

STATE OF MICHIGAN
COURT OF APPEALS

MICHAEL T. ROSS,

Claimant-Appellee,

v

ACRISURE P1, L.L.C.,

Defendant,

and

DEPARTMENT OF LICENSING &
REGULATORY AFFAIRS/UNEMPLOYMENT
INSURANCE AGENCY,

Appellant.

UNPUBLISHED

August 14, 2014

No. 315347

Ionia Circuit Court

LC No. 2012-029501-AE

Before: M. J. KELLY, P.J., and SAWYER and HOEKSTRA, JJ.

PER CURIAM.

Appellant Department of Licensing & Regulatory Affairs, Unemployment Insurance Agency (the Agency) appeals by leave granted a court order in which the circuit court reversed a decision by the Michigan Compensation Appellate Commission (MCAC) and ruled that claimant Michael T. Ross was eligible for unemployment benefits. Because, on the facts of this case, claimant's receipt of social security disability benefits (SSDI benefits) did not preclude him from asserting that he was willing and able to work for purposes of receiving unemployment benefits, we affirm.

Claimant worked as a sawyer at Hill's Crate Mill for about nine years until sometime in 2009. While working at Hill's, he mostly sawed logs, but also did "just about anything they asked [him] to do." At some point in his employment history, claimant also delivered car parts for an automotive store and performed maintenance for a Grand Rapids hotel chain; however, it is unclear from the record when, or how long, he held those positions. In any event, Hill's eventually closed, at which time claimant became unemployed.

On September 22, 2009, claimant applied for SSDI benefits. His application for SSDI benefits and the details of those proceedings are not contained in the lower court record in this

case. According to claimant's testimony related to the present proceedings, he applied for SSDI benefits because of a head injury, memory limitations, a back injury, and a fractured hip. He sustained his injuries in an automobile accident in 1988 and while working a previous job in 1993. As a result of his injuries, claimant experienced severe pain and depression. According to claimant, the effects of his injuries and depression were present while he worked at Hill's. On May 21, 2010, the Social Security Administration (SSA) denied claimant's application for social security benefits, finding that claimant's condition was not "severe enough" to keep him from working.

In the meantime, in addition to applying for SSDI benefits, in December 2009, claimant applied to the Agency for unemployment benefits, and he began to receive those benefits. In order to continue receiving unemployment benefits, claimant understood that he was required to certify that he was able to work, was available for employment, and was seeking employment. Consistent with these requirements, while receiving unemployment benefits, claimant called into the Michigan Automated Response Voice Interactive Network (MARVIN) regularly and stated that he was looking for work and was able to work. According to claimant's testimony, since losing his job at Hill's, he had applied for work at a gas station, a self-serve lumber store, a hardware store, a mini-mart, and a garden supply store. Claimant also looked in the newspaper for job openings, but saw no jobs that fit his limited qualifications insofar as he had only a 10th grade education and had difficulty reading. When asked if there were any jobs he could currently perform, claimant said that he could work in a self-serve lumber store or he could perform "cleaning type work." Claimant also said that there was no reason that he could not work stocking shelves or at an auto parts store performing driving or delivery work.

Although initially claimant's application for SSDI benefits was denied, claimant successfully appealed that decision, and on September 21, 2011, the SSA found that "claimant has been under a disability as defined in the Social Security Act since February 1, 2010." The SSA determined that "claimant has the residual functional capacity to perform a full range of work at all exertional levels with the following nonexertional limitations: an inability to relate to coworkers, deal with the public, use judgment, interact with supervisors, deal with work stresses, function independently, maintain attention and concentration, behave in an emotionally stable manner, and relate predictably in social situations." The SSA found that these limitations were caused by claimant's "severe depression." Because of these limitations, the SSA found that claimant was "unable to perform any past relevant work," that his job skills did not "transfer to other occupations," and that "[c]onsidering the claimant's age, education, work experience, and residual functional capacity, there are no jobs that exist in significant numbers in the national economy that he can perform." The SSA awarded claimant \$1,113 per month and a lump sum payment for past due benefits. A letter from the SSA dated October 3, 2011 informed claimant of the award.

