2015 IL App (2d) 140773-U
No. 2-14-0773
Order filed March 13, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

KATHERINE HINTERLONG,	)	Appeal from the Circuit Court
	)	of Du Page County.
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 13-MR-1928
	)	
BOARD OF TRUSTEES OF THE ILLINOIS	)	
MUNICIPAL RETIREMENT FUND,	)	Honorable
	)	Bonnie M. Wheaton,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justice Burke concurs in the judgment of the court.
Presiding Justice Schostok dissented.

ORDER

¶ 1 *Held*: The Board's decision to deny the plaintiff temporary disability benefits was affirmed where the medical evidence failed to establish that the plaintiff incurred a disability while she was employed.

¶ 2 In this administrative review action, plaintiff, Katherine Hinterlong, appeals from an order of the circuit court of Du Page County affirming the decision of defendant, Board of Trustees of the Illinois Municipal Retirement Fund (Board), to deny plaintiff temporary disability benefits. We affirm.

¶ 3 I. BACKGROUND

¶ 4 For many years, plaintiff was employed as an occupational therapist for the Grundy Kendall Regional Office of Education. Then, when she received an across-the-board unsatisfactory performance review in March 2012, she was notified that her employment would not be renewed for the 2012-2013 school year. She was terminated as of June 5, 2012, and her last day of work was May 30, 2012.

¶ 5 As a participating employee of the Illinois Municipal Retirement Fund (IMRF), she applied for temporary disability benefits pursuant to section 7-146 of the Pension Code (Code) (40 ILCS 5/7-146 (West 2012)) and was denied based upon her supposed ineligibility. She administratively appealed IMRF's decision to the Board, which upheld the decision. She filed a complaint for administrative review in the circuit court, which, after a hearing, affirmed the Board's decision. Plaintiff filed a timely appeal to this court.

¶ 6 The record shows the following. In 1969, at age 5, plaintiff became blind in her left eye. The cause of her blindness was an optic glioma, a cancerous brain tumor. She was treated with radiation. As a result of the treatments, she lost her sense of smell, and her memory, coordination, balance, and hearing were impaired. When plaintiff was 13 years old, she was diagnosed with epilepsy. Since that time, she has taken medication to control her seizures, but the medication causes extreme drowsiness. By age 46, in January 2011, plaintiff had additional diagnoses of obstructive sleep apnea (OSA); fatigue; morbid obesity; urinary incontinence; and hypercholesteremia. As of April 2012, plaintiff was prescribed Lexapro, an antidepressant; simvistatin; and Vimpat, an epilepsy medication.

¶ 7 In a letter accompanying her application for temporary disability benefits, plaintiff detailed the difficulties she had working as an occupational therapist: legs falling asleep; extreme

dizziness when exposed to hot sun; inability to organize and remember information; and inability to input data into a computer and communicate through email. She described how sometimes she was so fatigued in the mornings that she could not safely drive to work and how she often had to pull over on her drive home from work to sleep for an hour or more. The record shows that on March 15, 2011, plaintiff's employer granted her a special accommodation for her fatigue disability, allowing her to nap for periods during the work day, as long as she made up the time. However, that accommodation was removed the following school year.

¶ 8 When plaintiff applied for temporary disability benefits, one of her treating physicians was Dr. Roy Sucholeiki, a neurologist. Plaintiff had been seeing Dr. Sucholeiki since 2009 for her seizures. Plaintiff made an April 20, 2012, appointment with the doctor to discuss her application for disability. According to the medical record of that date, Dr. Sucholeiki found that she was not having seizures and was tolerating her medication. He found that her neurological exam was normal. The record listed plaintiff's diagnoses as "part epil w imp consc w Intr epil," OSA, "other malaise and fatigue," morbid obesity, unspecified urinary incontinence, unspecified hearing loss, and "pure hypercholesteremia." The doctor recommended that plaintiff "write up" the "chronic limitations that are impairing work performance" and return in one year.

