IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

CHRISTIANNE M. HAGGERTY, Appellant, v. BOARD OF PENSION TRUSTEES of the STATE OF DELAWARE, and the DELAWARE OFFICE OF PENSIONS, Appellees.	)	C.A. No. N11A-12-006 JRS

Date Submitted: June 21, 2012
Date Decided: July 20, 2012

Upon Consideration of
Appeal From the Board of Pension Trustees of the State of Delaware.
REVERSED AND REMANDED.

O R D E R

This 20th day of July, 2012, upon consideration of the *pro se* appeal of Christianne M. Haggerty ("Haggerty") from the November 18, 2011, decision of the Board of Pension Trustees of the State of Delaware ("the Board") denying her appeal for total disability benefits, it appears to the Court that:

1. Haggerty was a police officer for the New Castle County Police Department

("NCCPD") for sixteen years. On March 9, 2009, while responding to a domestic violence dispute, Haggerty struggled with a combative suspect causing her personal injury. Haggerty reported the injury the next day and was immediately referred to an occupational medicine and health clinic and placed on light duty work, effective March 10, 2009.

2. Subsequent to the injury, Haggerty was diagnosed with a left shoulder strain/sprain, cervical whiplash and potential bursitis. Two MRIs were taken, one on May 1, 2009 and a second on September 15, 2009, both indicating mild degenerative changes due to aging in the cervical spine.[1] On January 6, 2010, after treatment, therapy and a job placement assessment, Haggerty was placed back on full duty work as a police officer.[2]

3. Three weeks later, on February 2, 2010, Haggerty was pulled from full duty work because of aggravated neck pain and headaches. Dr. Ann Kim, M.D. ("Dr. Kim") and Pierre L. LeRoy, M.D. ("Dr. LeRoy") concluded that wearing her uniform and carrying her gun, together weighing twenty five pounds, caused the aggravation. On August 29, 2010, Stephen Rodgers, M.D. ("Dr. Rodgers") evaluated Haggerty and concluded that she was totally disabled from any form of law enforcement work,

[1] Record ("R.") at 109-110.

[2] R. at 148.

including her position as a patrol officer. Haggerty was placed in a light duty position.

4. While in that position, on August 20, 2010, Haggerty received a letter from the NCCPD notifying her that her employment had been terminated. NCCPD held a pre-termination hearing on September 17, 2010, and Haggerty's termination was effective as of October 7, 2010. Given her physical limitations, no other positions in New Castle County were available for her at the time.[3] Haggerty applied to the State Office of Pensions ("SPO") for duty-connected disability pension benefits on September 2, 2010. The Medical Committee of the Board reviewed Haggerty's medical records. On November 23, 2010, David Craik ("Craik"), the State Pension Administrator, sent Haggerty a letter granting her a partial disability pension. On December 15, 2010, Haggerty appealed the determination to the Board for consideration of her request for a total disability pension.

5. Prompted by the appeal, the SPO requested that Haggerty participate in a vocational assessment to determine her level of disability, ability to work and earning capacity. Malcolm & Associates, LLC ("Malcolm") conducted the vocational assessment on February 9, 2011. On April 4, 2011, Malcolm submitted its vocational

[3] R. at 100 ("Our files indicate that there are no other positions within the County she can perform.").

assessment report for Haggerty (the "Malcolm Report") based on all of the medical records that had been released by Haggerty's treating physicians from February 17, 2009 (prior to her work related injury) through the date of the interview, Haggerty's current medical condition, prior employment history, education and prior job placement assessment. The Malcolm Report concluded: "[g]iving consideration to Haggerty's current physical capacity, residual transferrable skills and education, it is the opinion of this vocational expert that Haggerty is able to work in an alternate occupation for which she is reasonably suited by both training and experience."[4]

6. On September 14, 2011, two members of the Board (designated "Hearing Officers") held a hearing on Haggerty's appeal. The SPO presented the Malcolm Report in support of its decision to award Haggerty partial disability benefits. Haggerty and her husband, Mike Haggerty, testified as to the incident causing her injury and ongoing medical condition, and introduced five medical records from her treating physicians that indicated she was totally disabled.[5] Haggerty argued that the Malcolm Report presented potential vocations that were too dangerous for her level of physical ability or not "reasonably" suited for her because (a) they do not require

---

[4] R. at 20.

