

**BEFORE THE EXECUTIVE DIRECTOR
OF THE INDIANA STATE TEACHERS' RETIREMENT FUND**

**IN THE MATTER OF
LYDIA P. BRUNKE**

Petitioner,

)
)
)
)
)
)
)

**INDIANA STATE TEACHERS'
RETIREMENT FUND**

Respondent.

FINAL ORDER

The Board of Trustees ("Board") of the Indiana State Teachers' Retirement Fund (TRF) is the ultimate authority in administrative appeals brought by TRF members under IC 4-21.5-3-28 and 550 IAC 2-2-2.5. In the TRF Statement of Board Governance, the Board delegates to the Executive Director the authority to conduct a final authority proceeding, or a review of decision points by the administrative law judge (ALJ), to issue a final order in this matter.

1. The ALJ issued a Decision and Recommended Order on Motion for Summary Judgment ("Recommended Order") in this matter on April 4, 2011, granting TRF's motion for summary judgment.
2. Copies of the Recommended Order have been delivered to the parties.
3. It has been more than fifteen (15) days since having received the ALJ's Recommended Order.
4. No objection to the ALJ's Recommended Order has been received.

NOW THEREFORE the Recommended Order of the Administrative Law Judge is affirmed.

DATED April 21, 2011



Steve Russo, Executive Director
Indiana State Teachers' Retirement Fund
One North Capitol, Suite 001
Indianapolis, IN 46204

CERTIFICATE OF SERVICE

I certify that on the 21st day of April, 2011, service of a true and complete copy of the foregoing was made upon each party or attorney of record herein by depositing same in the United States mail in envelopes properly addressed to each of them and with sufficient first class postage affixed.

Distribution:

Lydia P. Brunke



Jaclyn M. Brinks, Staff Attorney
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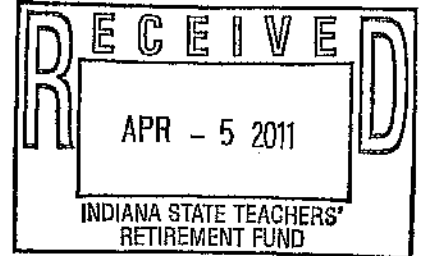
Wayne E. Uhl
Administrative Law Judge
8710 North Meridian Street, Suite 200
Indianapolis, IN 46260-5388

A handwritten signature in black ink, appearing to read "Steve Russo", written over a horizontal line.

Steve Russo, Executive Director
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**BEFORE AN ADMINISTRATIVE LAW JUDGE
INDIANA STATE TEACHERS' RETIREMENT FUND**

LYDIA P. BRUNKE,)
Petitioner,)
)
v.)
)
INDIANA STATE TEACHERS')
RETIREMENT FUND,)
Respondent.)



**DECISION AND RECOMMENDED ORDER
ON MOTION FOR SUMMARY JUDGMENT**

Introduction

Lydia P. Brunke seeks administrative review of TRF's determination that she is not eligible for TRF disability retirement. Pursuant to a schedule agreed to by the parties, TRF filed a motion for summary judgment on December 14, 2010; Brunke filed a response on January 3, 2011; TRF filed a reply on February 3, 2011; and Brunke filed a reply on February 7, 2011. Neither party requested a hearing, so the matter is ready for decision.

Findings of Undisputed Material Fact ¹

1. Brunke became a member of TRF upon her full-time employment by Penn-Harris-Madison School Corporation on August 23, 1993 (TRF Ex. A-1). See Ind. Code § 5-10.4-4-1; 550 Ind. Admin. Code 2-4-1.
2. Brunke had a contract to teach for Penn-Harris-Madison for the 2004-2005 school year ending on June 10, 2005 (TRF Ex. A-2).
3. Brunke submitted an application for retirement benefits signed on June 7, 2010, and received by TRF on June 11, 2010 (TRF Ex. A-4). The application stated that Brunke was applying for disability retirement, not regular or early retirement (*id.*). It stated that her last day of service was December 2, 2004 (*id.*).

¹ To the extent that the parties may have filed duplicate exhibits, the citation to one party's exhibit does not indicate a preference over the other party's submission of the same exhibit.

