

RENDERED: OCTOBER 12, 2018; 10:00 A.M.  
NOT TO BE PUBLISHED

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

NO. 2017-CA-001028-MR

KENTUCKY RETIREMENT SYSTEMS

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE PHILLIP SHEPHERD, JUDGE  
ACTION NO. 16-CI-00188

ROY WALLING

APPELLEE

OPINION  
REVERSING

\*\* \*\* \* \* \* \* \*

BEFORE: DIXON, NICKELL, AND THOMPSON, JUDGES.

NICKELL, JUDGE: Kentucky Retirement Systems (Agency) appeals from a Franklin Circuit Court order reversing the final order of its Board of Trustees denying Roy Walling's application for disability retirement benefits. Upon review, we reverse.

The hearing officer's findings of fact, conclusions of law and recommended order was issued on November 25, 2015. Walling filed exceptions

to the hearing officer's recommended order. After reviewing the evidence, the Board issued a final order adopting the hearing officer's recommended order. In its final order, issued January 25, 2016, the Board adopted the hearing officer's recommended order in its entirety, and summarized the central issues, facts, and procedural history relative to the present appeal.

### FINDINGS OF FACT

1. [Walling] timely applied for disability retirement benefits in an application dated August 13, 2013.
2. [Walling's] membership date in the KERS<sup>1</sup> was October 15, 2006, and his last date of paid employment was November 12, 2014. [Walling] has 98 months of service credit with the KERS, at least twelve months of which was current service credit.
3. [Walling] has less than sixteen years of service credit with the KERS.
4. [Walling] was employed by the Department of Military Affairs as a Military Material Handler Sr. [Walling's] job duties fell into the category of medium work duty.
5. [Walling] filed for disability benefits pursuant to KRS<sup>2</sup> 61.600 based on diabetes and resulting problems including diabetic retinopathy, diabetic neuropathy in his lower extremities, and diabetic nephropathy.

---

<sup>1</sup> Kentucky Employees Retirement System.

<sup>2</sup> Kentucky Revised Statutes.

6. Reasonable job duty accommodations were requested, and [Walling] had worked with job duty accommodations for one year prior to his last day of paid employment.

7. Kentucky Retirement Systems challenged [Walling's] application on the grounds that [Walling's] condition was not permanently disabling, and that the condition of diabetes predated his membership in KERS.

8. The final review by the Medical Review Board recommended denial of [Walling's] application due to a lack of objective medical evidence of a permanent disability that was expected to last at least twelve months after [Walling's] last day of paid employment, and that diabetes was a preexisting condition.

9. [Walling] was a reliable witness as to the symptoms of his medical conditions.

10. [Walling] timely filed a request for an Administrative Hearing in a letter received by Kentucky Retirement Systems on August 18, 2014.

11. The objective medical evidence submitted demonstrates that [Walling] suffers vision limitation due to diabetic retinopathy and diabetic macular edema. Had [Walling] been required to perform his unaccommodated job duties on his last day of paid employment, the objective medical evidence supports a finding that [Walling] would be disabled. However, [Walling] had been accommodated by his employer in such a way that he was able to function at work with his vision limitations. And while [Walling] testified that he didn't think his employer would continue his accommodations, there was no such indication from [Walling's] employer in any of the three Form 8030 Employer Job Description documents submitted in the evidence. In each Form 8030, [Walling's] employer stated very clearly that [Walling's] job duties were the accommodated job duties. As to the alleged of lower extremity peripheral

neuropathy, there is neither nerve conduction study nor functional capacity evaluation submitted to assess [Walling's] physical limitations based on neuropathy; nor is there any indication from the records that [Walling] could not perform his job as accommodated because of lower extremity peripheral neuropathy. There [is] no objective evidence indicating that kidney problems or renal failure were disabling [Walling] from performing his accommodated job duties as of his last day of paid employment. Therefore, it is the finding of this Hearing Officer that [Walling] has failed to meet his burden of proof that he was permanently disabled from his job as accommodated due to diabetes and resulting problems including diabetic retinopathy, diabetic neuropathy in his lower extremities, and diabetic nephropathy as of his last day of paid employment and for at least twelve months thereafter.

