STATE OF MICHIGAN

COURT OF APPEALS

SANDRA WHALEY, Petitioner-Appellee,	UNPUBLISHED June 13, 2013
v	No. 308613 Baraga Circuit Court
STATE EMPLOYEES RETIREMENT SYSTEM, Respondent-Appellant.	LC No. 11-006193-AA

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

PER CURIAM.

Respondent, State Employees' Retirement System (SERS), appeals by leave granted the circuit court order that reversed a final decision by the SERS Board (the Board) to deny petitioner non-duty disability retirement benefits, and awarded the same. On appeal, respondent argues that the circuit court erred by applying incorrect legal principles and misapplying the substantial evidence test in rendering its decision. For the reasons stated below, we reverse and remand for entry of an order affirming the Board's denial of benefits.

I. FACTUAL AND PROCEDURAL BACKGROUND

Petitioner was employed by the Michigan Department of Corrections as a registered nurse at the Baraga Maximum Correctional Facility for approximately 16 years. She was suspended in November 2006 and terminated in January 2007 for alleged inattentiveness to an inmate. She filed a grievance and was returned to work pursuant to a "last chance agreement" in February 2009. She resigned three days after returning to work, asserting that she was unable to perform her work-related duties. Petitioner applied for non-duty disability retirement benefits on May 15, 2009, alleging that her ability to work was limited by depression, anxiety, and knee, hip, lower back, and foot pain.

Two independent medical advisors (IMAs) examined petitioner's medical records. The first IMA, Dr. Russell E. Holmes, M.D., examined the records of petitioner's physical condition submitted by her primary care physician, Dr. Ronald D'Agostino, D.O., St. Vincent Hospital, and Dr. Tama D. Abel, M.D. Although Dr. D'Agostino stated that petitioner was unable to work due to her diagnosis, Dr. Abel opined that petitioner's weight was likely contributing to her hip and knee pain and saw potential for improvement in her physical condition that would allow her to return to her duties as a registered nurse with the Department of Corrections. In addition, petitioner also stated that her substantial weight loss had in fact reduced her level of pain. Based

on his examination of petitioner's medical records, Dr. Holmes concluded that petitioner's conditions did not meet the SERS definition of total and permanent disability.

The second IMA, Dr. Ashok Kaul, M.D., a psychiatrist, examined records submitted by Dr. D'Agostino, psychologist S. George Field, and psychiatrist Dr. Michael J. Koval, M.D. Both Mr. Field and Dr. Koval acknowledged that petitioner was unable to work in any capacity in a stressful situation at present. Mr. Field said that petitioner's prognosis was poor, but Dr. Koval stated that petitioner's anxiety and depression would improve with standard practice treatment by a mental health doctor. Based on his examination of petitioner's records, Dr. Kaul also concluded that petitioner's conditions did not meet the SERS definition of total and permanent disability.

On February 25, 2010, the Office of Retirement Services denied petitioner's application for non-duty disability retirement benefits. Petitioner appealed and a hearing was held before the State Office of Administrative Hearings and Rules. The presiding administrative law judge (ALJ) issued a proposal for decision that concluded that petitioner's application should be denied. The Board adopted the proposal for decision's recommendation and denied petitioner's request for benefits. Petitioner appealed the Board's ruling to the circuit court. The court determined that the findings and conclusions of the IMAs, on which the findings and the conclusions of the Board were based, were not supported by the record and were based on an improper legal standard. Consequently, the court reversed the Board's denial and granted petitioner's requested benefits. This Court granted respondent's application for leave to appeal.[1]

II. STANDARDS OF REVIEW

The Michigan Constitution sets forth the standard of direct judicial review of the decisions of administrative agencies as follows:

> All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record. [Const 1963, art 6, § 28.]

"'Substantial evidence' is that which a reasonable mind would accept as adequate to support a decision, being more than a scintilla, but less than a preponderance of the evidence." *VanZandt v State Employees' Retirement Sys*, 266 Mich App 579, 583-584; 701 NW2d 214 (2005). "Courts should accord due deference to administrative expertise and not invade administrative fact finding by displacing an agency's choice between two reasonably differing

[1] *Whaley v State Employees' Retirement Sys*, unpublished order of the Court of Appeals, issued June 26, 2012 (Docket No. 308613).

views." *Dignan v Mich Pub Sch Employees Retirement Bd*, 253 Mich App 571, 576; 659 NW2d 620 (2002). When we review a lower court's review of an 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." *Boyd v Civil Serv Comm*, 220 Mich App 226, 234-235; 559 NW2d 342 (1996).

III. ANALYSIS

Eligibility requirements for a non-duty disability retirement are codified in MCL 38.24(1), which provides in relevant part:

> (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 that is not the natural and proximate result of the member's performance of duty may 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 likely to be permanent, and that the member should be retired.
>
> (c) The member has been a state employee for at least 10 years.

