STATE OF MICHIGAN

COURT OF APPEALS

PAULA D. JOHNSON,

Petitioner-Appellee,

v

STATE EMPLOYEES' RETIREMENT BOARD,

Respondent-Appellant.

UNPUBLISHED
February 3, 2009

No. 278248
Ingham Circuit Court
LC No. 06-000844-AV

Before: Fitzgerald, P.J., and Bandstra and O'Connell, JJ.

PER CURIAM.

This case concerns the standard of review to be applied by the circuit court in considering an appeal from the Retirement Board in a duty disability retirement benefit proceeding. A panel of this Court previously determined that the circuit court failed to apply a proper standard of review, and erred by considering a letter that was not submitted until after the hearing referee closed the case record and prepared the proposal for decision. This Court remanded the case to the circuit court for further consideration. *Johnson v State Employees' Retirement Bd*, unpublished opinion per curiam of the Court of Appeals, issued March 17, 2005 (Docket No. 251505) (*Johnson I*). On remand, the circuit court directed the Board to reconsider the case on the expanded record. The Board again denied petitioner's request for duty disability retirement benefits. On appeal, the circuit court again reversed the Board's denial of benefits. The Board appeals by leave granted. We reverse and remand.

Facts and Procedural History

The relevant facts were set forth in *Johnson I*:

> Petitioner is a social worker who has been employed with the State of Michigan since 1971. Her disability claim arises from her reaction to physical attacks made against other state employees. The first attack, in April 1993, was the rape and murder of a colleague by an inmate at the Maxey Training School to whom Johnson had been providing therapy for several years. Johnson took a leave of absence from the school, returning in October 1993 to a job without inmate contact. In that month, another school staff member was attacked and beaten. Johnson became depressed; by 1996, she stopped working and was granted worker's compensation. Johnson resumed working for the state as a foster care worker in 1998. Soon after that, Johnson learned that a state welfare

> worker had been murdered in a client's home. Johnson suffered an emotional breakdown in August 1999, after which she was put on medical leave. In 2001, Johnson saw clients as a private therapist for a short period, and she obtained a part-time job as a secretary in a school run by her church.
>
> Johnson applied for duty and non-duty disability benefits retirement in 2001, which the Board denied in January 2003. (*Johnson 1, supra* at slip op p 1.)

The Board's denial of benefits was based on the opinion of the independent medical examiner [IME], Dr. Tien, who reviewed petitioner's medical records and determined that petitioner was not permanently disabled.

Petitioner requested a hearing, which was held on May 23, 2002. She presented two reports from psychologist Dr. Barry Mintzes, who had examined petitioner. Neither of Dr. Mintzes' reports addressed whether petitioner was permanently disabled. On November 4, 2002, the hearing officer issued a proposal for decision that recommended denial of retirement benefits because petitioner had not shown permanent disability.

Petitioner then submitted to the Board a November 19, 2002, letter from Dr. Mintzes opining that petitioner was permanently disabled. Petitioner filed just the letter, and did not file exceptions to the proposal for decision. The Board declined to reopen the proofs to consider the letter, and adopted the findings and conclusions of the hearing officer in support of its denial of retirement benefits.

The circuit court reversed the Board's decision. The court considered Dr. Mintzes' November 19, 2002, letter and ruled that petitioner was entitled to benefits.

This Court granted the Board's application for leave to appeal. In its opinion reversing the circuit court, the majority stated that the circuit court erred in considering Dr. Mintzes' letter, "which was not submitted until after the hearing referee closed the case record and prepared the proposal for decision." This Court instructed the circuit court that, on remand, it "may decide whether good cause justified the late submission and, if so, direct the board to reconsider the case on the expanded record." *Johnson I, supra* at slip op p 3.

On remand, the circuit court remanded the matter to the Board for consideration of Dr. Mintzes' November 19, 2002, letter. On April 13, 2006, the Board issued its decision, again denying petitioner's request for retirement benefits. The Board explained in part:

> As directed by the Court, the Board reviewed the administrative record again and considered the November 19, 2002 letter from Dr. Barry Mintzes. The Board also requested and reviewed briefs filed by the parties stating their respective positions prior to its deliberation of the case. After a full review of the administrative record, the briefs of the parties, and Dr. Mintze[s'] letter, the Board unanimously reaffirms its findings of Fact and Conclusions of Law in its final agency decision of January 9, 2003 denying duty or non-duty disability retirement benefits to the Petitioner.

The Board is not persuaded by Dr. Mintze[s'] letter to find that Petitioner is permanently disabled.

Petitioner again appealed to the circuit court. The circuit court again reversed the Board's denial of benefits:

> *THE COURT:* And the Court notes that really the only issue is whether or not the petitioner's condition is permanent. And originally Dr. Mintzes had seen petitioner, but in his original record he didn't refer – or he didn't address the issue of whether or not the condition was permanent. When he was requested to do so, then he did address that. And that is contained in his letter of I believe November – November of '02.
>
> And it's interesting – it's interesting to note that both Dr. Mintzes, Dr. Tien, who's a psychiatrist who did a psychiatric evaluation – and it's also interesting that he never examined petitioner, but yet he evaluated some records and diagnosed the petitioner with depression, severe problems, and was able to opine that she – that she probably was not going to be permanently disabled, even though he didn't see petitioner.
>
> Then about Bishop, who I believe was also an independent medical evaluator on behalf of the Respondent Board, on page 4 of her report under prognosis she states guarded. She's in need of mental health and medical treatment.
>
> And she diagnosed petitioner as having prost-traumatic stress disorder; chronic, major depressive disorder; recurrent moderate, migraine headaches; other psycho-social problems, but that's basically the same as what Dr. Tien did and also Dr. Mintzes. And when he addressed the issue of permanence he found that she was – it was his opinion that she was permanently and totally disabled.
>
> Dr. Mintzes stated in his letter, after again reviewing the information, although she is an intelligent individual the psychological impact of what happened to her in 1993 was so devastating as to render her incapable of engaging in any type of productive employment. It does not appear that she will become capable of doing any more than this in the foreseeable future.
>
> She was doing something as –helping out in a church as secretary. At the end it's clear that realistically she's probably not able to do anything.
>
> So based on that opinion, and Dr. Bishop's diagnosis, which was the same as Dr. Mintzes, and the fact that Dr. Tien never evaluated – never physically evaluated the petitioner, the Court finds that the respondent's decision is arbitrary

> and capricious. It's against the great weight of the evidence. And it's not based on competent, material or substantial evidence looking at the whole record.
>
> So the Court is going to reverse the agency opinion and grant petitioner her retirement benefits – or disability benefits.[1]

Standard of Review

A circuit court's review of an administrative agency's decision is limited to determining whether the decision was contrary to law, was supported by competent, material, and substantial evidence on the whole record, was arbitrary or capricious, was clearly an abuse of discretion, or was otherwise affected by a substantial and material error of law. *Dignan v Michigan Public School Employees Retirement Bd*, 253 Mich App 571, 576; 659 NW2d 629 (2002). "Substantial" means evidence that a reasoning mind would accept as sufficient to support a conclusion. *Id*. Substantial evidence is "more than a mere scintilla, but somewhat less than a preponderance." *Cogan v Bd of Osteopathic Medicine & Surgery*, 200 Mich App 467, 469-470; 505 NW2d 1 (1993). Courts should accord due deference to administrative expertise and not invade administrative fact finding by displacing an agency's choice between two reasonably differing views. *Dignan, supra*.

This Court reviews a lower court's review of an agency decision to determine whether (1) the lower court applied correct legal principles and (2) misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings. *Jackson-Rabon v State Employees' Retirement System*, 266 Mich App 118, 119; 698 NW2d 157 (2005). The lower court's application of the substantial evidence test is reviewed for clear error. *Boyd v Civil Service Comm*, 220 Mich App 226, 234; 559 NW2d 342 (1996). "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.' " *Dignan, supra* at 576, quoting *Boyd, supra* at 235.

