STATE OF MICHIGAN
IN THE SUPREME COURT

MICHAEL NASON,

Petitioner-Appellee,

v

STATE EMPLOYEES' RETIREMENT SYSTEM,

Respondent-Appellant.

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Supreme Court No. 142246

Court of Appeals No. 290431

Marquette Circuit Court No. 08-45798-AA

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.

142246 reply

APPELLANT'S REPLY BRIEF

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INTRODUCTION

Petitioner-Appellee's (Petitioner) Brief in Opposition primarily discusses facts and law not relevant to this Court's determination of whether to grant Respondent-Appellant's (Respondent) Application for Leave to Appeal. Petitioner's discussion of whether *Knauss v State Employees' Retirement Sys* was correctly decided is misplaced.[1] The relevant inquiry with regard to *Knauss* is whether the interpretation of sections 21 and 24 of the State Employees' Retirement Act (the Act) and its 2002 legislative amendments restrict the provision of "totally incapacitated for further performance of duty" to be interpreted as "solely allow[ing] consideration of whether a member can perform the state job from which the member seeks retirement."[2] As discussed in its Application for Leave, Respondent contends that, based on the amendments, the phrase "totally incapacitated for further performance of duty" is *not limited* solely to whether an applicant can perform the state job from which he or she seeks retirement, but includes an applicant's capacity to perform any work for which he or she has training, education, or experience. This standard has long been applied by the Board, is consistent with *Knauss* and its progeny, and, moreover, was codified by the Board in a properly promulgated rule.

Therefore, the State Employees' Retirement Board's (Board's) interpretation that "totally incapacitated for further performance of duty" means that a disability applicant must be unable to perform his or her current position, *or any other position for which the applicant has training, education, or experience* does not conflict with the plain language of MCL 38.21 or MCL 38.24. Finally, if the Court of Appeals' new interpretation of the statutory language stands, it may implicate tens of millions of dollars over the next five years in additional *disability* retirement

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[1] *Knauss v State Employees' Retirement Sys*, 143 Mich App 644; 372 NW2d 643 (1985).
[2] MCL 38.21; MCL 38.24; Slip Opinion, p 10. Attached as Exhibit A.

pensions to individuals who are qualified and able to engage in employment reasonably related to their training, education, or experience. There are more than 4,000 former State employees currently receiving some form of disability retirement payments as a result of their inability to perform any job for which they are qualified. The fact that a member cannot perform one specific job should not entitle him or her to a full disability retirement pension. As a result, the Court of Appeals' decision to disavow *Knauss* and ignore the Board's interpretation of its governing statute was erroneous and should be overturned.

ARGUMENT

I. The phrase "totally incapacitated for further performance of duty" as used in MCL 38.21 and MCL 38.24 is not limited solely to whether a petitioner can perform the state job from which the petitioner seeks retirement.

Petitioner argues that the Court of Appeals' October 28, 2010 decision in this case did not change the law, but rather "applied proper law to cases involving state employees' requests for duty/non-duty related disability benefits."[3] Since 1985, however, Respondent and the courts have consistently interpreted "totally incapacitated for further performance of duty" to mean that an applicant cannot perform his or her current job or any other job for which the applicant has experience, training, or education.[4] Further, in May 2008, the State Employees Retirement Board (Board) promulgated administrative rules codifying "totally incapacitated" to mean that an applicant is "unable to perform the duties of his or her current position, or any position reasonably related to the [applicant's] education, training, or experience."[5] Although the Court of Appeals may have addressed what it believed was a prior misapplication of the law, it is still bound by the plain language of the statute and principles of statutory interpretation. It is Respondent's firm position that *Knauss* is the correct law today with respect to "duty" not being limited to the state job from which the member seeks retirement.

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[3] Petitioner's Brief in Opposition, p v.

[4] See, *e.g.*, *VanZandt v State Employees' Retirement System*, 266 Mich App 579, 583-588; 701 NW2d 214 (2005); and, for this Court's consideration the following unpublished opinions: *Wilber v State Employees' Retirement Sys*, unpublished opinion per curiam of the Court of Appeals, issued August 4, 1998 (Docket No. 199206), attached as Exhibit B; *Feley v State Employees Retirement Sys*, unpublished opinion per curiam of the Court of Appeals, issued June 22, 1999 (Docket No. 205253), attached as Exhibit C; *Caffie v State Employees' Retirement Sys*, unpublished opinion per curiam of the Court of Appeals, issued February 15, 2005 (Docket No. 247885), attached as Exhibit D; *Mitchell v State Employees' Retirement Sys*, unpublished opinion per curiam of the Court of Appeals, issued September 2, 2010 (Docket No. 289577), attached as Exhibit E.

[5] Rule 38.21(o), 2008 AACS, R 38.21(o).

