

STATE OF WISCONSIN
TEACHERS RETIREMENT BOARD

In re appeal of DETF determination by:

Appeal No. 99-019-TR

[Appellant]

FINAL DECISION AND ORDER

The Teachers Retirement Board (Board), having duly considered the record in this appeal, including Objections to Proposed Decision, dated October 31, 2002, filed by the Department of Employee Trust Funds (DETF), rejects the hearing examiner's proposed decision and adopts the following as its final decision and order in this appeal:

FINDINGS OF FACT

1. This is a timely appeal of a determination by DETF denying the application of Appellant for disability benefits under Wis. Stat. § 40.63, because it determined that the medical evidence did not establish that she was disabled to the extent required to receive disability benefits under Wis. Stat. § 40.63.

2. A pre-hearing conference for this appeal was held on June 15, 1999, before Donald Johns, Hearing Examiner for the Board. Examiner Johns issued a Pre-Hearing Conference Memorandum on June 23, 1999, identifying the following issues on appeal:

a. Did DETF err in its March 15, 1999, determination to deny Appellant's February 18, 1998 application for disability benefits under Wis. Stat. § 40.63?

b. Does Wis. Stat. § 40.63 allow an attorney for the applicant or the applicant herself to approve or appoint one or both of the licensed and practicing physicians required under Wis. Stat. § 40.63(1)(d)?

3. An evidentiary hearing was held before Hearing Examiner Barry Stern on February 8, 2002. Appellant appeared in person represented by [Attorney]. Deputy Chief Legal Counsel David Nispel appeared in person for DETF. At the hearing, Appellant's Exhibits (App. Ex.) 1 through 13 and DETF Ex. 1 through 4 were received into evidence. DETF Ex. 1 is a certification of DETF records pursuant to Wis. Admin. Code § ETF 11.06(6), with 217 pages of attached records from Appellant's Wisconsin Retirement System (WRS) participant file. Appellant and DETF filed post-hearing legal briefs.

4. Appellant worked as an elementary school teacher for the [Employer] from 1965 to 1995. Due to this employment, she was a participant in the Wisconsin Retirement System.

Her last day of work was June 9, 1995. (R. 424) The last day for which she was paid was November 15, 1995. (R. 424) Appellant initially filed an application for a disability benefit under Wis. Stat. § 40.63 in September 1996, identifying her disability as:

Small fiber neuropathy in both feet to above ankles. Unable to stand or walk for a sustained period of time. Pain is constant--no relief when seated. Pain causes problems with sleep.

(R. 424)

5. Wisconsin Stat. § 40.63(1)(d) requires that a disability claimant be certified in writing by at least two licensed and practicing physicians approved or appointed by DETF to be “unable to engage in any substantial gainful activity by reason of a medically determinable physical or mental impairment which can be expected to result in death or to be of long-continued and indefinite duration” (hereinafter referred to as “totally and permanently disabled”). Three neurologists submitted medical reports in connection with Appellant’s first application: Dr. [A], her treating neurologist at the time, said that she was totally and permanently disabled; Dr. [B], whose name was one of three provided by DETF as approved for a second opinion, was unable to express an opinion at that time; and Dr. [C], whose name was also one of the three provided by DETF, was of the opinion that she was not totally and permanently disabled. Dr. [C] commented in his report: “No abnormalities noted[;] suspect malingering or functional overlay.” “Medication . . . may cause some of her complaints. I would recommend they be discontinued.” (R. 542-43) DETF cancelled Appellant’s first application on October 21, 1997, because she had not filed all the materials necessary, specifically two qualifying medical reports, to support her application within 12 months, as required by Wis. Stat. § 40.63. (R. 552)

6. Appellant filed a second application for a disability benefit under Wis. Stat. § 40.63 with DETF in February 1998. (R. 305) She claimed the same disability. She again asked Dr. [A] to provide the first medical report, but he responded on July 30, 1998, that he was unable to determine whether she was totally and permanently disabled at that time. (R. 310-14) Dr. [A] had also provided a letter, dated July 21, 1998, stating that when he re-evaluated her on January 22, 1998, there had been no change regarding her neurological symptomology, but Dr. [A] further suggested to DETF that it seek a medical opinion from one of the other physicians who had recently been more involved in her treatment, as those physicians had not provided him with any updates on her health status. (R. 372) DETF determined that Dr. [A]’s report was a non-report, because he was unable to make a determination.

7. On August 26, 1998, DETF notified Appellant that Dr. [A] was unable to determine if she is totally and permanently disabled, and that his medical report could not be used to determine her eligibility for disability benefits. Enclosed with the letter was a new medical report form with instructions to Appellant to take the form to the physician of her choice for the initial medical report. (R. 367)

8. On November 18, 1998, DETF received a medical report from Dr. [D]. (R. 328-33) (Subsequently, Dr. [D]'s last name was changed to [P].) Dr. [D]'s report indicated that she had examined Appellant on November 4, 1998, and that Appellant was totally and permanently disabled as a result of small fiber polyneuropathy and degenerative arthritis. She stated that the medical reasons that Appellant could not be employed in any occupation were "chronic pain, inability to stand for long periods, joint limitations." DETF determined that the report was a qualifying medical report for purposes of Wis. Stat. § 40.63(1)(d).

