

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000643-MR

TIMOTHY MOUTARDIER

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 06-CI-01698

KENTUCKY RETIREMENT SYSTEMS;
BOARD OF TRUSTEES OF KENTUCKY
RETIREMENT SYSTEMS; KENTUCKY
EMPLOYEES RETIREMENT SYSTEM;
AND ADMINISTRATIVE APPEALS
COMMITTEE OF KENTUCKY
RETIREMENT SYSTEMS

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: ACREE AND TAYLOR, JUDGES; BUCKINGHAM,¹ SENIOR
JUDGE.

TAYLOR, JUDGE: Timothy Moutardier brings this appeal from a March 11,
2009, Opinion and Order of the Franklin Circuit Court affirming an order of the

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Kentucky Retirement Systems, Board of Trustees (Board) discontinuing appellant's disability retirement benefits. We affirm.

Appellant was awarded hazardous disability retirement benefits by the Kentucky Retirement Systems in 1998. He had been employed as a law enforcement officer with the Department of Fish and Wildlife. He received disability benefits based upon an orthopedic impairment to his spine. Thereafter, appellant sought permission from the Retirement Systems to work as a school resource officer, while still receiving disability benefits. The request was denied. Later, appellant again sought permission, and the request was approved by the Retirement Systems.

Subsequently, in 2005, a physician with the Retirement Systems recommended discontinuation of appellant's disability benefits based upon the lack of objective medical evidence of a continued disability. Appellant received notice of the discontinuation of disability retirement benefits by letter dated September 7, 2005.

Following a hearing, a hearing officer for the Retirement Systems recommended appellant's disability retirement benefits be reinstated. However, the Board rejected the hearing officer's recommendation and ordered appellant's retirement benefits discontinued. The Board specifically found, in relevant part, the following:

- 5) The grant information submitted for the COPS in school program reflects that the School Resource Officer will be a sworn Deputy Sheriff and that

the duties include, among other things, providing security for school related events, enforcing criminal laws and ordinances and taking law enforcement action.

6) The Claimant testified that, as a School Resource Officer, he does carry a gun, does drive a marked car and does carry a badge that indicates he is a Deputy Sheriff. He notes that he has arrested a student and has worked wrecks near the school, including assisting an EMT. Claimant testified that he is required to attend in service police officer training and to keep up his marksmanship certification. He stated that he initially wore a sheriff's uniform, however doesn't currently wear a traditional sheriff's uniform because the school is experimenting with how wearing a uniform affects his interaction with the students.

7) The Claimant was initially denied approval to work as a School Resource Officer because he carried a gun and would have to intervene in volatile situations. Only when the Sheriff indicated that he would not carry a gun or make arrests was he approved to work as a School Resource Officer.

8) Records submitted at the hearing reflect the Claimant was able to participate and pass the in service firearm training requirements, which include shooting on the move, shooting multiple targets, speed reloading, weak hand shooting, strong hand only shooting, failure to stop drills, biannual-annual marksmanship qualification, marksmanship classification course, dynamic marksmanship course and tactical course.

9) The Claimant testified that he also participates in competitive archery and hunting.

10) Medical records reflect the Claimant injured his finger while lifting a horse trailer to hook it up to his truck.

11) Despite being able to pass the annual fire arm training and participating in activities that require strength in his arms, Claimant testified that he has

numbness in his arm all the time and can lift only 10 pounds.

12) The records confirm that Dr. Templin has placed restrictions on the Claimant. However, it is disingenuous for the Claimant to assert that he is physically unable to perform the exertional requirements of his previous job yet routinely participate in activities, both professionally and personally, that would exceed the restrictions.

13) The records reflect that the Claimant has been reemployed in four positions since his award of benefits. KRS 61.615(1) requires that a disability recipient notify the Systems if he has returned to gainful employment to determine if employment in the position would require his retirement benefits to be discontinued. As noted above, the Claimant did receive approval to work as a School Resource Officer, although the job duties were apparently misrepresented to the Systems. Only during the hearing process did the Claimant's other reemployment come to light. Based upon a review of the records submitted, the Claimant has failed to provide a copy of all the job duties for review.

The Board also remanded to determine "if [appellant] is required to repay hazardous in line of duty disability retirement benefits to the Systems" under KRS 61.615(1).

Appellant then sought review with the Franklin Circuit Court. By order dated March 11, 2009, the circuit court affirmed the decision of the Board to discontinue appellant's benefits under KRS 61.615(2) but remanded for an evidentiary hearing upon whether appellant was engaged in employment forbidden under KRS 61.615(1). This review follows.

Appellant contends that the Board's decision to discontinue his disability retirement benefits was not supported by substantial evidence of a probative value. We disagree.

Upon judicial review, the findings of fact of an administrative agency will only be disturbed if lacking evidence of a probative value. *See Thompson v. Kentucky Unemployment Ins. Com'n.*, 85 S.W.3d 621 (Ky. App. 2002). In this case, there existed substantial evidence to support the Board's decision to discontinue appellant's disability retirement benefits under KRS 61.615(2).² We agree with the circuit court's erudite analysis of the evidence supporting the Board's decision to discontinue appellant's disability benefits and cite to it herein:

[T]he Systems did not present medical evidence that [Moutardier] is no longer disabled. Instead, the only medical evidence the Board received indicated that [Moutardier] was still injured and subject to certain physical limitations that would preclude his working as a law enforcement officer for the Department of Fish and Wildlife Resources. These limitations included not lifting objects weighing more than twenty pounds, not lifting any weight repetitively, and refraining from repetitive bending, stooping, kneeling, crouching, and carrying. The Board based its decision that [Moutardier's] claim of disability was "disingenuous" because his work and leisure activities required him to exceed those limitations. In particular, the Board noted that [Moutardier's] employment as a School Resource Officer required him to carry a handgun,

