

STATE OF MICHIGAN
COURT OF APPEALS

TONI BRITTON,

Petitioner-Appellee,

v

STATE EMPLOYEES RETIREMENT SYSTEM,

Respondent-Appellant.

UNPUBLISHED

June 28, 2011

No. 297274

Mason Circuit Court

LC No. 09-000321-CZ

Before: WHITBECK, P.J., and MARKEY and K. F. KELLY, JJ.

PER CURIAM.

Respondent appeals by leave granted a circuit court order reversing a decision of the State Employees' Retirement Board denying petitioner's application for non-duty disability retirement benefits under MCL 38.24. We reverse.

This Court reviews a circuit court's decision on review of an agency decision to "determine whether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings. This latter standard is indistinguishable from the clearly erroneous standard of review" *Boyd v Civil Serv Comm*, 220 Mich App 226, 234; 559 NW2d 342 (1996). "[A] finding is clearly erroneous when, on review of the whole record, this Court is left with the definite and firm conviction that a mistake has been made." *Id.* at 235.

"A final agency decision is subject to court review but it must generally be upheld if it is not contrary to law, is not arbitrary, capricious, or a clear abuse of discretion, and is supported by competent, material and substantial evidence on the whole record." *VanZandt v State Employees' Retirement Sys*, 266 Mich App 579, 583; 701 NW2d 214 (2005). Substantial evidence is that which a reasonable mind would accept as sufficient to support a conclusion. It is something more than a scintilla of evidence, but may be substantially less than a preponderance of the evidence. *In re Payne*, 444 Mich 679, 692; 514 NW2d 121 (1994). An agency's findings should be upheld if they are supported by substantial evidence even if alternative findings could have been supported by substantial evidence on the record. *Id.* When the administrative

decision is supported by sufficient evidence, the circuit court may not substitute its judgment for that of the agency. *VanZandt*, 266 Mich App at 584.

In this case, the circuit court did not apply correct legal principles. Rather than decide whether the board's decision was supported by substantial evidence on the record, it concluded that plaintiff was sufficiently disabled to qualify for non-duty disability retirement benefits because her complaints of pain were supported by an objectively manifested injury. Whether a person suffered an objectively manifested injury is relevant in determining whether the person has suffered a serious impairment of body function within the meaning of MCL 500.3135. *McCormick v Carrier*, 487 Mich 180, 194-195; 795 NW2d 517 (2010). A non-duty disability retirement requires, however, that a medical advisor certify in writing that the person is totally incapacitated for further performance of duty, that the incapacitation is likely to be permanent, and that the person should be retired. MCL 38.24(1)(b).

According to the evidence that was presented below, petitioner had low back pain that radiated into her left leg. Corrective surgery relieved pressure on the affected nerve, but petitioner continued to experience pain that affected her leg and other areas of her body. The record shows that the various medical experts involved in the case were not in agreement on whether there was a physical basis for petitioner's complaints of pain. Petitioner's surgeon, Dr. Bruce Dall, could not determine the basis for petitioner's pain because an MRI did not demonstrate any nerve impingement and an EMG was normal. Another doctor, however, seemed to think that petitioner's left leg pain was causally connected to an annular tear in the L3/L4 disc even though that disc was not impinging on the nerve. Nevertheless, not one physician certified in writing that petitioner was totally incapacitated for further performance of duty, which incapacitation was likely to be permanent, and that petitioner should be retired.

Dr. David Carr, the neurologist who examined petitioner in connection with her disability application, concluded in February and March 2008 that petitioner was not totally incapacitated because he could find nothing physically wrong with her that would prevent her from working. Dr. Robert Digby, the independent medical advisor, concluded in May 2008 that petitioner was not "totally or permanently disabled" and was able to return to work. Dr. Dall stated that petitioner was "indefinitely disabled" as of February 2008, Dr. Frances Madden, a physician at the pain clinic, stated at some unspecified time that petitioner was not able to perform the essential duties of her own or any other occupation, and Dr. Stephen Montes, who examined petitioner at the request of her attorney in December 2008, concluded that petitioner was "incapable of any gainful employment" on a full-time basis. Still, not one of the three stated that petitioner's incapacitation was likely to be permanent. Further, even if the statements of petitioner's physicians could be construed as statements of total and permanent incapacitation, the board was entitled to find Dr. Carr's and Dr. Digby's reports more persuasive; it is not the reviewing court's function to determine the credibility of witnesses or resolve conflicts in the evidence. *VanZandt*, 266 Mich App at 593.

Because competent, material, and substantial evidence supported the board's decision that petitioner was not entitled to non-duty disability retirement benefits, the circuit court erred in reversing that decision.

We reverse.

/s/ William C. Whitbeck

/s/ Jane E. Markey

/s/ Kirsten Frank Kelly