STATE OF MICHIGAN

COURT OF APPEALS

KRENDA K. SELASK, Petitioner-Appellee,	UNPUBLISHED July 2, 2013
v	No. 309387 Ingham Circuit Court
PUBLIC SCHOOL EMPLOYEES RETIREMENT SYSTEM, Respondent-Appellant.	LC No. 10-001466-AA

Before: BECKERING, P.J., and SAAD and O'CONNELL, JJ.

PER CURIAM.

Respondent, Public School Employees Retirement System (PSERS), appeals by leave granted the circuit court's order reversing the decision of the Public School Employees Retirement Board and granting petitioner, Krenda Selask, disability retirement benefits. For the reasons set forth below, we reverse.

I. FACTS AND PROCEEDINGS

Selask worked as a custodian for the Hanover-Horton Public Schools from 1997 until 2007. In June 2007, after stacking chairs in the school cafeteria, Selask went to the Foote Hospital emergency room complaining of pain in her right groin and hip. She stated that she experienced the same pain three weeks earlier and later told a nurse practitioner that she had the pain for a month. Selask improved with physical therapy and returned to work until September 13, 2007. On that date, Selask gave her employer a note from Dr. Bruce Bigelow that stated Selask should avoid excessive twisting and that she could not wear a vacuum backpack. Selask went on sick leave on the same date, and never returned to work.

Over the next several months, petitioner continued to see Dr. Bigelow for back pain. She had decreased mobility and range of motion, and tenderness in her lumbar spine. Petitioner resumed physical therapy, which improved her condition. In October 2007, petitioner had foot surgery for bunions. In March 2008, school district superintendent Linda Brian sent Selask a letter offering her work within her restrictions and stating that she arranged a schedule to accommodate "any" of Selask's restrictions so she could return to work on March 24, 2008. Selask declined to return to work.

Selask began treating with Dr. Brian Chodoroff in March 2008, and reported that her lower back pain was caused by an injury at work. After examining Selask and her test results, Dr. Chodoroff concluded that Selask's symptoms resulted from a disc disruption in a June 2007 work injury. Dr. Chodoroff recommended that Selask should not work but, at his suggestion, Selask underwent steroid epidural injections which relieved some of her back pain.

On June 12, 2008, Dr. Chodoroff signed a statement that Selask should not work because of low back pain. Dr. Chodoroff stated that petitioner's condition was improving, but she had ongoing pain that had stabilized. On August 11, 2008, a lumbar MRI revealed some spinal stenosis at L3-L4 and L4-L5, and disc protrusion and herniation at L4-L5. A September 17, 2008 EMG study showed no evidence of active right lumbosacral radiculopathy or plexopathy or generalized polyneuropathy or myopic process. Dr. Chodoroff opined that Selask had a posttraumatic L4-5 disc herniation with stenosis. He referred her for evaluation of discography and possible nucleoplasty. Selask opted for additional steroid injections and, by March 2009, she reported significant improvement, stating that she could stand in one place for 30 minutes, she could sit in one place for 60 minutes, and she could walk for a half mile before her pain would worsen. Selask rated her pain level at 1 or 2 on a scale of 10. Dr. Chodoroff noted that Selask's strength was normal, her movements were smoother, her back movement was not stressed, and she could walk heal to toe. Accordingly, Dr. Chodoroff took Selask off pain medications, and instructed her to increase her activities, but stated that he did not believe it was in Selask's best interest to return to her previous work activities.

Selask applied for nonduty disability retirement benefits on April 20, 2009, and asserted that her back injury prevented her from lifting, carrying, walking, sitting or standing. Dr. Amer Arshad performed an independent medical examination on petitioner on May 21, 2009. Selask reported low back pain radiating down her legs that was worse on the left side. Dr. Arshad noted that Selask's strength was normal, but that she walked slowly with a slight limp. He also observed that Selask's lumbar spine was tender and she had decreased range of motion and muscle spasms. Dr. Arshad did not opine that Selask is totally and permanently disabled. After reviewing Dr. Arshad's notes and Selask's other medical records, the independent medical advisor, Dr. David Mika, reported:

> Krenda Selask is not totally or permanently disabled. She has back pain that she currently rates is about a 1-2/10. Straight leg raising is negative, strength is normal and reflexes are symmetrical and intact in the knees and ankles. MRI shows a right disc protrusion/herniation [at] L4/5. No surgery is planned. She receives epidural injections on occasion. Her primary care physician has restricted her to no lifting over 20 pounds. The Hanover Horton School District sent Ms. Selask a letter in March 2008 letting her know that they were willing to allow her to work with accommodations within her physician's restrictions. She did not respond to the letter, instead she sent a doctor's note and refused to comply with the restrictions [sic].
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> Ms. Selask can do work that does not require lifting over 20 pounds on occasion. Her school district was able to accommodate her but she refused to comply.

