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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001907-MR

KENTUCKY RETIREMENT SYSTEMS
AND BOARD OF TRUSTEES OF
KENTUCKY RETIREMENT SYSTEMS — APPELLANTS

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 14-CI-00933

MARGARET SHUMATE — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, MAZE, AND STUMBO, JUDGES.

CLAYTON, JUDGE: Kentucky Retirement Systems ("KERS") and the KERS Board of Trustees ("Board") appeal an order by the Franklin Circuit Court granting relief pursuant to Kentucky Rules of Civil Procedure ("CR") 59.05 to a disability claimant, Margaret Shumate. Shumate had sought disability retirement benefits

from KERS due to severe plantar fasciitis, ankle instability with pain, and equinus with secondary contracture of the Achilles tendon, all of which combine to make it difficult for her to stand and walk. Her application was unanimously rejected by KERS' Medical Review Board.

Shumate petitioned for further review, and two hearings were held before a Hearing Officer – one at which Shumate testified, and one at which her podiatrist testified – after which the Hearing Officer entered her Findings of Fact, Conclusions of Law, and Recommended Order. The Hearing Officer found Shumate met her burden of proof and should receive disability retirement benefits. KERS filed exceptions, and the Board then entered a Final Order denying Shumate's request for disability benefits.

On appeal, the Franklin Circuit Court initially affirmed the Board's Final Order, but then on a motion pursuant to CR 59.05, vacated the original order and reversed the Board's Final Order. KERS and the Board now appeal to us. We begin with a discussion of the relevant facts.

FACTS

I. Job.

Shumate was employed for over a decade as an Instructional Assistant for the Whitley County Board of Education. As such, she would be on her feet for up to four hours a day taking care of children aged 6 weeks to 12 years – changing diapers, playing with the children, feeding the children, and escorting children from place to place. She would have to sometimes lift children weighing

approximately 40 pounds, and frequently lift up to 20 pounds. The Hearing Officer found the job, as described, was properly classified as medium duty work pursuant to Kentucky Revised Statute ("KRS") 61.600(5)(c)(3).

All adjudicative bodies agreed that the job was more properly classified as light duty work, though, as Shumate received some accommodations. *See* KRS 61.600(5)(c)(2). For example, her co-workers would assist her by performing her long-distance walking tasks, lifting children onto changing tables for diaper changes, picking up toys, and vacuuming. Shumate was permitted to use a cane and a walker and wear foot appliances while at work. In spite of these accommodations, Shumate still had to stand during the better part of her four-hour workday.

II. Employment Medical History

Shumate has a lengthy history of multiple ailments. In fact, on her disability retirement application she listed ten conditions: (1) hypertension; (2) fibromyalgia; (3) migraines; (4) hyperlipidemia; (5) morbid obesity; (6) bilateral osteoarthritis; (7) severe plantar fasciitis; (8) ankle instability with pain; (9) equinus with secondary contracture of the Achilles tendon; (10) left knee synovial osteochondromatosis with Bakers cyst. At the hearing and in her position statement, Shumate narrowed the disabling ailments down to three – severe plantar fasciitis, ankle instability with pain, and equinus with secondary contracture of the Achilles tendon.

Shumate began her employment with the Whitley County Board of Education on July 1, 2000. Her last day of actual work was July 28, 2011, and her final day of paid employment was October 10, 2011. Thus, the relevant time period during her employment is July 1, 2000 through October 10, 2011.

Her foot issues appear to have occurred near in time to the conclusion of her employment. Shumate's medical history contains an undated letter from her treating physician, Dr. Richard Park, stamped "Received October 24, 2011" that states as follows:

> Margaret Shumate has been under my medical care since 2008, she also follows with a number of specialists including a foot and ankle specialist and an orthopedic. She is under my care for a number of complaints that include but are not limited to hypertension, fibromyalgia, headaches, hyperlipidema, and morbid obesity. She also follow [sic] a foot and ankle specialist as well as myself for bilateral osteoarthritis of the feet and ankles this condition is aggravated by morbid obesity and therefore Ms. Shumate is unable to work.

A review of Shumate's medical records indicates Shumate's foot problems began in 2011 and worsened such that Dr. Park referred Shumate to physical therapy. A physician update form dated October 4, 2011, shows that Shumate had attended 10 physical therapy sessions. Her current pain scale was a 7 out of 10, her best pain scale was a 4 out of 10, and her worst pain scale was an 8 out of 10. The physical therapist noted "*pt has had little to no change in symptoms/po since initiation of therapy, however ROM [range of motion] has imp."