I

The Board argues that petitioner's failure to file exceptions to the hearing officer's 2002 proposal for decision waived her argument that Dr. Tien's failure to personally examine petitioner rendered the Board's denial of benefits arbitrary and capricious. Thus, the Board asserts that the circuit court erred in reversing the Board's denial of retirement benefits in large part on the basis that Dr. Tien, did not personally examine petitioner.

MCL 24.281(1) provides in pertinent part:

> When the official or a majority of the officials of the agency who are to make a final decision have not heard a contested case or read the record, the decision, if adverse to a party to the proceedings other than the agency itself, shall not be made until a proposal for decision is served on the parties, and an opportunity is

[1] The circuit court clarified that it was granting petitioner duty disability retirement benefits.

> given to each party adversely affected to file exceptions and present written arguments to the officials who are to make the decision.

Failure to file exceptions to a proposal for decision in a timely manner constitutes a waiver of the objection. *Attorney General v Public Service Comm,* 174 Mich App 161, 164; 435 NW2d 752 (1988); *Attorney General v Public Service Comm #1*, 136 Mich App 52, 56; 355 NW2d 640 (1984).

In its prior decision, this Court permitted the circuit court on remand to instruct the Board to consider Dr. Mintzes' November 19, 2002, letter if the circuit court found good cause for its late submission. The subject of the letter was the permanence of petitioner's disability. The letter cannot be construed as an exception to the hearing officer's proposal on the ground that Dr. Tien failed to personally examine petitioner. Indeed, petitioner made no specific argument and provided no legal support for her position that the lack of an examination by the IME made the board's denial of benefits arbitrary and capricious. It was on the *second* appeal to the circuit court that petitioner first raised this issue. By not raising any objections, petitioner did not give the Board an opportunity to correct any alleged errors. *Id.* Therefore, the issue of the lack of a personal examination by Dr. Tien was not properly before the circuit court because petitioner did not raise it before the Board by timely exception to the hearing officer's proposal. *Public Service Comm #1, supra* at 56. Under these circumstances, the circuit court erred by accepting this argument as grounds for reversing the Board's decision.

II

The Board contends that the trial court erred by allowing petitioner to supplement the record with Dr. Mintzes' November 19, 2002, letter, and by ordering the board to reconsider its decision in light of the letter, because petitioner did not show good cause for failing to present the evidence before the proposal for decision was issued.

Review on direct appeal is confined to the agency's record. MCL 24.304(3); *Northwestern Nat Cas Co v Ins Comm'r,* 231 Mich App 483; 586 NW2d 563 (1998). "In order to enlarge the record, a party must obtain leave of the court by showing either that an inadequate record was made before the agency or that the additional evidence is material, and by further showing that there were good reasons for failing to present the additional evidence before the agency." *Id*.; MCL 24.305.

MCL 24.305 provides:

> **If timely application is made** to the court for leave to present additional evidence, **and it is shown** to the satisfaction of the court that an inadequate record was made at the hearing before the agency or **that the additional evidence is material**, and that there were good reasons for failing to record or present it in the proceeding before the agency, **the court shall order the taking of additional evidence before the agency** on such conditions as the court deems proper. The agency may modify its findings, decision or order because of the additional evidence and shall file with the court the additional evidence and any new findings, decision or order, which shall become part of the record. [Emphasis added.]

This Court concluded in its previous opinion that the circuit court erred in considering the November 19, 2002, letter because it was not submitted until after the hearing officer closed the case and issued the proposal for decision. This Court instructed the circuit court that on remand it "may decide whether good cause justified the late submission and, if so, direct the Board to reconsider the case on the expanded record." *Johnson I, supra* at slip op p 3, citing MCL 24.305.

On remand, the circuit court held that good cause existed for admission of the letter because an inadequate record was made at the hearing and because the board relied on Dr. Tien's testimony even though Dr. Tien never examined petitioner.

