

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

DONNA McKNEELY,

Petitioner,

v.

Civil Action Number: 07-AA-89
Judge Jennifer F. Bailey

WEST VIRGINIA CONSOLIDATED
PUBLIC RETIREMENT BOARD,

Respondent.

OPINION AND FINAL ORDER
AFFIRMING ADMINISTRATIVE ORDER

Currently pending before the Court is Donna McKneely's "Petition for Appeal" which seeks reversal of a final decision of the West Virginia Consolidated Public Retirement Board. The appealed decision denied the petitioner's request as a disability annuitant from the West Virginia Death, Disability and Retirement Fund (State Police Plan "A") to correct and change her disability status from a non-duty related status to a duty-related partial disability status.

The Court has studied the petition, the memoranda of law submitted by both parties, the underlying record as a whole, and all other pertinent legal authorities. As a result of these deliberations, for the reasons set forth in the following opinion, the Court finds that the final decision of the Board should be **AFFIRMED**.

FINDINGS OF FACT

The petitioner, Donna McKneely, was an active member of the West Virginia State Police for eight years, two months, and fourteen days. She is now a disability annuitant from the West Virginia Death, Disability and Retirement Fund.

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On June 28, 1999, the petitioner slipped and fell at the State Police Academy where she was taking an examination for promotion to the rank of sergeant. At that time, she was on a maternity leave of absence and had given birth via caesarian section three weeks prior to the date of the examination. The petitioner fell during a break in the examination while going to the restroom.

The petitioner's participation in the promotional examination was voluntary. Specifically, her participation was not mandated by her superiors nor was she compensated in any manner for her time or other expenses related to the examination. Meanwhile, the petitioner maintains that she attended the examination pursuant to orders. However, this Court notes that the petitioner was unable to provide documentation of such orders.

In October 2000, the petitioner applied for duty-related partial benefits and was denied this request based upon the opinions of the examining physicians. Instead, the Board awarded the petitioner non-duty related disability benefits on January 24, 2001. At that time, the petitioner received a letter from the Board informing her that she could appeal the disability decision or see a second Board selected physician. Between October 1999 and her retirement on January 24, 2001, the petitioner worked periodically on and off duty.

Following the Board's award of non-duty disability benefits, the petitioner took no steps to perfect an administrative appeal until September 5, 2005. At that time, her lay representative, Norman Henry, requested that her status be changed from a non-duty related annuity to a duty related annuity.

By letter dated September 22, 2005, the petitioner's request was denied. In the letter, the request was treated as a new matter and the petitioner was advised that she had ninety days to request an appeal.

On August 18, 2006, an administrative hearing was held and presided over by hearing examiner Jack DeBolt. The hearing examiner recommended that the petitioner's appeal was timely filed because the legislative rules imposing time limitations for appeal were not in effect in 2001. The hearing examiner further recommended that the Board deny the petitioner's request to change her partial non-duty related disability award from the West Virginia Death, Disability and Retirement Fund to a duty related award.

By final order entered May 23, 2007, the Board adopted the recommendations of the hearing examiner. Currently pending before this Court is an appeal from the final order of the Board.

STANDARD OF REVIEW

West Virginia Code §29-5-4 provides the standard of review for appeals from administrative decisions. This provision provides that:

The Court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate, or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of statutory authority or jurisdiction of agency; or
- (3) Made upon unlawful procedure; or
- (4) Affected by other error of law; or

(5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or

(6) Arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

W.Va. Code §29A-5-4(g)

In absence of an error of law, factual findings by an administrative agency should be given great deference, and should not be disturbed on appeal unless clearly wrong or arbitrary and capricious. *Healy v. W. Va. Board of Medicine*, 506 S.E.2d 89, 92 (W.Va. 1998). Under the arbitrary and capricious standard, a circuit court which is reviewing the factual findings of an administrative agency must “not substitute its judgment for that of the hearing examiner.” *Woo v. Putnam County Board of Education*, 504 S.E.2d 644, 646 (W.Va. 1998).

Legal issues, such as statutory and regulatory interpretation, are legal matters which are subject to *de novo* review. *Id.*

As to judicial review of an administrative agency’s interpretations of the statutes and regulations it administers, and notwithstanding the general rule of *de novo* review of issues of law, the West Virginia Supreme Court of Appeals has held that “absent clear legislative intent to the contrary, we afford deference to a reasonable and permissible construction of [a] statute by [an administrative agency]” having policy making authority relating to the statute. *Sniffen v. Cline*, 456 S.E.2d 451 (W.Va. 1995). Furthermore, interpretations of statutes by administrative bodies charged with enforcing such statutes are afforded great weight, and such an agency’s construction of these statutes must be given substantial deference. *Id.* citing to *W.Va. Department of Health v. Blankenship*, 431 S.E.2d 681 (W.Va. 1993); *Dillon v. Board of Education*, 301

S.E.2d 588 (W.Va. 1983); *Smith v. State Workmen's Compensation Commissioner*, 219 S.E.2d 361 (W.Va. 1975).

DISCUSSION

In her petition for appeal, McKneely contends that the administrative decision should be reversed because the Board was clearly wrong in finding that she was not "on duty" when she suffered her injury. Furthermore, the petitioner asserts that the Board incorrectly concluded that she is not entitled to a duty-related disability pension.