Her medical history shows that on July 14, 2011, Shumate first saw Dr. Jamie Carter. Dr. Carter is a podiatrist. In Shumate's initial evaluation, Dr. Carter noted Shumate "has bilateral foot pain that has been present for about 4 months. The left foot is worse and is described as constant, sharp and numbness [sic]. She states that when she gets up, she can hardly walk. The area of pain is from the heel up to the arch." Dr. Carter found a hammertoe deformity and educated Shumate on stretching exercises. Dr. Carter also gave Shumate injections in her heels. The injections are painful and are only administered to patients with severe pain. Dr. Carter also ordered Shumate to use two foot apparatuses, one to wear in the day and one at night. Shumate was then cast for orthotics.

Dr. Carter continued to see Shumate. On July 25, 2011, Dr. Carter saw Shumate and noted she is wearing her apparatus on and off and that the injections helped for a day or two. Dr. Carter administered a second round of injections into Shumate's heels. On August 1, 2011, Dr. Carter saw Shumate again and noted the pain had gotten so bad that Shumate could hardly walk when she got up in the morning. Shumate picked up some orthotics and received a third injection.

Two weeks later, Shumate returned to Dr. Carter and stated she was approximately 25 percent better. Shumate did not take a prescribed steroid medication due to side effects. Shumate also had not yet worn the orthotics due to the fact that she had just purchased new shoes and needed the doctor's office to

insert the orthotics in the new shoes. Dr. Carter administered a fourth injection into Shumate's foot.

Shumate next returned to Dr. Carter on August 22, 2011. After having received four injections, Shumate assessed her improvement at 35 percent. Shumate informed Dr. Carter that she was wearing the orthotics for about an hour a day due to her hips and back hurting, and that she was attending physical therapy twice a week. Shumate was also stretching every day and soaking her feet as needed. Another injection was given.

A week later, on August 28, 2011, Shumate had another appointment with Dr. Carter. Shumate noted no improvement since the previous visit. Dr. Carter performed a Dolorclast treatment on Shumate's heels this time. On September 8, 2011, Shumate returned for a second Dolorclast treatment. Shumate reported that her overall improvement was 40 percent, and she also reported that after the first Dolorclast treatment her "heels are no different."

Shumate's next visit was on September 19, 2011. Shumate reported that "overall she is about 50% better." Due to her heels being sore, a third Dolorclast treatment was not performed. Dr. Carter noted, "Patient is still doing therapy and is to continue." Three days later, Dr. Carter, at the request of Shumate's physical therapist, fitted Shumate with a pneumatic walker for her right foot "to help decrease the pressure applied to the right heel" due to Shumate being "in a great deal of pain[.]"

The next visit to Dr. Carter was on October 6, 2011. Dr. Carter noted that Shumate had been wearing the pneumatic walker on her right foot most of the time, and that Shumate "has tried to walk a little without it and states it doesn't hurt too bad." Shumate suffered an injury to her toe after dropping a soda can on it, and the nail was sore and bloody. Shumate was no longer attending physical therapy. Dr. Carter concluded her notes with, "Patient is doing well, d/c [discontinue] boot on the right and transition into a tennis shoe. Done with P.T. No need for 3rd Dolorclast at this time. Continue to stretch and ice."

Shortly after this visit, Shumate's employment terminated. Shumate's last day of paid employment for the Whitley County Board of Education was October 10, 2011. The last day she physically worked, though, was July 28, 2011, just two weeks after she began her treatment by Dr. Carter.

Shumate did not return to Dr. Carter until June 4, 2012. Dr. Carter noted:

> This 50 year old female patient presents today for care of heel pain plantar heels bilateral that has returned. Patient states that she has bilateral foot pain that has been present for about 2 months. The left foot is worse and is described as constant, sharp and numb. The patient has had 5 injections in each heel (last injection 8-22-2011) and 2 Dolorclast treatments in the past. She states the Dolorclast did not help but the injections did. She does stretching exercises and wears custom orthotics with added felt.

Dr. Carter administered injections into the heels and cast Shumate for another pair of orthotics.

On June 11, 2012, Shumate returned to Dr. Carter and noted her heels were doing about 25 percent better. Another round of injections was administered. A week later Shumate returned, noted a 50 percent improvement, and Dr. Carter administered another round of injections.

Shumate returned again on June 25, 2012. Though the injections had been making her heels feel better "for a while[,]" her heels were now "worse again." Another round of injections was administered, and an AirHeel was dispensed for Shumate to wear. A week later, Shumate again saw Dr. Carter and noted her heels felt 75 percent better. She was administered another round of injections into the heels.

