

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

NO. 2009-CA-001241-MR

BOARD OF TRUSTEES OF KENTUCKY  
RETIREMENT SYSTEMS

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE PHILLIP J. SHEPHERD, JUDGE  
ACTION NO. 07-CI-00985

WILLIAM R. JOSEPH

APPELLEE

OPINION  
REVERSING

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BEFORE: CAPERTON AND MOORE, JUDGES; BUCKINGHAM,<sup>1</sup> SENIOR  
JUDGE.

CAPERTON, JUDGE: The Appellant, Kentucky Retirement Systems (“KRS”),  
appeals the Franklin Circuit Court’s reversal of a KRS Hearing Officer’s decision

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

denying disability benefits to the Appellee, William R. Joseph, a former inspector with the Cabinet for Natural Resources and Environmental Protection. On appeal, KRS argues that the circuit court's decision was not supported by substantial evidence. After a thorough review of the record, the arguments of the parties, and the applicable law, we reverse.

Joseph accepted employment with the Mine Reclamation and Enforcement division of the Department of Natural Resources and Environmental Protection in 1985 and continued working there until his last date of paid employment on April 14, 2006.<sup>2</sup> Throughout his career, Joseph's duties included visits to mine reclamation sites in Eastern Kentucky to ensure compliance with the Environmental Reclamation Statutes and Regulations. KRS asserts that Joseph's job duties fell into the classification of light work, while Joseph argues that testimony at the hearing established that his duties were strenuous and included walking up and down treacherous, uneven, and rocky hillsides,<sup>3</sup> as well as driving a truck over rough back country roads approximately one thousand miles per month.<sup>4</sup> KRS states that Joseph worked in a seated position approximately four

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<sup>2</sup> The last day Joseph performed actual work duties was January 13, 2006.

<sup>3</sup> In support of this assertion, Joseph directs this Court's attention to the testimony of Jeff O'Dell, an internal policy analyst with the department, who stated that the position held by Joseph could be treacherous. He also cites the testimony of co-worker Omar Reed, who stated that the terrain they were forced to work on was steep, non-level ground which was often loose and rocky, and that the conditions would be difficult even for a person with a healthy back. Finally, Joseph states that his supervisor, Gary Perkins, also testified in confirmation of the treacherous working conditions.

<sup>4</sup> KRS acknowledges that Joseph's job duties consisted of conducting mine inspections which sometimes involved driving long distances, walking uneven terrain, and working in mild to adverse weather conditions.

and one-half hours per day and stood approximately three hours per day. Joseph had to lift items weighing up to 10 pounds frequently and up to 20 pounds occasionally.

In 1993, Joseph began experiencing back problems, for which he received medical treatment, resulting in a spinal fusion performed in 2001. This apparently reduced Joseph's pain for approximately two years, after which time the pain worsened and became more consistent. According to the record, Joseph stepped into a hole while working in July of 2002, and further aggravated his back. As the pain in his back increased, Joseph began experiencing feelings of numbness in his legs and feet, which caused him difficulty in walking to and around the mine sites, as well as when driving over the back roads leading to and from the work areas. On October 15, 2005, Joseph filed an application for disability benefits, alleging permanent disability under KRS 61.600 due to back problems which had begun in 1993, and had worsened to the extent that he was unable to perform his job duties as a mine inspector.

Joseph's last day of work was January 13, 2006, at which time he was informed by the Cabinet that his request for reasonable accommodations for his position as an Environmental Inspector III could not be met. Apparently, on February 21, 2006, Joseph's counsel also contacted the Cabinet and requested assistance in reassigning Joseph to the position of bond release officer in the same department, in order that he would be able to continue working until he could reach regular retirement age.

On March 7, 2006, counsel for the Cabinet responded that the agency would be unable to grant Joseph's request because the medical opinions, including those of his treating family practitioner, Dr. James Frederick, were clear that he could not perform any core functions of the classification of Environmental Inspector III or the duties of a bond release officer. As of the last date of his paid employment on April 14, 2006, Joseph had 248 months of retirement membership. Joseph stated that if he had been able to finish his term of service, he would have continued working until he could retire with full benefits.

