STATE OF MICHIGAN

COURT OF APPEALS

ANTHONY CLEVELAND, Petitioner-Appellee,	UNPUBLISHED March 29, 2011
v	No. 294852 Wayne Circuit Court
STATE EMPLOYEES RETIREMENT BOARD and STATE EMPLOYEES RETIREMENT SYSTEM, Respondents-Appellants.	LC No. 08-108468-AA

Before: JANSEN, P.J., and OWENS and SHAPIRO, JJ.

PER CURIAM.

Respondents appeal by leaved granted the circuit court's order reversing the decision of the State Employees' Retirement Board and ruling that petitioner is totally disabled. We reverse and remand.

On June 13, 2005, when petitioner was at work, his chair broke as he leaned backward. He fell and strained his neck and back. His pain worsened and changed locations – it shot down into his knees and radiated up his back to the front. He did not return to work after his injury.

Petitioner applied for duty disability retirement benefits under MCL 38.21[1] to the State Employee's Retirement Board (the Board) stating that the conditions that limited his ability to

[1] MCL 38.21 provides: "(1) Except as may be provided otherwise 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 employment. (b) The retirement board finds that the member's personal injury or disease is the natural and proximate result of the member's performance of duty. (c) A medical advisor conducts a medical examination of

work included herniated lumbar discs, diabetes and high blood pressure. He said he could not perform the walking, standing, lifting and climbing required for his job. He stated that his condition first bothered him in April of 1999.

Since his back injury 1999, petitioner was seen by multiple physicians regarding his back and the related pain, these doctors included:

1. **Jacquelyn G. Lockhart, M.D., Pain & Rehabilitative Medicine Center,** treated petitioner after his 1999 accident and through at least 2005. She opined in July of 2005 that petitioner had lumbar instability and opined that he was permanently unable to return to his past work.

2. **Jeffrey Kimpson, M.D., Director of Acute and Cancer Pain Management at Providence Hospital,** saw petitioner in May of 2000 and diagnosed lumbar radiculopathy.

3. **Dr. Edward Fuller, Concentra Medical Center**, saw petitioner on June 13, 2005, the date of his fall, and diagnosed lumbar strain and released him to work with restrictions.

4. **Dr. Montales, Concentra Medical Center**, saw petitioner on June 15, 2005, and diagnosed lumbar strain and aggravation of petitioner's preexisting back condition.

5. **David Williams, M.D., petitioner's family doctor,** diagnosed petitioner in December of 2005 with degenerative joint disease.

6. **Jeffrey Kirouac, M.D., Michigan Pain Management Consultants,** saw petitioner in December of 2005 and diagnosed lumbar radiculopathy, hypertension and diabetes.

7. **Ali Alhimiri, M.D., independent medical examiner,** saw petitioner in July of 2005 and diagnosed petitioner with diabetic peripheral polyneuropathy, osteoarthritis of the lumbar spine and chronic lower back pain. He imposed restrictions for only one month.

8. **Ralph Blasier, M.D., University Orthopedics,** saw plaintiff in December of 2005. He diagnosed degenerative disc disease and herniated disc. He recommended no heavy lifting, no repeated bending and stooping, a sit/stand option and no prolonged walking or standing. He suggested vocational rehabilitation.

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the member and certifies in writing that the member is mentally or physically totally incapacitated for further performance of duty, that the total incapacitation is probably permanent, and that the member should be retired. (d) The retirement board concurs in the recommendation of the medical advisor."

9. Cynthia Shelby-Lane, M.D., Internal Medicine, Sierra Medical Group, saw plaintiff in June of 2006. She diagnosed a history of herniated disc in the lumbar spine, diabetes and hypertension. She stated that petitioner was able to stand, bend, stoop, carry, push, pull, squat and climb stairs.

10. David Mika, Internal Medicine, was the independent medical advisor. After reviewing petitioner's medical records, he concluded in July of 2006 that petitioner was not totally and permanently disabled. He opined that petitioner had degenerative joint disease from at least 1999, but petitioner improved under conservative treatment. In April of 2007, Dr. Mika opined that, with additional information, his opinion did not change. He found an aggravation of preexisting, non-work related conditions.

The record reflects a division in the doctors' opinions regarding plaintiff's disability. Dr. Lockhart found petitioner to be totally disabled. Dr. Blasier, while not making that express finding, indicated that petitioner should consider vocational rehabilitation, which strongly suggests that he believed petitioner was disabled. On the other hand, Drs. Fuller, Montales, Alhimiri, Shelby-Lane and Mika did not find petitioner to be disabled.

In terms of diagnoses, the doctors' opinions varied as well. Kimpson diagnosed lumbar radiculopathy, as did Kirouac. Lockhart diagnosed lumber instability. Fuller and Montales believed petitioner had lumbar strain. Blasier diagnosed degenerative disc disease with herniated disc. Shelby-Lane also diagnosed a history of herniated disc, while Mika and Williams diagnosed degenerative joint disease. Alhimiri diagnosed osteoarthritis. Although there appears to be no dispute that petitioner has issues with his back, the extent of his disability and how much it related to his job are disputed.

The Board noted that petitioner had to prove by a preponderance of the evidence that he was totally incapacitated. For a duty disability retirement, petitioner had to prove that his disability was the natural and proximate result of his state job, i.e., the June of 2005 fall at work. The Board ruled that petitioner had not made that showing. Petitioner appealed to the circuit court, which reversed the decision of the Board, concluding that its decision was "arbitrary and illogical."