It appears Shumate next saw Dr. Carter on November 8, 2012. At that appointment, Shumate noted she wears AirHeels every day and "they do help." Shumate also reported a neuroma had developed in her feet. Another injection was administered. Shumate then returned on November 20, 2012, where she reported a total improvement of 75 percent for her bilateral heel pain. Her neuroma was approximately 40 percent better. Another injection was administered for her heel pain, and a second injection was administered for the neuroma. Shumate then returned to Dr. Carter on November 26, 2012. Shumate reported her heels were 85 percent better and her neuroma had not improved since the previous visit. Injections were administered for each condition. Dr. Carter also wrote a "To Whom It May Concern" letter summarizing Shumate's condition:

> I am writing this letter in regards to Ms. Margaret Shumate (DOB 7-29-1961). I have been treating her for several months for both chronic plantar fasciitis and chronic neuromas (pinched nerve in the foot) of bilateral feet. She has had multiple rounds of steroid injections for both conditions and has just begun another round. She also has custom orthotics that she wears daily. Although Ms. Shumate responds as expected to the course of treatment that we pursue, her condition always seems to recur. I attribute this mainly to the structure of her foot.

Shumate returned to Dr. Carter twice in April, 2013, and in June, 2013, for additional injections.

On May 2, 2013, Dr. Carter filled out a Residual Functional Capacity Questionnaire. Dr. Carter noted she had not seen Shumate between October 7, 2011, and June 4, 2012. However, she did state that between October 10, 2011, and October 30, 2012, Shumate's "condition returned. It was extremely painful [and] did not respond as expected to normal conservative treatments." Dr. Carter noted that no work restrictions were placed on Shumate between October 11, 2011, and October 30, 2012. Nonetheless, Dr. Carter averred that based solely on Shumate's bilateral foot condition and impairments therefrom, Shumate "has been continuously incapable of performing all of the above required duties of her job since her last day of paid employment on October 11, 2011." Dr. Carter gave a "poor" prognosis for Shumate's foot condition, and further stated that as an independent condition, Shumate's bilateral foot ailments alone would have prevented Shumate "for periods of time" from performing the duties required of

her job. Dr. Carter concluded that, "It was extremely painful for her to work – condition did not respond as anticipated."

The remainder of Shumate's medical records show that Shumate was also being treated for osteoarthritis in her knees, hypertension, fibromyalgia, migraines, morbid obesity, and other conditions for which Shumate was not seeking disability retirement.

After reviewing this medical history, the hearing officer summarized her reasons for recommending granting retirement disability as follows:

> Claimant has submitted sufficient objective medical evidence to support her assertion that her Severe Plantar Fasciitis, Ankle Instability with Pain and Equinus with Secondary Contracture of Achilles permanently physically incapacitated her on her last day of paid employment from performing her job as an Instructional Assistant, which was best described as light work in nature, as reasonable accommodated, or job of similar duties. Claimant's disability application alleged other medical conditions as disabling, however, Claimant withdrew those conditions as a basis for her disability and stated that it was her ankle and foot conditions that disable her from her job. Claimant's disability application was unanimously denied by the medical review board because they found a lack of evidence that Claimant's conditions either individually or cumulatively disabled Claimant from her job. However, the medical review board did not review the medical records from Dr. Jamie Carter's, Claimant's podiatrist, who began treating Claimant prior to her last day of paid employment and also was a witness at a supplemental hearing.
>
> Claimant's primary care physician, Dr. Richard Parks, who wrote a letter opining that Claimant was disabled from her employment referred Claimant to Dr. Carter because of Claimant's severe foot pain which he was not able to successfully treat himself. Claimant's medical

> records from Corbin-London Medical Associates and her orthopedic, Dr. Richard Belhausen, support the assertion that Claimant's foot pain began around March 2011 as reflected in the medical records of those doctors. The medical records from Dr. Carter and Dr. Carter's testimony meet Claimant's burden of showing that she suffered from disabling foot pain which prevented her from standing for long periods of time which was required by her job even with accommodations. Claimant did try many treatments such as medications, injections, walking assistance devices, orthotics, stretching, icing, physical therapy with short term relief. Claimant last went to work on July 28, 2011. Therefore, while Dr. Carter's report on October 2011 was more positive, these records reflect that Claimant has not been working since July 28, 2011. Claimant's medical records show that she had chronic recurrence of her foot conditions and that her foot conditions worsened with the development of neuroma or nerve pain in July 2012. As Dr. Carter testified at the hearing, Claimant continued to suffer the symptoms of her severe plantar fasciitis after she stopped working and even with her not working, Claimant developed neuroma pain in July 2012. Claimant has continued to treat with Dr. Carter even though she does not have health insurance because of the pain that Claimant continued to suffer after her last day of paid employment. Dr. Carter stated that while she did not put Claimant on restrictions in around Claimant's last day of paid employment, she did tell Claimant to stay off her feet as much as possible so that Claimant could reduce her pain. Claimant's job, even as accommodated, did require a good deal of standing and therefore would prevent Claimant from following Dr. Carter's advice to stay off her feet to avoid pain.