The KRS medical review board initially denied Joseph's request for benefits, and he filed a second request. The second request was denied by two of the reviewing physicians, while the third, Dr. William Keller, found that Joseph had met his burden to substantiate his disability and recommended benefits. In so doing, Dr. Keller stated that he had reviewed letters from Dr. James Frederick, Dr. James Bean, and Dr. Angela Clifford, and concluded that there was a strong consensus of opinion that Joseph was legitimately disabled and that he would be unlikely to be able to resume his job in the near future.

As noted, the three primary physicians relied upon by Joseph in seeking disability benefits were Drs. Bean, Frederick, and Clifford. Dr. Bean was a neurosurgeon who treated Joseph conservatively for several years prior to performing the lumbar fusion in 2001, and who continues to treat him presently. On March 17, 2006, Dr. Bean issued a letter stating that in the absence of a new correctable finding, he believed Joseph to be disabled from work as a result of

progressive back pain syndrome uncorrected by the prior fusion. Dr. Frederick has been Joseph's treating physician since 2003. He stated that Joseph's condition has been unchanged and that while the pain is subjective, he believes Joseph to be honest. He did not believe that Joseph could continue performing his duties as a mine inspector. Finally, Dr. Clifford treated Joseph for hernia problems and performed a hernia repair on September 30, 2005. Joseph had already previously undergone one hernia repair. Dr. Clifford opined that Joseph's work would increase the pain caused by his hernia condition and would put him at risk for another occurrence.

A formal hearing was held on September 19, 2006, before a KRS Hearing Officer. On December 28, 2006, the Hearing Officer issued an initial recommended order denying Joseph's request for benefits. Due to factual errors initially in the order, it was remanded to the Disability Appeals Committee for further consideration, after which time the Hearing Officer reweighed the evidence and again recommended denial of benefits.

In that order, the Hearing Officer stated:

In order to receive disability retirement benefits, Claimant must show by objective medical evidence that he suffers from a total and permanent incapacity to perform his work duties. Claimant's surgery in 2001 seems to have, according to the objective tests, including diagnostic tests and physical exams, corrected his spinal problems, with the resulting complaints being subjective complaints of pain. None of the treating physicians have presented objective evidence of a condition which prevents him from performing his job duties.

The Hearing Officer also found that Joseph's job was properly classified as light in nature, that reasonable accommodations were requested, and that the objective medical evidence did not establish by a preponderance of the evidence that Joseph was totally and permanently incapacitated by any physical or mental health condition from his job duties, nor that he was likely to remain so for a period of not less than twelve months from his last date of paid employment. Accordingly, the Hearing Officer found that Joseph was not entitled to disability retirement benefits pursuant to KRS 61.600.

That recommendation was subsequently affirmed by a final Order of the Board of Trustees of the Kentucky Requirement Systems on May 23, 2007. Joseph appealed to the Franklin Circuit Court, and on June 5, 2009, the circuit court issued an opinion and order reversing the order of the Board. In so doing, the Circuit Court found that the proof was overwhelming that Joseph's condition later deteriorated to the point that he could not perform his work duties. Further, the court found that the records relied upon by KRS were so far removed from the relevant timeframe as to be of no probative value in determining disability as of Joseph's last date of paid employment. The court found that there was no doubt, based on a preponderance of the evidence, considering the strenuous demands of Joseph's job, and his physical condition, that he was permanently incapacitated as of his last date of paid employment. The court further stated that this evidence made clear that Joseph would no longer be able to perform his duties and that his condition could not be improved by treatment.