4. Submitted with the application were a Notice of Award and Notice of Decision of the Social Security Administration (SSA) (TRF Ex. A-3). The Notice of Award stated that Brunke was entitled to monthly disability benefits starting in September 2006, five months after the date she became disabled, March 15, 2006 (*id.*). The Notice of Decision stated that Brunke was found disabled as of March 15, 2006, because of [REDACTED] so severe that she was unable to perform any work (*id.*). The disability onset date was "agreed upon by the claimant and her attorney at the hearing" (*id.*). The documents gave Brunke notice of her right to seek review (*id.*).

5. A computer data form labeled as Part II of the TRF retirement application stated that in 2004-2005, Brunke's contract salary was [REDACTED], her paid salary was [REDACTED] she earned additional compensation of [REDACTED] and she had lost earnings of [REDACTED] due to "Voluntary Resignation" (TRF Ex. A-5). This form also stated that Brunke's last day in service was December 2, 2004 (*id.*)

6. By letter dated August 19, 2010, TRF notified Brunke that she was not eligible to receive disability benefits (TRF Ex. A-6). The letter explained that in order to receive disability retirement, she must have an employment relationship with the school corporation (*id.*). The letter stated that because her onset date was in March 2006, but she "voluntarily resigned" in December 2004, she did not qualify for a disability retirement benefit (*id.*).

7. By notice dated August 29, 2010, and received by TRF on September 1, 2010, Brunke requested administrative review (TRF Ex. B). In a letter and supporting documents attached to her notice, Brunke related several facts, which are presumed true and undisputed for the purposes of TRF's summary judgment motion. Some of these documents have been resubmitted by Brunke in opposition to TRF's summary judgment motion.

- a. Brunke started teaching ceramics employment at Penn High School in 1993.
- b. In 1996 she was diagnosed with [REDACTED] which, although treated, led to debilitating symptoms.
- c. In 1999 and 2002, Brunke or others reported incidents of possible harassment of Brunke by other employees.
- d. In 2002 and 2003, Brunke's doctors recommended reassignment to a position less strenuous than ceramics, which involves lifting of heavy items such as clay and pottery.
- e. For 2002-2003 and 2003-2004, Brunke taught drawing and painting, but only half-time in the second year due to her [REDACTED] health.
- f. In 2004-2005, Brunke was asked to teach photography. She reluctantly agreed but found photography to be more physically demanding than she anticipated.

- g. In September 2004, Brunke submitted a disciplinary complaint against a student who used vulgar language. At meetings to discuss the complaint, Brunke was ridiculed and harassed by requests to repeat the vulgar language and explain her objection to it. She complained of harassment.
- h. On November 15, 2004, Brunke gave notice of her resignation with a last day of work on November 29, 2004, due to her [REDACTED] medical condition and the harassment situation.
- i. Brunke contends, and for summary judgment purposes it will be presumed, that her resignation was not voluntary.
- j. Brunke applied for unemployment compensation. An ALJ for the Department of Workforce Development (DWD) found that Brunke was entitled to benefits, concluding that she voluntarily left her employment "with good cause," that is, working conditions "so unreasonable or unfair that a reasonably prudent person would be compelled to leave the employment." The ALJ accredited evidence that Brunke's supervisors taunted and patronized Brunke, and were unresponsive to her complaints.²

8. In response to Brunke's request for review, counsel for TRF reaffirmed and explained TRF's earlier determination that Brunke was not eligible for disability retirement by letter dated September 8, 2010 (TRF Ex. C). The letter gave Brunke notice of her right to seek administrative review within 15 days of receipt (*id.*).

9. Brunke submitted a petition for review signed on September 11, 2010, and received by TRF on September 21, 2010.

10. TRF has conceded that the petition for review was timely (Assignment Letter to ALJ Uhl, 9/24/10).

11. Any finding of fact inadvertently included in the Conclusions of Law below is incorporated herein by reference.

² The factual findings of the ALJ for DWD are not taken as binding or having any sort of preclusive effect. Instead, they are part of the factual package that is presumed to be true for the purposes of summary judgment.

Conclusions of Law

Legal standard

Summary judgment “shall be rendered immediately if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits and testimony, if any, show that a genuine issue as to any material fact does not exist and that the moving party is entitled to a judgment as a matter of law.” Ind. Code § 4-21.5-3-23(b).

