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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-001193-MR
&
NO. 2017-CA-001236-MR

KEITH SPEARS

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 14-CI-04359

BOARD OF TRUSTEES OF THE
LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT
POLICEMEN'S AND
FIREFIGHTERS' RETIREMENT
FUND

APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CLAYTON, CHIEF JUDGE; KRAMER AND NICKELL, JUDGES.

CLAYTON, CHIEF JUDGE: Keith Spears appeals from an opinion and order of the Fayette Circuit Court entered on June 30, 2017, affirming the denial of his

petition for disability benefits by the Board of Trustees (“Board”) of the Policemen’s and Firefighters’ Retirement Fund of the Lexington-Fayette Urban County Government (“Fund”). A cross-appeal has been brought by Jim Gray, Ronnie Bastin, Keith Jackson, William O’Mara, Clay Mason, John Maxwell, Chris Sweat, Larry Kinnard, Andrew Short, Jonathan Bastian, Rock Vance and Tommy Puckett, collectively named as the Board of Trustees of the Lexington-Fayette Urban County Government Policemen’s and Firefighters’ Retirement Fund. Because the Board’s denial of disability retirement benefits was fully in accordance with the provisions of Kentucky Revised Statutes (KRS) 67A.360 to 67A.690, we affirm.

Spears was employed as a police officer by the Lexington-Fayette Urban County Government Division of Police. According to his application for disability retirement benefits, he joined the force on January 15, 2001. During the course of his employment he purchased four years of additional service credit. Spears was an active, contributing member of the Fund, which provides benefits to any member and his or her spouse and minor children in the event of the member’s disability or death. *See* KRS 67A.460.

In October 2006, Spears sustained an ankle injury while pursuing a fleeing suspect. Over time, he developed traumatic arthritis in the articulating joint

of his ankle which ultimately limited his ability to run, jump, climb, stoop, crawl, push, pull, and generally perform the essential physical duties of a police officer.

On October 16, 2013, Spears was involved in an off-duty verbal and physical altercation with a youth league soccer referee who was thirteen years of age at the time. On January 16, 2014, he entered a guilty plea to an amended charge of harassment. Because of this incident, Spears was suspended without pay on April 3, 2014, pending a disciplinary hearing.

Meanwhile, on March 7, 2014, Spears filed an application under KRS 67A.460, seeking total and permanent occupational disability retirement benefits from the Fund. The Board accepted the application and voted to have Spears examined by two independent physicians of the Board's choice, in accordance with KRS 67A.480.

Dr. Norman Ellingsen, an orthopedist, examined Spears on April 8, 2014. He opined that Spears was permanently disabled from performing the job responsibilities of a police officer. The other physician, Dr. Ray Garmen, recommended an additional MRI study and evaluation by a second orthopedist.

On June 11, 2014, the Board unanimously voted to follow Dr. Garmen's recommendation. Accordingly, Spears was examined by another orthopedist, Dr. Frank Burke, on July 2, 2014. Dr. Burke also reviewed the MRI report and other medical evidence. He concluded that Spears had reached

maximum medical improvement from his injury and it was unlikely to resolve in such a fashion as to permit him to return to the physical demands required of a police officer.

According to Spears, he was told by the staff of the city attorney that all disciplinary hearings in connection with the harassment incident would have to be completed before his disability hearing. He was informed the disciplinary hearing would be conducted on live television before the city council and the only way for him to avoid public embarrassment would be to resign from the police force. When Spears asked how his resignation would affect his upcoming disability hearing, he claims he was assured that the two proceedings were separate and unrelated.

Spears submitted a letter of resignation on June 30, 2014, stating in part as follows:

I must reiterate that in no way am I relinquishing my rights to proceed through the Disability Retirement Procedure of the Pension Board and the guarantee of KRS 67A.380 (regarding pensions). My disability retirement was filed long before any personnel policy violations became an issue. In realizing that I cannot return to active duty due to my condition, there is no need to proceed through the hearing process. I will continue through the disability procedure with the Pension Board.