¶ 9 However, on June 4, 2012, in support of plaintiff's disability claim, Dr. Sucholeiki signed IMRF form 5.42 entitled "Physician's Statement—Disability Claim" in which he certified that plaintiff was disabled from January 2012 through the "present." IMRF refused to accept the certification, asserting that "January 2012" was not a "disability date." Dr. Sucholeiki signed a second certification on July 3, 2012, in which he stated that plaintiff was continuously disabled from May 30, 2012, through the "current" time. One of the questions on form 5.42 asked: "Did you recommend this person stop working?" The doctor checked the "[y]es" box. The next

question was "[i]f yes, indicate date." The doctor wrote "7/2012." Then, plaintiff's attorney submitted a third certification, which was the form the doctor had signed on July 3, 2012, with the "7/2012" date whited out and the date "5/30/12" written over it.

¶ 10 In addition to the certifications, Dr. Sucholeiki provided letters in support of plaintiff's disability claim. On April 24, 2012, the doctor opined that plaintiff's medical problems posed an "ongoing challenge" for her to perform adequately in her employment. He stated that the "challenges" were likely long term and chronic. On July 26, 2012, he wrote that it was his medical opinion that plaintiff "is no longer able to get employment due to her neurological/medical condition." He added that the start date of her disability was May 30, 2012. On September 11, 2012, Dr. Sucholeiki wrote that plaintiff suffered "long term consequences" and the "burden of treatment" since youth. He stated that she had been able, inconsistently, to work but that "over time her functionality has deteriorated as indicated by her most recent poor job performance." The doctor stated that plaintiff's care had consisted of "intermittent visits with me (neurology) and continued medication adjustments."

¶ 11 IMRF asked plaintiff for a medical record dated May 30, 2012, to correspond to Dr. Sucholeiki's certification that she was disabled as of that date. Plaintiff explained that she had seen the doctor in April 2012 and was scheduled to see him again on July 24, 2012. IMRF determined that she was ineligible to receive temporary disability benefits, because "IMRF law specifies that a claimant's disability must be certified by a doctor, and that the claimant must be under a physician's care and receiving the appropriate treatment as of the date that they [*sic*] are alleging disability." The IMRF Benefit Review Committee met on November 21, 2013, to hear plaintiff's appeal. The Benefit Review Committee found that there "is insufficient evidence supporting this date of disability [(May 30, 2012)] since when she was seen in April of 2012 she

was not declared disabled by the doctor." The Benefit Review Committee further determined that plaintiff was ineligible because she was not a participating employee as of July 24, 2012, her first date of treatment following her last day of work. The Board affirmed the decision on November 22, 2013.

¶ 12 In the administrative review proceeding, the Board took the position that plaintiff was ineligible for temporary disability benefits because she did not see her doctor on May 30, 2012, the date of the start of her disability. Additionally, according to the Board's decision, when she next saw the doctor on July 24, 2012, she was separated from service, having been terminated on June 5, 2012. In the administrative review proceedings, the Board supported its position with IMRF Rule 5.40C, which provides in relevant part that "IMRF cannot accept doctor's [*sic*] statements that certify a disability for a date prior to the member's visit or for a date in the future." At the hearing, the Board admitted that plaintiff was disabled. In ruling in favor of the Board, the court stated that Dr. Sucholeiki's three certifications were "all over the board."

¶ 13 II. ANALYSIS

¶ 14 Plaintiff makes numerous arguments, which boil down to the assertion that IMRF's requirement of a doctor's visit that is contemporaneous with the finding of disability is in conflict with section 7-146 of the Code. Section 7-146 provides that a participating employee is considered disabled if he or she is unable to perform the duties of any position which might reasonably be assigned to him or her due to mental or physical disability caused by injury or disease, other than as a result of self-inflicted injury or addiction to narcotic drugs, and IMRF has received certifications from at least one licensed and practicing physician as well as the employer that the employee is temporarily disabled. 40 ILCS 5/7-146(a)(1)(2) (West 2012). The statute further provides in relevant part that, once the employee meets the above requirements, he or she

is eligible for temporary disability benefits if he or she is not separated from the service of the employer on the date the temporary disability was "incurred." 40 ILCS 5/7-146(b)(6) (West 2012).

¶ 15 The Board asserts multiple arguments urging the validity of Rule 5.40C. However, the Board's final argument is that we need not address whether IMRF properly disallows a physician's retrospective opinion, because the Board made the factual determination that there was no evidence that plaintiff's disability was incurred while she was employed.

