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Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1856**

In the Matter of the Fact-Finding Conference
Regarding the Application for Permanent and
Total Disability Benefits for William Klabunder

**Filed August 24, 2010
Affirmed
Minge, Judge**

Public Employees Retirement Association of Minnesota
File No. 8-3600-20096-5

William L. Klabunder, West St. Paul, Minnesota (pro se relator)

Lori Swanson, Attorney General, Rory H. Foley, Assistant Attorney General, St. Paul,
Minnesota (for respondent)

Considered and decided by Toussaint, Chief Judge; Klaphake, Judge; and Minge,
Judge.

UNPUBLISHED OPINION

MINGE, Judge

Relator challenges the determination by a pension board denying disability
benefits based on the finding that relator is not totally and permanently disabled. We
affirm.

FACTS

In May 2006, relator William Klabunder injured his shoulder while operating a
large hose in his job as a street worker for the City of St. Paul. Klabunder had worked for

the city since 1999. In November 2006, following the expiration of his medical and vacation leave, Klabunder terminated his employment with the city. Since then, his employment has been limited to delivering dental products one hour per day.

Following the injury, multiple examinations and an MRI revealed tendinitis but no tearing in Klabunder's shoulder. Klabunder's treating physicians concluded that the condition required restrictions on lifting, pulling, and overhead movement. The city paid workers' compensation benefits to Klabunder until December 2006, when it settled his claim. Klabunder also applied for and received federal disability-insurance benefits (SSDI) from the Social Security Administration (SSA).

In July 2008, Klabunder applied for disability benefits through the state Public Employees Retirement Association (PERA).¹ In support of Klabunder's application, an occupational-medicine specialist completed a medical-information form that reiterated Klabunder's lifting restrictions but did not check a yes/no box to indicate whether Klabunder is "totally and permanently disabled from engaging in any substantial gainful activity." Three consultants for PERA reviewed Klabunder's records, concluding that his condition did not constitute a total and permanent disability. In November 2008, PERA staff denied Klabunder's application. Klabunder appealed to PERA's board of trustees, who referred the matter to an administrative law judge (ALJ).

¹ The filing came two years after the injury because Klabunder originally applied for PERA retirement benefits. Although a retirement-benefit application typically precludes an application for disability benefits, the legislature passed and the governor signed a law in May 2008 specifically granting Klabunder the opportunity to withdraw his application for retirement benefits and apply for disability benefits. *See* 2008 Minn. Laws. ch. 349, art. 16, § 2.

The ALJ proceeding was based on a written record. Klabunder submitted letters from a physician's assistant and psychologist stating that since June 2006 he had been undergoing treatment for depression and antisocial-personality disorder. An orthopedic surgeon, one of Klabunder's treating physicians, wrote a letter to PERA stating that, although Klabunder could possibly work "from an orthopedic point of view," it would be "in everybody's best interest" to grant him benefits due to his mental condition. A PERA consultant reviewed these letters, noted that none stated that Klabunder was incapable of substantial gainful activity, and recommended denial of benefits. The ALJ found that, as of his November 2006 separation with the city, Klabunder was "able to undertake substantial work activity" and recommended that Klabunder be denied disability benefits.

The PERA board reviewed the ALJ's record and recommendation. At a June 2009 PERA board meeting, Klabunder submitted a psychiatrist's report describing his depression and antisocial disorder. The report was on a PERA form that asked for a "yes" or "no" conclusion whether Klabunder is "totally and permanently disabled from engaging in any substantial gainful activity." The psychiatrist checked "no." A PERA consultant considered the newly submitted psychiatrist report and recommended that Klabunder be denied benefits. In August 2009, the board accepted the ALJ's findings and denied Klabunder's petition for disability benefits. Klabunder appeals by writ of certiorari.

DECISION

The issue on appeal is whether the PERA decision denying benefits is supported by substantial evidence in the record. PERA is a public-employee pension fund governed

by Minn. Stat. ch. 353 (2008). The board is entrusted to administer the fund, which includes the collection and disbursement of payments to members. Minn. Stat. § 353.03, subds. 1, 3 (2008).

