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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2016-2017

1150997

The City of Birmingham Retirement and Relief System

v.

Kevin McGough

Appeal from Jefferson Circuit Court
(CV-14-902954)

PARKER, Justice.

The City of Birmingham Retirement and Relief System ("the Retirement System") appeals the Jefferson Circuit Court's judgment in favor of Kevin McGough. We reverse and remand.

Facts and Procedural History

1150997

McGough, then a firefighter employed by the City of Birmingham ("the city"), alleges that he sustained an injury to his left knee on April 30, 2011, during the course of his employment. For approximately one year after he injured his left knee, McGough received medical treatment from numerous doctors and continued to work as much as he was able.

On August 20, 2012, McGough filed a claim with the Retirement System for extraordinary-disability benefits¹ and

¹Section 45-37A-51.226(b) (1), Ala. Code 1975 (Local Laws, Jefferson County), states that extraordinary-disability benefits are available to those who "shall become totally disabled to perform his or her customary duties by reason of personal injury received as a result of an accident arising out of and in the course of his or her employment in the service and occurring at a definite time and place" and that,

"in the event such total disability shall continue until the participant ceases to draw salary as an employee of the city, such disabled participant shall be entitled to a monthly allowance from the fund equal to 70 percent of his or her monthly salary at the time of the application for extraordinary disability benefits arising from the accident which resulted in such total disability. If such participant shall be eligible for extraordinary disability benefits subsequent to August 1, 2009, the extraordinary disability benefit shall be subject to the offset for any workers' compensation benefit or other such disability benefit payable by the city as set forth hereafter."

(Emphasis added.)

1150997

ordinary-disability benefits² to be paid out of "the retirement and relief fund." See § 45-37A-51.120(a)(27), Ala. Code 1975 (Local Laws, Jefferson County). McGough signed a form entitled "disability procedure" that stated that "[t]he Retirement and Relief Pension Board³ is the authoritative entity which will consider the medical evidence and determine whether you will be approved to receive a disability benefit." The "disability-procedure" form also stated: "I understand that if my disability claim is denied, ... I have the opportunity to appeal the Board's decision, through the circuit court, within 90 days of the denial of my claim."

²Section 45-37A-51.225(a), Ala. Code 1975 (Local Laws, Jefferson County), states that ordinary-disability benefits are available to those who "shall become totally disabled to perform his or her customary duties as an employee of the city and not be entitled to an extraordinary disability allowance" and that those employees shall be "be entitled to a monthly ordinary disability allowance equal to two percent of such participant's final average salary multiplied by his or her years of credited service at the date of disability."

³Although not explained by the parties, it appears that "the Retirement and Relief Pension Board" is the Retirement System's board of managers. See § 45-37A-51.120(a)(6) and § 45-37A-51.130, Ala. Code 1975 (Local Laws, Jefferson County).

1150997

On November 14, 2012, the Retirement System denied McGough's request for extraordinary-disability benefits and granted McGough's request for ordinary-disability benefits. It is undisputed that the Retirement System did not notify McGough by certified mail of its decision.⁴ Instead, on November 26, 2012, Lorren Oliver, the Retirement System's secretary, sent McGough a non-certified letter stating that the Retirement System "approved your application for ordinary disability at the rate of \$722.31 per month, effective September 22, 2012, ... based on the doctor's recommendation."

On February 18, 2013, less than 90 days after McGough received Oliver's letter dated November 26, 2012, McGough sent a letter to Oliver stating:

"This is in response to your letter dated November 26, 2012, in reference to the ... Retirement ... System's denial of my application for extraordinary disability. I wish to appeal the [Retirement System's] decision and request information as to the appeal process as well as any other information I need to formally appeal.

"If nothing more than this letter is required it will stand as formal request for the appeal of the [Retirement System's] decision."

⁴Notification of the Retirement System's final decision is significant for the appeals process set forth in § 45-37A-51.139(a), Ala. Code 1975 (Local Laws, Jefferson County), which is set forth and discussed below.

1150997

McGough received nothing from the Retirement System in response to his February 18, 2013, letter.

On July 15, 2013, McGough sent another letter to Oliver. McGough's letter stated that he had not received a certified letter notifying him of the Retirement System's denial of his application for extraordinary-disability benefits and that, in February 2013, he had telephoned the Retirement System "to inquire about the certified letter." McGough's letter states that he was told by an employee of the Retirement System that she "would make sure [the certified letter] gets sent and that [McGough] would have 30 days from the date of the letter to appeal." McGough's letter further states that, "[a]s of July 10, 2013, [he] still [had] not received the certified letter." McGough requested a certified letter from the Retirement System "so that [he could] proceed with the appeal process." On the same day, McGough sent the same letter to Sandy Roberts, an employee of the Retirement System.

On August 1, 2013, McGough's attorney e-mailed Oliver and Roberts, requesting that McGough be permitted to appeal the Retirement System's decision denying McGough's application for extraordinary-disability benefits.

1150997

On December 3, 2013, more than one year after the Retirement System's final decision denying McGough's application for extraordinary-disability benefits, the Retirement System sent McGough a certified letter. The parties submitted to the circuit court two different certified letters sent by the Retirement System to McGough, both dated December 3, 2013. One notified him of the Retirement System's November 14, 2012, decision to approve McGough's application for ordinary-disability benefits; the other notified him of the Retirement System's November 14, 2012, decision to deny McGough's application for extraordinary-disability benefits. The latter certified letter was delivered to McGough on December 5, 2013.

On July 15, 2014, in accordance with § 45-37A-51.139, Ala. Code 1975 (Local Laws, Jefferson County), McGough filed a mandamus petition in the Jefferson Circuit Court ("the circuit court") in an effort to challenge the Retirement System's decision denying his application for extraordinary-disability benefits.

On August 18, 2014, the Retirement System filed a motion to dismiss McGough's mandamus petition or, in the alternative,

1150997

for a summary judgment. The Retirement System argued that McGough's mandamus petition was barred as untimely under § 45-37A-51.139(a). On October 22, 2014, following a hearing, the circuit court denied the Retirement System's motion to dismiss or, in the alternative, for a summary judgment.

On December 5, 2014, the Retirement System petitioned this Court for a writ of mandamus directing the circuit court to dismiss McGough's challenge to the Retirement System's decision to the circuit court as untimely. This Court denied the Retirement System's petition for a writ of mandamus, without an opinion. See Ex parte City of Birmingham Ret. & Relief Sys. (No. 1140223, June 30, 2015), ___ So. 3d ___ (Ala. 2015) (table).

On October 30, 2015, the Retirement System again filed in the circuit court a motion to dismiss or, in the alternative, for a summary judgment, arguing that McGough's mandamus petition challenging the Retirement System's decision was barred under § 45-37A-51.139(a) as untimely. On November 27, 2015, McGough filed a response to the Retirement System's motion. On November 30, 2015, following a hearing, the

1150997

circuit court denied the Retirement System's motion to dismiss or, in the alternative, for a summary judgment.

On May 9, 2016, following a bench trial, the circuit court granted McGough's petition for a writ of mandamus and ordered that the Retirement System grant McGough's application for extraordinary-disability benefits. The circuit court again held that McGough had "timely and properly appealed his request for a determination of extraordinary disability benefits."

On May 23, 2016, McGough filed a motion to tax costs. McGough requested reimbursement for \$5,497.79 in costs and supported his motion with extensive documentary evidence. On June 6, 2016, the circuit court granted McGough's motion. Also on June 6, 2016, the Retirement System filed a motion requesting that the circuit court reconsider its order granting McGough's motion to tax costs. On June 22, 2016, after the Retirement System had filed its notice of appeal, the circuit court purported to deny the Retirement System's motion.

Standard of Review

"'Because the trial court heard ore tenus evidence during the bench trial, the ore tenus

standard of review applies.' Kennedy v. Boles Invs., Inc., 53 So. 3d 60, 67 (Ala. 2010).