On August 13, 2014, following a hearing, the Board denied the disability application. Spears requested and was granted an “appeal hearing” with

counsel before the Board on November 12, 2014. On the day before the hearing, the city attorney informed him that medical evidence of his condition was not to be considered. Spears was only permitted to testify regarding his letter of resignation and the incident with the soccer referee. The Board again denied benefits. In its final order, the Board found that Spears voluntarily withdrew from employment on June 30, 2014, and that he was not compelled by a disability to resign prior to the Board's final consideration of his application on August 13, 2014. The order stated: "Based upon Spears's voluntary withdrawal from employment, this Board finds by virtue of KRS 67A.500 that he is not eligible for award of a total and permanent disability, rather he is solely entitled to a refund of contributions to the Fund as permitted under the statute[.]"

Spears filed a petition for review in Fayette Circuit Court. The Board filed a motion to dismiss on the grounds that his complaint was not verified as required by KRS 67A.670. The circuit court denied the motion upon finding that Spears had substantially complied with the verification requirement.

The Board filed a petition for a writ of prohibition which was granted by this Court and subsequently reversed by the Kentucky Supreme Court which remanded the case to the circuit court for a hearing on the merits. *See Spears v. Goodwine*, 490 S.W.3d 347 (Ky. 2016). On remand, the circuit court entered an opinion and order affirming the denial of benefits, holding that the Board's

interpretation and application of KRS 67A.500 was not arbitrary and that the Board did not violate Spears's due process rights by limiting the scope of the hearing.

This appeal by Spears followed.

In reviewing an order of the Board, the circuit court's review is limited to determining whether or not:

- (a) The board acted without or in excess of its powers;
- (b) The order, decision or determination was procured by fraud;
- (c) The order, decision or determination of the board is not in conformity with the provisions of KRS 67A.360 to 67A.690;
- (d) If findings of fact are in issue the party seeking to set aside any order, decision or determination of the board shall have the burden of proof to show by clear and satisfactory evidence that the order, decision or determination is unreasonable or unlawful. If upon appeal as herein provided, the order, decision or determination of the board is reversed the party perfecting the appeal shall be refunded by the board his portion of the costs paid for the transcript of the record made on the rehearing.

KRS 67A.670(3).

“Typically, judicial review of an administrative action is concerned with whether the agency action was arbitrary.” *Smith v. Teachers' Ret. Sys. of Kentucky*, 515 S.W.3d 672, 675 (Ky. App. 2017), *as modified* (Feb. 17, 2017), *review denied* (Apr. 19, 2017) (internal citation omitted). “Arbitrariness may arise when

an agency: (1) takes an action in excess of granted powers, (2) fails to afford a party procedural due process, or (3) makes a determination not supported by substantial evidence.” *Id.* (internal citation omitted). “A reviewing court assesses whether the agency correctly applied the law under a *de novo* standard of review. If the court finds that the agency applied the correct rule of law to facts supported by substantial evidence, the court must affirm the agency’s final order.” *Id.* (internal citations omitted).

In this case, the primary question is one of law: whether the Board correctly applied KRS 67A.500(1) to deny Spears’s application for disability retirement benefits. The statute provides in pertinent part as follows: “Upon withdrawal from service prior to retirement, a member shall be entitled to receive a refund of the amount of contributions made by the member or picked up by the urban-county government pursuant to KRS 67A.510(2) after the date of establishment, without interest.” KRS 67A.500(1).

It is undisputed that Spears withdrew from service by submitting a letter of resignation on June 30, 2014. He did not retire and his application for disability retirement benefits was still pending on the date of his resignation. Under the plain terms of the statute, he was entitled only to receive a refund of the amount of contributions he had made. We agree with the circuit court that the

Board's interpretation of the statute and its determination that Spears's voluntary resignation precluded an award of disability benefits was not arbitrary.

Spears argues that he was nonetheless entitled to a hearing on the merits for his disability pension. He contends the denial of the opportunity to present evidence and create a record in support of his application for benefits was a denial of due process. Again, we agree with the circuit court that such a hearing was unnecessary because Spears's resignation disqualified him from receiving disability retirement benefits. A hearing on the merits would have been futile and wasteful of resources and time.

