STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(Filed: July 9, 2012)

DAVID PALUMBO	**:**	
	:	
v.	**:**	**C.A. No. PC 10-6338**
	:	
EMPLOYEES' RETIREMENT SYSTEM OF RHODE ISLAND	**:**	

DECISION

VAN COUYGHEN, J. The matter before the Court is an appeal from a decision of the Retirement Board of the Employees' Retirement System of Rhode Island (hereafter "ERSRI" or "Board"). The Board denied Mr. Palumbo's application for accidental disability pension benefits. Jurisdiction is pursuant to G.L. 1956 § 42-35-15.

I

Facts and Travel

Mr. Palumbo had been employed as a janitor at Eleanor Slater Hospital since June of 1987. He filed a claim for accidental disability pension as the result of an alleged injury that occurred on June 10, 2007. Mr. Palumbo was lifting a bag of trash in the performance of his duties, when he claims to have experienced a sharp pain in his lower back that radiated down his legs. (Record of Administrative Appeal Ex. 6 (hereinafter, "R.").)

This incident was witnessed by Heather DiBenedetto, a registered nurse at the hospital. Ms. DiBenedetto's witness affidavit states that she observed Mr. Palumbo emptying trash when he moaned in pain. Mr. Palumbo then told Ms. DiBenedetto that "he felt a sharp pain in his back and going down" both his legs. Id. Following this incident, Mr. Palumbo visited his primary care physician, who referred him to Dr. Gus Stratton, a neurologist.

On May 15, 2008, Mr. Palumbo applied for an accidental disability pension due to the above-referenced incident. (R. Ex. 1.) In support of his application, Mr. Palumbo submitted an "Applicant's Physician's Statement for Disability" prepared by Dr. Stratton. (R. Ex. 2.) Dr. Stratton diagnosed Mr. Palumbo with chronic low back pain with radicular symptoms due to a large central disc protrusion. Id. Dr. Stratton stated that it appeared Mr. Palumbo became acutely symptomatic following the June 10, 2007 incident at work. He was also aware that Mr. Palumbo had a history of a previous back injury prior to this most recent event. Id. In fact, Dr. Stratton compared MRIs[1] taken before, and after, the June 2007 incident and found no significant change. However, Dr. Stratton noted that Mr. Palumbo had been asymptomatic for "quite some time" prior to the June 10, 2007 incident. Id. Dr. Stratton ultimately concluded that Mr. Palumbo was disabled as a result of the June 10, 2007 incident.

Upon the filing of Mr. Palumbo's application with ERSRI, the Board retained three doctors to conduct Independent Medical Examinations of Mr. Palumbo. All three of the independent medical examiners were orthopedic surgeons. The first, Dr. William Buonanno, concluded that Mr. Palumbo was incapacitated and that he could not return to work. Dr. Buonanno also concluded that the incapacity was the result of the on the job injury of June 10, 2007. (R. Ex. 7.)

The second independent medical examiner, Dr. Kenneth Lambert, also indicated that Mr. Palumbo was incapacitated and could not return to work as the result of the on the job injury on June 10, 2007. (R. Ex. 8.) Dr. Lambert also opined that "Mr. Palumbo had previous back problems that contributed, but these did not prevent or limit his working at his job." Id. Dr. Lambert noted that his assessment was based on Mr. Palumbo's "subjective complaints, history

[1] MRI stands for magnetic resonance imaging, and it is a procedure using a scanner which obtains detailed images of the internal structure of the body. See Random House Dictionary of the English Language 1259 (2nd Ed.1987).

given by the claimant, medical examination and medical tests as provided, with the assumption that the material is true, correct and complete." Id.

The third independent medical examiner, Dr. Michael Wiggins, disagreed with the three physicians referenced above and determined that Mr. Palumbo was not disabled. (R. Ex. 9.) Dr. Wiggins found "no evidence of radicular/neurologic symptoms and only subjective complaints of low back pain." Id. Dr. Wiggins, like Doctor Stratton, noted that the abnormalities seen in Mr. Palumbo's recent MRI were present prior to Mr. Palumbo's incident on June 10, 2007. Id.

