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## Commonwealth Of Kentucky

### Court of Appeals

NO. 2003-CA-001806-MR

BILLIE JEAN BOLLING

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE WILLIAM L. GRAHAM, JUDGE  
ACTION NO. 00-CI-00957

KENTUCKY RETIREMENT SYSTEMS; BOARD OF  
TRUSTEES OF THE KENTUCKY RETIREMENT SYSTEMS;  
AND KENTUCKY EMPLOYEES RETIREMENT SYSTEMS

APPELLEES

OPINION  
VACATING AND REMANDING

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BEFORE: BARBER, HENRY, AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Billie Jean Bolling has appealed from the July 29, 2003, order of the Franklin Circuit Court which affirmed a decision of the Kentucky Retirement Systems denying Bolling's claim for disability retirement benefits.<sup>1</sup> Having concluded that

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<sup>1</sup> In an application for disability retirement, the disability determination procedure is as follows:

the hearing officer, despite substantial evidence in the record, failed to make specific findings supporting his denial of benefits, we vacate the circuit court's order affirming and remand to the Retirement Systems for further specific findings by a hearing officer.

Bolling was born on June 26, 1953, and was employed by the Commonwealth on three separate occasions with Kentucky River Community Care, Inc., in Perry County, Kentucky. Bolling was employed temporarily in 1973, but joined the Retirement Systems full-time in 1974 and worked until August 1978 as a clinical secretary. From May 1979 until September 1984 Bolling was reemployed at the same position. In September 1990 Bolling was reemployed as a clinical secretary, but was subsequently promoted to administrative assistant, and was employed in that capacity until her last day of work on June 25, 1997. Her last day of paid employment was June 30, 1997. Bolling's employer

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1. The claimant petitions a medical review board, whose decision is final if favorable to a claimant. The "medical examiners" review only written records and never examine an applicant. See Kentucky Revised Statutes (KRS) 61.665(1) and (2).
  2. If the claimant is unsuccessful, upon request, a hearing officer conducts a hearing according to KRS Chapter 13B and makes findings of fact, conclusions of law, and a recommendation. See KRS 61.665(3).
  3. The Board of Trustees of the administrator or a Disability Appeals Committee of the board is appointed to make the final administrative decision which can overturn the recommendation of the hearing officer. See KRS 61.665(4).

classified her job duties as sedentary.<sup>2</sup> At the time she stopped working, Bolling's job duties included working with medical records, filing, answering the telephone, and relieving the switchboard operator during lunch.<sup>3</sup> She traveled to one of the various counties around Perry County at least once a week. Bolling also supervised and trained other employees. Bolling testified that she was unable to sit or focus on her work and did not return to work because she was in so much pain.

Bolling's medical history and medical records in the record date back to 1992. Numerous office notes of Dr. George Chaney, Bolling's regular treating physician, dated from March 9, 1992, to November 25, 1995, were filed which related to Bolling's back pain, headaches, and vision problems.<sup>4</sup> In 1992 Dr. Chaney performed a lumbar tap and referred Bolling to Dr.

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<sup>2</sup> KRS 61.600(5)(c)(1) provides as follows:

Sedentary work shall be work that involves lifting no more than ten (10) pounds at a time and occasionally lifting or carrying articles such as large files, ledgers, and small tools. Although a sedentary job primarily involves sitting, occasional walking and standing may also be required in the performance of duties.

<sup>3</sup> Bolling's tasks as administrative assistant were mainly secretarial and clerical. However, Michelle Patrick, one of Bolling's co-workers, testified that Bolling's job duties included travel, filing, working on copiers, fax machines, and postage machines, and taking minutes. Patrick testified that she had the same job as Bolling and knew that Bolling's job required Bolling to work on the machines before calling for technical support.

<sup>4</sup> Bolling also filed medical records from Dr. Chaney dated 1995 through April 1999. These records related to visits for headaches, bronchitis, urinary tract infections, asthma, and anxiety. Apparently, the records prior to 1992 had been destroyed by water damage.

Syamal H.K. Reddy for an evaluation of her vision. Dr. Reddy stated in a letter dated February 25, 1992, that Bolling suffered from "disc edema in the right eye which seems to be the cause for blurred vision" and that she had suffered from migraines for over ten years. Dr. Reddy stated that Bolling could possibly have pseudotumor cerebri<sup>5</sup> and referred Bolling to Dr. Avrom Epstien, a neuro-opthamologist with the University of Kentucky, for a neuro-opthamological consultation relating to her migraine headaches. Dr. Epstein confirmed Bolling had pseudotumor cerebri and letters and copies of visual-field tests from Dr. Epstein were filed dating from 1992 to 1993.

Bolling was then seen by Dr. Phillip Tibbs, a neurosurgeon at the University of Kentucky Spine Center from 1993 to 1997. Her first visit was on May 25, 1993, following her diagnosis of pseudotumor cerebri. Dr. Tibbs performed a thecoperitoneal shunt procedure<sup>6</sup> which he stated gave Bolling a "prompt improvement with resolution of her headaches." Dr. Tibbs's letter dated August 30, 1993, stated that "[t]his patient has minimal visual field depression in the setting of pseudotumor cerebri, recently treated by thecoperitoneal shunt surgery." Dr. Epstein was "pleased for the preservation of

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<sup>5</sup> This is a condition where the intracranial pressure is too high, causing headaches and pressure on the optic nerve.