12. [Walling] failed to submit any medical records dated prior to his membership in the KERS. The Medical Review Board repeatedly stated that [Walling's] diabetes likely developed over a period of many years and they therefore requested the older medical records. Walling failed to supply such records. Once the Medical Review Board had raised the issue of preexisting condition, the burden of proof shifted to [Walling] to show that his incapacity does not result directly or indirectly from a condition which predated [sic] his membership. [Walling] failed to submit any records from prior to his membership date, and he therefore has failed to meet his burden of proof that diabetes was not a preexisting condition. KRS 61.600(3); *Kentucky Retirement Systems v. Brown*, 336 S.W.3d 8 (Ky. 2011).

#### CONCLUSIONS OF LAW

1. Pursuant to KRS 13B.090(7), [Walling] has the burden of proving, by a preponderance of the evidence, that he is entitled to disability benefits under KRS 61.600. [Walling] bears the burden of proof on all issues

raised in this case. *Dawson v. Driver*, 420 S.W.2d 553 (Ky. 1967). Kentucky Retirement Systems is not required to prove that [Walling] is able to perform his duties as of his date of last paid employment. *Personnel Board v. Heck*, 725 S.W.2d 13, 17 (Ky. App. 1987).

2. [Walling] has failed to prove by a preponderance of the evidence that he suffers from a permanent mental or physical impairment as defined in KRS 61.600(5)(a)(1) that would prevent [him] from performing the accommodated job duties as a Military Material Handler Sr. or job similar to that as of his last date of paid employment.

3. [Walling] has failed to prove by a preponderance of the evidence that the condition of diabetes did not result directly or indirectly from bodily injury, mental illness, disease, or condition which predated his reenrollment with the KERS. KRS 61.600(3)(d).

Based on the foregoing, it is hereby recommended that [Walling's] application for disability benefits be denied.

Walling filed an original action in Franklin Circuit Court appealing the Board's decision. The circuit court reversed, reasoning: (1) the Board's determination Walling was not incapacitated to perform his job duties as of his last date of employment was unsupported by substantial evidence;<sup>3</sup> (2) as a *pro se* litigant, Walling was severely disadvantaged in interpreting the consequences of failing to provide medical records predating his membership in KERS; and (3)

---

<sup>3</sup> Substantial evidence is defined as "evidence of substance and relevant consequence having the fitness 'to induce conviction in the minds of reasonable men.'" *Kentucky State Racing Comm'n v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972) (internal quotation marks omitted).

Kentucky's longstanding policy of leniency toward *pro se* litigants warranted remand of Walling's claim and required the Board to issue another notice explicitly informing Walling failing to produce medical records proving his condition did not predate his membership in KERS will not only result in "his claim's review being based solely on the information currently contained in the record, but would be fatal to his disability claim." The Agency now appeals, arguing reversal of its decision resulted from legal misinterpretation and impermissible reweighing of the evidence. We agree.

In administrative proceedings, the claimant bears the burden of proving entitlement to a benefit by a preponderance of the evidence, and the claimant likewise carries the risk of non-persuasion. KRS 13B.090(7). Where the fact-finder denies relief to the party with the burden of proof or persuasion, the issue on appeal is not whether the denial is supported by substantial evidence; rather, "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." *McManus v. Kentucky Ret. Sys.*, 124 S.W.3d 454, 458 (Ky. App. 2003).

Walling initiated administrative proceedings to secure benefits under KRS 61.600. He bore the burden of proving and persuading the Agency he had a disabling condition and his disabling condition did not exist at the time he became a member of KERS. The Agency had no reciprocal obligation to disprove either of

those points, present any evidence in rebuttal, or otherwise challenge evidence Walling presented which it deemed unconvincing. *Kentucky Ret. Sys. v. West*, 413 S.W.3d 578, 581 (Ky. 2013).

The circuit court reversed the Board, finding diabetes and related medical conditions prevented Walling from performing even his accommodated job duties. In so finding, the circuit court improperly relied on a series of Form 8030's Walling's former employer had completed in response to his disability applications. Those forms are of no probative value in ascertaining whether Walling had a disability qualifying him for benefits under KRS 61.600, as they do not constitute "objective medical evidence"<sup>4</sup> necessary to support a determination of disability.

