COURT OF APPEALS
DECISION
DATED AND FILED

October 2, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-0226 **Cir. Ct. No. 02CV002056**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

LUANN GEHIN,

PETITIONER-RESPONDENT,

V.

WISCONSIN GROUP INSURANCE BOARD,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: MORIA KRUEGER, Judge. *Reversed.*

Before Deininger, P.J., Dykman and Lundsten, JJ.

¶1 PER CURIAM. The Wisconsin Group Insurance Board appeals a circuit court order that set aside its administrative determination that Luann Gehin's income continuation insurance benefits should be terminated. The issue is whether the board properly relied on written medical reports to conclude that

Gehin was no longer totally disabled. We conclude that it did, and we therefore reverse the circuit court's decision, reinstating the board's determination.

BACKGROUND

¶2 Gehin began receiving income continuation insurance (ICI) benefits in 1993 as the result of a back injury she suffered while performing housekeeping work at the University of Wisconsin Hospital. After undergoing spinal fusion surgery, Gehin entered an on-the-job training program through the Department of Vocational Rehabilitation with placement at the Mendota Mental Health Institute. She trained in a clerical capacity at Mendota approximately 24-30 hours a week, on and off due to several extended medical leaves until 1997, and she received a positive job performance evaluation.

¶3 In 1996, the third-party administrator of the ICI program initiated a routine review of whether Gehin remained "totally disabled" within the meaning of § 5.14(3) of the ICI contract. Gehin's treating physician examined her and concluded that her condition had improved sufficiently to allow her to perform the essential duties of jobs other than her former custodial position with certain lifting and bending restrictions. He filled out additional forms over the next few months, opining that Gehin could work up to full time with lifting restrictions if she were allowed to change position for five minutes every 45-60 minutes, and that she could work up to eight hours a day with lifting restrictions in a job that allowed her to alternate between sitting and standing. Based on her treating physician's medical evaluations and Gehin's performance in the training program, the ICI administrator informed Gehin that her benefits would be terminated.

¶4 Gehin requested reconsideration. She obtained a functional capacity evaluation from a physical therapist that concluded that she did not appear to be

employable due to her inability to squat, lift, stand, walk or carry anything but negligible loads. An independent medical examiner also examined Gehin and concluded that she could work up to eight hours a day with lifting and carrying restrictions if she alternated between sitting and standing every thirty minutes. Another physician also reviewed Gehin's files and concluded that the functional capacity evaluation was invalid and inconsistent with the fact that Gehin had been on a camping trip shortly before the evaluation.

¶5 Based on these three medical reports, the administrator again denied continuation of Gehin's ICI benefits. The Department of Employee Trust Funds reviewed the file and upheld the administrator's decision. Gehin then appealed to the Wisconsin Group Insurance Board, which held a hearing on the matter.

¶6 At the hearing, Gehin presented testimony from a physician who had treated her in 1999. Based on his review of Gehin's medical records he opined that Gehin had been totally disabled, within the meaning of the ICI contract, in the spring of 1997. The department placed the three medical reports by the physical therapist and the two physicians into evidence, but did not have those doctors testify.

¶7 The hearing examiner proposed upholding the decision of the Department of Employee Trust Funds. The Wisconsin Group Insurance Board adopted the proposed decision, with certain amendments, over Gehin's objection. Gehin then sought certiorari review pursuant to WIS. STAT. § 40.08(12) (2001-02).[1] The circuit court concluded that the board could not properly rely upon

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

opinions set forth in the written medical reports because they were hearsay, and hence, that the board's determination was not supported by substantial evidence. The board appeals.

STANDARD OF REVIEW

¶8 Our certiorari review of administrative proceedings is confined to the administrative record. WIS. STAT. § 227.57(1). We will reverse only if we determine that the board acted outside of the discretion accorded to it by law, or if it otherwise acted contrary to a constitutional or statutory provision or its own rules or practice. WIS. STAT. § 227.57(8).

¶9 We may not substitute our judgment for that of the board as to the weight of the evidence on any disputed finding of fact, so long as the fact is supported by substantial evidence in the record. WIS. STAT. § 227.57(6). In addition, because the board has been charged by the legislature with administering the ICI program and has expertise in that area, we will accord its legal conclusions great deference, and we will uphold them so long as they are reasonable, even if another determination would have been more reasonable. ***Harnischfeger Corp. v. LIRC***, 196 Wis. 2d 650, 660-61, 539 N.W.2d 98 (1995).