<sup>6</sup> The purpose of this procedure was to drain spinal cord fluid and to relieve pressure on the optic nerve.

[Bolling's] vision" and recommended "no additional treatment for her psuedotumor[.]"

Bolling then returned to work and continued to improve until August 1994, when she again presented to Dr. Tibbs with blurred vision and an increase in headaches. In September 1994 Bolling underwent a "shuntogram" which was negative for obstruction. Dr. Tibbs's impression was that Bolling's symptoms stemmed from a sinus infection and he released her from his care. Dr. Tibbs saw Bolling again in April 1996 for a follow-up to her shunt surgery. Dr. Tibbs again stated that although Bolling complained of continued headaches,<sup>7</sup> she was doing "exceptionally well."

In July 1996 Bolling presented to Dr. Tibbs complaining of left hip, leg, and back pain.<sup>8</sup> Dr. Tibbs stated that Bolling told him the pain started when she was hospitalized for bronchitis,<sup>9</sup> and she had been unable to work since that time. Dr. Tibbs ordered a lumbar MRI, which revealed a disc herniation at L5-S1. Dr. Tibbs stated in a letter dated August 13, 1996, that there was no need for surgery at that time and that Bolling had returned to work without any difficulty. According to Dr.

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<sup>7</sup> Dr. Tibbs's notes dated April 16, 1996, indicate that these headaches were related to migraines, rather than the recurrent pseudotumor symptomatology.

<sup>8</sup> In 1983 Bolling broke the base of her spine, but there was no indication in the record as to how this occurred.

<sup>9</sup> A discharge summary from Appalachian Regional Healthcare indicates that Bolling had a recurrence of her bronchitis and was again hospitalized in September 1996.

Tibbs's letter dated January 14, 1997, Bolling underwent a successful lumbar microdiscectomy in October 1996, which resolved her leg pain, although she continued to have pain in her hip from time to time. Dr. Tibbs also indicated that Bolling was doing well and was back at work. On April 4, 1997, Bolling underwent a cervical spine MRI which indicated degenerative spurring posterior to C5, C6, and C7, but was otherwise normal.

On June 10, 1997, Bolling presented to Dr. Tibbs complaining that the pain in her left hip and leg was worse. Dr. Tibbs noted that Bolling had what appeared "by exam and history, to possibly be a recurrent herniated disc." During this time, Bolling went to Dr. James D. Adams, her childhood doctor, in April, May, and June 1997, for a second opinion. In a letter to Dr. Adams dated June 10, 1997, Dr. Tibbs stated that Bolling had been pain free until approximately two or three weeks prior when she stepped backward, with a twisting movement, while undressing and had an acute onset of left hip pain radiating down into her leg toward the foot. He also stated in the letter that Bolling had "very minimum-to-no-back pain." Dr. Tibbs's July 15, 1997, letter to Dr. Adams reported that a subsequent MRI was performed which showed a small focal herniation, but no evidence of root compression, and recommended

that Bolling continue her conservative therapy and attempt eventually to get back to work.

In September 1997 Dr. Chaney referred Bolling to Dr. John W. Gilbert at the Spine and Brain Neurological Center. In a chart note dated December 18, 1997, Dr. Gilbert stated that Bolling was unable to tolerate physical therapy and he advised her that her pain would be decreased if she could attempt to lose some weight, which she had not done. He also diagnosed her anxiety and depression. On September 24, 1997, Dr. Gilbert reviewed an MRI film showing some degeneration of L4-L5, but more marked at L5-S1, and a small re-rupture at L5-S1. He diagnosed Bolling with failed back syndrome, L5-S1 HNP, lumbar degenerative disc disease, muscle spasms, pseudotumor and recommended that Bolling have no fine manipulation while on narcotic drugs. On March 18, 1998, Dr. Gilbert diagnosed Bolling with lumbago in addition to his prior diagnosis. His January 27, 1999, record reports that an MRI showed significant disc degeneration at L4-L5 and L5-S1, post laminectomy syndrome on the left, perineal fibrosis, nerve root injury syndrome, and numbness and he also noted that Bolling was still having anxiety and nervousness. This letter also indicated that Dr. Gilbert relied on objective medical evidence to make these findings, including an MRI. Subsequent chart notes revealed that there

were no changes to Bolling's conditions, related to her back and leg pain.<sup>10</sup>

As early as January 7, 1996, Dr. Chaney reported in his notes that he performed a mental status exam on Bolling and found that she suffered from depression. In his April 15, 1996, note, he states that Bolling had anxiety related to her job. He found her anxious, but not depressed, based on the mental status exam he performed. On June 25, 1997, Dr. Chaney conducted another mental status exam and found that Bolling was both anxious and depressed. Bolling saw Dr. Barbara L. Belew, a psychologist, from October 2, 1997, through October 23, 1997. Dr. Belew only saw Bolling on three occasions, and Dr. Belew's diagnosis of Bolling was that she suffered from depression as a result of her medical conditions, inability to work, and divorce. Dr. Belew's final notation indicated that Bolling's symptoms continued.

