

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

NO. 2010-CA-000441-MR

BILL RAINS

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE THOMAS D. WINGATE, JUDGE  
ACTION NO. 08-CI-01791

KENTUCKY RETIREMENT SYSTEMS; and  
THE BOARD OF TRUSTEES OF THE  
KENTUCKY RETIREMENT SYSTEMS

APPELLEES

OPINION  
AFFIRMING

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BEFORE: VANMETER AND WINE, JUDGES; SHAKE,<sup>1</sup> SENIOR JUDGE.

WINE, JUDGE: Bill Rains (“Rains”) appeals from an opinion and order of the Franklin Circuit Court which affirmed an order by the Board of Trustees of the Kentucky Retirement Systems (“Board”) denying his claim for disability

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<sup>1</sup> Senior Judge Ann O’Malley Shake sitting as Special Judge by assignment of the Chief pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

retirement benefits. Rains argues that he established a *prima facie* case showing his entitlement to benefits under Kentucky Revised Statute (“KRS”) 61.600, and that the Board misconstrued his burden of proof and the statutory requirements. Finding no error, we affirm.

Rains was most recently employed as a Family Support Specialist IV with the Cabinet for Health and Family Services. That position was classified as “sedentary” in nature under KRS 61.600. At the time of his retirement, he had 141 months of Kentucky Employee Retirement Systems (“KERS”) membership. His last date of paid employment was September 30, 2005, when he was 58 years old.

Shortly before his retirement, in August 2005, Rains filed an application for disability retirement benefits on the basis of arthritis, degenerative bone disease, sciatica, borderline diabetes, floaters in left eye, surgery on rotator cuff and three muscles, bone spurs from base of head to heels, and bulging and ruptured discs. The KERS Medical Review Board physicians recommended that Rains’s application be denied based on medical records showing that these conditions were improving, were not totally disabling, or pre-existed his membership with KERS.

Thereafter, Rains filed a timely appeal from the denial of his application. On the scheduled hearing date, March 11, 2008, Rains raised a new claim of disability based on mental conditions, rather than the physical conditions he cited in his application. In support of this claim, Rains submitted additional medical records, a report of a psychological evaluation performed by Dr. Stuart

Cooke, and a report from Licensed Clinical Social Worker Ron Kibbey. After reviewing the evidence, the hearing officer found that Rains had failed to prove his mental condition was totally and permanently incapacitating as of his last date of paid employment. The hearing officer also noted that Rains had been treated for depression as a teenager, and consequently this condition pre-dated his employment. Based on these findings, the hearing officer recommended Rains's application be denied. The Disability Appeals Committee of the Board adopted the hearing officer's recommended order.

Thereafter, Rains filed a timely appeal to the Franklin Circuit Court pursuant to KRS 61.665(5). The circuit court affirmed, concluding that the Board's findings were supported by substantial evidence. Rains now appeals to this Court.

Rains argues that the Board misconstrued his burden of proof to establish eligibility for disability retirement benefits and consequently erred by finding he had failed to establish his *prima facie* case. Where the Board'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. *McManus v. Kentucky Retirement Systems*, 124 S.W.3d 454, 458 (Ky. App. 2003). In its role as a finder of fact, the Board is afforded great latitude in its evaluation of the evidence heard and the credibility of witnesses, including its findings and conclusions of fact. *Id.*

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. *Id.*

A member of the KERS may seek disability benefits as a result of a total and permanent incapacitation based on the criteria set out in KRS 61.600. After meeting the minimum service requirements and filing deadlines, the statute requires an applicant to present “objective medical evidence” establishing 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. 12111(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.

KRS 61.600(3).

In this case, the hearing officer found Rains failed to establish that his permanent mental incapacity existed as of the last day of his paid employment.

Rains argues that the hearing officer misapplied the requirement of KRS 61.600(3)(a) as requiring him to show that his mental incapacity existed as of the last day of his paid employment. He notes the language of the statute requires him to establish that he has been mentally incapacitated “since the last day of paid

employment”. He also points to KRS 61.600(5)(a), which provides that “an incapacity shall be deemed to be permanent if it is expected to result in death or can be expected to last for a continuous period of not less than twelve (12) months from the person’s last day of paid employment in a regular full-time position.” Given this language, he argues that he is qualified for disability retirement benefits upon a showing that his mental condition became totally disabling within twelve months of his last day of paid employment.

We disagree. The purpose of disability retirement benefits is to provide an eligible employee with enhanced benefits based on a physical or mental incapacity which permanently disables the employee from performing his or her job duties, even with reasonable accommodation. By definition, an incapacity which becomes totally disabling after the employee’s last day of paid employment cannot be the reason for the incapacity. The statutory scheme supports this conclusion by requiring proof that the incapacity be permanent and by defining permanent incapacity as an incapacity which can be expected to last for at least twelve months from the person’s last day of paid employment. When read in context, the phrase “since the last day of paid employment” clearly anticipates that the totally disabling condition exists from the last day of paid employment forward.

Most of the evidence concerning Rains’s mental incapacity was based on examinations conducted well after he left his employment. The circuit court suggested that “a *post hoc* examination can only speculate at whether the claimant

was actually disabled on the last day of paid employment.” We decline to hold that a claimant could never show total incapacity based on medical examinations occurring after the last day of paid employment. Nevertheless, the circuit court is correct that a medical examination obtained prior to that date would be more persuasive than an examination obtained after that date.

Under the circumstances, we cannot find that the evidence presented by Rains was so compelling that no reasonable person could fail to be persuaded by it. As the hearing officer noted, Rains did not receive treatment for his mental health until March 10, 2006, more than five months after leaving his employment. Furthermore, the opinions of Ron Kibbey and Dr. Cooke were formulated more than two years after Rains left his employment. Finally, the hearing officer pointed out that two of the stressors identified by Dr. Cooke, specifically Rains’s unemployment and the breakup of his marriage, did not occur until after his last day of paid employment.

Rains submitted only two medical records from before his retirement concerning his mental state. One was an August 29, 2005 list of his prescription medications stating that he was taking Zoloft for “depression/sleep.” The other record was an August 19, 2005 progress note from Dr. Baxter Napier which reported that Rains stated he was “stressed” and “feels down, depressed.” The diagnoses included anxiety, depression, and insomnia. While this evidence may be sufficient to show that Rains was suffering from depression prior to his retirement,

it is not sufficient to establish that the condition was totally disabling as of his last day of paid employment.

In any event, the Board also noted that Rains had been treated for depression as a teenager, and consequently his current mental condition resulted directly or indirectly from a condition which pre-existed his membership with the KERS. KRS 61.600(3)(d). Rains does not seriously contest this finding.<sup>2</sup> Since Rains had less than 16 years of current or prior service with employers participating in the KERS, he is not qualified for disability retirement benefits for depression which has now become totally disabling. Therefore, the Board properly denied his application for benefits.

Accordingly, the opinion and order of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

John H. Gray  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Leigh A. Jordan  
Frankfort, Kentucky

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<sup>2</sup> Rains does not address this finding in his primary brief. In his reply brief, he briefly argues that there was no evidence to support the Board's finding that his depression pre-dated his membership with KERS. However, he does not significantly develop this argument.