In reviewing an agency's decision, the 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 and capricious, was clearly an abuse of discretion, or was otherwise affected by substantial and material error of law." *Dignan v Michigan Pub School Employees Retirement Bd*, 253 Mich App 571, 576; 659 NW2d 629 (2002). That standard

conforms to the Administrative Procedure Act's recitation of the limited grounds for reversal of an agency's decision.[2]

This Court reviews a circuit court's review of an agency decision under the clearly erroneous standard. *Id*. at 575. Therefore, we consider whether the circuit court "applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings." *Id.* (citation omitted).

The circuit court ruled that the Board "arbitrarily ignored Dr. Lockhart's evidence that in fact Appellant did work with limitations prior to the 2005 chair incident but not after." We disagree with this statement, where the Board's opinion clearly reflected petitioner's work history after his 1999 accident through the 2005 fall, and included opinions from doctors who examined petitioner after his 2005 fall.

The court then stated that the Board focused on the petition for benefits and not the evidence. Unlike the circuit court, we agree that it is important to note what precisely petitioner identified as his disability in his actual application for benefits. Petitioner identified his 1999 injury, not his June of 2005 fall. Accordingly, the Board correctly observed petitioner's condition after the initial injury in 1999, as well as after his fall in 2005.

The circuit court added that the Board "irresponsibly failed to cite . . . [that Dr. Blasier] restricted [petitioner] from walking, standing, climbing stairs, lifting, bending, stooping and crouching." This is clear error, for the Board expressly noted that "Dr. Blasier recommended no heavy lifting, no repeated bending and stooping, a sit/stand option and that Petitioner be precluded from prolonged walking or prolonged standing."

The circuit court also failed to acknowledge that the Board had before it two distinct views regarding petitioner's injuries, both of which were reasonable. On the one hand, Lockhart and Blasier found petitioner to be disabled; on the other hand, Alhimiri, Shelby-Lane and Mika did not find petitioner to be disabled. Thus, the circuit court should not have invaded the Board's fact finding by displacing its choice between two reasonably differing views. See *Dignan*, 253 Mich App at 576. In other words, "[w]hen there is sufficient evidence, a reviewing court may not substitute its discretion for that of the administrative tribunal even if the court might have reached a different result." *In re Kurzyniec Estate*, 207 Mich App 531, 537; 526 NW2d 191 (1994).

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[2] MCL 24.306(1) provides: "Except when a statute or the constitution provides for a different scope of review, the court shall hold unlawful and set aside a decision or order of an agency if substantial rights of the petitioner have been prejudiced because the decision or order is any of the following: (a) In violation of the constitution or a statute. (b) In excess of the statutory authority or jurisdiction of the agency. (c) Made upon unlawful procedure resulting in material prejudice to a party. (d) Not supported by competent, material and substantial evidence on the whole record. (e) Arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion. (f) Affected by other substantial and material error of law."

Petitioner suggests that the Board erred in considering his condition before his 2005 fall. But petitioner's application for benefits refers to his back condition beginning in 1999, and does not reference the 2005 fall. Under those circumstances, we cannot conclude that the Board erred in considering petitioner's condition, job duties and restrictions both before and after the fall. This is particularly true when several of the physicians opined that the 2005 fall was an aggravation of petitioner's preexisting condition.

We decline to give credence to petitioner's argument that the circuit court's order reversed the order of the State Employees' Retirement "System" rather than the Board. Where the circuit court's jurisdiction is invoked by final orders from the Board, see MCL 24.301,[3] the reference to the "System" appears to have been merely a clerical error. The circuit court's failure to distinguish between duty and non-duty disability benefits[4] does not appear to be form over substance, as petitioner argues.

Respondent also requests that this Court review whether the Board has the discretion to award benefits where the independent medical advisor (IMA) does not find disability. We find that it is unnecessary for us to address this issue because the circuit court's findings were clearly erroneous. *Id*.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Donald S. Owens

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[3] That section provides, in pertinent part: "When a person has exhausted all administrative remedies available within an agency, and is aggrieved by a final decision or order in a contested case, whether such decision or order is affirmative or negative in form, the decision or order is subject to direct review by the courts as provided by law."

[4] See MCL 38.24.

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SHAPIRO, J. (*dissenting*).

I respectfully dissent as I do not believe the trial court committed clear error in its review of the administrative agency decision.

This is a challenging appeal to analyze given the standards of review at play. Having reviewed the administrative agency record, I would conclude that the evidence weighed heavily in favor of a finding of disability and, had I been sitting on the agency, would have voted to grant the petitioner's request. However, had I been sitting as the circuit court, applying the very low standard of review applicable, I would have seen it as a close question, but would have affirmed the agency decision. We are not, however, deciding whether petitioner is disabled (the role of the agency), or whether the agency decision had a substantial evidentiary basis (the role of the circuit court). We are only reviewing the circuit court's determination of the question it faced and we must affirm the circuit court unless it applied incorrect legal principles or "misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings." *Dignan v Mich Pub Sch Employees Retirement Bd*, 253 Mich App 571, 575; 659 NW2d 629 (2002) (internal quotation and citation omitted).

In answer to that question, I cannot conclude that the trial court clearly erred in reversing the agency. The trial court's criticism of the agency's failure to fully take into account Dr. Blasier's opinion, as well as the agency's failure to give sufficient weight to the opinions of the physician who had treated petitioner for many years, were well-taken. Moreover, the agency seemed to give almost no weight to the objective MRI findings of multiple disc herniations and the testimony of the petitioner.

I respectfully suggest that the majority is substituting its judgment for that of the circuit court as the reviewer of the agency decision. As already noted, were that our role, I would join the majority opinion. However, since our review is of the circuit court, it is governed by the clear error standard and, since the question before the circuit court was close, I would affirm.

/s/ Douglas B. Shapiro