COURT OF APPEALS
DECISION
DATED AND FILED

September 6, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 01-0077

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

TONI NICOLETTI,

PLAINTIFF-APPELLANT,

V.

TEACHERS RETIREMENT BOARD, DEPARTMENT OF EMPLOYEE TRUST FUNDS, AND BAYFIELD SCHOOL DISTRICT,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: SARAH B. O'BRIEN, Judge. *Affirmed.*

Before Vergeront, P.J., Roggensack and Deininger, JJ.

¶1 ROGGENSACK, J. Toni Nicoletti applied to the Wisconsin Department of Employee Trust Funds (DETF) for a disability annuity under WIS.

STAT. § 40.63 (1999-2000).[1] Initially, her claim was denied, but following an administrative appeal and the submission of additional medical reports, benefits were awarded, retroactive to the date she applied. Nicoletti then moved for costs, including attorney fees, pursuant to WIS. STAT. § 227.485(3), which motion was denied by the Teachers Retirement Board. She appealed first to the circuit court and now to us. We conclude the board did not err in concluding DETF was substantially justified in initially denying her benefits because she had not provided evidence from a second physician that she was disabled within the meaning of § 40.63(1)(b). Therefore, we affirm the order of the circuit court, which affirmed the board's denial of her request for costs and fees.

BACKGROUND

¶2 Nicoletti was a teacher for the Bayfield School District. On October 10, 1995, she applied to DETF for a disability annuity under WIS. STAT. § 40.63. In her application, she described her disability as "connective tissue disease [and] depression." During the application process, Nicoletti submitted statements from three different physicians: Dr. Goldberg, Dr. Leff, and Dr. Downs. Dr. Goldberg certified that Nicoletti was totally and permanently disabled to the extent that she was "unable to engage in any substantial gainful activity," as § 40.63 requires. DETF treated Dr. Goldberg's statement as a qualifying certification of disability. Dr. Leff's report stated that he "did not do a disability exam," and he did not offer an opinion as to whether Nicoletti was disabled according to the standard set forth on the medical report form. Following the

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted. We use the 1999-2000 version of the statutes because there have been no statutory changes which would affect our opinion.

receipt of Dr. Leff's report, DETF sent Nicoletti a letter stating that "this second medical report cannot be used in determining your eligibility for disability benefits." DETF's letter also stated that Nicoletti could submit another medical certification from a qualified physician.

¶3 In response to DETF's action on Dr. Leff's medical report, Nicoletti submitted a third medical report form. On this form, Dr. Downs checked a box indicating that Nicoletti was disabled. However, he added several comments to the form. Next to the checked box, Dr. Downs inserted the word "intermittently." He also stated that Nicoletti's clinical picture was "consistent with being able to work part time" and that he recommended "working with DVR to explore possibilities."

¶4 DETF interpreted Dr. Downs's additional comments to suggest that perhaps Nicoletti did not meet the relevant standard of total and permanent disability. Accordingly, the agency sent Dr. Downs a request to clarify his opinion. In response to the follow-up question of whether Nicoletti is "**totally and likely to be permanently disabled** for the performance of the duties of **any** position involving substantial gainful activity" (bold emphasis in original), Dr. Downs checked "No." He also added an additional comment:

> At the time of my exam psychological & physical status may fluctuate to impact on her employability[.] Can't speak to her ability to find part time work which will pay more than $7,429.00/yr.

¶5 After receiving Dr. Downs's response, DETF sent Nicoletti a notice of disability benefit denial because "The medical evidence submitted did not establish that you are disabled within the meaning of the law." Nicoletti appealed DETF's decision, and an administrative hearing was held. On November 30,

1998, the hearing examiner issued a proposed decision and order recommending that Dr. Downs's reports be treated as ambiguous and further recommending that Nicoletti be permitted to supplement the reports with either a further clarification from Dr. Downs or a separate evaluation from another physician. The board issued the final decision on Nicoletti's appeal. It concluded that Dr. Downs's reports were insufficient because no conclusion could be reached from them about whether Nicoletti's disability satisfied WIS. STAT. § 40.63. It remanded the matter to DETF with the following instructions:

> 10. The information submitted by Dr. Downs to the DETF constituted neither a qualifying nor a non-qualifying medical opinion as to the appellant's ability to engage in any substantial gainful activity, as defined in § 40.63, Wis. Stats. … No conclusion as to the appellant's qualification under § 40.63, Wis. Stats., can be reached based on Dr. Downs' medical report. It is a non-opinion for § 40.63 purposes. The appellant must be permitted to submit another medical report ….

¶6 On remand, Dr. Downs clarified his opinion and stated that Nicoletti was disabled according to the relevant statutory standard. DETF subsequently approved Nicoletti's application for disability benefits retroactive to October 1995. Subsequent to DETF's decision to award benefits, Nicoletti renewed an earlier motion, made pursuant to WIS. STAT. § 227.485(3), for an award of costs and fees incurred as the prevailing party in her application for benefits. Section 227.485(3) provides in relevant part:

> In any contested case in which an individual … is the prevailing party and submits a motion for costs under this section, the hearing examiner[2] shall award the prevailing party the costs incurred in connection with the

[2] "Hearing examiner" is defined as "the agency or hearing examiner conducting the hearing." WIS. STAT. § 227.485(2)(a).

