Not designated for publication.

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CA08-493

	Opinion Delivered FEBRUARY 11, 2009
MICHAEL W. EASON APPELLANT	APPEAL FROM THE OUACHITA COUNTY CIRCUIT COURT, [NO. CV-2005-18-6]
V.	HONORABLE DAVID F. GUTHRIE, JUDGE
ARKANSAS LOCAL POLICE and RETIREMENT SYSTEM a/k/a LOPFI APPELLEES	AFFIRMED

ROBERT J. GLADWIN, Judge

Appellant Michael Eason appeals the January 23, 2008 judgment of the Ouachita County Circuit Court that affirmed the Arkansas Local Police & Fire Retirement System's (LOPFI) determination that he was entitled only to non-duty-related disability retirement benefits. On appeal, appellant argues that (1) LOPFI's determination was arbitrary, capricious, and characterized by abuse of discretion pursuant to Arkansas Code Annotated section 25-15-212(h)(6), and (2) LOPFI's decision is not supported by substantial evidence of record as required by Arkansas Code Annotated section 25-15-212(h)(5). We affirm.

Facts

Mr. Eason served as a Sergeant with the Camden Police Department for approximately ten years until he became disabled—with symptoms in the form of chest pain and tightness, left elbow pain, severe headaches, dizziness, fatigue, nausea, blurred vision, and syncope he

experienced only while on duty. By virtue of his employment, Mr. Eason participated in LOPFI. On July 21, 2003, he applied for duty-related-disability retirement benefits through LOPFI, pursuant to the provisions of Arkansas Code Annotated section 24-10-607(c), requesting an effective date of August 1, 2003.

On October 21, 2003, the LOPFI Board of Trustees approved appellant's request, but only for non-duty-related disability retirement benefits, because it determined that Mr. Eason suffered from an "underlying cardiac condition." He appealed, and a hearing on the matter was held, after which the LOPFI Board of Trustees upheld the original determination on June 3, 2004. Mr. Eason filed a petition for judicial review of the final agency action, pursuant to the Arkansas Administrative Procedure Act, as codified at Arkansas Code Annotated sections 25-15-201 - 218, with the Ouachita County Circuit Court on January 13, 2005. LOPFI filed its initial response to the petition on January 26, 2005. Mr. Eason filed a brief in support of his petition on December 7, 2006, and LOPFI filed a brief in response on January 8, 2007, after which Mr. Eason filed a response brief on January 16, 2007. On January 23, 2008, a judgment was entered by the Ouachita County Circuit Court affirming LOPFI's determination that he was entitled only to non-duty-related disability retirement benefits. Mr. Eason filed a timely notice of appeal on February 11, 2008, and this appeal followed.

Standard of Review

Our standard of review with respect to administrative agency decisions was thoroughly reviewed in *Arkansas Professional Bail Bondsman Licensing Bd. v. Oudin*, 348 Ark. 48, 69 S.W.3d 855 (2002). Our supreme court stated that the appellate court's review is limited in

scope and is directed not to the decision of the circuit court but to the decision of the administrative agency. It is not the role of the circuit courts or the appellate courts to conduct a de novo review of the record; rather, review is limited to ascertaining whether there is substantial evidence to support the agency's decision. *Id.*

Additionally, in *Oudin*, the supreme court reiterated that administrative agencies are better equipped than courts, by specialization, insight through experience, and more flexible procedures to determine and analyze underlying legal issues affecting their agencies, and this recognition accounts for the limited scope of judicial review of administrative action and the refusal of the court to substitute its judgment and discretion for that of the administrative agency. *Oudin*, *supra.* Thus, administrative decisions will be upheld if they are supported by substantial evidence and are not arbitrary, capricious, or characterized by an abuse of discretion. *Id.* Substantial evidence is defined as "valid, legal, and persuasive evidence that a reasonable mind might accept as adequate to support a conclusion, and force the mind to pass beyond conjecture." *Arkansas State Police Comm'n v. Smith*, 338 Ark. 354, 362, 994 S.W.2d 456, 461 (1999). These standards are consistent with the provisions of the Administrative Procedure Act.

