

RENDERED: NOVEMBER 10, 2011; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2010-CA-001682-MR

BOARD OF TRUSTEES OF KENTUCKY  
RETIREMENT SYSTEMS

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE THOMAS D. WINGATE, JUDGE  
ACTION NO. 09-CI-00381

ANTHONY J. BONNER

APPELLEE

OPINION  
AFFIRMING IN PART,  
REVERSING IN PART AND REMANDING

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BEFORE: ACREE, CLAYTON AND WINE, JUDGES.

ACREE, JUDGE: The Board of Trustees of the Kentucky Retirement Systems appeals the August 9, 2010 Opinion of the Franklin Circuit Court reversing the Board's order denying Anthony Bonner's petition for disability retirement benefits.

We affirm in part, reverse in part, and remand the matter to the circuit court for additional findings.

### ***Background***

Anthony Bonner began permanent employment as a custodian for the Jefferson County Public Schools on April 5, 1993, and his membership in the Kentucky Retirement Systems began on that date.<sup>1</sup> Over the course of the ensuing years, Bonner periodically experienced a number of health problems of varying severity. The record reflects that he last performed his job duties in February 2006. Bonner's last day of paid employment was June 30, 2006. He filed for disability retirement benefits in November 2006 pursuant to Kentucky Revised Statute (KRS) 61.600 *et seq.*, after undergoing talonavicular fusion surgeries on his left foot in June and September 2006.

After his claim was twice rejected, Bonner invoked his right to a hearing in accordance with KRS 61.665(3). The bases upon which Bonner claimed to be disabled were various. His purportedly disabling ailments included blindness in his right eye, a foot deformity, surgical fusion of the talonavicular joint,<sup>2</sup> a torn rotator cuff which had been surgically repaired, morbid obesity, sleep apnea, pain in his right knee and both feet, diabetes, and hypertension. Ultimately, the hearing officer was not persuaded by Bonner's evidence and recommended that the Board

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<sup>1</sup> As an employee of the Jefferson County Public Schools, Bonner participated in the County Employees Retirement System (CERS), which is administered by the Kentucky Retirement Systems. KRS 61.645(1).

<sup>2</sup> This opinion will refer to the foot deformity and talonavicular fusion surgery, and Bonner's residual disability collectively as his "foot and ankle" condition.

deny Bonner's petition. The recommendation was based upon the hearing officer's conclusion that all of Bonner's ailments were either not disabling or pre-existed his membership in the Kentucky Retirement Systems. The hearing officer also classified Bonner's job duties as medium work as defined by KRS 61.600(5)(c)(3).

Of particular import to the instant appeal, the hearing officer determined that while Bonner's foot and ankle conditions were disabling, they had pre-existed Bonner's membership in CERS.<sup>3</sup> This conclusion was based upon a statement made by a treating physician in a 2006 operative report, that Bonner's foot and ankle maladies were "longstanding," and the observation that Bonner's obesity had predated his employment; the hearing officer opined that obesity likely contributed to the disabling foot and ankle conditions. The Board adopted the recommended order in its entirety.

Bonner appealed to the Franklin Circuit Court. KRS 61.655(5). That court reversed the Board's order on several bases, finding that: the classification of Bonner's job duties as "medium work" was not supported by substantial evidence; the Board was not entitled to rely upon the operative report made by Bonner's treating physician because the document did not comply with 105 Kentucky Administrative Regulation (KAR) 1:210, Section 6(6); and obesity could not be a

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<sup>3</sup> The circuit court interpreted the administrative order as finding Bonner's condition was not disabling; the circuit court then reversed that finding as not supported by substantial evidence. We understand the Board's finding on this matter to be that Bonner's ankle and foot maladies were disabling. This difference of opinion needs no resolution, however, because the Board has not appealed the circuit court's ruling that Bonner was, in fact, disabled due to foot and ankle problems.

pre-existing condition under the circumstances of Bonner's case. This appeal followed.

### *Standards of review*

A member of the Kentucky Retirement Systems may receive disability retirement benefits upon a showing that he is permanently incapacitated to perform his job duties by a "bodily injury, mental illness, or disease[]" which "does not result directly or indirectly from bodily injury, mental illness, disease or condition which pre-existed membership in the system . . . ." KRS 61.600(3)(a)-(d).

Following submission of an application for disability retirement benefits, if a majority of medical examiners twice denies a claimant's application, the claimant may request an evidentiary hearing before an impartial hearing officer. KRS 61.665(2). The hearing officer, in turn, makes recommendations to the Board. *See* KRS 61.665(3).

