

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

NO. 2015-CA-000409-MR

GERALDINE BARE

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE THOMAS D. WINGATE, JUDGE  
ACTION NO. 13-CI-00967

KENTUCKY RETIREMENT SYSTEMS AND  
BOARD OF TRUSTEES OF KENTUCKY  
RETIREMENT SYSTEMS

APPELLEES

OPINION  
AFFIRMING

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BEFORE: CLAYTON, MAZE, AND THOMPSON, JUDGES.

CLAYTON, JUDGE: Geraldine Bare appeals the Franklin Circuit Court's order affirming the Final Order of the Board of Trustees of Kentucky Retirement Systems ("Board"). Bare was denied disability retirement benefits because the

Board found Bare was not permanently disabled. Bare claims the Board's decision was: (1) arbitrary and not supported by substantial evidence; and (2) incomplete, as it did not consider the cumulative effect of Bare's physical and psychological conditions. Having conducted a thorough review of the record and the numerous and lengthy orders below, we affirm the denial of disability retirement benefits.

### **FACTS**

Bare was an Accounts Payable Clerk for the Greenup County Fiscal Court. She began participating in the County Employees Retirement System ("CERS") on March 20, 1994. She got into a political argument with the County Judge Executive on October 11, 2010, and she never returned to work thereafter. Bare officially ceased employment on January 31, 2011. She has 203 months of CERS service. On January 27, 2011, Bare sought early retirement and disability retirement, with her retirement date beginning February 1, 2011. Bare claimed a constellation of physical and mental conditions prevented her from continuing to work.

In her previous job as an Accounts Payable Clerk, Bare performed what appears to be primarily sedentary work. Kentucky Revised Statutes (KRS) 61.600(5)(c)(1).<sup>1</sup> Bare worked five days a week for seven and a half to eight hours

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<sup>1</sup> That statute defines sedentary work as: "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."

It does not appear the decisions below made the finding that Bare's employment was sedentary work. We only note that the description of her work environment that she submitted aligns mostly with the sedentary work descriptor. Whether her job constituted sedentary work is not a necessary finding on this appeal.

a day. She would sit for up to five and a half of those hours. She inputted bills, performed secretarial work, interacted with the public, answered phones, and wrote down messages. Bare would occasionally lift fifty-pound boxes of accounts payable records. She had to handle, finger, feel, reach, push, and pull frequently and bend, stoop, crouch, kneel, crawl, climb, and balance occasionally. She had to use stairs or ramps and reach items overhead. Bare used pens, pencils, calculators, and computer keyboards. She occasionally moved boxes of copy paper.

Bare performed her job duties in spite of a lengthy history of mental and physical medical conditions, which were detailed in 36 ½ pages of factual findings by the hearing officer. Rather than reiterate every detail of Bare's conditions, it is sufficient to note Bare suffered from heart disease, sciatic nerve problems, spurs in both shoulders, anxiety, panic disorder, major depression, degenerative disc disorder, joint disease, carpal tunnel syndrome, pinched nerves, COPD, sleep apnea, uncontrollable bladder, chronic urinary tract infections, right-neck radiculopathy, Thoracic Outlet Syndrome, and muscular and skeletal disorders. Her medical history spanned many decades including a work injury Bare suffered in the late 1980s while working for the railroad, and a history of depression and anxiety that began in the 1970s following a harsh divorce.

Three medical examiners for the Kentucky Retirement Systems reviewed Bare's application. Each medical examiner denied Bare's application for disability. Their opinions detailed the many physical and mental conditions from which Bare suffered and found the conditions collectively did not amount to

permanent disability: “The claimant has had many various illnesses over the years but according to the medical records none seem to arise to the level of permanent disability[;]” “The claimant does have a number of medical conditions, which are all being adequately treated and none appear to be disabling at this time or evidence of total and permanent disability[;]” “I, therefore, do not see any compelling objective evidence that would indicate that the claimant is permanently disabled for her job as described based on the evidence submitted.” Bare was notified on June 24, 2011, that her disability retirement request was denied. Bare appealed, requested a formal hearing, and submitted hundreds of additional documents.

