

STATE OF MICHIGAN
COURT OF APPEALS

KEVIN K. TASSON,

Petitioner-Appellee,

v

STATE EMPLOYEES RETIREMENT SYSTEM,

Respondent-Appellant.

UNPUBLISHED

June 13, 2013

No. 308252

Marquette Circuit Court

LC No. 11-049193-AA

Before: RONAYNE KRAUSE, P.J., and GLEICHER and BOONSTRA, JJ.

BOONSTRA, J. (*concurring*).

I concur in the result. More specifically, I agree with the majority opinion except insofar as it asserts that “MCL 38.21(1)(c) permits the [State Employees Retirement System] Board to exercise its discretion regardless of the recommendation(s) of the medical advisor(s),” but that “it does not compel the Board to do so.” In my view, that is an incorrect statement of the law.

The plain language of MCL 38.21 conditions an award of benefits in part on a medical advisor’s certification of incapacity. MCL 38.21(1)(c). Where, as here, there exists no such certification, the Board lacks discretion to award benefits. *Polania v State Employees Retirement Board*, 299 Mich App 322, 335; ___ NW2d ___ (2013).¹ In providing that an award of benefits *also* is conditioned on the Board “concur[ring] in the recommendation of the medical advisor,” MCL 38.21(1)(d), the Legislature has conferred upon the Board the discretion to *deny* benefits notwithstanding a plaintiff’s satisfaction of the condition of MCL 38.21(c), i.e., the existence of a medical advisor’s certification of incapacity. However, the Legislature has *not* conferred on the Board the discretion to *grant* benefits notwithstanding the *absence* of the statutorily required medical advisor certification. Where, as here, there is no such certification, the Board lacks discretion to award benefits.

¹ I note that while *Polania* addressed the plaintiff’s eligibility for non-duty disability benefits under MCR 38.24, and plaintiff here seeks duty disability benefits under MCR 38.21, the two statutory provisions are identical in their plain language conditioning benefits in either event on a medical advisor’s certification of incapacity. Although the majority does not address our decision in *Polania*, the rationale that it sets forth, as well as the plain language of MCR 38.21, must govern our analysis here.

Accordingly, I disagree with the above-quoted language from the majority opinion, but otherwise concur in its analysis and in the result.

/s/ Mark T. Boonstra