For purposes of judicial review, the board is analogous to an administrative agency. *Axelson v. Minneapolis Teachers' Ret. Fund Ass'n*, 544 N.W.2d 297, 299 (Minn. 1996). We reverse the quasi-judicial decision of an agency if it is “fraudulent, arbitrary, unreasonable, unsupported by substantial evidence, not within [the agency’s] jurisdiction, or based on an error of law.” *Id.* (quotation omitted). We presume that the board acted correctly and defer to it in its areas of expertise. *Rosinski v. Teachers Ret. Ass'n Bd. of Trustees*, 495 N.W.2d 14, 16 (Minn. App. 1993). But when reviewing legal questions we need not defer. *St. Otto's Home v. Minn. Dep't of Human Servs.*, 437 N.W.2d 35, 39-40 (Minn. 1989); *see In re PERA Police & Fire Plan Line of Duty Disability Benefits of Brittain*, 724 N.W.2d 512, 516 (Minn. 2006) (reviewing de novo PERA decision regarding statutory interpretation).

PERA-covered employees with at least three years of service receive disability benefits if they have a total and permanent disability before retirement age. Minn. Stat. § 353.33, subd. 1 (2008). “Total and permanent disability” is “the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to [exist for at least one year].” Minn. Stat. § 353.01, subd. 19 (2008). To receive benefits, an applicant must submit two reports from licensed medical professionals—each showing the requisite disability and that the disability arose before the termination of employment. Minn. Stat. § 353.031, subd. 3

(2008). The applicant has the burden to prove that the statute's requirements are met. *Id.*, subd. 8.

Klabunder's pro se brief basically argues that the PERA board's finding that he is capable of performing substantial gainful activity is arbitrary and capricious and that the denial of benefits is not supported by substantial evidence. A decision is arbitrary and capricious if it represents an agency's will rather than its judgment. *Mammenga v. State Dep't of Human Servs.*, 442 N.W.2d 786, 789 (Minn. 1989). A decision is supported by substantial evidence if there is (1) relevant evidence that a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some or any evidence; and (4) evidence considered in its entirety. *Cable Commc'ns. Bd. v. Nor-West Cable Commc'ns. P'ship*, 356 N.W.2d 658, 668 (Minn. 1984).

The ALJ's conclusions, which were adopted by the PERA board, were based on findings that (a) none of Klabunder's examining physicians stated that Klabunder could not engage in "substantial gainful activity"; and (b) Klabunder was capable of more than part-time employment. Our review of the record and the multiple medical reports on file shows that these findings are supported by substantial evidence.² Although physicians

² In previous decisions this court has affirmed PERA's determinations of ineligibility based on applicants' actual full- or part-time employment at the time of the determination. In this case, however, the decision was based on Klabunder's *potential* for employment. This is permissible because the statute focuses on the applicant's abilities to perform substantial gainful activity. See Minn. Stat. § 353.01, subd. 19. Although the determination was based on Klabunder's capacity to work hypothetical jobs, nothing in the record indicates that Klabunder does not have a realistic chance (i.e., an "[a]bility") of sustainable, gainful employment (i.e., "substantial gainful ability"). *Id.* (defining "total and permanent disability"); cf. *McMillian v. Schweiker*, 697 F.2d 215, 220-21 (8th Cir. 1983) (holding that, for hypothetical work to be the basis for an SSDI-

and other health professionals placed restrictions on Klabunder's work abilities, they never concluded that he was prevented from working. It is most notable that of the two examining physicians, one declined to answer whether Klabunder was incapable of substantial gainful activity and the other answered "no." Because one of these doctors was an orthopedic specialist and the other was a psychiatrist, both Klabunder's physical and psychological condition were accounted for. Klabunder points to the orthopedist's statement that, because of Klabunder's antisocial behavior, it would be "in everybody's best interest" to grant him benefits. But this is not a clear statement demonstrating a "total and permanent disability" sufficient for us to find error in the ALJ's findings. As the ALJ noted, "everybody's best interest" is not the standard; total and permanent disability is. *See* Minn. Stat. § 353.33, subd. 1.

Based on this record, we conclude that there is substantial evidence supporting the board's determination and that the determination is not arbitrary and capricious. Accordingly, we find no error in the board's determination that Klabunder is ineligible for PERA disability benefits.

Affirmed.

benefits denial, the other work must be "*realistically* within the physical and mental capabilities of the claimant").