S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

KEVIN K. TASSON, Plaintiff-Appellee,	UNPUBLISHED June 13, 2013
v	No. 308252 Marquette Circuit Court
STATE EMPLOYEES RETIREMENT SYSTEM, Defendant-Appellant.	LC No. 11-049193-AA

Before: RONAYNE KRAUSE, P.J., and GLEICHER and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals by leave granted from the circuit court's decision and order reversing the retirement board's decision to deny plaintiff a duty disability retirement and granting him such. We reverse and remand for entry of an order reinstating the board's decision.

Plaintiff was hired by the Michigan Department of Corrections (DOC) in 1987. He worked initially as a corrections officer and was promoted in the early 1990s to resident unit officer. His last day as a DOC employee was December 2, 2008. On February 3, 2009, plaintiff applied with the Office of Retirement Services for a duty disability retirement because of alleged physical and psychological injuries. Psychiatrist and independent medical advisor (IMA) Ashok Kaul, M.D., concluded that plaintiff was not permanently and totally disabled by his diagnosed mental disorders and IMA Donald Kuiper, M.D., concluded that plaintiff was not permanently and totally disabled because of his physical injuries. His application was denied and he requested a review hearing. The presiding officer at the review hearing upheld the board's denial of a disability retirement. Plaintiff appealed that decision to the circuit court, and the circuit court held that the board's decision was not supported by competent, material, and substantial evidence on the whole record.

When reviewing an administrative agency's decision, a circuit court "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 Pub Sch Employees Retirement Bd*, 253 Mich App 571, 575-576; 659 NW2d 629 (2002); see Const, art 6, § 28; MCL 24.306(1)(d). Courts should "not invade administrative fact finding by displacing an agency's choice between two reasonably differing views." *Dignan*, 253 Mich App at 576. Moreover, "[i]t is not a reviewing court's function to resolve conflicts in the evidence or

to pass on the credibility of witnesses." *VanZandt v State Employees Retirement Sys*, 266 Mich App 579, 588; 701 NW2d 214 (2005). "If there is sufficient evidence, the circuit court may not substitute its judgment for that of the agency, even if the court might have reached a different result." *Id*. at 584. Here, the circuit court found that the agency's decision was not supported by competent, material, and substantial evidence on the whole record.

We "'review[] a lower court's review of an administrative decision to determine whether the lower court applied correct legal principles and whether it misapprehended or misapplied the substantial evidence test to the agency's factual findings, which is essentially a clearly erroneous standard of review.'" *Bandeen v Pub Sch Employees Retirement Bd*, 282 Mich App 509, 515; 766 NW2d 10 (2009), quoting *VanZandt*, 266 Mich App at 585. A circuit court's factual determinations will only be reversed if this Court is left with a definite and firm conviction that a mistake has been made. *Id*.

MCL 38.21 sets forth the criteria for a duty disability benefits as follows:

> (1) Except as may otherwise be provided in sections 33 and 34, a member who becomes totally incapacitated for duty because of a personal injury or disease shall be retired if all of the following apply:
>
> (a) The member, the member's personal representative or guardian, the member's department head, or the state personnel director files an application on behalf of the member with the retirement board no later than 1 year after termination of the member's state employment.
>
> (b) A medical advisor conducts a medical examination of the member and certifies in writing that the member is mentally or physically totally incapacitated for further performance of duty, that the incapacitation is probably permanent, and that the member should be retired.
>
> (c) The retirement board concurs in the recommendation of the medical advisor.

"'For purposes of deciding eligibility for disability retirement under MCL 38.21 and 38.24 of the act, a medical examination conducted by 1 or more medical advisors means either a personal medical examination of the member or a review of the application and medical records of the member.'" *Monroe v State Employees' Retirement Sys*, 294 Mich App 594, 606; 809 NW2d 453 (2011), quoting 1999 AC, R 38.35(1).

Here, neither Dr. Kaul nor Dr. Kuiper certified that plaintiff is totally and permanently disabled. Plaintiff argues that Kaul and Kuiper ignored and misrepresented the findings of psychiatrist and IMA David Van Holla, M.D., and IMA W. B. Carlson, Jr., M.D. However, in his report, Van Holla wrote that plaintiff "reports that he felt as though he was somewhat free from psychiatric related illness with exception of having some problems with substance abuse," and opined that plaintiff had a treatable psychiatric related illness and could recover "in as quickly as 12 months with the appropriate follow up, guidance and treatment." Kaul based his opinion that plaintiff would be able to return to his past work as a resident unit officer on both of those statements by Van Holla. As for Carlson, although he opined that plaintiff was at an

increased risk for increased problems if he continued to be involved in physical altercations similar to the ones he had previously been involved in, he did not conclude that plaintiff was totally and permanently disabled. Further, Kaul considered but rejected Carlson's recommended physical restrictions because, as Carlson noted, the restrictions were based on plaintiff's subjective reports.

Plaintiff also argues that Kaul and Kuiper's opinions were not in conformity with MRE 702 because they lacked support in the record. As discussed in the preceding paragraph, record evidence supplied by Drs. Van Holla and Carlson established an adequate foundation for Kaul and Kuiper's opinions. Thus, the evidence was admissible under MRE 702.

Plaintiff also argues that Kuiper and Kaul used an invalid definition of "disability," and that by relying on their reports, the board essentially rendered a decision based on an incorrect legal standard. Here, the hearing officer utilized the definition set forth in *Knauss v State Employees*' *Retirement Sys*, 143 Mich App 644, 649-650; 372 NW2d 643 (1985), which was rejected in *Nason v State Employees*' *Retirement Sys*, 290 Mich App 416, 433; 801 NW2d 889 (2010). However, because both Kuiper and Kaul opined that plaintiff could return to his old job as a resident unit officer, any error in applying the rejected standard from *Knauss* was harmless.

Plaintiff argues that even without certification the board had the authority to override the Kaul and Kuiper's conclusions and grant him a duty disability retirement. Although MCL 38.21(1)(c) permits the Board to exercise its discretion regardless of the recommendation(s) of the medical advisor(s), it does not compel the Board to do so. The medical advisors did not certify plaintiff as totally and permanently disabled, and the Board agreed with their recommendation; therefore, plaintiff has failed to meet the statutory requirements for a duty disability retirement.

Reversed and remanded for entry of an order reinstating the board's decision to deny plaintiff a duty disability retirement. We do not retain jurisdiction.

/s/ Amy Ronayne Krause
/s/ Elizabeth L. Gleicher