

STATE OF MICHIGAN
COURT OF APPEALS

SARAH D'ANGELO,

Petitioner-Appellee,

v

PUBLIC SCHOOL EMPLOYEES RETIREMENT
BOARD,

Respondent-Appellant.

UNPUBLISHED

May 13, 2014

No. 313149

Chippewa Circuit Court

LC No. 12-012184-AA

Before: FITZGERALD, P.J., and SAAD and WHITBECK, JJ.

PER CURIAM.

Respondent Public School Employees Retirement Board (the board) appeals by leave granted the circuit court's order remanding this case to the board for further proceedings. We vacate the circuit court's order and remand to the circuit court for reconsideration using the correct standard of review.

Petitioner worked as a custodian for Southfield Public Schools for 24 years. Her duties included moving furniture, cleaning floors, unloading trucks, removing snow, and maintaining equipment. On January 4, 2008, petitioner fell from a ladder and injured her back. Petitioner has not returned to work since the accident. During her absence, her custodian position was eliminated and she was reclassified as a paraprofessional/teacher's assistant assigned to work with autistic pre-school students from three to nine years old. Petitioner never began working in that position because she was not ready to return to work. However, she had performed the teaching assistant job on a couple of occasions when she was a custodian because rules required more than one adult in the classroom and she was needed for that reason.

Petitioner applied for disability retirement benefits on April 19, 2010. She claimed that her ability to work was limited by "extreme pain, fibromyalgia, a loss of short-term memory, unable to bend over, cannot sit or stand for any length of time, her hands move by themselves." After being denied disability retirement benefits, petitioner requested an administrative hearing.

At the administrative hearing, the board noted that the questionnaire that petitioner had filled out with regard to her request for disability retirement benefits identified her job title as "paraprofessional." Documentary evidence indicated that the responsibilities of a paraprofessional/teacher's assistant included supervising classroom activities, working with students to accomplish assigned tasks, organizing and maintaining classroom materials, and

producing materials for students and information for parents. Petitioner believed that she could perform some, but not all, of these tasks.

The Administrative Law Judge (ALJ) concluded that petitioner had not established by a preponderance of the evidence that she was totally and permanently disabled from her job as a paraprofessional. The ALJ set forth the applicable law:

Section 86 imposes certain requirements which must be met before a disability retirement allowance may be granted. Included is the requirement that the member or person undergoes an examination by one 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 a similar position for which the member is qualified by reason of training, or experience, or both. See MCL 38.1386(1)(d).

Based on the above findings of fact, it is concluded that Petitioner has not shown by a preponderance of the evidence that at the time of her termination from employment she had a disability that was total or permanent for purposes of her employment or a similar position that she was qualified for based upon her training and/or experience.

The Public School Employees Retirement Act requires that a practicing physician or medical officer, *designated by the retirement board*, certify to the retirement board that the member is totally and permanently disabled. Here, the IMAs designated by the Retirement Board, Dr. Valorie J. Domino, Dr. Donald Kuiper and Dr. David Mika all concluded that Petitioner was not totally and permanently disabled.

The ALJ considered the opinions of the medical experts with respect to petitioner's mental condition:

The Petitioner has not provided medical documentation to substantiate her claim that she has a total and permanent disabling mental condition. On September 28, 2010, Dr. Giannini one of Petitioner's treating physicians did opine that the Petitioner was totally disabled from work for the foreseeable future. Later, on March 7, 2011, he opined that the Petitioner was totally and permanently disabled for performing the duties of her prior position or similar position for which she was qualified [] based upon her training and/or experience. A review of the totality of Dr. Giannini's medical reports suggests that Dr. Giannini did expect that at some point the Petitioner would be able to return to work.

Dr. Valorie Domino, the State's IMA who evaluated Petitioner's mental condition, correctly points out that while the medical evidence shows the Petitioner has a long history of anxiety and had been diagnosed with depression and a cognitive disorder, her cognitive disorder has now resolved. She does

exhibit signs of depression and anxiety, but they are described as mild and related to her pain and prescription drug dependence. Petitioner has normal memory testing. She is able to drive short distances, perform household chores and shop. She has overdosed on medication, but the evidence indicates that this was accidental and that she has no suicidal ideation. She admits to repeatedly overusing narcotics. Dr. Domino stated that the Petitioner's condition would greatly improve with better prescription drug control. Permanency is not established by the Petitioner's condition where additional treatment exists for her condition. *Jackson-Rabon v State Employees' Retirement System*, 266 Mich App 118, 121 (2005).

Dr. Domino correctly concluded that the preponderance of the evidence indicates that the Petitioner is currently able to concentrate, remember, and understand instructions. She retains the mental capacity to perform her past work as a paraprofessional. Thus, Dr. Domino found that the Petitioner did not have a total and permanent disability.

The ALJ also found evidence of physical disability to be lacking:

Dr. Kuiper, one of the State's IMAs who evaluated Petitioner's physical condition, also assessed the medical evidence presented in the case, which showed the Petitioner has a long history of back pain and headaches. She was being treated for migraines in 1994. She was being treated for low back pain in 2004. Petitioner was diagnosed with an annular tear and degenerative disc disease in 2009. She had a lumbar fusion in June 2009. She has impingement of the right shoulder and degenerative disease in the right knee.

