STATE OF MICHIGAN

COURT OF APPEALS

HERBIE HUNTER, Plaintiff-Appellee,	UNPUBLISHED January 31, 2012
v	No. 300048 Ingham Circuit Court
PUBLIC SCHOOL EMPLOYEES RETIREMENT SYSTEM, Defendant-Appellant.	LC No. 09-001585-AA

Before: CAVANAGH, P.J., and SAWYER and METER, JJ.

PER CURIAM.

Defendant appeals by leave granted from the circuit court's reversal of the State Public School Employees' Retirement Board's denial of duty disability retirement benefits for petitioner,[1] a 52-year-old resident of Detroit who has been a glazier or glazier foreman for the Detroit Public Schools since 1983. We reverse.

During the course of his career, petitioner suffered numerous injuries and ailments.[2] He has been diagnosed with degenerative disc disease and bulging discs, and has had multiple rotator cuff surgeries. Under a doctor's orders, petitioner has been on and off work since July 2005. Petitioner submitted an application for duty disability retirement benefits to the Office of Retirement Services in November 2007, citing back, shoulder, and neck injuries. The Office of Retirement Services notified petitioner that his application had been denied in April 2008, and

[1] Because this case originated in an administrative agency, we will refer to plaintiff as "petitioner" in this opinion.

[2] A hearing referee found that petitioner hurt his back at work in a fall when a ladder broke in 1984, experienced a sharp pain in his shoulder while lifting a window in 1986, was diagnosed with right shoulder bursitis in 1986, experienced pain in his lower back when he tripped over a box in 1992, injured his left shoulder carrying a bucket in 1996, sprained his lower back lifting glass and frames in 1999, injured his back and groin while lifting glass in 2001, fractured a rib in an automobile accident in a work van in 2002, injured his left hand and arm while lifting a window frame in 2004, and strained his back while lifting and carrying glass in 2005.

petitioner requested a hearing. Following the hearing, a hearing officer recommended that the application be denied, and the State Public School Employees' Retirement Board denied petitioner's application in June 2009. Petitioner sought judicial review in the Ingham Circuit Court pursuant to MCR 7.105 and MCL 24.301.

The circuit court reversed and remanded, finding that the hearing officer's determination was not supported by competent, material, and substantial evidence. The court criticized the hearing officer and retirement board for relying on the determinations of the independent medical advisers because they did not physically examine petitioner. The court also stated that the medical advisers' opinions that petitioner was not totally and permanently disabled were flawed because the advisers relied on a dictionary definition of a glazier supervisor, and not the actual requirements of petitioner's employment, in reaching their conclusions. The circuit court further found that the hearing officer should not have relied on a medical adviser's opinion that petitioner's injuries were not a result of his work because the adviser merely stated that there was not enough information to determine the cause of petitioner's injuries. The court found that other evidence supported the conclusion that petitioner's on-the-job injuries caused his condition.

We review a circuit court's review of an administrative decision under a mixed standard; the circuit court's legal conclusions are reviewed de novo and its factual findings are reviewed for clear error. *Mericka v Dep't of Community Health*, 283 Mich App 29, 36; 770 NW2d 24 (2009). "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." *VanZandt v State Employees Retirement Sys*, 266 Mich App 579, 585; 701 NW2d 214 (2005).

We must "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 . . . ." *Mericka*, 283 Mich App at 35-36 (internal citation and quotation marks omitted). A final administrative agency decision must be upheld if it is not contrary to law, not arbitrary, not capricious, not a clear abuse of discretion, and supported by competent, material, and substantial evidence on the whole record. *VanZandt*, 266 Mich App at 583. An agency's decision is arbitrary if it is without an adequate determining principle, or arrived at through an exercise of will or by caprice; it is capricious if it is apt to change suddenly or is freakish or whimsical. *Id.* at 584-585. "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 584 (internal citation and quotation marks omitted). A circuit court "should accord due deference to administrative expertise and not invade administrative fact finding by displacing an agency's choice between two reasonably differing views." *Dignan v Mich Pub Sch Employees Retirement Bd*, 253 Mich App 571, 576; 659 NW2d 629 (2002). "It is not a reviewing court's function to resolve conflicts in the evidence or to pass on the credibility of witnesses." *VanZandt*, 266 Mich App at 588.

We first must consider whether the statute governing duty disability retirement benefits under the Public School Employees Retirement Act[3] requires that a state-appointed physician

[3] MCL 38.1301 *et seq.*

physically examine an applicant for benefits. Two medical advisers appointed by the board reviewed petitioner's medical records but did not physically examine petitioner himself. If MCL 38.1387 requires a physical examination, the board's denial of benefits was contrary to law. The statute states, in relevant:

> (1) A member whom the retirement board finds to have become totally and permanently disabled from any gainful employment by reason of personal injury or mental or physical illness while serving as an employee of that reporting unit shall receive a duty disability retirement allowance if all of the following requirements are met:
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> * * *
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> (d) The member undergoes an examination by 1 or more practicing physicians or medical officers designated by the retirement board who certify to the retirement board that the member is totally and permanently disabled for performing the duties for the member's position for which the member is qualified by reason of training, or experience, or both. [MCL 38.1387.]