The burden of proof is the claimant's. *Kentucky Retirement Systems v. Brown*, 336 S.W.3d 8, 13-14 (Ky. 2011) (citing KRS 13B.090(7) and *McManus v. Kentucky Retirement Systems*, 124 S.W.3d 454 (Ky. App. 2003)). More precisely, the claimant must show by a preponderance of the evidence that he is disabled and that his condition did not pre-exist his membership in the Kentucky Retirement Systems; both showings must be supported by objective medical evidence. *Id.* at 14.

"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).

Reviewing courts may not casually disturb the Board's findings of fact.

When the decision of the fact-finder is in favor of the party with the burden of proof or persuasion, the issue on appeal is whether the agency's decision is supported by substantial evidence, which is defined as evidence of substance and consequence when taken alone or in light of all the evidence that is sufficient to induce conviction in the minds of reasonable people. Where the fact-finder's decision is to deny relief to the party with the burden of proof or persuasion, the issue on appeal is whether the evidence in the party's favor is so compelling that no reasonable person could have failed to be persuaded by it.

*Brown*, 336 S.W.3d at 14-15 (Ky. 2011) (quoting *McManus*, 124 S.W.3d 454).

The Board's resolution of questions of law, on the other hand, is reviewed *de novo*. *Id.* at 16.

### ***Discussion***

The Board asserts the circuit court erred in the following respects: (1) concluding the operative report, which described Bonner's foot and ankle conditions as "longstanding," was not objective medical evidence; (2) ruling Bonner's obesity was not a pre-existing condition of his subsequent foot and ankle

problems; (3) holding the evidence did not support the conclusion that Bonner's job duties were properly classified as "medium work," but mandated a finding that he was required to perform "heavy work." We will address each argument in turn.

***The circuit court erred in concluding a written report of Bonner's treating physician did not constitute medical evidence***

This argument concerns a statement made by Bonner's treating physician, Keith W. Myrick, in the operative report filed following the talonavicular fusion surgery he performed on September 15, 2006. Other medical records show Dr. Myrick was treating Bonner for his foot and ankle problems as early as February 2006. Those records include notes following examinations of Bonner's feet and ankles, the doctor's observations, Bonner's medical history, and other relevant matters. The Board fixated, however, on the operative report because, in describing the symptoms which justified the surgery, Dr. Myrick stated that Bonner suffered from "longstanding *pes planus* deformity . . . ." (Administrative record, p. 392). The Board concluded that this vague representation in 2006 that Bonner's foot troubles were "longstanding" was evidence that the disability had pre-existed his employment in 1993.

The circuit court ruled, however, that the operative report was not competent medical evidence and reversed the Board's finding that Bonner's disability pre-existed his employment, after concluding that finding was not supported by substantial evidence. We disagree that the report does not constitute medical evidence as required by 105 KAR 1:210, Section 6(6).

KRS 65.600(1)(d) requires that the Board select three medical examiners (who by definition must be licensed physicians) to evaluate the medical evidence submitted by a claimant. 105 KAR 1:210 supplements the statute. It provides in pertinent part that, to begin the process of obtaining benefits, the claimant must complete a form detailing the basis of his claim. 105 KAR 1:210, Section 6(1). The form must be accompanied by medical records, all of which are ultimately submitted to the medical examiners. KRS 61.665, 105 KAR 1:210, Section 6(1)-(3). The examiners, in turn, make recommendations to approve or deny the request and write a letter explaining the bases for their recommendations. KRS 61.665(2)(f),(h). 105 KAR 1:210, Section 6(6) provides as follows: “Statements by the physicians shall not be considered medical evidence unless accompanied by documented medical records or test results.” 105 KAR 1:210, Section 6 (6). The only physicians mentioned in Section 6 are *Board-appointed* medical examiners, and 105 KAR 1:210 does not purport to regulate any physicians other than those medical examiners.<sup>4</sup>

This regulation is apparently meant to apply only to the statements of the non-treating medical examiners who are employed by the Board to offer guidance in the disability benefits application process. In other words, the statements of the Board-appointed examiners (presumably those made in the letters of explanation

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<sup>4</sup> 105 KAR 1:210, Section 7 permits a medical examiner to contact a claimant’s treating physicians “to request additional medical evidence as necessary.” The regulation makes no other mention of physicians besides Board-appointed medical examiners.

they are required to write) are not to be considered medical evidence unless they are supported by the medical records of treating physicians.

There is good reason for this rule. The independence and impartiality of the medical examiners – who are paid by the Board which selects them – might reasonably be questioned if their opinions were not supported by the records of medical professionals who actually examined or treated the claimants. Requiring that the Board-appointed medical examiners supplement their opinions with actual medical records ensures that there is some factual basis for those opinions.

We have discerned nothing in the language or structure of the regulation, or its treatment in case law, which requires that a treating or examining physician's report must be accompanied by additional records. In fact, the records of a treating physician's examination or of the surgical procedures performed are, in and of themselves, medical evidence. *See* KRS 61.510(33).