Any error of the circuit court in finding good cause and directing the Board to consider the letter is harmless inasmuch as the letter did not affect the Board's decision. The Board reconsidered its decision and considered the letter, in accordance with the circuit court's instructions, but ultimately reached the same conclusion that petitioner is not entitled to benefits because she has not shown total and permanent disability. Indeed, the Board specifically stated that Dr. Mintzes' letter did not persuade it.

III

Lastly, the Board argues that the circuit court applied an erroneous standard when it reviewed and reversed the Board's decision. We agree.

The circuit court reversed the Board's denial of benefits, concluding that the Board's decision was arbitrary and capricious, against the great weight of the evidence, and not based on competent, material, or substantial evidence on the whole record. The circuit court supported its decision primarily on the basis of (1) the failure of Dr. Tien to personally examine petitioner, and (2) Dr. Mintzes' November 19, 2002, letter opining that petitioner's condition is permanent.

However, the board's rejection of these arguments and its decision to deny benefits was not arbitrary and capricious. With respect to Dr. Tien basing his expert opinion on petitioner's medical records rather than a personal examination of her, the board noted that petitioner was examined by an IME, Dr. Bishop, and also that petitioner refused other opportunities to be examined:

> The Board further finds that the Petitioner refused to attend personal medical examinations scheduled at the Independent Medical Examiner's request on December 27, 2001 (with Dr. Gerald Riess) and December 28, 2001 (with Dr. William Buckman) to assist in the review of her medical claims. Therefore, the Petitioner's argument regarding the failure of the Independent Medical Examiner to personally observe her is without merit as she had the opportunity to be personally examined again (she was personally examined by Dr. Elizabeth Bishop, Ph.D. on March 21, 2001 on behalf of the Independent Medical Examiner) but she rejected this opportunity. The Board has adopted Policy Determination No. 6, copy attached, through the contested case process, which states that the procedure employed by the State Employees' Retirement System through the Disability Determination Services meets the statutory requirement of Section 21 and 24 of the State Employees' Retirement Act. Therefore the Board

> reaffirms that the medical review process used in this case was proper and in conformity with Sections 12 and 24 of the Act.

The circuit court did not address these findings by the Board and did not address petitioner's refusal to be examined by other IME doctors.

With regard to Dr. Mintzes' letter, the Board noted that petitioner had submitted at the hearing two reports from Dr. Mintzes that were based on his examinations of her. The Board noted that "Neither of these reports from Dr. Mintzes contained any opinion on the issue of whether the Petitioner was permanently disabled." The Board found that petitioner did not request an opinion from Dr. Mintzes regarding the permanency of petitioner's condition until after the proposal for decision recommending denial of benefits was issued. Dr. Mintzes gave that opinion in the November 19, 2002, letter. The Board stated that it was "not persuaded by Mr. Mintze's [sic] letter to find that Petitioner is permanently disabled."

In light of Dr. Tien's opinion that petitioner's condition is not permanent, and Dr. Bishop's reports containing no indication of permanency, the Board's decision was not arbitrary, capricious, or an abuse of discretion. Because competent, material, and substantial evidence existed on the whole record to support the Board's decision, the circuit court clearly erred in reversing the Board's decision. We are left with a definite and firm conviction that a mistake has been made because the circuit court displaced the Board's reasonable views with the court's own. Indeed, the circuit court's reasoning suggests a review of the evidence anew, without the due deference required for agency findings. The circuit court afforded greater weight to Dr. Mintzes' opinion than to Dr. Tien's opinion because Dr. Tien did not personally examine petitioner. However, courts should accord due deference to administrative expertise and not invade administrative fact finding by displacing an agency's choice between two reasonably differing views. *Dignan, supra*. The Board clearly found the opinions of Dr. Tien and Dr. Bishop more persuasive and more credible than Dr. Mintzes' opinion and it was the Board's unique province as the administrative fact-finder to do so.

Reversed and remanded. Jurisdiction is not retained.

/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra
/s/ Peter D. O'Connell