STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2001 CA 2912

ETHEL DOBROWOLSKI

VERSUS

LOUISIANA STATE EMPLOYEES' RETIREMENT SYSTEM

Judgment Rendered: February 14, 2003

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Appealed from the
19th Judicial District Court
For the Parish of East Baton Rouge, Louisiana
Trial Court Number 405,567-D

The Honorable Janice Clark, Judge Presiding

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BEFORE: KUHN, DOWNING AND GAIDRY, JJ.

Downing, J. concurs and assigns reason.

GAIDRY, J.

The Louisiana State Employees' Retirement System (LASERS) appeals an adverse judgment of the trial court in Ethel Dobrowolski's favor, overruling LASERS's decision that she was not disabled. For the following reasons, we reverse the trial court's judgment and remand the case to the trial court for further proceedings.

FACTS AND PROCEDURAL HISTORY

This action commenced when LASERS sought to re-certify Ms. Dobrowolski's continuing eligibility for disability benefits pursuant to La. R.S. 11:220. After three medical examinations, two rheumatologists and a psychiatrist certified that Ms. Dobrowolski was no longer permanently and totally disabled; therefore, LASERS ruled she was not entitled to continued disability benefits.

The statutory certification procedure does not specifically provide for any type of hearing wherein Ms. Dobrowolski could present relevant on her behalf. *See* La. R.S. 11:218. Nor does it allow for her treating physician's opinion to be considered, other than as expressed through her case history. *Id.* Accordingly, Ms. Dobrowolski filed a petition for judicial review of the administrative ruling with the 19th Judicial District Court pursuant to La. R.S. 49:964.

Prior to the hearing, the trial court entered an order allowing Ms. Dobrowolski to supplement the record with evidence including the deposition testimony of her treating physician, Dr. Jed Morris, and her treatment file. After considering that evidence and the evidence in the agency record, the trial court concluded that LASERS had been arbitrary and capricious in discontinuing Ms. Dobrowolski's disability status, and that its

conclusions were not supported by a preponderance of the evidence. The trial court entered judgment accordingly.

LASERS now appeals raising three assignments of error. LASERS contends that the trial court committed manifest error when it rendered judgment based upon a medical diagnosis unsupported by competent evidence, that the trial court committed manifest error when it permitted Ms. Dobrowolski to supplement the administrative record in the trial court, and that the trial court was manifestly erroneous in finding LASERS's decision to be arbitrary and capricious.

SUPPLEMENTATION OF THE RECORD

LASERS argues that the trial court's review of its decision is confined to the agency record "unless additional proof is taken in accordance with the Act, LSA-R.S. 49:964 . . . ." In this regard, La. R.S. 49:964(E) provides as follows:

> E. If, before the date set for hearing, application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, *the court may order that the additional evidence be taken before the agency upon conditions determined by the court.* The agency may modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court. (Our emphasis.)

Accordingly, we address two issues in determining whether the trial court committed error in supplementing the record: 1) whether the evidence from Ms. Dobrowolski's treating physician was material, and 2) whether the trial court erred in not remanding the matter to LASERS to "take" the additional evidence and to supplement the record.

Evidence is material if the proposition it tends to prove or disprove is a matter in issue. *Matte v. Louisiana Farm Bureau Casualty Insurance*

Company, 95-1308, p. 4 (La. App. 3 Cir. 6/12/96), 676 So.2d 713, 715, *citing State v. Rogers,* 553 So.2d 453, 455 (La. 1989). Here, Dr. Morris's testimony and treatment record, detailing Ms. Dobrowolski's "case history," suggested that she is totally and permanently disabled. Such evidence is clearly "material" to the issue of her disability status.

LASERS argues that Dr. Morris is not qualified to render an opinion in this matter because he is not a board-certified rheumatologist. However, while Dr. Morris is not board certified, the record amply demonstrates his expertise in the field. He testified that he has received "exactly the same" training as a board-certified rheumatologist, has been practicing rheumatology since 1974, and began that practice before the practice of board certification in that field began. He is a member of the American College of Rheumatology, and has authored articles on rheumatology. Contrary to LASERS's assertions, La. R.S. 11:218 does not expressly limit the evidence in the record to the reports of State Medical Disability Board physicians or Board-designated physicians. The statute expressly contemplates consideration of the "disability case history" as well as, in certain instances, "medical evidence of disability." The additional evidence of the treating physician, therefore, is not excludable on the basis of immateriality. We conclude the trial court did not err in concluding that evidence was material.

Ms. Dobrowolski argues that the trial court acted properly in receiving the additional evidence of her treating physician, as La. R.S. 11:218 does not provide for an agency hearing or other opportunity for her to submit her proposed material evidence. This is not entirely accurate. Judicial review under the Louisiana Administrative Procedure Act, particularly La. R.S. 49:964, is also part of the pertinent statutory scheme. *See* La. R.S.

11:218(D)(2). La. R.S. 49:964(E) authorizes the trial court to order "additional evidence be taken before the agency *upon conditions determined by the court*." (Our emphasis.) Such conditions may properly include compliance with the procedures set forth in La. R.S. 49:955 – 958. For example, La. R.S. 49:958 requires that an agency's final decision in an administrative adjudicatory proceeding be in writing or stated in the record, and that it include "findings of fact."

Louisiana Revised Statutes 49:964(G) makes the trial court reviewing an administrative decision a factfinder who weighs the evidence and makes its own conclusions of fact by a preponderance of the evidence. *Multi-Care, Inc. v. State, Department of Health and Hospitals*, 00-2001, p. 4 (La. App. 1st Cir. 11/9/01), 804 So.2d 673, 675. But La. R.S. 49:964(F) expressly confines the trial court's review of the agency decision to its record, and La. R.S. 49:964(E) expressly restricts the submission of additional evidence found material by the court to that "taken before the agency." *West v. Louisiana Department of Public Safety*, 432 So.2d 273, 278 (La. App. 1st Cir. 1982). The reason for that requirement is obvious: "The agency may modify its findings and decision by reason of the additional evidence." La. R.S. 49:964(E). Such result might obviate further review by the courts and conclude the matter.

Because we conclude the trial court erred in admitting additional evidence *de novo*, without following the procedure mandated by La. R.S. 49:964(E), we pretermit discussion of its assignment of error as to the trial court's finding that LASERS's decision was arbitrary and capricious under La. R.S. 49:964(G)(5).

Based on the foregoing, we reverse the trial court's judgment, and remand this matter to the trial court for determination of the conditions for

the receipt of the material evidence at issue by LASERS, prior to remand of the matter to LASERS for consideration of such evidence.

DECREE

For the foregoing reasons, the judgment of the trial court is reversed, and this matter is remanded to the trial court for further proceedings consistent with this opinion. The costs of this appeal are taxed equally to the appellant, the Louisiana State Employees' Retirement System (in the amount of $923.92, representing half of the total appeal costs), and to the appellee, Ethel Dobrowolski.

REVERSED AND REMANDED.

ETHEL DOBROWOLSKI	NUMBER 2001 CA 2912
VERSUS	FIRST CIRCUIT
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LOUISIANA STATE EMPLOYEES' RETIREMENT SYSTEM	STATE OF LOUISIANA

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RPD

DOWNING, J., concurs and assigns reasons.

DOWNING, J., concurring

I concur with the majority opinion on the off chance that the Louisiana State Employees' Retirement System (LASERS) can suggest at the trial court a reasonable and legal method for receiving and considering Ms. Dobrowolski's supplemental evidence, including the deposition testimony of her treating physician, Dr. Jed Morris. Otherwise, I would affirm the judgment of the trial court.

Louisiana Revised Statutes 49:964E does provide that "the court may order that the additional evidence be taken before the agency upon conditions determined by the court." The statutory framework for LASERS' decision-making under La. R.S. 11:218, however, does not appear to allow the introduction of Ms. Dobrowolski's evidence, which I agree is material. No board or hearing procedure is statutorily authorized. We certainly cannot jurisprudentially grant judicial power and functions (deciding the law and fact-finding) to the evaluating physicians, who in this instance are charged statutorily with rendering medical opinions.

Even so, it appears from the record that the trial court did not explore whether any legal and practical means existed by which it could remand the matter back to LASERS for consideration before it decided to accept and consider the evidence on its own. If no such legal or practical means exists,

LASERS should stipulate to the admissibility of Ms. Dobrowolski's evidence or supplement the record with the evidence and return the record to the trial court. The law does not require the performance of vain and useless acts. See ***Country Club of Louisiana Property Owners Association, Inc. v. Dornier***, 96-0898, p. 13 n.2 (La.App. 1 Cir. 2/14/97), 691 So.2d 142, 149 n.2.

I agree for reasons stated by the majority that Ms. Dobrowolski's evidence is material and that the trial court serves as factfinder on administrative review. I also believe the trial court was correct in crediting the testimony of Ms. Dobrowolski's treating physician, Dr. Jed Morris, who had been treating Ms. Dobrowolski long term and was intimately familiar with her condition and prognosis.

Dr. Morris testified that Ms. Dobrowolski had symptoms and findings of several disorders including degenerative disc disease, chronic fatigue syndrome, inflammatory arthritis, and fibromyalgia. He testified that it would be hard to pigeonhole her problems into one disorder. He noted that his use of the term "fibromyalgia" was descriptive just to place her illness in some general category. He testified that the tender points used in diagnosing fibromyalgia may be present or absent on certain days. He explained that Ms. Dobrowolski has never had a full-blown, classical case of fibromyalgia - that her symptoms fall into "a realm of evolving or undifferentiated connective tissue disease."

Dr. Morris further testified that when examining a "complex rheumatological patient," he did not think "on many occasions" one evaluation would be adequate to tell "exactly what's going on." Though he did state that some well defined disorders could be easily diagnosed on one visit and examination.

Dr. Morris stated that he had treated Ms. Dobrowolski for eight years and found her to be highly intelligent and well motivated. He said that her "compendium of symptoms of findings are consistent" and could not be made up. His diagnosis is that she is systemically ill and shows evidence of degeneration in her cervical spine, overwhelming fatigue and inflammatory polyarthroscopy. He noted that her condition had been deteriorating over the last eight months and that there have been "recent ominous findings" that she may become more ill.

Regarding Ms. Dobrowolski's ability to work, Dr. Morris testified: "She presents as someone who is systemically ill and who basically is not capable of rectifying . . . her clinical status to the point that she can pursue meaningful work like the average person." He said that perhaps she could perform her job functions for a few days but that she was not qualified to do what she was trained for because of weakness, fatigue, a sense of being overwhelmed and depression. Dr. Morris's medical opinion based on his examinations, the years of treatment, and the tests run over the years was that Ms. Dobrowolski was totally disabled from the further performance of her normal duties and that the incapacity was likely to be permanent.

Regarding rehabilitation, he testified: "I think that somebody who has depression, inflamed joints and overwhelming fatigue is not a very rehabilitatable person, and who appears to be getting worse."

Regarding the opinions of LASERS' evaluating physicians, Dr. Morris testified that in a case like Ms. Dobrowolski's, he disagreed "totally and firmly" that Ms. Dobrowolski could be diagnosed able to work in one examination. He analyzed the LASERS' physicians' problems with diagnosis as follows: "they had a lot of trouble with coming to total grips to what the problem was, and the reason they did was, is they were seeing her

on one occasion and they didn't see her during periods of disease activity, and they certainly haven't seen her since that time when unbenounced (sic) to them she's developed inflammatory arthritis. I mean that would certainly turn their heads."

Accordingly, while I agree with the remand of this matter to the trial court to explore legal means for LASERS to accept and consider Ms. Dobrowolski's evidence, I would otherwise affirm the trial court's decision that by the preponderance of the evidence, Ms. Dobrowolski was totally and permanently disabled and entitled to disability benefits.