The KERS Board, following exceptions being filed by KERS, rejected this recommendation based on the submitted evidence:

> Claimant did <u>not</u> submit sufficient objective medical evidence to support her assertion that her Plantar Fasciitis, Ankle Instability with Pain, and Equinus with Secondary Contracture of the Achilles tendon

permanently physically incapacitated her on her last day of paid employment from performing her job as an Instructional Assistant, which was best described as light duty work as reasonably accommodated, or a job of similar duties.

. . .

In fact, records dated just four (4) days prior to her last day of paid employment show that the Claimant's treating podiatrist discontinued the boot she was wearing, noted that she was doing very well, and told her to begin wearing regular tennis shoes. (Exhibit 13). Notably, Dr. Carter did not indicate in any way that the Claimant could not continue working, just as she had been. In fact, rather than scheduling a follow-up appointment, Dr. Carter noted that the Claimant could just follow up if needed and noted again how well she was doing. Just prior to Claimant's last day of paid employment, her podiatrist noted that her condition was being successfully treated and she was just told to continue stretching exercises. These records do not support a finding of incapacity since the Claimant's last day of paid employment on October 10, 2011.

Furthermore, Claimant certainly did not prove by objective medical evidence that she was incapacitated for a continuous period of not less than twelve (12) months after her last day of paid employment when she was not seen again by Dr. Carter until June 4, 2012, some eight (8) full months after her last day of paid employment. At that time, Claimant indicated that she had heel pain that had recurred for the past two months, or since April 2012. (Exhibit 13). Claimant's follow up records indicate that she was not having complaints since her last day of paid employment, as they had not recurred until some six (6) months after her last day of paid employment. Dr. Carter's records do not support a finding of permanent incapacity since the Claimant's last day of paid employment in October 2011.

(Emphasis in original).

On petition, the Franklin Circuit Court initially agreed with the Board. However, upon Shumate's CR 59.05 motion, the circuit court reversed the Board's final order, finding that the Board's findings were ostensibly based on one "cherry-picked" note by Dr. Carter that Shumate was doing better and did not account for the totality of the evidence. "It is unthinkable that this Court or any other adjudicatory body could expect for the Petitioner to return to her job after a marginally successful treatment only to have that same job again inflame and aggravate her foot pain which would in turn require more time off and more treatment." (Order, p. 13).

Furthermore, the circuit court noted that though there was a gap in Shumate's medical history, "[o]nly the most cynical of reasoning can support a conclusion that she was anything but permanently incapacitated between October 2011 and April 2012 simply because she was not experiencing the type of severe pain that would cause her to seek treatment." (Order, p. 14). It found that Shumate presented objective medical evidence supporting her claim of permanent incapacitation during the twelve-month period following her last day of paid employment.

III. Pre-Employment Medical History.

As Shumate had less than 16 years of state employment, pre-existing conditions were a relevant factor. *See* KRS 61.600(3)(d). Two notes in Shumate's medical history are relevant to her foot pain prior to the date she began employment.

On September 23, 1996, Dr. John Watts, Shumate's primary care physician, noted that Shumate had a "Pain in R. Calf, nipping pain while carrying wood, caused to fall[,] clearing yard [and] felt acute pain." The doctor noted increased pain with plantar flexion, but no swelling. Shumate was diagnosed with an Achilles strain. There is no mention of her foot in this record.

Next, on December 4, 1996, Shumate again went to her primary care physician who noted as follows:

> [Shumate] comes in today stating that for the past two weeks she has been in a lot of pain in her left lateral foot. She denies any trauma and has had no discoloration or swelling noted. . . . Very tender over her navicular and base of the 5th metatarsal, no swelling noted, good pulses, x-ray negative for stress fracture. . . . Foot contusion. . . . . Observation and Motrin if symptoms persist may need to get a bone scan.