In making this determination, we review the entire record and give the evidence its strongest probative force in favor of the agency's ruling. *Oudin*, *supra.* Between two fairly conflicting views, even if the reviewing court might have made a different choice, the board's choice must not be displaced. *Id.*

The challenging party has the burden of proving an absence of substantial evidence. *Oudin*, *supra*. To establish an absence of substantial evidence, the challenging party must demonstrate that the proof before the administrative tribunal was so nearly undisputed that fair-minded persons could not reach its conclusion. *Id.* The question is not whether the testimony would have supported a contrary finding but whether it supports the finding that was made. *Id.*

Regarding the determination of whether an administrative action is arbitrary and capricious, the supreme court stated in *Arkansas Cont. Lic. Bd. v. Pegasus Renovation Co.*, 347 Ark. 320, 64 S.W.3d 241 (2001):

> Administrative action may be regarded as arbitrary and capricious where it is not supportable on any rational basis. To have an administrative action set aside as arbitrary and capricious, the party challenging the action must prove that it was willful and unreasoning action, without consideration and with a disregard of the facts or circumstances of the case. We have stated that the requirement that administrative action not be arbitrary and capricious is less demanding than the requirement that it be supported by substantial evidence. . . . [O]nce substantial evidence is found, it automatically follows that a decision cannot be classified as unreasonable or arbitrary.

347 Ark. at 332, 64 S.W.3d at 248 (citations omitted).

Discussion

Arkansas Code Annotated section 24-10-607 sets out rules governing disability-retirement benefits for LOPFI, in pertinent part:

> (c)(1)(A) Any active member who while an active member becomes totally and permanently physically or mentally incapacitated for any suitable duty as an employee as the result of a personal injury or disease that *the board finds to have arisen out of and in the course of his or her actual performance of duty as an employee* may be retired by the board upon written application filed with the board by or on behalf of the member or former member. (Emphasis added.)

> (B) The employee shall be retired only if, after a medical examination of the member or former member *made by or under the direction of a physician or physicians designated by the board*, the physician reports to the plan in writing that the member or former member is physically or mentally totally incapacitated for the further performance of any suitable duty, that the incapacity will probably be permanent, and that the member or former member should be retired. (Emphasis added.)

Mr. Eason maintains that he satisfies the requirements of section 24-10-607(c)(1)(A) and (B), based upon the assessments of his treating physicians, specifically Mirfat A. Hariri-Bird, M.D., and Asim A. Shah, M.D., as well as licensed psychologist John W. Rago, Ed.D. Mr. Eason asserts that each one determined that he is totally disabled from serving as a police officer, due to his duties as such, and that such disability was permanent in nature. The assessments of Drs. Hariri-Bird and Rago were made at the request of LOPFI on July 22, 2003, and August 22, 2003, respectively. After LOPFI received these assessments that were favorable to Mr. Eason, they arranged for him to be evaluated by their own consulting physicians for a one-time consultation, whose opinions were inconsistent with the findings of his treating physicians. Mr. Eason points out that his treating physicians are specialists and are significantly more familiar with his overall health.

Mr. Eason underwent a psychological evaluation by Douglas A. Stevens, Ph.D., on July 2, 1996, at which time Dr. Stevens stated that he "could not recommend [Mr. Eason] for a position in law enforcement." He opined that, "at this time [Mr. Eason] does not evidence a personality profile that would be suitable for law enforcement." LOPFI notes that this occurred prior to Mr. Eason complaining of any stress-related symptoms and suggests that it provides a foundation for the later findings that his disabling condition was not caused by his duties as a police officer, but may have been "aggravated" by the same. However, Mr.

Eason testified that approximately two months after the evaluation, Dr. Stevens recommended him to return to law enforcement.

As far back as February 26, 1997, Mr. Eason experienced the debilitating, and eventually disabling, symptoms. At that time he presented to the Ouachita County Medical Center complaining of dizziness, chest, neck, and face pain that had occurred specifically while he was working the graveyard shift—after he became involved in a short pursuit on foot following a burglary call. Mr. Eason's treating physician since approximately 1975, Dr. J. R. Kendall, noted at that time that "[h]e has *no history of cardiac disease*," and that, "[h]e is under a considerable amount of stress at work." (Emphasis added.) Dr. Kendall's final diagnosis was "[c]hest pain, doubt myocardial infarction. *Probably stress related*." (Emphasis added.) Subsequently, Mr. Eason underwent numerous tests, examinations, and evaluations with Dr. Bruce Murphy including an angiogram, arteriogram, gastrointestinal tests, and EKGs, and those results are included in the administrative record. No underlying medical condition, especially nothing cardiac related, was ever diagnosed as being the cause of Mr. Eason's symptomology.

