

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Wayne Wolfgang,	:	
	:	
Relator-Appellant,	:	
	:	
v.	:	No. 09AP-433
	:	(C.P.C. No. 07CVH-11818)
Ohio Public Employees Retirement	:	
System et al.,	:	(REGULAR CALENDAR)
	:	
Respondents-Appellees.	:	
	:	

D E C I S I O N

Rendered on November 17, 2009

The Mikulka Law Firm, LLC, Angela J. Mikulka and Thomas L. Mikulka, for appellant.

Richard Cordray, Attorney General, Hilary R. Damaser and Todd Nist, for appellees.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶1} This is an appeal from a judgment of the Franklin County Court of Common Pleas denying a writ of mandamus sought by appellant, Wayne Wolfgang, to compel appellees, Ohio Public Employees Retirement System ("OPERS") and Ohio School

Employees Retirement System ("SERS") to reinstate him to his prior disability status. For the reasons that follow, we affirm the judgment of the trial court.

{¶2} Appellant became a member of OPERS in 1975 by virtue of his employment with the Columbiana Soil and Water Conservation District. He transferred to the Mahoning Soil and Water Conservation District in 1976. Appellant's position as a district technician was performed largely outdoors and was physically demanding. In March 1998, appellant was laid-off from his district technician position and was never recalled. After leaving public employment in 1998, appellant became a truck driver in the private sector.

{¶3} While still working as a district technician and contributing to OPERS, appellant was elected to the Crestview Local School District Board of Education. He contributed to SERS while serving on the school board until he was defeated in the November 2003 election.

{¶4} As a result of long-term complications from Type I diabetes, including kidney failure, appellant applied to OPERS for a combined disability benefit on May 20, 2004. OPERS directed appellant to apply through SERS because his most recent contributions were with SERS. On July 14, 2004, appellant completed an application with SERS. Appellant indicated that he underwent dialysis three times per week, and that he could not attend school board meetings on those days. After a medical examination, appellant was notified on September 20, 2004 that his claim was approved because he was disabled from his former responsibilities as a school board member. The medical advisor for OPERS then reviewed the SERS medical report and concurred in granting the

disability. Appellant's retirement benefit was conditioned on appellant undergoing an annual medical examination to determine if he was no longer disabled.

{¶5} Appellant received a kidney transplant on September 9, 2005. At his first annual examination, OPERS examining physicians determined that he could perform his prior duties as a school board member. Based on the conclusion that he could perform the duties of his last place of contributing service, OPERS terminated appellant's disability benefits, effective August 31, 2006. Appellant appealed the determination and, after further medical evaluation, OPERS retirement board affirmed the termination on November 15, 2006.

{¶6} Appellant brought a mandamus action and sought a declaratory judgment in the Columbiana Court of Common Pleas challenging the termination of benefits and claiming that OPERS should have conducted the reevaluation of his disability based on his job as a district technician and not as a school board member. OPERS and SERS sought a change of venue, and the case was transferred to the Franklin County Court of Common Pleas. On April 9, 2009, the court denied the writ. This appeal followed with appellant assigning the following as error:

First Assignment of Error

The Trial Court erred in granting summary judgment to Appellees on the basis that the record was devoid of evidence that Appellant's former position as school board member was an elected office.

Second Assignment of Error

The Trial Court erred in granting summary judgment to Appellees on the basis that Appellant's last held position was

School Board Member, rather than District Technician, as required by statute.

{¶7} Appellant contends that OPERS should have conducted its annual reevaluation based upon his job as district technician rather than that of school board member. Appellant states that the system in which he had the most service credit, OPERS, is in charge of determining and paying the benefit. He further notes that his position as a school board member was an elected position. Appellant relies upon R.C. 145.01 that excludes from the definition of "public employee" persons holding elected office. Based upon that statute, appellant argues that his school board position cannot be used in his annual reevaluation. Appellant wants his reevaluation to be based upon his position as a district technician under OPERS, which undeniably is a more physically strenuous job than that of a school board member.

{¶8} To be entitled to a writ of mandamus, appellant is required to establish a clear legal right, a corresponding duty on the part of OPERS and SERS, and the lack of an adequate remedy at law. *State ex rel. Husted v. Brunner*, ____ N.E.2d ____, 2009-Ohio-5327, ¶8. "[M]andamus is an appropriate remedy where no statutory right of appeal is available to correct an abuse of discretion by an administrative body." *State ex rel. Pipoly v. State Teachers Retirement Sys.*, 95 Ohio St.3d 327, 2002-Ohio-2219, ¶14. Appellant is incorrect in his assertion that the trial court granted summary judgment. As this is a mandamus action, and not one for summary judgment, we apply the abuse of discretion standard of review, not the de novo standard for summary judgment.