""""[W]hen a trial court hears ore tenus testimony, its findings on disputed facts are presumed correct and its judgment based on those findings will not be reversed unless the judgment is palpably erroneous or manifestly unjust."" Water Works & Sanitary Sewer Bd. v. Parks, 977 So. 2d 440, 443 (Ala. 2007) (quoting Fadalla v. Fadalla, 929 So. 2d 429, 433 (Ala. 2005), quoting in turn Philpot v. State, 843 So. 2d 122, 125 (Ala. 2002)). ""The presumption of correctness, however, is rebuttable and may be overcome where there is insufficient evidence presented to the trial court to sustain its judgment." Waltman v. Rowell, 913 So. 2d 1083, 1086 (Ala. 2005) (quoting Dennis v. Dobbs, 474 So. 2d 77, 79 (Ala. 1985)). "Additionally, the ore tenus rule does not extend to cloak with a presumption of correctness a trial judge's conclusions of law or the incorrect application of law to the facts." Waltman v. Rowell, 913 So. 2d at 1086.'

"Retail Developers of Alabama, LLC v. East Gadsden Golf Club, Inc., 985 So. 2d 924, 929 (Ala. 2007). 'Questions of law are reviewed de novo.' Alabama Republican Party v. McGinley, 893 So. 2d 337, 342 (Ala. 2004)."

Moultrie v. Wall, 172 So. 3d 828, 839 (Ala. 2015).

Discussion

The appeals process from a final decision by the Retirement System is set forth in § 45-37A-51.139. The first issue raised by the Retirement System concerns the timeliness

1150997

of McGough's petition for a writ of mandamus challenging the Retirement System's denial of McGough's application for extraordinary-disability benefits. Section 45-37A-51.139(a) sets forth the following procedure for challenging a final decision of the Retirement System:

"Any decision of the board denying a benefit claimed may be subject to review by the circuit court, in the manner and subject to the limitations herein provided. An employee may secure a review of a decision of the board by mandamus proceedings in the circuit court, which proceedings the employee shall institute, in the court by filing therein a petition for mandamus. The petition may designate the board as respondent or the members thereof as respondents. Each respondent shall be served with process, unless the respondent or his or her or its attorney accepts service. The petition for mandamus shall be barred if it is not filed within 90 days from the date whereon the board of managers makes its final decision on the benefit claimed, provided written notice of such final decision of the board shall be given by certified or registered mail, postage prepaid, and properly addressed, to the claimant or his or her attorney within 10 days after such final decision of the board. If timely notice shall not be given as provided in the last preceding sentence, claimant shall not be barred from filing mandamus until the expiration of 80 days from the mailing of notice as above provided; but in no event, anything therein to the contrary notwithstanding, shall mandamus be filed after one year from the date of such final decision of the board"

The plain language of § 45-37A-51.139(a) contemplates three situations regarding the timeliness of an employee's

1150997

filing of a mandamus petition in the circuit court challenging a final decision of the Retirement System. First, § 45-37A-51.139(a) states that a claimant's petition for mandamus challenging a final decision of the Retirement System will be barred "if it is not filed within 90 days from the date" of the Retirement System's final decision. However, this 90-day period applies only if the Retirement System provides written notice to the claimant "by certified or registered mail, postage prepaid, and properly addressed, to the claimant or his or her attorney within 10 days after such final decision." (Emphasis added.) Second, § 45-37A-51.139(a) states that, if the Retirement System fails to send, by certified or registered mail, the claimant notice of its final decision within 10 days of that final decision, then the claimant "shall not be barred from filing mandamus until the expiration of 80 days from the mailing of notice as above provided." Third, § 45-37A-51.139(a) states, "but in no event, anything therein to the contrary notwithstanding, shall mandamus be filed after one year from the date of such final decision of the board."

