

FILED: June 05, 2013

IN THE COURT OF APPEALS OF THE STATE OF OREGON

SHADMAN AFZAL,
Petitioner,

v.

PUBLIC EMPLOYEES RETIREMENT BOARD,
Respondent.

Public Employees Retirement Board
071072

A149863

Argued and submitted on January 14, 2013.

Nelson R. Hall argued the cause for petitioner. With him on the briefs was Bennett, Hartman, Morris & Kaplan, LLP.

Erin C. Lagesen, Assistant Attorney General, argued the cause for respondent. With her on the brief were Mary H. Williams, Deputy Attorney General, and Anna M. Joyce, Solicitor General.

Before Armstrong, Presiding Judge, and Hadlock, Judge, and Egan, Judge.

HADLOCK, J.

Affirmed.

1 HADLOCK, J.

2 In *Afzal v. PERB*, 239 Or App 284, 293, 246 P3d 5 (2010) (*Afzal I*), we
3 reversed and remanded a final order in which the Public Employees Retirement Board
4 (PERB) had denied claimant's request for a disability retirement allowance on the ground
5 that he had failed to show that he was unable to perform any work for which he was
6 qualified. See ORS 238.320(3) (conditioning eligibility for a disability retirement
7 allowance on the claimant being "unable to perform any work for which qualified");
8 OAR 459-015-0040(1) ("The burden of proof for entitlement to a disability retirement
9 allowance is upon the applicant."). On remand, PERB reached the same conclusion as it
10 had in its initial order, again denying claimant's request for benefits. Claimant seeks
11 judicial review of PERB's order on remand, asserting that the order is flawed for two
12 reasons. First, claimant contends that the order on remand relied on the same reasoning
13 that we rejected in *Afzal I*. Second, claimant argues that the order on remand is not
14 supported by substantial evidence. We disagree with claimant on both points and, for the
15 reasons set forth below, affirm.

16 We take the following facts from PERB's findings and the record, in part as
17 we summarized them in *Afzal I*. Claimant worked for Multnomah County for many
18 years, most recently as a community justice manager. In that position, claimant planned
19 and approved arrests, detainments, and searches; he also actively participated in arrests.
20 In addition, claimant held meetings with department members, management, staff, and
21 outside partners. In a job description he submitted to the Public Employees Retirement

1 System (PERS), claimant described his duties as follows:

2 "Manage, direct, evaluate and coordinate and prioritize a multifunction
3 work unit. Manage delivery of community justice services. * * * Manage
4 and direct lead workers in operation of the work unit and flow of work.
5 Manage the lead worker to help in staff training and assignments.
6 Collaborate and form partnerships with other entities and represent the
7 department in public meetings and multi agency taskforces. Respond to
8 community groups and formulate plans to resolve issues. This position is
9 responsible for unit and office budgets. Head and organize safety
10 committees. This position also requires program development and
11 implementation of programs. * * *"

12 As claimant testified, before working for the county, he had worked in fast food
13 restaurant management and also for a security department. Claimant held a bachelor's
14 degree in administrative justice and psychology, and he also had completed some post-
15 graduate coursework.

16 While employed as a community justice manager, claimant developed a
17 physical impairment, primarily in his left leg, and he subsequently resigned from his
18 position with the county. We summarized those events in *Afzal I*:

19 "From October 2002 through January 2008, claimant saw an
20 internist, Dr. Frank Fric, to address symptoms that were causing him to
21 have problems at work, including dizziness, heaviness in the head, unstable
22 gait, and weakness. By early 2006, claimant's symptoms had progressed to
23 the point that they began to cause more noticeable complications at work.
24 Claimant's colleagues expressed concern about changes in his decision-
25 making ability and attention to detail. He often seemed confused, fatigued,
26 and inattentive; on several occasions he nodded off during meetings.