[5] One record was Dr. Kim's report of September 9, 2010, prior to Haggerty's termination on October 7, 2010. Three of the records were signed by Frank Falco, M.D. ("Dr. Falco") dated March 1, 2011, May 31, 2011 and August 23, 2011. The final record was signed by Dr. Soreta Coubanies dated July 25, 2011. R. at 95-98.

her higher level of education, experience and training; and (b) some of them require additional job-related training.

7. The Board issued a Report and Recommendation denying Haggerty's appeal for total disability benefits on November 18, 2011. Based on the unambiguous language of 11 *Del. C.* § 8801[6] and *Jordan v. Board of Pension Trustees of Delaware*,[7] the Board concluded, that: "the words of the statute were intended to compensate with total pension benefits only those police officers who are completely disabled from work in any occupation, because of a duty related injury."[8] Because the Board found she was "reasonably suited by training or experience" for some other employment (aside from work as a police officer), Haggerty was entitled to partial disability benefits, but not total disability benefits.[9] The Board chose to rely upon the Malcolm Report and not on the medical records provided by Haggerty. In doing so, however, the Board failed to analyze any of the medical evidence Haggerty

---

[6] By statute, "partial disability" means "a medically determined physical or mental impairment which renders the member unable to function as a police officer and which is reasonably expected to last at least 12 months." 11 *Del. C.* § 8801(13). In contrast, "total disability" is "a medically determined physical or mental impairment which renders the member totally unable to work in any occupation for which the member is reasonably suited by training or experience, which is reasonably expected to last at least 12 months." 11 *Del. C.* § 8801(16).

[7] *Jordan v. Bd. of Pension Trs.*, 2004 WL 2240598, at *3 (Del. Super. Sep. 21, 2004).

[8] R. at 11.

[9] R. at 10-11.

submitted.[10]

8. On December 15, 2011, Haggerty appealed the decision of the Board to this Court. On appeal, Haggerty argues that she put substantial evidence before the Board to prove her eligibility for a total disability pension. The evidence she presented, which the Board arbitrarily ignored, included: (1) medical records from Dr. Kim presenting Haggerty's full disability as early as September 2010, prior to her termination; and (2) medical evidence from two other board certified physicians that found Haggerty suffered from "total disability" and could not perform any work at all.[11] Haggerty argues that the Board arbitrarily gave too much weight to the Malcolm Report, which was not a medical opinion and was based on outdated information, and Craik's personal opinion, which was without objective data to support it.

9. Furthermore, Haggerty contends that the Board erred as a matter of law by misapplying *Jordan* and *Lindewirth v. Board of Pension Trustees*.[12] Haggerty does

---

[10] R. at 9.

[11] On May 21, 2012, the Court struck from the record the additional medical records of Dr. Falco dated March 6, 2012, attached to Haggerty's reply brief because they were never presented to the Board. *See, e.g.*, Supr. Ct. Civ. R. 8 ("Only questions fairly presented to the trial court may be presented for review [unless the interests of justice otherwise so require] . . . ."); *Equitable Trust Co. v. Gallagher*, 77 A.2d 548, 550 (Del. 1950) ("Appellate Courts generally will refuse to review matters on appeal not raised in the Court below.").

[12] *Lindewirth v. Bd. of Pension Trs.*, 1996 WL 111134, at *2 (Del. Super. Feb 29, 1996). In Haggerty's reply brief on appeal she suggests that the Board erred in neglecting to consider her a "displaced worker" pursuant to *Watson v. Wal-mart Assoc.*, 30 A.3d 775 (Del. 2011). The "displaced worker" doctrine applies under Delaware's Workers' Compensation Law and was

not take issue with the Board's decision that she is "suited by training and experience" for positions other than police officer, as suggested in the Malcolm Report. This was the central issue in *Jordan*. Rather, Haggerty argues that her medical restrictions prevent her from working in any position at all. Moreover, she contends that New Castle County made no attempt to accommodate her injury or offer her any alternate positions.[13] In a supplemental submission requested by the Court, Haggerty also argues that the Board should consider evidence of her worsening physical state caused by a degenerative condition. She contends that the Police & Firefighter Pension Plan statutes are incomplete in failing to address worsening conditions affecting disability.