Bolling then saw Darlene Collins-Bernard, M.A., from January 9, 1998, to April 30, 1999. According to Ms. Collins-Bernard's notes, when she first saw Bolling on January 9, 1998, her depression was better. However, by July 17, 1998, Bolling had severe to extreme depression. Bolling seemed to be doing better at her November 19, 1998, visit. Ms. Collins-Bernard's

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<sup>10</sup> A chart note dated January 27, 1999, revealed that Bolling "does not like" Dr. Tibbs and felt she had not been treated appropriately by him since her pain continued to worsen following her disc surgery in 1996.

notes on February 25 1999, indicated that Bolling had not accepted that she was disabled. On March 13, 1999, Bolling was reported depressed and despondent. The last notation in the record indicated that Bolling seemed to be doing better, but recommended continued cognitive therapy. In October 1998 Dr. Gilbert referred Bolling to Dr. Catherine E. Yen of the Associates in Neurology in Lexington, Kentucky. Bolling saw Dr. Yen three times from October 1998 to March 1999. Dr. Yen recommended that Bolling consider seeing someone for further treatment of her anxiety as needed.

In April 1999 Dr. Gilbert referred Bolling to Dr. Craig Cartia, who treated her at the Pain Care Center at Samaritan Hospital in Lexington, Kentucky. Dr. Cartia noted that Bolling "would benefit from some type of therapy and conditioning[,]" and due to the arthritis in her knees and ankles, he recommended aqua therapy. He also continued to treat Bolling's pain with the same medication Dr. Chaney had originally prescribed.

On May 25, 1999,<sup>11</sup> Dr. Chaney was deposed by Bolling's attorney and testified as follows:

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<sup>11</sup> Dr. Chaney testified that he relied on objective medical evidence, including abnormal examinations, abnormal x-rays, abnormal MRI scans of her back, abnormal mental status exams, and objective findings at the time of Bolling's surgery.

- A. Well, yeah, she also is fairly obese and her last weight was 280 - or 290 pounds[.]
- Q. Does that aggravate any of these conditions?
- A. Sure. It would aggravate her back condition, and in a roundabout way it would aggravate the headaches, because the obesity contributes in a roundabout way to blood pressure elevation and to the increase in spinal fluid pressure.
- Q. Have you ever considered any type of diet or weight reduction program?
- A. Yeah, but this has not been - she's been instructed many times of dietary modifications, but her mother is obese, her father is obese, one of her brothers is obese. . . . And, of course, depression plays a role in contributing to the obesity, too, and a lot of people who are depressed often have eating disturbances.
- . . .
- Q. [W]e've kind of gone through the diagnosis, what type of prognosis do you have for this patient?
- A. I think her prognosis is poor, overall poor, and she will always have pain. She going to have - always have problems with blood pressure and asthma and she's always going to have these headaches. She's had, you know, quite aggressive therapy for the pain.
- Q. And let me get you to describe what type of limitations, occupational type limitations . . . she'll have as a result of this[.]

A. Well, I know that she worked in a secretarial type job. I do know that was what she was doing. At one time she was doing some transcription in medical records and things like that. Her limitations would be - I would say that she should lift no more than 10 pounds on an occasional basis. She should avoid prolonged sitting, prolonged standing, and prolonged walking. She should avoid repetitive bending, kneeling, crouching, crawling and stooping. She should avoid temperature extremes. She should avoid heights. She should avoid moving objects. She should avoid work stresses. She should avoid - did I say dusts and humidity and things like that.<sup>12</sup>

Q. What about her ability to return to work?

A. No.

. . .

Q. [C]ould you continue and describe whether Billie could go back to the job which she had?

A. I still don't think she can go back to her job. That job description is essentially that of a sedentary job, but I don't think that she's going to be able to not do any bending, twisting and turning for pulling of the charts and records and things like that. Furthermore, if you take all of her physical complaints aside and she has to go to supervise other people, then her anxiety and depression is going to

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<sup>12</sup> The Retirement Systems argues that this is the only evidence of current physical limitations from Dr. Chaney and is well within the job duties required in the sedentary position of administrative assistant held by Bolling.

limit that, because she has marked overwhelming work stresses, and her stresses were precipitated by some of the things that's happened to her at work and I believe that in and of itself contributed somewhat to her anxiety and depression, so I don't think she could be in a supervisory role or even be supervised when things like that precipitate crying, feelings of hopelessness and worthlessness and make her want to just go in a room and lock herself up. You can't supervise people doing that.<sup>13</sup>

On July 14, 1997, Bolling filed an application for disability retirement benefits.<sup>14</sup> Her claim for disability stated as follows:

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<sup>13</sup> Dr. Chaney also testified that Bolling's back pain will cause her to be tired and not able to work a full day. He also testified that her pain medication would interfere with her "cognizant functioning."

<sup>14</sup> KRS 61.600 provides in pertinent part:

- (1) Any person may qualify to retire on disability, subject to the following conditions:  
  
. . .
- (3) Upon the examination of the objective medical evidence by licensed physicians pursuant to KRS 61.665, it shall determine 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

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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.
- (4) Paragraph (d) of subsection (3) of this section shall not apply if:
- (a) The incapacity is a result of bodily injury, mental illness, disease, or condition which has been substantially aggravated by an injury or accident arising out of or in the course of employment; or
  - (b) The person has at least sixteen (16) years' current or prior service for employment with employers participating in the retirement systems administered by the Kentucky Retirement Systems.
- (5) (a)1. 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.
2. The determination of a permanent incapacity shall be based on the medical evidence contained in the member's file and the member's residual functional capacity and physical exertion requirements.
- (b) The person's residual functional capacity shall be the person's capacity for work activity on a regular or continuing basis. The person's physical ability shall be assessed in

I have terrible pain in my left hip and down my leg. Last October [1996] I had surgery to remove a bulging disc. It got better for a while, then in late May or early June it started again. The pain is so great when I sit in a chair that I can't focus. I also have severe migraines which have increase[d] in intensity and frequency. This pain keeps me from focusing [and] my vision becomes blurred. I also become nauseated and vomit when I have them. I also have arthritis in my C-spine, hands, knees [and] ankles [and] chronic bronchitis [and] asthma.