Spears insists that the Board's interpretation of KRS 67A.500 cannot be reconciled with the purpose of the Fund expressed in KRS 67A.380, which:

[I]s to provide retirement annuities and disability benefits for the members of the police and fire departments who become aged or otherwise incapacitated, . . . to the end that such members may accumulate reserves for themselves and their dependents to meet, without prejudice or hardship, the hazards of old age, disability, death, and termination of service, thereby encouraging qualified personnel to enter and remain in the service of such departments.

KRS 67A.380.

He contends that the circuit court was required by KRS 67A.670(3)(c) to determine whether the Board's decision was in conformity with this provision. But Spears was not denied his disability benefits in contravention of KRS 67A.380's stated

purpose of providing benefits in order to encourage qualified personnel to enter and remain in the police department. Spears simply withdrew from service voluntarily because he apparently did not want to undergo a public disciplinary hearing.

Spears argues that no statute expressly requires a member to be active on the police force at the time a decision is rendered regarding his or her eligibility for disability benefits. He relies on two cases holding that a retired member of the Fund may seek disability benefits when there is a delayed manifestation of an occupational disability. In *Board of Trustees of Policemen's & Firefighters Ret. Fund of Lexington-Fayette Urban Cty. Gov't v. Brown*, 665 S.W.2d 924, 925 (Ky. App. 1983), the Court of Appeals held that a retired police officer was entitled to occupational disability benefits for a back condition that was aggravated and aroused by repeated trauma occurring during the course of his employment. *Id.* at 926. In *Board of Trustees of Policemen's & Firefighters' Ret. Fund of Lexington-Fayette Urban Cty. Gov't v. Franklin*, No. 94-CA-001147-MR, 1995 WL 385148 (Ky. App. June 30, 1995), *opinion not to be published* (Mar. 13, 1996), a case which has been ordered not to be published, and consequently is of no precedential or persuasive value, the Court of Appeals held that a retired police officer who was receiving a pension based on age and seniority was not precluded from seeking a disability benefit if there was a delayed manifestation of a job-related injury.

These cases are factually distinguishable. The claimants in both were receiving pension benefits as retired members of the Fund at the time they applied for disability benefits. Spears was not retired when he sought disability benefits, nor did he experience a manifestation of injury during retirement which would cause him to seek disability retirement benefits. Spears voluntarily withdrew from employment before a determination on his application for disability retirement benefits was made by the Board.

Spears also relies on several opinions from the state courts of Illinois addressing the eligibility of various claimants for disability pensions. These opinions are not binding authority in Kentucky; furthermore, the statutory scheme they interpret is specific to the state of Illinois and differs significantly from ours.

Spears argues that the Board acted improperly when its staff encouraged him to submit a letter of resignation before the resolution of his application for disability benefits. He describes the actions of these unidentified individuals as coercive and unconscionable. He also argues that the Fund trustees failed to act on his benefits application in a timely manner. Invoking the equitable doctrine of unclean hands, he contends the Board should not be allowed to claim that his resignation rendered him ineligible to pursue disability retirement benefits when it was the Board's staff that coerced him to submit a letter of resignation in the first place. There is no indication that the circuit court ever addressed these

allegations or that Spears requested the circuit court to address them. Spears makes no references to the record to indicate how these claims are preserved. “The Court of Appeals is without authority to review issues not raised in or decided by the trial court.” *Regional Jail Authority v. Tackett*, 770 S.W.2d 225, 228 (Ky. 1989).

Finally, based upon our holding that the terms of KRS 67A.500 are dispositive in this case, the cross-appeal, which alleges that the circuit court erred in denying the Fund’s motion to dismiss on the grounds that Spears failed to verify his petition within the time allotted under KRS 67A.670, is rendered moot.

For the foregoing reasons, we affirm the Fayette Circuit Court’s opinion and order.

ALL CONCUR.

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