Mr. Eason testified that in April 1998, he returned to the emergency room experiencing migraine-type symptoms. Dr. Tabe was the emergency room physician, and after a consultation and further examination, Mr. Eason was told by Dr. Kendall that he was going to have to slow down because the stress "was killing him." Medical records indicate, but Mr. Eason could not recall, that he had returned to the emergency room in December 1998 due to nausea and vomiting, but did indicate he underwent an EEG, with normal

results. Mr. Eason also recounted an incident that occurred on our about February 29, 2000. He explained that he was transporting two prisoners, mental patients, to Little Rock, when the two began acting unruly, yelling at him from the backseat, and one of them spitting on Mr. Eason while being placed in the police vehicle. He explained that he started feeling sweaty and clammy, along with experiencing blurred vision. Upon examination at the hospital, Dr. Kendall explained the symptoms as another episode of stress. He ran additional tests, including an EEG and EKG, and reported to Mr. Eason that his heart was fine, his brain was basically fine, but the stress "was killing him."

Mr. Eason testified that he began to be able to tell when he was going to experience the symptoms, and he began to cope with it by knowing when to stop, sit down, or take a break. After Dr. Kendall retired, Mr. Eason began seeing Dr. Hariri-Bird in 2000, at which time Dr. Hariri-Bird reviewed all his records and test results, and started treating him for stress and high blood pressure.

In February 2002, Dr. Hariri-Bird referred Mr. Eason back to Dr. Murphy for additional tests, including a stress test, EKGs, and another arteriogram, and still no problems with his heart were indicated. In March 2003, Mr. Eason returned to the emergency room again, at which time Dr. Tabe diagnosed another angina attack. At that time, Dr. Hariri-Bird took Mr. Eason off work for a six-week period in order to treat him for stress, which included chest x-rays, another EKG, wearing a heart monitor for a while, and additional tests.

He experienced additional symptoms while on duty in June 2003, getting dizzy and clammy and losing color in his face and ears. He again returned to the emergency room and

eventually had another arteriogram performed by Dr. David Bauman because Dr. Murphy was out of the country at the time.

On July 22, 2003, Dr. Hariri-Bird assessed Mr. Eason's condition, stating that Mr. Eason was permanently disabled due to a diagnosis of "neurocardiogenic syncope, arrhythmias, and tachycardia *caused by and aggravated by job stress*." (Emphasis added.) He had also noted neurocardiogenic syncope on June 26, 2003, as well as July 15, 2003. Dr. Shah prescribed ten milligrams of Lexapro for Mr. Eason for depressive disorder, NOS, on April 29, 2003, and on August 5, 2003, Dr. Shah noted that Mr. Eason had been referred by Dr. Hariri-Bird for *stress related to his work*. Mr. Eason was depressed and anxious at the time he began the Lexapro treatment, and Dr. Shah referred him to Dr. Rago for stress management. Dr. Rago completed an attending physician's statement of disability dated August 6, 2003, at which time he diagnosed depressive disorder, NOS, noting that "the long term stress of being a police officer has caused physical problems as well as symptoms of depression [and] anxiety which have been the primary focus of treatment at [Neuropsychiatry Associates of South Arkansas, P.A.]." Dr. Rago also noted that as a result of his duties as a police officer, Mr. Eason was permanently disabled. Evidence in the record reflects that Mr. Eason's symptoms appear to have completely abated when he discontinued working as a police officer.

At the request of LOPFI, Dr. Winston Brown, an associate professor of psychiatry at UAMS, evaluated Mr. Eason on September 5, 2003. He opined that Mr. Eason "suffers no psychiatric disorder." That assessment, based upon a one-time evaluation that lasted approximately one hour, is contrary to the opinions of Mr. Eason's treating physicians. Mr.

