COURT OF APPEALS
DECISION
DATED AND FILED

December 7, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2017AP398 **Cir. Ct. No. 2016CV2018**

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

GREGORY POZARSKI,

PETITIONER-APPELLANT,

V.

WISCONSIN RETIREMENT BOARD AND DEPARTMENT OF EMPLOYEE TRUST FUNDS,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: FRANK D. REMINGTON, Judge. *Affirmed.*

Before Lundsten, P.J., Kloppenburg and Fitzpatrick, JJ.

¶1 PER CURIAM. The Wisconsin Retirement Board denied Gregory Pozarski's application for duty disability benefits as a surviving spouse, and the circuit court affirmed the Board's decision. On appeal, Pozarski argues that the Board erroneously interpreted WIS. ADMIN. CODE §§ ETF 52.07 and 52.08 (Dec. 2013)[1] when it concluded that his late wife's qualifying date for the purpose of receiving duty disability benefits was the day after her last day of work instead of the day of her death. The qualifying date matters because Pozarski is entitled to duty disability benefits as a surviving spouse only if he and his wife were married on the qualifying date, and it is undisputed that they were not yet married on the day after her last day of work. Under the circumstances here, review of an agency's interpretation of its own rules, we give the Board's interpretation controlling weight because the Board's interpretation is reasonable. Thus, we affirm the Board's interpretation and, therefore, affirm the circuit court.

BACKGROUND

¶2 The pertinent facts are few and undisputed.

¶3 Denise Waterman was a firefighter for the City of Eau Claire. Waterman last reported for duty on February 16, 2014. On March 3, 2014, Waterman was diagnosed with colon cancer. On March 28, 2014, Waterman and Pozarski, who had been "a couple" since 2001, married. On April 30, 2014, Waterman died.

[1] All references to the Wisconsin Administrative Code are to the 2013 version unless otherwise noted.

¶4 After Waterman died, the Department of Employee Trust Funds rejected Pozarski's application for duty disability benefits as a surviving spouse. The Department determined that: (1) Waterman's "qualifying date"— the date on which Waterman became disabled for the purpose of receiving duty disability benefits—was February 17, 2014, the day after Waterman last reported for duty as a firefighter; and (2) because Pozarski was not married to Waterman on her qualifying date, February 17, 2014, Pozarski was ineligible for duty disability benefits payable to a surviving spouse.

¶5 Pozarski appealed the Department's determination to the Wisconsin Retirement Board, arguing that the Department had incorrectly determined Waterman's qualifying date. The Board affirmed the Department's determination, concluding, as had the Department, that Waterman's qualifying date was February 17, 2014, the first day after her last day at work, and that Pozarski was not entitled to duty disability benefits payable to a surviving spouse because he was not married to Waterman on that date. Pozarski petitioned the circuit court for certiorari review of the Board's decision, and the circuit court affirmed. Pozarski appeals.

DISCUSSION

¶6 Pozarski challenges the Board's conclusion that, under WIS. ADMIN. CODE §§ ETF 52.07 and 52.08, Waterman's qualifying date for receiving duty disability benefits was February 17, 2014, the day after Waterman last reported for duty as a firefighter. The Board responds that its conclusion is based on a reasonable interpretation of those rules and is therefore entitled to controlling weight. As we explain, we agree with the Board.

¶7 We first address the standard of review, we then review the applicable regulatory scheme and, finally, we address the reasonableness of the Board's interpretation of the regulatory scheme.

A. *Standard of Review*

¶8 Because this is an action for certiorari review, we review the decision of the Board, not the circuit court. ***Carey v. Wisconsin Ret. Bd.***, 2007 WI App 17, ¶10, 298 Wis. 2d 373, 728 N.W.2d 22 (2006). "Our review is limited to determining whether the agency kept within its jurisdiction, applied a correct theory of law, did not act arbitrarily, and made a reasonable determination under the evidence presented." ***Id.*** Pozarski's appeal focuses on whether the Board applied a correct theory of law.

¶9 Resolution of Pozarski's appeal requires review of an administrative agency's interpretation of its own rules. In this circumstance, our review is deferential:

> This presents a question of law, and we ordinarily review questions of law de novo. However, an administrative agency's interpretation of its own rules is entitled to controlling weight unless it is "plainly erroneous or inconsistent with the regulations." The inquiry whether the agency's interpretation is plainly erroneous or inconsistent with the rule essentially asks whether the agency's interpretation is reasonable. If the agency's interpretation is reasonable, it is entitled to controlling weight even if an alternative interpretation is just as reasonable or even more reasonable. If the agency's interpretation is not reasonable, we review it de novo, without giving any deference to the agency.