On November 29, 2011, claimant informed the Agency that the SSA determined that he was disabled. As a result, on December 20, 2011, the Agency issued a determination informing claimant that he was not eligible for unemployment given his receipt of SSDI benefits. The Agency's letter informed claimant that:

[Y]ou notified [the] Agency that you were awarded [SSDI] payments . . . beginning 02/01/10. You claimed unemployment benefits for the same period

and stated that you were able to work. The documentation from the SSDI proved otherwise, therefore, you do not meet the [statutory requirements for unemployment benefits].

The Agency demanded that claimant repay the unemployment benefits he had received during the time he was “disabled,” an amount totaling \$19,486.00, and the Agency imposed a fraud penalty in the amount of \$77,944.00, due to claimant’s representations to the Agency regarding his ability to work.

Claimant objected to the determination, and, in various letters to the Agency, claimant emphasized that his disability determination involved a finding of a residual functional capacity. He argued that the criteria used to determine a disability for purposes of SSDI differed from regulations for unemployment compensation, meaning, according to claimant, that “a person may be disabled according to the regulations determining disability in Social Security while at the same time the person may be capable of other work.” In support, claimant relied on a memorandum from Chief Administrative Law Judge Frank A. Cristaudo, which indicated that the “[r]eceipt of unemployment benefits does not preclude the receipt of Social Security disability benefits.”

Following an administrative hearing, in February 2012, an administrative law judge upheld the Agency’s denial of benefits and demand for repayment as well as the imposition of penalties, finding in relevant part that plaintiff “successfully petitioned for social security disability and offered no credible evidence as to how he remained capable of performing suitable full-time work for unemployment purposes.” Claimant thereafter appealed to the MCAC, and the MCAC affirmed the ALJ’s decision. Then, claimant appealed the MCAC’s decision to the circuit court, which reversed in an opinion and order dated February 28, 2013. Relying on *Cleveland v Policy Mgt Sys Corp*, 526 US 795; 119 S Ct 1597; 143 L Ed 2d 966 (1999), the circuit court found that “an individual can qualify for Social Security Disability while also being eligible for unemployment benefits.” The circuit court stated that it was “unable to find merit in the [MCAC’s] finding that the claimant’s application for social security disability was inconsistent with his testimony that he was ready and able to work in connection with his application for unemployment benefits.” The circuit court further noted:

Significant aspects of this case are that a doctor never determined that the Appellant was unable to work, he believed his disability did not rise to the level that he could not do some type of work and his disability was of a mental health condition of depression as opposed to a physical limitation. . . . [T]he fact that he was determined eligible for disability is entirely different from what appears to be a legitimate and sincere belief on the Appellant’s part that he could work when he certified he was available and able to work.

Thus, the circuit court overruled the MCAC's decision and held that claimant was eligible for benefits.¹ The Agency now appeals as on leave granted.

“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.” *Vanzandt v State Employees Ret Sys*, 266 Mich App 579, 585; 701 NW2d 214 (2005). “The circuit court’s legal conclusions are reviewed de novo and its findings of fact are reviewed for clear error.” *Mericka v Dep’t of Community Health*, 283 Mich App 29, 36; 770 NW2d 24 (2009). “Great deference is accorded to the circuit court’s review of the [administrative] agency’s factual findings; however, substantially less deference, if any, is accorded to the circuit court’s determinations on matters of law.” *Id.* (quotations omitted) (alteration in original).

In this appeal, we are asked to resolve whether claimant may receive both unemployment benefits and SSDI benefits. Specifically, relying on the SSA’s determination of claimant’s disability for purposes of SSDI benefits, the Agency argues that claimant cannot be both disabled and able to work, and therefore he could not be eligible for unemployment benefits and must make restitution for those benefits previously paid. The Agency argues that claimant was estopped from asserting that he was willing and able to work for unemployment purposes based on prior assertions to, and findings by, the SSA that claimant was “disabled.”

