

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001843-MR

TERRY MONTGOMERY

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 05-CI-01687

BOARD OF TRUSTEES OF THE
KENTUCKY RETIREMENT SYSTEMS

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: DIXON, MOORE, AND TAYLOR, JUDGES.

DIXON, JUDGE: Terry Montgomery appeals from a Franklin Circuit Court order affirming the decision of the Board of Trustees of the Kentucky Retirement Systems (“Board”) which denied Montgomery a statutory enhancement of his retirement benefits. After reviewing the record, we affirm.

Montgomery, who was born in 1954, is a former Jefferson County Sheriff’s Deputy. He was employed as a deputy sheriff from 1993 through 2003, which qualified as a hazardous duty position. During the majority of his employment with the

department, Montgomery worked as a vehicle inspector. As an inspector, he drove to automobile dealerships in Louisville to check the vehicle identification numbers on vehicles transferred to Kentucky from out-of-state. On August 8, 1997, Montgomery was inspecting vehicles at Budget Car Sales. While he was checking a vehicle identification number, the elderly owner of the car tripped and fell onto Montgomery, knocking him to the ground. Montgomery was subsequently diagnosed with a herniated disc and had a successful lumbar discectomy in September 1997. He received full workers' compensation benefits for his injury and returned to work full-time in January 1998. Montgomery continued as a vehicle inspector until 2001, when he transferred to a position in courthouse security.

In February 2003, Montgomery underwent a second back surgery to resolve recurring back and leg pain. He never returned to work and filed for hazardous disability retirement benefits in October 2003. In January 2004, Montgomery underwent two additional surgical procedures.

Montgomery was approved for hazardous disability retirement benefits pursuant to Kentucky Revised Statutes (KRS) 61.592. However, his request for “act in line of duty” benefit enhancement pursuant to KRS 16.505(19) and KRS 16.582(6) was denied. Montgomery appealed the denial of “act in line of duty” enhancement, and a hearing was held on January 26, 2005. The hearing officer issued a lengthy opinion detailing his factual findings and ultimately recommended that “act in line of duty” enhancement should be denied. The officer found:

8) This record does reflect that [Montgomery]'s injury in 1997 and subsequent surgeries are the basis for this hazardous disability. However, he did not receive hazardous disability payments until after his last date of paid employment of June 30, 2003. He stopped working after the surgery in February of 2003. Therefore, he worked basically from 1998 until February of 2003. [Montgomery] therefore worked for approximately five years after the accident and had a second surgery prior to his last date of paid employment.

9) Counsel for the [Retirement] Systems has pointed out that the definition of act-in-line-of-duty also requires the disability to be a direct result of the act-in-line-of-duty. The status does not contemplate an individual being able to continue to work for five plus years and then being able to receive act-in-line-of-duty. After this injury, [Montgomery] was able to return to work. During his work, as he testified and as the record reflects, he exacerbated his condition by getting in and out of the vehicle, which, as argued by the [Retirement] Systems, are separate and intervening causes. The fact that he worked for five years and also aggravated his back condition in the performance of his duties such as getting in and out of the car, as well as other possible events, supports the finding that his disability is not a direct result of an act-in-line-of-duty as contemplated by the statute.

10) The record further reflects that [Montgomery] had degenerative disc disease, which is a progressive condition and, as argued by counsel for [Montgomery], progressed from 1997 to the need for a second operation in 2003 and operations thereafter.

11) It is found that there are intervening causes that have resulted in [Montgomery] becoming disabled and, while his initial injury and surgeries are the basis for the hazardous disability finding, this record reflects that he had a herniated disc in 1995, and he had subsequent aggravation to his back condition, which caused [Montgomery]'s disability five years after the original injury.

12) [Montgomery] has failed to show that he meets the definition of an act-in-line-of-duty as set forth in KRS 16.505(19).

13) [Montgomery] has failed to set forth objective medical evidence to show that his hazardous disability is a direct result of an act in line of duty.

Although Montgomery filed exceptions to the hearing officer's recommendations, the Board adopted the officer's opinion as its final order on November 9, 2005.

Montgomery appealed the Board's decision to Franklin Circuit Court. The court issued an opinion and order on August 2, 2006, affirming the Board. This appeal followed.

