

RENDERED: AUGUST 7, 2020; 10:00 A.M.  
NOT TO BE PUBLISHED

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

NO. 2019-CA-000297-MR

KENTUCKY RETIREMENT SYSTEMS;  
BOARD OF TRUSTEES OF THE  
KENTUCKY RETIREMENT SYSTEMS;  
DISABILITY APPEALS COMMITTEE OF  
THE KENTUCKY RETIREMENT  
SYSTEMS; AND COUNTY EMPLOYEES  
RETIREMENT SYSTEM

APPELLANTS

v.

APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE PHILLIP J. SHEPHERD, JUDGE  
ACTION NO. 12-CI-01309

GLENNA SLONE

APPELLEE

OPINION  
AFFIRMING

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BEFORE: GOODWINE, LAMBERT, AND K. THOMPSON, JUDGES.

LAMBERT, JUDGE: This is an appeal from the Franklin Circuit Court's opinion and order reversing the denial of Glenna Slone's application for disability benefits

sought pursuant to Kentucky Revised Statute (KRS) 61.600. After careful review of the briefs, the record, and applicable statutory and case law, we affirm.

We repeat the facts and procedural history as set forth in the circuit court's November 8, 2017, order (with citations to the record omitted):

Petitioner Glenna Slone was employed by the Magoffin County Board of Education as a Family Resource Center Coordinator. Slone was a member of the County Employees Retirement System (CERS), which is administered by the Kentucky Employees Retirement System [KERS or Agency]. She has a membership date of August 31, 1991, and her employment was terminated on February 28, 1997. However, she was reemployed on July 1, 2000 and her last date of paid employment was June 30, 2006. Slone therefore accumulated 135 months of service credit with CERS.

Slone's job duties included "plann[ing], organiz[ing], implement[ing], and coordinat[ing]" projects, programs, and activities; acting as a liaison with other departments and agencies; evaluating the effectiveness of programming; assisting in the preparation of reports and other documents[;] and assisting with training opportunities. According to the Employer Job Description, Slone worked seven and a half (7.5) hours per day and spent approximately seven (7) hours a day sitting and one half (.5) hour standing/walking. Her employer further noted, "The job mainly required sitting & doing computer/paper work and telephone." The Employer Job Description also noted that Slone was required to lift up to ten (10) pounds occasionally and up to twenty (20) pounds seldomly/randomly, but she was never required to lift over fifty (50) pounds. The items that Slone lifted and/or carried included clothing, supplies, and donations. Assistance for coworkers was available, if needed.

However, in her Employee Job Description, Slone stated that she spent approximately three (3) to four (4) hours a day sitting and three (3) to six (6) hours a day standing. She further stated that her essential job duties included doing “all Clerical, Grant Writing, pick up donations, organize activities, stock [Family Resource Center],” and she often cleaned. Additionally, as stated in the Employee Job Description, Slone was frequently required to lift up to ten (10) and twenty (20) pounds and required to lift up to fifty (50) and 100 pounds seldom/rarely. Though the Board ultimately found this claim to be incredible, the Board acknowledged that “[t]he possibility exists . . . that the boxes/supplies that Claimant was frequently required to lift/carry exceeded ten (10) pounds, and that she may have been required to lift/carry items that exceeded twenty (20) pounds.” Slone noted that she occasionally had a volunteer to assist her, “but this was very seldom.”

On June 13, 2006, approximately[] seventeen (17) days prior to her last day of paid employment, Slone underwent an aortic aneurysm repair and aortic valve replacement. Several years prior to the surgery, at the age of approximately fourteen (14) or fifteen (15), Slone was diagnosed with a bicuspid valve abnormality. There is no indication that this abnormality caused any health problems for Slone prior to her heart surgery, and at least one doctor noted that Slone’s bicuspid valve abnormality did not cause any limitations.

On her last day of paid employment, Slone had not yet fully recovered from her heart surgery. However, Slone eventually received positive postoperative reviews from her doctor, Dr. Keith P. Webb, who noted on September 12, 2006 that Slone “had done well” after the surgery. She received similar reports from her surgeon, Dr. Robert O. Mitchell, who noted in a January 15, 2007 letter that Slone’s progress “has been very satisfactory.” At that time, Slone’s incision had healed well, her x-rays

lacked any indication of cardiomegaly, and Dr. Mitchell requested a one-year follow-up.