{¶9} Appellant claims that the trial court abused its discretion in denying the writ. "An abuse of discretion occurs when a decision is unreasonable, arbitrary, or

unconscionable." *State ex rel. Stiles v. School Emp. Retirement Sys.*, 102 Ohio St.3d 156, 2004-Ohio-2140, ¶13. In the mandamus context, an abuse of discretion occurs when a decision is to an end or purpose not justified by, and clearly against, reason and evidence. *State ex rel. Bryant v. Kent City School Dist. Bd. of Edn.* (1991), 71 Ohio App.3d 748, 752.

{¶10} Under this standard, we must decide whether the decision to terminate appellant's disability benefit was unreasonable, arbitrary, or unconscionable. More precisely, we must decide whether the court of common pleas correctly determined that in reviewing a combined disability retirement recipient's capability of returning to his previous job duties, the public retirement system administering the combined disability benefit must consider the most recent position of public employment, regardless of the whether the administering system covered that service.

{¶11} Under applicable rules of statutory construction, all statutes relating to the same general subject matter must be read in *pari materia*. Further, in interpreting related and co-existing statutes, we must harmonize and accord full application to those statutes unless they are irreconcilable and in hopeless conflict. *State ex rel. Gains v. Rossi* (1999), 86 Ohio St.3d 620, 622 (construing expungement statutes).

{¶12} In considering combined disability benefits, we must analyze the applicable OPERS statutes and the corresponding SERS statutes together and attempt to harmonize them in order to give proper effect to the legislature's intent. Here, the legislature evinced a clear intent to permit employees who worked under different state retirement systems to combine their service credit and receive a combined benefit.

Therefore, even if an applicant is unable to qualify independently under a single system, he can still obtain a disability benefit under the combined disability statutes enacted by the General Assembly.

{¶13} Appellant was a member of both OPERS and SERS by virtue of his employment with different public entities. Under statutes governing both systems, a person who is a member of OPERS and SERS may file a combined application for disability retirement benefits and receive one retirement benefit based on years of service and contributions to both systems. R.C. 145.37; R.C. 3309.35.

{¶14} In this case, appellant was ineligible for an independent disability benefit from OPERS because he did not apply for benefits within two years after his last service as a district technician. R.C. 145.35(C) states, in pertinent part:

Application must be made within two years from the date the member's contributing service terminated.

Nor was appellant eligible for an independent disability benefit with SERS because he lacked the necessary five years of service credit. R.C. 3309.39(A) states, in pertinent part:

The school employees retirement system shall provide disability coverage to each member who has at least five years of total service credit.

Appellant had not reached five years of service credit with SERS because his position was part-time.

{¶15} The only way that appellant could receive a disability determination was by means of the combined disability provisions and the coordinating benefits statutes. R.C. 3309.35; R.C. 145.37; and R.C. 3307.57. Since appellant applied for and received a

combined disability determination, his service credit under both systems had to be considered in the original application of disability or he would have been statutorily ineligible for the benefit.

{¶16} In both OPERS and SERS, the respective combined disability statutes do not have a separate standard for determination of disability. The combined disability applications are reviewed under the same standard as applications for an independent system. In this case, SERS conducted the initial determination because the systems interpret their statutes to require that the system under which the applicant had the most recent service is the appropriate system to make the initial determination. The system the applicant has the most service credit with is then to administer and pay the benefit. R.C. 145.37(B)(1)(c); and R.C. 3309.35(B)(3).

{¶17} Additionally, OPERS has a rule that specifies when it will request and pay for the examining physician's report, or in other words, make the initial determination. The version of the rule in effect at the time appellant made his application, Ohio Adm.Code 145-2-25 entitled "Combined disability benefits," provides, in pertinent part, that:

(A) This rule amplifies section 145.37 [coordinating benefit statute] of the Revised Code.

(B) If a member of the public employees retirement system files an application for a disability benefit pursuant to section 145.35 of the Revised Code, and also chooses to apply for a combined disability benefit with the state teachers retirement system or school employees retirement system, the following shall apply.

(1) This system shall request and pay for the examining physician(s) report(s) if:

(a) The member's last public service was covered by this system, and the member was not contributing concurrently to such other retirement system(s) as of the last covered date of public service, or;

(b) The member's contributions to this system for Ohio service credit during the twelve months preceding an application are greater than such contributions to such other retirement system(s) during the same period and he the member was contributing concurrently to such other system(s) as of the last covered date of public service.

(2) If this system is paying for the examining physician(s) report(s), disability for performance of duty shall be determined on the basis of the duties for the most recent service covered by this system.