² KRS 61.615(2) provides:

If the board's medical examiner determines that a recipient of a disability retirement allowance is, prior to his normal retirement date, no longer incapacitated by the bodily injury, mental illness, or disease for which he receives a disability retirement allowance, the board may reduce or discontinue the retirement allowance.

arrest students, assist in emergencies, and maintain both sidearm and rifle qualifications via periodic training sessions. Plaintiff also admitted to competing in archery contests, which required him to lift and aim a bow weighing approximately fifty-one pounds. He had engaged in employment as a security guard, as a truck driver, and in some unspecified capacity for UPS "during Christmas rush," all after his disabling injury. In short, while [Moutardier's] medical records indicated that he was disabled, his behavior did not. It was therefore permissible for the Board to conclude that [Moutardier] was no longer physically disabled from performing a job similar to his previous law enforcement position.

Appellant's activities constitute substantial evidence that he was not physically disabled from performing the duties of a law enforcement officer with the Department of Fish and Wildlife – as the circuit court succinctly concluded “while [appellant's] medical records indicate that he was disabled, his behavior did not.” Accordingly, we hold that substantial evidence of a probative value supported the Board's decision to discontinue appellant's retirement disability benefits under KRS 61.615(2).

Appellant next asserts that the Board's decision to discontinue his disability retirement benefits violated his due process rights. Specifically, appellant contends that the initial decision by the medical reviewers to discontinue his disability benefits was based upon a lack of objective medical evidence; whereas, the ultimate decision by the Board to discontinue appellant's disability benefits was based upon his employment as a school resource officer. In particular, appellant argues that he was “deprived of due process on the question of

discontinuance of benefits based upon his taking of another job because notice had never been given that this was the basis for discontinuance and that such would be litigated at the formal hearing.” Appellant’s Brief at 11.

Upon appeal, the circuit court determined that appellant did not receive adequate notice “that the Board would also determine whether he had engaged in employment forbidden by KRS 61.615(1).” As such, the circuit court remanded “that portion of the [Board’s] opinion” relating to the Board’s disability finding under KRS 61.615(1)³ for an evidentiary hearing. We agree with the circuit court that appellant is entitled to an evidentiary hearing and the opportunity to present evidence as to whether he is “employed in a position with the same or similar duties as the position from which he was disabled” per KRS 61.615(1). However, as hereinbefore pointed out, the Board’s ultimate decision to discontinue appellant’s benefits was based not only on KRS 61.615(1), but also upon KRS 61.615(2). Thus, appellant is not entitled to a reversal of the Board’s decision to discontinue his disability benefits. We further conclude that appellant is entitled to

³ KRS 61.615(1) provides:

If the board's medical examiner determines that a recipient of a disability retirement allowance is, prior to his normal retirement date, employed in a position with the same or similar duties, or in a position with duties requiring greater residual functional capacity and physical exertion, as the position from which he was disabled, except where the recipient has returned to work on a trial basis not to exceed nine (9) months, the system may reduce or discontinue the retirement allowance. Each recipient of a disability retirement allowance who is engaged in gainful employment shall notify the system of any employment; otherwise, the system shall have the right to recover payments of a disability retirement allowance made during the employment.

an evidentiary hearing regarding whether he engaged in forbidden employment under KRS 61.615(1).

Appellant also maintains that the Board erroneously rejected the recommended order of the hearing officer. In particular, appellant believes that the Board rejected the hearing officer's recommended order "without articulating a non-discriminating reason." Appellant's Brief at 17.

Under KRS 13B.120(2), an administrative agency may adopt, reject, or modify the recommended order of the hearing officer. And, if the agency's final order differs from the recommended order, the final order must simply contain separate findings of fact and conclusions of law. KRS 13B.120(3).

In this case, the Board's final order rejected the hearing officer's recommend order and included independent findings of fact and conclusions of law. As such, we conclude the Board complied with KRS 13B.120 and, thus, committed no error.

Appellant finally asserts that the Board should be equitably estopped from discontinuing his disability benefits. In support thereof, appellant maintains the Retirement Systems approval of his employment as a resource officer led to the discontinuation of his benefits.

Equitable estoppel may only be invoked against a governmental entity when exceptional and extraordinary reasons are present. *Weiland v. Bd. of Trustees of Ky. Ret. Sys.*, 25 S.W.3d 88 (Ky. 2000). To prevail upon a claim of equitable estoppel, the claimant must demonstrate:

(1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. And, broadly speaking, as related to the party claiming the estoppel, the essential elements are (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice.’ [28 Am.Jur.2d Estoppel and Waiver § 35](#) and [S. Smith v. Howard, Ky., 407 S.W.2d 139 \(1966\)](#).

Electric and Water Plant Bd. of City of Frankfort v. Suburban Acres, 513 S.W.2d 489, 491 (Ky. 1974).

Upon review of the Board’s opinion and order, appellant’s discontinuation of benefits was based upon the totality of appellant’s actions, which not only included his work activities, but also his ability to engage in competitive archery, hunting, and the lifting of a horse trailer. Moreover, the record indicates that the Retirement Systems only approved appellant’s employment based upon the representation that he would neither carry a gun nor effectuate arrests. In fact, he engaged in both these activities. As such, we do not think that appellant has demonstrated sufficient grounds to assert equitable estoppel that would preclude termination of disability benefits.

For the foregoing reasons, the opinion and order of the Franklin

Circuit Court is affirmed.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT
FOR APPELLANT:

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BRIEF AND ORAL ARGUMENT
FOR APPELLEES:

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