On July 28, 1997, Dr. Chaney signed a form regarding Bolling's claim for disability benefits and indicated that Bolling suffered from lumbar disc disease, pseudotumor cerebri, anxiety, depression, migraine headaches and osteoarthritis. On December 12, 1997, Dr. Belew signed a form regarding Bolling's claim for disability benefits and indicated that Bolling experienced "severe pain from several medical problems and has

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light of the severity of the person's physical, mental, and other impairments. The person's ability to walk, stand, carry, push, pull, reach, handle, and other physical functions shall be considered with regard to physical impairments. The person's ability to understand, remember, and carry out instructions and respond appropriately to supervision, coworkers, and work pressures in a work setting shall be considered with regard to mental impairments. Other impairments, including skin impairments, epilepsy, visual sensory impairments, postural and manipulative limitations, and environmental restrictions, shall be considered in conjunction with the person's physical and mental impairments to determine residual functional capacity.

become unable to work." She stated that "the combination of pain, financial stress/dependency, and loss of satisfaction that she had gained from work had produced severe depression." Both physicians certified that Bolling was "[m]entally or physically incapacitated to engage in the job which [she] held as of [her] last day of paid employment, or a job of like duties, and such incapacity is expected to continue for not less than 12 months from [her] last day of paid employment, or is expected to result in death."

On February 2, 1999, the Retirement Systems's medical review board<sup>15</sup> denied Bolling's claim for disability retirement benefits on the grounds that she presented no objective medical evidence<sup>16</sup> of an impairment that would prevent her from performing her usual work activity. Upon Bolling's request, an administrative hearing was held on May 28, 1999, before a

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<sup>15</sup> The medical review board included Dr. William P. McElawain, Esten S. Kimbel, and Horace Adams.

<sup>16</sup> KRS 61.510(33) provides:

"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[.]

hearing officer for the Retirement Systems, almost two years after Bolling's last day of paid employment. The hearing officer heard testimony from Bolling, Cecilia Stewart, Medical Records Director for Kentucky River Community Care, Inc., and Bolling's co-workers Michelle Patrick, Vonda Watts, and Jim Short. The hearing officer also reviewed Bolling's medical records.

Bolling testified that she was unable to perform her job now because of the pain in her low back and her legs, chronic obstructive pulmonary disease, bronchitis<sup>17</sup> and her asthma. She further testified that her low back, numbness in her legs, breathing, migraines, depression, anxiety, as well as the pain associated with these problems, and her weight of 290 pounds, caused her the most problems.<sup>18</sup> Bolling's co-workers testified as to Bolling's daily routine and the fact that Bolling was not allowed to take work home to make up for sick days. All three co-workers testified that they observed Bolling at work in great pain and were aware of her job duties and did not believe she could perform them.

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<sup>17</sup> The Retirement Systems argues that while Bolling had been hospitalized for bronchitis, asthma, and sinus infections, there was no lung function tests in the record to show her ability to breath was permanently damaged due to these problems. It further argues that Bolling did not allege disability due to breathing problems.

<sup>18</sup> Bolling testified that she can do very little and rests most of the time, although she occasionally washes dishes, she experiences pain when both sitting and standing and is on numerous medications.

Bolling and Short testified that Bolling had requested accommodations in her work including a lumbar support. A letter from Phillis Smith, Benefits Manager at Kentucky River Community Care, Inc., dated August 8, 1997, stated that up until the day of her resignation, Bolling had not requested accommodations. However, the purchase orders of record indicate otherwise. Bolling filled out two purchase orders dated March 31, 1997, and April 16, 1997, requesting a lumbar support. Stewart testified that Bolling needed a doctor's request for these purchases, but never told Bolling of this requirement. The purchase orders were simply denied. Short did try to help Bolling find an appropriate chair, but none helped her lower back. Dr. Chaney testified that Bolling would not be able to work, even with accommodations.

In his report and recommended order dated June 16, 2000, the Retirement Systems's hearing officer, pursuant to KRS 61.500, denied Bolling's claim for disability benefits finding that she "failed to establish by objective medical evidence the existence of a permanent mental or physical impairment which would prevent her from performing her job as Administrative Assistant, or a similar job from which she received her last paid employment." Bolling timely filed exceptions to the report which were denied on July 19, 2000, when the Disability Appeals Committee of the Retirement Systems adopted its hearing

officer's findings of fact, conclusions of law, and recommended order.

On August 18, 2000, Bolling filed a petition for judicial review in the Franklin Circuit Court requesting that the final order of the Retirement Systems be reversed and that it be ordered to pay her disability and associated retirement benefits, including but not limited to, periodic payments, health insurance, regular retirement, back pay, and all previously accrued payments which should have been paid. The Retirement Systems filed its answer on September 6, 2000,<sup>19</sup> stating that the denial of Bolling's application for disability retirement benefits was based upon substantial evidence of record pursuant to KRS 61.600.<sup>20</sup>

On July 29, 2003, the circuit court entered its opinion and order denying Bolling's petition and affirmed the Retirement Systems's denial of benefits. The circuit court stated:

Although both parties can point to evidence in the record to support their position, the Court finds that the [Retirement Systems] based [its] decision on substantial evidence in the record and correctly applied the law to this case. The

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<sup>19</sup> The Retirement Systems also denied that Bolling was a member of the County Employees Retirement System, but rather stated she was a member of the Kentucky Employees Retirement Systems.

