

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
19 DST 05261

<p>Kirk Justin Barefoot Petitioner,</p> <p>v.</p> <p>NC Retirement Systems Division Respondent.</p>	<p>FINAL DECISION ON REMAND</p>
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THIS MATTER is on remand from the Honorable James M. Webb, Senior Resident Superior Court Judge of Moore County Superior Court. Judge Webb reversed the Final Decision issued by Administrative Law Judge Tenisha Jacobs on July 30, 2020. Judge Jacobs granted summary judgment to the North Carolina Retirement Systems Division (“RSD” or “Respondent”).

Upon remand, pursuant to N.C. Gen. Stat. § 150B-49, Judge Webb ordered Petitioner Kirk Justin Barefoot (“Petitioner”) be allowed to present additional evidence that must be considered by the administrative law judge before deciding the motion for summary judgment. In accordance with Judge Webb’s Order, the presiding Administrative Law Judge Stacey B. Bawtinhimer having now considered Petitioner’s additional evidence, **AFFIRMS** Judge Jacob’s original decision, and **GRANTS** Respondent’s Motion for Summary Judgment.

ISSUE

The issue in dispute is whether North Carolina Retirement Systems Division properly calculated Petitioner Kirk Justin Barefoot’s disability retirement benefits, in particular, the reduction in benefits due to Petitioner’s ability to engage in gainful employment.

STANDARD OF REVIEW

Summary judgment is granted when the “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” *Crocker v. Roethling*, 363 N.C. 140, 142, 675 S.E.2d 625, 628 (2009) (quotations and citations omitted).

A defendant is entitled to summary judgment by “1) proving that an essential element of the plaintiff’s case is non-existent, 2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or 3) showing that the plaintiff cannot surmount an affirmative defense.” *Lail v. Cleveland Cnty. Bd. of Educ.*, 183 N.C.App. 554, 557, 645 S.E.2d 180, 183-184 (2007).

PROCEDURAL HISTORY

1. Petitioner filed his petition for a contested case hearing on September 19, 2019.
2. By order filed on September 23, 2019, the case was assigned to Administrative Law Judge (“ALJ”) Tenisha S. Jacobs.
3. On January 13, 2020, Respondent filed a Motion for Summary Judgment, supported by a memorandum of law and the affidavits of Nanette L. Cosbey and James E. Dunn. Petitioner responded to the motion on January 28, 2020, without opposing affidavits.
4. On July 30, 2020, ALJ Jacobs entered a Final Decision, in which she granted summary judgment for Respondent.
5. On August 28, 2020, Petitioner timely filed in Moore County Superior Court a Petition for Review of an Administrative Decision and Request for the Presentation of New Evidence. The petition and request, which was filed in the Office of Administrative Hearings (“OAH”) on April 30, 2021, 4:10 p.m., had an attachment consisting of a copy of a Vocational Task Report, which Petitioner requested to be allowed to present as additional evidence.
6. By order entered December 29, 2020, the Senior Superior Court Judge Webb granted the request for presentation of new evidence and remanded the case back to OAH for further proceedings pursuant to N.C. Gen. Stat. § 150B-49 and stated in his Order that “[a]fter hearing the evidence, the administrative law judge may affirm or modify [her] previous findings of fact and final decision.”
7. On February 26, 2021, ALJ Jacobs held a scheduling conference with the parties for the purpose of determining how the case would proceed on remand. Petitioner indicated that he had obtained an updated Vocational Task Report, which he would like to submit to OAH. Counsel for Respondent indicated that Respondent would like the opportunity to argue that Respondent was entitled to summary judgment even considering the Vocational Task Report.
8. ALJ Jacobs instructed the Parties that Petitioner should submit his additional evidence, and following that submission, Respondent would be permitted to argue that Respondent remains entitled to summary judgment even after the consideration of Petitioner’s additional evidence. ALJ Jacobs explained to the Parties that, in accordance with N.C. Gen. Stat. § 150B-49, after considering Petitioner’s evidence, her options were to (1) affirm her final decision granting summary judgment to Respondent; (2) deny summary judgment and proceed to a hearing; or (3) enter summary judgment in favor of Petitioner.
9. On March 3, 2021, Petitioner filed his additional evidence with OAH, which consisted of three letters and the updated Vocational Task Report. None of the additional evidence

were supported by sworn affidavits. On April 9, 2021, ALJ Jacobs issued an order giving Respondent (ten)10 days to respond to Petitioner’s additional evidence.