27 "Also in 2006, claimant developed physical complications, including
28 walking with a limp and dragging his left leg. * * * He began seeing
29 neurologist Dr. Bruce Bell on May 22, 2006. After that initial visit, Bell
30 opined that claimant could have 'some sort of unusual dystonia or possible
31 early Parkinson disease to explain the gait problems. He may have a mild
32 seizure disorder.' Claimant's internist, Fric, also noted in a subsequent visit
33 that claimant's condition had worsened, developing into 'basically

1 uncontrollable non-symmetric movements of the entire body, arms, legs.
2 Observing him sitting in [a] chair, he is moving up and down on the chair,
3 almost sliding off.'

4 "After resigning from his position as a community justice manager
5 on December 8, 2006, he and his wife, from February 2007 through
6 December 2007, operated a business selling watches and clocks from a cart
7 inside a shopping mall. Claimant worked at the cart for a short time but
8 had to stop because he was having problems focusing and staying alert. He
9 was also having difficulty standing and otherwise being able to physically
10 assist customers."

11 239 Or App at 287 (brackets in *Afzal I*).

12 Claimant applied to PERS for disability retirement benefits in January
13 2007, listing his condition as "Parkinson's--dopamine sensitive dystonia." At the request
14 of PERS, claimant's internist, Fric, provided a medical report stating that he was
15 uncertain whether claimant would be able to perform any work for which he was
16 qualified. Neurologist Bruce Bell also provided PERS with medical information,
17 identifying claimant's condition as "Parkinson's." In March 2007, Bruce Bell opined that
18 claimant's physical impairments left him unable to return to his former job because he
19 could not "respond rapidly from a physical point of view to anything that may come up."¹
20 Bruce Bell also reported, however, that, if claimant "had some sort of sedentary work
21 which did not require stress, he might be able to do that."

22 Later in 2007, neurologist Lynne Bell performed an independent medical
23 examination of claimant. She, too, reported that claimant's primary difficulty related to

¹ Bruce Bell reiterated that opinion in late 2007, reporting that claimant was "100% disabled and * * * unable to perform the work of his previous job due to the difficulty of using his left foot." Bruce Bell concluded that it was "unlikely" that claimant "will be able to return to" the job with the county.

1 his left leg and ambulation, and she opined that claimant had a "functional gait disorder."
2 Lynne Bell also noted that the "shaking of the hands" that claimant initially exhibited
3 "disappeared with distracting maneuvers[,] " and that she suspected "a psychogenic
4 component" to claimant's condition. Lynne Bell concluded that, based on claimant's
5 "current clinical presentation, he would be capable of performing a desk job."

6 In September 2007, PERS denied claimant's application for disability
7 retirement benefits. Claimant sought a hearing, and PERS referred his request to the
8 Office of Administrative Hearings, which assigned an administrative law judge (ALJ) to
9 hear his claim. Before the hearing took place, another neurologist, William Herzberg,
10 reported that claimant suffered from two conditions--seizure disorder and dystonia (a
11 neurological movement disorder)--and would not be able to return to his position with
12 Multnomah County.

13 After a June 2008 hearing, the ALJ issued a proposed order recommending
14 that claimant's request for disability benefits be denied. PERB then issued a final order in
15 which it adopted the ALJ's findings of fact and, ultimately, agreed with the ALJ that
16 claimant was not entitled to a disability retirement allowance.

17 That first final order focused, at least nominally, on whether claimant had
18 met his burden of proving that he no longer was able to perform any work for which he
19 was qualified. A statute and several administrative rules govern that analysis. Under
20 ORS 238.320(1), to establish eligibility for a disability retirement allowance, a claimant
21 must be "mentally or physically incapacitated for an extended duration * * * and thereby

1 unable to perform any work for which qualified[.]” OAR 459-015-0001(1) defines “any
2 work for which qualified” as follows:

3 “A job, not necessarily the last or usual job, which the applicant for a
4 disability retirement allowance:

5 “(a) Is physically and psychologically capable of performing; and

6 “(b) Has, or may obtain with reasonable training the knowledge, skills and
7 abilities, to perform the job.”

