

STATE OF MICHIGAN
COURT OF APPEALS

AVANTE MITCHELL,

Petitioner-Appellee,

v

STATE EMPLOYEES RETIREMENT SYSTEM,

Respondent-Appellant.

UNPUBLISHED
September 2, 2010

No. 289577
Wayne Circuit Court
LC No. 08-114387-AA

Before: CAVANAGH, P.J., AND O'CONNELL AND WILDER, JJ.

PER CURIAM.

Respondent appeals by leave granted from a circuit court order reversing a decision of the State Employees' Retirement Board (the "Retirement Board") denying petitioner's application for duty disability retirement benefits pursuant to MCL 38.67a of the State Employees' Retirement Act (SERA), MCL 38.1 *et seq.* We reverse.

Petitioner sustained a knee injury in July 2003, while employed as a forensic security officer for the state of Michigan. In February 2005, petitioner applied for duty disability retirement benefits with the Office of Retirement Services ("ORS"). After the ORS denied his application because an independent medical examiner had not recommended a duty disability retirement, petitioner requested an administrative hearing. Petitioner relied on the opinion of his physician, Dr. Ronald Lederman, that he would never be able to return to his job. As the administrative proceedings progressed, the main issues concerned the totality and permanency of his disability. The principal disputed issue was whether medical restrictions prevented petitioner from performing his past job as a bank teller or customer services representative, or a similar position within his training, education, and experience. After proceedings conducted by a hearing officer, and respondent's filing of objections to the hearing officer's proposed decision, the Retirement Board determined that petitioner failed to carry his burden of showing that he was permanently disabled and incapable of performing all employment with his training, education, or experience.

Petitioner appealed the Retirement Board's decision to the circuit court. Relying in part on *Ford v Astrue*, 518 F3d 979 (CA 8, 2008), a case involving how a claimant's complaints of pain should be evaluated when determining the claimant's residual functional capacity under 20 CFR 404.1545 for purposes of eligibility for social security disability benefits, the circuit court expressed concern that the Retirement Board "seemed to discuss [petitioner's] testimony but at the end of the opinion it seemed to ignore the testimony." The circuit court also commented that it had considered petitioner's "total medical picture," including a medical examination performed

by Dr. William Higginbotham, and restrictions imposed by petitioner's attending physicians. The circuit court criticized the Retirement Board for relying on the opinion of an independent medical advisor, that petitioner should be able to perform the duties of a bank teller, because it found that the Retirement Board "ignored the fact that the duties of the bank teller do not comply with the restrictions imposed by the attending physicians." The circuit court therefore concluded that the Retirement Board's decision was not supported by substantial evidence and, accordingly, reversed its decision.

On appeal, respondent argues that the circuit court misapplied the substantial evidence test and applied an incorrect legal principle by relying on *Ford*, 518 F3d at 979. We review a circuit court's decision on review of an administrative decision to determine whether the circuit 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. A finding is clearly erroneous where, after reviewing the record, this Court is left with the definite and firm conviction that a mistake has been made. Thus, the circuit court's decision will only be overturned if this Court is left with a definite and firm conviction that a mistake was made. [*VanZandt v State Employees' Retirement Sys*, 266 Mich App 579, 585; 701 NW2d 214 (2005) (citations omitted).]

Stated otherwise, we review the circuit court's legal conclusions de novo and its findings of fact for clear error. *Mericka v Dep't of Community Health*, 283 Mich App 29, 36; 770 NW2d 24 (2009). Although great deference is given to a circuit court's review of an administrative agency's findings, substantially less deference, if any, is accorded to legal conclusions. *Id.* at 36. Issues of statutory construction are reviewed de novo as a question of law. *Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008); *Bandeem v Pub School Employees' Retirement Bd*, 282 Mich App 509, 515; 766 NW2d 10 (2009).

We note as a threshold matter that a final agency decision must be supported by a precise statement of the evidence that supports its ruling and conclusions of law in order to facilitate appellate review. See MCL 24.285; *Butcher v Dep't of Natural Resources*, 158 Mich App 704, 707; 405 NW2d 149 (1987). A reviewing court may appropriately remand for further findings when further explanation would facilitate review. *Blom v Thermotron Corp*, 139 Mich App 50, 55; 360 NW2d 172 (1984). Notwithstanding the circuit court's concerns in this case regarding the extent of the Retirement Board's comments concerning petitioner's testimony, it did not find that remand for further factual findings was necessary, but rather found that substantial evidence to support the Retirement Board's decision was lacking. We agree with respondent that the circuit court misapplied the substantial evidence test in reversing the Retirement Board's determination that petitioner failed to prove that he was totally incapacitated.