10. By order filed April 12, 2021, this case was reassigned from ALJ Jacobs to ALJ Stacey Bice Bawtinhimer.

11. Consistent with the order filed on April 9, 2021, Respondent filed a response on April 19, 2021, in which Respondent argued that Petitioner’s additional evidence was insufficient to defeat Respondent’s motion for summary judgment, and therefore, ALJ Jacobs’ final decision granting summary judgment in favor of Respondent should be affirmed.

12. After the case was reassigned to ALJ Bawtinhimer, Respondent renewed its Motion for Summary Judgment on April 30, 2021, and Petitioner Responded to the renewed Motion on May 12, 2021, again without opposing affidavits.

13. A conference call with the Parties was held on May 18, 2021, to address how to proceed in light of the reassignment of this remanded case to Judge Bawtinhimer.

14. During the conference call, the Parties agreed that the Petitioner should be allowed to submit a supplemental response to Respondent’s Motion which would include the affidavits of Petitioner and his Vocational Expert, Ron Alford. Both Parties agreed that the matter could be decided on summary judgment and that a hearing was not necessary.

15. Respondent was given an opportunity to respond with opposing affidavits, to Petitioner’s vocational expert and Petitioner, but declined to file a Reply on May 26, 2021.

16. The record was closed on May 27, 2021; at which point the matter became ripe for adjudication.

FACTUAL BACKGROUND

The entry of findings of fact is not necessary when granting a motion for summary judgment, *Hyde Ins. Agency, Inc. v. Dixie Leading Corp.*, 26 N.C. App. 138, 142, 215 S.E.2d 162, 165 (1975), and decisions issued by the OAH granting such motions need not include such findings. N.C. Gen. Stat. § 150B-34(e). If the findings of fact are actually the trial court’s summation of the undisputed facts which support the judgment, findings of fact and conclusions of law do not render a summary judgment void or voidable. *Noel Williams Masonry, Inc. v. Vision Contractors*, 103 N.C. App. 597, 406 S.E.2d 605 (1991).

The Undersigned nonetheless summarizes the following undisputed facts in her legal analysis to provide context for her ruling. *See e.g., Hyde Ins. Agency, Inc.*, 26 N.C. App. at 142, 215 S.E.2d at 165 (“[I]t is helpful to the parties and the courts for the trial judge to articulate a summary of the material facts which he considers are not at issue and which justify entry of judgment.”)

LEGAL ANALYSIS

1. The Parties do not dispute that Petitioner is eligible to receive disability retirement benefits, that he is capable of engaging in gainful employment, or that his benefit must be reduced as a result of his ability to engage in gainful employment. Nor does Petitioner dispute the method of calculation of his disability retirement benefits.

2. The sole dispute is over the amount RSD determined that Petitioner is able to earn, which is used in calculating the reduction in benefits. With that sole issue in mind, it is unnecessary to review the method of calculation and only the amount that Petitioner is able to earn will be addressed.

3. Up until his retirement, Petitioner was employed as an Administrative Technician (formerly classified as Information Response Technician) for the City of Raleigh. Petitioner's treating doctors approved the position as being within his work limitations with accommodations.