This Court may not confer retirement benefits for employment where the legislature has not so authorized. *Cain v. PERS*, 476 S.E.2d 185 (W.Va. 1996). The rule of statutory construction to liberally construe a remedial statute to the benefit of the beneficiaries of the statute does not operate to confer a benefit where none is intended. *Id.*

Disability retirement benefits from the West Virginia Death, Disability and Retirement Fund (State Police Plan "A") are governed by West Virginia Code §15-2-29(a). In 2000, at the time the petitioner initially requested disability retirement, the Code provided that:

Any member of the division who has been or shall become physically or mentally permanently disabled by injury, illness or disease *resulting from an occupational risk or hazard inherent in or peculiar to the services required of members of the division and incurred pursuant to or while such member was or shall be engaged in the performance of his or her duties as a member of the division* shall, if, in the opinion of the retirement board, he or she is by reason of such cause unable to perform adequately the duties required of him or her as a member of the division, but is able to engage in any other gainful employment, be retired from active service by the retirement board.

W.Va. Code §15-2-29(a) (emphasis added).

Therefore, in order to qualify for duty related benefits the beneficiary must meet two prongs. First, the beneficiary must have been injured as a result of an occupational risk or hazard inherent

in or peculiar to the services required of members of the division. Secondly, the injuries must be incurred pursuant to or while such member was or shall be engaged in the performance of her duties as a member of the division.

The record reflects that on June 28, 1999, the petitioner, while on maternity leave, voluntarily attended without pay a non-required examination at the State Police Academy to participate in an opportunity to be promoted to sergeant. While walking to the restroom, the petitioner slipped on a slick spot on the floor and fell injuring her back.

This Court concludes that the issue of whether a slip and fall is an occupational risk or hazard inherent in or peculiar to the services of a State Trooper is inconsequential. The Court notes that there is a conflict in expert testimony in that Dr. Gyanesh Agrawal opined that the petitioner's injury resulted from an occupational risk, while Dr. Paul K. Forberg concluded that the petitioner's injury did not result from an occupational risk. However, the Court finds such a determination unnecessary because the petitioner does not qualify for benefits under the second prong.

Specifically, the petitioner's fall did not occur while the petitioner was performing her duties as a State Trooper. This Court finds that the petitioner's attendance at the exam was voluntary as she was not ordered to attend. Although the petitioner claims that a written special order exists which required her attendance, the petitioner failed to provide a copy of such an order despite her promise to do so.

The evidence in the record indicates that the petitioner's participation in the examination for promotion was voluntary, not compensated and occurred while she was not on duty. The petitioner's failure to sit for the exam would only result in her forgoing the promotional cycle;

participation or non-participation in the exam had no adverse affect on her present working conditions or the continuance of her employment as a State Trooper. In a letter addressed to the petitioner and dated February 26, 1999, Captain Charles R. Bedwell stated the following:

“All members are reminded that participation in a promotional cycle is voluntary and is not compensable time. The time spent preparing for, traveling to and participating in examinations and evaluation boards and other candidate activities will not be considered as or reported as hours worked. Also, expense accounts will not be allowed.”

The record further includes testimony from Commander P.D. Clemens and Colonel Gary L. Edgell indicating that Trooper McKneely’s injury was not department related.

This Court further notes that the petitioner’s analogy involving the West Virginia Worker’s Compensation Act and the opinion delivered in *Dodson v. Worker’s Compensation Division*, 210 S.E.2d 635 (W.Va. 2001), is misplaced as workers’ compensability standards are not the same as the standards set forth in West Virginia Code §15-2-29(a).

In sum, this Court concludes that the petitioner’s appeal lack merits because the petitioner does not qualify for duty-related benefits under West Virginia Code §15-2-29(a). Specifically, the petitioner’s injury did not result from an “occupational risk or hazard peculiar to the services required of members of the Department and incurred pursuant to or while the member was engaged in the performance of her duties as a member of the department.” As a result, the Board’s findings were not clearly wrong in view of the reliable, probative, and substantial evidence in the record and do not constitute an abuse of discretion. Furthermore, the findings of the Board do not constitute an error of law.

DECISION

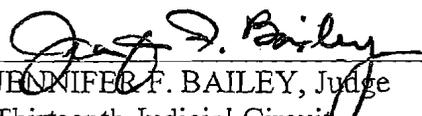
Upon a thorough examination of the record below, the Court finds that the Board made findings which were correct and appropriate under the circumstances of this case. Additionally, this Court finds that the decision was not contrary to law, clearly wrong, or otherwise in violation of the applicable law.

Accordingly, this Court **ORDERS**:

The decision of the West Virginia Consolidated Public Retirement Board, dated the 10th day of April, 2007, is **AFFIRMED IN ITS ENTIRETY** and this matter shall be **DISMISSED** and **STRICKEN** from the docket of this Court.

It is further **ORDERED** that the Circuit Clerk distribute certified copies of this Order to all *pro se* parties or counsel of record and the West Virginia Consolidated Public Retirement Board. This is a Final Order.

Entered this 31st day of July, 2009.


JENNIFER F. BAILEY, Judge
Thirteenth Judicial Circuit

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. SATOON, CLERK OF THE CIRCUIT COURT OF SAID COUNTY
AND IN OPEN STATE DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 3
DAY OF August, 2009
Cathy S. Satoon, CLERK
COUNTY CLERK OF KANAWHA COUNTY, WEST VIRGINIA lt