

RENDERED: JANUARY 14, 2011; 10:00 A.M.  
NOT TO BE PUBLISHED

**OPINION OF JULY 9, 2010, WITHDRAWN**

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2009-CA-000905-MR

KATHY HOSKINS

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE HON. THOMAS D. WINGATE, JUDGE  
ACTION NO. 07-CI-01420

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

APPELLEES

OPINION  
AFFIRMING

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BEFORE: MOORE AND THOMPSON, JUDGES; WHITE,<sup>1</sup> SENIOR JUDGE.

WHITE, SENIOR JUDGE: Kathy Hoskins, a former dispatcher for the Kentucky State Police (KSP), appeals from a Franklin Circuit Court order affirming the decision of the board of trustees (Board) of the Kentucky Retirement Systems to

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<sup>1</sup> Senior Judge White 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.

deny her disability retirement benefits. This case comes before this Court for reconsideration based upon Hoskins' petition for rehearing.

In our previous review, we affirmed the circuit court order based upon Hoskins' failure to comply with the statutorily imposed filing deadline. The hearing officer's findings of fact stated that Hoskins' claim for benefits was filed on March 5, 2004. The statute of limitation ended on February 28, 2004. However, Hoskins actually filed her motion within the prescribed statutory period. The hearing officer's finding of fact was erroneous. Hoskins failed to file a motion to correct the mistake and failed to indicate the mistake in her brief. Hoskins also failed to ensure that the properly date-stamped documents were included in the appellate record.

During our review of record, we discovered the date in the hearing officer's findings of fact and had no reason to believe that the claim was not filed outside of the 24-month period. The appellant bears the burden of assuring all relevant documents were provided to the appellate court. *Fanelli v. Commonwealth*, 423 S.W.2d 255, 257-58 (Ky. 1968). Although we did not address the grounds relied upon by the circuit court, appellate courts may affirm on separate grounds not relied upon by the trial court. *O'Neal v. O'Neal*, 122 S.W.3d

588, 589 (Ky. App. 2002). Therefore, we affirmed the circuit court's order.

Hoskins timely

petitioned our Court for rehearing. The motion was granted.

### I. Factual Background

In 1987, Hoskins began her employment with the KSP as a dispatcher. She was eventually promoted to the position of office supervisor. Her duties included sedentary duties, such as: clerical tasks, ordering supplies, inventory, and supervising secretarial staff. Her last day of employment with KSP was on February 28, 2002. Hoskins amassed a total of 182 months of membership in the Kentucky Employees Retirement System (KERS).

During her employment, Hoskins missed significant periods of work due to injuries that she sustained in a 1989 car accident. Although Hoskins returned to work after the accident, she took periodic leaves of absence due to her injuries and surgeries.<sup>2</sup>

On December 6, 2001, Hoskins filed an application for disability retirement with KERS. In the application Hoskins claimed that she suffered from arthritis in her hands, feet, and arms, tendinitis in her left arm, vision problems, lost sense of smell, an anxiety disorder, high blood pressure, chronic sinusitis, chronic fatigue, obsessive compulsive disorder, and severe depression. She further claimed that her job made her mental illness worse.

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<sup>2</sup> Hoskins underwent a total of fifty surgeries related to the injuries that she sustained in the 1989 car accident.

Hoskins' first application for disability retirement benefits was denied. Although the hearing officer found that Hoskins had greatly suffered as a result of the injuries that she received in the automobile accident, the officer found that Hoskins was able to perform the duties of her position, both physically and mentally. This denial was upheld by the Board and the Franklin Circuit Court. Hoskins' first application is not at issue in this appeal.

Hoskins filed a timely, second application for disability retirement benefits, in which she claimed that she suffered from arthritis, tendonitis, fibromyalgia, chronic depression, an anxiety disorder, loss of vision, hiatal hernia, acid reflux, irritable bowel syndrome, allergies, severe sinusitis, and hypertension.

Once again, the hearing officer recommended the denial of Hoskins' application in an order entered on May 25, 2007. The officer found that:

[t]he objective medical evidence does not establish by a preponderance of the evidence that Hoskins is totally and permanently incapacitated from her former job duties by reason of any physical or mental health condition, nor that she is likely to remain so for a period of not less than 12 months from her last date of employment.

The Board accepted the hearing officer's recommendation on August 6, 2007. On May 5, 2009, the Franklin Circuit Court affirmed the Board's decision. This appeal follows.

## II. Analysis

On appeal Hoskins claims that the Board erred in the following ways:

(1) the Board's conclusion was not based upon sufficient evidence; (2) the Board erroneously required Hoskins to show a change in condition from the time of the first application to the second; (3) the hearing officer erroneously relied upon medical records; (4) the Board erred by refusing to grant preference to the testimony of Hoskins' treating physician; and (5) the hearing officer failed to make sufficient findings of fact. After a very careful review of the record and applicable case law, we affirm.

#### A. Standard of Review

Hoskins suggests that the proper standard of review in this case is whether substantial evidence supported the Board's conclusion. This contention is erroneous.

When the decision of the fact-finder is in favor of the party with the burden of proof or persuasion, the issue on appeal is whether the agency's decision is supported by substantial evidence, which is defined as evidence of substance and consequence when taken alone or in light of all the evidence that is sufficient to induce conviction in the minds of reasonable people. 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. 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. Causation generally is a question of fact. 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.

*McManus v. Kentucky Retirement Systems*, 124 S.W.3d 454, 458 (Ky. App. 2004).

(citations omitted).