¶ 16 The Board's decision to deny plaintiff's application for temporary disability benefits is an administrative decision, and judicial review is governed by the Administrative Review Act (735 ILCS 5/3-101 *et seq.* (West 2012)). We review the administrative agency's decision, not the decision of the circuit court. *Kimble v. Illinois State Board of Education*, 2014 IL App (1st) 123436, ¶ 73. On review, the agency's findings and conclusions on questions of fact are deemed *prima facie* true and correct. *Kimble*, 2014 IL App (1st) 123436, ¶ 73. This court does not reweigh the evidence or make an independent determination of the facts. *Kimble*, 2014 IL App (1st) 123436, ¶ 73. Rather, the agency's factual findings will be upheld unless they are against the manifest weight of the evidence. *Kimble*, 2014 IL App (1st) 123436, ¶ 74. An administrative decision is against the manifest weight of the evidence only if the opposite conclusion is clearly evident. *Kimble*, 2014 IL App (1st) 123436, ¶ 74. That the opposite conclusion is reasonable, or that the reviewing court could have reached a different result, does not justify reversal of the administrative findings. *Kimble*, 2014 IL App (1st) 123436, ¶ 74. The agency's decision should be affirmed where the record contains evidence to support the agency's decision. *Kimble*, 2014 IL App (1st) 123436, ¶ 74.

¶ 17 As we stated above, the Board conceded that plaintiff is "disabled" as defined by section 7-146(a)(1)(2). However, the Board posits that plaintiff is not eligible for temporary disability benefits under section 7-146(b)(6), because Dr. Sucholeiki did not find her to be disabled on the April 20, 2012, visit, and because she was separated from service when Dr. Sucholeiki next saw her on July 24, 2012. Plaintiff maintains that the Board failed to liberally construe the statute and impermissibly modified the statute by imposing an obstacle that otherwise does not expressly exist. Plaintiff argues that nowhere in the plain language of section 7-146(b)(6) does the legislature impose the requirement of a doctor's visit that is contemporaneous with the physician's certification of temporary disability, which it could have done had it intended to so limit a pensioner's benefits. Plaintiff cites *Donnells v. Woodridge Police Pension Board*, 159 Ill. App. 3d 735, 740 (1987), where the legislature specifically provided a date by which an applicant had to submit a written application for benefits, as an example of legislative intent to limit benefits. Because there is no similar limiting language in section 7-146, plaintiff concludes that the legislature imposed no requirement of a contemporaneous doctor's visit.

¶ 18 We agree with the Board that we need not reach the issue of the validity of Rule 5.40C. As a threshold matter, the Board reasonably found that plaintiff failed to establish that her disability was incurred on May 30, 2012, prior to her separation from employment.

¶ 19 It is undisputed that plaintiff's various medical conditions were of long duration and serious. Nevertheless, plaintiff was able to maintain employment for many years despite those conditions. Then, her last performance review in March 2012 rated her unsatisfactory across the board. Plaintiff relates this to her being unable to function at her job because of a medical disability. However, the record does not support that conclusion. The employer filed a document with IMRF, which stated that the reason for plaintiff's termination was "performance."

The performance review indicated that plaintiff's failings were related to such things as her inability to communicate satisfactorily with families and staff and not following up on phone messages, as well as becoming frustrated and loud when her performance was questioned. Although plaintiff relies heavily on the fact that her employer accommodated her so that she could nap during the day, we do not think it significant for two reasons. One, the accommodation allowed her to keep working, not quit because of a disability, meaning that she was not "unable to perform the duties of any position which might reasonably be assigned" to her, as required for eligibility for IMRF temporary disability benefits. See 40 ILCS 5/7-146(a)(1) (West 2012). Two, there is no showing that a disability for purposes of the Americans with Disabilities Act (42 U.S.C.A. § 12102 *et seq.* (1990)) is the same as a disability for purposes of section 7-146 of the Code. Furthermore, the accommodation addressed plaintiff's extreme fatigue, which was not a cause for the unsatisfactory performance review.