The hearing officer held a hearing at which Bare testified. He also reviewed the 1,400-plus pages of documents detailing Bare’s medical conditions. A recommended order was then entered on April 29, 2013. The hearing officer recommended denying Bare’s application for disability retirement. Bare appealed to the Disability Appeals Committee of the Board of Trustees of the Kentucky Retirement Systems. On July 23, 2013, they adopted the hearing officer’s recommended order, with one minor correction of a typographical error.

On August 12, 2013, Bare then filed in Franklin Circuit Court a petition for judicial review of the July 23, 2013 decision. Following briefing, the Franklin Circuit Court entered an order on March 2, 2013, affirming the Board’s order. In relevant part, the court held:

The weight of evidence shows that Bare could no longer perform in her current job, due to stress and personal relationships, but evidence does not also lend itself to the conclusion that Bare would be unable of completing the basic duties of her job in another workplace setting. Therefore, Bare did not meet her burden of proof on the question of whether she was permanently incapacitated to perform her job or a job of like duties.

As of her last date of actual work, which was October 11, 2010, Bare was not under any permanent restrictions with respect to her heart condition, her spinal condition or her carpal tunnel syndrome. Moreover, the medical records presented did not evidence an ongoing recorded problem with her shoulders; in fact, she had returned to work without restrictions and was released from treatment, only to return on an as needed basis. Finally, when Bare quit work on October 11, 2010, she was under no permanent restrictions with respect to anxiety or depression. While it may be true that the “hostile environment” she worked in added to her ailments and conditions, the tense and political difficulties of her duties do not render her permanently incapacitated from performing a job of similar duties on another office or environment. As to her argument regarding the Hearing Officer’s dismissive discussion of the cumulative effect of her conditions on Bare, the record shows that the Hearing Officer considered each of her allegedly disabling conditions, individually and together, and concluded that permanent incapacity did not result therefrom. The Court agrees that a more detailed discussion would have been helpful. However, the law does not require it. Rather, the Hearing Officer as fact finder discharges his duty under *Bowens* to contemplate disability as a result of the cumulative effects of a claimant’s conditions by reviewing the evidencing [sic]

and reaching a conclusion, just as a Hearing Officer in Bare's case did.

Applying the standard of review to the facts, the record does not compel a finding in Bare's favor. Bare failed to produce objective medical evidence to support her claim that she is entitled to disability retirement benefits. The Hearing Officer recommended denial of Bare's application for the reasons discussed above. The trier of fact in an administrative action is afforded great latitude in the evaluation of evidence and credibility of witnesses. While Bare's *Brief* details all of the medical evidence she believes requires a finding in her favor, the Hearing Officer was not persuaded by its presentation at the hearing. The Hearing Officer heard all of the evidence and chose which evidence he believed to be most persuasive. The presence of conflicting evidence in the record is not sufficient reason for this Court to disturb the Hearing Officer's findings of fact.

(Opinion p. 9-10).

Bare timely appealed. She alleges two errors occurred below: (1) the decisions are not supported by substantial evidence; and, (2) the cumulative effect of the medical and psychological conditions was not considered. Following a recitation of the standard of review, we review Bare's claims *in seriatim*.

### **STANDARD OF REVIEW**

Pursuant to Kentucky Revised Statutes (KRS) 61.600, a qualified Kentucky Retirement Systems member may seek disability benefits if the person is totally and permanently incapacitated.<sup>2</sup> *Kentucky Retirement Systems v. Brown*,

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<sup>2</sup> KRS 61.600 states the qualifications as follows:

(1) Any person may qualify to retire on disability, subject to the following conditions:

336 S.W.3d 8, 13 (Ky. 2011). Under that statute, the adjudicative body must examine a claimant’s “objective medical evidence by licensed physicians” to determine whether: (1) the person is mentally or physically incapacitated to perform his or her job or a job of like duties; (2) “[t]he incapacity is a result of bodily injury, mental illness, or disease[;]” (3) the incapacity is permanent; and (4) the incapacity is not a result of a pre-existing injury. KRS 61.600(3)(a)-(d).

Objective medical evidence is defined as:

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).