<sup>20</sup> While there is no indication in the record as to the delay in the circuit court, a briefing schedule was not set in this case until October 16, 2002.

Court finds that the [Retirement Systems] did not act arbitrarily and that the record does not compel a contrary decision. The Hearing Officer found that [Bolling] failed to meet her burden of proof in showing that she met the criteria contained in KRS 61.600, because she failed to show [by] objective medical evidence that she was unable to perform her work in a sedentary, accommodated position. The Court finds [Bolling's] remaining arguments unpersuasive.

This appeal followed.

KRS 61.600(3)(c) requires that the person seeking benefits must have been, since his or her last day of paid employment, mentally or physically incapacitated to perform the job from which he or she received his or her last paid employment, and such proof must be based on objective medical evidence. Furthermore, the incapacity must be deemed permanent.<sup>21</sup> A claimant for disability retirement benefits has the burden of proving she satisfies the statutory criteria which entitles her to those benefits.<sup>22</sup> When a claimant is unsuccessful in obtaining administrative relief, the question on appeal is "whether the evidence was so overwhelming, upon consideration of the entire record, as to have compelled a

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<sup>21</sup> KRS 61.600(3)(c).

<sup>22</sup> See Energy Regulatory Commission v. Kentucky Power Co., 605 S.W.2d 46, 50 (Ky.App. 1980).

finding in [appellant's] favor,"<sup>23</sup> and, whether the denial of the relief sought was arbitrary.<sup>24</sup>

It is fundamental law "that administrative agencies are creatures of statute and must find within the statute warrant for the exercise of any authority which they claim."<sup>25</sup> "[F]indings of fact are essential to support the orders of administrative agencies, at least where the order issued by the agency rests upon a factual determination."<sup>26</sup> "Other administrative agencies are required to make specific findings as to basic facts which support an ultimate finding."<sup>27</sup> There is no reason for an exception to this rule, in the case of disability retirement benefits.<sup>28</sup> The goal of the administrative

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<sup>23</sup> Wolf Creek Collieries v. Crum, 673 S.W.2d 735, 736 (Ky.App. 1984).

<sup>24</sup> Bourbon County Bd. of Adjustments v. Currans, 873 S.W.2d 836, 838 (Ky.App. 1994); Bowling v. Natural Resources & Environmental Protection Cabinet, 891 S.W.2d 406, 409 (Ky.App. 1995)(quoting Commonwealth, Transportation Cabinet v. Cornell, 796 S.W.2d 591, 594 (Ky.App. 1990)) (stating that "[i]n determining whether an agency's action was arbitrary, the reviewing court should look at three primary factors. The court should first determine whether the agency acted within the constraints of its statutory powers or whether it exceeded them. . . . Second, the court should examine the agency's procedures to see if a party to be affected by an administrative order was afforded his procedural due process. The individual must have been given an opportunity to be heard. Finally, the reviewing court must determine whether the agency's action is supported by substantial evidence. . . . If any of these three tests are failed, the reviewing court may find that the agency's action was arbitrary"); Dawson v. Driver, 420 S.W.2d 553, 555 (Ky. 1967).

<sup>25</sup> Department for Natural Resources & Environmental Protection v. Stearns Coal & Lumber Co., 563 S.W.2d 471, 473 (1978).

<sup>26</sup> Pearl v. Marshall, 491 S.W.2d 837, 839 (Ky. 1973).

<sup>27</sup> Chemetron Corp. v. McKinley, 574 S.W.2d 332, 333 (Ky.App. 1978).

<sup>28</sup> Chemetron Corporation, 574 S.W.2d at 334, states:

process must be to insure uniformity of treatment by administrative agencies to all persons who are similarly situated. Without specific findings of fact, it is difficult upon review, if not impossible, to determine whether the administrative agency has acted arbitrarily or within its powers.<sup>29</sup>

Our standard of review<sup>30</sup> of a circuit court's affirmance of an administrative action is to determine whether

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We think it would be infinitely better if the [administrative agency] in each case would make a specific finding of the basic facts necessary to support the ultimate finding rather than expect reviewing courts to hold that the necessary basic findings are implicit in the ultimate finding. We have not been cited to any authority which holds that we must always indulge the assumption that necessary basic findings were made. In view of the evidence here, which we regard as weak, we do not think this is a proper case to indulge such an assumption.

<sup>29</sup> Pearl, 491 S.W.2d at 839.

<sup>30</sup> Pursuant to KRS 13B.150(1), "[r]eview of a final order shall be conducted by the court without a jury and shall be confined to the record[.]" Moreover, KRS 13B.150(2) states as follows:

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:

. . . .

- (c) Without support of substantial evidence on the whole record;
- (d) Arbitrary, capricious, or characterized by abuse of discretion; [or]

. . . .