However, though Slone recovered well from the aortic valve replacement and aneurysm repair, Dr. Webb found that Slone suffered “numerous, numerous problems” after the surgery. These problems included complications from her use of Coumadin, a blood thinner that Slone was required to take after the surgery to prevent blood clots. As Dr. Webb explained, “[Slone] had to have multiple other surgeries for bleeding problems because once the graft was done she had to be placed on some pretty powerful blood thinning agents that caused numerous complications.” These complications included bleeding through her throat, bleeding into her ovaries and bowels, and “trouble with bleeding from the incision site which ca[us]ed all kinds of incisional problems.” As Dr. Webb explained, “This lady had a lot of problems. That’s just the high points.”

For example, Slone suffered from a hematoma in her mouth on September 9, 2006, which resulted in her admission to Highlands Regional Medical Center. There, it was discovered that she was suffering from high levels of Coumadin, her blood thinner, which created a risk of spontaneous hemorrhage. She was ultimately discharged on September 12, 2006, but Dr. Webb acknowledged that “her problem was pretty extensive,” and it would have taken approximately four (4) to six (6) weeks for her to heal. Additionally, she was seen for abdominal pain on October 4, 2006, and her left ovary was removed later that month due to continuous bleeding. The wound from that surgery took two (2) to three (3) months to heal. In the meantime, on October 26, 2006, an exploratory surgery was performed to address bleeding in Slone’s pelvis. The blood thinner also caused ischemic colitis, which required numerous hospitalizations throughout that year and “one period [in which] she had to have six weeks of daily IV antibiotics.” At least one colitis episode occurred in May of 2007. Additionally, in

December 2007, Slone underwent surgery to repair a ventral hernia that resulted from her ovarian surgery. In April 2008, she also endured a laparoscopic reduction and repair of the upper abdomen incision, which was related to prior surgeries. In addition, Slone also suffered from depression as a result of the heart surgery.

When asked if there was “ever any time frame” between Slone’s last day of paid employment on June 30, 2006 and June 30, 2007 “where she really was able to be up and about for any length of time,” Dr. Webb replied, “With her problems, no, not at all.” When asked what effect Slone’s various conditions had on her ability to work, Dr. Webb opined, “As far as her ability to work, she certainly could not work during that time frame. She spent most of her time in the hospital.” He further explained that Slone “certainly” could not lift anything, could not sit or stand for prolonged periods, and had to shift positions often due to her bleeding issues. As a result, Dr. Webb stated, “I don’t see any feasible way that she could work.” In 2009, Dr. Webb also noted that Slone continued to suffer from dizziness and chronic fatigue, she became short of breath just walking down the hall, and he would still place “significant limitations” on her.

In addition to the heart surgery and the conditions and complications resulting from that surgery, Slone suffered from back problems. For example, on May 23, 2006, an MRI of Slone’s thoracic spine indicated mild degenerative changes, but no spinal stenosis or cord compression. Later, on June 5, 2006, Slone fell “on her butt” when the steps she was descending broke. This occurred at her place of employment. The next day, she was diagnosed with an LS sprain, a contusion of the left buttocks, and a contusion and sprain of the left hip. Her treating physician, Dr. Charles E. Hardin, Jr., recommended “no work” through October 15, 2006. However, on October 23, 2006, Dr. Laura Hazeltine

examined Slone and found that she would be ready to return to work in approximately 30 days.

Slone filed for disability retirement benefits on January 23, 2007. She alleged disability due to “Aortic Aneurysm [sic] Repair, Aortic Valve Replacement, Back injury, problems with Blood Thinner, Ovary removed; hemotomia [sic] mouth, [and] stomach wound open for 3 months,” and depression. At her Administrative Hearing, the parties stipulated that “ischemic colitis” would be added to the conditions supporting her application.<sup>1</sup> On her application, Slone explained that she was unable “to lift, walk, sit for [l]ong periods,” and she had “dizzy spells with nasua [sic] And pain in lower back, leg and hip.”