After reviewing these, and all other medical records, the hearing officer found in Shumate's favor on the pre-existing condition element:

> Claimant has met her burden of proving that her Severe Plantar Fasciitis, Ankle Instability with Pain and Equinus with Secondary Contracture of Achilles was not a pre-existing condition. K[E]RS raised the pre-existing condition issue because K[E]RS asserts that Claimant received treatment three times in September, November and December 1996 for Achilles Strain and left foot contusion which was diagnosed and treated by her primary care doctor, Dr. Watts. However, Claimant only complained of pain in her right calf in September 1996 after doing yard work and the [sic] Dr. Watts diagnosed Achilles strain even though Claimant did not complain of pain in her foot. Claimant only complained of swelling in her left foot on December 4, 1996 for a duration of two weeks. Her November 1996 visit with Dr. Watts was for sinusitis conditions only. Claimant's primary care

> physician records dating back to 1996 confirm that Claimant's foot conditions which prevented her from working did not begin until 2011.
>
> K[E]RS argued that these incidents in 1996 indicate that Claimant should have known that she had plantar fasciitis and her other foot conditions and that these conditions lay dormant until March 2011, therefore, Claimant's foot conditions are pre-existing. However, Dr. Carter testified at the supplemental hearing that while the 1996 incident with foot swelling may possibly be an indicator of plantar fasciitis that lay dormant until 2011, it was unlikely. The medical records from 1996 do not provide sufficient evidence that Claimant knew or should have known that she had plantar fasciitis and other foot conditions. Claimant did not seek the treatment of a specialist in 1996 for her foot pain and did not seek the services of a podiatrist until 2011, almost 15 years after.

The KERS Board's final order following KERS's filed exceptions found that because of this medical history, Shumate failed to meet her burden of proof on the pre-existing condition element:

> Claimant has <u>not</u> met her burden of proving that her Severe Plantar Fasciitis, Ankle Instability with Pain and Equinus with Secondary Contracture of the Achilles tendon were not pre-existing conditions. Claimant's medical records prior to her membership confirm that Claimant was having foot complaints at that time. The Claimant received treatment three (3) times in September, November, and December of 1996 for Achilles Strain and left foot contusion which was diagnosed and treated by her primary care doctor, Dr. Watts. In September 1996, Claimant was noted to have pain with plantar flexion on the right, and was diagnosed with an Achilles strain at that time. The Claimant also complained of pain and swelling on the bottom of her left foot in November 1996. A December 1996 examination noted that she was very tender over the navicular bone, and at the base of her 5th metatarsal. (Exhibit 13). Dr. Carter testified that these complaints were entirely

> consistent with plantar fasciitis and acknowledged that they could have been dormant form that time until she sought treatment with Dr. Parks.
>
> Since the Claimant actually sought treatment for foot swelling and Achilles strain on more than one occasion, she clearly was aware that she had foot problems. The Board of Trustees also notes that Dr. Carter indicated in her report that the reason Claimant's condition recurs is because of the "structure of her foot." (Exhibit 13). The structure of the Claimant's foot would be a congenital characteristic, present since birth, that any reasonable person would be aware of well before attaining the age of fifty. In a May 2013 report, Dr. Carter refers to the fact that Claimant has a "structural deformity" of her arches. Dr. Carter acknowledged that plantar fasciitis is highly treatable and the structure of Claimant's foot is what causes her to have flare-ups. Thus, Claimant was already having problems before her membership, and the hereditary bone structure of her foot causes her to have recurrences. Consequently, Claimant has not met her burden of proving that her claimed incapacity does not result directly or indirectly from bodily injury, mental illness, disease or condition which pre-existed her membership into the system.

(Emphasis in original).

Here, again, the Franklin Circuit Court reversed the Board's final order. It found the Board's order utilized only "various and sundry pieces of evidence," namely, two doctor's visits in 1996 and Dr. Carter's testimony that the plantar fasciitis defect is due to Shumate's foot structure, to "advance[] a theory that the Petitioner's condition is congenital and thus, the Petitioner should have been put on alert in the mid-1990s to her foot problems." (Order, p.15). To explain the 15-year gap between the 1996 and the 2011 doctor's visits, the Board "relies on selective use of Dr. Carter's testimony in order to cobble together [its]

theory[.]" *Id*. Namely, the Board took the portion of Dr. Carter's testimony where she stated it was possible that Shumate's plantar fasciitis laid dormant for 15 years and ignored her testimony "that it is not likely" that the condition laid dormant. Other than Dr. Carter's testimony that it was possible but not likely, the Board had no other evidence that the condition pre-existed Shumate's membership in the retirement system. Accordingly, the Franklin Circuit Court rejected *in toto* the Board's final order.

ISSUES

KERS and the Board now collectively appeal. They raise multiple issues, which are addressed below.