> contested case, unless the hearing examiner finds that the state agency which is the losing party was substantially justified in taking its position ….

¶7 The hearing examiner recommended that the board award Nicoletti costs under WIS. STAT. § 227.485(3). The board rejected the examiner's recommendation. It concluded that DETF's initial decision to treat Dr. Downs's report as insufficient to satisfy the requirements of WIS. STAT. § 40.63 was substantially justified. The circuit court affirmed the board's decision on costs, and Nicoletti appeals.

DISCUSSION

Standard of Review.

¶8 On appeal of a circuit court's order affirming an agency decision, we review the agency's decision, not the circuit court's decision. ***Gordon v. State Med. Examining Bd.***, 225 Wis. 2d 552, 556, 593 N.W.2d 481, 483 (Ct. App. 1999). Accordingly, in this case, we review the board's conclusion that DETF was substantially justified in treating Dr. Downs's report as insufficient to supply the statutorily required medical certification by a second physician.

¶9 For purposes of a motion for costs under WIS. STAT. § 227.485, an administrative agency's position is substantially justified if it has "a reasonable basis in law and fact." Section 227.485(2)(f). Reasonableness is a legal standard and applying a legal standard to a set of facts is a question of law. ***Susie Q Fish Co. v. Wisconsin Dep't of Revenue***, 148 Wis. 2d 862, 868, 436 N.W.2d 914, 917 (Ct. App. 1989). However, we will defer to a state agency's legal conclusions when the expertise of the agency is significant to the agency's decision. ***Id.*** at

868-69, 436 N.W.2d at 917; ***Behnke v. DHSS***, 146 Wis. 2d 178, 184, 430 N.W.2d 600, 602 (Ct. App. 1988).

¶10 In the case at hand, the question of substantial justification under WIS. STAT. § 227.485(3), and therefore the determination of reasonableness, hinges on the interpretation and application of the requirements of WIS. STAT. § 40.63(1)(d) that a disability annuity applicant must submit statutorily sufficient certifications of disability from two physicians. This court has previously held that the Wisconsin Retirement Board's interpretation of statutory eligibility requirements is entitled to "great weight" deference. *See* ***State ex. rel Bliss v. Wisconsin Ret. Bd.***, 216 Wis. 2d 223, 233, 576 N.W.2d 76, 80 (Ct. App. 1998) (giving great weight deference to the Wisconsin Retirement Board's interpretation of the requirement that an applicant submit an employer certification of disability). Accordingly, we give great weight to the board's conclusion that Dr. Downs's first two statements were insufficient to satisfy the statute, as DETF also concluded.

¶11 Because the board's decision that DETF's initial denial of benefits was substantially justified is intertwined with its administration of WIS. STAT. § 40.63, we conclude that its decision in regard to WIS. STAT. § 227.485(3) costs is entitled to some deference. *See* ***Behnke***, 146 Wis. 2d at 184, 430 N.W.2d at 602. It is unnecessary to determine whether we owe "due weight" deference or

"great weight" deference to the board's determination about the requested costs because even under a *de novo* review, our decision would be the same.[3]

Substantial Justification.

¶12 The only issue raised by Nicoletti on this appeal is whether the board properly determined that DETF was "substantially justified" in initially denying Nicoletti's application for disability benefits. Specifically, Nicoletti argues that the board erred by concluding that DETF was substantially justified in treating Dr. Downs's report as an insufficient medical certification because it labeled it a non-qualifying opinion rather than a non-opinion. We affirm the board's decision.

¶13 WISCONSIN STAT. § 227.485(2)(f) defines "substantially justified" as an agency's decision that has "a reasonable basis in law and fact." The facts here are undisputed, as are the requirements of the law, WIS. STAT. § 40.63. However, rather than addressing the reasonableness test of § 227.485(2)(f) in regard to the

[3] We note that in ***Stern v. DHFS***, 212 Wis. 2d 393, 397-98, 569 N.W.2d 79, 81-82 (Ct. App. 1997), we held that our review of a circuit court's determination under WIS. STAT. § 814.245(3) of whether the State's position was substantially justified should be conducted under the erroneous exercise of discretion standard. Our position in ***Stern*** was taken from the Wisconsin Supreme Court's statement in ***Sheely v. DHSS***, 150 Wis. 2d 320, 337, 442 N.W.2d 1, 9 (1989), which is also based on § 814.245(3), not on WIS. STAT. § 227.485(2)(f). ***Sheely*** reasoned, "The United States Supreme Court has held that under the EAJA an appellate court must review a trial court's determination on whether a government agency's position was 'substantially justified' as a question of an abuse of discretion." ***Sheely***, 150 Wis. 2d at 337, 442 N.W.2d at 9 (citing ***Pierce v. Underwood***, 487 U.S. 552, 559-63 (1988)). We have followed ***Behnke*** because it reviews an agency's decision under § 227.485(3), as we do in this decision.