Montgomery argues KRS 16.505(19) does not impose a time limit as to when a disability resulting from an "act in line of duty" can manifest, and that the Board erred by failing to recognize his progressive disability. He contends his disability is a direct result of the August 1997 work injury and that the injury occurred in the line of duty because checking vehicle identification numbers was his principal duty.

The statutory language at issue states:

For employees in hazardous positions under KRS 61.592, an 'act in line of duty' shall mean an act occurring which was required in the performance of the principal duties of the position as defined by the job description.

KRS 16.505(19).

If the member receives a satisfactory determination of total and permanent disability or hazardous disability pursuant to KRS 61.665 and the disability is the direct result of an act in line of duty, the member's retirement allowance shall be calculated as follows

KRS 16.582(6).

At the administrative hearing, Montgomery, as the claimant, had the burden of persuading the hearing officer he was entitled to an “act in line of duty” benefit enhancement. *See McManus v. Kentucky Retirement Systems*, 124 S.W.3d 454, 457-58 (Ky.App. 2003) quoting KRS 13B.090. However, since the hearing officer denied Montgomery's claim, our review must focus on “whether the evidence in [Montgomery's] favor is so compelling that no reasonable person could have failed to be persuaded by it.” *Id.* at 458. Furthermore, we are mindful that, “[i]n its role as a finder of fact, an administrative agency is afforded great latitude in its evaluation of the evidence heard and the credibility of witnesses, including its findings and conclusions of fact.” *Id.* quoting *Aubrey v. Office of Attorney General*, 994 S.W.2d 516, 519 (Ky.App. 1998).

After reviewing the record, we find the evidence in Montgomery's favor is not so compelling that no reasonable person could reach the same conclusion as the Board. There is ample evidence regarding Montgomery's degenerative disc disease, which was exacerbated by his obesity and daily activities over time. Consequently, we are unpersuaded by Montgomery's various evidentiary challenges. Evaluating the weight and credibility of the evidence is within the province of the hearing officer, and we find no proof the officer or the Board acted arbitrarily. *McManus*, 124 S.W.3d at 458.

Finally, contrary to Montgomery's argument, the Board's order does not improperly impose a time limit which precludes benefits unless immediate total disability results from the “act in line of duty.” The plain language of KRS 16.582(6) requires the

disability to be “the direct result of an act in line of duty.” Here, more than five years elapsed before Montgomery sought disability benefits. Under the circumstances, it is not unreasonable, when considering all of the medical evidence and the plain language of the statute, to find that Montgomery's ultimate disability was not a “direct result” of the 1997 accident. Accordingly, we find the Board properly denied “act in line of duty” benefit enhancement.

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

TAYLOR, JUDGE, CONCURS.

MOORE, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

MOORE, JUDGE, DISSENTING: Respectfully, I disagree with the conclusion reached by the majority and would reverse for a finding that Montgomery is entitled to hazardous duty disability retirement benefits.

There is no dispute that the genesis of Montgomery's condition is the August 8, 1997 incident, which occurred in the line of duty. While Montgomery may have had related problems that made the condition caused by the 1997 incident to worsen, I believe the Board erred in its findings. From my view of the evidence, it is indisputable that the severe deterioration of Montgomery's health leading to disability status over the past years was a direct result of the 1997 accident.

The fact that he worked for several years does not change my opinion. During this time, he suffered pain resulting from the 1997 incident but remained

dedicated to his profession in attempting to work. I do not believe that a person who attempts to work, in spite of the pain he suffers, should be penalized when later in life, the original trauma produces results that make it impossible for him to continue to work. To find otherwise encourages malingering.

A police officer should not be placed in a position of deciding to continue to work for a period of time, while exhibiting symptoms from the original injury, and facing the foreclosure of hazardous duty disability retirement benefits if he does work. The record is void of evidence that in the absence of the 1997 incident that Montgomery would be seeking hazardous disability retirement benefits at this stage in his life.

I do not read the relevant statutes to require that an injury occurring in the line of duty must immediately impair a police officer to the point of seeking hazardous duty disability retirement benefits as soon as the injury occurs. Rather, the disability only need be the direct result of an act in the line of duty.

I do not believe that substantial evidence supports the Board's conclusion and would reverse for a finding that Montgomery's present condition is a direct result of an injury taking place in the line of the duty. Accordingly, I would find that he is entitled to hazardous duty disability retirement benefits.

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BRIEF FOR APPELLEE

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