ANALYSIS

¶10 The circuit court concluded, and Gehin argues, that the board erred in relying on the three written medical reports. Gehin relies on statements extracted from Wisconsin case law explaining that "'[m]ere uncorroborated hearsay or rumor does not constitute substantial evidence,'" ***Folding Furniture Works, Inc. v. Wisconsin Labor Relations Board***, 232 Wis. 170, 189, 285 N.W. 851 (1939) (citation omitted), and "administrative bodies should never ground

administrative findings upon uncorroborated hearsay," ***Village of Menomonee Falls v. DNR***, 140 Wis. 2d 579, 610, 412 N.W.2d 505 (Ct. App. 1987). Although the cited propositions are sound, their proposed application in this case is not.

¶11 First, the U.S. Supreme Court held in ***Richardson v. Perales***, 402 U.S. 389, 402 (1971), that medical reports may constitute substantial evidence to support an administrative evidentiary decision, even if the reports stand alone and are opposed by live testimony, where the reporting doctor could have been subpoenaed but was not. Here, Gehin was aware in advance of the hearing that the board would be relying on the three written medical reports. She thus had the opportunity to subpoena and call the authors adversely to examine them about their reports, if she believed the reports contained inaccurate statements of their opinions or wished to further examine the basis for their opinions. We conclude that there was no procedural due process impediment to the board's reliance on the reports as substantial evidence.

¶12 We are not persuaded by Gehin's assertions that it is unreasonable to assign a party the burden of compelling the appearance of a doctor or other health care provider whose report is contrary to the party's position. Rather, it is fair to assume that a party will undertake the time and expense of subpoenaing the adverse health care provider if there is some likelihood that he or she would undermine the strength of the report in some manner. If no such likelihood exists, the adverse party is not harmed by the health care provider's absence. Moreover, the opposing party (whose position is supported by the written health care record) bears the risk that a written report might be outweighed by opposing live testimony. Thus, it is not unreasonable to have a rule which allows each party to decide whether a health care provider's live testimony would add enough to his or

her case to warrant a subpoena, and to avoid unnecessary expense if the live testimony would add little beyond the written report.

¶13 Next, we do not agree with the trial court that the restrictions imposed by Wisconsin courts on hearsay evidence in administrative agency proceedings extend to recognized exceptions to the hearsay rule. *See* ***City of Superior v. DILHR***, 84 Wis. 2d 663, 672 n.6, 267 N.W.2d 637 (1978) (expressing the rule as applying to "hearsay not subject to a recognized exception"). Despite the broad language in some cases that disparages reliance on "uncorroborated hearsay" without mentioning recognized hearsay exceptions, we are aware of no Wisconsin case which has excluded hearsay evidence as a permissible basis for administrative decision-making when the hearsay fell within a statutorily enumerated exception. Such a rule would be contrary to WIS. STAT. § 227.45(1), which relaxes evidentiary rules and standards in administrative proceedings. The statute permits some evidence which would be inadmissible in court to be introduced in an administrative proceeding; it does not bar evidence that is admissible in court from being introduced in an administrative proceeding.

¶14 WISCONSIN STAT. § 908.03(6m) excludes "health care provider records" from the general prohibition against the admission of hearsay evidence. The presence of the exception is an acknowledgement of the generally reliable character of such records. The three medical reports would seem to fall within the scope of the statutory exception. We conclude that the board could not only admit the reports into evidence, but also rely upon them.

¶15 Finally, we are not persuaded that the medical reports at issue here were "uncorroborated," given that three different professionals reached essentially the same conclusion that Gehin was no longer totally disabled. The reports tended

to corroborate each other. Thus, Gehin's argument would fail even if the "uncorroborated hearsay" rule she proffers could be applied to evidence falling within a recognized hearsay exception.

¶16 In sum, we are satisfied that the medical reports were properly before the board, and that they constituted substantial evidence to support the board's decision. The trial court erred in setting the board's determination aside. We therefore reverse the trial court and reinstate the decision terminating Gehin's benefits.

By the Court.—Order reversed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5.