

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2008-CA-001299-MR

KENTUCKY RETIREMENT SYSTEMS

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE THOMAS D. WINGATE, JUDGE  
ACTION NO. 07-CI-00705

MILDRED PATTON

APPELLEE

OPINION  
REVERSING

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BEFORE: CLAYTON AND TAYLOR, JUDGES; KNOPF,<sup>1</sup> SENIOR JUDGE.

CLAYTON, JUDGE: Kentucky Retirement Systems (KERS) appeals from a Franklin Circuit Court order reversing a prior decision of the KERS that denied Mildred Patton's (Patton) application for enhanced disability retirement benefits.

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

The sole issue before our Court is whether the agency relied on substantial evidence in making its decision. Finding that ample evidence existed to support the conclusion, we reverse the Franklin Circuit Court order.

Patton is 60 years old. Her educational background consists of a high school diploma and a commercial driver's license. Since 1980, Patton has been employed by the Nelson County Board of Education as a bus driver. The position was sedentary in nature. Patton's position involved sweeping the bus, driving the bus, completing paperwork, and sitting for long periods of time.

On March 10, 2005, Patton filed a notification of retirement in which she requested early retirement benefits due to her condition of non-Hodgkin's lymphoma<sup>2</sup>. Patton was diagnosed with the disease in 1995. Due to periodic relapses she underwent chemotherapy treatment for the disease in 2003 and 2005. Patton complained of fatigue, weakness, slowed reflexes, slow responses, and decreased ability to concentrate following treatments. The Medical Review Board (Board) denied her application and found that she failed to present objective medical evidence to establish that she was totally and permanently unable to perform her job or a job of like duties.

On October 31, 2005, Patton submitted statements from her treating physicians to establish that she was permanently and totally disabled. Nonetheless, KERS denied Patton's claim. Once again, the Board found that Patton failed to

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<sup>2</sup> Patton's application was filed pursuant to KRS 61.600.

provide evidence of total and permanent functional incapacity as of her last day of employment.

After her claim was denied for the second time, Patton requested an administrative hearing. The hearing officer issued findings of fact, conclusions or law and recommended that Patton's claim be denied. The officer once again reiterated that the claim lacked specific medical evidence of a continuous medical problem. The hearing officer pointed out that Patton has low grade non-Hodgkin's lymphoma, which only required observation and testing from 1995-2003. In 2004 and 2005, Patton suffered relapses that required additional treatment. At the time of Patton's retirement, her condition was in remission and she had completed the chemotherapy treatments which caused her increased fatigue and diminished concentration. Patton did not present any evidence which indicated that her condition had worsened or that she experienced an increased effect of the disease more than she had in previous years.<sup>3</sup>

Patton appealed the decision to the Franklin Circuit Court which reversed the decision on June 11, 2008. The court reasoned that subsequent treatment caused severe fatigue and symptoms that would preclude her from working safely as a bus driver. The court stated "that [Patton] carries a precious cargo each and everyday. It would be remiss to require the Petitioner to continue her duties when doing so would place numerous school children at risk on a daily basis." This appeal follows.

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<sup>3</sup> The record reflects that Patton also suffered from back problems and hearing loss. Patton's appeal, however, did not focus on these illnesses.

Our review of the administrative agency decision is limited to whether the decision was arbitrary or unsupported by substantial evidence. *American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission*, 379 S.W.2d 450, 454 (Ky. App. 1964); *Thompson v. Kentucky Unemployment Ins. Com'n*, 85 S.W.3d 621, 624 (Ky. App. 2002). We may not substitute our opinion for the opinion of the administrative agency. *Id.*

An administrative agency is afforded great discretion to determine the credibility of witness and to assign weight to the evidence. *Bowling v. Natural Resources and Environmental Protection Cabinet*, 891 S.W.2d 406, 409-10 (Ky. App. 1995). Conflicting evidence alone does not indicate an abuse of discretion by the trier of fact. Instead, the agency has the ability to weigh the evidence.

Patton qualified to receive benefits as long as she met the requirement of total and permanent incapacitation. KRS 61.600. Patton presented medical records and information obtained from Dr. Robert Hendren stating that claimant suffered from fatigue, nausea and bone marrow suppression from chemotherapy, which he considered disabling. There was no indication, however, that these symptoms would continue months or years after the completion of chemotherapy. Further, the opinions of the other treating physicians did not indicate a permanent incapacitation.

In addition, we disagree with the Circuit Court's analysis which indicated that agency's must be more rigid when deciding a case involving children's safety. Although we certainly recognize the importance of safe

transportation for children, the law makes no distinction between a school bus driver and another type of worker. Each worker must meet the permanent incapacity requirement under KRS 61.600.

While we may have arrived at another conclusion, the evidence was not so overwhelming that Patton was permanently and totally disabled. Moreover, we find that substantial evidence exists to indicate that Patton's condition would likely be temporary.

Accordingly, the Franklin Circuit Court order is reversed.

KNOPF, SENIOR JUDGE, CONCURS.

TAYLOR, JUDGE, DISSENTS BUT DOES NOT FILE SEPARATE  
OPINION.

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