

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1998-CA-002267-MR

GALEN M. THURMAN, III

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE WILLIAM GRAHAM, JUDGE  
ACTION NO. 97-CI-01261

BOARD OF TRUSTEES,  
KENTUCKY RETIREMENT SYSTEM

APPELLEE

OPINION  
AFFIRMING  
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BEFORE: COMBS, EMBERTON AND GUIDUGLI, JUDGES.

GUIDUGLI, JUDGE. Galen M. Thurman, III (Thurman) appeals from an opinion and order entered August 11, 1998, by the Franklin Circuit Court which affirmed an earlier decision of the Board of Trustees, Kentucky Retirement Systems, denying his application for disability retirement benefits. We affirm.

The record shows that despite being afflicted with polio myelitis at the age of 18 months, Thurman was able to obtain a college degree as well as maintain employment. Thurman began working for the City of Murray (the City) in January 1985. His work with the City was continuous until his last day of paid employment on July 28, 1996.

When Thurman began working for the City, he utilized crutches to enable him to walk. Due to increasing problems with stooping and pain, Thurman was advised to have steel rods inserted in his back to prevent excessive spinal curvature from causing the collapse of his internal organs. Thurman underwent this procedure in 1988, and while it successfully halted the spinal curvature, it did not relieve the pain. Work became increasingly difficult for Thurman due to the pain, and the City's efforts to try to provide additional accommodations to alleviate the pain were unsuccessful. It appears that Thurman ultimately retired from his position with the City in December 1996, after an extended period of sick leave.

In August 1996, Thurman forwarded a notification of retirement to Kentucky Retirement Systems (KRS). Thurman indicated that he was seeking disability retirement due to "unbearable" back pain.

In medical evidence filed with KRS, Dr. John Quertermous indicated that Thurman was "physically incapacitated for life." Dr. Quertermous indicated a history of childhood polio, 1988 back surgery, and a fall in 1992. Dr. Quertermous indicated the presence of severe osteoarthritis in Thurman's lumbosacral spine and also diagnosed depression. Dr. Quertermous did not give a cause of Thurman's disability.

Medical records were also submitted from Dr. Terri Price, a chiropractor. Dr. Price indicated that she began treating Thurman in April 1993. In a letter to KRS dated September 17, 1996, Dr. Price stated:

Due to severe scoliotic changes, insertion of Harrington rods and polio, he is no longer able to sit or stand for sustained periods of time because advanced degenerative joint changes and progressive muscle atrophy are complicating his already compromised musculoskeletal system.

Records from the University of Minnesota Hospital were also submitted. Although they detail Thurman's 1988 back surgery, no estimate of disability was provided. However, the records do indicate that Thurman had been experiencing increasing pain over the last ten years.

On December 13, 1996, KRS informed Thurman that his claim for disability retirement benefits had been denied by the Medical Review Board. All three reviewing physicians indicated that Thurman's application should be denied because his disability stemmed from a condition which predated his employment with the City.

Thurman duly filed an appeal from the initial denial of benefits. In his memorandum, Thurman alleged:

The contention in this case is that the current disability law regarding pre-existing conditions is a violation of the ex post facto provision of the Kentucky Constitution. When Mr. Thurman went to work for the State of Kentucky the law was different. It is the contention that there was a bilateral contractual situation entered into between Mr. Thurman and the Kentucky Retirement Systems whereby if he performed his services as mandated by law that the employer (a participant in the Kentucky Retirement Systems) would pay him a salary and afford him fringe benefits, such as protection for disability benefits. During the entire period of time that Mr. Thurman worked for the City of Murray, they withheld money from his paycheck to contribute to the Kentucky Retirement Systems. Therefore, the recent changes in the law regarding pre-existing

conditions violated his State and constitutional rights, as well as the due process rights afforded Mr. Thurman by the Constitution of the United States of America.

Following a hearing, the hearing officer entered findings of fact and conclusions of law upholding the denial of benefits. However, for reasons not evident of record, the Disability Appeals Committee chose to reject the hearing officer's findings in favor of a Report and Order from the Board of Trustees.

In a report and order entered July 24, 1997, the Board upheld the denial of retirement benefits. In refuting Thurman's argument regarding the constitutionality of KRS 61.600, the Board held:

In 1985, when Thurman joined the System, the pre-existing condition clause in KRS 61.600 read in part: "Upon the examination by licensed physicians it must be determined that the employee, since his last day of paid employment, has been mentally or physically incapacitated to engage in any occupation for remuneration or profit and that such disability did not pre-exist at the time of initial employment or re-employment..." Thurman interprets "disability" in the 1985 statute to mean a condition that disables one from working. Thus, although Thurman may have been limited in his activities when he began work for the City, he did not have a disability, according to his argument, because he could still work.