8 To determine whether a claimant is unable to perform any work for which qualified,
9 PERB must consider six factors:

10 “(A) Previous employment experience;

11 “(B) Formal education;

12 “(C) Formal training;

13 “(D) Transferable skills;

14 “(E) Age; and

15 “(F) Physical or mental impairment.”

16 OAR 459-015-0010(4)(a).

17 PERB’s assessment of those factors is aided by information provided by the
18 claimant, who must submit at least one medical report “resulting from a physical
19 examination, documenting how the injury or disease incapacitates” him or her.

20 OAR 459-015-0010(2). In addition, where the claim is based on a neurological
21 condition, the claimant must submit at least one report from a “treating or consulting
22 neurologist or neurosurgeon.” OAR 459-015-0010(3)(c)[.] The claimant bears the
23 burden of proving entitlement to a disability retirement allowance. OAR 459-015-

1 0040(1). "PERB" is not required to prove whether the applicant is or is not eligible for a
2 disability retirement allowance." OAR 459-015-0005(2).

3 In its initial order, PERB denied claimant's request for a disability
4 retirement allowance based on its determination that claimant had failed to "present at
5 least one report from a treating neurologist to support his claim that his injury or disease
6 incapacitates him to such an extent that he is incapable of performing *any* work for which
7 qualified, as required by ORS 238.320." (Emphasis in original.) As we explained in
8 *Afzal I*, however, ORS 238.320(3) does not require a claimant to submit a physician's
9 report opining that the claimant is incapable of performing any work for which he or she
10 is qualified; rather, the statute simply specifies that the claimant must be incapacitated to
11 that extent in order to qualify for a retirement disability allowance. 239 Or App at 292;
12 *see* ORS 238.320(3). And, to the extent that the administrative rules require claimants to
13 submit medical reports that include specific information about their disabilities, claimant
14 met that obligation here. *See Afzal I*, 239 Or App at 292 (citing OAR 459-015-0010(2),
15 (3)).

16 Our decision to remand PERB's order was based on PERB apparently
17 having denied benefits based *solely* on the absence of a statement by a neurologist that
18 claimant was incapable of performing any work for which he was qualified--a statement
19 that, as we explained, is required neither by ORS 238.320(3) nor by the related
20 administrative rules. *Id.* at 292-93. Instead, we held, PERB needed to consider all
21 pertinent factors, as specified in OAR 459-015-0010(4)(a), in assessing whether claimant

1 had carried "his burden * * * to show that he was unable to do *any* work for which he
2 was qualified." *Id.* at 293 (emphasis in original). Because we could not tell from PERB's
3 order whether it had considered all of those factors, the order "lack[ed] substantial reason
4 justifying its denial of disability allowance." *Id.* Accordingly, we reversed the order and
5 remanded it to PERB for further proceedings.

6 On remand, PERB again denied claimant's application for a retirement
7 disability allowance. However, in accordance with our holding in *Afzal I*, PERB's order
8 on remand included new analysis related to the OAR 459-015-0010(4)(a) factors
9 (employment experience, education, training, transferable skills, age, and physical or
10 mental impairment):

11 "At 44 years old, [claimant] is relatively young. He holds a Bachelor of
12 Science in Administrative Justice and in Psychology and has completed
13 some post-graduate coursework. He has dystonia of the lower extremities,
14 particularly in his left leg which impairs his ability to ambulate in a rapid
15 manner. But this physical impairment does not preclude him from other,
16 more sedentary, tasks and duties. His prior work experience as a manager
17 brings with it extensive job skills, including the ability to manage, direct,
18 evaluate and coordinate and prioritize a multifunction work unit.