As with motions under Ind. Trial Rule 56, a genuine issue of material fact exists where facts concerning an issue which would dispose of litigation are in dispute or where the undisputed facts are capable of supporting conflicting inferences on such an issue. The party moving for summary judgment bears the burden of making a *prima facie* showing that there is no genuine issue of material fact and that he or she is entitled to a judgment as a matter of law. Once the moving party meets these two requirements, the burden shifts to the non-moving party to show the existence of a genuine issue of material fact by setting forth specifically designated facts. *Indiana-Kentucky Electric Corp. v. Comm’r, Indiana Dep’t of Environmental Management*, 820 N.E.2d 771, 776 (Ind. App. 2005) (citing cases). All facts and reasonable inferences drawn from those facts are construed in favor of the nonmoving party. *Butler v. City of Peru*, 733 N.E.2d 912, 915 (Ind. 2000).

Contrary to federal practice, a moving party cannot simply allege that the absence of evidence on a particular element is sufficient to entitle that party to summary judgment—it must prove that no dispute exists on all issues. *Dennis v. Greyhound Lines, Inc.*, 831 N.E.2d 171, 173 (Ind. App. 2005), citing *Jarboe v. Landmark Community Newspapers*, 644 N.E.2d 118 (Ind. 1994).

An ALJ’s review of an agency’s initial determination is *de novo*, without deference to the initial determination. *Indiana Dept. of Natural Resources v. United Refuse Company, Inc.*, 615 N.E.2d 100, 103-04 (Ind. 1993); *Branson v. Public Employees’ Retirement Fund*, 538 N.E.2d 11, 13 (Ind. App. 1989).

Issue

Whether Brunke is entitled to disability retirement under Ind. Code § 5-10.2-4-6.

Evidence

Neither party objects to the admissibility of the evidence submitted by the other party. TRF objects to statements of fact made in Brunke’s argument, but these objections are more in the nature of disagreements over legal conclusions or the characterization of the record evidence. Therefore, all of the evidence is deemed admissible and has been considered by the ALJ.

Disputes of Material Fact

Neither party expressly argues that there is a dispute of material fact for trial based on the evidence presented. TRF objects to some of the conclusions or inferences Brunke draws from the evidence, such as Brunke's statements that her resignation was not voluntary and that she became disabled when she was diagnosed [REDACTED] in 1996 (TRF Reply at 2-3).

For the purposes of summary judgment, the ALJ is required to draw inferences from the evidence most favorable to Brunke as the opponent to TRF's motion. *Butler, supra*. Thus, the ALJ will presume that the evidence shows that Brunke's resignation was involuntary, that is, was a constructive and wrongful discharge due to intolerable working conditions. The ALJ will also presume that, as a matter of fact and in a generic sense, Brunke was at least partially disabled due to her medical condition starting in 1996, although it is also undisputed that she continued to work full-time until 2003, and half-time from 2003 through 2004.

Discussion

Brunke's eligibility for disability retirement depends on her meeting the criteria set forth by statute and administrative rule. The pertinent statute provides:

(a) A member who becomes disabled while receiving a salary or employer provided income protection benefits or who is on leave under the Family and Medical Leave Act [³] may retire for the duration of the member's disability if:

(1) the member has at least five (5) years of creditable service before the:

(A) termination of a salary or employer provided income protection benefits or Family and Medical Leave Act leave; or

(B) exhaustion of all worker's compensation benefits;

(2) the member has qualified for Social Security disability benefits and has furnished proof of the Social Security qualification to the board; and

(3) at least once each year until the member reaches age sixty-five (65) a representative of the board verifies the continued disability.

For the purposes of this section, a member of the public employees' retirement fund who has qualified for disability benefits under the federal civil service system is considered to have met the requirement of subdivision (2) if the

³ 29 U.S.C. §§ 2601 *et seq.* (FMLA).

member furnishes proof of the qualification to the board of the public employees' retirement fund.

Ind. Code § 5-10.2-4-6(a).⁴ This provision applies to TRF members who become disabled after June 30, 1984. I.C. § 5-10.2-4-6(d).

