STATE OF MICHIGAN

COURT OF APPEALS

DONALD WILBER,

Petitioner-Appellee,

v

STATE EMPLOYEES' RETIREMENT SYSTEM,

Respondent-Appellant.

UNPUBLISHED
August 4, 1998

No. 199206
Ingham Circuit Court
LC No. 96-082455 AA

Before: Bandstra, P.J., and Griffin and Young, Jr., JJ.

PER CURIAM.

Respondent appeals by leave granted an order of the Ingham Circuit Court reversing an order of the State Employees' Retirement Board (SERB), denying duty disability retirement benefits to petitioner. We reverse the circuit court and reinstate the order of the State Employees' Retirement Board.

Respondent argues that the SERB's decision was authorized by law and supported by competent, material, and substantial evidence on the whole record. Respondent maintains that the circuit judge erred in substituting his judgment that petitioner was totally and permanently disabled for that of the board, which found, based on the hearing referee's proposal for decision, that petitioner was only partially disabled. We agree. Section 21 of the State Employees' Retirement Act, MCL 38.21; MSA 3.981(21), provides:

> Subject to the provisions of sections 33 and 34, upon the application of a member, or his department head, or the state personnel director, *a member who becomes totally incapacitated for duty in the service of the state of Michigan without willful negligence on his part, by reason of a personal injury or disease, which the retirement board finds to have occurred as the natural and proximate result of the said member's actual performance of duty in the service of the state, shall be retired: Provided, The medical advisor after a medical examination of said member shall certify in writing that said member is mentally or physically totally incapacitated for the further performance of duty in the service of the*

> *state, and that such incapacity will probably be permanent*, and that said member should be retired: And provided further, That the retirement board concurs in the recommendation of the medical advisor.

When reviewing a lower court's review of agency action,

> [T]his Court must determine whether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings. This latter standard is indistinguishable from the clearly erroneous standard of review that has been widely adopted in Michigan jurisprudence. As defined in numerous other contexts, a finding is clearly erroneous when, on review of the whole record, this Court is left with the definite and firm conviction that a mistake has been made. [*Boyd v Civil Service Comm*, 220 Mich App 226, 234-235; 559 NW2d 342 (1996) (emphasis added).]

"Substantial evidence" has been defined as evidence "which a reasonable mind would accept as adequate to support a decision, being more than a mere scintilla, but less than a preponderance of the evidence." *St Clair Intermediate School Dist v Intermediate Ed Ass'n/Michigan Ed Ass'n*, 218 Mich App 734, 736; 555 NW2d 267 (1996); lv gtd 456 Mich 899 (1997). In a different context, the Supreme Court quoted the dictionary definitions of the terms "competent," "material," and "substantial" and came to the following conclusion:

> What can be gleaned from these definitions is that if the magistrate makes a finding or draws a conclusion on the basis of competent, material, and substantial evidence, which is solid, true, reliable, authoritative, capable, and can articulate this evidence from the record, then the decision of the magistrate may not be reversed. [*Goff v Bil-Mar Foods, Inc (After Remand)*, 454 Mich 507, 514, n 5; 563 NW2d 214 (1997).]

In the present case, the hearing officer determined that petitioner was only partially disabled. On petitioner's appeal, the circuit court misapplied the substantial evidence test to the agency's factual findings when it found that the hearing officer's decision was not supported by competent, material, and substantial evidence on the whole record. The evidence was substantial in the sense that a reasonable mind would accept it as adequate to support the hearing officer's observations that petitioner's treating physicians and the medical advisor to the State Employees' Retirement System, Dr. William S. Gonte, had found petitioner to be only partially disabled, and its conclusion that petitioner had not met his burden of proof. *St Clair Intermediate School Dist*, *supra* at 736. Evidence that supports a finding that petitioner did not satisfy his burden to prove total disability, in addition to the testimony of Dr. Michael, was the testimony of orthopedic surgeon Perry W. Greene, Jr., M.D., that petitioner could work with restrictions if his symptoms could be controlled and the conclusion of Dr. Gonte that petitioner was not totally and permanently disabled. We disagree with the circuit court's opinion that the hearing officer made an improper inference in arriving at its interpretation of Dr. Greene's testimony. This testimony appears to have suggested a way to control petitioner's symptoms that would have made

it possible for him to work with restrictions. Moreover, Dr. Gonte concluded that petitioner's prognosis for return to employment was good.

Although case law suggests that a hearing officer is not bound by the decision of the State Medical Advisor, there is nothing to prevent a hearing officer from making a determination in accordance with the recommendation of the medical advisor. *Gersbacher v State Employees' Retirement System*, 145 Mich App 36, 45; 377 NW2d 334 (1985). Moreover, a hearing officer has the authority to conclude that a petitioner failed to sustain his burden of proof. *Stoneburg v State Employees' Retirement System*, 139 Mich App 794, 801; 362 NW2d 878 (1984). In light of all the evidence, we hold that the circuit court misapprehended the substantial evidence test, because the evidence, particularly the testimony of Dr. Gonte and Dr. Greene, was such that the hearing officer could reasonably conclude that petitioner had not sustained his burden of proving that he was totally disabled from engaging in employment reasonably related to his past experience and training.

We reverse the circuit court and reinstate the order of the State Employees' Retirement Board.

/s/ Richard A. Banstra
/s/ Richard Allen Griffin
/s/ Robert P. Young, Jr.