S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

MARYANN JACKSON-RABON, Petitioner-Appellee,	UNPUBLISHED February 15, 2005
v	No. 249538 Wayne Circuit Court
STATE EMPLOYEES RETIREMENT BOARD, Respondent-Appellant.	LC No. 03-301675-AA

Before: Talbot, P.J., Whitbeck, C.J., and Jansen, J.

PER CURIAM.

Respondent appeals by leave granted the circuit court order reversing the State Employee Retirement Board's denial of petitioner's application for non-duty disability retirement benefits. We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

After administrative hearings, a proposal for decision was issued recommending that petitioner be granted either duty disability or non-duty disability retirement benefits. The board rejected the proposal for decision, and determined that petitioner failed to prove that her condition was either work-related or permanent. The circuit court reversed and remanded for the award of non-duty disability retirement benefits, finding that the opinion of the psychiatrist relied on by the board was based solely on speculation and conjecture. This Court granted respondent's application for leave to appeal.

This Court reviews a lower court's review of an administrative decision to determine whether the lower court applied correct legal principles and whether it misapprehended or misapplied the substantial evidence test to the agency's factual findings, which is essentially a clearly erroneous standard of review. *Dignan v Pub School Employees Ret Bd*, 253 Mich App 571, 575-576; 659 NW2d 629 (2002); *Boyd v Civil Service Comm,* 220 Mich App 226, 234-235; 559 NW2d 342 (1996). A finding is clearly erroneous where, after reviewing the record, this Court is left with the definite and firm conviction that a mistake has been made. *Dignan***,** *supra*, 576.

The statute governing non-duty disability retirement for state employees is MCL 38.24, which was amended by 2002 PA 93, effective March 27, 2002. MCL 38.24(1) now provides:

> Except as may otherwise be provided in sections 33 and 34, a member who becomes totally incapacitated for duty because of a personal injury or disease

> that is not the natural and proximate result of the member's performance of duty may be retired if all of the following apply:
>
> (a) The member . . . files an application . . . with the retirement board no later than 1 year after termination of the member's state employment.
>
> (b) A medical advisor conducts a medical examination of the member and certifies in writing that the member is mentally or physically totally incapacitated for further performance of duty, that the incapacitation is likely to be permanent, and that the member should be retired.
>
> (c) The member has been a state employee for at least 10 years.

The parties stipulated in the administrative proceedings that petitioner's disability was total. The remaining issue is whether the board's finding that petitioner's disability was not permanent is supported by competent, material and substantial evidence. Substantial evidence is any evidence that reasonable minds would accept as adequate to support the decision. It is more than a mere scintilla of evidence but may be less than a preponderance of the evidence. *Barak v Oakland Co Drain Comm'r*, 246 Mich App 591, 597; 633 NW2d 489 (2001).

The circuit court clearly erred in reversing the board's decision. Neither the hearing referee nor the circuit court took into consideration the fact that only one medical expert testified that petitioner's condition was permanent. Thus, the bulk of the expert testimony supported the board's finding that petitioner's disability was not permanent. The board was also entitled to accept Dr. Elliott Wolf's opinion that petitioner was malingering, even if it was contrary to the opinion of other experts.

Petitioner correctly points out that in *Knauss v State Employees Retirement System,* 143 Mich App 644; 372 NW2d 643 (1985), this Court adopted an intermediate view, which "regards total disability as a relative term." *Id.* at 649, quoting *Chalmers v Metropolitan Life Ins Co*, 86 Mich App 25, 31; 272 NW2d 188 (1978). However, *Knauss, supra,* dealt with the employee's ability to perform other work, not the time limits necessary to prove permanency. In *Brown v State Employees Retirement Bd*, unpublished per curiam opinion of the Court of Appeals, issued 2/18/2003 (Docket No. 232973), this Court concluded that permanency was not established where alternative, unexplored treatments exist.[1]

In this case, Dr. Wolf concluded that there were alternative medications and courses of treatment that held more promise than the medications and course of treatment petitioner had been receiving. It was reasonable for the board to conclude that petitioner will be able to recover with continuing treatment. The board's decision was supported by competent, material and substantial evidence, and the circuit court erred in reversing it.

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[1] We view this unpublished opinion as persuasive, because of the limited case law, but note that unpublished opinions are not binding under the rules of stare decisis. MCR 7.215(C)(1); see also *Dyball v Lennox*, 260 Mich App 698, 705 n 1; 680 NW2d 522 (2003).

Reversed.

/s/ Michael J. Talbot
/s/ William C. Whitbeck
/s/ Kathleen Jansen