The pertinent administrative rule provides:

Disability retirement

(a) In order to receive disability retirement benefits, a member must have been employed under a uniform or supplemental contract or on a leave approved by the school board on the disability onset date as determined by the Social Security Administration.

(b) A member seeking or receiving disability retirement benefits may execute a waiver authorizing the Social Security Administration to annually release to the fund information regarding the member's eligibility to continue receiving Social Security disability insurance payments.

550 I.A.C. 2-9-2.

The statute alone is not crystal clear. It grants eligibility to a member who "*becomes disabled while receiving a salary*" (or while receiving an income-protection benefit or while on leave under the FMLA). Separately, the statute requires that the member "*has qualified for Social Security disability benefits.*" The statute does not expressly state that "disabled" means disabled as determined by SSA, or that the member must have qualified for Social Security benefits while still employed. While the conjunction of these elements strongly suggests that they must occur at the same time, the statute leaves open the possibility that the member became disabled while employed (or on leave) under some standard other than the Social Security standard, but "has qualified" for Social Security by the time of the application for disability retirement.

TRF has used its rulemaking authority to provide clarification, definitively stating in the administrative rule that the member must be employed or on leave on the SSA onset date. The courts will defer to interpretation of a statute by the agency charged with its enforcement unless the agency's interpretation would be inconsistent with the statute itself. *LTV Steel Co. v. Griffin*, 730 N.E.2d 1251, 1257 (Ind. 2000); cf. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

⁴ Section 5-10.2-4-6 was amended twice in 2008, by P.L. 124-2008 (HEA 1019) and P.L. 131-2008 (HEA 1125), and alternate versions are presented on the Indiana Code Web site. Subsection (a), however, is identical in both versions, and the only change from the prior version was stylistic (changing "his" to "the member's" and "he" to "the member").

The TRF rule is reasonable and consistent with the statute. The statute already suggests that "becomes disabled" is coterminous with the SSA onset date. Because the statute does not define "disabled," it further suggests that "disabled" is synonymous with the SSA's standard. The rule provides a bright line and eliminates the need for TRF to make a determination of "disabled" different and apart from the SSA determination. The TRF rule is also consistent with probable legislative intent that a member not be eligible to receive TRF disability benefits if the member became disabled after leaving TRF-covered employment and after employee contributions to the fund have stopped.

Therefore, as a matter of law, the member must have been deemed disabled by SSA while still employed (or on leave etc.). Given this legal conclusion, application to this case is straightforward. It is undisputed that Brunke left her employment with Penn-Harris-Madison effective December 2, 2004, there is no evidence that she was on any sort of income-protection program or leave, and her Social Security onset date was March 15, 2006. She was not employed (or on leave) as of the SSA onset date, so she is not eligible for TRF disability retirement.

Brunke's arguments to the contrary are without merit.

First, she argues that her resignation was involuntary and was a constructive discharge in the face of intolerable and illegal conditions. This is immaterial because there is no exception in the TRF statute or rule for involuntary or illegal separation from employment. Indeed, even if Brunke had been fired from her job for reasons that were clearly illegal (breach of contract, race discrimination, or the like), she still would have been ineligible for disability retirement because the TRF statute and rule admit of no exceptions. Her remedy for illegal discharge (whether constructive or actual) would have been to file suit against her employer for relief including reinstatement or compensation for the lost benefit. In any event, TRF is in no position and under no obligation to determine or litigate the legality of the constructive discharge.

Second, she argues that the SSA onset determination was inaccurate and that she was in fact "disabled" as far back as 1996 when she was first diagnosed [REDACTED].⁵ She states that the ALJ for SSA decided that she was not disabled until March 15, 2006, because she had briefly worked at a country club for a handful of days (in a desperate but futile effort to earn income). Again, however, the statute and rule are clear that the SSA onset date controls, and TRF is without authority to look behind or re-litigate the SSA determination. Brunke's remedy was to appeal the ALJ's finding.⁶

⁵ She cites the definition of "disabled" under the Americans With Disabilities Act, 42 U.S.C. §§ 12101 *et seq.*, but that definition has no application here.

⁶ It should be noted that, according to the SSA notice of determination, Brunke and her attorney agreed to the onset date at the hearing (TRF Ex. A-3).