Although the Agency’s discussion of estoppel is somewhat cursory, it appears to be the Agency’s underlying contention that judicial estoppel should apply to bar claimant’s receipt of both benefits. Under the doctrine of judicial estoppel, “a party who has successfully and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding.” *Paschke v Retool Indus*, 445 Mich 502, 509; 519 NW2d 441 (1994). For this doctrine to apply, the claims must be “wholly inconsistent.” *Id.* at 510. Further, “the mere assertion of inconsistent positions is not sufficient to invoke estoppel; rather, there must be some indication that the court in the earlier proceeding accepted that party’s position as true.” *Id.*

We are not aware of any Michigan caselaw to consider the interaction of our state unemployment benefit legislation and federal statutes regarding the receipt of SSDI benefits, or, more specifically, to consider whether a finding of disability for purposes of SSDI benefits operates to judicially estop an individual from also receiving unemployment benefits. However, in view of discussions in analogous contexts, it appears that there are two broad considerations relevant to determining whether judicial estoppel should prevent an individual from bringing claims under two statutory schemes when there is a potential that the claims involved may be inconsistent. First, courts consider whether there is an inherent conflict between the statutory schemes, such that a negative presumption should apply against the possibility of an individual

¹ The circuit court also concluded that the Agency had not presented clear and convincing evidence of fraud so as to merit the imposition of penalties. The Agency does not contest this determination on appeal.

pursuing both types of claims. See *Cleveland*, 526 US at 802-803 (finding no inherent conflict between receipt of SSDI benefits and a claim under the Americans with Disabilities Act, and rejecting application of a negative presumption). Second, courts consider whether a claimant's purely factual assertions in the respective contexts genuinely conflict with one another, and whether an individual can explain any apparent contradiction. *Id.* at 805-806. See also *Kerns v Dura Mech Components, Inc (On Remand)*, 242 Mich App 1, 7, 11; 618 NW2d 56 (2000) (recognizing receipt of SSDI benefits for disability did not automatically preclude claim of discrimination under Persons with Disabilities Civil Rights Act, but holding that the claimant could not succeed on his discrimination claim because of the previous facts and statements involved with his SSDI claim). It is the claimant's burden to explain any apparent contradictions between his claims in order to justify receipt of both types of benefits. See *Cleveland*, 526 US at 806.

In the present case, the Agency concedes that there is no per se disqualification for unemployment benefits on the basis of an individual's receipt of SSDI benefits. That is, the Agency apparently recognizes that there is not an inherent conflict between the statutory schemes such that a finding of disability for purposes of SSDI necessarily precludes the possibility of also receiving unemployment. Specifically, in its appellate brief, the Agency states: "Applying for and receiving Social Security disability benefits do[es] not necessarily mean that a claimant is unable to work, thereby making a claimant ineligible for unemployment benefits."²

Given the Agency's recognition that there is no brightline prohibition on the receipt of both types of benefits, it appears that the Agency believes that in claimant's specific case there is a purely factual contradiction between his receipt of SSDI benefits and his claim for unemployment benefits. However, apart from the general fact that claimant applied for and received SSDI benefits, which the Agency concedes does not necessarily preclude an award of unemployment benefits, the Agency points to nothing in claimant's specific factual assertions in each arena which can be considered wholly inconsistent. Indeed, although the SSA decision awarding benefits is in the record, the claimant's SSA application is not, and the record does not contain transcripts of the proceedings before the SSA, meaning it is not entirely clear to us what specific factual assertions claimant advanced in support of his application for SSDI.

² Because the parties are in agreement on the conclusion that receipt of SSDI benefits does not necessarily preclude receipt of unemployment issues, we need not consider the issue. See generally *Thomas M Cooley Law Sch v Doe I*, 300 Mich App 245, 254; 833 NW2d 331 (2013) ("Michigan courts exist to decide actual cases and controversies."). We also decline to address the argument raised by amicus curiae that allowing the Agency to deny unemployment benefits based on the SSA finding that an individual is disabled would violate the Americans with Disabilities Act (ADA). Neither claimant nor the Agency raised this issue, and thus the issue is not properly before this Court. See *In re MU*, 264 Mich App 270, 277 n 3; 690 NW2d 495 (2004), citing MCR 7.212(H)(2) ("The [amicus] brief is limited to the issues raised by the parties.").

Rather than focus on claimant's factual assertions before the SSA, the Agency asks this Court to invoke judicial estoppel on the basis of the SSA's finding that claimant is "disabled." Specifically, the Agency maintains that the "practical effect" of the SSA's finding of disability is that there are no jobs claimant could perform because the SSA determined that claimant cannot perform any "past relevant work" and there are not a "significant number" of jobs in the national marketplace for claimant. It is the Agency's position that, as a result of the SSA's findings, claimant cannot claim unemployment benefits pursuant to MCL 421.28(1)(c), which conditions eligibility for employment benefits on the requirement that an individual be "able . . . to perform suitable full-time work of a character which the individual is qualified to perform by past experience or training, which is of a character generally similar to work for which the individual has previously received wages"

In advancing this argument, the Agency ignores significant portions of the SSA's findings which make plain that the circuit court did not clearly err in finding that claimant in this case has an ability to work, despite the SSA's finding of "disability." Specifically, the SSA expressly acknowledged that claimant possessed a "residual functional capacity," pursuant to which claimant could "perform a full range of work at all exertional levels" subject to several "nonexertional limitations," including an inability to relate to coworkers, deal with the public, use judgment, interact with supervisors, deal with work stresses, function independently, maintain attention and concentration, behave in an emotionally stable manner, and relate predictably in social situations. In other words, the SSA determined that claimant has the physical capabilities to work full-time and, though there are not a "significant number" of jobs he could obtain given his mental and emotional difficulties, he can work and there remains some unspecified number of suitable jobs for him.³ Given that there apparently remains work claimant can perform and he has expressed his willingness to do so, the circuit court did not clearly err in finding claimant able to work for purposes of unemployment benefits. Thus, we find nothing clearly erroneous in the circuit court's determination that the SSA's findings and claimant's receipt of unemployment benefits were not wholly inconsistent.⁴ Because the circuit court

³ Insofar as the Agency argues there is no suitable full-time work for claimant because the SSA found claimant could not perform "past relevant work," the Agency ignores that "past relevant work" has a specific definition in the context of SSDI. "Past relevant work" must be work done within the 15 years prior to the date of disability, it must have been of such duration that the claimant learned to do the job, and it must have constituted "substantial gainful activity," meaning significant physical or mental activity of the type usually performed for pay or profit. See 20 CFR 404.1560(b)(1); 20 CFR 404.1572. In claimant's case, the details of his work history have not been presented, meaning there could well be work he performed longer than 15 years ago, or for a short duration, for which he received wages and for which he is now qualified. Such work may not qualify as "past relevant work" before the SSA, but it would constitute suitable work he could now perform. Again, absent more information regarding the SSA proceedings and claimant's factual assertions, there is nothing wholly inconsistent apparent on the record before us and nothing clearly erroneous in the circuit court's conclusions.

applied correct legal principles, and there is no clear error in its factual findings, the Agency is not entitled to relief. See *Mericka*, 283 Mich App at 35-36.

Affirmed.

/s/ Michael J. Kelly
/s/ David H. Sawyer
/s/ Joel P. Hoekstra

⁴ To the extent the Agency condemns the potential “double-dipping” of SSDI benefits and unemployment benefits, the Agency’s concerns relate to policy decisions properly left to the Legislature, with which this Court will not interfere. See generally *Devillers v Auto Club Ins Ass’n*, 473 Mich 562, 589; 702 NW2d 539 (2005).