- (g) Deficient as otherwise provided by law.

the circuit court's findings upholding the Retirement Systems's decision are clearly erroneous.<sup>31</sup> The circuit court's role as an appellate court is to review the administrative decision, not to reinterpret or reconsider the merits of the claim,<sup>32</sup> and thus, to determine both "[i]f the findings of fact are supported by substantial evidence of probative value" and "whether or not the administrative agency has applied the correct rule of law to the facts so found."<sup>33</sup> "The test of substantiality of evidence is whether . . . it has sufficient probative value to induce conviction in the minds of reasonable men."<sup>34</sup> As long as there is substantial evidence in the record to support the agency's decision, the court must defer to the agency, even if there is conflicting evidence.<sup>35</sup>

We must consider the findings of fact relied upon by the Retirement Systems in its denial of benefits. In his

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<sup>31</sup> Johnson v. Galen Health Care, Inc., 39 S.W.3d 828, 833 (Ky.App. 2001); See also Kentucky Rules of Civil Procedure (CR) 52.01.

<sup>32</sup> Kentucky Unemployment Insurance Commission v. King, 657 S.W.2d 250, 251 (Ky.App. 1983); Kentucky Bd. of Nursing v. Ward, 890 S.W.2d 641, 642 (Ky.App. 1994).

<sup>33</sup> Southern Bell Telephone & Telegraph Co. v. Kentucky Unemployment Insurance Commission, 437 S.W.2d 775, 778 (Ky. 1969)(citing Brown Hotel Co. v. Edwards, 365 S.W.2d 299 (Ky. 1962)). See also Kentucky Commission on Human Rights v. Fraser, 625 S.W.2d 852, 856 (Ky. 1981).

<sup>34</sup> Kentucky State Racing Commission 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)).

<sup>35</sup> Fraser, 625 S.W.2d at 856.

recommended order denying benefits, the Retirement Systems's hearing officer made the following findings:

- 1) The Claimant meets the employment service requirements of KRS 61.600 in that she has 81 months of total service and at least 12 months which are current service.
- 2) The Claimant's application for disability retirement benefits was timely filed on July 14, 1997. Her last date of paid employment was June 30, 1997.
- 3) Claimant's position as an Administrative Assistant falls within the category of sedentary work.
- 4) The Claimant's medical conditions relate to her back, migraine headaches, breathing and depression and anxiety. It is found that the migraine headaches have documented history of existing prior to her re-employment date in 1990. Dr. Epstein and Dr. Reddy make reference to the history of migraines.
- 5) The Claimant's back condition, apparently after Dr. Tibbs' surgery in 1996, improved. Thereafter, the Claimant began experiencing problems with her back as indicated by Dr. Gilbert and the MRI reflects some bulging but apparently no nerve root compression. The Claimant apparently did not tell the doctors that she fell in November and Dr. Gilbert's report of January, 1999 makes no reference to a fall, nor does Dr. Cartia's report of April 2, 1999 make any reference to a fall. . . . The November 17, 1998 MRI report does not contain a reference to her fall either. . . .

- 6) The Claimant has been diagnosed with a pain syndrome which either causes or compounds her emotional state. However, the record does not contain any information as to treatment for her depression and anxiety from a mental health specialist other than in October of 1997 from Dr. Belew and Ms. Collins-Bernard. . . . Dr. Chaney would include her work stresses as part of the problem with her emotional state. This apparently is what happened in June of 1997 when he saw her prior to putting her on leave.
- 7) It is found that the Claimant has a multiple of problems, in particular previous surgery and possible injury to her back after her last date of paid employment in November of 1998 when she fell, although she injured her shoulder and leg in the fall.
- 8) The limitations suggested by Dr. Chaney in his deposition would allow her to perform sedentary work. These include lifting no more than 10 pounds, avoiding prolonged sitting, standing and walking and repetitive bending, kneeling and stooping. Claimant's job duties involved minimal bending and stooping, lifting less than 10 pounds, and the ability to alternate sitting and standing. . . .
- 9) It is further found that the Claimant has not presented objective medical evidence to support her claim that she is unable to perform the sedentary duties that she performed previously as a result of her conditions, especially in view of the fact that her pain has been improving as indicated by Dr. Gilbert . . . and Ms. Collins-Bernard . . . in 1999.

10) It is further unclear how the Claimant's migraine headaches impact her ability to work. However, if they are a major factor then she would be denied because of a pre-existing condition.

An administrative agency is afforded great latitude in evaluating evidence and determining the credibility of witnesses. Although a reviewing court might have come to a different conclusion had it heard the case de novo, such disagreement does not deprive the agency's decision of support by substantial evidence.<sup>36</sup> Further, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence."<sup>37</sup> Indeed, an administrative agency's trier of facts may hear all the evidence and choose the evidence that he believes.<sup>38</sup> While, "[t]he 'clearly erroneous' standard narrows the scope of review, [ ] it is not without teeth. The [Retirement Systems] has not been granted an unbridled discretion, and courts on review are not required to uphold arbitrary or unreasonable awards of damages."<sup>39</sup>

When considering a claim, an administrative officer is not required to provide a detailed analysis of the facts and the

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<sup>36</sup> Bowling, 891 S.W.2d at 410.

<sup>37</sup> Fuller, 481 S.W.2d at 307.

<sup>38</sup> Bowling, 891 S.W.2d at 410.