4. RSD used the salary figure Petitioner was earning from this position at the time his disability retirement was approved as the amount he was able to earn through gainful employment. (Cosbey Aff. ¶¶7c; Dunn Aff. ¶¶9-10)

5. Petitioner himself *admits* that he voluntarily resigned from this position and that he was physically capable of continuing his work in the position. (Response to Admission No. 3)

6. By his own admission, Petitioner admits that he was able to engage in gainful employment and the amount of income he was able to earn upon his disability retirement.

7. Although the Undersigned reviewed Petitioner's additional evidence, the Undersigned agrees with Judge Jacobs' conclusion that further inquiry about Petitioner's future earning capacity was unnecessary. Despite this conclusion and for clarification purposes, the Undersigned will briefly analyze the statutory grounds for the disability retirement allowance reduction.

8. Once a member is approved for disability retirement, N.C. Gen. Stat. 128-27(c) provides that the Medical Board shall "determine if the member is able to engage in gainful employment and, if so, the member may still be retired and the disability retirement allowance as a result thereof shall be reduced" as provided in N.C. Gen. Stat. 128-27(e). Section 128-27(e) provides in relevant part that the benefit should be reduced if the recipient "is engaged in or is able to engage in a gainful occupation paying more than the difference . . . between his disability retirement allowance and the gross compensation earned as an employee during the 12 consecutive months in the final 48 months of service prior to retirement producing the highest gross compensation excluding any compensation received on account of termination." N.C. Gen. Stat. § 128-27(e)(1).

9. The same section provides further, "[i]f the disability beneficiary is earning or is able to earn more than the difference [between his disability retirement allowance and his gross compensation], the portion of his disability retirement allowance not provided by his contributions shall be reduced to an amount which, together with the portion of the disability retirement

allowance provided by his contributions and the amount earnable by him shall equal the amount of his gross compensation prior to retirement.” *Id.*

10. From September 2017 until Petitioner retired effective June 1, 2018, Petitioner was employed by the City of Raleigh as an Information Response Technician (“IRT”), a position that was later classified through a city-wide job classification as Administrative Technician. (Dunn Aff. ¶¶9, 12, 18)

11. RSD determined that Petitioner was able to earn \$47,099.16 per year, based on its determination that this was the salary Petitioner actually earned as an IRT/Administrative Technician just prior to retiring. (Mem. in Supp. S.J. pp. 4-7)

12. Of significance, Petitioner does not dispute that he was physically capable of continuing his employment as an IRT/Administrative Technician.

13. Although Petitioner does not dispute the method of the calculation of his benefits, RSD did err in the calculation of Petitioner’s salary, but this error resulted in a higher benefit for Petitioner. RSD misinterpreted the salary information it received from the City upon Petitioner’s retirement, by incorrectly assuming that Petitioner was paid monthly, when in fact, Petitioner was paid biweekly. As a result of this error, RSD underestimated Petitioner’s annual income, which resulted in a smaller reduction and the calculation of a higher benefit for Petitioner. (Cosbey Aff. ¶¶7c, 7d) The error came out in Petitioner’s favor, and therefore, Petitioner was not prejudiced by the error. (Attachment to Mem. in Supp. of S.J.) Neither Party contested this error in this case; therefore, it is not subject to consideration.

14. Petitioner alleges that the salary for the Administrative Technician position was inflated. In support of this argument, Petitioner asserts that “high levels of authorization were required in order to transfer [him] into the IRT position (and subsequently the administrative Technician position) with [his] previous law enforcement salary.” (Barefoot Aff. p. 3, Exs. B&C)

15. In support of his assertion, Petitioner attached an email exchange between Sergeant James Dunn and the highest levels of Human Resources which purportedly “strongly implies” that even the Raleigh City Attorney’s Office had to become involved in his position transfer. (Barefoot Aff. p. 4) Petitioner also compares his salary to a former female IRT whose salary upon separation in 2016 was \$38,707.00. (Barefoot Aff. p. 4, Ex. D) These emails are inadmissible hearsay and cannot be considered as credible evidence. And, even if allowable, the emails do not indicate that Petitioner’s salary was inflated. To the extent that Petitioner based his argument about inflation of his salary on these emails, this was merely speculation.