In addition, the court noted that the hearing officer incorrectly cited a March 17, 2006, MRI/CT report as showing “no new findings”, when it actually stated that there were “no new correctable findings,”<sup>5</sup> and found that this was a material mischaracterization of the report. Finally, the court found that the medical reviewers who recommended denial of benefits made obvious factual errors in arriving at their determination,<sup>6</sup> and accordingly, found that the review reports were unreliable and not of probative value. Thus, the circuit court reversed, finding that the final order of KRS was not supported by substantial evidence and that the record compelled a finding of disability. It is from that decision that KRS now appeals to this Court.

On appeal, KRS makes four arguments. First, it asserts that the circuit court improperly failed to consider the entire administrative record, in violation of KRS 13B.150(c). Secondly, it argues that the circuit court improperly substituted its judgment for that of KRS when it found that the decision issued by KRS was not supported by substantial evidence. Third, KRS argues that the circuit court’s determination that the order of the agency misrepresented evidence was not

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<sup>5</sup> See A.R. at 389.

<sup>6</sup> Specifically, the court noted that Dr. McElwain summarized Joseph’s medical records as showing “a long history of back pain,” and noted that “in the absence of any documentation of change in the claimant’s condition over the past several years, it is recommended that the application be rejected for disability retirement benefits.” A.R. at 282. The court, however, was of the belief that the record was replete with unchallenged findings of deterioration in Joseph’s condition, which were noted both by the hearing officer and by KRS in its brief. Additionally, the court noted that the findings of Dr. Quarles, while more lengthy, were also factually erroneous. The court found Dr. Quarles’s statement that there was no “new convincing objective evidence” to support a finding of disability to be erroneous, in light of the fact that he failed to consider the physicians’ reports, which uniformly indicated disability, as objective medical evidence. The court found that this was in violation of KRS 61.50 and 105 KAR 1:210 §6(6).

supported by the record itself. Finally, KRS asserts that the circuit court improperly gave more weight to evidence from Joseph's treating physicians. In essence, KRS argues that a proper review of the evidence of record compels a conclusion that there is substantial evidence in the administrative record to support the decision of KRS to deny Joseph's application for benefits.

In response, Joseph asserts that the circuit court properly considered the entire administrative record and appropriately reversed the Board's affirmation of the hearing officer. Joseph argues that the circuit court was correct in its determination that the findings and opinion of the hearing officer were not supported by substantial evidence. Joseph asserts that the court was also correct in its determination that the hearing officer mischaracterized the reports of the treating physicians and that the evidence relied upon by the hearing officer was irrelevant because it was not related to the point in time at which Joseph could no longer work. Joseph agrees with the circuit court's interpretation of the medical evidence at issue, as well as of the nature of his job, and argues that the hearing officer should have used the "residual functional capacity" standard of KRS 61.600(5)(B) for work activity on a regular and continuing basis, but did not. Joseph also argues that the hearing officer, in assessing the evidence, ignored the statutory definition of objective medical evidence set forth in KRS 61.510(33), and that this is further reason for affirmation of the circuit court.

At the outset, we note that in reviewing an agency decision, the court may only overturn that decision if the agency acted arbitrarily or outside the scope



of its authority, if the agency applied an incorrect rule of law, or if the decision itself was not supported by substantial evidence. *Kentucky State Racing Comm'n v. Fuller*, 481 S.W.2d 298, 300-301 (Ky. 1972). Thus, if the record includes substantial evidence to support the agency's findings, the court must defer to that finding even though there is evidence to the contrary. *See Kentucky Comm'n on Human Rights v. Fraser*, 625 S.W.2d 852, 856 (Ky. 1981). If the court finds the correct rule of law was applied to the facts supported by substantial evidence, the final order of the agency must be affirmed. *Brown Hotel Company v. Edwards*, 365 S.W.2d 299, 302 (Ky. 1963).

