

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2016-CA-001814-MR

PATTY J. WOLFE

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE THOMAS D. WINGATE, JUDGE  
ACTION NO. 12-CI-00982

KENTUCKY RETIREMENT SYSTEMS;  
THE BOARD OF TRUSTEES OF THE  
KENTUCKY RETIREMENT SYSTEMS;  
THE DISABILITY APPEALS COMMITTEE OF THE  
KENTUCKY RETIREMENT SYSTEMS AND  
THE COUNTY EMPLOYEES RETIREMENT SYSTEMS

APPELLEES

OPINION  
AFFIRMING

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BEFORE: CLAYTON, CHIEF JUDGE; COMBS AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Patty J. Wolfe appeals from an order of the Franklin

Circuit Court affirming a decision of the Board of Trustees of the Kentucky

Retirement Systems (Retirement Systems) denying her disability retirement

benefits pursuant to Kentucky Revised Statute (KRS) 61.600. Wolfe's primary arguments are that Retirement Systems erred as a matter of law when it found her last date of paid employment was June 30, 2004, and there is no substantial evidence to support the Retirement Systems' decision that her condition pre-existed her membership in the County Employee Retirement Systems (CERS). We conclude that June 30, 2004, the last date Wolfe contributed to CERS, was her last day of paid employment for purposes of KRS 61.600 and affirm. We do not address whether her condition pre-existed her membership in CERS.

Wolfe was employed by the Greenup County Board of Education at Greysbranch Elementary as a noncertified school board employee in an instructional assistant position. In September 1991, she began her membership in the CERS. In December 2000, Wolfe initially filed a claim for disability retirement benefits based on two hernia repair surgeries, one in 1992 and the other in 1995, and complications resulting from those surgeries. That application was denied.

On February 9, 2005, Wolfe filed her second application for disability retirement benefits. After the Retirement Systems Medical Review Board recommended denial, an administrative hearing was conducted at Wolfe's request.

After finding that Wolfe met employment service requirements for KRS 61.600, the hearing officer found that Wolfe's job duties were sedentary in nature and her last day of paid employment was June 30, 2004. The hearing officer recommended Wolfe's application be denied because she failed to establish

by objective medical evidence she had a permanent physical incapacity that would prevent her from performing her former job or a job of like duties since her last day of paid employment and that her condition pre-existed her membership in CERS. The Disability Appeals Committee of the Board of Trustees of Retirement Systems adopted the hearing officer's report and entered a final order denying Wolfe's application for enhanced disability retirement benefits. Wolfe appealed, and the Franklin Circuit Court affirmed.

“KRS 61.665(3) provides for a hearing challenging a determination of the Kentucky Retirement Systems ‘in accordance with KRS Chapter 13B,’ which places the burden of proof on the claimant seeking benefits.” *McManus v. Kentucky Ret. Sys.*, 124 S.W.3d 454, 458 (Ky. App. 2003). In *McManus*, this Court set forth the standard of review applicable to appeals from an adverse decision of the Retirement Systems as follows:

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 that party's favor is so compelling that no reasonable person could have failed to be persuaded by it.

*Id.* (citations omitted). This Court is required to defer to an administrative agency “in its evaluation of the evidence heard and the credibility of witnesses, including

its findings and conclusions of fact.” *Aubrey v. Office of Attorney General*, 994 S.W.2d 516, 519 (Ky. App. 1998). However, we review issues of law and the legal conclusions of administrative agencies *de novo*. *Id.*

An award of retirement disability benefits for CERS members is governed by KRS 61.600 which, in addition to minimum service requirements and filing deadlines, requires the following:

(3) Upon the examination of the objective medical evidence by licensed physicians pursuant to KRS 61.665, it shall be determined that:

- (a) The person, since his last day of paid employment, has been mentally or physically incapacitated to perform the job, or jobs of like duties, from which he received his last paid employment. In determining whether the person may return to a job of like duties, any reasonable accommodation by the employer as provided in 42 U.S.C. sec. 12111(9) and 29 C.F.R. Part 1630 shall be considered;
- (b) The incapacity is a result of bodily injury, mental illness, or disease. For purposes of this section, “injury” means any physical harm or damage to the human organism other than disease or mental illness;
- (c) The incapacity is deemed to be permanent;  
and
- (d) The incapacity does not result directly or indirectly from bodily injury, mental illness, disease, or condition which pre-existed membership in the system or reemployment, whichever is most recent. For purposes of this subsection, reemployment shall not mean a change of employment between

employers participating in the retirement systems administered by the Kentucky Retirement Systems with no loss of service credit.

KRS 61.600(5)(a) provides that an incapacity is permanent “if it is expected to result in death or can be expected to last for a continuous period of not less than twelve (12) months from the person’s last day of paid employment in a regular full-time position.”

Wolfe’s initial disagreement with the Board is its conclusion that her last day of paid employment as used in KRS 61.600(3)(a) was June 30, 2004 instead of November 7, 2004, the last day she worked as an instructional assistant.<sup>1</sup>

Retirement Systems benefit counselor, Lori Wells, explained that following a report from the Greenup Board of Education, Wolfe worked 127 days in the 2004-2005 school year at a rate pay of \$9.61 per hour but that her wages for the year were \$3,421.92. After Wolfe’s service was checked, it was determined that Wolfe’s service did not average as full-time to receive service credit in CERS.

Based on that evidence, Retirement Systems held Wolfe’s last day of paid employment was June 30, 2004, the last day contributions were required to be

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<sup>1</sup> Although Wolfe argues that Retirement Systems changed her last day of paid employment after the administrative hearing on November 28, 2011, and suggests that she was somehow prejudiced, the record cover sheet to the administrative record and an affidavit signed by a Retirement Systems’ benefit counselor on July 25, 2006 regarding the member’s service credit stated that the last day of paid employment was June 30, 2004. Any argument that Wolfe was unfairly surprised by Retirement Systems’ calculation of the last day of paid employment is without merit.

reported for Wolfe to receive service credit for the 2004-2005 school year. The

Board reasoned as follows:

[Wolfe] initially reported to have worked 183 days at an hourly rate of \$9.61 for the 2004-2005 fiscal year. Based upon these reported wages and days worked, Claimant failed to meet the 80-hour average necessary to receive twelve (12) months of service credit for the 2004-2005 school year. The Greenup County Board of Education received the resulting exception and error report generated for [Wolfe] by Systems and adjusted her days from the 183 days previously down to 127 days actually worked. A recalculation using this adjustment still determined that claimant did not average over 80 hours over the days worked, but averaged only 56.07 hours over the 127 days worked...[Wolfe's] last day of paid employment for purposes of the application of KRS 61.600 is therefore accurately reflected as June 30, 2004.

Wolfe argues that her last day of paid employment was November 7, 2004, the last day she was employed in a full-time position. Retirement Systems argues that regardless of whether Wolfe was employed in a full-time position, the determination of her last day of paid employment for purposes of KRS 61.600 (3)(a) is whether she worked sufficient hours to require contribution as a CERS member rather than the last day she held a full-time position. Our inquiry requires that we construe the applicable statutory law. Our review of the issue is *de novo*. *Aubrey*, 994 S.W.2d at 519.

We are guided by certain rules of statutory construction.

In construing statutes, our objective is to effectuate the intent of the General Assembly. *Hawkins v. Commonwealth*, 536 S.W.3d 697, 702 (Ky. 2017). KRS 446.080(1) requires that statutes be construed liberally “to promote their objects

and carry out the intent of the legislature[.]” However, the General Assembly’s intent is to be determined, “if at all possible, from the language the General Assembly chose, either as defined by the General Assembly or as generally understood in the context of the matter under consideration.” *Shawnee Telecom Resources, Inc. v. Brown*, 354 S.W.3d 542, 551 (Ky. 2011). A statute must be construed as a “whole, for all of its parts to have meaning, and for it to harmonize with related statutes.” *Id.* While “the purpose of disability retirement benefits is to provide security for those who are unable to continue working until normal retirement due to injury or disease” and pension statutes are to be liberally construed, *Roland v. Kentucky Retirement Systems*, 52 S.W.3d 579, 583 (Ky. App. 2000), unambiguous statutes must be construed without resort to canons of construction. *Shawnee Telecom Resources, Inc.*, 354 S.W.3d at 551.

No other reasonable conclusion can be reached that the phrase “since [the] last day of paid employment” as used in KRS 61.600(3)(a) unambiguously means that the incapacity to perform the job or like duties exists from the last day of paid employment forward. The question presented by Wolfe is what the phrase “last day of paid employment” means.

Although KRS 61.600 does not define the term “last day of paid employment,” other provisions within the same Chapter do so. KRS 61.510(32) specifically defines last day of paid employment stating: “‘Last day of paid employment’ means the last date employer and employee contributions are required to be reported in accordance with KRS 16.543, 61.543, or 78.615 to the

retirement office in order for the employee to receive current service credit for the month.”