Therefore, our review of the Board's decision denying Hoskins disability benefits must question whether Hoskins presented evidence that was "so compelling that no reasonable person could have failed to be persuaded by it." *Id.*

#### B. Sufficiency of the Evidence

Hoskins claims that the Board's decision was not based upon sufficient evidence. Instead, she argues that the medical records and testimony presented conclusively show that she is permanently and wholly disabled.

Employees may qualify to retire on disability if they meet the requirements of KRS 61.600. In addition to time and service requirements, KRS 61.600 (3) provides:

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 U.S.C. sec 1211(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 or reemployment, whichever is most recent. For purposes of this subsection, reemployment shall not mean a change of employment between employers participating in the retirement systems administered by the Kentucky Retirement Systems with no loss of service credit.

Although medical evidence existed to support Hoskins' claims of permanent physical disability, each KERS physician that reviewed her file recommended denial. To support their denial, the KERS physicians noted the light physical nature of the position. Further, the medical records indicated only some limitations in range of motion, mild tenderness, and mild to moderate osteoarthritic changes. The evidence also indicated that physical complaints, such as hypertension, irritable bowel syndrome, and her hiatal hernia, were adequately controlled by medication and dietary changes.

The presence of conflicting evidence alone is not enough to reverse the Board's decision. As previously stated, we must only question whether that evidence was so compelling that a reasonable person could not arrive at the same conclusion. *McManus*, 124 S.W.3d at 458. Our review of the record does not indicate that such compelling evidence existed here. Therefore, we find no error in the Board's decision.<sup>3</sup>

<sup>3</sup> Hoskins presented a vast amount of evidence concerning her mental health condition. However, the evidence indicated that Hoskins' condition remained unchanged since her last

### C. Required Change of Condition

Hoskins claims that the hearing officer erred by requiring her to demonstrate a change in condition between her first application for benefits and her second application for benefits. KRS 61.600 allows applicants to refile for disability benefits. In order to do so, however, the applicant must only show that new evidence was presented which would justify the award of benefits. KRS 61.600 (2).

Although a change in condition is not required, the applicant cannot relitigate the same facts and issues under the doctrine of *res judicata*. *E.F. Prichard Co. v. Heidelberg Brewing Co.*, 314 Ky. 100, 234 S.W.2d 486 (Ky. 1950). “The doctrine of *res judicata* prevents the relitigation of the same issues in a subsequent appeal and includes every matter belonging to the subject of the litigation which could have been, as well as those which were, introduced in support of the contention of the parties on the first appeal. *Id.* at 487-88. The Board properly refused to consider evidence and arguments which were presented in the first application. We find no error in this decision.

### C. Medical Records

Hoskins claims that the hearing officer erred by relying upon medical records. She claims that medical records are generally not relied upon because they are based upon hearsay and not taken under oath. Further, Hoskins claims

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application for benefits. The Board concluded that this claim was barred by *res judicata*. We agree. Our analysis is discussed further in subsection C of this opinion.



that the hearing officer is a lay person incapable of interpreting the medical records. We disagree with these arguments.

Medical records are often relied upon by hearing officers in administrative proceedings. KRS 13B.090 (2) specifically permits “the submission of evidence in written form if doing so will expedite the hearing without substantial prejudice to any party. KRS 13B.090 (1) states that hearsay evidence is admissible if it is the type of evidence that reasonable and prudent persons would rely on in their daily affairs.” *McManus*, 124 S.W.3d at 459.

While the records appear to contain test results and x-rays, they also contain notes written during the course of treatment from physicians. Hoskins failed to articulate why the evidence in this case required a degree or specialized knowledge. Nothing indicates that the hearing officer interpreted evidence that a reasonable person could not understand and rely upon. Further, the medical records fall under the exception to the hearsay rule found in KRS 803(6), which provides in part:

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term “business” as used in this paragraph includes business,

institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

While Hoskins alleges that substantial prejudice occurred from the records' admission, she simply claims that she was prejudiced by an inability to cross-examine the information. However, Hoskins failed to explain the prejudice. She did not claim that the records were unreliable or based upon incorrect information. Therefore, we do not find error in the hearing officer's reliance upon medical records.

#### E. Treating Physician Rule

Hoskins also claims that the Board erred by refusing to give deference to her treating physician's testimony. Hoskins cites several out-of-state cases to support her argument. However, the Kentucky Supreme Court definitively rejected this proposition in *Kentucky Retirement Systems v. Bowens*, 281 S.W.3d 776 (Ky. 2009). The Court stated, "There is no . . . Kentucky statute authorizing greater weight to be given to the opinions of the treating physician." *Id.* at 784 (citations omitted).

Giving preference to the testimony of treating physicians is not in line with the agency's role as fact-finder. "[A]n 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 Gen.*, 994 S.W.2d 516, 519 (Ky. App. 1998). Our role "is to review the administrative decision, not to reinterpret or reconsider the merits of the claim." *Lindall v.*

*Kentucky Ret. Sys.*, 112 S.W.3d 391, 394 (Ky. App. 2003). Certainly the agency may choose to assign greater weight to the testimony of a treating physician based upon the physician's familiarity with the patient's history. The agency, however, is under no obligation to do so.

#### F. More Specific Findings of Fact

Finally, Hoskins claims that the Board failed to make specific findings of fact concerning fact #6, which provides:

The objective medical evidence does not establish by a preponderance of the evidence that Claimant is totally and permanently incapacitated from her former job duties by reason of any physical or mental health condition, nor that she is likely to remain so for a period of not less than 12 months from her last date of paid employment.

The Board's reasoning and factual basis for this finding is apparent after a simple review of the entire opinion. The above quote labeled as finding of fact #6 is simply a summary of points detailed in the body of the opinion.

Accordingly, we affirm the Franklin Circuit Court order.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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