Although the Board relied on medical source statements of Drs. Andrew Pearson and Thomas Abell in denying Walling's disability application, based on its interpretation of these statements, the circuit court found:

---

<sup>4</sup> KRS 61.600(3) requires a qualifying disability to be supported by "objective medical evidence." That term is defined in KRS 61.510(33) as:

[R]eports 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[.]

at a maximum, Walling could perform near acuity tasks for only sixty-six percent of his work day. Both documents state Walling cannot work with small objects. Even Walling's accommodated job duty of reading, understanding and placing packing slips would fall under a "near acuity task" and are "small objects" that his physicians claim he cannot work with without "great difficulty."

The circuit court concluded the statements supported a finding of disability, contradicting the conclusion drawn by the Board from its evaluation of the same evidence.

In its review of this administrative matter, however, the circuit court was authorized to reverse the Board only if it "overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). The Board has sole authority to determine weight, credibility, substance, and inferences to be drawn from the evidence. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985).

Here, the Board's interpretation of the medical source statements, and its conclusions based upon its reading of those source statements, was reasonable. The circuit court usurped the Board's fact-finding role by reinterpreting the evidence in a manner to support its own conclusion. Accordingly, the circuit court erred in reversing the Board's findings based on its interpretation of Drs. Pearson and Abell's medical source statements.



Next, the circuit court reversed the Board's decision that Walling failed to meet his burden of establishing his condition did not predate his employment as required under KRS 61.600(3)(d). The circuit court reasoned Kentucky's policy of leniency toward *pro se* litigants, as expressed in *Russell v. Commonwealth*, 495 S.W.3d 680, 683 (Ky. 2016), *Adkins v. Wrightway Readymix*, 499 S.W.3d 286, 289 (Ky. App. 2016), and *Cubar v. Town Country Bank and Trust Co.*, 473 S.W. 3d 91, 92 (Ky. App. 2015), would extend to excuse Walling's failure to prove his diabetes was not a preexisting condition. The circuit court further found the Board's initial notice to Walling, stating failure to produce the requested information would result in the Medical Review Board "relying solely upon the medical information provided," was inadequate to inform Walling a physician had already denied his claim for lack of clarity on the date of his diabetes diagnosis and Walling's failure to provide the requested medical records would result in the other two physicians denying his claim, as well. Accordingly, the circuit court concluded the Board's final order was deficient under KRS 13B.150(2)(g). The circuit court's opinion and order reversing stated:

[i]t is reasonable to assume that a *pro se* plaintiff without such information will have very limited or no means of obtaining such knowledge. If he had been represented by legal counsel, the Court would impute this knowledge onto Walling. Walling was operating at such distinct disadvantage that it would be extremely difficult for any similarly situated claimant to succeed.

...

The Court recognizes that it is not necessary for an agency to show the negative of an issue when a *prima facie* case as to the positive has not been established. [*Personnel Bd. v. Heck*, 725 S.W.2d 13, 17 (Ky. App. 1987)]. If Walling cannot or will not produce the records Kentucky Retirement Systems originally requested, his claim must fail. However, the Court will reverse and remand Kentucky Retirement System's final order under KRS 13B.150(2)(g) due to our longstanding public policy of leniency to *pro se* litigants. Kentucky Retirement Systems should issue another letter to Walling again requesting the information that all three doctors on the Kentucky Retirement System's Medical Review Board indicated on multiple occasions was necessary to determine whether Walling's diabetes was a [preexisting] condition. This subsequent letter must inform Walling that failing to produce said medical information will *not only* result in his claim's review being based solely on the information currently contained in the record, *but would be fatal to his disability claim*.

(Emphasis added).

The Agency argues the circuit court improperly relied on *Russell*, *Adkins*, and *Cubar* in finding Walling's *pro se* status justified granting him another chance to produce evidence demonstrating his diabetes did not predate his membership in KERS and requiring the Board to renotify Walling failing to produce the evidence would be fatal to his disability claim. Indeed, the circuit court's show of leniency far exceeded the leniency shown to *pro se* litigants in *Russell*, *Adkins*, and *Cubar*.

