

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**November 18, 2003**

Cornelia G. Clark  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 03-0758  
STATE OF WISCONSIN**

**Cir. Ct. No. 02CV006805**

**IN COURT OF APPEALS  
DISTRICT I**

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**ROGELIO DELGADO, JR.,**

**PETITIONER-APPELLANT,**

**v.**

**CITY OF MILWAUKEE EMPLOYEES' RETIREMENT  
SYSTEM/ANNUITY AND PENSION BOARD,**

**RESPONDENT-RESPONDENT.**

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APPEAL from an order of the circuit court for Milwaukee County:  
MICHAEL P. SULLIVAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. Rogelio Delgado, Jr., appeals from a circuit court order affirming the decision of the City of Milwaukee Employees' Retirement System/Annuity and Pension Board discontinuing Delgado's duty disability benefits. Delgado contends that the circuit court and the Board erred in eliminating his benefits because there was no "substantial evidence" to support the

decision and because he continues to suffer from posttraumatic stress disorder rendering him unable to return to work. Because the Board's decision is supported by substantial credible evidence, we affirm.

## I. BACKGROUND

¶2 On August 17, 1992, Delgado began working as a police officer for the City of Milwaukee. On August 2, 1993, Delgado shot a man who had reportedly brandished a gun. Subsequent to the shooting, Delgado was placed on a brief administrative leave while the shooting was investigated. He was then returned to active duty. On November 24, 1993, Delgado shot a man who allegedly had been involved in a battery. The man died as a result of the gunshot wound. Following both incidents, investigations and other proceedings took place. It was determined that the shootings were justified. Delgado was placed on light duty assignments.

¶3 In January 1994, Delgado filed a worker's compensation claim stating that he was suffering from posttraumatic stress disorder. He also noted that he had been treating with a psychologist and had continued treatment between 1994 and 1995. He remained on administrative duty during this time.

¶4 Psychiatrist Dr. Leslie Gombus conducted an examination and concluded that Delgado was "medically unfit for duty in any capacity." A medical panel was selected and both physicians agreed that Delgado was disabled and should receive disability benefits. On February 20, 1995, Delgado applied for and was granted duty disability benefits.

¶5 In these circumstances, the Milwaukee City Charter (MCC) requires periodic medical examinations and case reviews for officers placed on duty

disability. MCC § 36-05-3-c-1-a. According to MCC § 36-05-3-c-1-b: “Case Review. In the event a member receiving a duty disability retirement allowance is later determined to be fit for service he shall be restored to service in his department and he shall no longer be entitled to receive a duty disability retirement allowance.” Based on this provision, a medical panel performed a subsequent examination of Delgado in 1996. Dr. Larry Sprung was selected by the police union and concluded that Delgado continued to suffer from depression and posttraumatic stress disorder, which rendered him totally and permanently disabled. Sprung concluded that Delgado should remain on duty disability. Dr. Donald Feinsilver, the physician selected by the City of Milwaukee, reached a similar conclusion. Dr. Feinsilver noted that Delgado should eventually recover and recommended annual evaluations. It was determined that benefits should continue as Delgado continued to suffer from posttraumatic stress disorder and could not perform his duties as a police officer.

¶6 The next examination was concluded in 1998. The police union selected Dr. Charles Hodulik, who concluded that Delgado was still suffering from the disorder and could not return to work. The City selected Dr. Gay Anderson to conduct the medical examination. Dr. Anderson concluded that the posttraumatic disorder had resolved and Delgado could return to light duty work. Because the two physicians disagreed, a third physician was selected to break the tie. *See* MCC § 36-01020. The medical panel chose Dr. Thomas Michlowski as its third member.

¶7 Dr. Michlowski diagnosed Delgado with a somatoform disorder and certified that he was no longer permanently and totally disabled as a result of work-related injuries. Dr. Michlowski concluded that Delgado could return to light duty work, and therefore was no longer entitled to duty disability benefits.

The Board adopted the certifications of the majority of the medical panel and restored Delgado to active service in the police department, effective March 26, 2001.

¶8 Delgado filed for review of the Board's decision pursuant to WIS. STAT. § 68.09 (2001-02).<sup>1</sup> Patrick Sheedy was appointed as the independent reviewer. On May 9, 2001, he affirmed the Board's decision to terminate duty disability benefits. Delgado appealed and a hearing was held before Hearing Examiner Frank P. Zeidler. On March 25, 2002, Zeidler affirmed the decision to terminate duty disability benefits. Zeidler's decision was adopted by the Board and became its final determination. Delgado then filed a petition for writ of certiorari to the circuit court, which issued an order affirming the Board's decision. Delgado now appeals.

## II. DISCUSSION

¶9 Our review of a *certiorari* proceeding is the same as the trial court's. We are limited to reviewing the administrative record to determine whether: (1) the Board kept within its jurisdiction; (2) the Board proceeded on a correct theory of the law; (3) the Board's actions were arbitrary, oppressive or unreasonable and represented its will and not its judgment; and (4) the evidence allows the Board to reasonably make the resulting determination. *State ex rel. Ruthenberg v. Annuity & Pension Bd.*, 89 Wis. 2d 463, 472, 278 N.W.2d 835 (1979). Here, Delgado's contention is limited to whether there was substantial evidence to support the Board's determination. In applying the substantial

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

evidence test, we will affirm the Board's findings if they are supported by "any credible and substantive evidence in the record." *Hoell v. LIRC*, 186 Wis. 2d 603, 612, 522 N.W.2d 234 (Ct. App. 1994).