“[T]he party seeking the benefit bears the burden to show that he or she is entitled to that benefit.” *Brown*, 336 S.W.3d at 14 (citing KRS 13B.090(7)).

All KRS 61.600 threshold factors must be proven by a preponderance of the

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- (a) The person shall have sixty (60) months of service, twelve (12) of which shall be current service credited under KRS 16.543(1), 61.543(1), or 78.615(1);
  - (b) For a person whose membership date is prior to August 1, 2004, the person shall not be eligible for an unreduced retirement allowance;
  - (c) The person’s application shall be on file in the retirement office no later than twenty-four (24) months after the person’s last day of paid employment, as defined in KRS 61.510, in a regular full-time position, as defined in KRS 61.510 or 78.510; and
  - (d) The person shall receive a satisfactory determination pursuant to KRS 61.665.

evidence by the person seeking the entitlement determination. *Brown*, 336 S.W.3d at 14. “[W]here the Kentucky Retirement Systems, in its role as a finder of fact, makes a factual determination based upon objective medical evidence, it must be afforded ‘great latitude in its evaluation of the evidence heard and the credibility of witnesses . . .’ including its findings and conclusions of fact.” *Id.* (quoting *Kentucky State Racing Comm’n v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972)).

On appeal, “we accept the Board’s findings of fact as true as long as they are supported by substantial evidence.” *Kentucky Retirement Systems v. Lowe*, 343 S.W.3d 642, 646 (Ky. App. 2011) (citing *Bowling v. Natural Resources and Environmental Protection Cabinet*, 891 S.W.2d 406 (Ky. App. 1994)).

Substantial evidence “means evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men.” *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998) (citations omitted).

When the fact-finder denies relief to the party with the burden of proof, “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 (adopting *McManus v. Kentucky Retirement Systems*, 124 S.W.3d 454, 458 (Ky. App. 2003)).

## ISSUES

### **I. The decision was supported by substantial evidence.**



Bare claims the decisions below were not supported by substantial evidence. After a thorough and careful review of the voluminous record and the applicable law, we find no validity to this allegation of error. We initially address Bare's implicit argument that her treating physicians' opinions should be given greater weight. Bare's records contain multiple reports from both treating physicians and Kentucky Employee Retirement System medical examiners. In her brief, Bare repeatedly asserts that her treating physicians who "actually *examined* Bare," (Aplt's Brf. at 17, emphasis in original), render insubstantial any opposite conclusions by non-treating physicians. We need not linger on this point, as the Kentucky Supreme Court has expressly rejected a "treating physician" rule in Kentucky disability analysis. *Kentucky Retirement Systems v. Bowens*, 281 S.W.3d 776 (Ky. 2009).

By rejecting this rule, opinions of non-examining physicians serving on the Medical Review Board can be given less, as much, or more weight than the opinions of treating physicians. *Id.* at 784. Accordingly, "it is well-settled that the trier of fact may evaluate the evidence presented and give the evidence the weight the fact-finder deems appropriate." *Id.* (citation omitted). Thus, Bare's implicit argument that her treating physicians' opinions should be given more weight holds no validity in Kentucky jurisprudence. The hearing officer could properly weigh any of the physicians' opinions as he saw appropriate.

Bare also argues the adjudicative bodies below improperly relied on the opinions of Kentucky Employee Retirement System medical records

examiners. Bare claims the examiners' opinions are not "objective medical evidence" pursuant to KRS 61.600(3) and 61.510(33). Bare relies upon this Court's unpublished opinion in *Board of Trustees of Kentucky Retirement Systems v. Vanhose*, 2010-CA-000784-MR, 2011 WL 1220248 (rendered April 1, 2011). Bare's use of a not-to-be-published opinion to support her appellate claim is inappropriate.

Kentucky Rules of Civil Procedure (CR) 76.28(4)(c) requires parties to neither cite nor use as binding precedent not-to-be-published opinions. Parties may cite not-to-be-published opinions for consideration by this Court only "if there is no published opinion that would adequately address the issue before the court." *Id.* Case law that adequately addresses an issue has been described as "good," "clear," and "standing authority[.]" *Stansbury v. Commonwealth*, 454 S.W.3d 293, 304 (Ky. 2015). Likewise, unpublished decisions that are "redundant" of published authority, or that rely on "unclear record[s,]" should not be utilized. *Commonwealth v. Wright*, 415 S.W.3d 606, 613-14 (Ky. 2013).