In *Cubar*, a *pro se* litigant appealed from an order granting summary judgment in a foreclosure action, arguing lack of standing for the first time on appeal. *Cubar*, 473 S.W.3d at 91-92. Another panel of this Court did not extend *pro se* leniency to excuse this procedural error where the issue of standing was waived by failure to include it in an answer. *Id.* (citing *Harrison v. Leach*, 323 S.W.3d 702, 708 (Ky. 2010) (in Kentucky, a party must timely plead lack of standing as a defense, lest it be waived)). Delineating the boundaries of leniency afforded *pro se* litigants, the panel stated, “leniency has a limit: *Cubar* must still present us with a factually cognizable and legally coherent challenge to summary judgment.” *Cubar*, 473 S.W.3d at 92.

In *Adkins*, a *pro se* litigant appealed from an order dismissing his counterclaim for wrongful use of civil proceedings in a contract dispute. *Adkins*, 499 S.W.3d at 286-89. Another panel of this Court found *Adkins*’ *pro se* status did not excuse his failure to argue for recusal “immediately upon discovery of the facts upon which the disqualification rests,” or the resulting waiver of the issue. *Id.* at 290-91 (internal citations omitted).

Finally, in *Russell*, a letter to the trial court after entering a guilty plea, complaining his counsel was ineffective and his sentence exceeded statutory limits could not be construed as a *pro se* motion as it failed to give the trial court fair

notice of the claim for relief, *i.e.*, Russell’s request to withdraw his plea of guilty. *Russell*, 495 S.W.3d at 682, 683, 685.

We recognize Kentucky’s policy of leniency expressed in *Cubar*, *Adkins*, and *Russell* permits trial courts to liberally construe a *pro se* litigant’s pleadings. However, that policy of leniency does not abrogate the legal necessity of affirmatively proving, pursuant to KRS 61.600(3)(d), that one’s incapacity did not “result directly or indirectly from bodily injury, mental illness, disease, or condition which [preexisted] membership” in KERS.

Walling bore the burden of proof; however, he failed to provide medical records establishing his condition prior to October 15, 2006, when he became a member of KERS. The earliest medical records he presented were from June 30, 2009. The Board reasonably concluded Walling had failed to prove his disabling diabetic condition did not result directly or indirectly from a preexisting condition; therefore, the circuit court was precluded from setting the Board’s findings aside. *Kentucky Bd. of Nursing v. Ward*, 890 S.W.2d 641, 642 (Ky. App. 1994).

The Supreme Court of Kentucky has held a disability retirement claimant may offer his or her own medical history to prove a disabling condition was not preexisting, pursuant to KRS 61.600(3). Where medical evidence is sufficient to prove a condition or disease did not exist until after the date of

membership, a permissible inference arises establishing the condition or disease either did not preexist membership, or was dormant and asymptomatic. In either case, the claim would be compensable. *Brown*, 336 S.W.3d at 15. In *Brown*, the testimony of the claimant's physician was bolstered by the required presentation of comprehensive medical records documenting preexisting condition or disease. *Id.* at 11-12. In the present appeal, however, Walling failed to provide the required documentation to support his physician's statement.

In addition to submitting limited medical records, Walling testified his diagnosis occurred when he began having trouble with his vision in about 2011. The hearing officer found Walling credible with regard to his symptoms. The medical history Walling provided did not indicate he suffered from diabetes prior to his 2006 membership date. Walling did not introduce any medical records predating 2009, much less 2006. In his appellate brief, Walling concedes there "are not any medical records to be found from physicians to show that I had pre-existing diabetes." The Board acted within its authority in choosing to disbelieve Walling's representation he simply had no medical records from that time period. Any difficulty Walling may have had in obtaining such records provides no basis for relaxing his burden of persuasion. *West*, 413 S.W.3d at 580-81.

Ultimately, Walling's application for benefits was denied because, in the proper exercise of its authority, the Board took into account gaps, ambiguities,

and questions raised in his medical records detracting from the weight and persuasive value of the evidence he presented. *See Ward*, 890 S.W.2d at 643 (“In determining whether the evidence is substantial, the court must take into account whatever in the record fairly detracts from its weight.”) (Internal quotation marks omitted).

In light of the foregoing, the order of the Franklin Circuit Court is REVERSED.

DIXON, JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, DISSENTING: Respectfully, I dissent. I would affirm the Franklin Circuit Court.

I do so with awareness of the standard of review that must be applied when reviewing decisions of the Board of Trustees of the Kentucky Retirement Systems which, for brevity, I will not repeat. Even under this limited standard, I believe the Board must be reversed.