16. On the other hand, the sworn affidavit of Sergeant James Dunn, who emailed the HR Director about Petitioner’s salary, contradicts Petitioner’s assertions that his salary was inflated. Sergeant Dunn testified in his affidavit that the position is a full-time civilian position within Raleigh Police Department’s Crime Reporting Center; it is a budgeted position that has been included in the Raleigh Police Department budget since at least 2008; and, like other openings with the City of Raleigh, it is listed on the City of Raleigh’s website and www.NEOGOV.com. At the time Petitioner left the Administrative Technician position, he was earning \$51,024, which is

within the current salary range associated with the position. (Dunn Aff. ¶¶10, 12; Response to Admission No. 4; Response to Interrog. No. 10)

17. Petitioner's salary earned in this position is a reasonable measure of the amount he is able to earn. The amount that RSD determined Petitioner was able to earn exceeded the difference between Petitioner's disability retirement allowance and his gross compensation as measured by section 128-27(e)(1). (Cosbey Aff. ¶7) Therefore, Petitioner's benefit was reduced accordingly.

18. In Petitioner's case, the amount of the reduced benefit required by Section 128-27(e)(1) is equivalent to the difference between the amount he is able to earn and his gross compensation. (Cosbey Aff. ¶8) RSD's use of Petitioner's salary *at the time he retired* as a measure of what he "is earning or is able to earn" is supported by the statute and is reasonable. Even Petitioner's additional evidence in opposition to Respondent's motion does not raise genuine issues of material fact, and Respondent is entitled to summary judgment as a matter of law.

19. Petitioner, on remand from the superior court, proffers a Vocational Task Report. This report, however, does not provide a basis for denying Respondent's motion for summary judgment. The Vocational Task Report purports to "establish the annual salary for an Administrative Technician and or an Information Response Technician in and around police departments within a 50 mile [sic] radius of Jackson Springs, NC." (Voc. Task. Rep. p. 1) This report does not meet Petitioner's burden in response to Respondent's motion for summary judgment for three reasons.

20. First, it is clear from the relevant statutory language that RSD must make its determination regarding the reduction in benefits *at the time* the member applies for disability retirement, using the information available at that time. N.C. Gen. Stat. § 128-27(c) directs the medical board to determine whether the member can engage in gainful employment, "and, if so, the member may still be retired and the disability retirement allowance as a result thereof shall be reduced." N.C. Gen. Stat. § 128-27(c) (emphasis added).

21. Until the time Petitioner retired, he was employed as an IRT/Administrative Technician for the City of Raleigh, and the salary he received in this position is the proper measure of what he was able to earn.

22. Petitioner argues that N.C. Gen. Stat. § 128-27(c) "clearly lays out a progression of events involved in a member's retirement." (Barefoot Aff. p. 3) According to Petitioner, the "calculations cannot be made at the time the member applies for retirement". (*Id.*) (emphasis in original) Instead, Petitioner asserts that the "calculations must be made after the member has been approved for retirement and after the medical board has determined they are capable of gainful employment." This is precisely what happened here.

23. RSD notified Petitioner on July 11, 2018 that his disability retirement benefits were approved and that the Medical Board determined he was able to engage in gainful employment. This notification was sent to Petitioner's current address of 4409 Birnamwood Court, Holly Springs, North Carolina 27540. (Barefoot Aff. Ex. E)

24. Evidently, at some point Petitioner moved to Moore County *after he applied and was approved for disability retirement*, but information regarding Petitioner's later circumstances is not relevant to the determination made in response to his application for retirement when he resided in Wake County.

