IN THE COURT OF APPEALS OF IOWA

No. 3-689 / 13-0017
Filed September 5, 2013

PRYBIL FAMILY INVESTMENTS, A LIMITED PARTNERSHIP,
Plaintiff-Appellant,

vs.

BOARD OF ADJUSTMENT OF IOWA CITY, IOWA,
Defendant-Appellee.

Appeal from the Iowa District Court for Johnson County, Ian K. Thornhill, Judge.

Prybil Family Investments appeals the Iowa City Board of Adjustment's grant of a special exception, permitting Streb Construction Company to build a concrete manufacturing plant in the Scott-Six Industrial Park located in Iowa City. **AFFIRMED.**

Steven E. Ballard and Michael J. Harris of Leff Law Firm, L.L.P., Iowa City, for appellant.

Sarah E. Holecek, First Assistant City Attorney, Iowa City, for appellee.

Considered by Vogel, P.J., and Danilson and Tabor, JJ.

VOGEL, P.J.

I. Factual and Procedural Background

This appeal concerns a special exception to Iowa City's zoning ordinances, which would allow the construction of a concrete wet batch manufacturing plant in the Scott-Six Industrial Park. The industrial park is situated in a "General Industrial Zone" as opposed to a "Heavy Industrial Zone," such that a special exception is required to conduct activities that involve heavy manufacturing. As such, Streb Construction Company filed an application for a special exception on July 14, 2011, seeking to construct a concrete manufacturing plant. The application was filed with the Iowa City Board of Adjustment (the Board). The Board notified all property owners who owned land within 300 feet of the subject real estate. After a public hearing was held, the Board approved the special exception on September 14, 2011.

The appellant, Prybil Family Investments (Prybil), is a limited partnership that owns agricultural property located adjacent to the land on which Streb intends to build the plant. Prybil's land has been, and will continue to be, used for farming. It filed a petition for a writ of certiorari to contest the Board's approval of the special exception, claiming res judicata prevented the Board from considering Streb's application because a similar application was filed and denied in 1998. It also asserted substantial evidence does not support the Board's findings.

The district court, by agreement of the parties, considered the matter without oral argument. On December 10, 2012, it issued a ruling concluding res judicata did not preclude the Board from considering Streb's application. The court stated: "The 2011 case did not involve the same property, property owner,

or application, and actually involved a different application, different apparatus/installation, different property, different applicant, and a different Comprehensive Plan." The court further concluded:

> There clearly were substantial and material changes in the facts concerning the property from the time the 1998 application was considered until the time of the 2011 application was granted, such as the expansion of the industrial zone, the reconstruction of 420th Street, the plans for landscaping to screen industrial areas, and the plans for a park to buffer the industrial areas from the nearby residential areas. These were not factors considered by the Board in 1998. Due to the difference in issues considered by the Board in the 1998 and 2011 proceedings, the 1998 decision is not preclusive of the Board's 2011 decision to grant the 2011 application.

Accordingly, the writ of certiorari was annulled. Prybil now appeals, claiming the district court erred, as it should have found that res judicata barred Streb's application, and the Board's decision was not supported by substantial evidence.

II. Standard of Review

A party aggrieved by a ruling of the Board may petition a district court for a writ of certiorari, and the court will review the Board's decision for any illegality that may exist. *Bontrager Auto Serv*., *Inc*. *v*. *Bd*. *of Adjustment*, 748 N.W.2d 483, 490 (Iowa 2008). We review the district court's ruling on a petition for certiorari for correction of errors at law. *Id.* at 495. While we are bound by the findings of fact if they are supported by substantial evidence, we are not bound by the court or agency's legal determinations. *Id.*

III. Whether the Board's Decision was Precluded by Res Judicata

Prybil argues res judicata[1] should have prevented the Board from considering Streb's application, as an application with "the same property owner, or an entity on that owner's behalf," concerning the same property, with the same issue of building a cement plant, was denied in 1998.[2] While the parties do not cite, and we are unable to find, any Iowa case law stating the concept of issue preclusion applies to zoning board determinations, a parallel matter was addressed in *City of Johnston v*. *Christenson*, 718 N.W.2d 290 (Iowa 2006). In *Christenson*, the Iowa Supreme Court held issue preclusion prevented the city from bringing a petition for a writ of certiorari appealing the board of adjustment's decision at the same time it was bringing an action for a declaratory judgment, considering the same issues were being litigated. 718 N.W.2d at 298 ("[A]n administrative adjudication by an entity such as the board of adjustment can have a preclusive effect in a judicial proceeding."). Additionally, section 741 of the second edition of American Jurisprudence Zoning and Planning states: "Res judicata applies to administrative zoning decisions in order to promote finality of decisions unless it is shown that there has been a substantial change of