{¶18} Appellant's last day of service with OPERS ended in 1998, and his last day of service with SERS ended in 2003. The outcome for appellant is that, under OPERS rules, appellant was required to have his initial disability evaluation with SERS. Appellant could have had his disability determination based on his duties as a district technician only if his most recent public service was with OPERS.

{¶19} In order to be entitled to disability retirement benefits, a SERS member must be mentally or physically incapacitated for the performance of the member's last assigned primary duty by a disability condition that is either permanent or presumed to be permanent for at least the 12 months following the application for benefits. R.C. 3309.39(C); *Stiles* at ¶13. See also R.C. 145.362 for comparable OPERS statute.

{¶20} Once the initial determination of disability has been made, R.C. 145.37(B)(1)(b) provides that:

In determining eligibility for a disability benefit, the medical examiner's report to the retirement board of any state retirement system, showing that the member's disability

incapacitates the member for the performance of duty, may be accepted by the state retirement boards as sufficient for granting a disability benefit.

See also R.C. 3309.39(B)(2) for analogous SERS statute. Thus, after SERS made the initial determination of disability, OPERS relied on the report of the SERS examining physician to find appellant to be disabled from the same position, that of a school board member. These statutes show a clear legislative intent that one system may accept another system's report and that the disability determination be made on the most recently held public service job. The OPERS rule indicates that the systems have interpreted the statutes in the same way. If each system must consider separate job descriptions, there would be no need for the statutes in their present form.

{¶21} Appellant relies on R.C. 145.01, the OPERS definitions section, to support his contention that OPERS cannot use his elective position of school board member for his annual examination to determine whether he is capable of resuming his duties. In defining who is a public employee, R.C. 145.01(A)(1) excludes elected officials from the definition of "public employee." Appellant claims that because OPERS is charged with conducting the annual examination, it follows that OPERS statutes govern the examination. Appellant further argues that his exclusion as a public employee of OPERS means that OPERS must look to his job with OPERS in determining whether he continues to be disabled.

{¶22} Appellant is correct that his service as a school board member is not included in the definition of who is a public employee. That is because under SERS statutes, a school board member may elect whether to become a member of SERS. If he

does not elect to become a member, he is forever barred from membership rights. R.C. 3309.012(A). Also, certain elected officials are given the option to participate in OPERS or social security. R.C. 145.20.

{¶23} Appellant has misconstrued the combined disability statutes and interpreted R.C. 145.01 in a vacuum. Regardless of whether R.C. 145.01 excludes elected officials from membership in OPERS, appellant applied for and was granted a *combined* disability benefit based on his service under OPERS *and* SERS. The examining physician for the annual medical examination was required to "report and certify to the board whether the disability recipient is no longer physically and mentally incapable of resuming the service from which the recipient was found disabled." R.C. 145.362. OPERS statutes do not contemplate that entirely different job descriptions govern the annual examination. The statute provides that the annual examination be based on the service from which the recipient was found to be disabled. Once appellant initially was found to be disabled from his position as school board member, the statute is clear; appellant had to be reexamined based upon his service as a school board member.

{¶24} Appellant bases much of his argument on this court's decision in *State ex rel. Gill v. School Emps. Retirement Sys.*, 10th Dist. No. 07AP-286, 2008-Ohio-2302 ("*Gill I*"), reversed, 121 Ohio St.3d 567, 2009-Ohio-1358, ("*Gill II*"). *Gill* involved an employee who was found to be disabled under an independent claim based solely on his OPERS employment, but was found not disabled under a combined benefit analysis with SERS using his SERS employment.

{¶25} Gill had originally pursued combined disability benefits based on his service with both OPERS and SERS. SERS was responsible for having Gill examined by a physician because his last date of service was with his SERS employer. SERS determined that Gill was not disabled from his part-time employment covered under SERS. Gill appealed. While his appeal was pending, Gill applied for independent disability retirement benefits through OPERS. On his application, Gill specifically indicated that he did not want to pursue combined disability with SERS. OPERS granted the independent disability benefit from his full-time employment covered under OPERS. When SERS learned that Gill had been granted independent benefits from OPERS, SERS determined that he was no longer eligible for combined benefits and voided his pending appeal.

{¶26} In a two-to-one decision, this court found that there was no statutory authority to require both systems to base their disability determinations on the same job. This court also determined that Gill could proceed with his appeal for a combined disability benefit even though he was already receiving independent benefits through OPERS.

{¶27} The Supreme Court of Ohio reversed this court's judgment in *Gill II*. The court noted that "insofar as the statutes are silent on this issue, we must accord SERS the deference to which it is entitled in interpreting the pertinent legislation." *Id.* at ¶28. "A court must give due deference to the agency's reasonable interpretation of the legislative scheme." *Id.*, quoting *Northwestern Ohio Bldg. & Constr. Trades Council v. Conrad*, 92 Ohio St.3d 282, 287, 2001-Ohio-190.