9. On December 1, 1998, DETF notified Appellant that it had received the qualifying report from Dr. [D] and informed her that she must now obtain another medical report from Dr. [C], the neurologist who had filed a non-qualifying medical report in connection with her first disability application. (R. 520) Appellant's attorney wrote to DETF on January 13, 1999, and requested that another physician's name be provided for the second opinion. (R. 335-36) He noted that DETF had told him that it was DETF policy to send the applicant making a second application back to the physician who had given a non-qualifying opinion in an earlier application. He asked DETF to reconsider that position. Despite the request, DETF did not provide the names of alternate physicians.

10. On February 9, 1999, DETF received a medical report from Dr. [C], with attached notes, indicating that he had examined Appellant on February 1, 1999, and that she is not totally and permanently disabled. (R. 533-34, 319-22) On the form, he stated the reason she was not totally disabled was that her problem "is numbness pain in feet otherwise no deficits." (R. 320) He did note that her pain had worsened since he had last seen her on August 15, 1997. He concluded in his review notes that she was a "[c]hronic pain patient, etiology not clear," and stated that "there is probably an underlying neuropathy, however, examination still shows some functional overlay." (R. 322)

Be that as it may, I do not feel the patient is totally disabled from this. All evidence would indicate that treatment with narcotics and a sedentary life style are counter productive. I would encourage the patient to become involved in a work hardening program and become physically active through exercise.

(R. 322)

11. On March 15, 1999, as a result of the non-qualifying medical report filed by Dr. [C], DETF denied Appellant's application for disability benefits because "[t]he medical evidence submitted did not establish that you are disabled within the meaning of the law." (R. 463) On April 1, 1999, DETF received a letter from Appellant's attorney, appealing DETF's denial of Appellant's application for disability benefits. (R. 461-62)

12. On April 16, 1999, Dr. [B], a neurologist, saw Appellant for a neurologic reevaluation. DETF had approved Dr. [B] for a second medical report in connection with Appellant's first application, but at that time (February 1997), Dr. [B] said she was unable to provide an opinion. (R. 539-40) Dr. [B] did not see Appellant again until the April 16, 1999 reevaluation. Based on the reexamination, she submitted a medical report, with attached notes, stating that Appellant is totally and permanently disabled because of "irreversible (at least by

available studies to date) damage to peripheral nerves resulting in pain and impaired mobility of extremities (lower extr. [greater than] upper).” (R. 315-18) In her notes attached to the form, Dr. [B] stated that Appellant has “an established diagnosis of a painful small fiber polyneuropathy and etiology has not been determined.” (R. 317) She noted in conclusion that small fiber polyneuropathy is very difficult to treat, even for symptomatic relief. “I would agree that it would not be practical for [Appellant] to continue her duties as required by the teaching profession and would consider her condition a permanently disabling one to a reasonable degree of medical certainty.” (R. 318) DETF found that this medical report could not be accepted since it was received after the application had been denied.

13. At the hearing, Dr. [D] and Dr. [C] testified by telephone; Dr. [B] was present and testified in person.

Dr. [D] testified that, as a neurologist, she specialized in the evaluation and treatment of neuromuscular diseases. (R. 177) She explained that Appellant’s condition was much harder to diagnose than other forms of neuropathy because ordinarily the diagnosis of neuropathy is made on the basis of a clinical assessment and electrophysiologic (EMG) studies. She said both she and the Mayo clinic conducted specialized testing (autonomic testing) on Appellant because Appellant’s condition, which involved just the small fiber portion or sensory portion of the nerve, occasionally is not reflected in an ordinary EMG study. (R. 179) She testified that the results of Appellant’s specialized tests were abnormal. (R. 179) Dr. [D] explained that Appellant’s disability is the result of problems with the smaller fibers of the nerve which carry sensory input, rather than the larger fibers which carry motor axons which control muscle strengths. (R. 178) Dr. [D] testified that she reviewed Appellant’s medical records and believed that they substantiated her medical problem. (R. 184-85) Her examination of Appellant for her report had lasted most of an hour.

Dr. [C] testified that Appellant’s appointment with him in 1999 had lasted about 20 minutes (R. 149) and that he considered it relevant to his conclusion that she was able to work as a teacher that he found no significant abnormalities in his physical examination of Appellant, that she was able to walk into his office and that she communicated clearly. (R. 150) His examination of Appellant did not include physical tests for strength, coordination, and reflexes, but did not include the specialized tests described by Dr. [D]. He also testified that he did not review any of her medical records prior to reevaluating her in 1999 (R. 149), but did review other doctors’ reports that had been issued since he had last seen Appellant in 1997, including the Mayo Clinic report, which reported that an electromyogram reflected chronic nerve damage to her calf muscles (R. 153 and 157). Dr. [C] noted that Appellant’s pain had worsened since he last saw her on August 15, 1997. His recommendation was that she try to handle the pain without narcotics, by being physically active. (R. 149-50) He was of the opinion that she was without “significant physical abnormalities under examination, and that she was a totally independently functioning adult.” (R. 150)

Dr. [B] testified at the hearing that she reviewed Appellant’s medical records before the reexamination and that Appellant’s exam lasted about 45 minutes. She testified that the reason she had not expressed an opinion in 1997 was that she thought the total disability might not be permanent. She further testified that, based on the fact that Appellant’s symptoms had worsened

over the intervening two-year period, despite extensive workups, she concluded that the disability was not only total, but permanent.

