

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CI-001281-MR

STEVEN W. KEISTER

APPELLANT

V.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
CIVIL ACTION NO. 03-CI-00423

BOARD OF TRUSTEES,
KENTUCKY RETIREMENT SYSTEMS

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: GUIDUGLI, McANULTY, AND MINTON, JUDGES.

MINTON, JUDGE: Steven W. Keister was injured on the job while employed by the Kentucky Department of Transportation (DOT). He applied for disability retirement benefits through the Kentucky Retirement Systems (the "System"); a hearing officer recommended that Keister's claim be denied. The Board of Trustees for the System adopted the officer's recommendation, as did the Franklin Circuit Court. Keister then appealed to this Court. The question we are asked to resolve is whether there was

substantial evidence to support the decision to deny Keister's claims for disability. We conclude that there was so we affirm.

Keister was employed by the DOT as an auto/truck technician II. His job duties included maintenance and repair of automobiles, trucks, and diesel equipment. Keister was injured at work in February 2000; he has remained unemployed since that time.

Both parties stipulated that Keister had a pre-existing back condition, but that his current injury was related to his employment with the DOT. His complaints ranged from "pain in his left lower extremity" to "numbness and tingling at the bottom part of his left foot." Upon his doctors' recommendations, Keister underwent three different surgeries in an attempt to correct his back pain.

Eventually, Keister was deemed to have reached maximum medical improvement and was released to return to work. On June 20, 2001, Dr. Mohammed Majd indicated that Keister could return to work "with restrictions." Those restrictions were noted in a "Work Status Statement" issued by Dr. Majd on June 21, 2001, and included: no heavy lifting greater than 20-

25 pounds; no prolonged standing; and no repetitive bending or twisting.¹

In accordance with Dr. Majd's recommendations, a memorandum was sent to Keister regarding the recommencement of his job duties. The letter stated:

Effective Friday, June 22, 2001, you are to resume your duties as a Tr Auto/Truck Tech II based on the restrictions outlined in your doctor's statement dated June 20, 2001. You are to avoid prolonged standing. You are to avoid repetitive bending or twisting. You may lift up to twenty (20) pounds, but you are to avoid heavy lifting over twenty-five (25) pounds. If lifting weight over twenty-five (25) pounds is necessary, we will provide you assistance from other employees. You are not to violate any of the restrictions stated in this memorandum. Anyone who advises you to do job duties contrary to these requirements should be reported to your supervisor.

These job restrictions will be subject to review by management on or before August 22, 2001. If your medical condition changes before August 22, 2001, it is your responsibility to provide this office any and all medical statements from your doctor.

The memorandum was acknowledged and signed by Keister. But he never returned to work.

On August 18, 2001, Keister applied for retirement disability benefits from the System. In his application, Keister described his injury as follows:

¹ Although the faxed copy of Dr. Majd's recommendations included in the record is illegible, a notation on the bottom of the copy clarifies Keister's restrictions.

I have pain (cronic) [sic] in my lower back that radiates down my left leg to my foot. I have numbness, tingling, and burning sensations.

I cannot bend, stoop, crawl, or sit for very long. My pain level every day on a scale of 1 to 10, 10 being extreme[,] is 3-4.

Several weeks after Keister filed his application, Dr. Majd issued an additional recommendation restricting Keister to lifting no more than fifteen pounds.

A hearing officer reviewed Keister's application for disability. In the officer's report and recommended order, he found that "[t]he preponderance of the objective medical evidence contained of record indicates that Claimant's back condition would not prevent him from performing his duties as accommodated." The officer further found that Keister had "failed to present any evidence that he would not be allowed to return to work in his job or a job of like duties with the restrictions set by his physicians." Therefore, the officer recommended that Keister's application for disability retirement benefits be denied.

Shortly thereafter, the Board of Trustees of the System reviewed the administrative record and the hearing officer's recommendations. The Board adopted the officer's report as its final order and denied Keister's claim.