Pursuant to the Retirement Board's regulations, Mr. Palumbo's application for accidental disability pension was preliminarily referred to the Disability Subcommittee, so that the Subcommittee could provide a recommendation to the Board. It is the role of the Subcommittee to review the application submitted and make a recommendation without a hearing. See ERSRI Reg. § 9.5. On August 28, 2009, the Disability Subcommittee issued a written decision recommending denial.[2] (R. Ex. 14.) The Board adopted the Subcommittee's recommendation on September 2, 2009 and informed Mr. Palumbo that his application for accidental disability pension was denied. Id.

Mr. Palumbo appealed that decision, which afforded him a hearing before the Disability Subcommittee. The hearing took place on January 8, 2010. Thereafter, the Subcommittee again voted to deny Mr. Palumbo's application.[3] Similarly, on March 10, 2010, the Board again denied Mr. Palumbo's claim for disability without a hearing based upon the recommendation of the Subcommittee. (R. Ex. 29.) Mr. Palumbo appealed that decision, which afforded him a hearing before the full board. See ERSRI Reg. § 9.10. The hearing before the full board was

[2] No transcript of this proceeding was provided in the certified record to this Court. However, a transcript of the proceedings before the Board was provided in accordance with § 42-35-9.

[3] No transcript of the deliberation of the Subcommittee was provided in the certified record provided to this Court. Similarly, however, a transcript of the proceedings before the Board was provided in accordance with § 42-35-9.

scheduled for October 13, 2010. At that hearing, the Board again voted to deny Mr. Palumbo's application. (R. Ex. 33.)

After this final hearing, the Board mailed Mr. Palumbo the Subcommittee's written decision, which the Board adopted. The Board stated that:

> "After a thorough review of the evidence, the Disability Subcommittee finds that Palumbo is not incapacitated for the performance of service as the natural and proximate results of a specific and identifiable accident while in the performance of duty. The Disability Subcommittee finds it significant that one of the independent medical examiners did not find Palumbo to be disabled. The Subcommittee also finds it significant that Drs. Stratton and Buonanno noted that Palumbo's MRI results showed no significant difference before and after the incident by which Palumbo claims to be disabled. It does not appear that Palumbo was disabled by the June 10, 2007 incident, and Palumbo has failed to show any other specific and identifiable incident which resulted in his disability. Further, the incident of June 10, 2007 cannot be deemed an "accident" for purposes of R.I.G.L. § 36-10-14, as emptying trash is one of the customary duties of Palumbo's position as Janitor. (R. Ex. 14.)

Mr. Palumbo timely filed his appeal with this Court on October 28, 2010 pursuant to § 42-35-15.

II

Standard of Review

This Court's appellate review of administrative agencies, such as ERSRI, is governed by the Rhode Island Administrative Procedures Act, as set forth at § 42-35-1, et. seq. See Rossi v. Employees' Retirement Sys. of R.I., 895 A.2d 106, 109 (R.I. 2006). The applicable standard of review, codified at § 42-35-15(g), provides in pertinent part:

> "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inference, conclusions or decisions are:
> (1) In violation of constitutional or statutory provisions;

(2) In excess of the statutory authority of the agency;
(3) Made upon unlawful procedure;
(4) Affected by other error of law;
(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

The Superior Court's review is essentially "an extension of the administrative process." R.I. Telecomms. Auth. v. R.I. State Labor Relations Bd., 650 A.2d 479, 484 (R.I. 1994).

"In essence, if 'competent evidence exists in the record, the Superior Court is required to uphold the agency's conclusions.'" Auto Body Ass'n of R.I. v. State of R.I. Dep't of Bus. Regulation, 996 A.2d 91, 95 (R.I. 2010) (quoting Env't Scientific Corp. v. Durfee, 621 A.2d 200, 208 (R.I. 1993)). This Court defers to the administrative agency's factual determinations provided that they are supported by legally competent evidence. Town of Burrillville v. R.I. State Labor Relations Bd., 921 A.2d 113, 118 (R.I. 2007); Arnold v. R.I. Dep't of Labor and Training Bd. of Review, 822 A.2d 164, 167 (R.I. 2003). Legally competent evidence is "'some or any evidence supporting the agency's findings.'" Auto Body Ass'n of R.I., 996 A.2d at 95 (quoting Env't Scientific Corp., 621 A.2d at 208).

In reviewing a decision of an administrative agency, this Court is limited to an examination of the certified record to determine if there is any legally competent evidence therein to support the agency's decision. Johnston Ambulatory Surgical Associates, Ltd. v. Nolan, 755 A.2d 799 (R.I. 2000). If a tribunal fails to disclose findings of fact which form the basis for its decision, this Court will neither search the record for supporting evidence nor decide for itself what is proper in the circumstances. Cullen v. Town Council of Town of Lincoln, 850 A.2d 900 (R.I. 2004). If there are inadequate findings of fact, the Court will either order a hearing de novo or remand the case in order to afford the board an opportunity to clarify and

complete its decision. Hooper v. Goldstein, 104 R.I. 32, 241 A.2d 809 (1968). "The absence of findings by the board makes it impossible [for this Court] to review the board's decision and determine whether it was supported by legally competent evidence or included any errors of law." Pierce v. Providence Retirement Bd., 962 A.2d 1292, 1293 (R.I. 2009).

On the other hand, errors of law are reviewed de novo. Cohen v. Duncan, 970 A.2d 550, 561 (R.I. 2009). Questions of law decided by an administrative agency are not binding upon this Court and may be reviewed to determine what the law is and its applicability to the facts. Narragansett Wire Co. v. Norberg, 118 R.I. 596, 376 A.2d 1 (1977). When the administrative agency is empowered to enforce the statutes in question, the administrative agency's interpretation of those statutes should be accorded "weight and deference as long as that construction is not clearly erroneous or unauthorized." Labor Ready Ne., Inc. v. McConaghy, 849 A.2d 340, 344 (R.I. 2004). However, deference is only afforded when the statute is susceptible to multiple reasonable meanings. See Unistrut Corp. v. State Dept. of Labor and Training, 922 A.2d 93, 101 (R.I. 2007).

III

Analysis

A

Definition of an "Accident"

On appeal, Mr. Palumbo argues that the Board committed numerous errors of law in denying his application for accidental disability pension. Specifically, Mr. Palumbo argues that the Board erred in determining that the June 10, 2007 incident was not an accident within the meaning of § 36-10-14(c).

In its decision, the Board stated that "the incident of June 10, 2007 cannot be deemed an 'accident' for purposes of R.I.G.L. § 36-10-14, as emptying trash is one of the customary duties of Palumbo's position as Janitor." (R. Ex. 14.) Section 36-10-14(c) states that:

> "If a medical examination conducted by three (3) physicians engaged by the retirement board and such investigation as the retirement board may desire to make shall show that the member is physically or mentally incapacitated for the performance of service as a natural and proximate result *of an accident*, while in the performance of duty, and that the disability is not the result of willful negligence or misconduct on the part of the member, and is not the result of age or length of service, and that the member has not attained the age of sixty-five (65), and that the member should be retired, the physicians who conducted the examination shall so certify to the retirement board stating the time, place, and conditions of service performed by the member resulting in the disability and the retirement board may grant the member an accidental disability benefit." Sec. 36-10-14(c) (emphasis added).

Preliminarily, it should be noted that the word "accident" is not defined in chapter 10 of title 36. Also, notably, ERSRI does not define the word "accident" in its regulations regarding accidental disability pensions.

It is well-settled that absent any ambiguity, this Court must interpret a statute literally and apply its words using their "plain and ordinary meaning." Accent Store Design, Inc. v. Marathon House, Inc., 674 A.2d 1223, 1226 (R.I. 1996). Our Supreme Court has adopted the definition of the word "accident" in the context of interpreting an insurance contract as "an unusual, fortuitous, unexpected, unforeseen, or unlooked for event, happening, or occurrence . . . ." See General Accident Insurance Company of America v. Olivier, 574 A.2d 1240, 1242 (R.I. 1990) (quoting Black's Law Dictionary 30 (rev. 4th ed. 1968)). This Court finds that the same definition should apply to the word "accident" as used in § 36-10-14(c).

Recently, in Pierce v. Providence Retirement Board, 15 A.3d 957 (R.I. 2011), our Supreme Court dealt with the issue of what constituted an accident in the context of the

Providence disability pension ordinance, which is identical to § 36-10-14(c). In Pierce, a firefighter who had several on the job injuries, claimed that the cumulative effect of those injuries caused his disability. 15 A.3d at 960. The Providence Pension Board denied his application for disability, finding Pierce could not establish that his most recent accident caused his disability. Id. at 966. Our Supreme Court reversed, stating that the term, "accident," included multiple accidents within the course of his employment. Implicit in the Pierce Court's decision is that the definition of the term "accident" encompasses incidents occurring while an employee is in the performance of his or her duties.

Here, the Board erroneously determined that the incident in question did not qualify as an accident because "emptying trash is one of the customary duties of Palumbo's position as Janitor." The Board's "accident" determination was premised on the fact that Mr. Palumbo was performing an ordinary job function; thus, it found no accident could have occurred. This determination is clearly inconsistent with the intent of the statute. In fact, § 36-10-14(c) requires that an accident occur "while in the performance of duty." Sec. 36-10-14. The Board's determination that Mr. Palumbo's incident was not an accident is contrary to the clear and unambiguous meaning of the statute. It is clear the statute is meant to encompass all "unintended and unforeseen injurious occurrences" so long as the applicant was in the performance of job related duties. See generally 60A Am. Jur. 2d Pensions § 1206 (2012). The Board's narrow and unsubstantiated definition clearly defeats the purpose of § 36-10-14(c), which was meant to protect employees who were injured while performing their job duties. It is clear from the record that Mr. Palumbo suffered an "an unintended and unforeseen injurious occurrence" constituting an accident within the meaning of § 36-10-14(c).

The Board was also concerned that Mr. Palumbo's most recent injury—the June 2007 incident emptying the trash—was not the natural and proximate cause of his disability. In its decision, the Board stated that "Mr. Palumbo is [not] incapacitated for the performance of service as the natural and proximate result of a specific and identifiable accident while in the performance of duty. (R. Ex. 34.) A review of the transcript reveals that the Board found it significant that Mr. Palumbo had a prior history of back problems. Id. It is important to note that the statute does not prohibit applicants who have a preexisting condition from qualifying for accidental disability benefits. In addition, Pierce makes clear that a preexisting condition is not per se grounds for denial if the natural and proximate cause of the disability was an on the job accident. 15 A.3d at 966-967. The Pierce Court stated that "proximate cause 'need not be the sole and only cause. It need not be the last or latter cause. It's a proximate cause if it concurs and unites with some other cause which, acting at the same time, produces the injury of which complaint is made.'" Pierce, 15 A.3d at 966 (quoting Hueston v. Narragansett Tennis Club, Inc., 502 A.2d 827, 830 (R.I. 1986)).

The Board applied an erroneous definition of the word "accident" to the case before the Court. See Rossi, 895 A.2d at 113 (an agency's interpretation is afforded deference unless its interpretation is clearly erroneous or unauthorized). As a result, the Board's decision constitutes an error of law which warrants a remand. See § 42-35-15(g) (If an agency's decision is affected by error of law, then the Court may order a remand.).

B

Evidence before ERSRI and Findings of Fact

Next, Mr. Palumbo contends that ERSRI's decision was clearly erroneous in view of the medical evidence as a whole. He emphasizes that two of the three independent medical

examiners, Dr. Buonanno and Dr. Lambert, concluded that he was disabled as a result of the June 10, 2007 incident. It was only Dr. Wiggins who found Mr. Palumbo not to be disabled. Despite the conflicting opinions, the Subcommittee and, later, the Board gave more weight to the determination of Dr. Wiggins.

Section 42-35-12 mandates that any agency decision must include "findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings." G.L. 1956 § 42-35-12. A satisfactory factual record is an essential component to the Board's decision. Before this Court can conduct a meaningful review of the decision before it, a complete record with adequate factual findings must be presented. von Bernuth v. Zoning Board of Review of New Shoreham, 770 A.2d 396, 401 (R.I. 2001).

Factual findings cannot be merely conclusive. Kaveny, 875 A.2d at 8. The requirement that the Board's decision be accompanied by sufficient factual findings is especially important when evidentiary conflicts abound. Thorpe v. Zoning Board of Review of North Kingstown, 492 A.2d 1236, 1237 (R.I. 1985); see also May-Day Realty Corp. v. Board of Appeals of City of Pawtucket, 107 R.I. 235, 239, 267 A.2d 400, 403 (1970). It is only by making basic findings of fact that a reviewing court is able to determine how such conflicts were resolved. See id. Absent sufficient findings of fact, our Supreme Court has instructed that a remand is appropriate so that the agency can "correct deficiencies in the record and thus afford the litigants a meaningful review." Lemoine v. Department of Mental Health, Retardation and Hospitals, 113 R.I. 285, 290, 320 A.2d 611, 614 (1974) (affirming trial justice's order remanding the case to the agency "for the taking of additional evidence").

