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NOT TO BE PUBLISHED

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

NO. 2012-CA-000931-MR

ALLISON DENT

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE PHILLIP J. SHEPHERD, JUDGE  
ACTION NO. 10-CI-00183

KENTUCKY RETIREMENT SYSTEMS

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CLAYTON, LAMBERT, AND THOMPSON, JUDGES.

CLAYTON, JUDGE: Allison L. Dent appeals from the “Opinion and Order” of the Franklin Circuit Court upholding the decision of the Kentucky Retirement Systems denying her claim for hazardous disability retirement benefits. After careful review of the record and the parties' briefs, we affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

Allison Dent was employed by the Department of Corrections as a correctional officer at Roederer Correctional Complex. Her membership date as a hazardous employee in the Kentucky Retirement System began on September 5, 1995, and her last day of paid employment was on December 13, 2007. Based on her membership dates, Allison accumulated 148 months or 12.33 years of service credit working as a correctional officer.

Allison's job duties consisted of providing security at the correctional facility. These duties included physically responding to emergency situations, physically moving inmates if necessary, and intervening in combative situations. According to Allison, she spent between four and six hours of her eight-hour workday standing.

Allison claims disability and entitlement to the Kentucky Retirement Systems hazardous duty disability benefits based upon Stage IV chronic renal disease. Although diagnosed with kidney disease in August 2003, she was able to continue working for a time. Now, she alleges that the symptoms of her condition consist of persistent fatigue, frequent need to urinate, and painful episodes of gout, which impair her ability to walk.

Dr. André Duff, a physician with Nephrology Associates of Kentuckiana, PSC, has treated Allison since September 2003. In a note, dated July 1, 2008, Dr. Duff stated that Allison now has chronic kidney disease stage IV and is expected to have worsening renal function.

In October 2007, Allison submitted her application for disability retirement benefits based on her claim of severe kidney disease, which was causing frequent illness and constant fatigue. These symptoms, according to Allison, incapacitated her from performing her job or a job of similar duties. In December 2007, the initial disability application was reviewed and denied by all the Kentucky Retirement Systems medical examiners because of a lack of objective medical evidence to support a disability.

Allison appealed the denial and submitted additional medical information. The Kentucky Retirement Systems medical examiners re-considered the case in June 2008. But the claim was again denied by all the medical examiners because the renal insufficiency did not appear to be incapacitating, and it had begun prior to her membership date.

After the second denial, Allison requested an administrative hearing and submitted more medical evidence. The application was reviewed for a third time and again denied in February 2009 by the Kentucky Retirement Systems medical examiners although one of the medical examiners changed his mind and recommended approval of the claim. Still, on three separate occasions, pursuant to Kentucky Revised Statutes (KRS) 16.582, the majority of the medical examiners denied the hazardous disability retirement benefits because objective medical evidence did not support that Allison was unable to perform her hazardous duties and that Allison's condition did not pre-exist her membership in the Kentucky Retirement Systems.

Then, on June 3, 2009, a formal administrative hearing was held before an Administrative Law Judge (hereinafter “ALJ”). On October 15, 2009, the ALJ entered findings of fact, conclusions of law, and a recommended order in which the ALJ recommended a denial of Allison’s disability application. The ALJ recommended denial because “although it is clear that Claimant does indeed suffer from chronic kidney disease, the evidence is not clear that it is an incapacitating condition. Dr. Duff, her primary doctor with respect to her kidney disease, does not offer the opinion that she is totally and permanently disabled.”

Allison filed exceptions to the recommended order and appealed the matter to the Disability Appeals Committee of the Kentucky Retirement Systems’ Board of Trustees (hereinafter “the Board”). On January 7, 2010, the Board, however, adopted the recommended order of the ALJ as its final order. Thereafter, Allison appealed the Board’s order to the Franklin Circuit Court. On May 3, 2012, the circuit court affirmed the final order of the Board. Allison now appeals from this order.

The Board adopted the hearing officer’s Recommended Order as its final order. Therein, the ALJ made a full analysis of the evidence. Below are the findings of fact:

#### FINDINGS OF FACT

Claimant has the burden of establishing that she is totally incapacitated to continue as a full-time employee in a hazardous position, but not that she is totally incapacitated to perform other occupations for remuneration or profit. (KRS 16.582). Because she has

less than 16 years of KERS membership, she must further establish that the condition upon which she relies for disability benefits does not pre-date her membership in the retirement system, or if it does that her condition was aggravated by an accident or injury arising out of or during the course of her employment.