10. In response, the Board argues that it correctly affirmed the SPO's decision that Haggerty is entitled only to partial disability benefits based on the facts presented at the hearing, the statutory language of 11 *Del. C.* §§ 8801(13) & (16), and the correct application of *Jordan*. The Board claims that it acted within its discretion by relying

---

never presented to the Board. As a result, this Court will not address the merits of the argument. *See The Down Under, Ltd. v. Del. Alcoholic Beverage Control Comm'n*, 576 A.2d 675, 677 (Del. Super. 1989) ("Under the waiver rule, issues and arguments not raised to an administrative agency cannot be considered by a reviewing court."). Furthermore, Haggerty presented evidence to the Board that she receives workers' compensation. R. at 26.

[13] The Court in *Lindewirth* affirmed the Board's denial of disability benefits to the appellant because he had been offered accommodation through his previous employer and, despite being physically able to perform the functions in that role, refused to accept the position. *Lindewirth*, 1996 WL 111134, at *2.

upon the decisions of the Medical Committee and the Malcolm Report. Finally, in its supplemental submission requested by the Court, the Board argues that a remand based on new evidence that shows Haggerty's condition has deteriorated would be beyond the powers of this Court and contrary to the legislative intent of the Police & Firefighter Pension Plan statute.

11. Decisions of the Board are subject to judicial review.[14] On appeal from the decision of an administrative agency, the Superior Court's review is limited to determining whether the Board's decision was supported by substantial evidence and free from legal error.[15] Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[16] The Court considers the record in the light most favorable to the prevailing party before the Board.[17] The Court does not weigh evidence, assess credibility, or make independent

---

[14] 29 *Del. C.* § 8308(i) ("Any applicant for a pension aggrieved by a decision after a hearing by the Board of Pension Trustees may appeal that decision to the Superior Court and such appeal and review shall be conducted according to the provisions governing judicial review of case decisions under the Administrative Procedures Act.").

[15] *Stoltz Mgmt Co., Inc. v. Consumer Affairs Bd.*, 616 A.2d 1205, 1208 (Del. 1992).

[16] *Histed v. E.I. duPont Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993) (citing *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981)).

[17] *See Thompson v. Unemployment Ins. Appeal Bd.*, 25 A.3d 778, 782 (Del. 2011) (citing *Pochvatilla v.United States Postal Serv.*, 1997 WL 524062, at *2 (Del. Super. June 9, 1997)).

factual findings.[18] On appeal, legal determinations, including "statutory construction and application of the law to undisputed facts," require plenary review.[19] Finally, the Court is authorized by statute to remand a case for further proceedings when a decision is not supported by substantial evidence.[20]

12. The Court is satisfied that the Board correctly interpreted 11 *Del. C.* § 8801. When determining whether an agency's statutory interpretation is correct, a court first turns to the plain language of the statute.[21] The definition of "total disability," as this Court has previously found, focuses on the employee's ability to engage in "any occupation, whether police related *or otherwise.*"[22] The phrase does not restrict the Board from considering jobs outside of New Castle County's authority. To interpret the "any occupation" language in § 8801(16) to mean "any occupation within New Castle County's authority," as suggested by Haggerty, contradicts the plain language

---

[18] *Thompson*, 25 A.3d at 782 (quoting *Falconi v. Coombs & Coombs, Inc.*, 902 A.2d 1094, 1098 (Del. 2006)).

[19] *Del. Dep't of Health and Soc. Serv. v. Jain*, 29 A.3d 207, 211 (Del. 2011); *Jordan*, 2004 WL2240598, at *2 (quoting *Dep't of Servs. for Children, Youth and Their Families v. Cedars Acad.*, 1991 WL 260775 (Del. Ch. Dec. 5, 1991)) (internal quotations omitted).

[20] 29 *Del. C.* § 10142(c).

[21] *See Jordan*, 2004 WL 2240598, at *2 (citing *Caminetti v. United States*, 242 U.S. 470, 485 (1917)).

[22] *Id.* at *3 (emphasis supplied).

of the statute.[23] Thus, the Malcolm Report's conclusion that Haggerty can work in positions aside from those provided by the County was consistent with the operative statute.

