

STATE OF MICHIGAN
COURT OF APPEALS

SANDRA WHALEY,

Petitioner-Appellee,

v

STATE EMPLOYEES RETIREMENT SYSTEM,

Respondent-Appellant.

UNPUBLISHED

June 13, 2013

No. 308613

Baraga Circuit Court

LC No. 11-006193-AA

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

BOONSTRA, J. (*concurring*).

I concur in the result. More specifically, I concur in the majority’s analysis of our dispositive precedent, *Polania v State Employees Retirement Board*, 299 Mich App 322; ___ NW2d ___ (2013), which mandates, on the record before us, the reversal of the circuit court’s decision reversing the denial of benefits by the State Employees’ Retirement System board (the “Board”). I write separate simply because I cannot concur in the majority’s characterizations of our prior decisions in *VanZandt v State Employees’ Retirement Sys*, 266 Mich App 579; 701 NW2d 214 (2005) and *Monroe v State Employees’ Retirement Sys*, 293 Mich App 594; 809 NW2d 453 (2011).

In *VanZandt*, this Court correctly noted that “[t]he plain language of MCL 38.24 seemingly provides that respondent’s discretion to retire petitioner does not arise unless and until the medical advisor . . . has certified that the applicant is totally and permanently incapacitated from working.” *Id.* at 587. In *Monroe*, the Court endorsed this interpretation of MCL 38.24, concluding that “[a]bsent a medical advisor’s certification that [petitioner] suffers permanent and total disability, the SERSB did not possess discretion to retire [petitioner].” *Monroe*, 293 Mich App at 609 (citing *VanZandt*).

The majority characterizes the quoted language in *VanZandt* and *Monroe* as dicta. Indeed, in both cases this Court’s holding did not depend solely upon an assessment of the scope of the Board’s discretion, because we also found that the Board’s denials of benefits were supported by the whole record, were not contrary to law, and were neither arbitrary, capricious, nor a clear abuse of the Board’s discretion. *VanZandt*, 266 Mich App at 587-588; *Monroe*, 293 Mich App at 609.

In my view, however, the majority need not (and should not), in what is itself extended dicta, characterize the quoted language in *VanZandt* and *Monroe* as non-binding dicta. First, the discussion is wholly unnecessary because this Court subsequently, in *Polania*, directly answered

the very question before us. Second, the fact that we employed alternative lines of reasoning in *VanZandt* and *Monroe*, as a result of which we reversed the circuit court and reinstated the Board's denial of benefits, does not in any way undermine the language we used in *VanZandt* and *Monroe* relative to the limited discretion afforded to the courts by the Legislature in the absence of a medical advisor's certification of incapacity. To the contrary, it was the very legitimacy of our reasoning in *VanZandt* and *Monroe* that gave rise to the unmistakably binding precedent now set for in *Polania*.

I also note that the text of the statute in question (MCL 38.24) was revised in 2002, after *VanZandt* was decided. However, both versions of the statute conditioned an award of benefits in part on a medical advisor's certification of incapacity. I therefore disagree with the majority's suggestion that "the language on which our interpretation in *VanZandt* was based was eliminated." To the contrary, the pertinent language remained unchanged.

Here, as in *VanZandt*, *Monroe* and *Polania*, no independent medical advisor certified plaintiff to be incapacitated. Consequently, under the plain language of MCL 38.24, the Board lacked discretion to award benefits because a statutory prerequisite remained unmet. *Polania*, 299 Mich App at 333. As the majority correctly notes, "the fact that neither medical advisor certified that petitioner was totally and permanently incapacitated not only prohibited the Board from exercising its discretion, it also prohibited the Board from so much as examining "the competing medical evidence to determine whether it *should* exercise its discretion." *Id.* (emphasis added).

In addressing the trial court's review of the Board's decision, this Court stated in *Polania* as follows:

[The court] should have reviewed the record to determine whether the Board's finding that *Polania* had not established the certification required under MCL 38.24(1)(b) was supported by competent, material and substantial evidence on the whole record. Given the undisputed evidence that the medical advisors had not certified that *Polania* was totally and permanently disabled, the trial court should have concluded that the Board's decision was supported by the record. [*Polania*, 299 Mich App at 324.]

Similarly, the trial court's review of the record in this case should have been limited to determining whether petitioner had established, by competent, material and substantial evidence, the certification required under MCL 38.24(1)(b). Since the record reflects no such evidence, and no such certification, the Board lacked discretion to award benefits, and the trial court erred in substituting its judgment for that of the Board, and in awarding benefits notwithstanding the absence of the requisite medical advisor certification.

For these reasons, and while I do not agree with the majority's characterization of *VanZandt* and *Monroe*, I join the majority in reversing the trial court, in vacating its order reversing the Board's decision, and in remanding to the trial court for entry of an order affirming the Board's decision.

/s/ Mark T. Boonstra