SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0029-15T4

S.A.,

Appellant,

v.

PUBLIC EMPLOYEES' RETIREMENT SYSTEM,

Respondent.

Argued December 20, 2016 – Decided May 3, 2017

Before Judges Koblitz and Sumners.

On appeal from the Board of Trustees, Public Employees' Retirement System, PERS No. 2-1088162.

Samuel M. Gaylord, argued the cause for appellant (Gaylord Popp, L.L.C., attorneys; Mr. Gaylord, on the brief).

Robert S. Garrison, Jr., Deputy Attorney General, argued the cause for respondent (Christopher S. Porrino, Attorney General, attorney; Melissa Dutton Schaffer, Assistant Attorney General, of counsel; Mr. Garrison, on the brief).

PER CURIAM

Petitioner S.A.[1] appeals from the final agency decision of the Board of Trustees (the Board), Public Employment Retirement System (PERS), denying her application for ordinary retirement disability benefits, N.J.S.A. 43:15A-42. We affirm.

I.

We discern the following facts and procedural history from the record on appeal.

In 1999, S.A. was hired by the New Jersey Housing and Mortgage Finance Agency as an administrative assistant. In 2001, she transferred to the Juvenile Justice Commission (JCC). S.A. retired from state employment on June 1, 2011. About a week later, she applied for accidental disability retirement benefits. When her application was denied, she appealed and the matter was transferred to the Office of Administrative Law (OAL) for a contested hearing. Prior to her hearing, she amended her application to seek ordinary disability retirement. An administrative law judge (ALJ) heard testimony on three hearing days in August 2014, November 2014, and January 2015.

At the time of her retirement, S.A. testified that her duties consisted of making and answering telephone calls, data entry, copying, filing, and mailing documents. She indicated that she

[1] Because plaintiff was a victim of sexual harassment, we use initials to protect her privacy.

sustained injuries to her back, knees, and left shoulder due to car accidents in 2000 or 2001 and 2008, which caused her to miss significant time from work.

S.A.'s testimony also addressed her mental health issues. Starting in 2004 and continuing until approximately 2013, she received psychiatric treatment and was prescribed medication from Dr. Gail Kase for depression and anger management.

S.A. testified that in 2009, a male co-worker verbally and physically sexually harassed her at her workstation and over the phone. She contended he made inappropriate comments about oral sex, left love notes on her desk, and asked her to have sexual intercourse with him. She indicated that on various occasions he would brush his crotch on her breasts, and pull the back of her pants to observe the color of her undergarments. She revealed that she did not initially report the harassment for fear of causing a controversy. S.A. claimed that she later tried to tell her female supervisor but "[she didn't] want to hear it[,]" because "[she] was a real asshole."

S.A. stated that she had a mental breakdown on May 10, 2010, after telling a union representative that a co-worker was sexually harassing her. She was sent home after being examined by a JCC nurse. A day later, Dr. Kase placed S.A. on medical leave from

work for approximately one month and prescribed her medication for sleeplessness and anxiety.

Upon return to work, S.A. was assigned to a different building so that she would not have regular contact with her alleged harasser. She, however, still felt anxiety because she would occasionally see him at work, which would cause her to "go in the bathroom and throw up[.]" According to S.A., despite the new work location, she was not able to fulfill her job duties because she "had so much anxiety and so much fear," that she "can't be in groups of people[,]" and would "lash out[]" as a result of the harassment. She also testified that she had difficulty concentrating and experienced pain in her legs.

S.A. worked for several more weeks until she took another leave on June 28, 2010, after an investigation by the State Attorney General's Office substantiated her claim of sexual harassment. Her last day at work was May 31, 2011.

The parties relied on medical reports and testimony from their respective experts. S.A. was examined by Victor J. Nitti, Ph.D., her expert, and Richard A. Filippone, Ph.D., the Board's expert. Both experts relied on medical reports and psychological evaluations prepared by Drs. Kase, Edward Tobe, and David Scasta.

Dr. Nitti concurred with Dr. Kase's opinion that S.A. was disabled in performing her job duties, and she could not continue

to work until she regained psychological stability. He disagreed with Dr. Scasta's opinion that S.A. suffered from borderline personality disorder. In contrast, Dr. Nitti opined that S.A. did not exhibit the stable set of traits that interfered with social functioning because she had a history of getting along socially with others in the past. He believed that based upon S.A.'s symptoms of sleep disturbance, nightmares regarding her harasser, fear of leaving her home, and anxiety at night, she suffered from post-traumatic stress disorder (PTSD) caused by the workplace sexual harassment. He stated that her existing mental illness was exacerbated because of the harassment.

Dr. Nitti testified that S.A. could not return to work and that she was totally and permanently psychologically disabled because her work duties "require[] that she interact with other people and . . . [S.A.] would have great difficulty doing that without it impacting her level of functioning, her concentration, her attention, [and] cognitive function[.]"

Dr. Filippone found that there was nothing from his evaluation that would indicate that S.A. was not able to go back to work if she had the appropriate interventions and guidance. He stated that S.A. is able to leave and maintain her home, shop, care for her children, and have a relationship with a male romantic partner. Dr. Filippone concluded that S.A. was not totally and permanently

disabled from working within the scope of her job duties for her state employment, but actually chose not to work.

The ALJ issued his initial decision on June 11, 2015. He found that S.A. did not meet her burden of proof that she is permanently and totally disabled, and denied her application for accidental disability retirement, rather than her amended request for ordinary disability retirement benefits. He found Dr. Filippone's opinion more persuasive regarding S.A.'s ability to perform her work duties. Specifically, the ALJ noted that Dr. Nitti's opinion that S.A. was totally and permanently disabled was unpersuasive because "[i]nefficiency, irritability, and the possibility of making mistakes does not equal to an inability to perform a job." Further, the ALJ found that S.A. demonstrated the "ability for restricted work, and she demonstrated [an] ability for her essential job duties as set forth in her job description." Moreover, her expert and past psychological evaluations "did not affirmatively find that [S.A.] could never work again in any location."