In so stating, we note that, at the administrative hearing level, Joseph was assigned the burden of proof pursuant to KRS 13B.090(7). The test of substantial evidence where the party with the burden of proof has been denied relief is whether the evidence in that party's favor is so compelling that no reasonable person could have failed to be persuaded by it. *McManus v. Kentucky Retirement Systems*, 124 S.W.3d 454, 458-59 (Ky.App. 2004). Ultimately, the function of this Court in administrative matters is one of review and not of reinterpretation. *Kentucky Unemployment Ins. Comm'n v. King*, 657 S.W.2d 250, 251 (Ky.App. 1983). With this in mind, we turn now to the arguments of the parties.

As noted, KRS argues first that the circuit court failed to consider the entire administrative record in violation of KRS 13B.150(c). That provision provides as follows:

(1) Review of a final order shall be conducted by the court without a jury and shall be confined to the record, unless there is fraud or misconduct involving a party engaged in administration of this chapter. The court, upon request, may hear oral argument and receive written briefs.

(2) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the final order or it 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;

(b) In excess of the statutory authority of the agency;

(c) *Without support of substantial evidence on the whole record;*

(d) Arbitrary, capricious, or characterized by abuse of discretion;

(e) Based on an ex parte communication which substantially prejudiced the rights of any party and likely affected the outcome of the hearing;

(f) Prejudiced by a failure of the person conducting a proceeding to be disqualified pursuant to KRS 13B.040(2); or

(g) Deficient as otherwise provided by law.

KRS 13B.150 (Emphasis added).

More particularly, KRS argues that the circuit court expressly excluded from its consideration certain portions of the medical evidence, noting that the hearing officer's consideration of the history of Joseph's back condition, "was in error" and that the facts relied upon in the final order were "so far removed from the relevant

time period as to be of no probative value at all in determining disability as of Mr. Joseph's last date of paid employment.”

In response, Joseph argues that the circuit court did in fact consider the entire record, but simply concluded that the medical evidence relied upon by the hearing officer was irrelevant, because it was out-of- date, and not related to the point of time during which Joseph could no longer work. He also notes that the circuit court reviewed all of the evidence submitted, including the reports from numerous physicians, and concluded that some of those reports were materially mischaracterized by the hearing officer. Having reviewed the order of the circuit court, as well as the record, we are in agreement with Joseph's contention that the court properly considered the entire record in rendering its decision.

While KRS is correct in its recitation of the court's opinion as to the nature of the evidence at issue, we disagree with its conclusion that the court failed to consider the evidence itself, or that it “struck” the evidence from the record. To the contrary, we believe that the court's opinion in this regard is indicative of the fact that it did consider the evidence and simply found it to be outdated, immaterial, and without probative value to the issues at hand. Thus, in stating that the final order, “stripped of this immaterial evidence, contains only reports from Mr. Joseph's treating physicians...,” we do not believe the court to have literally intended the order to be “stripped,” or the evidence to have been stricken. To the contrary, we believe it merely to have been stating that it did not consider the

evidence to be probative of the issues at hand. Therefore, we disagree with the argument that the court violated KRS 13B.150 in rendering its opinion.

Nevertheless, we are in agreement with KRS that the circuit court erred in its assessment of the older evidence as being “irrelevant” and without probative value. Without question, the history of the condition upon which Joseph is alleging disability is relevant, insofar as it helps to provide a clear picture of the condition upon which a worker is alleging disability and as it provides a basis upon which to assess the progression of his condition over time. Having reviewed the opinion of the hearing officer, this Court is of the opinion that it provided a thorough recitation and summarization of the evidence at issue. The hearing officer was of the opinion that when considered cumulatively, the objective medical evidence established that Joseph’s condition has not changed since the time of the 2001 surgery. This Court is compelled to agree.

Having so found, we are in agreement with KRS concerning its second argument, namely that the circuit court improperly substituted its judgment for that of the fact-finder when it found that the KRS decision was not supported by substantial evidence in the record as a whole.

KRS 61.510(33) defines “objective medical evidence” as:

[R]eports 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 ....