"Totally incapacitated for further performance of duty" means that the individual cannot perform the state job from which he or she seeks retirement. *Nason v State Employees' Retirement Sys*, 290 Mich App 416, 419, 433; 801 NW2d 889 (2010).

Respondent argues that the circuit court applied incorrect legal principles and grossly misapplied the substantial evidence test when it granted petitioner's application for non-duty disability despite the fact that no Independent Medical Advisor (IMA) had certified petitioner as totally and permanently disabled. Respondent also argues that, absent a medical advisor's certification that petitioner is totally and permanently incapacitated, the Board is prohibited from exercising its discretion. As authority, respondent relies initially on *VanZandt v State Employees' Retirement Sys*, 266 Mich App 579; 701 NW2d 214 (2005) and *Monroe v State Employees' Retirement Sys*, 293 Mich App 594; 809 NW2d 453 (2011).

In *VanZandt*, this Court stated that "[t]he plain language of MCL 38.24 seemingly provides that respondent's discretion to retire petitioner does not arise unless and until the medical advisor . . . has certified that the applicant is totally and permanently incapacitated from working." *Id.* at 587. In *Monroe*, the Court quoted this interpretation of MCL 38.24 and then summarized it by stating: "Absent a medical advisor's certification that [petitioner] suffers permanent and total disability, the SERSB did not possess discretion to retire [petitioner]." *Monroe*, 293 Mich App at 609 (citing *VanZandt*). Respondent sees in this summary a

"confirmation" of the Court's "analysis" of MCL 38.24, thus implying that *Monroe* renders binding what was dictum in *VanZandt*.

Respondent's reliance on *Monroe* for support of respondent's interpretation of MCL 38.24 is misplaced. *Monroe* is not binding with regard to the Board's exercise of discretion absent a medical advisor's certification of total and permanent incapacity for two reasons. First, our comment in *Monroe* that "[a]bsent a medical advisor's certification that [petitioner] suffers permanent and total disability, the SERSB did not possess discretion to retire [petitioner]" is no less dictum than our similar comment in *VanZandt*. *Monroe*, 293 Mich App at 609; *VanZandt*, 266 Mich App at 587. In both cases this Court found it unnecessary to address the scope of the Board's discretion because we found that the Board's decisions were supported by the whole record, were not contrary to law, and were neither arbitrary, capricious, nor a clear abuse of the Board's discretion. *VanZandt*, 266 Mich App at 587-588; *Monroe*, 293 Mich App at 609. And second, the text of the statute in question (MCL 38.24) was revised in 2002, and the language on which our interpretation in *VanZandt* was based was eliminated. Further discussion of the precedential value of our interpretation of statutory language that is no longer current is irrelevant.

However, we need not decide whether the quoted language in *VanZandt* and *Monroe* binds us here, because a recent decision of this Court directly addressed the proper interpretation of MCL 38.24. *Polania v State Employees Retirement Board*, 299 Mich App 322; ___ NW2d ___ (2013). The basic facts and procedural history of *Polania* are similar to those of the present case: Petitioner applied for but was eventually denied non-duty retirement benefits under MCL 38.24 "because neither of the Retirement Services' medical advisors certified that petitioner was totally and permanently disabled." *Polania*, 299 Mich App at 326. Petitioner appealed the Board's decision to the circuit court, which reversed the Board's decision. *Id.* at 327. The Board then appealed by delayed leave granted to this Court. *Id.*

The question on appeal was whether "the circuit court had incorrectly applied the law when it determined that the Board could retire petitioner even though its medical advisors had not certified that she was totally and permanently disabled." *Polania*, 299 Mich App at 327-328. This Court concluded that, in the absence of an independent medical advisor's certification that the claimant is totally and permanently incapacitated for duty, MCL 38.24 limits the Board's discretion to grant non-duty disability retirement benefits. *Id.* at 333. The fact that neither medical advisor certified that petitioner was totally and permanently incapacitated not only prohibited the Board from exercising its discretion, it also prohibited the Board from so much as examining "the competing medical evidence to determine whether it *should* exercise its discretion." *Id.* (emphasis added).

In addressing the trial court's review of the Board's decision, this Court stated the following:

> [The court] should have reviewed the record to determine whether the Board's finding that Polania had not established the certification required under MCL 38.24(1)(b) was supported by competent, material and substantial evidence on the whole record. Given the undisputed evidence that the medical advisors had not certified that Polania was totally and permanently disabled, the trial court should

have concluded that the Board's decision was supported by the record. [*Polania*, 299 Mich App at 324.]

For these reasons, we reverse the trial court's decision, vacate its order reversing the Board's decision, and remand to the trial court for entry of an order affirming the Board's decision. We do not retain jurisdiction.

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