Keister appealed the Board's decision to the Franklin Circuit Court. The crux of Keister's appeal was that the Board and the hearing officer had failed to take into account Dr. Majd's additional restrictions. He claimed that the memorandum from the DOT stated he would be restricted to lifting no more than twenty pounds; but because Dr. Majd later recommended he lift no more than fifteen pounds, Keister claimed the DOT could not make reasonable accommodations for his disability. Keister argued that it would be impossible for him to return to his previous job with the fifteen-pound restriction. Therefore, he claimed he was unable to resume his position with the DOT and that he should be awarded permanent retirement disability benefits.

But the circuit court disagreed with Keister and affirmed the decision of the Board. Specifically, the court adopted the hearing officer's finding that Keister "failed to prove that he could not return to his job or a job of like duties pursuant to KRS 61.600(2)(a) and KRS 13B.090(7)." The court noted that:

Substantial evidence supports this finding because 1) nothing in the record suggests that the employer could not accommodate the new restrictions, 2) the employers stated that it could accommodate the June 2001 restriction, and 3) despite the June 2001 accommodation, the Petitioner never returned to work. Since substantial evidence

supports the Respondent's finding, this Court is bound to affirm it.

This appeal follows.

Keister argues there is not substantial evidence to support the finding that the DOT could accommodate his limitations. He also claims there is insufficient evidence to prove he could perform the job duties of auto/truck tech II, and that the DOT failed to provide a complete description of his job duties. Upon review of the entire record, we must disagree.

Our review of appeals from administrative hearings is limited; we may only reverse if the agency's findings are not supported by substantial evidence.² "Substantial evidence" is defined as such "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 from being supported by substantial evidence."³

KRS⁴ 61.600 controls the requirements for persons seeking disability retirement. Subsection (3)(a) of the statute reads:

² Kentucky Board of Nursing v. Ward, 890 S.W.2d 641 (Ky.App. 1994).

³ Kentucky State Racing Commission v. Fuller, 481 S.W.2d 298, 307 (Ky. 1972).

⁴ Kentucky Revised Statutes.

(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[.]

42 U.S.C. § 12111 is contained within the Americans with Disability Act (ADA). The statute notes that the term "reasonable accommodation" may include:

- (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
- (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.⁵

⁵ 42 U.S.C.A. § 12111(9).

29 C.F.R.⁶ § 1630.9 further states that it is unlawful for an employer to fail to make "reasonable accommodations" for persons with "known physical or mental limitations" or to "deny employment opportunities to an otherwise qualified job applicant or employee with a disability based on the need of such [employer] to make reasonable accommodation to such individual's physical or mental impairments."⁷

The record indicates that the DOT knew of Keister's physical limitations. And, upon his release from Dr. Majd's care, the DOT quickly responded by assuring Keister that reasonable accommodations would be made so that he could return to his job as an auto/truck technician within the physical limitations recommended by his physician. The DOT went so far as to promise Keister that other employees would provide assistance should the job require him to lift an object beyond his weight restrictions and that any violation of his restrictions should be immediately reported. These attempts to accommodate Keister's disability were in compliance with KRS 61.600(3), 42 U.S.C. § 12111(9), and 29 C.F.R. § 1630.

Although Dr. Majd later limited Keister's restrictions to lifting no more than fifteen pounds, Keister has not proved that the DOT could not, or would not, reasonably accommodate

⁶ Code of Federal Regulations.

⁷ 29 C.F.R. § 1630.9(a), (b).

this constraint. Keister repeatedly argues in his brief that it would be impossible for him to return to his previous position with the fifteen-pound weight limitation; but he does not indicate why it would be impossible, nor does he establish that the DOT would be incapable of accommodating his restrictions. Rather, we believe it is apparent from the record that the DOT was more than willing to make necessary changes to accommodate Keister's disability; Keister was simply unwilling to return to work.

KRS 13B.090 states that the burden of proof is on the claimant in all administrative hearings. Keister has not met that burden; so we affirm the denial of his retirement disability benefits.

Keister also argues that the DOT's description of his job duties was incomplete. But, as the Franklin Circuit Court stated, "[e]ven if this assertion is true, it is not reversible error because [Keister's] employer stated that it could accommodate [his] condition." We agree with the court's assessment; therefore, the June 3, 2004, decision of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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