Madison Gas & Elec. v. LIRC, 2011 WI App 110, ¶8, 336 Wis. 2d 197, 802 N.W.2d 502 (citations omitted). Therefore, we will grant controlling weight to the Board's interpretation of WIS. ADMIN. CODE §§ ETF 52.07 and 52.08 if it is

reasonable. As the party seeking to overturn the Board's decision, Pozarski has the burden of demonstrating that the Board's interpretation is unreasonable. ***Madison Gas & Elec.***, 336 Wis. 2d 197, ¶9.

B. *Applicable Regulatory Scheme*

¶10 We start with the statute to which the rules at issue relate. In order to receive duty disability benefits as a surviving spouse of an employee who has died, the spouse must have been married to the employee "on the date the participant was *disabled* under [WIS. STAT. § 40.65(4)]." WIS. STAT. § 40.65(7)(ar)1.a. (2015-16) (emphasis added).[2] The meaning of this statute is not in dispute. Rather, the parties dispute the meaning of related administrative code provisions, which we now set forth.

¶11 The Department has promulgated rules used to determine eligibility for duty disability benefits under WIS. STAT. § 40.65(4). *See* WIS. ADMIN. CODE § ETF 52.01. An employee is disabled within the meaning of the statute when he or she suffers a work-related injury, the injury is likely to be permanent, and that permanent injury is sufficiently severe. *See* WIS. ADMIN. CODE § ETF 52.07(1)-

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[2] The statute applies to "protective occupation" participants in the Wisconsin Retirement System. WIS. STAT. § 40.65(4). The parties do not dispute that the statute applies to Waterman because she was a firefighter. For ease of discussion, in this opinion we refer to a protective occupation participant in the Wisconsin Retirement System as an employee.

WISCONSIN STAT. § 40.65(7)(ar)1.a. allows for domestic partners to claim duty disability benefits if "the domestic partner was in a domestic partnership with the participant on the date that the participant was disabled under sub. (4)." Pozarski does not assert to this court that he and Waterman were "domestic partners" at the time Waterman became disabled.

All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

(3); *see also* WIS. STAT. § 40.65(4). This appeal concerns only the third requirement, that the permanent injury is sufficiently severe.

¶12 WISCONSIN ADMIN. CODE § ETF 52.07(3) requires that an injury must be so severe that it causes one or more of the following changes in employment: (a) the employee is medically required to terminate her employment; (b) the employer or physician assigns the employee to light duty; (c) the employer reduces the employee's pay; (d) the employer reduces the employee's position; or (e) the employer prohibits the otherwise qualified employee from promotion.

¶13 Pertinent to this appeal, a "reduction in position" occurs as follows: "Assigning a formerly full-time employee to a part-time position or reducing a part-time employee's hours is considered a reduction of position for the purposes of this chapter. An employee who never returns to work is also considered to have received a reduction in position for the purposes of this chapter." WIS. ADMIN. CODE § ETF 52.07(3)(d). Under § ETF 52.07(4), only a permanent reduction in position is sufficiently severe as to render an employee disabled. Critically, "If eligibility for duty disability benefits is based upon a reduction of pay or position or assignment to light duty, then the qualifying date is the date on which the employee *began the permanent reduction or assignmen*t." WIS. ADMIN. CODE § ETF 52.08(3) (emphasis added).

C. *Reasonableness of the Board's Interpretation of the Rules*

¶14 Reading WIS. ADMIN. CODE §§ ETF 52.07(3)(d) and 52.08(1) and (3) together, the Board concluded that the qualifying date of disability for Waterman was February 17, 2014, the day after her last day of work, because that

was the date that she began her permanent reduction in position. The Board explained its reasoning as follows:

> Waterman "never return[ed] to work" after February 16. The language of the rule[s] does not consider whether the applicant might have returned to work if things had gone differently; it simply asks whether she ever did. If she did not, it treats that date as the disability date.