Here, Bare's use of *Vanhose* is inappropriate for two reasons. First, *Vanhose* does not stand for the proposition that Bare asserts. The panel of this Court in *Vanhose* quoted approvingly for two propositions: (1) it rejected the treating physician rule; and, (2) it found the Board erroneously failed to consider the cumulative effects of the claimant's physical ailments. Each of those propositions is redundant of published, Kentucky Supreme Court authority.

*Bowens, supra* (treating physician rule and cumulative effects rule). Thus, *Vanhoose* should not be cited as authority.

Second, published, controlling authority utilizes Kentucky Retirement Systems medical examiners' examinations of objective evidence. *See, e.g., Kentucky Retirement Systems v. Brown*, 336 S.W.3d 8 (Ky. 2011). Furthermore, the plain language of the statutes permits the hearing officer to rely upon the medical examiners' "examination" of the treating physician's reports. *Compare* KRS 61.600(3) ("Upon the *examination* of the objective medical evidence . . .") (emphasis added), *with* KRS 61.510(33) ("'Objective medical evidence' means *reports of examinations or treatments . . .*") (emphasis added). Accordingly, Bare's reliance on unpublished authority is inappropriate.

Having addressed the underlying allegations of error with the hearing officer's standards, we now turn to the main claim: was the hearing officer's decision supported by substantial evidence? Because Bare bore the burden of proof on her disability claim, "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. Under the facts before us, we cannot find that the hearing officer so erred.

Bare's medical records reveal that she has some limitations due to her multiple physical and mental conditions. For example, a physical residual functional capacity assessment by Dr. Drew Apgar in February of 2011 concluded that Bare could lift items up to twenty pounds, stand for less than two hours in an

eight-hour workday, sit for less than six hours in an eight-hour workday, occasionally climb stairs, fully manipulate the environment with her left arm and hand, and partially manipulate the environment with her right arm and hand. She had no communicative limitations and only a small limitation on her visual abilities. And while she had some environmental limitations to extreme temperatures and humidity, one would not expect those limitations to be an issue in a general office environment. Nor does it appear that she was unable to function at her job with these conditions prior to her political disagreement with the County Judge Executive.

Her mental evaluation revealed major depression, generalized anxiety disorder, and panic disorder. While these may have interfered with her daily functions, Bare was being treated with anti-anxiety and anti-depressant medications and had been for years, even while working. It does not appear that she was unable to function at her job with these mental conditions prior to her political disagreement with the County Judge Executive. Even Bare's January 20, 2011 request for work accommodations demonstrates she was not fully disabled. Bare wanted to work at a different office away from the County Judge Executive. Nothing about this request shows a physical or mental condition that is permanently disabling.

In sum, the records are not such compelling evidence of permanent mental or physical disability that no reasonable person could have failed to be persuaded by it. *Brown*, 336 S.W.3d at 14-15. Accordingly, neither the hearing

officer, the Board, nor the Franklin Circuit Court erred by finding Bare was not entitled to disability retirement. We therefore affirm the Franklin Circuit Court's order upholding the Board and the hearing officer's decisions.

**II. The hearing officer's decision considered the cumulative effect of the medical and psychological conditions.**

Finally, Bare claims the decisions below did not consider the cumulative effect of Bare's medical and psychological conditions. Again, after a thorough review, we find no validity to this alleged error. In *Kentucky Retirement Systems v. Bowens*, 281 S.W.3d 776 (Ky. 2009), the Kentucky Supreme Court adopted the "cumulative effects" rule for evaluating disability claims under KRS 61.600.

