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parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2684-16T3

A.B.,

Petitioner-Appellant,

v.

BOARD OF TRUSTEES OF THE PUBLIC
EMPLOYEES' RETIREMENT SYSTEM,

Respondent-Respondent.

Submitted February 15, 2018 – Decided March 1, 2018

Before Judges Haas and Rothstadt.

On appeal from the Board of Trustees of the
Public Employees' Retirement System,
Department of Treasury, PERS No. 2-1097252.

Ridgway & Stayton, LLC, attorneys for
appellant (Herbert J. Stayton, Jr., on the
brief).

Gubir S. Grewal, Attorney General, attorney
for respondent (Melissa H. Raksa, Assistant
Attorney General, of counsel; Sadyhé T.
Bradley, Deputy Attorney General, on the
brief).

PER CURIAM

Appellant A.B. appeals from the January 19, 2017 final
determination of the Board of Trustees of the Public Employees'

Retirement System (Board), denying her application for ordinary disability retirement benefits under N.J.S.A. 43:15A-42. We affirm.

In February 2000, A.B. began working in the adoption service unit of the Division of Youth and Family Services (Division). In 2006, she became a supervisor in the permanency unit. Five years later, she was transferred to a new supervisory role in the Division's intake unit. This position was more challenging than A.B.'s prior assignments and she was required to work extra hours.

A.B. testified that she began having panic attacks because she was "overwhelmed with her work" in the intake unit. She started seeing a psychiatrist, who prescribed a number of medications, including Xanax, Prozac, Wellbutrin, and Abilify. The Division offered to transfer A.B. to available permanency unit assignments in neighboring counties, but she decided the positions were too "far from home" for her. According to A.B., the panic attacks continued and she left her job in November 2013 and never returned.

On December 3, 2013, A.B. filed an application with the Board for ordinary disability retirement benefits. The Board denied the application, finding that A.B. was not totally and permanently disabled. A.B. filed an administrative appeal, which the Board

referred to the Office of Administrative Law for a hearing before an ALJ.

At the hearing, A.B. presented testimony from Dr. Edward Tobe, who was board certified in psychiatry and neurology. Based upon his evaluation, Dr. Tobe believed that A.B. may have suffered from Bipolar Type II disorder for many years, but it was never diagnosed. He also diagnosed A.B. with major depressive disorder with atypical features, and panic disorder. Dr. Tobe believed that A.B. was permanently disabled because she was depressed, had cognitive difficulties, problems organizing her thoughts, and impaired memory.¹

The Board presented the testimony of Dr. Richard Filippone, who was accepted by the ALJ as an expert in the field of clinical psychology without objection by A.B. at the hearing. Like Dr. Tobe, Dr. Filippone conducted an evaluation of A.B. and reviewed her pertinent treatment records. However, Dr. Filippone concluded that A.B. was not permanently disabled.

Dr. Filippone "diagnosed [A.B.] with a history of panic disorder currently mild without agoraphobia." He testified that A.B. told him she had had only one panic attack since she left

¹ A.B.'s husband and two of her former co-workers testified concerning their observations of A.B.'s behavior during the period between 2011 and 2013.

work, and was only seeing her therapist every other month for about twenty minutes per visit. While she continued to take her prescriptions, A.B. was not receiving any other therapy. A.B. was able to maintain her home, do the shopping and cooking, and assist her children with their schoolwork. Under these circumstances, Dr. Filippone found no evidence that A.B. was totally or permanently disabled from the performance of her job.

The ALJ issued an initial decision in which she concluded that Dr. Filippone's testimony was more persuasive than Dr. Tobe's testimony. The ALJ wrote:

Dr. Tobe's testimony that [A.B.] is totally and permanently disabled was not credible. He had no explanation for the undisputed fact that [A.B.] was fine before she transferred to the intake department, and is currently not experiencing any significant symptom[s]. I further FIND that this indicates that she is not totally and permanently disabled. Moreover, [A.B.] only sees a therapist once every other month for twenty minutes, and there was no testimony as to why she could not return and full[y] perform in her old position. [A.B.] did suffer from panic attacks and was rendered unable to work for a period of time. I FIND that ther[e] was no indication that this condition is total and/or permanent. I further FIND that by her own admission, [A.B.] was functioning fully in her previous position and is now fully functioning . . . at home. I further FIND that [A.B.] takes medications prescribed for her anxiety, depression and panic attacks, which have been effective in treating her condition. I FIND that Dr. Tobe's testimony regarding a

permanent disability is unsupported by the facts and the evidence in this case.