¶15 Pozarski correctly notes that there is no language in WIS. ADMIN. CODE § ETF 52.07(3)(d) that expressly states on what date an employee who never returns to work is deemed to have received a permanent reduction in position. Accordingly, although WIS. ADMIN. CODE § ETF 52.08(3) provides that the qualifying date is the date the employee *began* the permanent reduction, § ETF 52.07(3)(d) does not expressly address the question of how that date is determined. The question on appeal is whether in light of this ambiguity it was reasonable for the Board to interpret the rules so as to conclude that Waterman began a permanent reduction in position the day after her last day of work.

¶16 We conclude that the Board's interpretation was reasonable in cases like this one, where all that is known is that an employee stops working because of a work-related disability and subsequently dies because of that disability. In such cases, choosing the first day the employee no longer reported for work as the date the employee began the permanent reduction in position, promotes the uniform and certain administration of the duty disability benefits program. Moreover, it was not unreasonable for the Board to pick the earliest date consistent with the purpose of the rules, which is to provide compensation for those who are no longer able to work due to a permanent work-related injury. In light of this purpose, it was reasonable for the Board to read WIS. ADMIN. CODE § 52.07(3)-(4) together with WIS. ADMIN. CODE § 52.08, to conclude that an employee who suffers an

injury and never returns to work has received a permanent reduction in position on the day after her last day of work.

¶17 Pozarski argues that even though Waterman never returned to work, the Board "inexplicabl[y]" interpreted WIS. ADMIN. CODE §§ ETF 52.07(3)(d) and 52.08(3) together to conclude that Waterman experienced a permanent reduction in position solely because she never returned to work. Specifically, in his initial brief on appeal, Pozarski argues that § ETF 52.07(3)(d) does not apply at all because it contains no explanation as to how to determine the permanent reduction date; that under § ETF 52.08(3), read in isolation, a reduction in position can only be permanent when triggered by the affirmative action of an employer or physician; and that no such action occurred here. It follows, according to Pozarski, that "When all was said and done, Waterman's employer never did reduce her in pay or position; and it made no determination to permanently do so, nor to terminate her employment ...."

¶18 Looking just to Pozarski's brief-in-chief, his argument is self-defeating. If Pozarski is correct that Waterman's position was never reduced, then it follows that she died without triggering duty disability benefits. Pozarski fails to demonstrate that Waterman experienced any of the rule's enumerated "severe" employment actions and, therefore, he cannot demonstrate that Waterman suffered a permanent work-related injury that was sufficiently severe to render her disabled prior to her death. *See* WIS. ADMIN. CODE § ETF 52.07(3) (requires that for a permanent, work-related injury to render an employee disabled the injury must be so severe that it causes one or more enumerated changes in employment); WIS. STAT. § 40.65(4). Thus, even if we were to agree with the argument set forth in Pozarski's brief-in-chief, we would nonetheless affirm the decision of the Board

because Waterman could not be considered "disabled" at any time, including when she and Pozarski were married.

¶19 In his reply brief, for the first time on appeal, Pozarski argues a new legal theory. Looking to WIS. ADMIN. CODE § ETF 52.08(2), Pozarski argues that "Waterman was 'retired' from her employment, because of her death due to a work related cancer." According to Pozarski, "[t]he date of [Waterman's] death, April 30, 2014, was her 'qualifying date'" because that was when she "was 'retired'" under § ETF 52.08(2).[3]

¶20 We reject this argument because it is made for the first time in a reply brief. *See* ***Bilda v. County of Milwaukee***, 2006 WI App 57, ¶20 n.7, 292 Wis. 2d 212, 713 N.W.2d 661 ("It is a well-established rule that we do not consider arguments raised for the first time in a reply brief.").

¶21 We also conclude that, even if we did not apply forfeiture to the argument, it lacks merit. At best, Pozarski's "death equals retirement" argument presents an alternative reasonable interpretation. The argument does not demonstrate that the Board's interpretation is unreasonable. "If the agency's interpretation is reasonable, it is entitled to controlling weight even if an alternative interpretation is just as reasonable or even more reasonable." ***Madison Gas & Elec.***, 336 Wis. 2d 197, ¶8.

[3] WISCONSIN ADMIN. CODE § ETF 52.08(2) provides: "(2) RETIREMENT. If eligibility for duty disability benefits is based upon a disability which requires the employee to retire from his or her job, the termination date is the qualifying date."

CONCLUSION

¶22 For the reasons stated, we affirm.

By the Court.—Order affirmed.

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