A Medical Review Board reviewed [Slone’s] application and supporting documents and ultimately denied her request for disability benefits. [KERS] informed Slone of this decision by letter dated May 1, 2007. Slone then requested a formal administrative hearing, which took place on March 22, 2012. The Hearing Officer ultimately issued a decision recommending Slone’s claim for retirement benefits be denied. The Disability Appeals Committee of the Board of Trustees of Kentucky Retirement Systems met on September 17, 2012, and considered the Administrative Record, the Hearing Officer’s Recommended Order, and exceptions filed by Slone and [KERS]. On that same day, the Board issued a Final Order denying Slone’s application for disability retirement benefits under KRS 61.600.

Slone subsequently made a timely appeal to this Court, maintaining that the record contains substantial evidence to show by a preponderance of objective

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<sup>1</sup> The parties also stipulated that, while Slone’s application was initially filed as a claim for duty-related retirement benefits, it would be treated as a claim for regular disability benefits. (Footnote in original.)

medical evidence that she was mentally and/or physically incapacitated on a permanent basis since her last day of employment, so as to prevent her from performing her job or a similar job. Among other things, Slone contends that the Board erred in finding that the conditions related to Coumadin, Slone's blood thinner medication, arose after her last day of paid employment.

The circuit court concluded that the agency's decision was not supported by substantial evidence: There was no question that Slone's surgery occurred prior to her last day of paid employment, that Coumadin was prescribed immediately post-surgery, and that Slone's incapacity was directly related to complications caused by the blood thinner. The circuit court reversed the Board's final order and remanded the matter "for proceedings consistent with [its] Opinion."

On appeal, KERS first argues that the circuit court erred by failing to dismiss the action for lack of prosecution, citing Kentucky Rules of Civil Procedure (CR) 77.02(2)<sup>2</sup> and CR 41.02(1)<sup>3</sup>. Regarding the former Rule, the circuit court entered its notice to Slone on November 26, 2014. Slone responded,

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<sup>2</sup> CR 77.02(2) provides: "At least once each year trial courts shall review all pending actions on their dockets. Notice shall be given to each attorney of record of every case in which no pretrial step has been taken within the last year, that the case will be dismissed in thirty days for want of prosecution except for good cause shown. The court shall enter an order dismissing without prejudice each case in which no answer or an insufficient answer to the notice is made."

<sup>3</sup> CR 41.02(1) provides: "For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against him."

and the circuit court set aside the show cause order on December 23 of that year. Slone, though given ten days to file her brief, did not file it until December 3, 2015. The record is silent between those two dates. On January 4, 2016, KERS filed its motion to dismiss pursuant to CR 41.02. Slone responded, and a hearing was held on January 20, 2016. The record lacks a video recording of that hearing. The circuit court was apparently satisfied that good cause was shown by Slone. The motion to dismiss was denied, and a briefing schedule was entered.

CR 77.02(2) “is a housekeeping rule, **within the wide discretion of the trial court**, intended to expedite the removal of stale cases from the court’s docket.” *Honeycutt v. Norfolk Southern Ry. Co.*, 336 S.W.3d 133, 135 (Ky. App. 2011) (emphasis added) (citing *Hertz Commercial Leasing Corp. v. Joseph*, 641 S.W.2d 753 (Ky. App. 1982)). Likewise, under CR 41.02, “[a]s our case law has long held, these necessarily fact-specific **determinations are left to the sound discretion of the trial court; and reversal of these determinations is warranted only where the trial court has abused its discretion.**” *Jaroszewski v. Flege*, 297 S.W.3d 24, 32 (Ky. 2009) (emphasis added) (citation omitted). Therefore, it is incumbent upon the Agency to demonstrate that the circuit court abused its discretion in not dismissing Slone’s action for failure to prosecute. The Agency has failed to meet that burden. We, thus, affirm on this issue.



We next consider, because we feel they are inextricably intertwined, the Agency's arguments that the circuit court erroneously substituted its judgment for that of the fact-finder and that the circuit court ignored applicable statutory and case law. We first recite our standard of review:

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. *See* [*Bourbon County Bd. Of Adjustment v. Currans*, [873 S.W.2d 836, 838 (Ky. App. 1994)]; *Carnes v. Tremco Mfg. Co.*, Ky., 30 S.W.3d 172, 176 (2000) (workers' compensation case); *Morgan v. Nat'l Resources & Environ. Protection Cabinet*, Ky. App., 6 S.W.3d 833, 837 (1999). "In its role as a finder of fact, an 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." *Aubrey v. Office of Attorney General*, Ky. App., 994 S.W.2d 516, 519 (1998) (citing *Kentucky State Racing Commission v. Fuller*, Ky., 481 S.W.2d 298, 309 (1972)). Causation generally is a question of fact. *Coleman v. Emily Enterprises, Inc.*, Ky., 58 S.W.3d 459, 462 (2001). 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. *See Johnson v. Galen Health Care, Inc.*, Ky. App., 39 S.W.3d 828, 832 (2001).

*McManus v. Kentucky Retirement Systems*, 124 S.W.3d 454, 458-59 (Ky. App. 2003).

Thus, under the *McManus* standard, a court cannot substitute its judgment on those contested issues of fact but if the appealing party has not met his burden of proof with the fact-finder, the court can properly, indeed must,

consider whether that party's proof was so compelling that no reasonable person could have failed to be persuaded. If this high standard is met, so is KRS 13B.150(2)(d) which allows for reversal when a final order is "[a]rbitrary, capricious, or characterized by an abuse of discretion."

Simply put, the second part of the *McManus* standard allows for court intervention, reversal, where the evidence favoring the party with the burden of proof is so compelling that the agency's decision is properly seen as arbitrary or capricious or reflecting an abuse of discretion. Stated differently, the *McManus* standard captures how courts properly assess arbitrariness, capriciousness or abuse of discretion by the agency fact-finder in cases where the party with the burden of proof has lost.

*Kentucky Retirement Systems v. Ashcraft*, 559 S.W.3d 812, 820 (Ky. 2018)

(footnote omitted).

Furthermore, KRS 61.600(3)(a) requires: "The person, since h[er] last day of paid employment, has been mentally or physically incapacitated to perform the job, or jobs of like duties, from which [s]he received h[er] last paid employment." KRS 61.510(32) defines last day of paid employment:

"Last day of paid employment" means the last date employer and employee contributions are required to be reported in accordance with KRS 16.543, 61.543, or 78.615 to the retirement office in order for the employee to receive current service credit for the month. Last day of paid employment does not mean a date the employee receives payment for accrued leave, whether by lump sum or otherwise, if that date occurs twenty-four (24) or more months after previous contributions[.]

A review of the record confirms that the evidence compelled a finding that Slone's post-operative condition was disabling. Her prescription for Coumadin (one which pre-operatively she had expressed a desire to avoid) was administered immediately after her open chest surgery. Her physician stated that, for the entire year following, Slone was "always in the hospital, recovering, homebound, or in any event never able to significantly get around." The crux of this case hinged on whether Slone's disability occurred prior to her last day of paid employment. The circuit court found that Slone's disability was directly linked to the surgery, which occurred prior to her last day of paid employment. It stated:

[T]he evidence is uncontested that Slone's surgery, which occurred prior to her last day of paid employment, made it necessary for her to take Coumadin, an anticoagulant, which in turn caused numerous other health issues, including dizziness, risk of bleeding, a hematoma, bleeding of an ovary and removal of that ovary, an open stomach wound, and ischemic colitis. These conditions and the cumulative effects of these conditions physically incapacitated Slone until at least June 30, 2007. Thus, Slone was entitled to disability retirement benefits for the period during which she was—or continues to be—disabled.

This holding is in harmony with the applicable statutes and case law, and we decline to find fault with it. We do not agree with the Agency that bootstrapping occurred to link Slone's complications backward to the date of surgery, but rather we concur with the circuit court's determination that, but for the surgery and the complications which arose as a direct result of concomitant

anticoagulant prescriptions, Slone would not have been disabled. We further agree that these circumstances distinguish Slone's case from those found in the unpublished decision of *Robinson v. Kentucky Retirement Systems*, No. 2014-CA-000152-MR, 2015 WL 1433497 (Ky. App. Mar. 27, 2015), cited by the Agency pursuant to CR 76.28(4)(c).

Accordingly, we affirm the opinion and order of the Franklin Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

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