Eason asserts that Dr. Brown confused the situation by misunderstanding and/or mischaracterizing the medical history—specifically, by his thinking that Mr. Eason had an underlying "cardiac condition." Dr. Brown stated that "[i]f my interpretation of the cardiac diagnosis is correct, that this is a primary cardiac condition aggravated by stressors, it is my opinion indeed this man is permanently and totally disabled from police work." Additionally, he noted, "I cannot say that the cardiac condition has been caused by his job" and indicated that "it is my opinion that this man is permanently and totally disabled from police work as a result of work stress aggravating an underlying medical condition."

Subsequently, LOPFI requested that Dr. Luis Garza evaluate Mr. Eason on September 11, 2003, who noted—after his one-time, one hour long evaluation—that "even though some of his symptoms are hard to explain and his condition may warrant some further evaluation, I think that Mr. Eason is totally and permanently disabled from his duties as a police officer." Dr. Garza opined, "However, I do not think that his medical condition (while disabling) was caused by his work," and indicated that "further testing and treatment may be helpful to fully characterize his condition and alleviate his symptoms, but I do not think it would change this overall assessment."

Mr. Eason's treating cardiologist since April 2000, Dr. Bauman, completed an attending-physician's statement of disability dated October 1, 2003. He noted that, from a cardiac standpoint, Mr. Eason had "no documented disability at this time." In fact, Dr. Bauman attested to the fact that Mr. Eason's symptoms of syncope and chest pain were *not the result of an underlying cardiac condition*. (Emphasis added.) Mr. Eason maintains that Dr.

Bauman's findings are supported by the numerous tests, evaluations, and examinations performed on him from 1997 through 2003, all showing normal results with respect to his cardiac health. Mr. Eason urges that Dr. Bauman's opinion is entitled to great weight over that of Drs. Brown and Garza; however, LOPFI relied primarily on the opinions of Dr. Brown and Garza—again, who each examined Mr. Eason only one time for approximately one hour—rather than his regularly treating physicians.

Because the opinions of his treating physicians clearly state that Mr. Eason's disabling condition was due to job-related stress, Mr. Eason asserts that LOPFI's determination that it was not duty-related was arbitrary, capricious, and characterized by an abuse of discretion as prohibited by Arkansas Code Annotated section 25-15-212(h)(6), which specifically states that the circuit court may reverse or modify the decision of the agency if the substantial rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions, or decisions are arbitrary, capricious, or characterized by abuse of discretion. Mr. Eason emphasizes that there is no rational basis upon which to support LOPFI's decision to award only non-duty-related disability retirement benefits. He maintains that LOPFI's actions in waiting to send him to their own consulting examiners until after uncontroverted objective medical evidence was received from his treating providers that supported his claim is indicative of willful and unreasoning action, without consideration and with a disregard of the facts or circumstances of the case.

The second prong of Mr. Eason's argument is that LOPFI's decision was simply not supported by substantial evidence, and therefore should be reversed, or modified, pursuant to

Arkansas Code Annotated section 25-15-212(h). He cites *Arkansas Soil and Water Conservation Comm'n v. City of Bentonville*, 351 Ark. 289, 301, 92 S.W.3d 47, 54 (2002), for its definition of substantial evidence as "valid, legal, and persuasive evidence that a reasonable mind might accept as adequate to support a conclusion, and force the mind to pass beyond conjecture." In order to meet his burden of proving the absence of substantial evidence, Mr. Eason must demonstrate that the proof before LOPFI was so nearly undisputed that fair-minded persons could not reach its same conclusion. *Id.* Mr. Eason claims that is just the situation we have here. LOPFI relied almost exclusively on the opinions provided by its own consulting examiners who each examined him only one time, and Dr. Brown clearly misunderstood that Mr. Eason had an underlying cardiac condition where none existed. He asserts that a reasonable mind cannot accept as adequate that evidence relied upon by LOPFI when it is counter to all the objective medical evidence presented by his treating physicians.

