr. Burgess and Dr. Shraeberg [sic] claim the claimants injuries are not work related but do not establish she is not suffering any pain.

*Id.* at 3.

We determined that the circuit court erroneously concluded that if the HO's admission of statements of Drs. Burgess and Shraberg into evidence without resolving when Claxon was made aware of those statements was error, such constituted harmless error. We similarly determined that if the appellant was not afforded her right under KRS 13B.090(3) to inspect the doctors' statements, it was not harmless error. Although we did not expressly state that we were reversing the circuit court on these grounds, we wrote:

It is the role of the circuit court to make a finding as to whether or not these statements were properly admitted and whether or not Claxon was given her statutory right to inspect and respond to them. This is especially important in the case at hand, when the HO's decision was so greatly influenced by the questionable evidence.

*Id.* at 6.

Our 2008 opinion then addressed the appellant’s argument that the HO had failed to state why he chose the opinions of some doctors, and not others. In our analysis of this argument we effectively adopted the “treating physician” rule, which the Kentucky Supreme Court in *Bowens*, 281 S.W.3d at 783, paraphrased as a rule that “the opinions of treating physicians are entitled to more weight than the opinions of the non-examining physicians[.]” We wrote: “[T]he HO failed to indicate in his findings why he chose to side with the government physicians and not Claxon’s treating physicians. This, taken in conjunction with the possibility that the statements of the government’s physicians were improperly admitted, is sufficient for us to reverse and remand.” *Claxon*, slip op. at 7.

In *Bowens*, the Supreme Court reversed a decision of this Court which had adopted the “treating physician” rule and expressly held that “[t]he introduction of the ‘treating physician’ rule into Kentucky disability analysis is inappropriate[.]” 281 S.W.3d at 784. Because this case has been remanded to us for reconsideration in light of *Bowens*, we must analyze it anew with a recognition that the HO had the right to give the several physicians’ statements such weight and credibility as he deemed appropriate, provided those statements were properly introduced into evidence. Our ability to undertake this analysis is frustrated by the absence of any determination “whether or not the statements [of Drs. Burgess and Shraberg] were properly admitted into evidence and whether or not Claxon was given her statutory right to inspect and respond to them.” *Claxon*, slip op. at 6.

Our conclusion in our 2008 opinion that error by the HO on either of these issues

will not be deemed “harmless” is not affected by the Supreme Court’s rejection of the “treating physician” rule in *Bowens*.

Accordingly, we now reverse the Board’s Final Order and remand this case to the Board with direction to determine whether the statements of Drs. Burgess and Shraberg were properly admitted into evidence by the HO and whether or not Claxon was given her right under KRS 13B.090(3) to inspect and respond to those statements. Thereafter, the Board shall enter an amended Final Order in conformity with those determinations.

ALL CONCUR.

BRIEF FOR APPELLANT:

James P. Benassi  
Henderson, Kentucky

BRIEF FOR APPELLEE:

Brown Sharp, II  
Frankfort, Kentucky