We must determine whether the requirement that an applicant "undergo[] an examination by 1 or more practicing physicians or medical officers designated by the retirement board" necessitates a physical examination of the applicant by a state-appointed doctor. The construction of a statute by an administrative agency charged with executing it is entitled to respectful consideration but may not conflict with the plain meaning of the statute. *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90, 106, 108; 754 NW2d 259 (2008). We conclude that the board's interpretation of the statute does not conflict with its plain meaning. The Public School Employees Retirement Act does not define the "examination" required under MCL 38.1387. MCL 38.1387 does not state that the member must undergo a physical examination or that an examination of the member's medical records will not suffice. It also does not state that an examination of the member's medical records will suffice. Without clear meaning from the Legislature, we will defer to the interpretation of an agency charged with executing the act, and the agency in this case did not require a physical examination.

For guidance, we also look to § 24 of the State Employees Retirement Act,[4] which requires that "[a] medical advisor conduct[] a medical examination" of an applicant for disability retirement benefits. MCL 38.24(1)(b). Similar to MCL 38.1387, MCL 38.24 could also be read to require a physical examination of an applicant. The State Employees Retirement Board, however, in 2008 adopted a rule stating that a medical adviser's review can be based on medical records. 2008 AC, R 38.35(1); see also *Monroe v State Employees Retirement Sys*, ___ Mich App ___; ___ NW2d (Docket No. 297220, issued June 28, 2011), slip op at 7. "The Legislature is assumed to be aware of prior administrative interpretations of its acts, and legislative silence in the face of an agency's construction is construed as a consent to that construction." *Parker v Byron Ctr Public Schools Board of Education*, 229 Mich App 565, 570; 582 NW2d 859 (1998).

[4] MCL 38.1 *et seq.*

If the Legislature has consented to the State Employees Retirement Board's interpretation of MCL 38.24, we see no reason that the Legislature would not also consent to the same interpretation of the similar language of MCL 38.1387.

Having determined that MCL 38.1387 did not require that a state medical adviser physically examine petitioner, we turn to the circuit court's finding that the board's decision was not supported by competent, material, and substantial evidence because the board relied on independent medical advisers who did not physically examine petitioner. We find that the circuit court misapprehended or misapplied the substantial evidence test in making this finding. It essentially determined that the medical advisers were not credible because they had not physically examined petitioner. However, it is not a reviewing court's function to pass on the credibility of witnesses. *VanZandt*, 266 Mich App at 588. The simple fact is that the record did contain competent, material, and substantial evidence supporting the board's decision, and the court should not have disregarded that evidence.

The circuit court also misapprehended or misapplied the substantial evidence test in reversing the board because of the board's reliance on a particular medical adviser; this advisor had testified that petitioner was not totally and completely disabled because he could perform the duties of a glazier supervisor as listed in an occupational dictionary. The circuit court stated that the board should have determined whether petitioner was unable to perform the actual duties of his job, which required heavy lifting. MCL 38.1387, however, does not require that a petitioner be unable to perform the duties of the exact job from which he seeks to retire. MCL 38.1387(1) requires that an applicant show he has become totally disabled "from any gainful employment . . . ." The applicant must be "disabled for performing the duties for the member's position for which the member is qualified by reason of training, or experience, or both." MCL 38.1387(1)(d). Thus, if petitioner can be a glazier supervisor somewhere else, not just in the school system from which he seeks to retire, he cannot qualify for duty disability retirement. Moreover, there was no indication that the school district from which petitioner seeks to retire would or could not employ petitioner under the restrictions recommended by the independent medical advisers and petitioner's own doctor. In fact, the record shows that petitioner has worked under weight restrictions in the past.

Because MCL 38.1387 requires that an applicant be disabled from performing any job for which he is qualified, see MCL 38.1387(1)(d), the occupational dictionary definition provided more than a scintilla of evidence that petitioner could be a glazier supervisor somewhere. *Bandeen*, 282 Mich App at 519.

Finally, we find that the circuit court misapplied or misapprehended the substantial evidence test in determining that a reasonable person would not accept as adequate the evidence the board relied on to find that petitioner's disability was not a result of his work. The circuit court held that the board should not have relied on an independent medical adviser's opinion regarding whether petitioner's injuries were a result of his work because the adviser merely said that there was not enough information to determine the cause of petitioner's injuries. Other evidence, the circuit court found, supported the conclusion that petitioner's on-the-job injuries caused his condition.

In addition to reweighing the evidence, an action that exceeded its authority, *Dignan*, 253 Mich App at 576, the circuit court reversed the burden of proof that applies in an administrative hearing. Absent an applicable statute, administrative rule, or agency procedure, the proponent of an order or petition in a contested case under the Administrative Procedures Act[5]—the petitioner—has the burden of going forward with evidence and the burden of proof. *Bunce v Secretary of State*, 239 Mich App 204, 216; 607 NW2d 372 (1999). While no doctor diagnosed petitioner's condition as non-work-related, no doctor diagnosed it as work-related, either. One could infer from petitioner's long history of injuries and time on worker's compensation that his condition was caused by his work. However, the administrative agency's decision not to make that inference was not an unreasonable one, especially when the burden of proof lay with petitioner, there was no direct statement from any source indicating that his condition was work-related, and two medical advisers testified that there was not enough information to determine the issue one way or the other. The retirement board made a decision supported by evidence that a reasonable person would accept as adequate. The circuit court's contrary conclusion was inaccurate.

We find that the circuit court misapplied or misapprehended the substantial evidence test, and we are left with the definite and firm conviction that a mistake has been made.

Reversed and remanded. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ David H. Sawyer
/s/ Patrick M. Meter

[5] MCL 24.201 *et seq*.