A common sense reading of the 1985 statute, however, does not support the Claimant's interpretation of "disability" in the context of KRS 61.600 prior to 1992, because it would essentially make the pre-existing condition exception a logical absurdity. If one were disabled from work before one is employed or re-employed, one would not have been hired at all. To accept a Claimant's reading of "disability" with regard to the pre-1992 version of KRS 61.600 would run counter to

the direction given by KRS 446.080 (1) the "(a)ll statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature." The 1992 revision is an explicit elaboration on the sense of the 1985 statute. It was enacted to clarify the meaning of the statute and reflect the Systems' practical interpretation of it. Thus, the change in the statute was merely a clarification; not a substantive change which would alter the terms of the contract. Had Claimant applied for disability benefits prior to the statutory change, the application of the law would have been the same as it is now. The Board concludes that the terms of the contract were not violated by change in the statutory language and believes that the Claimant's contract argument is not valid in the case at hand.

Thurman next appealed to the Franklin Circuit Court.

In an opinion entered August 10, 1998, the trial court upheld the denial of benefits. This appeal followed.

Thurman argues that the various decisions basing denial of benefits in this case on the fact that his disability stems from polio are not supported by substantial evidence. In support of his argument, Thurman maintains that his disability is instead caused by osteoarthritis and degenerative disc disease, and that because neither of these conditions predated his employment with the City his application for benefits should have been approved.

Our scope of review concerning the factual determinations of an administrative body is limited to a determination of whether the decision is supported by substantial evidence. Kentucky Commission on Human Rights v. Fraser, Ky., 625 S.W.2d 852, 856 (1981). Substantial evidence is that which "has sufficient probative value to induce conviction in the minds

of reasonable men.” Kentucky State Racing Commission v. Fuller, Ky., 481 S.W.2d 298, 308 (1972). As long as the decision is supported by substantial evidence we are required to affirm it even though conflicting evidence is contained in the record. Fraser, 625 S.W.2d at 856. The fact that we may reach a different conclusion than that of the administrative body does not mean that the decision is not supported by substantial evidence. Bowling v. Natural Resources and Environmental Protection Cabinet, Ky. App., 891 S.W.2d 406 410 (1995).

We find that the decision to deny benefits on the ground that Thurman is disabled due to complications from polio is supported by substantial evidence. Although Dr. Quertermous indicated that Thurman has severe osteoarthritis, he offered no opinion as to what caused Thurman’s disability. Furthermore, Dr. Price appears to believe that the degenerative changes in Thurman’s spine are attributable to scoliosis, polio and insertion of the Harrington rods. Although there does appear to be conflicting evidence, the decision is supported by substantial evidence and must be affirmed.

Appellant next contends that the 1992 amendments to KRS 61.600 are violative of Section 19 of the Kentucky Constitution. Prior to the 1992 amendments, KRS 61.600 provided entitlement to disability retirement benefits as long as the “disability did not pre-exist at the time of membership in the system or upon re-employment.” Following the amendment, that particular provision now requires that “[t]he incapacity does not result directly or indirectly from bodily injury, mental illness, disease or

condition which pre-existed membership in the system or re-employment, whichever is most recent." Thurman maintains that because he would have been entitled to retirement benefits under pre-amendment version of KRS 61.600, the amended version of KRS 61.600 is an ex post facto law violative of the Kentucky Constitution. The crux of Thurman's argument is that because he was not disabled at the start of his employment in 1985, he was not suffering from a pre-existing disability within the meaning of the pre-amendment version of KRS 61.600.

Before we address the merits of Thurman's argument, we must first determine whether he would have been eligible for benefits under the pre-1992 version of KRS 61.600. Based on our review of the statute, we find that Thurman would not have been eligible for benefits under the pre-amendment version.

Prior to its amendment, KRS 61.600 provided:

- (1) An employee with sixty(60) months of service, twelve(12) months of which shall be current service, may retire at any time before his normal retirement date on account of disability upon written notification to the board. Application for disability benefits shall be made within twelve(12) months of his last paid day of employment. Upon examination by licensed physicians, it shall be determined that the employee, since his last day of paid employment, has been mentally or physically incapacitated to perform his job or jobs of like duties from which he received his last paid employment and the disability did not pre-exist at the time of membership in the system or upon re-employment, except in case where a disabled recipient has returned to work on a trial basis and is a result of bodily injury, mental illness or disease and that the incapacity is deemed to be permanent.

The trial court found that to accept Thurman's definition of "disability" would "render the pre-existing condition exception of nullity." We agree. Under Thurman's analysis, any person who had a handicap at the time of their employment but was still able to work would be eligible for retirement benefits at the time his handicap progresses to the point that is no longer physically able to work. Thus, the only people who would be precluded from receiving benefits under Thurman's construction of KRS 61.600 would be those who were too disabled to work at the time they were hired. We agree with the trial court that "common sense dictates that the Legislature could not have intended that disabled people, i.e., people who are incapable of working, become employed by the State." Hence, because Thurman would not have been eligible for benefits under the pre-amendment version of KRS 61.600, the 1992 amendments had no ex post facto effect.

Although we respect all that Thurman has accomplished and believe he is an exceptional individual and was a valuable employee, we do not believe that KRS or the trial court misconstrued or failed to properly and adequately interpret KRS 61.600. The opinion and order of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Robert E. Francis  
Cadiz, KY

BRIEF FOR APPELLEE:

James Dodrill  
Frankfort, KY