Although our supreme court has held that expert testimony qualifies as substantial evidence unless it is shown that it is without a reasonable basis, it is also the prerogative of the administrative agency, as with any other fact-finder, to believe or disbelieve any witness and decide what weight to accord the evidence. *See Pine Bluff for Safe Disposal v. Ark. Pollution Control and Ecology Comm'n*, 354 Ark. 563, 127 S.W.3d 509 (2003).

LOPFI maintains that physicians who have examined Mr. Eason have testified, in writing, that his disability was aggravated by his duties as a police officer, but those duties did not cause the disability. Those physicians found that it resulted from a preexisting condition, if from anything at all. Specifically, LOPFI points to cardiologist Dr. Garza's opinion that,

while Mr. Eason's conditions could have been "aggravated by work-related stress," he did "not think [Mr. Eason's] medical condition (while disabling) was caused by his work." Mr. Eason relies heavily upon Dr. Rago's opinion. Dr. Rago, who is not a medical doctor, was unable to formulate an opinion as to whether the disability was duty-related. Additionally, Dr. Brown clarified his opinion in a letter dated May 7, 2004, written to LOPFI executive director Mr. Clark, explaining that he felt he stated "very clearly in [his] report's conclusion that Mr. Eason's medical condition has not been caused by his job . . . the emphasis is on aggravating an existing medical condition and not causing a medical condition."

Moreover, LOPFI points out specific information contained in Dr. Bauman's October 1, 2003 attending physician's statement of disability that Mr. Eason failed to mention. Directly quoting the document, LOPFI directs our attention to the following questions and responses:

> 8. Is patient disabled to the extent that he/she will be unable to perform his/her duties as a police officer or fire-fighter?
>
> Answer: No.
>
> 9. In your opinion, will this disability be permanent?
>
> Answer: No.
>
> 10. In your opinion, is the disability a result of his or her duties as a police officer or fire fighter?
>
> Answer: No.

A subsequent letter that Dr. Brown sent to Mr. Clark in May 2004, explained that:

> Mr. Eason assured me, prior to the onset of cardiac difficulty on February 26, 1997, he had experienced no mental or emotional difficulties, again, no sensation of stress.

> It would stand to reason that, were his cardiac abnormalities caused by stress, Mr. Eason would have experienced himself as being stressed in the years preceding 1997. The only stress described by Mr. Eason was anxiety about the financial effects of his leave of absence and a possible adverse disability ruling.

LOPFI maintains that its determination to award non-duty-related disability retirement benefits was made on a rational basis and was in no way arbitrary, capricious, or an abuse of discretion. They note that the examinations noted by the Ouachita County Circuit Court in its opinion affirming the LOPFI decision were from the physicians that were designated by LOPFI, as is specifically required by Arkansas Code Annotated section 24-10-607(c)(1)(B), Drs. Brown and Garza.

As to the substantial evidence supporting the decision, or lack thereof, LOPFI argues that this issue is in reality the primary issue on appeal. LOPFI cites *Arkansas Soil and Water Conservation Comm'n v. City of Bentonville*, *supra*, in which the supreme court stated, "once substantial evidence is found, it automatically follows that a decision cannot be classified as unreasonable or arbitrary." *Id.* at 302, 92 S.W.3d at 55 (citing *Oudin*, 348 Ark. At 55, 69 S.W.3d at 860). The question is not whether the testimony would have supported a contrary finding, but whether it supports the finding that was made. *See Williams v. Scott*, 278 Ark. 453, 647 S.W.2d 115 (1983). LOPFI asserts that the evidence in this case is substantial enough for both its board, and later the Ouachita County Circuit Court, to find that Mr. Eason's disability was not caused by his duties as a police officer. LOPFI maintains that the opinions of Drs. Brown and Garza, and supported by Dr. Bauman's October 1, 2003 attending physician's statement of disability, indicated that Mr. Eason's condition was not *caused* by his duties as a police officer. As stated by the Ouachita County Circuit Court, the

doctors designated by LOPFI appear to have drawn a distinction between "caused by" and "aggravated by" the stress of work. Under our standard of review and the particular statutory language in Arkansas Code Annotated section 24-10-607(c)(1)(B) that allows LOPFI to designate the physicians, we hold that substantial evidence supports the decision. Accordingly, we affirm.

Affirmed.

HENRY and BAKER, JJ., agree.