¶ 20 We disagree with the dissent that Dr. Sucholeiki actually linked plaintiff's medical conditions to her termination from employment by saying that her challenges were long term and chronic. In any event, the Board is not contesting that plaintiff is disabled. The only issue is when she incurred the disability. We mention plaintiff's job performance review and the employer's accommodation because plaintiff relied heavily, if not almost exclusively, on those at oral argument.

¶ 21 Plaintiff sought to document that her termination was related to a medical disability when she made an appointment with Dr. Sucholeiki on April 20, 2012, to discuss the issue. Yet, Dr. Sucholeiki's report of that date indicated that plaintiff was seizure-free and that her neurological exam was normal. The doctor told her to "write up" the chronic limitations that were impairing

her work performance and to return in one year. Plaintiff does not dispute that Dr. Sucholeiki did not find that she was disabled on April 20, 2012.

¶ 22 Notwithstanding Dr. Sucholeiki's failure to find that plaintiff was disabled on April 20, 2012, he signed a physician's certification on June 4, 2012, stating that plaintiff was disabled beginning in January 2012 and continuing through the "present." Nothing in the record explains how plaintiff was disabled in January 2012 through the "present," when she was not disabled in April 2012. Then, Dr. Sucholeiki submitted another physician's certification, which was signed on July 3, 2012, stating that the start date of plaintiff's disability was May 30, 2012. Nothing in the record explains how the doctor picked that date, or what had changed between April 20, 2012, when she was not found to be disabled, and May 30, 2012.

¶ 23 At oral argument, plaintiff admitted the shortcomings and contradictions inherent in Dr. Sucholeiki's records and certifications, but she argued that all that the statute requires is a physician's written certification. According to plaintiff, the certification is like an opening "pleading" to "get a foot in the door." Plaintiff maintains that IMRF cannot demand proof of the date a disability is incurred to determine a claimant's eligibility for temporary benefits. We reject this argument. Section 7-146(b)(6) clearly and unequivocally requires that an employee not be separated from employment "on the date his temporary disability was incurred." 40 ILCS 5/7-146(b)(6) (West 2012). We must construe statutes so that they are applied in a practical and commonsense manner. *Jackson v. Mediacom Illinois, LLC*, 2012 IL App (5th) 110350, ¶ 12. Without a doubt, the legislature intended to prohibit post-termination temporary disability benefits. It almost goes without saying that IMRF has the obligation to make a determination of the date the disability was incurred. If we were to accept plaintiff's argument, nothing would prevent wholesale chicanery.

¶ 24 In sum, the record contains evidence that supports the Board's decision to deny plaintiff's claim for temporary disability benefits. Consequently, the Board's finding that plaintiff's disability was not incurred while she was an employee is not against the manifest weight of the evidence.

¶ 25 III. CONCLUSION

¶ 26 For the reasons stated, we affirm the circuit court of Du Page County.

¶ 27 Affirmed.

¶ 28 PRESIDING JUSTICE SCHOSTOK, dissenting:

¶ 29 I respectfully dissent from the majority's determination that the plaintiff was not eligible for temporary disability benefits under section 7-146 of the Code. The majority concludes that the plaintiff failed to establish that her disability was incurred on May 30, 2012, prior to her separation from employment. The evidence supports the opposite determination. On June 4, 2012, Dr. Sucholeiki certified that the plaintiff was disabled since January 2012. On July 3, 2012, he certified that she had been disabled from May 30, 2012. Further, Dr. Sucholeiki opined, in letters dated July 26, 2012, and September 11, 2012, that the plaintiff was disabled as of May 30, 2012, before her separation from employment. The record reveals that the plaintiff had been under the care of Dr. Sucholeiki for years. The plaintiff began seeing Dr. Sucholeiki in 2009 and was routinely under his care thereafter. Prior to the plaintiff's separation from employment, Dr. Sucholeiki had documented the plaintiff's numerous, longstanding, debilitating diagnoses. Additionally, prior to her separation, the plaintiff's employer granted her a reasonable accommodation for her fatigue disability—an implicit admission that she was disabled.