Nicoletti argues in her reply brief that this court owes "due weight" deference to the conclusions of the *hearing examiner* on the issue of costs under WIS. STAT. § 227.485. We reject this argument. The hearing examiner prepared only a "recommended" decision. Deference is owed solely to the final decision and order of the board, which has the authority to adopt, modify, or reject the proposed findings and conclusions of the hearing examiner. *See* ***Artac v. DHFS***, 2000 WI App 88, ¶¶11-12, 234 Wis. 2d 480, 488-89, 610 N.W.2d 115, 119-20, *review denied*, 2000 WI 102, 237 Wis. 2d 260, 618 N.W.2d 750 (July 27, 2000) (No. 99-1523).

board's application of § 40.63, Nicoletti focuses her appeal on the second and third factors of the test for "substantially justified" outlined in ***Sheely v. DHSS***, 150 Wis. 2d 320, 442 N.W.2d 1 (1989). Therefore, that is where we begin as well.

¶14 As we have noted in footnote 3 above, ***Sheely*** interprets WIS. STAT. § 814.245(3), not § 227.485(3). ***Sheely's*** second and third factors necessary to prove a decision was substantially justified are "(2) a reasonable basis in law for the theory propounded; and (3) a reasonable connection between the facts alleged and the legal theory advanced." ***Sheely***, 150 Wis. 2d at 337, 442 N.W.2d at 9. The law which DETF interpreted in initially denying benefits to Nicoletti because of the medical opinions she provided is WIS. STAT. § 40.63(1). It provides in relevant part:

> (1) Any participating employee is entitled to a disability annuity from the Wisconsin retirement system … if …:
>
> …
>
> (b) The employee becomes unable to engage in any substantial gainful activity by reason of a medically determinable physical or mental impairment which can be expected to result in death or to be of long-continued and indefinite duration.
>
> …
>
> (d) … the employee is certified in writing by at least 2 licensed and practicing physicians approved or appointed by the department, to be disabled as described in par. (b).

¶15 Nicoletti does not contest that it is her burden to provide written statements from at least two licensed and practicing physicians approved or appointed by the department that she is unable to engage in any substantial gainful activity because she suffers a disability expected to result in death or to be of long-continued and indefinite duration. And, until Dr. Downs's third statement was

submitted after the administrative remand, she does not claim to have complied with the statute. Instead, she argues, by using certain statements of DETF, some of which are taken from internal DETF documents, and by ignoring others, that DETF had no reasonable basis for treating Dr. Downs's first two statements, collectively, as a non-qualifying opinion, rather than as a non-opinion, and therefore she is due costs under WIS. STAT. § 227.485(3).

¶16 At its core, it is Nicoletti's contention that, although DETF's decision that she had not satisfied the statutory requirements for an award of benefits after submitting two statements from Dr. Downs is correct, DETF's initial denial of benefits was not substantially justified because DETF gave Dr. Downs's opinion the wrong label. This is an artful attempt at shifting our focus from the decision we are to review. The label DETF gave to Dr. Downs's first two statements has no legal significance because even if DETF had labeled those statements as a "non-opinion," Nicoletti still would not have been entitled to benefits. Furthermore, it is DETF's initial decision to deny benefits because the medical evidence Nicoletti submitted did not establish that she was disabled within the meaning of WIS. STAT. § 40.63(1) that must have a reasonable basis in law and have a reasonable connection between the facts and the application of the law if the ***Sheely*** analysis is used. And, under WIS. STAT. § 227.485(3), it is that same DETF decision to initially deny benefits because Nicoletti had not submitted opinions from two physicians that qualified under § 40.63(1)(d) that must have a reasonable basis in law and fact. It is not the internal label that DETF gave to Dr. Downs's first two statements that must be substantially justified. As the board explained:

> The DETF's *denial* had a reasonable basis in fact. The information provided by Dr. Downs was, at best ambiguous and, at worst, contradictory. … The DETF's *denial* had a

> reasonable basis in law, since, regardless of whether Dr. Downs' report is deemed to be a non-complying medical opinion or a non-opinion, Ms. Nicoletti's medical evidence did not meet the requirement of Wis. Stat. § 40.63(1)(d) to provide two medical certificates that she was totally and permanently disabled under the statute. (emphasis added).

¶17 Furthermore, this is not a case where there was more than one issue on which a party could prevail, as described in WIS. STAT. § 227.485(4). The only issue was whether Nicoletti had provided two certifications of disability from physicians sufficient to satisfy WIS. STAT. § 40.63. We agree with the board; Dr. Downs's first two statements did not satisfy Nicoletti's burden under the statute. Under either the ***Sheely*** test of substantially justified or the definition of substantially justified in § 227.485(2)(f), which we conclude is actually applicable, the board did not err in concluding that DETF's initial denial of benefits was reasonable. Accordingly, we affirm the order of the circuit court.

CONCLUSION

¶18 We conclude the board did not err in concluding DETF was substantially justified in initially denying Nicoletti benefits because she had not provided evidence from a second physician that she was disabled within the meaning of WIS. STAT. § 40.63(1)(b). Therefore, we affirm the order of the circuit court, which affirmed the board's denial of her request for costs and fees.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.