Dr. Kuiper correctly concluded that the medical evidence shows the Petitioner is able to walk with little or no difficulty. She does not require any ambulatory aid. Petitioner has some limited range of motion of her knee, back and shoulder. Her strength is normal. Petitioner is generally functioning well. Due to pain and some limited range of motion, Petitioner is found capable of standing or walking 6 of 8 hours intermittently, lifting up to 20 pounds occasionally and up to 10 pounds frequently. Dr. Kuiper acknowledged that Petitioner should not perform activities that require reaching over her head more than occasionally (up to 1/3 of a work day). Accordingly, Dr. Kuiper found that the Petitioner should be able to perform her past work as a teacher's assistant as it is commonly performed. Thus, Petitioner was not found to have a total and permanent disability.

Finally, Dr. Mika, the other IMA who evaluated Petitioner's physical condition, reviewed the most recent medical evidence submitted in this case by the petitioner. Dr. Mika correctly concluded that the additional medical evidence did not change the decisions rendered by the other IMAs. Dr. Mika points out that the Petitioner's biggest difficulty is pain and she regularly receives injections for the pain. Nevertheless, the Petitioner was able to care for her husband after bypass surgery and her sister who was in a wheel chair. Accordingly, Dr. Mika

correctly concluded that the Petitioner could return to her past light work as a paraprofessional, which requires lifting up to 20 pounds occasionally. Dr. Mika found that the Petitioner was not totally or permanently disabled based on the objective medical evidence.

The ALJ recommended that petitioner's application for disability retirement benefits be denied "as not meeting the requirements of MCL 38.1386." The board agreed with the ALJ's findings and denied petitioner's application for disability retirement benefits.

Petitioner filed an appeal in circuit court, and the judge remanded the case to the board to consider whether petitioner was totally and permanently disabled from her job as a custodian:

I think Miss D'Angelo was a custodian. That's all she was doing, she did, and she was doing on the day she actually was injured. Suddenly she finds herself moved up to a paraprofessional, but she was never qualified to be one, never really was one, and that somehow inures to the benefit of the Public Employees' Retirement because you can do that job, but she can't do the job she was doing. That is not the job she ever did and it is a strange, quixotic circumstance that she was injured as a custodian and then somehow between that time and the time she applied she was moved to another position, even if it says that on the application, well, yes, I mean, if she said that I don't know how I can hold that against her. What if they told me I am—I mean, they could tell you I am the Chief Judge of the Michigan Supreme Court and it wouldn't mean that I am. She isn't. She never was in the position.

We are going to make a ruling, say here, she was a custodian, that she should not be evaluated as a paraprofessional, something she never did. She was a custodian when she was injured. Somehow they put her in a classification as a paraprofessional. She never had the opportunity to be evaluated as a custodian. Quite honestly I don't believe she can, but I would send it back [to] the Administrative Law Judge. So, I hate to send it back because it might take forever to get another ruling, but I think if she were to receive an award it would be retroactive to the day she was injured, but I don't know.

The board argues that the circuit court failed to apply the correct standard of review when it decided to remand the case to the board for further proceedings. It maintains that the court's scope of review was limited to determining whether respondent's decision was authorized by law and supported by competent, substantial, and material evidence. The board further maintains that the court misinterpreted MCL 38.1386(1)(d), and that the board had made the correct inquiry when evaluating petitioner's application for disability retirement benefits: whether petitioner is totally and permanently disabled from performing the duties of her position, which is teacher assistant/paraprofessional.

"[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.

Petitioner sought to retire pursuant to MCL 38, 1386, which provides, in relevant part, that an applicant is not entitled to benefits unless he

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. [MCL 38.1386(1)(d) (emphasis added).]

The primary goal in statutory interpretation is to give effect to the Legislature’s intent. *City of Mt Pleasant v State Tax Comm*, 477 Mich 50, 53; 729 NW2d 833 (2007). When interpreting a statute, the statute must be considered as a whole and the words used are to be given their plain meaning. *Klooster v City of Charlevoix*, 488 Mich 289, 296; 795 NW2d 578 (2011). Reviewing courts are not at liberty to ignore the language of the statute. *Polania v State Employees’ Retirement Sys*, 299 Mich App 322, 334; 830 NW2d 773 (2013).

Here, petitioner’s position at the time she applied for disability retirement benefits was paraprofessional/teacher’s assistant. Her custodian position had previously been eliminated, and she was able to “bump” someone from the department and obtain the teacher’s assistant position. In that respect, the physicians’ and the board’s analysis of petitioner’s disability comports with

the plain language of the statute. Although the circuit court observed that petitioner had not assumed the duties of her new position when she applied for retirement benefits, the court's ruling that petitioner's position was that of custodian, and not teacher's assistant, is contrary to the plain language of the statute. The statute does not reference the employee's position at the time of injury or event that precipitated the disability.

We conclude that the circuit court misapplied the law when it held that petitioner's application for disability retirement benefits be evaluated in light of her ability to perform the duties of a custodian. The board properly concluded that petitioner's application for disability retirement benefits must be evaluated in light of her ability to perform the duties of a paraprofessional/teacher's assistant. We vacate the circuit court's order and remand this case to the circuit court for review of the board's decision that petitioner is not totally and permanently disabled from performing the duties of the job of teacher's assistant using the correct standard of review.

Vacated and remanded. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Henry William Saad
/s/ William C. Whitbeck