

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

NO. 2008-CA-001839-MR

KENTUCKY RETIREMENT SYSTEMS

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE PHILLIP J. SHEPHERD, JUDGE  
ACTION NO. 06-CI-01022

WILLIAM TURNER

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CAPERTON, CLAYTON, AND DIXON, JUDGES.

DIXON, JUDGE: Kentucky Retirement Systems (“KERS”) appeals a decision of the Franklin Circuit Court reversing KERS’s Board of Trustees’ (“the Board”) final order denying William Turner’s application for disability retirement benefits. We affirm.

Turner, who was employed as a sanitation truck driver for the city of Jackson, Kentucky, applied for disability retirement benefits in November 2004, when he was 55 years old. In his application, Turner stated he suffered a heart attack in 1998, chest discomfort from a car accident in 2001, sleep apnea, and chronic fatigue. Turner testified that his ailments left him too tired during the day to drive the sanitation truck safely.

On April 27, 2005, KERS notified Turner that his application had been denied based on the unanimous opinions of KERS's medical review physicians.<sup>1</sup> A short time later, Turner requested a second review and submitted additional medical records to support his claim. On July 18, 2005, KERS again notified Turner that his application had been denied. Thereafter, Turner retained counsel and requested a formal administrative hearing.

An evidentiary hearing was held November 29, 2005. Turner testified that, after his heart attack in 1998, he began feeling tired all of the time. He explained that driving the sanitation truck was dangerous, and he was so fatigued during the day he did not feel alert while on the job. Turner testified that he was diagnosed with sleep apnea in 2000, and had been prescribed a C-PAP machine and oxygen. Turner acknowledged, however, he only used the C-PAP one or two times per week because it was uncomfortable. Turner stated his injuries from a

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<sup>1</sup> Pursuant to Kentucky Revised Statutes (KRS) 61.665(2)(d), three licensed physicians evaluate a claimant's medical records and recommend whether to approve or deny disability benefits.

2001 car accident had healed, and he had no on-going complaints. Turner also testified that he was approved for social security disability in May 2005.<sup>2</sup>

The medical evidence submitted by Turner included: 1) A September 2002 radiology report finding degenerative disk disease in the lumbar spine and degenerative changes in the right hip. 2) The office notes of Dr. Melecio Abordo, Turner's primary care physician, dated 2002-2004, documenting that Turner was hypertensive and complained of chronic fatigue. Dr. Abordo also submitted a letter prior to the administrative hearing stating Turner had been diagnosed with hypertension, obstructive sleep apnea, coronary artery disease, and chronic fatigue. 3) The treatment notes from Dr. Barbara Phillips documenting three sleep studies and a diagnosis of obstructive sleep apnea. 4) The office notes of Dr. David Keedy, Turner's cardiologist, reported a cardiac catheterization in January 2000. A June 2001 stress test revealed a hypertensive response to exercise with no diagnostic evidence of exercise induced myocardial ischemia or myocardial scarring. An EKG revealed left atrial and left ventricular enlargement with concentric left ventricular hypertrophy, normal left ventricular systolic function, and diastolic dysfunction with a trace of tricuspid and mitral valve regurgitation. An evaluation in July 2001, revealed no evidence of reversible ischemia with a good stress test and known coronary insufficiency.

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<sup>2</sup> Pursuant to 105 Kentucky Administrative Regulations (KAR) 1:210 Section 8(1), a hearing officer may allow a claimant to introduce evidence of a Social Security Administration disability award. However, "[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 KAR 1:210 Section 8(2).

On April 10, 2006, the hearing officer rendered a report and recommended order denying Turner's application for disability benefits. The hearing officer concluded that the objective medical evidence did not support Turner's claim for disability retirement. On June 26, 2006, the Board adopted the recommended order and denied benefits. Turner then appealed the Board's decision to Franklin Circuit Court. On August 29, 2008, the circuit court reversed the Board, concluding that the medical evidence compelled a finding in favor of Turner. This appeal followed.

"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." *McManus v. Ky. Ret. Sys.*, 124 S.W.3d 454, 458 (Ky. App. 2003), quoting *Aubrey v. Office of Attorney Gen.*, 994 S.W.2d 516, 519 (Ky. App. 1998). In light of the deference owed the fact-finder, "[t]he position of the Circuit Court in administrative matters is one of review, not of reinterpretation." *Kentucky Unemployment Ins. Com'n v. King*, 657 S.W.2d 250, 251 (Ky. App. 1983). As Turner was unsuccessful before the Board, he is entitled to prevail on appeal only if the evidence in his favor is "so compelling that no reasonable person could have failed to be persuaded by it." *McManus*, 124 S.W.3d at 458.

KERS contends the circuit court impermissibly reweighed the evidence and substituted its judgment for that of the fact-finder. Turner, on the other hand, argues the court extensively reviewed the record and properly

concluded that the evidence in his favor was so compelling it required reversal of the Board's decision. After consideration of the parties' arguments and the record before us, we agree with Turner that the evidence compels a decision in his favor.

Kentucky Revised Statutes (KRS) 61.600 sets forth the criteria for disability retirement. The statute requires a determination, based on objective medical evidence, as to whether "[t]he person, since his last day of paid employment, has been permanently mentally or physically incapacitated to perform the job, or jobs of like duties, from which he received his last paid employment." KRS 61.600(3)(a)-(c). An incapacity is permanent if it is expected to continue for at least one year following the claimant's last day of employment. KRS 61.600(5)(a)(1). A determination of permanency must be based on the medical evidence and the claimant's "capacity for work activity on a regular and continuing basis." KRS 61.600(5)(a)(2) and KRS 61.600(5)(b).

In the order denying benefits, the hearing officer concluded:

The preponderance of the objective medical evidence contained of record indicates that [Turner's] conditions would not prevent him from performing his usual work activity. [Turner] was performing sedentary to light work activity, with the occasional requirement of heavy lifting, which more than likely could have been accommodated had he made such a request. [Turner] complains of ongoing and worsening chronic fatigue and although he must be able to stay alert to safely operate a large sanitation truck, the medical records contained in the record do not demonstrate continued heart problems or problems associated with the alleged automobile accident to an extent that must be considered disabling from a sedentary to light work job with accommodations. The record does demonstrate that [Turner] suffers from

obstructive sleep apnea. However, it is also clear that he is non-compliant with his treatment and that he fails to use his C-PAP machine as directed. Although, it is understood that [Turner] has problems associated with the use of the C-PAP machine, it is impossible to determine whether any disability resulting from his obstructive sleep apnea is permanent because unless he is treatment compliant, there is no way to determine with any accuracy if the treatment is or would be helpful.

We believe the hearing officer overlooked the incapacitating aspect of Turner's disability and his actual job duties. Turner testified that he was responsible for driving the truck on a designated route, and he had to ensure the safety of his coworkers who rode on the back of the sanitation truck. Turner explained that, following his heart attack in 1998, his fatigue gradually increased. When Turner applied for disability retirement benefits, he felt his chronic fatigue rendered him unable to safely perform his job because he could not stay alert to drive, maneuver in traffic, and ensure the safety of his coworkers.

KERS opines that Turner's claim is supported only by his subjective complaints. We disagree. The medical evidence clearly shows that Dr. Abordo diagnosed Turner with chronic fatigue, and Dr. Phillips diagnosed "severe" obstructive sleep apnea. Further, the records of Dr. Keedy reflect Turner's treatment for his cardiac symptoms, including increased shortness of breath. These diagnoses, coupled with Turner's explanation of the effect his condition had on his ability to perform his job, compel a finding that he is permanently incapacitated from his former employment as a sanitation truck driver.

Furthermore, it appears the hearing officer penalized Turner for failing to ask his employer for accommodations. Pursuant to KRS 61.600(3)(a), “[i]n determining whether the person may return to a job of like duties, any reasonable accommodation by the employer as provided in 42 U.S.C. sec. 12111(9) and 29 C.F.R. Part 1630 shall be considered[.]” A “reasonable accommodation” is defined as, “[m]odifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position[.]” 29 C.F.R. § 1630.2(o)(ii). In the case at bar, the hearing officer focused on occasional lifting required by Turner’s position if he assisted coworkers in dumping garbage. However, we believe it is irrelevant that Turner did not ask for accommodations, as his disability is not related to lifting. Indeed, it is unclear how Turner’s disability of chronic fatigue and shortness of breath could have been accommodated, as his principal job duty required him to safely drive the sanitation truck and ensure the safety of his coworkers. Accordingly, we believe the hearing officer’s conclusion regarding accommodations was arbitrary.

Finally, we disagree with the hearing officer’s conclusion regarding permanency. The hearing officer inferred that Turner’s condition could not be deemed permanent because he failed to use his C-PAP machine daily. While the testimony showed that Turner used his C-PAP machine as tolerated, approximately two times per week, the medical evidence documented Turner’s consistent

complaints of fatigue and shortness of breath over the course of a few years. After thorough review, we are simply not persuaded by the hearing officer's rationale, and we conclude that the evidence compels a finding that Turner's incapacity is permanent pursuant to KRS 61.600(5).

For the reasons stated herein, we affirm the decision of the Franklin Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Leigh A. Jordan  
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BRIEF FOR APPELLEE:

James Dean Liebman  
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