19 "[Claimant] has experience heading committees, developing and
20 implementing programs, and overseeing program budgets. These skills are
21 not unique to work as a parole officer or to managing parole officers.
22 These skills are transferable to other management positions, some of which
23 may be 'desk jobs' [claimant] could perform. These management positions
24 could include, but are not limited to, working for a corporation or state
25 agency that could offer job-specific training to [claimant]. [Claimant] did
26 not present a vocational evaluation, expert medical opinions, or any other
27 evidence to support a conclusion that he is not qualified for this type of
28 management-related work * * *. Moreover, there is no medical evidence to
29 support a conclusion that [claimant] suffers from a cognitive impairment
30 that would preclude him from performing this type of managerial work.

1 "[Claimant] failed to present expert medical evidence to support a
2 conclusion that his physical impairment prevents him from performing
3 sedentary work. Considering his age, his formal education, his formal
4 training, his transferable skills, and his physical impairment, [claimant] has
5 not demonstrated that h[e] is unable to perform any work for which
6 otherwise qualified. For these reasons, [claimant] is not entitled to a
7 disability retirement allowance."

8 On judicial review, claimant asserts that PERB's order on remand "contains
9 the same errors and leap of logic based on a lack of foundation this Court addressed" in
10 *Afzal I*. More specifically, we understand claimant to be arguing (1) that PERB again
11 erred by relying on the neurologists' reports as a basis for denying his claim, and (2) that
12 the order on remand lacks substantial evidence.² PERB responds that its order was not
13 contrary to our prior opinion. PERB also asserts that substantial evidence in the record
14 supports its conclusion that claimant had failed to establish that he was precluded from all
15 work for which he was qualified. In making that argument, PERB observes that claimant
16 had the burden of proving his qualification for a disability retirement allowance. We

² In *Afzal I*, we expressed our agreement with claimant's argument that he "was not required to 'eliminate the universe' of desk jobs." 239 Or App at 293. Citing that statement, claimant also argues that PERB erred on remand by "once again requiring [him] to carry a burden disproving a universe of jobs[.]" Claimant reads too much into a single sentence from *Afzal I*. Our statement that claimant was not required to "eliminate the universe' of desk jobs" must be read together with our explanation that claimant did have the burden of "proffering sufficient evidence under *all* the criteria in OAR 459-015-0010, to show that he was unable to do *any* work for which he was qualified." *Id.* (emphases in original). In that context, our observation that claimant was not required to "eliminate the universe" of possible desk jobs meant only that claimant did not have the burden of proving that negative *in the abstract*. That is, although claimant was not required to establish that *no* desk job exists (anywhere, of any type) that he could perform, he was required to prove that he generally could not perform jobs within the *specific* universe of desk jobs that he is qualified to perform, taking into account the OAR 459-015-0010(4)(a) factors.

1 address claimant's arguments in turn, reviewing PERB's order for substantial evidence
2 and reason, as well as for errors of law. *SAIF v. Ramos*, 252 Or App 361, 363, 287 P3d
3 1220 (2012).

4 Claimant first argues that PERB's order on reconsideration repeats the
5 reasoning that we rejected in *Afzal I*. According to claimant, PERB "relied upon the
6 same two medical statements [from neurologists Bruce Bell and Herzberg] to again * * *
7 conclude [that he] did not prove his inability to work." As noted, in its initial order,
8 PERB determined that claimant had not presented at least one report from a neurologist
9 that supported his claim that he could not perform any work for which he was qualified.
10 Thus, PERB at least implicitly found that the reports from Bruce Bell and Herzberg were
11 insufficient to establish that claimant could not perform sedentary work. As explained
12 above, our remand in *Afzal I* was based on PERB's error in relying *solely* on its
13 conclusion about the lack of a supporting neurology report as a basis for denying
14 claimant's application for benefits. 239 Or App at 291-93. In the order on remand,
15 PERB reiterated its observations about the reports from Bruce Bell and Herzberg. More
16 significantly--at least from claimant's perspective--PERB also repeated verbatim the
17 sentence that prompted our remand in *Afzal I*: "[Claimant] did not present at least one
18 report from a treating neurologist to support his claim that his injury or disease
19 incapacitates him to such an extent that he is incapable of performing *any* work for which
20 qualified, as required by ORS 238.320." (Emphasis in original.)