First, I strongly disagree with the majority that the documents describing Walling’s job duties are of no probative value because they do not constitute objective medical evidence. While the documents are not medical evidence, they are highly relevant for the determination of whether Walling can

physically perform the essential functions of his position. It would be impossible to make that determination without knowing the essential functions of Walling's position.

Pursuant to KRS 61.600(3)(a), “[i]n 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[.]” “Reasonable accommodation” is defined as “[m]odifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that *enable* a qualified individual with a disability to perform the *essential functions of that position*[.]” 29 C.F.R. § 1630.2(o)(ii) (emphasis added). In other words, an employee is totally incapacitated if he can no longer perform the essential functions of his position even with the reasonable accommodation provided.

The essential functions of Walling's position require much more than making boxes and reading packing slips. As the Franklin Circuit Court found, the essential functions of Walling's position included functions that the medical testimony established he cannot perform with his limited eyesight. In short, the “accommodation” provided by Walling's employer was not an accommodation at all, but a drastic decrease in his job functions. I would affirm the Franklin Circuit

Court's conclusion that Walling is totally incapacitated for purposes of KRS 61.600.

Walling had less than sixteen years of service credit with Kentucky Retirement Systems and, therefore, under KRS 61.600(3)(d), benefits are precluded if his disease or condition pre-existed his membership in the system. In *Kentucky Retirement Systems v. Brown*, 336 S.W.3d 8, 14 (Ky. 2011), the Supreme Court held that “the person seeking the entitlement determination must prove to the trier of fact that his or her condition was not pre-existing membership by a preponderance of the evidence.” However, the Court also pointed out that the intent of the legislature in excluding individuals who have a pre-existing condition from receipt of disability benefits “was to prevent a fraud on the retirement systems, to prevent individuals from knowingly and intentionally filing for disability benefits based on conditions predating their enrollment.” *Id.* at 15. Therefore, the Court held that only individuals “who suffer from symptomatic diseases which are objectively discoverable by a reasonable person” are precluded from benefits. *Id.* After all, “[t]he Kentucky Retirement Systems was created to provide its employees with a safety net such that in the event they are injured or succumb to a disease while in the employment of the State, they are insured with disability retirement benefits.” *Id.*



While the Supreme Court has held that the burden is on the claimant to establish that his disease or condition was not pre-existing, it has been less than clear on what proof is required. As noted in *Fankhauser v. Cobb*, 163 S.W.3d 389, 402 (Ky. 2005), “it is difficult, if not impossible, to prove a negative.”

In *Elder v. Kentucky Ret. Sys.*, No. 2015-CA-000916-MR, 2017 WL 1534856 (Ky.App. 2017) (unpublished),<sup>5</sup> this Court interpreted *Kentucky Retirement Systems v. West*, 413 S.W.3d 578 (Ky. 2013). Elder argued “West places him, and future claimants, in a catch–22: ‘In order to prove your condition did not pre-exist your membership date, you must have medical records from that time. However, if you required medical treatment for your condition, your condition would be pre-existing.’” *Id.* at 4. We concluded the Supreme Court could not have meant such an absurd result. Instead, this Court held that “[t]he point is to submit pre-membership medical records to show no prior treatment for or evidence of the specific condition claimant deems not to be pre-existing.” *Id.* We pointed out “[t]he lack of any reference to the condition at issue, or symptoms of that condition, in the patient’s medical history is evidence that the claimant was not symptomatic pre-membership.” *Id.* In the rare case that an individual has no “prior medical records for *any* illness, disease, or surgery prior to membership, . . .

---

<sup>5</sup> I cite this unpublished case pursuant to Kentucky Rules of Civil Procedure (CR) 76.28(4)(c).

a claimant might submit an affidavit affirming absolutely no pre-membership medical records exist.” *Id.*

Kentucky Retirement Systems has yet to inform Walling precisely what information would satisfy its request, including the relevant time period from which any medical records must have been made. I agree with the Franklin Circuit Court that leniency should be afforded to Walling and he should be afforded the opportunity to submit the type of evidence approved of in *Elder*. I would affirm.

BRIEF FOR APPELLANT:

Carrie B. Slayton  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Roy Walling, *pro se*  
Irvine, Kentucky