SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4852-15T1

DANIEL DELVALLE,

Petitioner-Appellant,

V.

BOARD OF TRUSTEES,
POLICE AND FIREMEN'S
RETIREMENT SYSTEM,

Respondent-Respondent.

Argued October 24, 2017 – Decided December 13, 2017

Before Judges Sumners and Moynihan.

On appeal from Board of Trustees, Police and Firemen's Retirement System, Docket No. 3-99307.

John D. Feeley argued the cause for appellant (Feeley & LaRocca, LLC, attorneys; Pablo N. Blanco, of counsel and on the brief).

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

PER CURIAM

Petitioner Daniel Del Valle[1] appeals from the final agency decision of the Board of Trustees, Police and Firemen's Retirement System (the Board), denying his application for ordinary disability retirement benefits. The Board adopted the initial decision rendered by Administrative Law Judge Gail M. Cookson, after hearing testimony over four days.

On appeal, petitioner argues that the Board's decision should be reversed because he proved that he is physically incapable of performing the duties of a sheriff's officer — a position he held for nine years with the County of Passaic — and because the administrative law judge erred by denying his request to amend his pension application to include an injury to his shoulder which was not mentioned in his application for disability retirement.

The scope of our review of a final administrative agency decision is limited. In re Taylor, 158 N.J. 644, 656 (1999). Generally, we "defer to the specialized or technical expertise of the agency charged with administration of a regulatory system." In re Application of Virtua-West Jersey Hosp. Voorhees for a Certificate of Need, 194 N.J. 413, 422 (2008). Accordingly, "an appellate court ordinarily should not disturb an administrative

[1] Petitioner's name is variously spelled "Delvalle" and "Del Valle" in the pleadings and documents that comprise the record. We use the spelling contained in the petitioner's original pension enrollment application which appears to be in his handwriting.

agency's determinations or findings unless there is a clear showing that (1) the agency did not follow the law; (2) the decision was arbitrary, capricious, or unreasonable; or (3) the decision was not supported by substantial evidence." Ibid. "The burden of demonstrating that the agency's action was arbitrary, capricious or unreasonable rests upon the [party] challenging the administrative action." In re Arenas, 385 N.J. Super. 440, 443-44 (App. Div. 2006); see also McGowan v. N.J. State Parole Bd., 347 N.J. Super. 544, 563 (App. Div. 2002); Barone v. Dep't of Human Servs., 210 N.J. Super. 276, 285 (App. Div. 1986), aff'd, 107 N.J. 355 (1987).

We affirm substantially for the reasons set forth by Judge Cookson in her written decision of April 13, 2016 — which was adopted by the Board — and in her order of February 3, 2016, denying petitioner's motion to amend.

Petitioner contends the judge did not give proper weight to Dr. Jerald P. Vizzone's testimony because she did not recognize him as one of petitioner's treating physicians. Judge Cookson recognized that a treating physician's testimony should be accorded more weight than an evaluating physician if the medical evidence is in conflict. Bialko v. H. Baker Milk Co., 38 N.J. Super. 169, 171-72 (App. Div. 1955). Notwithstanding that Dr. Vizzone prescribed anti-inflammatory medication, ordered tests,

administered one epidural steroid injection to petitioner, and discussed further injections and surgical options with him, the judge correctly noted that petitioner first saw Dr. Vizzone after he filed the application for disability benefits on October 24, 2013. He first saw petitioner on April 16, 2014, and last saw him in May, 2014.[2] Dr. Vizzone did not treat petitioner prior to the onset of petitioner's symptoms, nor did he treat petitioner when the symptoms first presented. See ibid. (according greater weight to a family physician who saw a petitioner shortly after he suffered a cerebral hemorrhage, and treated him as a patient from that moment on).

Contrary to petitioner's contention that the judge "failed to consider the weight of the experts' testimony in a legal context that recognizes [petitioner] need not show that he is incapacitated from performing any occupation in order to be entitled to ordinary disability but, instead, must show that his medical conditions prevent him from performing his former employment as a Sheriff's Officer," the judge not only applied the correct legal standard, she also properly parsed the medical evidence. As the judge said,

[2] During his testimony, Dr. Vizzone said he last saw Del Valle as a patient on May 28, 2014, but his report sets the date of his last examination as May 12, 2014.

"none of [the doctors] saw petitioner as a regular patient prior to his pension application." She concluded:

> [T]here is insufficient competent evidence in the record to support the legal conclusion that petitioner's lumbar spine issues were so debilitating that he was disabled within the meaning of the above-referenced law from his position as a correctional officer. All of the testifying orthopedic experts reviewed the same EMG and MRI studies. While there was variation in each physician's clinical findings of petitioner, petitioner's experts relied heavily upon his own subjective or self-reporting complaints, as are to some extent the strength, gait, flexibility and range or motion tests, which cannot form the basis of a determination of total and permanent disability. Even then, petitioner's own experts found only moderate symptomatology and no spasm. By contrast, the EMG and MRI studies are objective as are the physical measurements. In other words, the objective studies were not clinically supported or, at best, only weakly supported by his subjective symptomatology. As stated by Dr. Rosa, the herniated disk would have had to have been much more prominent on the MRI to match petitioner's complaints. I concur with respondent that petitioner failed to prove by the preponderance of the weight and credibility of the evidence that he is totally and permanently disabled.

As we said in Bialko, the "maze of conflicting medical proof must be appraised by judges, not medical experts, and in the final analysis the determination of which is the soundest is made by them on the particular facts of the case." 38 N.J. Super. at 171. That is exactly what Judge Cookson did in this case. The judge's,

and hence the Board's, determination of this case is consistent with the law, supported by substantial, credible evidence in the record, neither arbitrary nor capricious, and entitled to this court's deference. See Corvelli v. Bd. of Trs., P.F.R.S., 130 N.J. 539, 541 (1992) (finding that the trial court's decision in favor of petitioner's total forfeiture of his pension was neither arbitrary and capricious nor unsupported by substantial credible evidence).

We conclude petitioner's argument that he was not afforded a fair hearing because the judge denied his request to amend his application for disability retirement to include a partial thickness tear of the subscapularis tendon in his right shoulder; and his related argument that the judge applied "cases involving amendments to Superior Court pleadings in the context of litigation," instead of cases involving an amendment of an ordinary disability application; and that the judge should have applied the principle that pension statutes are to be liberally construed in favor of employees, to be without sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E).

Our Rules provide that amendments to pleadings "shall be freely given in the interest of justice." R. 4:9-1. The liberality of Rule 4:9-1 is akin to the liberal treatment given to pension statutes. Even so, a trial court's decision whether

to allow an amendment is left to its sound discretion, Kernan v. One Washington Park Urban Renewal Assocs., 154 N.J. 437, 457 (1998), which will not be disturbed on appeal in the absence of clear abuse of discretion. Salitan v. Magnus, 28 N.J. 21, 26 (1958). The "abuse of discretion standard . . . arises when a decision is made without a rational explanation, inexplicably departed from established policies, or rested on impermissible basis." Flagg v. Essex Cty. Prosecutor, 171 N.J. 561, 571 (2002) (quoting Achacoso-Sanchez v. INS, 779 F.2d 1260, 1265 (7th Cir. 1985)).

Petitioner sought to introduce medical testimony regarding his shoulder injury during the evidentiary hearings. The Board objected because that injury was not mentioned in his application. The judge allowed the evidence, and said she would consider the issue after briefing by the parties. Petitioner first sought to amend his petition after the close of hearings.

The judge found petitioner's delay in filing his motion to amend was "significant." There is no contention petitioner was unaware of his shoulder injury, or its significance. After weighing the evidence, "even without opportunity for rebuttal by [the Board]," she concluded the shoulder injury was "of marginal utility to the merits" of petitioner's application because it caused only "some discomfort in that shoulder and a slight lack

of strength without atrophy or decreased range of motion." She balanced reopening the case at that "late stage in the litigation and [the need] for another [independent medical exam] to be conducted," resulting in a protraction of the case "which [was] otherwise concluded as to evidentiary hearings." Her decision to deny the request to amend was not an abuse of discretion.

Affirmed.