KRS 78.615 referenced in KRS 61.510(32) governs the deduction of employee contributions to CERS employees and provides that contributions are required to be reported from regular full-time employees. As relevant here, KRS 78.510(21) provides that “[r]egular full-time positions” means “all positions that average one hundred (100) or more hours per month, determined by using the number of hours actually worked in a calendar or fiscal year, or eighty (80) or more hours per month in the case of noncertified employees of school boards, determined by using the number of hours actually worked in a calendar or school year[.]” Consistent with the statutory provisions, 105 Kentucky Administrative Regulations 1:300 Section 1(2) states that for purposes of service credit, “[i]f the employee does not work an average at least eighty (80) hours per month, the service credit shall be disallowed and all employer and employee contributions shall be refunded.”

The statutory language leaves no doubt that the term “last day of paid employment” as used in KRS 61.600(3)(a) means the last day the claimant worked full-time to receive service credit in the retirement system. However, Wolfe argues such a construction is at odds with our decision in *Roland* where this Court held that for purposes of determining the “last day of paid employment” the relevant date was when the claimant occupied a full-time position without



consideration of the number of hours worked in a month. *Roland*, 52 S.W.3d at 584.

Wolfe's argument ignores that the statutory law applicable in *Roland* provided that the "last day of paid employment" was when the claimant worked in a full-time position. *Id.* at 582-83. Under the subsequent amendments to the pertinent statutes relevant here, the focus is no longer on whether the position is full-time but instead, on a calculation based on the number of hours actually worked, to determine the claimant's last day of paid employment.<sup>2</sup> We conclude Retirement Systems did not err in concluding that Wolfe's last day of paid employment was June 30, 2004.

Using June 30, 2004 as the last day of Wolfe's paid employment, Retirement Systems found that Wolfe was not physically incapacitated on her last day of paid employment. This is a factual finding, which we must affirm unless the evidence is "so compelling that no reasonable person could have failed to be persuaded by it." *McManus*, 124 S.W.3d at 458.

There is no evidence that is so compelling to require reversal. Retirement Systems was persuaded, in part, by Wolfe's testimony that she performed her normal duties after June 30, 2004. It further found that there was objective medical evidence that Wolfe was not physically incapacitated during the year following her last day of paid employment. It found as follows:

Additionally, objective medical testing from January 2005 (specifically a CT scan and fluoroscopy) revealed only the

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<sup>2</sup> The *Roland* Court noted these statutory amendments in its opinion. *Id.* at 584, n.1, 6, and 9.

expected tissue loss and normal diaphragmatic motion (i.e. breathing). A month later, Dr. Short completed a return to School Certificate on February 17, 2005, which indicated that Claimant was under his care from 12/15 to 4/28, but could return to school on April 29, 2005-almost ten (10) months following her last day of paid employment.

Additionally, while Wolfe appeared at the hearing with an oxygen tank for her use, the evidence was that it was not prescribed until October 2004, well after her last day of paid employment. Likewise, much of Wolfe's argument focuses on her medical condition in years subsequent to her last day of paid employment. In light of the evidence supporting the Retirement Systems' decision, the evidence relied on by Wolfe does not compel a finding in Wolfe's favor.

Although Retirement Systems found Wolfe was not physically incapacitated on the last day of paid employment, it nevertheless addressed whether her lung disease and hypoxia pre-existed her membership in CERS. Because Wolfe had less than sixteen years of current or prior service participating in Retirement Systems, she is precluded from benefits for any pre-existing condition unless her resultant incapacity was substantially aggravated by an injury or accident arising out of or in the course of her employment. KRS 61.600(4)(a). This Court finds no reason to address this issue. Wolfe was not physically incapacitated on her last day of paid employment and, therefore, the pre-existing nature of her condition is not an issue.

Wolfe presents additional arguments for reversal most of which are briefly presented without citation to authority.<sup>3</sup> We have reviewed her remaining arguments and conclude all are without merit. We do note that Wolfe’s arguments as to the inadmissibility of medical records on the grounds of hearsay are belied by KRS 13B.090(2), which specifically permits the submission of evidence “in written form if doing so will expedite the hearing without substantial prejudice to . . . any party.” KRS 13B.090(1) states that hearsay evidence is admissible “if it is the type of evidence that reasonable and prudent persons would rely on in their daily affairs[.]” There is no indication the hearing officer interpreted evidence that a reasonable person would not understand and rely upon.

For the reasons stated, the opinion and order of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

James P. Benassi  
Louisville, Kentucky

BRIEF FOR APPELLEE:

Leigh A. Jordan Davis  
Frankfort, Kentucky

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<sup>3</sup> For instance, she argues *McManus* “was not a properly published opinion” because the Kentucky Supreme Court was without authority to order an opinion by this Court to be published. Also, among the myriad of arguments most of which are made in one or two sentences, is that the “Retirement Systems [is] not allowed to play doctor.”