The ALJ discredited S.A.'s argument that Dr. Nitti's psychological objective testing be given greater weight by finding that Dr. Nitti's results revealed, "no inability-to-work deficiency existed." Instead, he found Dr. Filippone's opinion was supported by S.A.'s testimony that she was able to complete

daily chores around her home, have a romantic relationship, and care for her six-year old child.

After considering the exhibits, the ALJ's initial decision as well as S.A.'s exceptions, the Board adopted the ALJ's recommendation on July 16, 2015. This appeal ensued.

Following argument, we issued a sua sponte order on March 28, 2017, remanding the matter to the Board "to reconsider its July 16, 2015 final agency decision by fully considering petitioner's amended application seeking ordinary disability retirement, and not accidental disability retirement as she initially requested." On April 19, 2017, the Board, after reconsidering the same record it did in rendering its earlier final agency decision, adopted the ALJ's findings of fact, and found that S.A. "is not eligible for [o]rdinary [d]isability retirement benefits." In doing so, the Board noted "[t]he standard for total and permanent disability is identical for [a]ccidental and [o]rdinary [d]isability retirement benefits," and "[S.A.] failed to prove that she is totally and permanently disabled from her regular and assigned job duties."

II.

On appeal, S.A. contends that the ALJ's finding that she is not totally and permanently disabled is arbitrary, capricious, and unreasonable because it is not supported by the record. She argues that she has met her burden of proof in establishing that she is

totally and permanently disabled from performing her regular and assigned work duties. She cites inconsistencies in the ALJ's weighing of experts' opinions and her past evaluations. We disagree.

Our scope of review of an agency decision is limited. In re Stallworth, 208 N.J. 182, 194 (2011) (citing Henry v. Rahway State Prison, 81 N.J. 571, 579 (1980)). We accord substantial deference to the agency's interpretation of a statute it is charged with enforcing. Bd. of Educ. of Neptune v. Neptune Twp. Educ. Ass'n, 144 N.J. 16, 31 (1996) (citing Merin v. Maglaki, 126 N.J. 430, 434-37 (1992)). The burden of showing the agency's action was arbitrary, unreasonable, or capricious rests upon the appellant. Barone v. Dep't of Human Servs., Div. of Med. Assistance & Health Servs., 210 N.J. Super. 276, 285 (App. Div. 1986), aff'd, 107 N.J. 355 (1987).

Absent arbitrary, unreasonable, or capricious action, or a lack of support in the record, "[a]n administrative agency's final quasi-judicial decision will be sustained . . . ." In re Herrmann, 192 N.J. 19, 27-28 (2007) (citing Campbell v. Dep't of Civil Serv., 39 N.J. 556, 562 (1963)). The court "may not vacate an agency determination because of doubts as to its wisdom or because the record may support more than one result," but is "obliged to give due deference to the view of those charged with the responsibility

of implementing legislative programs." In re N.J. Pinelands Comm'n Resolution PC4-00-89, 356 N.J. Super. 363, 372 (App. Div.), certif. denied, 176 N.J. 281 (2003).

In reviewing administrative adjudications, an appellate court must undertake a "careful and principled consideration of the agency record and findings." Riverside Gen. Hosp. v. N.J. Hosp. Rate Setting Comm'n, 98 N.J. 458, 468 (1985) (citing Mayflower Sec. Co. v. Bureau of Sec. in Div. of Consumer Affairs of Dep't of Law & Public Safety, 64 N.J. 85, 93 (1973)). "If the Appellate Division is satisfied after its review that the evidence and the inferences to be drawn therefrom support the agency head's decision, then it must affirm even if the court feels that it would have reached a different result itself." Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 588 (1988). If, however, our review of the record leads us to conclude that the agency's finding is clearly erroneous, the decision is not entitled to judicial deference and must be set aside. L.M. v. Div. of Med. Assistance & Health Servs., 140 N.J. 480, 490 (1995). We may not simply rubber stamp an agency's decision. In re Taylor, 158 N.J. 644, 657 (1999).

In order to qualify for ordinary disability retirement benefits under N.J.S.A. 43:15A-42, a member of PERS must establish by a preponderance of the credible evidence that he or she is

"physically or mentally incapacitated for the performance of duty and should be retired." The member must establish an incapacity to perform duties in the general area of his or her regular employment, rather than merely showing an inability to perform his or her specific job. Bueno v. Board of Trustees, Teachers' Pension & Annuity Fund, Div. of Pensions and Benefits, 404 N.J. Super. 119, 130-31 (App. Div. 2008), certif. denied, 199 N.J. 540 (2009).

Having reviewed the record on appeal, we are satisfied that S.A. has failed to demonstrate that the Board's decision, based upon its adoption of the ALJ's initial decision, is arbitrary, capricious, or unreasonable, or that it was not supported by substantial credible evidence in the record. We find no error, as S.A. contends, in the ALJ's finding that Dr. Filippone's opinion was more credible than Dr. Nitti's opinion. The ALJ heard them testify, and had the opportunity to review their respective reports. We are also convinced there is substantial support in the record for the decision. The ALJ engaged in a detailed discussion and evaluation of the medical evidence in reaching the determination that S.A. is ineligible for ordinary disability retirement benefits because she is not totally and permanently disabled from performing her job duties.

Affirmed.