<sup>39</sup> Fraser, 625 S.W.2d at 856.

law.<sup>40</sup> However, he is required to set forth sufficient facts to support the conclusions that are reached and to permit a meaningful appellate review.<sup>41</sup> Although a finding for which there is substantial evidence may not normally be disturbed on appeal, the parties are "entitled to at least a modicum of attention and consideration to their individual case[,]"<sup>42</sup> and to be certain that the decision was the product of a correct understanding of the evidence.<sup>43</sup>

We must determine whether the Retirement Systems "complied with the statute by making adequate findings of fact."<sup>44</sup> Therefore, the question on appeal in this case is not whether there was substantial evidence in the record to support the conclusion, but whether the decision contained adequate findings of fact to explain the basis for the conclusion. Bolling was entitled to have "the benefit of knowing the factual basis" for the Retirement Systems's determination that she was not entitled to the disability retirement benefits. The Retirement Systems's hearing officer used 12 and one-half pages to discuss the medical evidence but used less than two pages to

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<sup>40</sup> Big Sandy Community Action Program v. Chaffins, 502 S.W.2d 526 (Ky. 1973).

<sup>41</sup> Shields, 634 S.W.2d at 444.

<sup>42</sup> Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47, 49-50 (Ky.App. 1988).

<sup>43</sup> See Cook v. Paducah Recapping Service, 694 S.W.2d 684 (Ky. 1985).

<sup>44</sup> Shields v. Pittsburg & Midway Coal Mining Co., 634 S.W.2d 440, 444 (Ky.App. 1982.)

state his findings of facts. We conclude, as this Court did in the Kentland case, that the findings in this case are "woefully inadequate."<sup>45</sup> Despite substantial evidence in the record to support its decision, the Retirement Systems failed to provide the factual basis for its determination.

Specifically, Finding No. 3 established Bolling's position as administrative assistant as sedentary as classified by the Retirement Systems. However, there was contrary testimony by Bolling and her co-workers that her actual job duties were outside the definition of sedentary in KRS 61.510(33).<sup>46</sup> In Findings No. 8 and No. 9, the Retirement Systems adopted Dr. Chaney's restrictions placed on Bolling and found that they would not restrict sedentary work. However, the Retirement Systems ignored the fact that in conjunction with these limitations, Dr. Chaney also stated that Bolling could not return to her job even with those restrictions. Dr. Chaney was deposed on May 25, 1999, with no cross-examination and his deposition was made part of the record. While it was in the Retirement Systems's discretion to accept Dr. Chaney's opinion,

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<sup>45</sup> Kentland, 743 S.W.2d at 50.

<sup>46</sup> See Knott County Board of Education v. Williams, 348 S.W.2d 715, 717 (Ky.App. 1961)(stating that "[t]he testimony of appellee and other lay witnesses who observed him was competent probative evidence of his disability, and when taken with other evidence as to injury and disability is sufficient to support the Board's findings").

it should have stated in its findings sufficiently why it was rejected.<sup>47</sup>

Finding No. 9 indicates that there was no objective medical evidence presented that during the statutory period Bolling could not perform her work duties. Without explanation, the Retirement Systems disregarded Dr. Chaney's testimony that his opinions were based on objective medical evidence.

Findings No. 4 and No. 10 indicate that Bolling had a documented history of migraine headaches prior to her re-employment date in 1990. However, the Retirement Systems failed to discuss the undisputed fact that Bolling had unrelated headaches due to her pseudotumor cerebri and the effect that fact had on Bolling's disability claim.<sup>48</sup> The Retirement Systems should have provided a finding, based on the medical evidence, establishing that the headaches Bolling suffered from during the proscribed period were related solely to her migraines. Further, there is only a mention in Finding No. 4 that Bolling's medical condition relates to her breathing. However, there is no elaboration as to the evidence regarding her breathing condition.

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<sup>47</sup> Mengel, 618 S.W.2d at 187.

<sup>48</sup> The Retirement Systems argues that while Bolling still complained of migraines, they are a different etiology than the pseudotumor cerebri headaches and pre-existed her re-employment date and are thus excluded as basis for Bolling's application as found by the Retirement Systems.

Finding No. 5 discusses Bolling's low back pain. Despite the extensive record regarding Bolling's low back condition, the Retirement Systems's findings regarding the issue emphasize the failure of the medical records to reference her fall. This finding in no way explains why the Retirement Systems found that Bolling's low back pain did not qualify her for disability benefits. For the same reasons, Finding No. 7 provides no support for the denial of Bolling's disability claim as it discusses a fall after the 12-month statutory period.<sup>49</sup>

Finding No. 6 discusses Bolling's emotional state. The Retirement Systems acknowledged that Bolling had pain which "causes or compounds" her emotional state. The Retirement Systems acknowledged Dr. Chaney's undisputed testimony that he saw Bolling for depression prior to her last date of paid employment, but disregarded it with no explanation. Further, the Retirement Systems stated in Finding No. 9 that it based its decision on the notes of Ms. Collins-Bernard in 1999. A review of those notes only indicate that Bolling was doing better, but does not establish that she was ready or capable of returning to work, and advised that she should continue cognitive therapy.

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<sup>49</sup> Bolling discussed at length in her brief the evidence surrounding her fall in November 1998. Bolling argued that the fall was used as a basis for the Retirement Systems's denial of her disability retirement claim, but its relevance is not disclosed. Bolling stated that the fall was not a source of her disability and it occurred more than 12 months after the last day of paid employment.

Dr. Chaney further testified that Bolling's depression would prevent her from working.