The objective medical evidence establishes that the Claimant suffers from chronic kidney disease which is progressing to the point of the necessity of dialysis or transplantation. The question is whether her condition is at this time disabling and whether her condition is the result of a pre-existing condition.

Although it is clear that the Claimant does indeed suffer from chronic kidney disease, the evidence is not clear that it is incapacitating condition at this time. Dr. Duff, her primary care doctor with respect to her kidney disease, does not offer the opinion that she is totally and permanently disabled. Claimant has the burden of establishing by a preponderance of the evidence the incapacitating nature of her condition, and has not met this burden.

It is equally clear that the Claimant suffers from a lifelong kidney condition, and although Dr. Duff has attempted to separate the childhood condition from the current illness, he simply cannot make that argument by a preponderance of the evidence based on the records available. He offered the opinion that either shortly before he first saw her in 2003, or at an unknown time she had a left kidney infarct causing the wedge shaped defect. Based on the existence of the childhood deformity and corrective measures, this opinion simply is not enough to determine the lack of a pre-existing condition. Claimant bears the burden of establishing that her current condition is not the result of a pre-existing condition, and based on the available information has not sustained that burden.

Based on the foregoing, it is hereby found as follows:

1. Claimant timely applied for disability retirement benefits on October 3, 2007.
2. Claimant was employed in hazardous duty position.
3. Claimant has 148 months of KHAZ membership.
4. Reasonable accommodations were not requested.

5. The objective medical evidence does not establish by a preponderance of the evidence that Claimant is totally and permanently disabled by reason of any physical condition or the cumulative effect of physical conditions, from [*sic*] her previous hazardous job duties, nor that she is likely to remain so for a period of not less than 12 months from her last date of paid employment.
6. The objective evidence does not establish that the condition upon which the claimant relies [*sic*] for hazardous disability retirement benefits does not pre-exist her membership in the retirement system nor that a pre-existing condition was aggravated by an accident or injury arising out of or during the course of her employment.

The circuit court's review of the matter determined that the decision of the Kentucky Retirement Systems' Board was supported by substantial evidence in the record, and therefore, it upheld the decision of the Board.

#### STANDARD OF REVIEW

When a circuit court reviews an administrative decision, its role is not to reinterpret or reconsider the merits of the claim. *Kentucky Board of Nursing v. Ward*, 890 S.W.2d 641, 642 (Ky. App. 1994). Rather, the circuit court must ascertain whether the findings of fact are "supported by substantial evidence of probative value" and whether the administrative agency "applied the correct rule of law to the facts so found." *Southern Bell Tel. & Tel. Co. v. Kentucky Unemployment Ins. Comm'n*, 437 S.W.2d 775, 778 (Ky. 1969) (citing *Brown Hotel Co. v. Edwards*, 365 S.W.2d 299 (Ky. 1963)). If there is substantial evidence in the record to support the agency's decision, the circuit court must defer to the

agency notwithstanding conflicting evidence. *Kentucky State Racing Comm'n v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972) (citing *Blankenship v. Lloyd Blankenship Coal Co., Inc.*, 463 S.W.2d 62 (Ky. 1970)).

It is our task to review the circuit court's decision, which affirmed the Board's denial of disability benefits. Our review is similar to the circuit court's review. When we assess a state agency's administrative decision, which is adverse to a claimant, the decision will not be overturned unless the agency acted arbitrarily, outside the scope of its authority, applied an incorrect legal standard, or its decision was not supported by substantial evidence. *Kentucky State Racing Commission*, 481 S.W.2d at 307–08. Further, when disability benefits are denied, we accept the agency's findings of fact as true if they are supported by substantial evidence. *Bowling v. Natural Resources and Environmental Protection Cabinet*, 891 S.W.2d 406 (Ky. App. 1994). Substantial evidence is such evidence as would “induce conviction in the minds of reasonable [persons].” *Owens–Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998).

#### ANALYSIS

The issue before this Court is to determine whether the circuit court correctly determined that the Board's decision was supported by substantial evidence and that the Board correctly applied the law to the facts. Allison argues that she established by a preponderance of the evidence that she was not capable of performing the duties necessary for a corrections officer and that her condition was not pre-existing. Hence, Allison maintains that the circuit court erred in affirming

the Board's decision that negated her eligibility for hazardous retirement disability benefits.