¶ 30 The majority holds that the plaintiff has failed to establish a disability prior to her separation because her employment was terminated based on "performance" rather than a disability. The majority notes that her performance issues were related to an inability to communicate—not following up on phone messages, and becoming frustrated and loud. However, Dr. Sucholeiki opined that the plaintiff's medical conditions posed an "ongoing challenge" for her to properly perform her job duties and that her challenges were "long term and chronic." It is axiomatic that the plaintiff's inability to perform her job duties was the direct consequence of her disabilities. Regardless, however, the reason for the plaintiff's termination, and whether or not it was related to her disability, is irrelevant. I agree with the majority that, because the Board does not contest that the plaintiff is disabled, the only relevant issue is when she incurred her disability.

¶ 31 The majority notes the fact that Dr. Sucholeiki's April 20, 2012, medical report did not state that the plaintiff was disabled. While the record of April 20, 2012, indicated that plaintiff was seizure-free, and that the neurological exam was normal, it did not say that the plaintiff was not disabled. In fact, the report listed her various diagnoses, including epilepsy, and the medications she was prescribed to combat the symptoms of her maladies, including seizures. The majority questions how Dr. Sucholeiki could state in his June 4, 2012 physician's certification that the plaintiff was disabled beginning in January 2012 "when she was not disabled in April 2012." Once again, Dr. Sucholeiki, in his April 20, 2012 report, did not make a determination that the plaintiff was "not disabled." Dr. Sucholeiki's first opinion as to whether the plaintiff was disabled or not disabled was in his June 4, 2012, certification that she was disabled since January 2012.

¶ 32 The majority also notes that in the July 3, 2012 physician certification, Dr. Sucholeiki indicated the plaintiff's disability started on May 30, 2012. The majority questions the change in disability date. However, it is implicit from the record that the change in date was due to the IMRF informing the plaintiff that she needed physician certification that she was disabled as of her last day of work, May 30, 2012. While, on the July 3, 2012 certification form, Dr. Sucholeiki wrote "7/2012" as the date he recommended that the plaintiff stop working, this does not change the fact that he consistently opined that the plaintiff was disabled prior to her separation from employment. The issue is when the plaintiff was disabled, not when her doctor told her to stop working.

¶ 33 As the evidence clearly established that the plaintiff was disabled prior to her separation, the validity of Rule 5.40C must be addressed. An administrative agency is a creature of statute, and any power or authority claimed by it must find as its source the provisions of the statute that created it. *Prazen v. Shoop*, 2013 IL 115035, ¶ 36. Specifically, an agency's authority to adopt rules is defined and limited by the enabling statute. *Julie Q. v. Department of Children & Family Services*, 2011 IL App (2d) 100643, ¶ 35. In determining whether an agency's rule conforms to the enabling statute, courts look to the legislative intent. *Julie Q.*, 2011 IL App (2d) 110643, ¶ 35. If the language of the statute is plain, no further inquiry is necessary. *Julie Q.*, 2011 IL App (2d) 100643, ¶ 35. An administrative rule is valid if it follows the statute. *Julie Q.*, 2011 IL App (2d) 100643, ¶ 36.

¶ 34 An agency's rules are presumed valid, and the party challenging them has the burden to show that they are invalid. *Julie Q.*, 2011 IL App (2d) 100643, ¶ 36. However, the scope of the agency's power and authority is for the judiciary to determine and is not an issue to be finally determined by the agency itself. *Prazen*, 2013 IL 115035, ¶ 36. Administrative rules cannot

expand or limit the statute that they enforce. *Kean v. Wal-Mart Stores, Inc.*, 235 Ill. 2d 351, 372 (2009). A pension statute must be liberally construed in favor of the rights of the pensioner. *Prazen*, 2013 IL 115035, ¶ 39. Whether an agency rule appropriately implements a statute or conflicts with it is an issue of law that we review *de novo*. *Julie Q. v. Department of Children & Family Services*, 2011 IL App (2d) 100643, ¶ 28. Further, the construction of a statute invokes a question of law that is also reviewed *de novo*. *People ex rel. Madigan v. Bertrand*, 2012 IL App (1st) 111149, ¶ 20.