The Retirement System argues that McGough's mandamus petition challenging the Retirement System's denial of his application for extraordinary-disability benefits was untimely under the second and third timeliness clauses of § 45-37A-51.139(a).⁵ First, the Retirement System argues that McGough's mandamus petition is barred under the third timeliness clause of § 45-37A-51.139(a), which states: "[B]ut in no event, anything therein to the contrary notwithstanding, shall mandamus be filed after one year from the date of such final decision of the board." The Retirement System notes that it rendered its final decision denying McGough's application for extraordinary-disability benefits on November 14, 2012. The Retirement System further notes that McGough did not file his mandamus petition in the circuit court until

⁵We note that McGough argues that this Court cannot consider the Retirement System's arguments pertaining to the timeliness of his mandamus petition, because, he says, "there is no appeal of the denial of a motion to dismiss except by permission of the circuit court, a procedure the [Retirement] System did not use. See Rules 4 and 5, Ala. R. App. P." McGough's petition, at pp. 35-36. Of course, this rule applies only if a party seeks interlocutory appellate review of such an order. However, as McGough recognizes, we are not reviewing the interlocutory denial of the Retirement System's motion to dismiss, but the final judgment of the circuit court, which specifically addressed these arguments. These arguments, therefore, are properly before us.

1150997

July 15, 2014, considerably more than one year after the Retirement System's final decision. These facts are undisputed. The Retirement System argues that, by operation of the plain language of the third timeliness clause of § 45-37A-51.139(a), McGough's mandamus petition was untimely and that the circuit court erred in concluding otherwise.

McGough does not offer any argument in response to the Retirement System's interpretation of the third timeliness clause of § 45-37A-51.139(a). In fact, the plain language of that clause is clear: A mandamus petition challenging a final decision of the Retirement System cannot be filed more than one year after the final decision. Instead, McGough argues that the Retirement System should be estopped from asserting that McGough's mandamus petition is time-barred under § 45-37A-51.139(a) because of the actions taken by the Retirement System to allegedly mislead McGough. McGough directs this Court's attention to the letter he wrote Oliver on February 18, 2013, in which McGough expressed his desire to appeal and as to which he received no response from the Retirement System. McGough also directs this Court's attention to the letters he wrote Oliver and Roberts dated July 15, 2013, which

1150997

are summarized above. In short, in those letters, McGough states that he had been assured by an employee of the Retirement System that he would receive a certified letter and that, once he received the certified letter, he would have 30 days to appeal the Retirement System's final decision. McGough argues that these facts demonstrate that the Retirement System "was aware, at least constructively, by way of [McGough's] letters and other communication that he wanted to appeal, but [he] was acting under a misapprehension of the appeal procedure that they had created in him." McGough's brief, at p. 43 (footnote omitted).

For purposes of this decision, however, we need not determine whether the Retirement System is estopped from arguing that McGough's petition is barred by the third timeliness clause in § 45-37A-51.139(a). This is so because the Retirement System argues, in the alternative, that McGough's mandamus petition challenging the Retirement System's denial of his application for extraordinary-disability benefits was untimely under the second timeliness clause of § 45-37A-51.139(a), which states: "If timely notice shall not be given as provided in the last preceding sentence,

1150997

claimant shall not be barred from filing mandamus until the expiration of 80 days from the mailing of notice as above provided." We find the Retirement System's argument in this regard convincing.⁶

The second timeliness clause of § 45-37A-51.139(a) references the first timeliness clause of § 45-37A-51.139(a); the interplay between these two timeliness clauses is explained above. It is undisputed that the Retirement System did not send McGough a certified letter within 10 days of its November 14, 2012, final decision, as contemplated in the first timeliness clause of § 45-37A-51.139(a). Instead, the Retirement System sent McGough a certified letter on December 3, 2013, notifying McGough that his application for extraordinary-disability benefits had been denied. Accordingly, the second timeliness clause applies.⁷ Pursuant

⁶McGough's estoppel argument does not apply to this argument raised by the Retirement System. McGough has not directed this Court's attention to any evidence indicating that the Retirement System took any action to try and mislead or to dissuade McGough from filing his mandamus petition challenging the Retirement System's final decision denying his application for extraordinary-disability benefits after McGough was sent the December 3, 2013, certified letter giving him notice of the Retirement System's final decision.

