

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000537-MR

DEBORAH BURCHETT

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO.01-CI-00191

BOARD OF TRUSTEES,
KENTUCKY RETIREMENT SYSTEMS

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: McANULTY AND TAYLOR, JUDGES; EMBERTON, SENIOR JUDGE.¹

EMBERTON, SENIOR JUDGE: Deborah Burchett appeals from a judgment upholding the denial of her claim for disability retirement benefits pursuant to KRS² 61.600. Appellant argues that the Franklin Circuit Court erred in concluding that there was substantial evidence to support the appellee board's

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

² Kentucky Revised Statutes.

decision to deny her claim. Having carefully reviewed the evidence presented in this case, we find no error in the circuit judge's conclusion that the evidence before the board was sufficient to support its determination. Accordingly, we affirm the judgment in this case.

The standard of judicial review of decisions of administrative agencies is so well-settled that it hardly bears repeating. Judicial review is intended to insure that an agency action is not arbitrary and that the correct rule of law was applied to the facts of the case.³ It is not the function of an appellate court to re-interpret the evidence or to reconsider the merits of a claim.⁴ The framework for judicial review of administrative action is now codified in KRS 13B.150 and confines the court's authority to determining whether the agency decision: a) violates constitutional or statutory provisions; b) is in excess of the agency's statutory authority; c) is supported by substantial evidence based upon the whole record; d) is arbitrary, capricious or constitutes an abuse of discretion; e) is based upon improper and prejudicial ex parte communications; f) has been prejudiced by the failure to disqualify the hearing officer; or g) is deficient as otherwise

³ American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission, 379 S.W.2d 450 (Ky. 1964).

⁴ Kentucky Unemployment Ins. Commission v. King, 657 S.W.2d 250 (Ky.App. 1983).

provided by law. The statute also clearly specifies that the reviewing court "shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." Furthermore, we are bound by the agency's properly supported factual findings regardless of the existence of conflicting evidence in the record.⁵ Finally in this regard, an administrative agency's failure to grant relief to the party having the burden of proof will be considered arbitrary "if the record compels a contrary decision in light of substantial evidence" contained in that record.⁶ Because appellant Burchett bore the burden of proving her entitlement to disability retirement benefits, the focus of our review is whether the evidence in the record as a whole compelled a finding in her favor.

At the time of appellant's termination from employment with the Natural Resources and Environmental Protection Cabinet, she was working in the capacity of an Environmental Inspector III. The responsibilities of that position include conducting inspections of surface and underground mines to insure compliance with state laws and regulations. The record contains uncontradicted evidence that the terrain surrounding these mine sites often consists of steep slopes, mountain tops or valleys.

⁵ Urella v. Kentucky Board of Medical Licensure, 939 S.W.2d 869 (Ky. 1997).

⁶ Bourbon County Board of Adjustment v. Currans, 873 S.W.2d 836,838 (Ky.App. 1994).

The physical rigors of appellant's job require that she drive a four-wheel-drive vehicle over very rough roads and terrain. Occasionally, no road existed all the way to the inspection site and appellant would be forced to negotiate the rough terrain on foot. Appellant was required to transport the entire mining permit file to the site, and often these files consisted of up to three bankers boxes weighing as much as 70 pounds. Occasionally, appellant's vehicle would get stuck in rough roadways and she would have to winch the vehicle out of trouble. These activities and conditions comprised about one-half of appellant's workday and sedentary activities comprised the remainder of the day.

In January, 1997, while photographing a mine site, appellant fell on some loose dirt and injured her ankle. Although appellant did not seek immediate medical attention, later that evening she began to experience swelling in her feet, a "pins and needles" sensation, inability to turn her head and muscle spasms. After seeking medical treatment, appellant attempted to return to work but was subsequently taken off work by her treating physician for approximately three months. In May, 1997, she returned to work on a permanent basis but was forced to take time off regularly, missing three weeks due to migraine headaches. Appellant finally reduced her work to half days. In October, 1998, while on medical leave but after her

last date of paid employment, appellant fell and fractured her right ankle, necessitating the implantation of a plate and pins.