¶ 35 The Board asserts that the IMRF has the ability to establish rules for the efficient administration of the pension fund. The Board contends that the requirement of contemporaneous medical documentation from a physical examination to corroborate a stated date of disability is necessary to prove that the employee was employed on the date the disability was incurred, which in turn accomplishes the legislative goal of insuring that only individuals who qualify for benefits receive them. The Board further asserts that the legislature intended to prohibit post-termination disability benefits when it required in section 7-146(b)(6) that the employee not be separated from employment at the time the disability was incurred.

¶ 36 Nonetheless, the IMRF's requirement of a doctor's visit that is contemporaneous with the finding of disability is in conflict with section 7-146 of the Code, which does not include such a requirement. While the legislature intended to prohibit post-termination disability benefits, the rule requiring a doctor's visit that is contemporaneous with the date the disability is incurred is so narrow that it excludes otherwise eligible recipients, like the plaintiff, who have documented ongoing debilitating conditions for which they have been treated for years while employed. As noted, the plaintiff began seeing Dr. Sucholeiki in 2009 and was routinely under his care thereafter.

¶ 37 The Board maintains that its rule merely requires that the employee's claimed disability "be backed up by proof." Yet it refused to credit Dr. Sucholeiki's opinions, expressed most powerfully in his letters of July 26, 2012, and September 11, 2012, that plaintiff was disabled before her separation from employment. The Board refused to recognize that the plaintiff had been under Dr. Sucholeiki's care for years and that he had consistently documented plaintiff's numerous, longstanding, debilitating diagnoses. The plaintiff did not, post-termination, show up out of the blue at the doctor's office seeking a back-dated declaration of disability.

¶ 38 Further, the Board's interpretation of the statute could lead to absurdity. If an employee were to suffer a disabling stroke at 8 p.m. but not arrive at the emergency room until 12:30 a.m. the next day, there would be no medical visit that was contemporaneous with the date the disability was incurred. The same is true of the patient who cannot secure a doctor's appointment until two days, or a week, after the date the disability is incurred. Moreover, it is not uncommon for physicians to render a medical opinion after a disabling condition has arisen. See *Marconi v. Chicago Heights Police Pension Board*, 225 Ill. 2d 497, 536-38 (2006) (supreme court considered opinions expressed in a doctor's report made in 1998 relating to whether the plaintiff was disabled in 1996); *Hahn v. Police Pension Fund of the City of Woodstock*, 138 Ill. App. 3d 206, 210-11 (1985) (it was appropriate to rely on the results of a psychiatric evaluation conducted near the time of the plaintiff's retirement).

¶ 39 As in *Prazen*, the Board's construction of the statute is inconsistent with the court's obligation to construe pension statutes liberally in favor of the pensioner and to give effect to the plain meaning of the statute's language. See *Prazen*, 2013 IL 115035, ¶ 39. The issue in *Prazen* was whether the plaintiff forfeited his pension by returning to work for an IMRF employer in violation of the Code. *Id.*, ¶ 1. After the plaintiff retired from his position as superintendent of

the electrical department of the city of Peru, he formed a corporation that entered into a contract with the city for operation of the city's electrical department. *Id.*, ¶¶ 6, 7. Ultimately, the IMRF concluded that the corporation was merely a guise for circumventing the prohibition against returning to work for an IMRF employer, and the IMRF forfeited the plaintiff's pension. *Id.*, ¶ 15. Our supreme court held that IMRF lacked the authority to determine that the corporation was a guise. *Id.*, ¶ 47. Rejecting the IMRF's arguments that its rulemaking authority empowered it to make such a determination, the court stated that the agency had created a new condition for forfeiture of a pension of which the annuitant had no notice from the clear terms of the statute itself. *Id.*, ¶ 37.

¶ 40 Similarly, the clear terms of section 7-146(a)(2) provide that a claimant must provide a written certification of disability from at least one licensed and practicing physician. The IMRF's requirement of a contemporaneous doctor's visit is a new condition not imposed by the statute. Accordingly, because the plaintiff properly established eligibility for her temporary disability claim, and because the Board's interpretation of Rule 5.40C is invalid, the proper course is to remand this cause to the Board for further proceedings on the merits of the plaintiff's claim. For these reasons, I respectfully dissent.