¶10 Delgado argues that, in reviewing the record, we will not find any "substantial evidence" to support the Board's determination to terminate his duty disability payments. He claims that the only evidence supporting the Board's ruling is "uncorroborated hearsay" from physicians' reports. Citing *Folding Furniture Works, Inc. v. Wisconsin Labor Relations Board*, 232 Wis. 170, 188-89, 285 N.W. 851 (1939), he contends that uncorroborated hearsay does not constitute substantial evidence. We are not persuaded.

¶11 *Folding Furniture* does not control the outcome of this case. In *Folding Furniture*, the Board admitted non-probative hearsay from lay witnesses and the court cautioned against admitting hearsay evidence that is neither corroborated by other evidence nor relevant to a fact for determination. *Id.* at 188-89. The court was concerned about opinions without any basis or mere rumors being used as evidence. *Id.*

¶12 Delgado, on the other hand, wants this court to conclude that the two medical reports from Dr. Anderson and Dr. Michlowski constitute uncorroborated hearsay and cannot constitute substantial evidence to support the Board's findings. We cannot do so. First, Delgado stipulated to the admission of the medical reports. The time to object to the reports as uncorroborated hearsay was at the time of their admission. Such objection would have permitted the City to bring the physicians into court to testify personally, eliminating any alleged hearsay issues. Delgado failed to make the requisite objection and, therefore, he waives his right to challenge the reports here.

¶13 Second, we are not persuaded by his legal arguments. Medical reports can constitute substantial evidence. *Richardson v. Perales*, 402 U.S. 389, 407 (1971); *see also* WIS. STAT. § 908.03(6) (medical reports are admissible as substantive evidence as an exception to hearsay rule); WIS. STAT. § 102.17(1)(d) (certified reports of health care providers are admissible and constitute *prima facie* evidence). The United States Supreme Court rejected the argument Delgado makes here, explaining that although the medical reports may technically appear to be hearsay evidence, this was not the type of unreliable and non-probative hearsay the courts were referring to in rejecting “uncorroborated hearsay.” *Richardson*, 402 U.S. at 407. Thus, the statement on which Delgado relies was not intended to trigger the rejection of stipulated medical reports. Administrative agencies are permitted to rely on hearsay evidence in issuing decisions as long as the evidence is probative and reliable. *Crawford v. United States Dep’t of Agric.*, 50 F.3d 46, 49 (D.C. Cir. 1995). If the evidence is reliable and trustworthy, it can constitute substantial evidence. *Id.*

¶14 Delgado argues that Anderson’s and Michlowski’s medical reports were not reliable because each conflicted with DSM-IV diagnostic criteria as well as the other physicians’ conclusions. He contends that the physician who concluded he was still suffering from posttraumatic stress disorder, and thus still entitled to duty disability, offered the reliable and correct conclusions. The Board, however, is the fact finder, and we cannot substitute our judgment regarding “the weight or credibility of the evidence on any finding of fact.” *Currie v. DILHR*, 210 Wis. 2d 380, 387, 565 N.W.2d 253 (Ct. App. 1997). If there is credible and substantial evidence to support the Board’s determination, we will not overturn its decision. *Id.*

¶15 In the instant case, there was a difference of opinion among the physicians as to whether Delgado's work-related disability had resolved. The Board found that Anderson's and Michlowski's opinions were more credible. There is substantial evidence to support the Board's findings. In addition to the medical reports themselves, there was other evidence to support the Board's decision. First, both Dr. Sprung and Dr. Feinsilver had earlier opined that Delgado's disability would eventually resolve and he would be able to return to work. Second, in the years immediately following the shootings, Delgado clearly was unable to work. He was being treated for mental health issues, taking required medication, and was even suicidal. He was unable to focus or concentrate, and his attempts to continue his education were unsuccessful.

¶16 However, in 1999, Delgado was able to return to school full time, obtain a biology degree in 2001, and enter medical school. He no longer was taking any medication and was not being regularly treated for mental health issues. He was able to function. These facts support the conclusion that Delgado's work-related disability had resolved sufficiently so that he could perform a limited duty police assignment. Limited duty assignments have reduced physical demands and do not involve the hazards normally associated with police work.

¶17 Clearly, Delgado's functioning in recent years supports the medical opinions that he has overcome the disability, is able to function in everyday life, and can adequately handle the stresses associated with juggling family life and higher education. Accordingly, the Board gave greater weight to the conclusions of Anderson and Michlowski. We conclude that the Board's determination is supported by substantial credible evidence. It is supported by both the medical reports and the current conduct of Delgado. Accordingly, we affirm the decision to terminate duty disability benefits.

*By the Court.*—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE  
809.23(1)(b)5.