The applicable statute, MCL 38.67a(1), provides in pertinent part:

Except as otherwise provided in section 33, a qualified participant who becomes totally incapacitated for duty because of a personal injury or disease shall be retired if all of the following apply:

* * *

(c) A medical advisor conducts a medical examination of the qualified participant and certifies in writing that the qualified participant is mentally or physically totally incapacitated for further performance of duty, that the total incapacitation is probably permanent, and that the qualified participant should be retired.

(d) The retirement board concurs in the recommendation of the medical advisor.

Although “totally incapacitated” is not defined, this Court has construed this language in a separate section of the SERA applicable to a “member,”¹ MCL 38.21, to require that the person be unable to engage in employment reasonably related to the person’s past experience and training. See *Knauss v State Employees’ Retirement Sys*, 143 Mich App 644, 649-650; 372 NW2d 643 (1985).² The burden of proof rests with the petitioner to establish the requirements for retirement under MCL 38.21, *Stoneburg v State Employees Retirement Sys*, 139 Mich App 794, 801; 362 NW2d 878 (1984), and the general rule is that the burden of persuasion in an administrative proceeding rests with the party asserting the claim. See *Blue Cross & Blue Shield of Michigan v Governor*, 422 Mich 1, 89; 367 NW2d 1 (1985). The record discloses that the Retirement Board applied these standards in its evaluation of to petitioner’s application for duty disability retirement benefits under MCL 38.67a(1).

We note that in *VanZandt*, 266 Mich App at 586-587, this Court, when considering another disability provision, MCL 38.24, applicable to a “member” whose injury was *not* the result of the member’s performance of duty, questioned whether the Retirement Board could order the retirement without a medical advisor’s certification of total and permanent disability. The Court noted that an earlier case, *Gersbacher v State Employees’ Retirement Sys*, 145 Mich App 36, 45; 377 NW2d 334 (1985), construed MCL 38.21 as evidencing an intent to allow the Retirement Board to override the medical advisor’s decision by treating the decision as a recommendation. *VanZandt*, 266 Mich App at 587 n 5. Ultimately, however, this Court found it

¹ Whether a person is a “member” or a “qualified participant” determines the applicable retirement plan. A “member” is defined as a “state employee included in the membership of the retirement system, as provided for in section 13.” MCL 38.1f(1). The retirement plan available to a “member” is referred to as “Tier 1” under the SERA, which means “the retirement plan available to a member under this act who was first employed and entered upon the payroll before March 31, 1997 and who does not elect to become a qualified participant of Tier 2.” MCL 38.1i(3). A “qualified participant” participates in the Tier 2 plan. MCL 38.55(2). “Tier 2” means “the retirement plan established pursuant to section 401(k) of the internal revenue code that is available to qualified participants under sections 50 to 69.” The provisions for qualified participants were added to the SERA by 1996 PA 487, effective March 31, 1997.

² The current version of MCL 38.21(1), as amended by 2002 PA 93, for a “member” contains the same requirements for determining benefits as MCL 38.67a(1). The amendment to MCL 38.21(1) retained the requirement of total incapacitation that was at issue in *Knauss*, 143 Mich App at 649-650.

unnecessary to reach this statutory issue because, even assuming that the Retirement Board had the authority to retire the petitioner without a certification of total and permanent incapacitation, the medical advisors provided competent, material, and substantial evidence for the Retirement Board to deny benefits and, therefore, the circuit court clearly erred in applying the substantial evidence test. *Id.* at 587-588.