21 Notwithstanding PERB's repetition of the offending sentence, we conclude

1 that the order on remand is supported by substantial reason. The order on remand is not
2 actually based--as the initial order appeared to be--on the absence of a neurologist's report
3 stating that claimant is unable to perform any work for which he is qualified. Rather, the
4 order on remand reflects PERB's consideration of the six factors in OAR 459-015-
5 0010(4)(a): employment experience, education, training, transferable skills, age, and
6 physical or mental impairment. On remand, PERB explained that, in deciding whether
7 claimant could perform a desk job, it had considered

- 8 • claimant's previous management experience;
- 9 • claimant's bachelor's degree in administrative justice and psychology and his
10 completion of some post-graduate coursework;
- 11 • claimant's skills in, among other things, managing people, heading committees,
12 developing and implementing programs, and overseeing budgets, which were "not
13 unique to work as a parole officer or to managing parole officers" and therefore
14 were transferable;
- 15 • claimant's "relatively young" age (44 years old); and
- 16 • claimant's limitations, as well as evidence that those limitations did not "preclude
17 him from other, more sedentary, tasks and duties."

18 Thus, PERB considered the factors that OAR 459-015-0010(4)(a) requires it to take into
19 account. PERB's repetition of the sentence about the neurologists' reports appears, in
20 context, to be nothing more than an unfortunate artifact from the original order. Because
21 PERB's new rationale for denying claimant's claim is based on all of the OAR 459-015-

1 0010(4)(a) factors, and not solely on the neurologists' reports, we find that artifact to have
2 little significance. Phrased in the terms that claimant uses in his brief, PERB's order on
3 remand does not impermissibly rely on the reasoning that we rejected in *Afzal I*.

4 That brings us to claimant's second argument, in which he contends that the
5 order on remand is not based on substantial evidence. Claimant's argument starts from a
6 flawed premise--that the record must include "substantial evidence of an ability to work."
7 Based on that premise, he complains in his opening brief that the record does not include,
8 for example, a vocational evaluation establishing that he can perform certain types of
9 desk jobs. But, as explained above, claimant bore the burden of showing that he could
10 not perform any work for which he was qualified; PERB did not bear the burden of
11 showing the converse. OAR 459-015-0005(2); OAR 459-015-0040(1). Thus, the record
12 need not include substantial evidence showing that claimant *can* work; all it need contain
13 is substantial evidence supporting PERB's determination that claimant did not meet his
14 burden of proving that he *cannot* work. For that reason, the absence of a vocational
15 evaluation undercuts claimant's argument, rather than supporting it.³

16 And the record on remand does include substantial evidence supporting
17 PERB's determination that claimant did not establish that his impairment prevents him

³ Although claimant acknowledges in his reply brief that PERB "may not be required to obtain evidence from a vocational expert," he still insists that the order on remand is not supported by substantial evidence because the record does not include specific evidence of possible "alternative employment." As we have explained, it is claimant's burden to establish that such alternative employment does not exist, not PERB's burden to prove that it does.

1 from performing sedentary work for which he would be qualified. The record, viewed as
2 a whole, supports PERB's findings that claimant is relatively young, that he could benefit
3 from job-specific training, that his prior experience managing people is transferable to
4 other jobs requiring that skill, and that his management background generally qualifies
5 him for other management positions. The record also includes substantial evidence, like
6 the report from Lynne Bell, that supports PERB's finding that claimant does not suffer
7 from any cognitive impairment that would prevent him from performing management
8 work. Those findings rationally lead to PERB's ultimate determination that claimant
9 failed to show that he was unable to perform any work for which he was qualified and,
10 therefore, was not entitled to a disability retirement allowance. Thus, the order on
11 remand is supported by substantial evidence and reason.

12 Affirmed.