> Since she should be able to return to work there her application for disability is denied.

Thereafter, Selask submitted an MRI report from August 2008 and evidence that the Social Security Administration granted her claim for disability benefits. In response, Dr. Mika stated:

> The additional information does not change the prior decision. It is still felt that Ms. Selask can do light work. Although she cannot perform her job as a custodian the school district was willing to accommodate her so she did not have to lift over 20 pounds at work. She refused to comply with the district's accommodations. Since there was work available for her within her restrictions she is not entitle[d] to disability benefits.

Hearing referee William Bond concluded that Selask failed to establish total and permanent disability under MCL 38.1386(1)(d). He observed that Dr. Chodoroff's reports did not establish her claim because he did not state that Selask was totally and permanently disabled, nor did his opinion that she not return to work reflect knowledge or consideration of the school district's offer to accommodate Selask's restrictions. Because work was available within Selask's restrictions, she was not totally and permanently disabled. Further, while a hearing referee granted Selask Social Security Disability benefits, the threshold to establish those benefits is lower and the SSI referee superficially ruled that Selask was able to perform a full range of light duty work. Bond concluded that, "[b]ased on the above findings of fact and conclusions of law, the undersigned administrative law judge recommends that the Petitioner's application for non-duty disability retirement benefits be denied, as not meeting the requirements of MCL 38.1386." The Public School Employees Retirement Board agreed with Bond's findings and denied Selask's claim for disability retirement benefits.

Selask filed an appeal in Ingham Circuit Court, and the judge reversed the board's decision. Specifically, the judge ruled that the decision was not supported by competent, material or substantial evidence. The judge stated, "It is very clear to me that there are material facts here that were picked specifically in making their decision and others were simply ignored to get the outcome that they wanted." The judge took issue with hearing referee Bond's reliance on Dr. Mika's assessment and asserted that Bond ignored evidence that Selask had restrictions on repetitive bending and twisting, which her custodial job required. She also noted that, while the school district offered Selask work within her restrictions, at the time, her doctors instructed her not to return to work and she was never given clearance to return to any kind of work. Accordingly, the circuit court reversed the board's decision and ordered that Selask receive nonduty disability retirement benefits. PSERS appeals the circuit court's order.

II. DISCUSSION

"[A] circuit court's review of an administrative agency's decision is limited to determining whether the decision was contrary to law, was supported by competent, material, and substantial evidence on the whole record, was arbitrary or capricious, was clearly an abuse of discretion, or was otherwise affected by a substantial and material error of law." *Bandeen v Pub School Employees Retirement Bd*, 282 Mich App 509, 514; 766 NW2d 10 (2009). "If the agency's decision was not contrary to law and was otherwise supported by competent, material,

and substantial evidence on the whole record, the trial court had to affirm the agency's decision." *Polania v State Employees Retirement Sys*, 299 Mich App 322, 328; 830 NW2d 773 (2013); MCL 24.306(1)(2). In reviewing a circuit court's decision, "we must determine whether the trial court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's findings." *Id*. This case also involves the interpretation of the Public School Employees Retirement Act, and "this Court reviews de novo issues of statutory construction." *Nason v State Employees' Retirement Sys*, 290 Mich App 416, 424-425; 801 NW2d 889 (2010).

As this Court further explained in *Huron Behavioral Health v Dept of Community Health*, 293 Mich App 491, 497; 813 NW2d 763 (2011):

> Substantial evidence is what "a reasoning mind would accept as sufficient to support a conclusion." *Dignan v Mich Pub Sch Employees Retirement Bd*, 253 Mich App 571, 576; 659 NW2d 629 (2002). Substantial evidence is "more than a mere scintilla" but less than "a preponderance" of evidence. *Mantei v Mich Pub Sch Employees Retirement Sys*, 256 Mich App 64, 71; 663 NW2d 486 (2003). A reviewing court must not substitute its discretion for that of the administrative tribunal even if the court might have reached a different result. *VanZandt v State Employees' Retirement Sys*, 266 Mich App 579, 584; 701 NW2d 214 (2005). Deference must be given to an agency's findings of fact, *id*. at 588, especially with respect to conflicts in the evidence, *Arndt v Dep't of Licensing & Regulation*, 147 Mich App 97, 101; 383 NW2d 136 (1985), and the credibility of witnesses, *VanZandt*, 266 Mich App at 588.