I. Did the Franklin Circuit Court err by finding the Board improperly utilized language from a party's exceptions in the Final Order?

KERS first argues the circuit court erred by finding the Board's Final Order improperly utilized language from KERS's exceptions. We do not agree. While deciding whether to grant CR 59.05 relief, the Franklin Circuit Court re-analyzed the Board's factual findings in its Final Order. In that discussion, the circuit court noted the Final Order contains "entire selections which tracked verbatim" KERS's exceptions. Those sections were erroneous, the circuit court found, because they "did little more than cherry-pick favorable language from a single medical record and summarily dismiss other objective medical evidence[.]" (Opinion, p.9).

The circuit court did not hold, as KERS asserts, that the Board is prohibited from using language in a party's exceptions in its final orders. To the contrary, the circuit court instead found that in this case a mistake of fact occurred in KERS's exceptions, and that mistake of fact was copied almost verbatim into the Board's Final Order. Pursuant to *Guillion v. Guillion*, 163 S.W.3d 888 (Ky. 2005), it was proper for the circuit court to utilize CR 59.05 to alter, amend, or vacate its order on a mistake of fact.

Accordingly, as the circuit court did not hold that the Board is prohibited from utilizing language from a party's exceptions in its final orders, we decline to reverse the circuit court's order on this issue.

II. Did the Franklin Circuit Court err by disregarding the Board's determination regarding the weight of the evidence and finding the Board "cherry picked" evidence?

KERS next argues the circuit court erred by not giving proper weight to the Board's determination of the evidence and by finding the Board erroneously "cherry picked" favorable language from one medical record. As shown above, the circuit court found error with the Board's decision to give sole weight to one note by Shumate's treating podiatrist that indicated Shumate was doing better just a few days before Shumate's last paid day of employment. Giving weight to this one note, the circuit court held, ignored the doctor's own sworn testimony that Shumate was disabled, it ignored the fact that Shumate had not been at work for the 12 weeks preceding the note, and it ignored the lengthy medical history

indicating that though the foot condition waxed and waned in its severity, it never completely resolved favorably for Shumate. To resolve this issue we must look to the standard of review and whether the Board has unfettered discretion to believe one piece of evidence over the totality of the remaining evidence.

Shumate's application for disability retirement benefits was pursuant to KRS 61.600. Under that statute, Shumate had to prove entitlement to the benefits by a preponderance of the evidence.[1] *Kentucky Retirement Systems v. West*, 413 S.W.3d 578, 580 (Ky. 2013) (citing KRS 13B.090(7)). To prove her case, an administrative proceeding commenced. The administrative body became the fact finder in Shumate's case, and its factual determinations are "afforded 'great latitude in its evaluation of the evidence heard and the credibility of witnesses . . . .'" *Kentucky Retirement Systems v. Brown*, 336 S.W.3d 8, 14 (Ky. 2011) (quoting *Kentucky State Racing Comm'n v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972)).

In light of the fact-finding deference afforded the administrative body, appellate review for a Board's decision turns on whether the fact-finder's decision favored or disfavored the party with the burden of persuasion. *Brown*, 336 S.W.3d at 14 (citing *McManus v. Kentucky Retirement Systems*, 124 S.W.3d 454, 458 (Ky. App. 2003)). If the fact-finder favors the party with the burden of persuasion, then the question on appeal is "whether the agency's decision is supported by

[1] She also had to prove that her "incapacity [did] not result directly or indirectly from bodily injury . . . disease, or condition which pre-existed membership in the system[.]" KRS 61.600(3)(d). That issue is discussed *infra*.

substantial evidence[.]" *Id*. If the fact-finder denies relief to the party with the burden of proof or persuasion, as in the instant case, "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." *Id*. at 14-15.

Under the "no reasonable person" standard, we find no error with the Franklin Circuit Court's order. As shown above, Shumate's lengthy medical history surrounding her foot conditions was so compelling that no reasonable person could have failed to be persuaded by it. While Shumate's foot condition would vacillate between getting better and worse, it never completely resolved. Furthermore, Shumate's treating podiatrist testified that Shumate's conditions did not resolve themselves favorably (as would occur in most people suffering from plantar fasciitis), and she also said that Shumate was disabled during the relevant period. The doctor's note just a few days before Shumate's last day of paid employment that indicated Shumate was doing better did not state that Shumate was completely healed or that her foot condition was completely resolved, nor did it address the fact that Shumate had been away from work for many weeks while being treated. In fact, the totality of the evidence demonstrated that Shumate's condition continued for more than a year, that at the evidentiary hearing Shumate was in tremendous amounts of pain, and that Shumate had to undergo painful procedures over and over in a futile attempt to resolve the disabling condition.