{¶28} The court held that SERS lacked the authority to continue with Gill's appeal once OPERS approved and began disbursing an independent OPERS disability benefit. *Gill II* at ¶32. The court found that the issue of which of Gill's employment positions should be the focus of a disability determination in a combined benefits case was held to be moot. *Id.* at ¶32.

{¶29} Even though the Supreme Court of Ohio declined to address that issue, we find that we must reexamine our analysis in *Gill I* in light of *Gill II*, striving to construe the applicable statutes as a whole and applying due deference to the retirement systems' interpretation of their statutes and rules. In doing so, we conclude that in the combined disability context the intent of the legislature was for both systems to base the combined disability benefit on the most recently held public position, regardless of which system covered the employment. This conclusion allows the retirement systems to coordinate the conditions under which they determine a combined disability. This rationale is logical since many employees find that, as they age, they can no longer perform certain jobs, but they can still compete in the workforce. If each system must determine disability based upon the last job held in its respective system, conflicts would inevitably arise as to whether the applicant was disabled or not. Conflicting results are contrary to and defeat the purpose of the combined and coordinating disability statutes.

{¶30} We, therefore, overrule the remaining portion of our decision in *Gill I* that was not overturned by *Gill II*. In *Gill I* we determined that, under a combined benefit analysis, both systems did not have to find disability based on the job with the last date of service regardless of which system the employment was under. Instead, we agree with

SERS that the last date of service is a predicate issue to the determination of disability. Both systems must evaluate the member for disability based on the job the member was performing on the last day of service whether that service was with OPERS or SERS.

{¶31} From there the statute is clear that the annual medical examination must be based on the same position as the original disability. It is contrary to common sense and to the disability statute to construe the annual medical examination to mean anything other than an evaluation of "whether the disability benefit recipient is no longer physically and mentally incapable of resuming *the service from which the recipient was found disabled.*" R.C. 145.362. (Emphasis added.)

{¶32} Finally, we agree with the trial court that appellant's claim that it is impossible under R.C.145.362 for the employer to restore the no longer disabled employee to his previous position is not properly before the court. Appellant's employer was the Crestview Local School District, and that entity was not named as a respondent in this case. Therefore, we cannot rule upon this issue.

{¶33} Based on the foregoing, we find no abuse of discretion on the part of the court of common pleas or OPERS and SERS. We overrule appellant's two assignments of error, and affirm the judgment of the Franklin County Court of Common Pleas denying the writ of mandamus.

Judgment affirmed.

CONNOR, J., concurs.
SADLER, J., concurs in part and concurs in judgment.

SADLER, J., concurring in part and concurring in judgment.

{¶34} Though I concur in the disposition of both assignments of error and in affirming the trial court's judgment, I write separately because I disagree with the portion of the lead opinion that concerns this court's decision in *State ex rel. Gill v. School Emps. Retirement Sys.*, 10th Dist. No. 07AP-286, 2008-Ohio-2302.

{¶35} Though I agree that the Supreme Court of Ohio left undisturbed this court's holding in *Gill* related to which of Gill's employment positions the two retirement systems were required to use in determining combined-benefits disability, I do not believe that the instant case presents the same issue as was presented in *Gill*, and, therefore, I do not find it necessary to discuss, let alone overrule, our decision in *Gill*.

{¶36} The principal difference between *Gill* and the present case is that in *Gill* the action being challenged was an initial determination as to whether combined benefits would be granted, whereas here PERS' action involved an annual medical evaluation to decide whether the benefits that had already been approved should continue. The discrete issue before us in this case is whether, in an annual re-examination of a combined disability benefits recipient, PERS must evaluate continued disability based upon a position other than the one from which the member was originally found disabled. That issue was not before the court in *Gill*.

{¶37} This case, unlike *Gill*, involves the application of R.C. 145.362, which requires that the annual re-examination determination be "whether the disability benefit recipient is no longer physically and mentally incapable of resuming the service *from which the recipient was found disabled.*" (Emphasis added.) That statute directs the

outcome of this case because it required PERS to do precisely what it did. Because *Gill* involved an initial determination of eligibility for combined disability benefits, which is governed by R.C. 145.37, and not a re-examination, which is governed by R.C. 145.362, this case does not require us to overrule *Gill*. For this reason, I do not join in the majority's discussion contained in paragraphs 24 through 30 of the lead opinion.

{¶38} I do, however, concur in overruling both of appellant's assignments of error, as discussed in paragraphs 1 through 23 and 31 through 33, and in affirming the judgment of the Franklin County Court of Common Pleas.