13. Furthermore, the plain meaning of § 8801(16) is not altered by 11 *Del. C.* § 8817(d)(2).[24] Haggerty argues that § 8801(16) should, like 11 *Del. C.* § 8817(d)(2), require that the County offer her a job position before denying total disability. This argument misses the mark. The two provisions deal with discrete issues. Section 8801(16) deals with pension eligibility in the first place. Section 8817(d)(2) speaks to the consequent revocation of benefits where a pensioner recovers from a disability (unless the council or municipality fails to offer the pensioner employment). The two provisions are, by necessity, addressing separate and distinct issues.

14. Further, the Court finds no error in the procedures that the Board adopted to determine eligibility for disability pensions. It is quite clear that the statute envisions a reduction in the pension awarded to a service-member who recovers from a

---

[23] *See Stifel Fin. Corp. v. Cochran*, 809 A.2d 555, 560 (Del. 2002) ("The General Assembly has spoken on the issue and, in the absence of a specific legislative restriction, we cannot engraft a requirement that creates a further bar....Any attempt to read into the clear language of a statute will be rejected.").

[24] 11 *Del. C.* § 8817(d)(2) ("If a member who is disabled recovers and is no longer totally or partially disabled, the disability pension shall be discontinued unless...in the case of a duty-connected disability, the member is not offered employment by the council or municipality in a position for which the member is suited by training and experience.").

disability.[25] There is nothing in the statute, however, to suggest that the Board is obligated to increase a partial disability pension to a full disability pension where a pensioner's physical state worsens. As unfair as this may seem to Haggerty and any other service-member faced with a degenerative condition caused by a work-related injury, this Court is not the proper forum for relief.[26]

15. Despite proper application of the statute, the Court concludes that the Board's decision was not supported by substantial evidence. While the Board enjoys great autonomy in its role as fact-finder, the Board may not completely ignore evidence that contradicts the Board's findings.[27] At the Board's hearing, Haggerty presented independent medical opinions from three doctors who opined that she was totally disabled, i.e., unable to work in any capacity.[28] Yet the only attention paid to these

---

[25] *See* 11 *Del. C.* § 8817(c)-(d).

[26] *Workman v. Dept. of Labor*, 2011 WL 3903793, at *4 (Del. Super. Sept. 1, 2011) (noting that the legislature, not the courts, is the proper forum for changing the language of purportedly "unfair" statutes).

[27] *College v. Unemployment Ins. Appeal Bd.*, 2009 WL 5191831, at *9 (Del. Super. Dec. 31, 2009) ("While the Board need not comment on every piece of evidence, it must not fail to address material allegations or largely ignore a party's evidence.") (citations omitted). *See also Atlantis Comm. v. Webb*, 2004 WL 1284213, at *3 (Del. Super. May 28, 2004) (noting that the agency's "curt opinion....is inadequate because it fails to address some material allegations at all, and the way it discusses other issues is incomplete"); *San Juan v. Mountaire* Farms, 2007 WL 2759490, at *3 (Del. Super. Sep. 18, 2007) (noting that the Industrial Accident Board was "not free to accept [contested expert testimony as a basis of its determination] in isolation of all other evidence"); *Burnett v. Comm'r of Soc. Sec. Admin.*, 220 F.3d 112, 122 (3d Cir. 2008) ("The ALJ's failure to mention and explain....contradictory medical evidence was error.").

[28] R. at 95-98.

opinions by the Board in its summary of the evidence was that, "Haggerty disputed the findings of the Malcolm report and testified that her current treating physician had indicated she is totally disabled."[29] The Board failed to provide any indication that it actually considered the treating physician's opinion and apparently never considered or even reviewed the two separate medical opinions offered by Haggerty. Accordingly, the matter must be remanded for further proceedings.[30]

16. The Board, laboring under the belief that its decision was supported by substantial evidence, suggests that the scope of additional evidence to be considered on remand should be limited to any evidence that could have been obtained prior to its initial determination but, for good cause, was not. The Board cites *Thompson v. Commissioner of Social Security Administration*[31] as persuasive authority. In *Thompson*, the court found that the District Court could not remand a matter, otherwise supported by substantial evidence, to the Commissioner of the Social Security Administration to consider new evidence of a worsening physical condition, even if the new evidence could impact the initial determination. The court identified an exception to this general rule where "new" evidence was actually available to the

---

[29] R. at 7.