In contrast, I FIND that Dr. [Filippone's] testimony was credible and supported by the facts and evidence in the case. I FIND that his conclusion that [A.B.] was not totally and permanently disabled was credible and supported by the evidence.

A.B. filed exceptions to the ALJ's initial decision. The Board considered the matter at its January 18, 2017 meeting and decided to deny A.B.'s application for ordinary disability benefits. In its letter of January 19, 2017, which memorialized its decision, the Board stated that it had adopted the ALJ's findings of fact and conclusions of law. This appeal followed.

On appeal, A.B. asserts that the Board should have disregarded Dr. Filippone's testimony because he was a psychologist, rather than a psychiatrist, and his conclusions allegedly represented mere "net opinions." She also argues that the weight of the evidence supported her claim of permanent disability. We disagree.

Our scope of review of an administrative agency's final determination is limited. In re Herrmann, 192 N.J. 19, 27 (2007). "[A] strong presumption of reasonableness attaches" to the agency's decision. In re Carroll, 339 N.J. Super. 429, 437 (App. Div. 2001) (quoting In re Vey, 272 N.J. Super. 199, 205 (App. Div. 1993), aff'd, 135 N.J. 306 (1994)). The burden is upon the appellant to demonstrate grounds for reversal. McGowan v. N.J.

State Parole Bd., 347 N.J. Super. 544, 563 (App. Div. 2002); see also Bowden v. Bayside State Prison, 268 N.J. Super. 301, 304 (App. Div. 1993) (holding that "[t]he burden of showing the agency's action was arbitrary, unreasonable[,] or capricious rests upon the appellant"). To that end, we will "not disturb an administrative 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." In re Virtua-West Jersey Hosp. Voorhees for a Certificate of Need, 194 N.J. 413, 422 (2008).

It is not our place to second-guess or substitute our judgment for that of the agency and, therefore, we do not "engage in an independent assessment of the evidence as if [we] were the court of first instance." In re Taylor, 158 N.J. 644, 656 (1999) (quoting State v. Locurto, 157 N.J. 463, 471 (1999)).


With regard to expert witnesses, we rely upon the ALJ's "acceptance of the credibility of the expert's testimony and [the judge's] fact-findings based thereon, noting that the [judge] is better positioned to evaluate the witness'[s] credibility, qualifications, and the weight to be accorded [to his or] her testimony." In re Guardianship of D.M.H., 161 N.J. 365, 382 (1999) (citing Bonngo Petrol, Inc. v. Epstein, 115 N.J. 599, 607 (1989)).

In order to qualify for ordinary disability retirement benefits under N.J.S.A. 43:15A-42, a member of the PERS must establish by a preponderance of the credible evidence that he or she is "physically or mentally incapacitated from 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. Bd. of Trs., Teachers' Pension & Annuity Fund, 404 N.J. Super. 119, 130-31 (App. Div. 2008).

Applying our highly deferential standard of review, we are satisfied there is sufficient credible evidence in the record to support the Board's determination that A.B. failed to show that she qualifies for ordinary disability benefits pursuant to N.J.S.A. 43:15A-42. The Board adopted the ALJ's findings of fact, which were based on her assessment of the credibility of the expert testimony presented by Dr. Tobe and Dr. Filippone, both of whom she found qualified to render the expert opinions they provided at the hearing. We must give appropriate deference to the ALJ's and the Board's findings where, as here, those findings are based on sufficient credible evidence in the record. Taylor, 158 N.J. at 658-59.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION