

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2020-000178-001 DT

05/13/2024

HONORABLE JULIE A. LAFAVE

CLERK OF THE COURT
N. Johnson
Deputy

ALISON L BRAUGHTON

THOMAS GRIFFIN

v.

GOODYEAR POLICE PUBLIC SAFETY
PERSONNEL RETIREMENT BOARD (001)

STEPHEN B COLEMAN

COMM. LAFAVE
REMAND DESK-LCA-CCC

JRAD RULING – ADMINISTRATIVE DECISION AFFIRMED

Appellant, **ALISON L. BRAUGHTON**, seeks judicial review of Appellee, **GOODYEAR POLICE PUBLIC SAFETY PERSONNEL RETIREMENT BOARD’S (“the Board”)** June 21, 2023 denial of her Application for Accidental Disability Retirement (“Application”)¹. This Court has jurisdiction pursuant to A.R.S. § 12-905(A). This Court has considered the supplemental record on appeal in this matter, the record submitted prior to its July 7, 2022, Ruling (“Ruling”) and the May 2, 2024, oral argument presentation. For the following reasons, this Court affirms.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This is the second appeal of this matter. On July 7, 2022, this Court issued its Ruling. The factual and procedural background and findings of the Ruling are incorporated herein. Only the information material to this second decision will be set forth here. The Ruling was narrowly focused as is required on appeal. It vacated and remanded the Board’s denial of Braughton’s Application without first conducting an Independent Medical Examination (“IME”). See Ruling. The Ruling ordered the Board to conduct an IME prior to deciding the Application as it found, as a matter of law, Braughton was entitled to an IME. *Id.* The Ruling did not determine the merits of

¹ The vote is contained in the minutes from the Board meeting of that day. See Record on Review (“ROR”) at 168. This vote was memorialized in writing on June 30, 2023. *Id.* at 173. The two conveyances will be referred to collectively as “the Denial.”

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the Application or any legal argument on appeal regarding the denial, but specifically limited its findings to the need for an IME prior to any determination of the Application:

Based on a review of the record, the parties' submissions, and the oral argument, this Court concludes that the Decision not to send Appellant to a medical professional for an IME is contrary to law. This Court need not consider whether Appellee abused any discretion in its findings. Appellee did not have the discretion to deny the IME request. Thus, this Court must reverse the Decision. See A.R.S. § 12-910(E). This ruling is limited only to the need for an IME. This Court takes no position on what the outcome of that might be and whether, after being provided findings from a medical professional, Appellant will be eligible for a disability pension. Accordingly,

IT IS THEREFORE ORDERED reversing the September 23, 2021, denial of the request for an IME.

Id. at P:9.

On remand, the Board sought more medical information from Braughton prior to complying with the Ruling.² On October 27, 2022, the Board voted to send Braughton for an IME. On January 26, 2023, Scott Kirkorsky, the IME physician selected by the Board conducted his examination of Braughton and thereafter issued his report ("the IME"). See ROR at 156.

The Board asked Dr. Kirkorsky to answer questions specifically related to the statutory requirements for a finding of disability. See Appellant's Opening Brief ("Brief") at 6:11-15; See also ROR at 156. Braughton alleges the Board also improperly asked several questions unrelated to the statutory finding. Brief at 6:15-24. The IME notes that there were four issues "relating to the statutory criteria for accidental disability" and several others posed which fell under the heading "I was also asked to answer the following questions". ROR at 156; GY-Braughton 001007. While the Court understands Braughton believes these additional questions have no bearing on the statutory determination, it finds that the IME kept the responses to those questions separate from that finding. Those issues were at best extraneous, and while Braughton wants this Court to determine the intent of the Board was inappropriate, there is no evidence in the record that the IME results were influenced in any manner by these additional queries. Thus, in its review, the Court considered only whether the statutory findings were supported in the record.

The IME disputed the findings of Braughton's other providers. ROR at 156. It found that Braughton did suffer from three diagnoses but did not believe the finding of Post-Traumatic Stress

² Braughton argues the Board did not have the right to refuse to immediately comply with the Ruling. However, she alleges no error or harm in the Board's having done so after obtaining further documents so this Court will not address that alleged non-compliance.

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Disorder (“PTSD”) was supported. *Id.* at GY-Broughton 001038-001047. The IME indicated Broughton suffered from a condition(s) that totally prevented her from performing her job duties at the time. *Id.* at GY-Broughton 001046. Those conditions were believed to be major depressive disorder with anxious distress, unspecified alcohol-related disorder, and unspecified opioid-related disorder. *Id.* In short, the IME supported Broughton’s argument that she suffered a present disability that interfered with her ability to work in law enforcement. *Id.* However, the IME indicated that the conditions found had not yet been properly addressed or treated and thus a finding of permanent disability for those conditions was premature:

At the time of my evaluation, Ms. Broughton’s treatment was insufficient to opine that she reached maximum medical improvement. Her treatment included inconsistent psychotherapy sessions and limited psychotropic medication trials. Evidence-based treatment to address Ms. Broughton’s residual symptoms includes more frequent individual psychotherapy sessions, group psychotherapy in an intensive outpatient program setting, maximizing the dose of her antidepressant medication, medication changes, and evidence-based substance use disorder evaluation and treatment.

Id. at GY-Broughton 001046-47.

The IME found that the conditions which led to the disability were not pre-existing to Broughton’s employment but also that they were not suffered because of that employment. *Id.* at GY-Broughton 001047. The Accidental Disability Questionnaire (“Questionnaire”) completed by Dr. Kirkorsky on February 15, 2023, as part of the IME, indicates, consistent with his opinion, that Broughton does suffer a disabling condition. *Id.* at GY-Broughton 001051. It inadvertently perhaps indicates that condition was the basis for the Application when the Application was based on a PTSD finding.³ The Questionnaire also indicated the disability was total at the time of the examination but not permanent. *Id.* It concluded that there were conflicts in the medical records which were summarized in the IME. *Id.*

Based on the IME report, the Board then denied Broughton’s Application. This timely appeal followed.

II. STANDARD OF REVIEW

Questions of law, such as the interpretations of statutes, rules, and regulations, are reviewed de novo. *Tornabene v. Bonine ex rel. Ariz. Highway Dep’t*, 203 Ariz. 326, 332 (App. 2002). In a de novo review, no deference is owed to the Decision, regardless of how supported it might have

³ Broughton argues this inconsistency makes the entire findings unsupported but provides no evidence Dr. Kirkorsky did not favorably opine she had a disabling condition, just not the one claimed.

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been. *See McMurren v. JMC Builders, Inc.*, 204 Ariz. 345, 348 (App. 2003). Braughton argues this Court must conduct a de novo review to determine if the Board misapplied the law. *See* Brief at 11:1-12.

Braughton also argues the Board abused its discretion in its determination of the facts of the case. *Id.* at 11:13-28. We will “affirm the decision [of the Board] unless it is arbitrary, capricious, or an abuse of discretion.” *Hosea v. City of Phoenix Fire Pension Board*, 224 Ariz. 245, ¶ 10 (App. 2010); *quoting Weller v. Ariz. Dep’t of Econ. Sec.*, 176 Ariz. 220, 224 (App. 1993).

An administrative decision may be set aside only if it is unsupported by competent evidence. “Even when two inconsistent factual conclusions could be supported by the record, then there is substantial evidence to support an administrative decision that elects either conclusion. The superior court cannot substitute its judgment for that of the administrative agency involved.” *Ontiveros v. Ariz. Dep’t of Transp.*, 151 Ariz. 542, 543 (App.1986) (internal citations omitted); *see also Kuznicki v. Ariz. Dep’t of Transp.*, 152 Ariz. 381, 382 (App. 1986); *Carlson v. Ariz. State Pers. Bd.*, 214 Ariz. 426, 430 (App. 2007); *Webster v. State Bd. of Regents*, 123 Ariz. 363, 365 (App. 1979); *Gaveck v. Ariz. State Bd. of Podiatry Exam’r*, 222 Ariz. 433, 436 (App. 2009) (“If an agency’s decision is supported by the record, substantial evidence exists to support the decision even if the record also supports a different conclusion.”); *Garcia v. Ariz. State Liquor Bd.*, 21 Ariz. 456 (App. 1974) (if the testimony supports two inconsistent factual conclusions, there is substantial evidence for whichever conclusion the agency makes); *Petrus v. Ariz. State Liquor Bd.*, 129 Ariz. 449, 452 (App. 1981).

We review to determine whether substantial evidence supports an administrative board's factual findings, as a question of law. *Siler v. Ariz. Dep’t of Real Est.*, 193 Ariz. 374, ¶ 14 (App. 1998). We apply our independent judgment to questions of law, but do not substitute our judgment for that of the Board on factual questions. *Hosea*, 224 Ariz. 245, ¶ 10; *see A.R.S. § 12-910(F)*. We will only set aside a decision if the Board acted without reasoning or consideration, disregarding facts and circumstances. *Hosea*, 224 Ariz. at 245, ¶ 10.

III. ISSUES ON APPEAL

Braughton argues: 1) The Ruling established that the “law of the case” was that she terminated her employment by reason of disability; 2) The Board misapplied the law in determining her disability was not permanent, and; 3) The Board’s determination that her disability was not incurred in the performance of her duties was arbitrary and capricious resulting in an abuse of discretion.

She asks this Court to remand this matter for a second IME.

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IV. DISCUSSION

A. THE RULING WAS LIMITED TO A PROCEDURAL ERROR.

Broughton argues the Board was precluded from determining the underlying issues of the appeal as the Ruling has already “ruled upon the legal question” at hand. *See* Brief at 12:3-8; *citing Employers Mut. Liability Ins. Co. v. Industrial Comm’n*, 115 Aris 439, 441 (App. 1977). As support for her argument, she cites that her initial appeal raised the issue of whether the Board misapplied the law in determining her employment was not terminated by reason of accidental disability. Brief at 12:8-10. Because she raised that issue, Broughton seeks to expand the Ruling to suggest the Court determined that issue. *Id.* at 12:14-18. This is an overly broad and mistaken expansion of the specific language in the Ruling both for factual and legal reasons.

1. The Ruling made no findings on the merits.

The Ruling was specifically limited to whether the Board erred in not sending Broughton for an IME. *See* Ruling. That procedural error was the grounds for vacating the denial which was limited to instructing the Board to send Broughton for an IME prior to any decision. *Id.* Broughton’s argument on appeal is not supported in the record. Broughton correctly argues she raised that issue on appeal. However, the Court declined to determine that issue, instead finding that the Board had committed a legal error that made its decision premature. The initial appeal only granted Broughton the right to have an IME prior to any determination on the merits. Arizona law also requires that a physician provide the evidence upon which the Board must rely.

A finding of accidental, ordinary, temporary, or catastrophic disability shall be based on medical evidence by a designated physician or a physician working in a clinic that is appointed by the local board pursuant to § 38-847, subsection D, paragraph 9 that established the disability. The local board shall resolve material conflicts in medical evidence...

A.R.S. § 38-859(C)(emphasis added).

The Ruling was only that the Board erred in not obtaining that evidence prior to its decision. *See* Ruling. It took no position on what that determination would be thereafter, nor did it make the very legal determinations which are squarely within the Board’s discretion to make.

2. The Board, not the Court makes the findings of disability.

Except as limited by subsection E of this section, a local board shall have such powers as may be necessary to discharge the following duties:

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1. To decide all questions of eligibility for membership *and disability* and in the line of duty death benefits under the system.

A.R.S. § 38-847(D)(1)(emphasis added)

Under Arizona law, Braughton would be eligible for “an accidental disability pension if the member’s employment is terminated by reason of accidental disability.” *A.R.S. § 38-844(B)*. *A.R.S. § 38-842* requires an accidental disability be “a physical or mental condition that *the local board* finds totally and permanently prevents an employee from performing a reasonable range of duties within the employee's job classification and that *was incurred in the performance of the employee's duty.*” *See A.R.S. § 38-842(1) (emphasis added)*.

A.R.S. § 38-842(1) empowers the Board to determine disability. Reading the Ruling as Braughton asks the Court to do would evidence an overreaching that is not present. The Court has no jurisdiction to determine the question of disability; only to review whether that determination is supported in the record; which it does now. At the time of the Ruling, the Board had improperly denied the Application without the benefit of an IME. Now that the IME has been conducted, the denial is properly the subject of review by this Court.

B. THE BOARD RESOLVED THE MEDICAL CONFLICTS, INCLUDING THE DETERMINATION OF PERMANENCY WITHIN ITS DISCRETION

A local board is empowered to resolve material conflicts in the medical evidence. *Russell v. City of Sierra Vista Pub. Safety Pers. Ret. Sys. Loc. Bd.*, No. 2 CA-CV 2021-0141, 2022 WL 3711440, at *5 (Ariz. Ct. App. Aug. 26, 2022).⁴ *Russell* reversed the decision of the board that was not supported by any medical evidence. *Id.* In this case, the Board’s decision is supported by medical evidence; it just differs. Braughton’s treating physicians believe she suffers from a permanently disabling PTSD condition. The IME indicates she suffers from disabling conditions, but not PTSD, and that those conditions have not yet been properly focused on by way of treatment to determine if they might resolve.

The Board was presented with differing opinions from the medical professionals. It was within the Board’s discretion to determine which was most credible. This Court cannot disrupt that determination absent an abuse of discretion. *See Eastern Vanguard Forex, Ltd. v. Arizona Corp. Comm’n*, 206 Ariz. 399, 409, ¶35 (App. 2003) (stating that “[s]ubstantial evidence exists if either of two inconsistent factual conclusions are supported by the record”); *Shaffer v. Arizona State Liquor Bd.*, 197 Ariz. 405, 409, ¶20 (App. 2000) (stating that “[e]ven if the record supports inconsistent conclusions, neither we nor the superior court may substitute our judgment for that of

⁴ Cited pursuant to Arizona Supreme Court Rule 111(c).

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the ALJ because conflicting evidence can still be 'substantial'") (*citations omitted*); *DeGroot v. Arizona Racing Comm'n*, 141 Ariz. 331, 336 (App. 1984) ("If two inconsistent factual conclusions could be supported by the record, then there is substantial evidence to support an administrative decision that elects either conclusion").

Broughton argues that because she has been unable to perform her job duties for over three years, her condition is permanent under applicable law. Brief at 12:21-27.

E. Accidental or ordinary disability shall be considered to have ceased and an accidental or ordinary disability pension terminates if the member:

1. Has sufficiently recovered, in the opinion of the local board, based on a medical examination by a designated physician or a physician working in a clinic that is appointed by the local board, to be able to engage in a reasonable range of duties within the member's department and the member refuses an offer of employment by an employer in the system.

2. Refuses to undergo any medical examination requested by the local board, provided that a medical examination shall not be required more frequently than once in any calendar year.

A.R.S. § 38-844(E)(1-2)

Broughton's argument on this point is correct, as it applies to the opinions that she has PTSD. If the Board were to have adopted those opinions, it is likely that with the time that has passed, the condition would have been determined to be permanent under the statute. However, the Board adopted the IME opinion that the conditions diagnosed by Dr. Kirkorsky had not been treated in a manner to allow a determination that she "has sufficiently recovered" from them. In short, the PTSD, if accepted would likely be permanent. The other conditions are not. The Board adopted the IME conclusions and in so doing properly found no permanency.

C. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE BOARD'S FINDING THAT THE DISABILITY, EVEN IF PROVEN, WAS NOT INCURRED IN THE PERFORMANCE OF BRAUGHTON'S DUTIES

Broughton argues, that because the Board did not find she had PTSD, it "could not accurately assess" whether that PTSD was "incurred in the performance of her duties". Brief at 13:21-24. This point is true. But it does not further her argument. If a condition is determined not to exist, there is no way for the Board to have determined how it was incurred. *Id.* at 14:5-22 ("Thus, because the Local Board did not address Broughton's PTSD, it could not have properly decided if her PTSD was incurred in the performance of her duties".) Broughton argues that because the Board did not accept the finding of PTSD, its decision that the PTSD was not incurred

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in the scope of her employment was in error. If it is not raining outside, a person cannot be held to determine why it is raining. It is not raining. Braughton may disagree with the Board, and she has every right to, but it's failure to explain the causation for a condition it did not deem existed is not error.

As to Braughton's second point, that the underlying finding that she does not suffer from PTSD is "in direct conflict" with other medical evidence, this is again a true point. *Id.* at 13:24-26. The medical records lead to inconsistent opinions. Conflicts in medical evidence are not unusual. They are so common in fact, that the Questionnaire includes the standard form question: "Are there conflicts in the medical evidence?" and requires the IME physician to explain any such conflicts in the report. *See* ROR 156 at GY-Braughton 001051. Arizona law also addresses the need for the Board to resolve any conflicts in the records. *See Russell*, 2022 WL 3711440, at *5 (Ariz. Ct. App. Aug. 26, 2022). It was within the Board's purview to resolve those inconsistencies.

Finally, Braughton argues that the Denial is not supported as there is overwhelming evidence that she in fact does suffer from PTSD. Brief at 14:23-18:16. She then articulates the volumes of medical evidence reviewed and considered by the Board and the IME. A review of those pages of the Brief alone illustrates that there was considerable evidence to support either conclusion made by the Board. And, contrary to her argument, that there was sufficient evidence to support its Denial. Brief at 14:25-28; *citing Consolidated Edison Co. of New York*, 305 U.S. 197, 229 (1938).

Had the Board failed to consider opinions contrary to the IME, the decision would have to be vacated. *See Walters v. Indus. Comm'n of Arizona*, 134 Ariz. 597, 600-01 (App. 1982). In this case, there is no evidence the Board did not consider the opinions of all the physicians. Ultimately, it had to make a decision that "sided" with one or the other. That does not, on its face suggest the other "side" was not considered. Braughton admits the Board was required to resolve the material conflicts between the IME and the other medical opinions. Brief at 19:13-15. She argues it was not obligated "to follow" that IME opinion. *Id.* It was also not precluded from doing so.

V. DISPOSITION AND ORDERS

Based on a review of the record, the parties' submissions, and the oral argument, this Court concludes that the Denial was not arbitrary or capricious. The Board had all the evidence necessary. It had the medical opinions of Braughton's treating physicians and the IME. The Board resolved any conflicts in those opinions in its discretion as it is required to do. Because the Denial is supported in the record, this Court cannot find it is arbitrary or capricious.

Accordingly,

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IT IS THEREFORE ORDERED affirming the Board's Denial.

IT IS ALSO ORDERED denying Braughton's request for attorneys' fees and costs as she was not the prevailing party on appeal.

IT IS ALSO ORDERED that no further matters remain pending between the parties and this ruling constitutes this Court's final decision for purposes of Rule 13, Rules of Procedure for Judicial Review of Administrative Decisions ("Appeal from a Superior Court Decision"), and Ariz.R.Civ.P 54(c).

IT IS ALSO ORDERED signing this ruling as a formal order of the Court.



THE HON. JULIE A. LAFAVE
Judicial Officer of the Superior Court

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