Similarly in this case, it is unnecessary to decide whether MCL 38.67a(1) may be construed as requiring a medical advisor's certification of total incapacitation in order for the Retirement Board to grant a duty disability retirement. Although the Retirement Board considered the conclusions reached by the two medical advisors, Dr. David Mika and Dr. Sadia Shaikh, it also considered other evidence in reaching its conclusion that petitioner failed to satisfy his burden of proof. The board stated, in pertinent part:

(2) Petitioner's current restrictions prevent him from returning to his former position as a forensic security officer, but they do not prevent him from returning to his past job as a bank teller/customer services representative, or to a similar position within his training, education, and experience. Although Petitioner claims that he would be unable to return to work as a bank teller because he had difficulty sitting for long periods of time, no doctor has opined that Petitioner is unable to return to this type of work and neither Dr. Lederman, nor any other doctor, has ever listed prolonged sitting as one of Petitioner's work restrictions. Moreover, Petitioner's February 2005 functional capacity evaluation specifically demonstrated that Petitioner has the ability to go from sitting to standing as needed and occasionally ambulate up to a quarter mile.

(3) Two independent medical advisors, Dr. Mika and Dr. Shaikh, have concluded that Petitioner is not totally disabled and that he is capable of returning to work as a bank teller or a similar position.

The substantial evidence test arises from Const 1963, art 6, § 28, which provides for judicial review of a final agency decision to determine whether it is supported by competent, material, and substantial evidence. *VanZandt*, 266 Mich App at 583. "Substantial evidence is that which a reasonable mind would accept as adequate to support a decision, being more than a mere scintilla, but less than a preponderance of the evidence." *Id.* at 585, quoting *St Clair Intermediate School Dist v Intermediate Ed Ass'n/Michigan Ed Ass'n*, 218 Mich App 734, 736; 555 NW2d 267 (1996), *aff'd* 458 Mich 540 (1998). In reviewing the agency's decision, the entire record must be considered, giving deference to the agency's findings, "particularly with regard to witness credibility and evidentiary questions." *VanZandt*, 266 Mich App at 588. If there is sufficient evidence to support the agency decision, the circuit court may not substitute its judgment for that of the agency, even if it might have reached a different result. *Id.* at 584.

Even if the Retirement Board properly could grant a duty disability retirement under MCL 38.67a without a medical advisor's certification of total incapacitation, the circuit court in this case misapplied the substantial evidence test by considering Dr. Higginbotham's evaluation, which was not admitted in the administrative proceeding, and by substituting its view of the evidence and the weight it would accord the evidence for that of the Retirement Board. *VanZandt*, 266 Mich App at 584, 586-587. The material question was not whether petitioner could perform particular tasks that he had performed in his prior employment as a bank teller, as

set forth in his testimony before the hearing officer, but rather whether he was able to engage in employment reasonably related to his training as a bank teller.

Each medical advisor evaluated the bank teller job in this general context. That job was described in Dr. Shaikh's most recent report as requiring "only light lifting and carrying." Dr. Shaikh indicated in his earlier report that "[t]his work is *usually* performed as light exertion, lifting and carrying up to 20 pounds with no more than occasionally bending, stooping crouching and kneeling" (emphasis added). The job was described in Dr. Mika's most recent report as requiring "light lifting and carrying (no more than 20 pounds on occasion)." There was no evidence that either medical advisor lacked knowledge or information regarding the normal job responsibilities of a person hired to work as a bank teller. Further, petitioner did not offer any vocational expert or other source of evidence to establish the normal job responsibilities of a bank teller. Instead, petitioner described particular tasks that he had performed when he was previously employed as a bank teller. He recalled "heavy" lifting at times, and estimated that the heaviest items he lifted were coins that weighed "[p]robably 40 pounds, 40 to 50 pounds maybe." The Retirement Board recognized petitioner's testimony in its findings, but the Retirement Board could reasonably conclude from the evidence as a whole that petitioner did not meet his burden of proof, and its findings are sufficient to support that determination. Because the circuit court must give deference to the Retirement Board's findings regarding witness credibility and evidentiary questions, the circuit court erred in its application of the substantial evidence test and clearly erred in reversing the Retirement Board's decision.

Accordingly, we reverse the circuit court's decision and reinstate the Retirement Board's decision denying petitioner's application for duty disability retirement benefits.³

Reversed.

/s/ Mark J. Cavanagh
/s/ Peter D. O'Connell
/s/ Kurtis T. Wilder

³ We reject respondent's argument that the circuit court's consideration of *Ford*, 518 F3d at 979, provides an independent basis for reversal. Although *Ford* does not involve a claim under the SERA, the circuit court did not apply an incorrect legal principle to the extent that it found *Ford* helpful in evaluating complaints of pain by an applicant seeking duty disability retirement benefits.