While we agree with KERS that the Franklin Circuit Court's use of the term "cherry picked" to describe the Board's error in its factual findings and

legal conclusions is not wholly correct terminology, the circuit court's point still resonates in jurisprudentially-sound logic. In an administrative hearing such as occurred in the instant case, "[t]he Board had the right to believe part of the evidence and disbelieve other parts of the evidence whether it came from the same witness or the same adversary party's total proof." *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977). However, this authority is not limitless, as it is still subject to "substantial evidence" and "no reasonable person" standards on appeal. *Brown*, 336 S.W.3d at 14. As the Kentucky Supreme Court held more than three decades ago:

> The rule in Kentucky is that if there is substantial evidence in the record to support an agency's findings, the findings will be upheld, even though there may be conflicting evidence in the record. *Taylor v. Coblin*, 461 S.W.2d 78 (Ky. 1970); *Reeves v. Jefferson County,* 245 S.W.2d 606 (Ky. 1951). The agency's findings are clearly erroneous if arbitrary or unsupported by substantial evidence in the record.
>
> The "clearly erroneous" standard narrows the scope of review, *yet it is not without teeth*. The Commission has not been granted an unbridled discretion, and courts on review are not required to uphold arbitrary or unreasonable awards of damages.

Kentucky Commission on Human Rights v. Fraser, 625 S.W.2d 852, 856 (Ky. 1981) (emphasis and paragraph break added).

Here, based on our thorough review of the record, the Board's decision to believe only one small medical note from the vast body of medical records and expert testimony violates any of the standards of review – clear error,

substantial evidence, and no reasonable person. Shumate's debilitating medical conditions never completely resolved, and it is unfathomable to imagine how Shumate was to continue her job as an Instructional Assistant for little children when she could not be on her feet for extended periods of time. As Shumate's supervisor wrote on the Employer Job Description form, "[y]ou really can't sit while watching children . . . working w/ small babies you carry them all day they can weigh up to 40 lbs."

Accordingly, the circuit court did not err by determining the Board's use of only one chosen note violated the "substantial evidence" standard of review. We hold that no reasonable person viewing the submitted objective medical evidence would find that Shumate was not disabled. Thus, we affirm the circuit court on this issue.

III. Did the Franklin Circuit Court err by finding the Board erroneously determined Shumate did not prove by objective medical evidence that she was continuously incapacitated for at least a year following her last day of paid employment and that her condition was not pre-existing?

KERS next argues the circuit court erred in its review of two of the substantive elements for retirement disability.[2] The first substantive element is whether Shumate proved by a preponderance of the evidence that she was permanently incapacitated from work. The disability retirement statute defines a permanent incapacity to work as one that "is expected to result in death or can be

[2] KERS's brief includes the pre-existing condition element in a later Argument. We elect to review the argument in this section.

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." KRS 61.600(5)(a)(1). Permanent incapacity to work "shall be based on the medical evidence contained in the member's file and the member's residual functional capacity and physical exertion requirements." KRS 61.600(5)(a)(2). *See also Kentucky Retirement Systems v. Bowens*, 281 S.W.3d 776, 781 (Ky. 2009). A person's residual functional capacity is that persons' ability to work on a regular and continuing basis and "shall be assessed in light of the severity of the person's physical . . . impairments [including the] person's ability to walk [and] stand[.]" KRS 61.600(5)(b).

Here, the circuit court did not err by finding substantial evidence was presented by Shumate of her permanent incapacity to work. Shumate's medical and work records indicate that the foot conditions were constantly disabling. When she was at work, her fellow employees were having to perform most of the lengthy walking tasks for Shumate. Her child caretaking job required her to be constantly on her feet. Her feet affected her ability to work so much that she was off work for many weeks before her final date of paid employment, at which point she quit and filed for retirement disability. Her foot conditions never completely resolved though she received numerous, painful shots in her heels, and though she tried physical therapy and foot appliances. And, more importantly, Shumate had to return to her podiatrist even after her final day of paid employment to continue treatments for her feet.

The objective medical evidence of record is substantial and points to only one conclusion – that Shumate was permanently incapacitated from work for at least 12 months following her last day of paid employment. The circuit court did not err by reversing the Board's conclusion otherwise. Accordingly, we affirm the circuit court on this issue.