[1] In its brief, Prybil uses the terms res judicata and issue preclusion interchangeably, and cites the standards for both claim and issue preclusion. We note res judicata encompasses both issue and claim preclusion, though these concepts are not the same, given we employ different analyses. *See Pavone v. Kirke*, 807 N.W.2d 828, 835 (Iowa 2011). However, the way its brief is structured and the assertions Prybil makes indicate its argument is that issue preclusion, rather than claim preclusion, is what should have barred the Board from granting Streb's application. As such, we are employing the issue preclusion analysis.

[2] In the August 17, 2011 Board hearing, Prybil referenced the 1998 application in support of its argument Streb's application should be denied. The Board in turn referenced this discussion in the minutes of the meeting. Prybil also argued the issue of res judicata before the district court, and the court analyzed the issue in its opinion. As such, error was preserved on this argument. *See Bontrager Auto*, 748 N.W.2d at 487.

circumstances since the earlier ruling." 83 Am. Jur. 2d *Zoning & Planning* § 741 (2003). This section further states:

> Res judicata is applied sparingly in matters of zoning. It applies, however, in cases where the following four elements concur in prior and subsequent actions: (1) identity of the thing used upon or for; (2) identity in the cause of action; (3) identity of the parties; and (4) identity in the parties' capacity.

Id.

We will apply the rule set forth in American Jurisprudence as it relates to issue preclusion, and employ the standard set forth in *Christenson*. For issue preclusion to bar a second application for a special permit, the following elements must be met:

> (1) the issue concluded must be identical; (2) the issue must have been raised and litigated in the prior action; (3) the issue must have been material and relevant to the disposition of the prior action; and (4) the determination made of the issue in the prior action must have been necessary and essential to the resulting judgment.

Christenson, 718 N.W.2d at 298–99. However, if "there has been a substantial change of circumstances," the concept of res judicata will not apply. 83 Am. Jur. 2d *Zoning & Planning* § 741.

Here, the 1998 application listed Hawkeye ReadyMix, Inc. as the applicant, James Souter as the contact person, and A.F. Streb as the property owner. The purpose for the special exception was to "Erect and operate a ready mix concrete batch plant." The property on which the plant was to be built was the "South 300' Lot 36 [in the] Scott Six Industrial Park, Iowa City, Iowa."

Streb's 2011 application listed Streb Construction Company, Inc. as the applicant, Steve Streb as the contact person, and Streb Investment Partners as the property owner. As the purpose for the special exception it listed "concrete manufacturing plant," and under the section stating "Date of previous application

or appeal filed" it stated "none." Lot 35 in the Scott-Six Industrial Park was the property listed as the location for the plant.

Here, the parties are not identical, as no "A.F. Streb" appears in the 2011 application, and no reference to Streb Construction Company is made in the 1998 application. This conclusion is further supported by Streb's declaration in the 2011 application that no previous application was filed. Although there may be some indicia of being the same parties, Prybil has presented no evidence showing they are either identical or in privity. As such, we agree with the district court that the parties to the 1998 and 2011 applications were not the same, and Prybil's issue preclusion argument fails on this ground.[3] *See Christenson*, 718 N.W.2d at 297 ("Issue preclusion, or direct or collateral estoppel, 'means simply that when an issue . . . has once been determined by a valid and final judgment, that issue cannot again be litigated between *the same parties* in any future lawsuit.'" (emphasis added) (quoting *State v*. *Seager*, 571 N.W.2d 204, 208 (Iowa 1997))).

Moreover, the *Christenson* factors are not satisfied. While both the 1998 and Streb applications requested permission to build a concrete plant, the 1998 application requested a CONE-E-CO Concrete Batch Plant, whereas Streb intends to build a RexCon mobile wet batch plant with improved environmental protections. Additionally, though both applications referenced property in the Scott-Six Industrial Park, the lots were different. Given both the type of concrete

[3] We note, however, that defensive issue preclusion does not require that all parties from both actions be identical. *See Penn v. Iowa State Bd. of Regents*, 577 N.W.2d 393, 399 (Iowa 1998) ("Unlike claim preclusion, issue preclusion does not require mutuality of parties if it is being invoked defensively against a party so connected to the former action as to be bound by that resolution."). As we are employing it here, the requirement that "the identity of the parties" concur means the applicant, that is, Streb, be the same as, or in privity with, the previous applicant. *See id*. at 398.

plant as well as the property between the two applications differed, the issues on which the Board ruled were not identical. Unable to meet the first *Christenson* factor—that the issue concluded must be identical—the following three factors which necessarily relate to "the issue" cannot be satisfied either. Thus, we affirm the district court's finding that res judicata did not bar Streb's 2011 application.[4]

IV. Whether the Board's Decision is Supported by Substantial Evidence

Prybil further contends substantial evidence does not support the Board's findings that (1) the proposed exception will not be injurious to the use and enjoyment of other property in the immediate vicinity, (2) the plant would not impair property values, and (3) the proposed exception would not impede the normal and orderly development and improvement of the surrounding property, as required by Iowa City Code of Ordinances sections 14-4B-3(A)(2) and (3). In response, the Board asserts Prybil did not preserve error on these arguments, and, alternatively, the Board's decision was supported by substantial evidence with respect to all of Prybil's claims. As to the issue of error preservation, the Board contends Prybil did not raise the issues it now asserts on appeal before the district court. Prybil responds that it is simply offering new arguments in support of issues already argued before the district court, pursuant to *Burton v. Hilltop Care Center*, 813 N.W.2d 250 (Iowa 2012).

[4] Furthermore, there have been substantial changes to the area since 1998. Exhibits made part of the Board's record, and noted by the district court, show the factual distinctions to the property and infrastructure of the surrounding area, as well as the improved technology, which allows for more effective pollution mitigation. *See* 83 Am. Jur. 2d *Zoning & Planning* § 741 (res judicata will not apply if "it is shown that there has been a substantial change of circumstances since the earlier ruling.").

A. Preservation of Error

When disputing an agency decision, to preserve error on appeal the issue must first be brought before the agency. *Bontrager Auto*, 748 N.W.2d at 487 (finding that because the particular basis of error was never brought to the Board's attention, error was not preserved on the issue of whether the Board's decision was supported by substantial evidence). The issue must then be raised in the district court, and the court must address the argument. *Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012). "If the court's ruling indicates that the court *considered* the issue and necessarily ruled on it, even if the court's reasoning is 'incomplete or sparse,' the issue has been preserved." *Id.* (quoting *Meier v. Senecaut*, 641 N.W.2d 532, 540 (Iowa 2002)).

With respect to the argument regarding lack of substantial evidence, Prybil's petition for a writ of certiorari stated:

> The Board of Adjustment's findings and conclusions regarding its approval of the special exception are not supported by substantial evidence . . . . As a consequence, the Board of Adjustment acted illegally in one or more of the following particulars:
>
> (a) concluding that the proposed exception will not be injurious to the use and enjoyment of other property in the immediate vicinity and will not substantially diminish or impair property values;
>
> (b) determining that the landscape screening will adequately reduce the noise, dust and visual impact from the surrounding properties;
>
> (c) determining that the proposed concrete manufacturing plant is served by streets designed to support such a heavy industrial use;
>
> (d) determining that the site at issue is located in the middle of Scott Six Industrial Park, when it is adjacent to agricultural land;
>
> (e) concluding that the proposed use is consistent with Iowa City's Comprehensive Plan, when the Southeast District Plan encourages green industrial development in the Southeast District;
>
> (f) failing to identify a substantial change of circumstances that obviate the reasons cited by the Board of Adjustment for denying a nearly identical application in 1998; and/or

> (g) otherwise reaching conclusions and making determinations not supported by substantial evidence and/or resulting from failure to apply the proper rule of law.

In its brief in support of the petition for a writ of certiorari, Prybil cited Iowa City Code of Ordinances sections 14-4B-3(A)(1)–(7), and claimed substantial evidence did not support the Board's approval of the special exception, as required by this code section. Prybil further stated: "[T]he Board lacked substantial evidence when it granted the special exception for two reasons," that is, (1) cement dust pollution would be minimal, and (2) the paving needs of future nearby development are immaterial. All of Prybil's arguments to the district court were based on these claims.

In denying Prybil's first claim with respect to dust pollution, the district court stated: "The Court concludes that there is substantial evidence in the record to support the Board's finding that cement dust pollution can be adequately mitigated." The court did not reference section 14-4B-3(A)(2)'s requirement that the proposed exception not hinder the use and enjoyment of nearby property. In addressing Prybil's second argument regarding future paving needs, the court stated: "There is substantial evidence to support the Board's decision that there would be a lack of negative impact on property and property values, and the Board imposed additional conditions to diminish any negative impact on property and property values."

The exact phrasing of Prybil's first argument on appeal, that the plant impedes the use and enjoyment of surrounding properties, was neither referenced in its brief nor in the district court's opinion. However, the same argument Prybil now asserts on appeal, that the dust pollution damages the surrounding crops, was the same claim argued before the district court. While

the court did not specifically employ the words "use and enjoyment," or reference the section 14-4B-3(A)(2) factor, it did address the issue of dust pollution. Thus, while the phrasing Prybil now employs was not cited by the district court, the court nonetheless considered the same argument Prybil raises on appeal. This issue was also addressed in the Board's opinion, which indicates the matter was raised before the agency. As such, we find error was adequately preserved on this issue. *See Lamasters*, 821 N.W.2d at 864; *Griffin Pipe Prods*. *Co*. *v*. *Bd*. *of Review*, 789 N.W.2d 769, 772 (Iowa 2010) ("Our issue preservation rules are not designed to be hyper technical."); *Montgomery v*. *Bd*. *of Supervisors*, 299 N.W.2d 687, 697 (Iowa 1980) (addressing the issue of nuisance for a rezoning permit, and concluding: "This contention was alleged in plaintiffs' petition for certiorari, but was not specifically ruled on by the district court. We assume from the unfavorable judgment that the issue was determined adversely to plaintiffs. Therefore, we regard any error as preserved.").

Prybil also preserved error with regard to its second claim that substantial evidence did not support the Board's conclusion the plant would not diminish property values. Though again not used in its brief before the district court, the section 14-4B-3 factor was cited in the petition for a writ of certiorari, and the district court specifically referenced diminishing property values in the context of its discussion of the demand for concrete. The Board also specifically found the plant would not diminish property values, which again indicates it considered this issue. Therefore, the issue was raised before the Board, the district court addressed Prybil's argument, and consequently, we find error was preserved.

However, Prybil did not preserve error on its third argument, that substantial evidence does not support the Board's conclusion the plant will not

impede the development of the surrounding area. While the petition for a writ of certiorari alleges the plant is inconsistent with zoning plans and the area's development, nothing related to this claim was ever argued in Prybil's brief before the district court. Consequently, the court did not address this issue in its order. Given the court analyzed Prybil's other arguments in detail, Prybil has not established the lower court considered this issue. *Lamasters*, 821 N.W.2d at 864. As such, error was not preserved, and we decline to address the merits of Prybil's third claim.

B. Substantial Evidence

While we review an agency's decision for correction of errors at law, we will affirm the decision if it is supported by substantial evidence. *Bontrager Auto*, 748 N.W.2d at 495. Substantial evidence exists when a reasonable mind could accept the evidence as adequate to reach the same findings. *Id*. The absence of expert testimony is not fatal to the determination that substantial evidence supports the Board's findings, and the Board is permitted to rely on commonsense inferences as well as anecdotal evidence. *Id.* at 496. Though we may disagree with the Board, we are not allowed to substitute our opinion for the Board's decision. *Id.* at 495 ("[A] substantial-evidence review makes more sense if the fact-finding relevant to the issues before the board remains with the board."); *Helmke v*. *Bd*. *of Adjustment*, 418 N.W.2d 346, 352 (Iowa 1988).

The Iowa City ordinance governing the grant of a special exception states:

> A. Approval Criteria: In order to grant a special exception, the board must find that the applicant meets the specific approval criteria set forth in this title with respect to the specific proposed exception. The board must also find that the applicant meets the following general approval criteria or that the following criteria do not apply:

> 1. The specific proposed exception will not be detrimental to or endanger the public health, safety, comfort or general welfare.
>
> 2. The specific proposed exception will not be injurious to the use and enjoyment of other property in the immediate vicinity and will not substantially diminish or impair property values in the neighborhood.
>
> 3. Establishment of the specific proposed exception will not impede the normal and orderly development and improvement of the surrounding property for uses permitted in the district in which such property is located.
>
> 4. Adequate utilities, access roads, drainage and/or necessary facilities have been or are being provided.
>
> 5. Adequate measures have been or will be taken to provide ingress or egress designed to minimize traffic congestion on public streets.
>
> 6. Except for the specific regulations and standards applicable to the exception being considered, the specific proposed exception, in all other respects, conforms to the applicable regulations or standards of the zone in which it is to be located.
>
> 7. The proposed exception will be consistent with the comprehensive plan of the city, as amended.
>
> B. Burden Of Proof: The applicant bears the burden of proof and must support each of the approval criteria by a preponderance of the evidence.

Iowa City, Iowa, Code of Ordinances title 14, chap. 4, art. B, §§ 3(A)–(B). Prybil contends the requirement that the plant not hinder the use and enjoyment of surrounding properties or reduce property values has not been satisfied. Therefore, the Board's finding as to these special exception criteria is not supported by substantial evidence.

1. Use and Enjoyment

In claiming substantial evidence does not support the Board's conclusion the plant will not impede the use and enjoyment of the neighboring properties, Prybil contends the Board improperly considered the impact of dust pollution. Specifically, Prybil cites the fact the Board relied on an Iowa Department of Natural Resources (DNR) report that likens the amount of dust pollution from the plant to that found on an adjacent gravel road. Prybil contends this was

improper, especially considering the crop damage the dust from the plant will produce, and that the row of trees surrounding the property and other mitigation measures the Board is requiring of Streb is not enough to prevent dust and other debris from interfering with crops. Prybil further relies on cases in which the supreme court held dust pollution from a concrete plant constituted a nuisance, and enjoined production.[5]

In finding the plant would not be injurious to the use and enjoyment of the surrounding property, the Board stated:

> The applicant will pave the first 50 feet of the drive as contained in the approved site plan and will be required to pave the remainder of the drive within 2 years of the issuance of the occupancy permit . . . .
>
> Development of properties within the subject industrial area may require concrete and the proposed use would provide ready access to materials needed for development of these areas.

In making this determination, the Board relied on the information provided in Streb's application. Specifically, the application noted the plant will include a "bag house," which removes matter found in smoke, vapors, dust, or mists, thereby decreasing air pollution. To support its contention the bag house will decrease pollution, Streb included a report by the Environmental Protection Agency, which stated:

> Particulate matter, consisting primarily of cement and pozzolan dust but including some aggregate and sand dust emissions, is the primary pollutant of concern . . . . Types of controls used may include water sprays, enclosures, hoods, curtains, shrouds, movable and telescoping chutes, central duct collection systems, and the like. A major source of potential emissions, the movement of heavy trucks over unpaved or dusty surfaces in and around the plant, can be controlled by good maintenance and wetting of the road surface.

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[5] *See Helmkamp v. Clark Ready Mix Co.*, 214 N.W.2d 126, 130 (Iowa 1974); *Bates v. Quality Ready-Mix Co.*, 154 N.W.2d 852, 858 (Iowa 1967).

To mitigate pollution from the plant, the Board is requiring Streb to pave the surrounding roads, as well as plant trees to act as a barrier between the plant and the adjacent properties.

Additionally, the plant will be a wet batch plant as opposed to a dry batch plant, a method of mixing concrete that reduces dust pollution. The DNR supports this method of concrete production, and concluded, "For these types of operations if they are complying with [DNR] rules for point source emissions and minimizing fugitive dust there should not be an air pollution problem." The DNR memorandum went on to state: "As far as crop damage, if any occurred it would come from cement dust which the facility if complying with [DNR] rules should be minimizing. I would not expect the impacts to be as bad as on crops planted along a heavily use[d] county gravel road."

Though Prybil raises pertinent points, such as the lack of scientific or statistical evidence regarding the effect of this dust, even when mitigated, on the surrounding crops, the information cited above constitutes substantial evidence supporting the Board's conclusion. Even if a different determination could be drawn from the evidence presented, we are not permitted to substitute our judgment for that of the Board's. *Bontrager Auto*, 748 N.W.2d at 495. As such, the Board's conclusion the plant will not hinder the use and enjoyment of the surrounding properties is supported by substantial evidence, and we affirm the district court.