The Retirement Systems in its brief sets out the factual basis why it believes that it was correct to deny Bolling disability retirement benefits.<sup>50</sup> Had the Retirement Systems made these facts part of its findings, Bolling would have been adequately advised of the substantial evidence supporting the denial. Being mindful our high standard of review, we hold as a matter of law that the circuit court erred

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<sup>50</sup> The Retirement Systems argues as follows: There is no objective medical evidence from 1997 establishing that Bolling was totally and permanently incapacitated as of her last day of paid employment as required by KRS 61.600. According to Dr. Gilbert's notes, Bolling less than three months after her last day of paid employment, had full range of motion in her thoracic and lumbar spine with no deformation or restriction, no fibro muscular tenderness, tightness, or trigger points. On March 18, 1998, almost 9 months after her last day of paid employment, Bolling's range of motion was slightly decreased and she had a positive straight leg raising test at 25 degrees. These are the first indications of any degree of functional impairment and they do not occur until several months after her last day of paid employment. There is no objective medical evidence of record indicating that Bolling had any functional impairment regarding her back as of her last day of paid employment as evidence from the time period nearest to her last day of paid employment indicates that Bolling had full range of motion in her spine with no restrictions. It was not until almost nine months after Bolling's last day of paid employment, after Bolling had quit physical therapy and become deconditioned to work that Bolling had a slight decrease in her range of motion. Bolling's back problems have worsened somewhat over time due to her extremely sedentary lifestyle and not working but when she left her employment on June 30, 1997, she still had full range of motion in her cervical and thoracic lumbar spine as shown by Dr. Gilbert's examination on September 24, 1997, and she was not impaired from working a sedentary job. The Retirement Systems argues that Bolling was diagnosed with depression four months after her last day of employment and it became more severe ten months after her last day of paid employment. There are mental function evaluations in the record showing that Bolling is functionally incapacitated by her depression as of her last day of employment. Even if she was depressed on that date, it should not have extended over 12 months with proper treatment. All evidence of record indicates that Bolling's cognitive functioning was intact. There is no objective medical evidence of record indicating that Bolling was totally or permanently mentally functionally incapacitated as of her last day of paid employment.

in affirming the Retirement Systems's denial of Bolling's petition for disability retirement benefits and should have remanded the case to the Retirement Systems for more specific findings based on the substantial evidence of record.<sup>51</sup> We conclude the Retirement Systems's findings in this case are insufficient to apprise this Court and the parties of the basis of his decision, and thus hampers our ability to conduct a meaningful appellate review.<sup>52</sup> In the absence of sufficient findings by the Retirement Systems, this Court is not authorized to make its own factual findings,<sup>53</sup> but must remand the case to the Retirement Systems for further proceedings.<sup>54</sup>

Bolling addresses several other issues in her appeal, none of which has any merit. Throughout her brief, Bolling asserts that the Retirement Systems did not preserve its arguments prior to the administrative hearing as the statutory requirements of the notice of hearing under KRS 13B.050(3)(d) were not met and further Bolling's motion for a more definite statement was denied. However, Bolling was given notice of the hearing on April 9, 1999, and the notice stated the issues to be

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<sup>51</sup> City of Louisville v. Louisville Professional Firefighters Assoc., Local Union No. 345, 813 S.W.2d 804, 808 (Ky. 1991).

<sup>52</sup> See Kentland, 743 S.W.2d at 47; and Shields, 634 S.W.2d at 440.

<sup>53</sup> See Kentucky Commission on Human Rights v. Lesco Manufacturing & Design Co., Inc., 736 S.W.2d 361, 364 (Ky.App. 1987).

<sup>54</sup> KRS 13B.150(2).

decided. We agree with the circuit court's conclusion that this notice satisfies the Retirement Systems's duty to notify Bolling of the issues presented.

Bolling also argues that the Retirement Systems violated the Kentucky Unfair Claims Settlement Practices Act. This act applies to insurance policies and settlements. Bolling has not explained, nor do we see, how this Act applies to the Retirement Systems and its duties to Bolling.

Further, we do not follow Bolling's argument regarding the Retirement Systems's fiduciary relationship in this case. Bolling also argues that the medical forms submitted to her treating physicians by the Retirement Systems were inadequate because there was no place on the forms for the physicians to list the objective medical evidence upon which he or she based their opinion and no place to list recommended limitations. In reviewing the requirements of KRS 61.665(2), we conclude that the forms comply with the statute. There is no evidence that the Retirement Systems relied solely on the information provided on these medical forms, as there were also doctors' notes, letters, and a deposition contained in the record.

Bolling argues that the medical examiners on the medical review board were not physicians "practicing in the state," as required by statute because they were not actively engaging in practicing medicine when deciding Bolling's case.

Bolling argues that "practicing in the state" is not defined and by its ordinary meaning requires "actual hands on treatment of patients." This Court in McManus v. Kentucky Retirement Systems,<sup>55</sup> ruled that the statute "merely requires that the examiners be licensed to practice in the state[, and that it] is clear and unambiguous" [citations omitted].<sup>56</sup> We are not persuaded by Bolling's arguments that McManus should be overruled.

Thus, we hold that, despite substantial evidence in the record, the Retirement Systems as a matter of law failed to provide sufficient findings to inform Bolling of the basis of the denial of her claim, and thus, the circuit court's affirmance of the Retirement Systems's denial was erroneous. Accordingly, we vacate the order of the Franklin Circuit Court and remand this matter to the Retirement Systems to make specific findings sufficient for appellate review.

ALL CONCUR.

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<sup>55</sup> 124 S.W.3d 454 (Ky.App. 2004).

<sup>56</sup> Id. at 460.