25. Second, nothing in N.C. Gen. Stat. § 128-27 suggests that RSD must rely on a market study to determine the amount Petitioner is able to earn, as opposed to using the salary Petitioner was actually earning at the time he applied for disability retirement. The fact that Petitioner *voluntarily chose to retire* from this position and moved to a more rural area in North Carolina did not render him incapable of earning the salary he was earning in the IRT position with the City of Raleigh. Furthermore, even if a market study were required in this context, nothing in N.C. Gen. Stat. § 128-27 suggests that the amount Petitioner is capable of earning must be determined by reference to a limited geographical region.

26. Finally, although the report identifies the relevant position as an Administrative Technician or IRT (the position that Petitioner held until he began disability retirement), the analysis is conducted for "Secretaries and Administrative Assistants, Except Legal, Medical, and Executive," the category in "O*NET" that the author of the report found was "most similar" to Petitioner's position. (Alford Aff. - Voc. Task. Rep. p. 4) The positions are not equivalent, however. The description given of the duties for secretaries and administrative assistants is the following: "Perform routine clerical and administrative functions such as drafting correspondence, scheduling appointments, organizing and maintaining paper and electronic files, or providing information to callers." (*Id.*) The job description for the IRT/Administrative Technician position that Petitioner held states that the position includes both office administrative and technical duties, and provides that the work "involves the independent performance of complex clerical duties including some technical tasks of a difficult nature," and "requires the exercise of considerable initiative, independent judgment, and the performance of independent clerical work involving significant procedures and sequences of an advanced nature." (Dunn Aff. Ex. A) Thus, even if a market analysis such as that provided in the Vocational Task Report were required, the analysis in the report is irrelevant, in that it does not address the proper type of position.

27. The original Final Decision references cases interpreting the Workers' Compensation Act, and the Vocational Task Report appears to be written with Workers' Compensation law in mind. However, the Workers' Compensation Act and the disability retirement statute are not interchangeable. For example, the Worker's Compensation Act must be liberally construed in favor of the injured worker. *See, e.g., Dayal v. Provident Life & Accident Ins. Co.*, 71 N.C. App. 131, 132, 321 S.E.2d 452, 453 (1984) ("In applying the principles of workers' compensation law, it must be remembered that case law reflects a long-settled policy that the provisions of the Act are to be construed liberally and in favor of the employee."). No such judicial pronouncements have been made regarding disability retirement.

28. Furthermore, the structures of the two statutes are completely different. The disability retirement statute defines disability by reference to medical considerations. *See* N.C. Gen. Stat. § 128-27(c) ("Provided, 7 that the medical board, after a medical examination of such member, shall certify that such member is mentally or physically incapacitated for the further performance of duty . . ."). The Workers' Compensation Act, by contrast, defines disability in reference to a lack of earning capacity. *See* N.C. Gen. Stat. § 97-2(9) ("The term 'disability' means

incapacity because of injury to earn the wages which the employee was receiving at the time of the injury in the same or any other employment.”).

29. In summary, Workers’ Compensation law, and the analyses frequently conducted in a Worker’s Compensation case, are inapposite in the context of disability benefits. RSD’s actions were authorized by the disability retirement statute and are not erroneous, or arbitrary, or capricious. Therefore, Respondent is entitled to summary judgment. Accordingly, due to Petitioner’s admission and even after reviewing Petitioner’s additional evidence in the light most favorable to him, the grant of summary judgment in the Final Decision should be affirmed.

FINAL DECISION ON REMAND

BASED ON THE FOREGOING, upon remand and after reviewing all of Petitioner’s evidence including the additional evidence ordered by Judge Webb in the light most favorable to the non-movant Petitioner, the Undersigned **AFFIRMS** the original Final Decision and **GRANTS** summary judgment for Respondent.

NOTICE OF APPEAL

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge’s Final Decision.** In conformity with the Office of Administrative Hearings’ rule, 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties as indicated by the Certificate of Service attached to this Final Decision.** N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

IT IS SO ORDERED.

This the 24th day of June, 2021.



Stacey Bice Bawtinhimer
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service.

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This the 24th day of June, 2021.



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