Here, a total of four doctors provided opinions as to Mr. Palumbo's disability. Three of the four concluded that he was disabled as a direct and proximate result from an injury suffered on June 10, 2007 while he was in the performance of his duties at work. Two out of the three independent medical examiners appointed by the Board to examine Mr. Palumbo came to the conclusion that Mr. Palumbo was disabled as a result of the incident on June 10, 2007. (R. Exs. 7, 8.) In addition, Mr. Palumbo's own physician, Dr. Stratton, while recognizing that Mr. Palumbo had a prior history of back pain, opined that Mr. Palumbo was injured while in the performance of his duties on June 10, 2007. (R. Ex. 2.) Dr. Stratton also specifically noted that Mr. Palumbo's prior back pain had subsided, and the injury Mr. Palumbo suffered was a direct result from a work-related accident. He formulated this opinion after reviewing the MRIs taken before and after the incident in question. It was only Dr. Wiggins who determined that Mr. Palumbo was not disabled. (R. Ex. 9.) It was Dr. Wiggins' contention that Mr. Palumbo exhibited only subjective complaints of low back pain. However, this Court notes that subjective complaints of pain are not invalid per se when coupled with objective medical reports demonstrating that an injury is, in fact, present. See McClure v. Department of Labor and Industries of State of Wash., 810 P.2d 25 (Wash. Ct. App. 1991) (court held that medical professional's objective medical opinion can be based solely on patient's subjective complaints).

The Board and Subcommittee had before it conflicting evidence as to whether Mr. Palumbo was disabled and whether that disability was a natural and proximate result from an accident in the performance of his duty. Ultimately, the Board concluded that Mr. Palumbo was not disabled. The Board's decision was based on the opinion of Dr. Wiggins, while a majority of the independent medical examiners and Mr. Palumbo's treating physician found him to be disabled.

The Board stated that it was "significant that one of the independent medical examiners did not find Palumbo to be disabled." (R. Ex. 14.) Importantly, the Board did not explain why they rejected Dr. Stratton's opinion that the June 10, 2007 incident was the cause of his injury despite the fact that Dr. Stratton was Mr. Palumbo's treating physician. See Metz v. Shalala, 49 F.3d 374, 377 (8th Cir. 1995) (ordinarily, treating physician's opinion should be given substantial weight in determining whether to grant disability insurance benefits). Moreover, the Board's decision also did not present a factual basis as to why it chose to credit the opinion of Dr. Wiggins, who concluded Mr. Palumbo was not disabled, over Doctors Stratton, Buonanno, and Lambert's contrary conclusions. Doctors Buonanno and Lambert were independent medical examiners hired by ERSRI to examine Mr. Palumbo; thus, their conclusions regarding Mr. Palumbo's disability were presumably fair and unbiased. See LaFazia v. Connecticut Seafood Producers, Inc., 538 A.2d 670 (R.I. 1988). However, the Board never provided a factual basis for disregarding the conclusions of the other doctors in favor of Dr. Wiggins' conclusion. This was a finding of fact that needed to be made in light of the conflicting medical opinions provided. See Thorpe, 492 A.2d at 1237 (findings of fact are especially important when there are evidentiary conflicts).

This Court cannot conduct a meaningful review absent adequate findings of fact. von Bernuth, 770 A.2d at 401. Therefore, this matter is hereby remanded to the Board for a hearing de novo to determine whether Mr. Palumbo was disabled and if so, whether or not his disability was the natural and proximate result of the accident of June 10, 2007. The Board's decision shall include adequate findings of fact and conclusions of law in accordance with § 42-35-12.

IV

Conclusion

After review of the entire record, this Court finds the decision to deny Mr. Palumbo's application for an accidental disability pension was made in violation of statutory provisions and was affected by error in law. The Court finds that Mr. Palumbo's June 10, 2007 injury was an accident within the meaning of § 36-10-14. The Court also remands the matter because the Board failed to make adequate findings of fact and conclusions of law regarding the conflicting medical opinions. Accordingly, the matter is remanded for a hearing de novo consistent with this decision. Counsel shall submit the appropriate Judgment for entry.