2. Impairment of Property Value

Prybil next argues substantial evidence does not support the Board's conclusion the plant would not diminish surrounding property values, as there was no evidence whatsoever sustaining this finding. Conversely, two real estate

agents submitted letters concluding the plant would diminish property values. With this argument, Prybil also distinguishes *Bontrager Auto*, 748 N.W.2d at 495.

The Board relied on the following factors in concluding the plant will not substantially diminish or impair property values in the surrounding area:

> Based on current zoning and the comprehensive plan, future surrounding land uses will likely be industrial and the precise value for these mostly undeveloped properties is speculative.
>
> Development of properties within the subject industrial area may require concrete and the proposed use would provide ready access to materials needed for development of these areas.

In reaching this conclusion, the transcript from the Board's discussion indicates the Board considered the fact the plant will be located in the middle of an industrial zone, there are no Heavy Industrial Zones located in Iowa City where the concrete plant could be located as a matter of right, and the nature of future property values is inherently speculative. The Board also determined the screening requirements will help mitigate any decrease in property value, as well as the fact future development plans indicate surrounding areas will also be zoned for industrial use. In reaching this conclusion, the Board relied on a report by the Iowa City Department of Planning and Community Development, which, in response to whether the plant would decrease property values, stated:

> Staff believes the application will [not diminish property values] if the recommended S3 screening is provided along all four sides of the batch facility and if a taller variety of trees are mixed with the current proposed evergreen screening to soften views of the facility and to further reduce dust from the site. In addition, development of properties within the subject industrial area and southeast Iowa City may require concrete. The proposed use would therefore provide ready access to the materials needed in the construction of these facilities.

Additionally, there was testimony from Steve Streb to the effect that businesses had located next to two concrete plants built in the last two years, "[s]o to say that

property values are diminished or to say that people won't locate next to a concrete plant is just false."

However, there were opinions from two realtors stating the plant would decrease property values. Alan Swanson stated: "[T]his zoning variance, if approved, is likely to **lower land-use values** for existing and future development, close-in and perhaps even further-out." (emphasis in original). Teresa Morrow concluded:

> Land values in the area will not only be impacted by the view of the proposed plant but also by the dust that will be generated from the plant operations as well as additional truck traffic. If the current I-1 (light industrial) zoning was meant to allow this type of use, a special exception would not be required. There are likely much more suitable locations other than the one currently proposed.

In response to these letters, the Department of Planning and Community Development stated:

> The proposed cement batch facility is located in the middle of a large industrial zone with appropriate access to Highway 6 via an Improved 420, h Street. Adjacent uses are Industrial uses or agricultural. The Southeast District Plan indicates that future zoning in the area will be industrial on land between Highway 6 and the railroad. North of the railroad the plan indicates an area of open space (a regional park) following Snyder Creek to provide separation between future residential and the industrial zone, which does extend north of the railroad. The South District Plan shows the closest potential residential zoning south of Highway 6 (approximately 1,000 feet from the subject site). Given the current and future planned uses in the vicinity, Staff does not believe that the batch facility will negatively [a]ffect property values for the uses allowed in those zones.

The Board is not required to rely on expert opinions, and may in fact rely on anecdotal evidence and "commonsense inferences drawn from evidence relating to other issues, such as use and enjoyment, crime, safety, welfare, and aesthetics, to make a judgment as to whether the proposed use would substantially diminish or impair property values in the area." *Id.* at 496. The

Board evidently took into account the realtors' opinions and the Department of Planning's response, as it discussed the mitigation measures required of Streb, the speculative nature of property values, as well as the fact there are no Heavy Industrial Zones in Iowa City, and thus no other "more suitable locations other than the one currently proposed." Though a logical, different conclusion could be reached, we must determine whether the information supports the finding actually made, and not substitute our judgment for that of the Board's. *Id.*; *Helmke*, 418 N.W.2d at 352. Given the facts detailed above, which were presented to and considered by the Board, substantial evidence supports the Board's conclusion. As such, the decision annulling Prybil's petition for a writ of certiorari is affirmed.

AFFIRMED.