⁷Again, for purposes of this analysis we are assuming that the Retirement System is estopped from arguing that the third

1150997

to the second timeliness clause of § 45-37A-51.139(a), McGough's mandamus petition would not be barred as untimely so long as he filed it before "the expiration of 80 days from the mailing of notice as above provided." McGough did not file his mandamus petition in the circuit court before the expiration of 80 days from the mailing of the December 3, 2013, letter. McGough did not file his mandamus petition in the circuit court until July 15, 2013, more than 200 days from the time the Retirement System mailed him a certified letter notifying him of the Retirement System's final decision. Clearly, McGough's mandamus petition is barred under the plain language of the second timeliness clause of § 45-37A-51.139(a).

McGough offers no argument concerning the interpretation of the second timeliness clause of § 45-37A-51.139(a). Instead, McGough argues that he received a certified letter from the Retirement System dated December 3, 2013, notifying him that the Retirement System had approved his application

timeliness clause of § 45-37A-51.139(a) -- which prohibits an employee from filing a mandamus petition challenging a final decision of the Retirement System more than one year after the final decision has been reached -- bars McGough's mandamus petition.

1150997

for ordinary-disability benefits.⁸ McGough attached this letter to his mandamus petition filed in the circuit court. This alone is not evidence indicating that the Retirement System did not send McGough a certified letter giving him notice of the Retirement System's final decision concerning McGough's application for extraordinary-disability benefits. In fact, during the bench trial, the Retirement System introduced into evidence a certified letter it sent to McGough on December 3, 2013, notifying McGough that the Retirement System had denied his application for extraordinary-disability benefits.⁹ The circuit court specifically certified that this letter was an exhibit admitted during the course of the bench

⁸McGough notes in his brief before this Court that he actually stated in his mandamus petition that he filed with the circuit court that he received "a certified letter from [the Retirement System] informing him of the denial of his claim for extraordinary disability benefits." McGough states that that statement was simply a "scrivener's error." McGough's brief, at p. 37.

⁹Although not required to do so under § 45-37A-51.139(a), the Retirement System also presented evidence indicating that someone with the last name "McGough" signed a form indicating that he had received the certified letter on December 5, 2013. The second timeliness clause of § 45-37A-51.139(a) requires that notice be given to the claimant "by certified or registered mail, postage prepaid, and properly addressed, to the claimant or his attorney." McGough has not argued that the Retirement System failed to comply with those requirements.

1150997

trial. McGough has not directed this Court's attention to anything in the record indicating that he objected to the admission of this evidence at trial. Nor does McGough argue that this Court should not consider the certified letter. The fact that McGough was sent two certified letters on the same date is not contradictory evidence to which the ore tenus standard of review would be applicable. The record simply indicates that the Retirement System sent McGough two certified letters on December 3, 2013; one certified letter notified him of the Retirement System's decision granting his application for ordinary-disability benefits; the other certified letter notified him of the Retirement System's decision denying his application for extraordinary-disability benefits. McGough's argument does not demonstrate that the Retirement System failed to send him a certified letter notifying him of the Retirement System's final decision denying McGough's application for extraordinary-disability benefits.

For these reasons, we conclude that McGough's mandamus petition is barred by the second timeliness clause of § 45-

1150997

37A-51.139(a). Our conclusion pretermits discussion of the other arguments raised by the parties.

Conclusion

Based on the foregoing, we conclude that McGough's mandamus petition challenging the Retirement System's final decision denying McGough's application for extraordinary-disability benefits is untimely under § 45-37A-51.139(a). Accordingly, we reverse the circuit court's judgment and remand the matter for proceedings consistent with this opinion.

REVERSED AND REMANDED.

Stuart, Shaw, Wise, and Bryan, JJ., concur.