The second substantive element about which KERS complains is the pre-existing condition element. For this element, Shumate had to prove that her "incapacity [did] not result directly or indirectly from bodily injury . . . disease, or condition which pre-existed membership in the system[.]" KRS 61.600(3)(d). The Board's Final Order found Shumate had not met her burden of proof because Shumate saw a doctor in the mid-1990s for a foot contusion, and because Dr. Carter stated the foot disorder was a structural deformity. The Board reasoned that based on these two pieces of evidence, Shumate should have reasonably discovered her foot conditions prior to her membership in the state retirement system. The Franklin Circuit Court rejected this reasoning as not supported by substantial evidence. We agree.

Pre-existing conditions do not include "those diseases and illnesses which lie dormant and are asymptomatic such that no reasonable person would have realized or known of their existence. This is particularly so given the fact that some diseases are genetic and may not surface for many years." *Kentucky Retirement Systems v. Brown*, 336 S.W.3d 8, 15 (Ky. 2011).

We have thoroughly reviewed Shumate's medical records, especially those predating her membership in the retirement system, and thoroughly reviewed Shumate's and Dr. Carter's testimony. There is neither evidence of substance nor evidence that a reasonable person would conclude Shumate was aware of her foot condition prior to her membership in the retirement system. Shumate's records indicate one, isolated foot contusion that predated her employment. Notably, the contusion was not diagnosed as plantar fasciitis. Shumate's records indicate that she did not have a recurrence of foot pain until some 15 years later. And Dr. Carter's testimony indicated that Shumate was not likely to be aware of her foot condition until the pain surfaced in 2011.

As there was no substantial evidence to support the Board's Final Order on this issue, and no reasonable person would have found otherwise in light of the objective medical evidence, the circuit court did not err. Accordingly, we affirm the circuit court's order.

IV. Did the Franklin Circuit Court substitute its own judgment for the fact finder and reweigh the evidence?

KERS next argues that the Franklin Circuit Court impermissibly substituted its own judgment for the Board and reweighed the evidence in violation of KRS 13B.150(2). Under that statute, the reviewing court "shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." The reviewing court may only reverse an administrative agency's order if it

violates one of seven provisions, including being "[w]ithout support of substantial evidence on the whole record[.]" KRS 13B.150(2)(c).

We need not tarry long on this claim, as it ostensibly rehashes the arguments already presented by KERS and rejected above. The Franklin Circuit Court as an appellate body was required to examine the evidence under the "substantial evidence" and "no reasonable person" standards. *Brown*, 336 S.W.3d at 14. Substantial evidence has been defined in multiple ways:

> Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; it is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding form being supported by substantial evidence.
> . . .
> We have defined 'substantial' evidence as being evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable men.
>
> The test of substantiality of evidence is whether when taken alone or in the light of all the evidence it has sufficient probative value to induce conviction in the minds of reasonable men.

Kentucky State Racing Commission v. Fuller, 481 S.W.2d 298, 307-308 (Ky. App. 1972) (citations omitted). Thus, the circuit court was required to examine the entirety of the record evidence and determine whether the Board's decision was without the evidence of substance contained in the whole record. The circuit court did precisely that in the instant case. This was not a case where two competing experts testified and the Board had to determine which to believe. *Cf. H. Smith*

Coal Co. v. Marshall, 243 S.W.2d 40 (Ky. 1951). Instead, there was one doctor who treated Shumate for many months who testified that Shumate was permanently disabled and whose records indicate that Shumate was never completely healed of her condition. The Board took one isolated note from the doctor's records – a note that did not conclusively state that Shumate was not permanently disabled – and used it to counter the substantial record evidence in Shumate's favor.

The circuit court's review of the Board's decision for substantial evidence was not erroneous nor in contravention of its role as a review court. Accordingly, we affirm the circuit court on this issue.

V. Did the circuit court err by using CR 59.05 to alter, amend, or vacate its judgment?

Finally, KERS argues the circuit court erred by using CR 59.05 to alter, amend, or vacate its judgment. KERS argues Shumate's CR 59.05 motion "merely reasserted essentially the same arguments as in her briefs." Thus, KERS claims, there were no extraordinary circumstances warranting using CR 59.05 to alter, amend, or vacate the judgment. As we have already held CR 59.05 was properly invoked to correct a mistake of fact, Issue I, *supra*, we find no merit to KERS's argument on this issue. Accordingly, we affirm the circuit court's order.

CONCLUSION

Having thoroughly reviewed the record and the arguments presented by the parties, we affirm the Franklin Circuit Court. No reasonable person viewing

the substantial and convincing objective medical evidence presented by Shumate would find that she was not permanently disabled as of the date of her final day of paid employment. Accordingly, the Franklin Circuit Court did not err by reversing the Board's Final Order denying Shumate's retirement disability application.

ALL CONCUR.

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