Third, Brunke states that she was in a "Catch-22" situation, arguing that if she had taken the maximum one year of sick or disability leave available to her at Penn-Harris-Madison and immediately applied for Social Security, it would have taken longer than that to receive SSA benefits because it takes over two years to receive the benefits. However, as demonstrated by this case, SSA decisions are retroactive to the onset date. Brunke applied for the SSA benefit in April 2006, and while she did not receive a hearing until September 2008 and a final decision until November 2008, she received past-due benefits based on the onset date (TRF Ex. A-3).

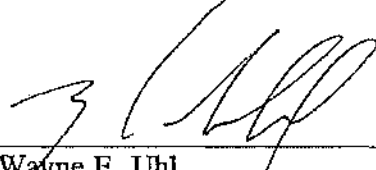
Finally, Brunke argues based on her circumstances that TRF's interpretation of the statute and rule would "make it virtually impossible for anyone to receive the benefit." That is simply not correct. In the normal course of a case like this, a member who becomes disabled while employed by a public school is able to take sick leave and/or leave authorized by the FMLA, and perhaps take advantage of a short- or long-term disability insurance benefit (*i.e.*, an income-protection benefit) while applying for Social Security benefits. If SSA finds the member to have been disabled, with an onset date before all employment, leave and disability benefits expired, the member is eligible for TRF disability retirement.

In this case, Brunke resigned (whether voluntarily or not) without seeking leave or an income-protection benefit, and SSA determined that her onset date was more than a year later. TRF is not authorized to re-litigate SSA's determination. For these reasons, TRF correctly determined that Brunke is not eligible for disability retirement.

Recommended Order

There is no dispute of material fact and TRF is entitled to judgment as a matter of law. TRF's motion for summary judgment is granted. TRF's determination that petitioner Lydia P. Brunke is not eligible for TRF disability retirement is confirmed.

DATED: April 4, 2011.



Wayne E. Uhl
Administrative Law Judge
8710 North Meridian Street, Suite 200
Indianapolis, Indiana 46260-5388

STATEMENT OF AVAILABLE PROCEDURES FOR REVIEW

The administrative law judge is not the ultimate authority, but was designated by the TRF Board to hear this matter pursuant to I.C. § 4-21.5-3-9(a). Under I.C. § 4-21.5-3-27(a), this order becomes a final order when affirmed under I.C. § 4-21.5-3-29, which provides, in pertinent part:

(b) After an administrative law judge issues an order under section 27 of this chapter, the ultimate authority or its designee shall issue a final order:

- (1) affirming;
- (2) modifying; or
- (3) dissolving;

the administrative law judge's order. The ultimate authority or its designee may remand the matter, with or without instructions, to an administrative law judge for further proceedings.

(c) In the absence of an objection or notice under subsection (d) or (e), the ultimate authority or its designee shall affirm the order.

(d) To preserve an objection to an order of an administrative law judge for judicial review, a party must not be in default under this chapter and must object to the order in a writing that:

- (1) identifies the basis of the objection with reasonable particularity; and
- (2) is filed with the ultimate authority responsible for reviewing the order within fifteen (15) days (or any longer period set by statute) after the order is served on the petitioner.

(e) Without an objection under subsection (d), the ultimate authority or its designee may serve written notice of its intent to review any issue related to the order. The notice shall be served on all parties and all other persons described by section 5(d) of this chapter. The notice must identify the issues that the ultimate authority or its designee intends to review.

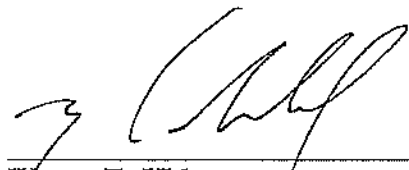
CERTIFICATE OF SERVICE

I hereby certify that I served a copy of this document on the following persons, by U.S. Postal Service first-class mail, certified mail, return receipt requested, postage prepaid, on April 4, 2011:

Lydia P. Brunke

[REDACTED]

Jaclyn M. Brinks, Staff Attorney
Indiana State Teachers' Retirement Fund
One N. Capitol St., Suite 001
Indianapolis, IN 46204



Wayne E. Uhl
Administrative Law Judge