[30] *Atlantis Comm.*, 2004 WL 1284213, at *3 ("The court cannot review the decision without more explanation and reasoning to consider.").

[31] *Thompson v. Comm'r of Soc. Sec. Admin.*, 425 Fed.Appx. 98 (3d Cir. 2011).

Commissioner at the time of the hearing but, for good cause, was not included in the record at the time of the original determination.[32] Any evidence that came into existence *after* the Commissioner's final decision would not be considered as part of the record on remand.[33] Following the *Thompson* framework, the Board argues that the evidence relating to Haggerty's deteriorating physical condition would fall outside the narrow exception because it was obtained after the Board's original decision.

17. The ability of the federal courts to remand matters to the Commissioner based on the exception of omitted evidence is grounded entirely in statutory authority. Delaware's Police & Firefighter Pension Plan does not provide the Court with any statutory authority - - beyond an insufficient record or a violation of any other general principles of administrative law developed under the Administrative Procedures Act - - to remand a matter for the inclusion of "new" pre-existing evidence. Thus, whether a matter may, through general principles of Delaware's administrative law, be remanded for an agency's failure to include evidence that could have been included in the original proceedings but, for good cause, was not, is an open question. The

---

[32] *Id.* at 101. *See also* 42 U.S.C. § 405(g) (2012) (granting statutory authority for the courts to remand a matter to the Commissioner for the consideration of evidence that, for good cause, was not included in the original proceedings).

[33] *Id.*

matter here does not *require* the Court to reach that question, and the Court declines to do so in *dicta*.

18. The opinion of the Board regarding Haggerty's appeal is not supported by substantial evidence. Thus, the Board's reliance on *Thompson* is misplaced. When an administrative decision is remanded because it fails to be supported by substantial evidence, the general practice in Delaware is to entitle each party to a new hearing.[34] In a new hearing, both parties may present evidence to support their positions within the scope of the agency's inquiry. The Court can see no reason why the Board should not permit Haggerty to submit new evidence in this case.[35] In fact, were the Court to remand the matter with a limitation on the scope of evidence that could be introduced at the new hearing, the Board might be encouraged to engage in *post-hoc* rationalization.[36]

---

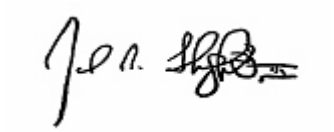
[34] *See Atlantis Comm.*, 2004 WL 1284213, at *3 ("Under current administrative practice [where an agency's decision is not supported by substantial evidence], on remand, either party is entitled to a new hearing) (citing *E.I. Dupont de Nemours & Co., Inc. v. Downes*, 2003 WL 23274837, at *3 (Del. Super. Dec. 29, 2003)).

[35] *See In re Int'l Acceptance Co.*, 280 A.2d 733, 735 (Del. Super. 1971) (noting that where a record is deemed to be insufficient for judicial review, the agency, upon remand, will be responsible for providing "a further hearing, additional evidence, findings of fact and conclusions of law and an official order of the Commission").

[36] *See Thomas v. Comm'r Soc. Sec. Admin.*, 625 F.3d 798, 800–01 (3d Cir. 2010) ("By not giving the Commissioner explicit instructions to fully develop the record, the District Court essentially gave the ALJ license to issue an advisory opinion.... To be sure, the purpose of *Burnett* is not to require a formulaic process that must be adhered to on remand, but rather to ensure that the parties have an opportunity to be heard on the remand issue and *prevent post hoc rationalization*

19. Based on the foregoing, the Court is satisfied that the Board applied the correct legal standards but that its decision is not supported by substantial evidence. Accordingly, the decision of the Board denying Haggerty's appeal for full disability pension must be **REVERSED AND REMANDED** for further proceedings consistent with this opinion.

IT IS SO ORDERED.



Judge Joseph R. Slights, III

Original to Prothonotary

---

by administrative law judges.") (emphasis supplied). *See also Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) (holding that counsel's *post-hoc* rationalization of agency action is entitled to no weight). The Court takes notice of the financial pressures placed upon administrative agencies and urges the parties to develop the record through additional submissions, as opposed to a full hearing. This would avoid repetition while still accomplishing what the Court has directed the Board to do.