A. There is a substantial question as to the interpretation of the phrase "totally incapacitated for further performance of duty" as it is used in MCL 38.21 and MCL 38.24

Petitioner asserts that there is no substantial question as to the interpretation of a legislative act in this case. Respondent, however, demonstrated in its Application for Leave to Appeal that the Court of Appeals misinterpreted the phrase "totally incapacitated for further performance of duty" as it is used in MCL 38.21 and MCL 38.24. Specifically, the Court of Appeals did not apply proper principles of statutory interpretation when it held that whether a member was "totally incapacitated for further performance of duty" under MCL 38.24 "solely allows consideration of whether a member can perform the state job from which the member seeks retirement, not other employment positions or fields for which the member may be qualified by training, education, or experience."[6] Contrary to Petitioner's argument, Respondent's Application for Leave thoroughly explained how the Court of Appeals erred in its holding.

Notwithstanding the holding in *Knauss* and the Board's consistent interpretation of "totally incapacitated," the Legislature eliminated the possibility that "further performance of duty" only meant "the state job from which the member seeks retirement" when it deleted the phrase "in service of the state," which originally followed the word "duty." Further, the Court of Appeals' decision created new law because it directly contravenes Board Rule 38.21(o) defining "totally incapacitated."[7] In *Clonlara, Inc v State Bd of Educ*, this Court stated that rules properly promulgated under the Administrative Procedures Act[8] have the force and effect of law.[9] The Court of Appeals' decision in the instant case not only affects cases arising before the Board

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[6] Slip Opinion, p 10. Attached as Exhibit A.
[7] 2008 AACS, R 38.21(o).
[8] MCL 24.201 *et seq.*
[9] *Clonlara, Inc v State Bd of Educ*, 442 Mich 230, 239; 501 NW2d 88 (1993).

promulgated rule 38.21(o),[10] but affects all cases going forward since the Court of Appeals effectively voided rule 38.21(o).[11] Thus, there is a substantial question as to the interpretation of the phrase "totally incapacitated for further performance of duty" as it is used in MCL 38.21 and MCL 38.24.

B. The Board's interpretation of "totally incapacitated for further performance of duty," which is consistent with *Knauss*, does not conflict with the plain language of MCL 38.21, MCL 38.24, or MCL 38.33.

Petitioner argues that *Knauss* did not consider the language of MCL 38.21 or MCL 38.33 when it held that a disability applicant is totally incapacitated under MCL 38.21 when the applicant cannot perform the duties of his or her current job, or any other job for which the applicant has the education, training, or experience to perform.[12] On the contrary, *Knauss* quoted the statutory language of MCL 38.21 and MCL 38.33 and stated that courts have the "duty to determine and apply the Legislature's intent in passing the statute."[13] *Knauss* then looked to analogous situations in Michigan jurisprudence in determining that "totally incapacitated for further performance of duty in service of the state" meant that the applicant must be unable to perform the duties of his or her current job, or any other job reasonably related to the applicant's training, education, or experience.[14]

In any event, judicial interpretation of the pre-amendment language contained in MCL 38.21 and MCL 38.24 is of no moment to the current state of the law other than the fact that the Legislature was presumed to be aware of *Knauss* at the time it amended the Act. In 2002, the Legislature eliminated any and all language suggesting that a disability applicant must be "totally

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[10] 2008 AACS, R 38.21(o).
[11] 2008 AACS, R 38.21(o).
[12] Petitioner's Brief in Opposition, p vi.
[13] *Knauss*, 143 Mich App at 645, citing *Detroit Auto Inter-Ins Exch v Comm'r of Ins*, 119 Mich App 113, 120; 326 NW2d 444 (1982).
[14] *Knauss*, 143 Mich App at 649-650.

incapacitated for further performance of duty *in service of the state.*" Thus, the relationship of *Knauss* to the Board's determination to deny disability retirement benefits in this matter only extends to the fact that the Board's interpretation of "totally incapacitated for further performance of duty" is consistent with *Knauss*. Moreover, the Legislature's removal of the phrase "in service of the state" strengthens the Board's interpretation that "totally incapacitated for further performance of duty" includes jobs beyond those "in service of the state." Finally, Rule 38.21(o)[15] codified the Board's interpretation and does not conflict with the plain language of MCL 38.21 or MCL 38.24 since the removal of the phrase "in service of the state" clarifies the Legislature's intent that the term "duty" not be limited to state duty.

Respondent is not arguing whether the underlying issue in *Knauss* was correctly decided, but rather that the Court of Appeals' interpretation of "totally incapacitated for further performance of duty," as used in MCL 38.21 and MCL 38.24, is incorrect and that the Board's interpretation, and subsequently promulgated rule, does not conflict with the plain language of the statutes. As a result, the Court of Appeals erred in disavowing *Knauss* to the extent that the term "duty," as used in the disability retirement context, is not limited to the member's most recent state position.