Initially, we note that, pursuant to Kentucky Revised Statutes (KRS) 13B.090(7), Allison has the burden to show by a preponderance of the evidence that she is either totally and permanently disabled or incapacitated from continuing a regular full-time employment in her hazardous position, as defined in KRS 61.592. Allison must also establish that her incapacity did not result directly or indirectly from a condition that pre-dated her membership in the Kentucky Employees Retirement System, or if it does, that she has at least 16 years of service and the condition was not aggravated by an accident or injury arising during her employment. KRS 61.600.

Therefore, in particular, to qualify for disability, Allison must supply evidence of physical findings, which are so severe they preclude Allison from working as a corrections officer, and since she has worked less than 16 years in the Kentucky Retirement System, she must submit objective medical evidence that her current impairment is in no way related to previous renal problems.

*Unable to work as a corrections officer*

First, we turn our attention to whether Allison has proven that based on her kidney disease, she qualifies for hazardous duty retirement benefits.

According to KRS 16.582(1)(b), “[h]azardous disability means a disability which results in the member's total incapacity to continue as a regular full-time officer or as an employee in a hazardous position, as defined in KRS 61.592, but which does



not result in the member's total and permanent incapacity to engage in other occupations for remuneration or profit.”

Although Allison has shown that she suffers from chronic kidney disease, she must also prove that she is unable to perform her job as a corrections officer. She was first diagnosed with kidney disease in 2003 but continued to work at her position until 2007. Between that time and the date of the administrative hearing, Allison had no kidney infections. Furthermore, since the last date of employment, she was not scheduled for dialysis nor begun the process to schedule a kidney transplant.

In her position, Allison works primarily in the guard tower. Her job duties consist of responding to emergency situations, if needed, moving inmates, and intervening in combative situations. In this position, she complains that she experiences constant fatigue, painful gout, and urinary urgency and frequency.

The circuit court observed that Allison’s guard duty responsibilities are basically sedentary. She primarily observed inmates from one of the towers. Allison usually sits and occasionally walks out on the cat walk to watch the prisoners. Consequently, Allison is able to sit during her shift, which alleviates the fatigue. Additionally, there is a restroom in her work area, which permits her to use the restroom as needed.

Allison also claims that she requested that her employer make reasonable accommodations. Her employer, however, denies that she ever requested reasonable accommodations. The only request by Allison to limit her

work duties occurred in January 2007, when Allison asked that she not be required to work double shifts. The request was denied. With regard to this request, the only evidence in the record regarding her inability to work double shifts was a letter from First Stop Urgent Care in February 2007, which recommended that she not work double shifts for the next four weeks.

In sum, the ALJ and the Franklin Circuit Court Judge both observed that Allison has not provided objective medical evidence that she is unable to perform her job duties. In fact, Dr. Duff, her primary care doctor who treats her kidney disease does not opine that the condition is totally incapacitating or even that it limits Allison. Therefore, the record, although establishing that Allison suffers from kidney disease, lacks objective medical evidence that Allison is unable to perform her hazardous duty job. Thus, we concur with the ALJ and the circuit court judge that Allison has not met her burden to establish by a preponderance of objective medical evidence that based on her physical condition, she is unable to perform her hazardous job duties.

*Pre-existing condition*

Next, we direct our attention to the second factor – Allison’s claim that her chronic kidney disease was not the result of a pre-existing condition. The inquiry is whether substantial evidence was presented by Allison that her renal insufficiency was not caused by a pre-existing condition.

Guidance is provided by KRS 61.600(3) as to the evaluation of whether a condition has a pre-existing component. The statute requires that

objective medical evidence be used to make such a finding. *Kentucky Retirement Systems v. Brown*, 336 S.W.3d 8, 14 (Ky. 2011). Objective medical evidence means:

reports 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.

KRS 61.510(33).

The hearing officer was presented with the following evidence: since childhood, Allison, admittedly, has only had one functioning kidney. A 1966 x-ray report from Children's Hospital in Cincinnati, Ohio, supports this finding. She also had a left kidney diagnosed with uretero visceral reflux, which required childhood surgery to correct the condition. Hence, the medical records verify the presence of renal problems in childhood.

Next, in 2003, when Dr. Duff, Allison's treating physician, saw her for the first time, he observed that at some unknown time, she had experienced a left kidney infarct (blood clot), which caused a wedge-shaped defect. No objective medical evidence existed to determine when this infarct occurred. Moreover, as

noted by the circuit court, Dr. Duff's note also states that Allison has “. . .chronic scarring from chronic reflux disease due to her childhood surgery.”