14. (DETF Staff), a disability specialist at DETF who processed Appellant's application, testified at the hearing that, ordinarily, DETF provides a list of three physicians who can provide a second opinion; however, where there has been a prior application with a non-qualifying medical report, the DETF policy at the time of Appellant's application was to require a second opinion from the doctor who provided that non-qualifying report. She responded that DETF might allow the applicant to use a different physician, if there were some reason it was unfair to use the same one. She was unaware that Appellant had requested that a different neurologist be approved.

CONCLUSIONS OF LAW

15. DETF applied its articulated policy of requiring an applicant making a second disability application to obtain the second opinion from the physician who previously issued a non-qualifying report as if it were an unpromulgated "rule." DETF provided no basis or explanation for the policy, but applied it simply because it was "policy." The Board believes that there may be circumstances in which such a requirement may be reasonable; for example, when the physician in question is uniquely qualified because he or she has conducted far more extensive exams than other physicians or has a more extensive knowledge of the applicant's condition or history. However, the "policy" should not be generally applied as a requirement. Dr. [C] had no special knowledge about Appellant's claimed disability. In fact, his views about pain medication were inconsistent with those of Appellant's treating physicians. Particularly troublesome in this case is the fact that Appellant expressly requested that she be allowed to obtain a second opinion from a different neurologist. There does not appear to be any reason she should not have been allowed to do so.

16. Dr. [B]'s report, and testimony, is acceptable as the second medical report required by Wis. Stat. § 40.63(1)(d). Dr. [B] was approved by DETF to provide a second opinion in connection with Appellant's first application, and, thus, was approved by DETF, as required by Wis. Stat. § 40.63(1)(d). She testified in person at the hearing, confirming her opinion that Appellant is totally and permanently disabled within the meaning of Wis. Stat. § 40.63, and she was available for cross-examination by DETF.

17. The medical reports submitted to DETF, together with the testimony of the three physicians at the hearing, support the conclusion that Appellant is totally and permanently disabled for purposes of Wis. Stat. § 40.63. All three were approved by DETF. Both Dr. [C] and Dr. [B] examined Appellant once for the first application and once for the second application. Dr. [D]'s report and testimony was consistent with Dr. [B]'s opinion. Dr. [D], who specializes in evaluation and treatment of neuromuscular diseases. Explained how Appellant's condition involving small muscle fibers required special tests which she and the Mayo clinic had conducted. Dr. [C] appears to have discounted the Mayo test results.

18. Since the Board has determined that Appellant is entitled to the disability benefit for which she applied in her second application, it need not address the second issue in this appeal.

VARIATIONS FROM HEARING EXAMINER'S PROPOSED DECISION

A. The hearing examiner proposed remanding the case so that Appellant could obtain an additional medical opinion of her condition at the time of her application in 1998. The Board agrees that Appellant should be allowed a medical opinion other than Dr. [C]'s. However, Dr. [B], who was approved by DETF to provide a second opinion, has already provided a qualifying medical report. Importantly, she confirmed her medical opinion at the hearing and was available for cross-examination.

B. The hearing examiner found that the current policies of DETF articulated in Proposed Finding of Fact ¶ 10 are "rules" within the meaning of Wis. Stat. § 227.10. The Board agrees that DETF has applied the policy as though it is a rule. However, the policy does not have the force of law and does not bind the Board. DETF was instructed to develop rules regarding the number of medical reports an applicant for disability benefits under Wis. Stat. § 40.63 may submit. Any such rules must be approved by the Board, as well as other ETF-attached boards, before they are effective. The policies at issue have not been approved. The Board agrees with the hearing examiner's conclusion that the policy at issue in this appeal may deny a claimant a fair opportunity to establish that he or she is eligible for the disability benefit and may assign undue weight to one physician's opinion. The Board removed ¶ 24 of the proposed decision, which ordered DETF to promulgate rules on the basis that such a communication from the Board to DETF is more appropriate in a separate communication, rather than in a final decision relating to an individual appeal.

E. The Board deleted Proposed Finding of Fact ¶ 19. The agreement between DETF and Appellant regarding the relation between her retirement benefit and her disability benefit is not at issue in this appeal and has not been addressed by the parties as an issue to be resolved.

ORDER

IT IS HEREBY ORDERED, that DETF's denial of Appellant's application for a disability benefit under Wis. Stat. § 40.63 is REVERSED, and the case is remanded to DETF with instructions to grant Appellant's disability application and to take action consistent with this decision.

Dated as of December 12, 2002.

TEACHERS RETIREMENT BOARD

Wayne McCaffery, Chair