C. The Court of Appeals' decision fails to give deference, or even respectful consideration, to the Board's interpretation of "totally incapacitated," as required by law.

Contrary to Petitioner's argument, Respondent was not required to preserve arguments relating to properly promulgated Board rules conflicting with a new interpretation of the law that it could not have foreseen. Rule 38.21(o)[16] codified the Board's interpretation of "totally incapacitated" and is not in conflict with the plain language of MCL 38.21 or MCL 38.24. The

[15] 2008 AACS, R 38.21(o).
[16] 2008 AACS, R 38.21(o).

Court of Appeals, in misinterpreting the plain language of MCL 38.21 and MCL 38.24, raised for the first time the question of whether there is a conflict between the statutory provisions and the administrative rule, and did not provide cogent reasons for overruling the Board's interpretation.[17] In so doing, the Court of Appeals failed to recognize that its holding would invalidate an administrative rule and did not give deference or respectful consideration to the Board's interpretation of "totally incapacitated," as required by law.[18]

Although the Court of Appeals stated that "the Board relied on *Knauss* in regard to interpretation of MCL 38.24 and not on any independent agency construction of the statute," the Court provided no basis for this conclusion. The Board has consistently held for over 25 years that "totally incapacitated" means that a disability applicant must be unable to perform his or her current position, or any position reasonably related to his or her education, training, or experience. Moreover, the Board codified this interpretation when it promulgated rule 38.21(o)[19] in May 2008. Respondent does not argue that rule 38.21(o)[20] should directly apply to the facts of this case, but rather that the promulgation of the rule codified an agency interpretation as opposed to a judicial construction of the statute. It would not make sense for the Board to codify a judicial construction of the law with which it does not agree. Otherwise stated, *Knauss* was *not* the sole basis for the Board's interpretation of "totally incapacitated" as used in MCL 38.21 and MCL 38.24. The Board simply relied on *Knauss* as providing additional support for its independent interpretation.

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[17] *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90, 103; 754 NW2d 259 (2008).
[18] *Rovas*, 482 Mich at 103.
[19] 2008 AACS, R 38.21(o).
[20] 2008 AACS, R 38.21(o).

Thus, the Court of Appeals erred when it failed to give respectful consideration or deference to the Board's interpretation of "totally incapacitated" as used in MCL 38.24, and gave no cogent reasons for overruling the Board's interpretation.

II. The Board found, as a matter of fact, that Petitioner should be able to return to his past job in the near future.

Although Petitioner states that Respondent did not present any grounds for this Court to consider its second question presented, Respondent correctly identified and accurately portrayed this Court's jurisdiction to hear all of Respondent's claims.

Petitioner asserts that Respondent is precluded from arguing that a medical advisor never certified that Petitioner was totally and permanently disabled, and should be retired, because the issue was not preserved for appeal.[21] In addition, Petitioner alleges that the Board "agreed there was no medical issue – medically the Petitioner could not perform his duty."[22] The Board, however, held as a matter of fact that Petitioner's "condition continues to improve and he should be able to return *to his past job* in the near future. Thus, he does not have a total and permanent disability." (CR, 11; emphasis added.) Hence, the Board explicitly found that Petitioner was not "totally and permanently disabled" because he would likely be able to return to his former position. That the Board later separately concluded that Petitioner did not qualify for disability retirement benefits because he was capable of performing other jobs for which he was fitted by training, education, or experience simply provides additional, broader grounds for its decision to deny benefits. (CR, 13) Moreover, the Board's denial was consistent with the plain language of the statute, *Knauss*, and its own long-held interpretation of the statute.

Thus, even if the Court of Appeals correctly held that "totally incapacitated for further performance of duty" "solely allows consideration of whether a member can perform the state

[21] Petitioner's Brief in Opposition, p 3.

job from which the member seeks retirement," Petitioner still would not be entitled to non-duty disability retirement benefits because the Board found that Petitioner did not have a total and *permanent* disability because he should be able to return to the state job from which he seeks retirement. (CR, 11; emphasis added) As a result, the Court of Appeals misapprehended or misapplied the substantial evidence test to the Respondent's decision, and erroneously deduced that the Board did not determine that Petitioner was totally incapacitated relative to his job as a corrections officer; therefore this Court should grant Respondent's Application for Leave to Appeal and ultimately reverse the Court of Appeals' October 28, 2010 decision and affirm the Board's April 10, 2008 final decision and order denying Petitioner's application for non-duty disability retirement benefits.

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[22] Petitioner's Brief in Opposition, p 18.

RELIEF SOUGHT

For the reasons stated in this Reply to Petitioner's Brief in Opposition and its Application for Leave to Appeal, Respondent requests that this Honorable Court grant its Application for Leave to Appeal, and ultimately affirm the Board's decision to deny non-duty disability retirement benefits and endorse the Board's interpretation of MCL 38.24, which coincides with *Knauss*.

Respectfully submitted,

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