It was erroneous to conclude the operative report was not properly considered. We therefore reverse that portion of the circuit court's opinion, and we remand the matter for reconsideration of the arguments presented *sub judice* concerning whether Bonner's disabling foot condition pre-existed his membership in CERS, in light of *all* the medical evidence, including Dr. Myrick's determination that Bonner's condition was "longstanding."<sup>5</sup>

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<sup>5</sup> The Board has identified other evidence of record which it believes supports its conclusion that Bonner's foot condition pre-existed his employment, but has not argued that the circuit court should have affirmed on the basis of that other evidence. We will therefore not entertain that possibility.

***Obesity is not a pre-existing condition of Bonner's disabling foot and ankle afflictions***

The Board also determined Bonner's foot problems pre-existed his CERS membership because his obesity, which pre-existed membership, contributed to his various foot and ankle troubles. This conclusion was based entirely upon statements made by Board-appointed medical examiners who did not treat or examine Bonner.

We must note from the outset that the Board's analysis of the evidence and conclusion identified no objective medical records in support of the proposition that Bonner had suffered any foot problems prior to his employment with the Jefferson County Public Schools. Rather, the Board's order identifies only Bonner's weight as listed in his medical records and the statements of the medical examiners as evidence supporting its finding.

Furthermore, there is no support in any of the medical records for the conclusion that Bonner's disabling foot condition "result[ed] directly or indirectly" from obesity. KRS 61.600(3)(d). The only basis in the record for such a conclusion can be found in the letters written by the Board's physicians to explain why they recommended denying Bonner's claim. These letters include postulations not based upon any examination of Bonner and identify no objective medical evidence in Bonner's record which establish a causal or contributory connection between Bonner's weight and his foot and ankle disability. Rather, they consist of speculation. In the absence of any objective medical evidence that

Bonner's disabling condition resulted directly or indirectly from a pre-existing condition, it was erroneous for the Board to find obesity was a pre-existing condition which disqualified Bonner from receiving disability retirement benefits for his various foot and ankle disorders. The circuit court was correct to reject this logic and reverse that portion of the Board's adopted order.

The Board takes issue with the circuit court's application of the logic of a case dealing with workers' compensation, *Kentucky Convalescent Home v. Henry*, to a disability benefits case governed by KRS 61.600 *et seq.*<sup>6</sup> 463 S.W.2d 328 (Ky. 1971). Even if the application of the case was erroneous, however, it is of no consequence. The fact remains that no objective medical evidence supported the conclusion that Bonner's pre-existing obesity caused his foot and ankle disability.

***Classification of Bonner's job duties has no bearing on his entitlement to benefits***

The Board's remaining argument is that the circuit court erred by reversing its classification of Bonner's job duties as "medium work" and reclassifying them as "heavy work."

KRS 61.600(5)(c) provides the definitions for each. Medium work is "work that involves lifting no more than fifty (50) pounds at a time with frequent lifting or carrying of objects weighing up to twenty-five (25) pounds." KRS 61.600(5)(c)(3). The statute goes on to define heavy work as "work that involves

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<sup>6</sup> In particular, the circuit court focused on the following passage from *Henry*, "Common human experience demonstrates that [obesity] can and does accentuate the consequences of injury in given situations, but the same experience also establishes that the same accentuation of ordinarily expectable consequences of injury may be caused by general bone structure or body frame or statu[re]." 463 S.W.2d at 330.

lifting no more than one hundred (100) pounds at a time with frequent lifting or carrying of objects weighing up to fifty (50) pounds.” KRS 61.600(5)(c)(4).

The Board has admitted in its appellate brief that, “The [c]lassification of [Bonner’s] job duties in this particular matter did not affect the ultimate outcome of the administrative process.” (Appellant’s brief, p. 20). Neither can we imagine how reclassifying Bonner’s job duties from “heavy” to “medium,” would form a basis for denying Bonner disability retirement benefits.<sup>7</sup> There is therefore no need to address this argument.

### ***Conclusions***

The circuit court correctly reversed the Board’s finding that under these facts, Bonner’s pre-existing obesity did not make his foot and ankle maladies pre-existing conditions for purposes of disability retirement benefits.

It was error, however, for the circuit court to exclude the treating physician’s operative report of the longstanding nature of Bonner’s condition from its consideration of the Board’s determination that Bonner’s condition was pre-existing. Accordingly, we reverse that portion of the circuit court’s order and remand to the circuit court for reconsideration of the parties’ arguments in light of all the evidence.

WINE, JUDGE, CONCURS.

CLAYTON, JUDGE, CONCURS IN RESULT ONLY.

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<sup>7</sup> We again note, as we did in footnote 2, *supra*, that the Board has not appealed the finding that Bonner is disabled from performing his job duties as a custodian.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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