Selask sought to retire pursuant to MCL 38.1386, which provides, in relevant part:

> (1) A member whom the retirement board finds to have become totally and permanently disabled for purposes of employment by his or her reporting unit by reason of personal injury or mental or physical illness before termination of reporting unit service and employment shall receive a disability allowance if all of the following requirements are met:
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> (a) The member has not met age and service requirements of section 81(1)(a) or (b) or, if the member first became a member on or after July 1, 2010, the member has not met age and service requirements of section 81c(1).
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> (b) The member has at least 10 years of credited service in effect before termination of employment.
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> (c) The member or reporting unit makes written application to the retirement board not more than 12 months after the date the member terminated public school employment.
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> (d) The person undergoes an examination by 1 or more practicing physicians or medical officers designated by the retirement board who certify to the retirement board that the member is totally and permanently disabled for

performing the duties for the member's position or similar position for which the member is qualified by reason of training, experience, or both.

There are no published opinions interpreting MCL 38.1386(1), which governs disability retirement review for Michigan public school employees, but several opinions address MCL 38.24, which governs disability retirement review for state employees. MCL 38.24(1)(b) requires that the board may retire an employee if, among other things, "[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." In both MCL 38.1386(1)(d) and MCL 38.24(1)(b), a medical officer or advisor must certify that the employee is totally and permanently disabled or incapacitated. MCL 38.24(1)(b) and MCL 38.1386(1) differ in that MCL 38.24(1)(b) requires that the certification show the member is "incapacitated for further performance of duty," while MCL 38.1386(1) requires certification that the member cannot perform the same position "or similar position for which the member is qualified by reason of training, experience, or both." However, again, under both statutory sections, there must be certification by the board's appointed doctor of total and permanent disability or incapacitation.

Further, the unambiguous language of MCL 38.1386(1) provides that all of the criteria must be met for the employee to receive disability retirement benefits. As under MCL 38.24(1)(b), for an employee to receive retirement benefits, the board must find, based on competent, material and substantial evidence on the whole record, that the employee has established receipt of the required certification. See *Polania*, 299 Mich App at 334. This requirement is dictated by the language of the statute, and the board and reviewing courts are not at liberty to ignore it. *Id*.

Here, the record reflects that the circuit court failed to apply the correct legal principles and misapprehended the substantial evidence test. *Id*. at 328. Selask had the burden of proof, MCL 24.201 *et seq*., and she failed to establish that either physician appointed by the board, Dr. Arshad or Dr. Mika, certified to the board that Selask is "totally and permanently disabled for performing the duties for the member's position or similar position for which the member is qualified by reason of training, experience, or both." Again, at least one doctor designated by the retirement board must certify that the employee is totally and permanently disabled from performing the duties of her employment or a similar position for which she is qualified. Here, no doctor designated by the board certified that Selask is totally and permanently disabled. To the contrary, the independent medical advisor designated by the board, Dr. Mika, specifically concluded that petitioner is *not* totally and permanently disabled. It was not for the trial court to weigh the evidence to reach a different conclusion. Absent proof of certification of her disability by one of the board's doctors, Selask was not entitled to retirement disability benefits under the plain language of MCL 38.1386(1). *Polania*, 299 Mich App at 333. Because it is undisputed that the board's doctors declined to certify Selask as totally and permanently disabled, Selask was not entitled to retirement benefits as a matter of law, and the trial court erred when it reversed the board's decision.

We further note that the circuit court also made credibility determinations and reweighed the evidence in Selask's favor, and this is contrary to the circuit court's reviewing authority.

Dignan, 253 Mich App at 576. Again, deference must be given to an agency's findings of fact and decisions regarding credibility. *Huron Behavioral Health*, 293 Mich App at 497. Contrary to the circuit judge's comments, the question is not simply whether an applicant is able to perform precisely the same duties required of her before she left the job. MCL 38.1386(1)(d). Rather, the applicant must be certified as "totally and permanently disabled" from performing the duties of her position or a "similar position for which [she] is qualified by reason of training, experience, or both." *Id*. And, as discussed, the school district advised Selask that it would accommodate her medical restrictions so that she could return to work. Further, the court was simply incorrect when it observed that the hearing referee failed to consider evidence beyond the opinion of Dr. Mika. And, though Selask relies on the opinion of her doctor, Dr. Chodoroff, he never opined about her ability to perform work that would accommodate her restrictions and did not state that her back problem constitutes a permanent disability as set forth in MCL 38.1386. Indeed, in its decision reversing the board, the circuit court never addressed whether petitioner's condition is permanent. It appears that the circuit court substituted its view and weight of the evidence for the board's, and this amounts to a misapplication of the substantial evidence test.

Reversed.

/s/ Jane M. Beckering
/s/ Henry William Saad
/s/ Peter D. O'Connell