We note that the definition provided in the statutory provision above does not provide for the patient's subjective complaints of pain. It was the opinion of the hearing officer, after a consideration of the evidence, that the opinions of Joseph's treating physicians concerning his disability relied substantially upon his subjective complaints of pain and were not supported by the objective medical evidence, including radiological reports and various imaging studies which established that his condition had not objectively changed since the time of his surgery, at which time he was able to work without difficulty.

Having reviewed the record, this Court is of the opinion that the circuit court went beyond its permitted scope of review in substituting its judgment for that of the hearing officer on a question of fact, namely, which medical reports were more credible. The record reveals that Dr. McElwain summarized Joseph's medical records as showing "a long history of back pain," as well as "the absence of any documentation of change in claimant's condition over the past several years...." The circuit court, in reviewing the evidence, came to its own conclusion, in opposition to that of the hearing officer, that the record was "replete" with unchallenged findings of deterioration in Joseph's condition. In so finding, the court goes on to describe Dr. McElwain's report as "blatantly erroneous" and "of no probative value whatsoever". Likewise, the court disagrees with Dr. Quarles's

conclusion that there was no “new convincing objective evidence” to support a finding of disability, and states instead that the physicians’ reports “uniformly indicated disability.” We simply cannot agree with the circuit court’s assessment in this regard. While the record may be replete with Joseph’s subjective complaints of pain, such is not the appropriate basis for an award of benefits.

Simply stated, it was for the hearing officer to weigh the evidence of record and make a determination. After reviewing the evidence, the hearing officer concluded that the objective tests conducted on Joseph, including x-rays, MRI, and CT studies, failed to reveal an objective change in his condition since the time of his surgery in 2001.<sup>7</sup> Accordingly, the hearing officer determined that this evidence tends to disprove Joseph’s subjective complaints of increased pain, as well as the opinions of the treating physicians, who relied substantially upon his subjective reports. While the circuit court may have disagreed with the hearing officer’s interpretation of the evidence in this regard, such is not a sufficient basis for reversal.

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<sup>7</sup> This evidence consists of, among other records, the March 17, 2006 note of Dr. Bean, which stated that Joseph’s objective tests from 2002 to 2004 have failed to reveal any abnormalities and signify a satisfactory fusion of L5/S1, based upon a review of negative 2003 x-rays, a 2003 MRI showing no abnormalities and a solid fusion, a 2004 MRI without new findings of disc change, and a 2004 CT, also showing a solid fusion. Finally, KRS notes that Joseph underwent updated CT and MRI examinations, which revealed a stable CT exam with no nerve root compression or canal compromise, and an MRI with surgical changes, but no disc disease at L3/4, L2/3 or above, and no nerve root compression or new stenosis.

Further, the evidence reviewed by the hearing officer includes records from Joseph’s pain management physician documenting that he received pain relief at a level of 60-70% from lumbar facet joint injects received in May of 2006. KRS notes, and correctly, that this record, along with a discharge note from September, was the only medical evidence submitted by Joseph in documentation of his condition for the twelve-month period prior to discharge, thereby giving the finder of fact little to no information upon which to base a finding of a permanently disabling condition, particularly as the May 2006 note documented improvement in same.

The law of this Commonwealth is clear that as long as the record contains substantial evidence to support the agency's decision, the Court must defer to the agency, even if there is conflicting evidence. *Kentucky Comm'n on Human Rights v. Fraser*, 625 S.W.2d 852, 856 (Ky. 1981). It is the role of the court to review the administrative decision, and not to reinterpret or reconsider the merits of the claim. *Kentucky Unemployment Ins. Comm'n v. King*, 657 S.W.2d 250, 251 (Ky.App. 1983). In the matter *sub judice*, the circuit court improperly deemed as "irrelevant" evidence properly relied upon by the finder of fact and then reweighed the evidence at issue to reach a different conclusion. We believe this was in error.