Appellant testified at the hearing on her claim that the 1997 accident was the commencement of her problems with migraine headaches and muscle spasms. Although she stated that in 1994 she was diagnosed with carpal tunnel syndrome, which was surgically repaired, and that an MRI taken around the same time revealed a mild herniated disc in her back, appellant traced the majority of her current problems to the 1997 fall. Appellant listed as follows the medical problems which she alleges preclude her from returning to her job: disc problems in her neck, headaches, muscle spasms, left shoulder and arm numbness, muscle pain in her back, weak and tired hands, and hurting feet (especially the left ankle which still has pins and screws in it).

KRS 61.600(3) directs that "objective medical evidence" of a claimant's physical or mental incapacity to perform a job be evaluated by a statutorily-created medical review board. Objective medical evidence is defined in KRS 61.510(33) as:

reports of examinations or treatments,
medical signs which are anatomical,
physiological, or psychological
abnormalities that can be observed;
psychiatric signs which are medically
demonstrable phenomena indicating specific
abnormalities of behavior, affect, thought,

memory, orientation, or contact with reality; or laboratory findings which are anatomical, physiological, or psychological phenomena that can be shown by medically acceptable laboratory diagnostic techniques, including but not limited to chemical tests, electrocardiograms, electroencephalograms, x-rays, and psychological tests.

The medical evidence offered in support of appellant's claim was submitted to the medical review board, each of whom ultimately recommended denial of disability retirement benefits. The medical examiners were of the opinion that appellant's complaints were not supported by objective medical findings. As noted by Dr. William P. McElwain, the medical reports from multiple physician visits "document the history of multiple subjective symptoms" but the "[o]bjective findings offer little if any understanding of the discomfort."

After reviewing the medical evidence in light of the nature of appellant's job description of "light to medium work" based on the standards set out in KRS 61.600(5) (c)(2), the hearing officer concluded that the "preponderance of the objective medical evidence contained of record indicates that the Claimant is not permanently disabled as a result of her various complaints as defined by KRS 61.600." The hearing officer noted that evidence concerning the fracture of appellant's left ankle could not be considered because that injury occurred almost seven months after the date of her last

paid employment. The denial of benefits was upheld by the board, as well as by the Franklin Circuit Court. In this appeal, appellant argues that the preponderance of the evidence establishes that she has serious medical problems which prohibit her from performing any type of physical labor, asserting that the fact of her permanent total disability is substantiated by an opinion and award of the Workers' Compensation Board. Concerning the reference to an award in appellant's workers' compensation case, because that evidence was not considered by the board in her retirement claim, we cannot consider it in this appeal. We would note, however, that the decision on her workers' compensation claim would not be controlling in any case as the criteria for retirement disability differ from the factors utilized in assessing workers' compensation claims.

Finally, our review of the extensive medical evidence submitted in this case discloses the existence of conflicting opinions as to the extent of appellant's medical problems, as well as to the disabling nature of those conditions. Thus, while are sympathetic to appellant's physical problems and might have reached a different conclusion on her claim, we are not free to substitute our opinion of the evidence for that of the agency charged with that determination. The existence of conflicting evidence or the possibility of drawing inconsistent conclusions from that evidence does not deprive an agency's

determination of the support of substantial evidence.⁷ The bottom line is that because the board's denial of retirement disability benefits is supported by substantial evidence, we have no authority to set that decision aside.

Accordingly, the judgment of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

J. Thomas Hardin
Inez, Kentucky

BRIEF FOR APPELLEE:

Jennifer A. Jones
Frankfort, Kentucky

⁷ Kentucky State Racing Commission v. Fuller, 481 S.W.2d 298, 307 (Ky. 1972).