Later, in 2008, Dr. Duff prepared another letter for Allison. Dr. Duff opines that if Allison had childhood kidney disease she would have likely developed symptoms of renal disease prior to 2003, but regarding the blood clot, Dr. Duff writes:

Again, when I initially saw her in 2003, my initial work up did include an MRI of her abdomen looking at her kidneys and besides showing the small right kidney as I expected, she had a focal web shaped defect in the lateral aspect of her left kidney consistent with a renal infarct. Somewhere either shortly before that or an unknown time, she developed a new problem with her kidney consistent with renal infarct on her left side which subsequently has probably been one of the major downfalls of her kidney function since that time. . .

As stated by Dr. Duff, he is not able to definitively state when the infarct, blood clot, occurred. Thus, he cannot state with any certainty that the chronic kidney disease was not the result of a pre-existing kidney problem.

From the evidence, the ALJ decided that based on the existence of the childhood deformity, the previous, corrective measures, and the lack of a definitive date as to when this blood clot occurred, objective medical evidence was not provided that ruled out a pre-existing condition, which contributed to the kidney disease. Therefore, the ALJ found that Allison did not prove that her current renal insufficiency was not the result of a pre-existing condition.

Allison cites *Brown*, as supportive of her position that her kidney disease did not result from a pre-existing condition. *Brown*, 336 S.W.3d 8. According to Allison, *Brown* holds that a condition, which may pre-exist employment, is not a disqualifying “pre-existing condition” if it was not symptomatic and objectively discoverable by a reasonable person. *Id.* at 15.

The actual statement, interpreting the statutory meaning of pre-existing condition, the Court makes in *Brown* is as follows:

We believe it the intent of our legislative authority to preclude from benefits those individuals who suffer from symptomatic diseases which are objectively discoverable by a reasonable person. We do not believe it the intent of the legislature in drafting KRS 61.600 to deny benefits to those individuals who suffer from unknown, dormant, asymptomatic diseases at the time of their employment, ailments which lie deep within our genetic make-up, some of which may not yet be known to exist. Rather, we believe the legislature intended to deny benefits to individuals whose diseases are symptomatic and thus were known or reasonably discoverable. Why else would the legislature have referred to ‘objective medical evidence’ in KRS 61.600(3)?

*Id.*

Thus, the Court states that it did not believe that the legislative intent in drafting KRS 61.600 was to preclude coverage to individuals who suffer from unknown, dormant, asymptomatic diseases that lie deep within their genetic make-up and may not even be known to exist. The facts in the *Brown* case involved a person seeking disability for COPD disease and being denied because of the “pre-existing” condition of smoking. But the Court held that smoking was not a

condition under the statute but rather a behavior. The Court stated: “[w]e hold that smoking is not a condition as it is used under this statute, but rather a behavior.”

*Id.* at 16.

In contrast, to Allison’s position, her kidney condition was not unknown or dormant or asymptomatic. She was born with a right kidney that did not work, a left kidney impacted by uretero visceral reflux that ultimately necessitated surgery, and suffered a blood clot in the left kidney at an indeterminate time. It was not a behavior.

The facts here concern a legitimate physical condition – deformed kidneys – which clearly meet the statutory definition of bodily injury, disease, or condition as contemplated in KRS 61.600. Further, Allison, as well as her physicians, was well aware that her right kidney did not function and her left kidney had previously required surgical intervention. *Brown* is inapposite; it addressed underlying conditions that no reasonable person would have realized or known of their existence. In this case, the medical history given by Allison supports the Board's finding that her kidney condition was not entirely dormant or asymptomatic.

## CONCLUSION

The evidence of record is sufficiently probative to convince a reasonable person that Allison’s condition does not prevent her from performing

the duties of her hazardous position and that her condition is related to a pre-existing condition. We caution that 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). Since there is substantial evidence in the record supporting the agency’s decision, we must defer to the agency, even if there is conflicting evidence. *Kentucky Commission on Human Rights v. Fraser*, 625 S.W.2d 852, 856 (Ky. 1981).

Accordingly, it is our determination that the Franklin Circuit Court's decision upholding the Kentucky Retirement Systems was legally correct, based on substantial evidence, and not erroneous. For these reasons, we affirm the judgment of the Franklin Circuit Court.

ALL CONCUR.

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