It is for the administrative agency to consider all of the evidence presented and to choose the evidence that it believes. *See Bowling v. Natural Resources*, 891 S.W.2d 406, 409 (Ky.App. 1995). In the matter *sub judice*, the report of the hearing officer reveals that the evidence reviewed included the opinions of both treating and evaluating physicians, radiological test results, and testimonial evidence. After reviewing same, the hearing officer concluded that Joseph had failed in his burden of proving that he was permanently incapacitated from his former job or a job of like duties, as of his last day of paid employment. While the circuit court may have interpreted the evidence differently, it was not for the court to substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.

As its third basis for appeal, KRS argues that the circuit court's determination that the final order of the Board misrepresented evidence is not supported by the record. KRS refers specifically to the court's determination that the final order "...incorrectly cited a March 17, 2006, MRI/CT report as showing "no new findings," when it actually stated that there were no new correctable findings. A.R. at 389 [sic]." KRS asserts that in fact, the administrative record does not contain the actual MRI/CT report in question, and instead, contains only an interpretation of that record by Dr. Bean, as set forth in his March 17, 2006, report.<sup>8</sup> KRS argues that when that note is read correctly, the final order accurately recited its contents. Accordingly, KRS asserts that the circuit court's opinion and order should be reversed in light of its reliance upon an incorrect interpretation of the factual evidence. In response, Joseph asserts simply that the circuit court did not misrepresent the record, and that a review of the record reveals that it was the hearing officer who misunderstood and misrepresented the evidence at issue.

Having reviewed the report at issue, we agree with KRS that the hearing officer did not misrepresent the contents of Dr. Bean's report. When read in its entirety, Dr. Bean describes the report itself as revealing "no new findings of disc change above the fusion level," and later goes on to refer to "no new

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<sup>8</sup> In that report, Dr. Bean states, "Continued pain complaints resulted in another MRI scan being done in June 2004, again showing the lumbar fusion without new findings of disc change above the fusion level. CT scan done 2004 confirmed satisfactory position of pedicle screws and the fusion being solid." A.R. p. 145. Following that impression, Dr. Bean ordered another MRI and CT scan for Joseph, and then opined that, "In the absence of any new correctable finding, I find him at this point disabled ..." A.R. pp. 145-146.



correctable findings.” Accordingly, we do not believe that the hearing officer incorrectly represented or mischaracterized the findings of the report.

As its final basis for appeal, KRS argues that the circuit court improperly gave more weight to evidence from Joseph’s treating physicians than to the opinions of reviewing physicians. In reliance upon the recently issued Kentucky Supreme Court decision in *Kentucky Retirement Systems v. Bowens*, 281 S.W.3d 776 (Ky. 2009), KRS notes that the opinions of treating physicians are not to be given more weight than those of reviewing physicians, and alleges several instances in which it believes that the opinion and order of the circuit court seemed to do so. Having determined that reversal is appropriate for the aforementioned reasons, we need not address this argument further herein.

Finally, we find no merit in Joseph’s arguments concerning the hearing officer’s alleged failure to use the appropriate standard of law in relying upon a statutory lifting standard instead of the appropriate residual functional capacity standard to determine if Joseph could continue working. KRS 61.600(3) clearly sets forth the basis for determining an individual’s ability for physical exertion, classifying light work as lifting no more than twenty pounds at a time, with frequent lifting of objects weighing up to ten pounds. The hearing officer weighed the evidence of record in this matter and determined that Joseph’s job duties fell within this classification. While the circuit court may have described Joseph’s work as “extremely physically demanding,” it did not explicitly reject the determination of the hearing officer that, according to the classifications set forth

by the statute, Joseph's job duties fell within the "light work" category.

Regardless, in light of our other findings herein, we are bound to affirm the hearing officer's finding that Joseph was capable of continuing to perform the duties required of his job, regardless of their classification.

Wherefore, for the foregoing reasons, we hereby reverse the June 5, 2009, decision of the Franklin Circuit Court, and affirm the administrative decision issued by the Board on May 23, 2007.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Brian C. Thomas  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Rex Hunt  
Frankfort, Kentucky