

STATE OF MICHIGAN
COURT OF APPEALS

MARTA A. SCRUGGS,

Petitioner-Appellee,

v

STATE EMPLOYEES RETIREMENT BOARD,

Respondent-Appellant.

UNPUBLISHED

July 20, 2006

No. 259788

Oakland Circuit Court

LC No. 04-057646-AA

Before: Fitzgerald, P.J., and Saad and Cooper, JJ.

PER CURIAM.

Respondent State Employees Retirement Board appeals by leave granted a circuit court order holding that the Retirement Board abused its discretion when it denied petitioner's request for non-duty disability retirement benefits and remanding the matter to the Retirement Board for an independent medical examination. We reverse.

Petitioner slipped and fell while shopping at a store in July 1999. She filed an application for non-duty disability retirement benefits, alleging that she was permanently disabled because of pain. The Retirement Board denied her application. Petitioner appealed the Retirement Board's decision to the circuit court.

The circuit court's review of an agency decision is limited. A final agency decision is subject to court review but it must generally be upheld if it is not contrary to law, is not arbitrary, capricious, or a clear abuse of discretion and is supported by competent, material and substantial evidence on the whole record. Const 1963, art 6 § 28[.] *VanZandt v State Employees Retirement Sys*, 266 Mich App 579, 583; 701 NW2d 214 (2005). Substantial evidence is "more than a mere scintilla but less than a preponderance of the evidence." *In re Kurzyniec Estate*, 207 Mich App 531, 537; 526 NW2d 191 (1994). "When 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." *Id.* Further, the court may not direct the manner in which an agency exercises its discretion. *VanZandt, supra* at 585.

At the time petitioner applied for non-duty disability retirement, MCL 38.24 provided:

Subject to the provision in sections 33 and 34, upon application of a member, or his department head, or the state personnel director, a member who has been a state employee at least 10 years becomes totally and permanently

incapacitated for duty as the result of causes occurring not in the performance of duty to the state, may be retired by the retirement board: Provided, The medical advisor after a medical examination of such member, shall certify that such member is mentally or physically incapacitated for the further performance of duty, and such incapacity is likely to be permanent and that such member should be retired.

The statute gives respondent the discretion to retire petitioner, but that discretion “does not arise unless and until the medical advisor . . . has certified that the applicant is totally and permanently incapacitated from working.” *VanZandt, supra* at 587.

In this case, the circuit court was troubled by the fact that, in its view, the evidence was not “definitive” with respect to whether petitioner could physically work. Dr. Usha Gupta conducted an independent medical examination on the records. Dr. Gupta concluded that petitioner’s condition was not totally or permanently disabling and that she was capable of returning to work. The court discounted Dr. Gupta’s findings because she did not personally examine petitioner and remanded the matter for “an independent medical examination of Petitioner with a definitive statement.”

The circuit court exceeded its authority when it determined that further tests and another medical examination were necessary before the Retirement Board properly could decide petitioner’s application for non-duty disability retirement benefits. The circuit court’s authority was limited to determining whether the Retirement Board’s decision was supported by competent, material, and substantial evidence on the whole record. The Retirement Board concluded that petitioner failed to satisfy her burden of proving entitlement to benefits. The evidence presented to the Retirement Board revealed several physicians examined the petitioner. Although she complained of pain, none of her doctors reported that petitioner was totally and permanently incapacitated from work. A functional capacity evaluation showed that petitioner could return to work, at least on a part-time basis. A doctor appointed by the state also examined petitioner, and Dr. Gupta reviewed all of petitioner’s medical records before concluding that petitioner was not totally and permanently disabled and was capable of returning to work. The Retirement Board’s decision that petitioner was not entitled to retirement benefits is supported by more than a mere scintilla of competent, material, and substantial evidence on the whole record. *VanZandt, supra* at 583; *In re Kurzyniec Estate, supra* at 537.

The circuit court also erred to the extent that it determined that the Retirement Board’s decision was procedurally flawed for failure to comply with MCL 38.24, causing the court to remand the case for “an independent medical examination of Petitioner with a definitive statement.” Under MCL 38.24, upon application for disability retirement benefits, “[t]he medical advisor after a medical examination of such member, shall certify that such member is mentally or physically incapacitated for the further performance of duty, and such incapacity is likely to be permanent and that such member should be retired.” In this case, in response to petitioner’s application for disability retirement benefits, the State Employees’ Retirement System implemented Board Policy Determination No. 6, whereby Dr. Jack Kaufman was appointed to personally examine petitioner, and he then provided his findings to Dr. Gupta, who issued an advisory opinion whether petitioner was permanently incapacitated and capable of working. This procedure comports with MCL 38.24. There was a medical examination, there

was a review by a medical advisor, and the advisor issued an advisory opinion whether petitioner was disabled.

For these reasons, we reverse the circuit court's decision. The Retirement Board's decision is affirmed.¹

Reversed.

/s/ E. Thomas Fitzgerald
/s/ Henry William Saad
/s/ Jessica R. Cooper

¹ We decline to address petitioner's argument that the Retirement Board was biased because respondent was represented by the attorney general, and because MCL 38.3(1)(a) provides that "the retirement board shall consist of 9 members," one of whom shall be "the attorney general." Petitioner did not raise this issue below and, therefore, it is not preserved. *Attorney Gen v Pub Service Comm*, 174 Mich App 161, 164; 435 NW2d 752 (1988). More significantly, petitioner has not filed a cross appeal. Although an appellee may urge alternative grounds for affirmance without filing a cross appeal, an appellee may not seek to "obtain a decision more favorable than that rendered by the lower tribunal." *In re Herbach Estate*, 230 Mich App 276, 284; 583 NW2d 541 (1998). Here, petitioner requests as relief that the presence of a representative of the attorney general on the Retirement Board "be declared unconstitutional." Because this request exceeds the scope of relief obtained below, petitioner was required to file a cross appeal in order to raise this issue.