Specifically, the Court found "legislative intent that the cumulative effect of a disability claimant's ailments must also be considered in assessing the claimant's eligibility for benefits." *Id.* at 780-81. This intent is derived from the General Assembly requiring hearing officers to assess a claimant's "residual functional capacity" when making a permanent incapacity finding. KRS 61.600(5)(a)(2). A hearing officer must do more than evaluate "each insular injury on [a claimant's] ability to perform her job duties and determine[] that no one injury" arises to the level of a disability. *Bowens*, 281 S.W.3d 776 at 783. The hearing officer must determine whether the cumulative effect of a claimant's ailments rendered him or her unable to work pursuant to the "residual functional capacity" standard of KRS 61.600(5)(a)(2).

In the instant case, following a 36 ½-page recitation of factual findings, including Bare's mental and physical conditions, the hearing officer rendered the following conclusion of law:

Claimant has failed to show by a preponderance of the objective medical evidence that Claimant's conditions, **or the cumulative effect of these conditions**, physically incapacitated her on a permanent basis since or from her last day of paid employment. This finding is made **with the consideration of the evidence of the Claimant's residual functional capacity** and the physical exertion requirements of her last job or a job of like duties.

(Hearing Officer's Opinion, p. 37) (emphasis added). The Board in its Final Order adopted all of the hearing officer's factual findings and conclusions of law. It corrected only one "typographical error" with the above-quoted conclusion of law, changing "physically incapacitated" to "physically or mentally incapacitated[.]" Bare petitioned the Franklin Circuit Court for judicial review of this Final Order, raising the allegation she now claims on appeal. The Franklin Circuit Court ruled against Bare:

As to her argument regarding the Hearing Officer's dismissive discussion of the cumulative effect of her conditions on Bare, the record shows that the Hearing Officer considered each of her allegedly disabling conditions, individually and together, and concluded that permanent incapacity did not result therefrom. The Court agrees that a more detailed discussion would have been helpful. However, the law does not require it. Rather, the Hearing Officer as fact finder discharges his duty under *Bowens* to contemplate disability as a result of the cumulative effects of a claimant's conditions by

reviewing the evidencing [sic] and reaching a conclusion, just as the Hearing Officer in Bare's case did.

(Opinion and Order, p. 9). Having reviewed the hearing officer's opinion, we agree.

The hearing officer's recommended order contains a lengthy, detailed, chronological report of Bare's history, hospitalizations, and mental and physical conditions. Because Bare's disability claim was based on multiple physical and mental conditions, "it is natural that the hearing officer would initially address these impairments individually." *Kentucky Retirement Systems v. West*, 413 S.W.3d 578, 583 (Ky. 2013). Thus, the recommended order initially reviews the myriad doctors' opinions regarding Bare's medical problems.

It goes further, though, and discusses how, if at all, the conditions relate to her ability to perform her job duties. For example, the recommended order states:

Dr. Lobach indicated that Claimant had a severe mental impairment and diagnosed her with severe depression and anxiety. Claimant was noted as being medicated in addition to seeing a psychiatrist and psychotherapist. As to "other" impairments Dr. Lobach listed that Claimant had bilateral carpal tunnel syndrome that resulted in surgery and decreased grip strength. Dr. Lobach wrote that Claimant did not have any exertional restrictions, such as limitations on lifting, standing, walking, sitting, stooping, crouching or climbing. Additionally, Claimant had no environmental restrictions.

(Recommended Order, p. 19).

Its findings of fact and conclusions of law ultimately discussed all of the conditions in concert – exactly what is required by *Bowens*. The recommended order details the constellation of mental and physical conditions and how they relate to Bare’s work abilities. Thus, the order addresses the cumulative effect of Bare’s mental and physical conditions. The Franklin Circuit Court correctly upheld the denial of disability benefits on this issue. Accordingly, we affirm the Franklin Circuit Court’s Order.

### CONCLUSION

Both of Bare’s appellate claims – that the decisions below were not supported by substantial evidence and that the decisions below did not consider the cumulative effect of Bare’s mental and physical conditions – fail as a matter of law and fact. While Bare appears to suffer from a plethora of medical problems, they do not singularly or collectively rise to the level of permanently disabling conditions. At minimum, the record evidence is not so compelling that no reasonable person could have failed to have been persuaded by it.

Thus, for the foregoing reasons, we affirm the Franklin Circuit Court’s order.

ALL CONCUR.

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