

STATE OF MICHIGAN
COURT OF APPEALS

DEBORAH LEE BLACK,

Petitioner-Appellant,

v

STATE EMPLOYEES RETIREMENT BOARD,

Respondent-Appellee.

UNPUBLISHED

November 16, 2001

No. 223239

Ingham Circuit Court

LC No. 99-089465-AA

Before: Fitzgerald, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Petitioner appeals by leave granted the circuit court order affirming the State Employees' Retirement Board's (SERB) denial of disability benefits. We affirm.

The sole issue on appeal is whether the circuit court employed the proper standard of review. We review the circuit court's decision for clear error. MCL 24.313; MCL 38.2(2); *Boyd v Civil Service Comm*, 220 Mich App 226, 232, 234-235; 559 NW2d 342 (1996). When reviewing a lower court's review of agency action this 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, supra* at 232, 234-235. The circuit court, in reviewing the SERB's decision, was to determine whether the SERB's decision was based on competent, material, and substantial evidence. MCL 24.306; *Boyd, supra* at 235.

In applying the competent, material, and substantial evidence standard of review to an administrative agency's decision, the circuit court is required to review the entire record, and not just portions that support the agency's findings. *Great Lakes Sales, Inc v State Tax Comm*, 194 Mich App 271, 280; 486 NW2d 367 (1992). Substantial evidence is less than a preponderance of the evidence, but is more than a mere scintilla. *In re Payne*, 444 Mich 679, 692 (Boyle, J.), 698 (Riley, J.); 514 NW2d 121 (1994). If there is sufficient evidence, the circuit court may not substitute its discretion for that of the agency, even if the court might have reached a different result. *Black v Dep't of Social Services*, 195 Mich App 27, 30; 489 NW2d 493 (1992). Further, an agency's findings of fact are afforded deference, *THM, Ltd v Comm'r of Ins*, 176 Mich App

772, 776; 440 NW2d 85 (1989), particularly concerning witness credibility and evidentiary questions, *Arndt v Dep't of Licensing*, 147 Mich App 97, 101; 383 NW2d 136 (1985).

MCL 38.24 of the State Employees' Retirement Act states in pertinent part:

Subject to the provisions of sections 33 and 34, upon application of a member, or his department head, or the state personnel director, a member who has been a state employee at least 10 years becomes *totally and permanently incapacitated* for duty as the result of causes occurring not in the performance of duty to the state, may be retired by the retirement board: Provided, [t]he medical advisor after a medical examination of such member, shall certify that such member is mentally or physically incapacitated for the further performance of duty, and such incapacity is *likely to be permanent* and that such member should be retired. [Emphasis added.]

As a subsidiary issue, petitioner claims that she need only have proven her case before the SERB and the circuit court to the degree that her conceded psychiatric (not physical) disability was *likely* to be permanent. This claim is without merit. The first part of the statute clearly states that the claimant must prove she is “permanently and totally disabled,” *not* that the claimant is *likely* to be permanently disabled. MCL 38.24. Rather, the last part of the statute states that a medical advisor must certify that the claimant is likely to be permanently disabled by a mental or physical incapacitation. *Id.*

In reviewing the agency's decision, the circuit court made references to “some evidence,” and to the fact that “there was evidence.” The circuit court also correctly examined the whole record, not just portions that supported the agency's findings. *Great Lakes Sales, supra* at 280. Again, substantial evidence is less than a preponderance of the evidence, but is more than a mere scintilla. *In re Payne, supra* at 692 (Boyle, J.), 698 (Riley, J.). Evidence is substantial if a reasonable mind would accept it as adequate to support a decision. *St Clair Intermediate School Dist v Intermediate Ed Ass'n/Michigan Ed Ass'n*, 218 Mich App 734, 736; 555 NW2d 267 (1996).

Our Supreme Court has cited the dictionary definitions of “competent,” “material,” and “substantial” with regard to a Worker's Compensation Appellate Commission's decision: “[C]ompetent, material, and substantial evidence . . . is solid, true, reliable, authoritative, [and] capable . . .” *Goff v Bil-Mar Foods, Inc (After Remand)*, 454 Mich 507, 514 n 5; 563 NW2d 214 (1997), criticized on other grounds *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 695; 614 NW2d 607 (2000). “Some” is defined as “unspecified but considerable in number, amount, degree . . .” *Random House Webster's College Dictionary* (1991). Therefore, the circuit court's references to “some evidence” and “there was evidence” cannot be deemed improper characterizations of the “competent, material, and substantial” standard. *Id.*; MCL 24.306(f); *In re Payne, supra* at 692 (Boyle, J.), 698 (Riley, J.).

The evidence on the permanency of petitioner's psychiatric health that was presented to the circuit court for its application of the proper standard was inconclusive. According to the record, respondent's physician noted at least twice that petitioner's condition may not be

permanent, and the only doctor petitioner brought forth to testify to permanency had not evaluated her personally in at least eleven years. This was in part a result of petitioner's admitted recent improvement in response to the drug Wellbutrin.

Using the proper standards of review and substantive standard for an award of disability benefits, we cannot say, after a review of the whole record, that we are left with the definite and firm conviction that a mistake has been made in the circuit court's finding that there was competent, material, and substantial evidence before the board to support its denial of benefits. MCL 24.306(f); *Boyd, supra* at 232, 234-235.¹

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra
/s/ Jane E. Markey

¹ Further, we note that the circuit court ordered a reevaluation of petitioner's condition for two years from the date of the oral argument.