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CONCLUSION

The decision of the district court is affirmed.

AFFIRMED.

WRIGHT, J., not participating.

JOCELYN SHEPHERD, APPELLANT, V. PHYLLIS CHAMBERS, DIRECTOR OF THE NEBRASKA PUBLIC EMPLOYEES RETIREMENT SYSTEMS, AND DENIS BLANK, CHAIRPERSON OF THE NEBRASKA PUBLIC EMPLOYEES RETIREMENT BOARD, APPELLEES.

794 N.W.2d 678

Filed January 28, 2011. No. S-10-157.

1. **Administrative Law: Judgments: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
2. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court resolves the questions independently of the conclusions reached by the trial court.
3. **Constitutional Law: Appeal and Error.** A constitutional issue not presented to or passed upon by the trial court is not appropriate for consideration on appeal.
4. **Appeal and Error.** Errors argued but not assigned will not be considered on appeal.

Appeal from the District Court for Lancaster County: KAREN B. FLOWERS, Judge. Affirmed.

Timothy J. Cuddigan, Sean D. Cuddigan, and Jessica Levine Finkle, of Brodkey, Cuddigan, Peebles & Belmont, L.L.P., for appellant.

Jon Bruning, Attorney General, and Lynn A. Melson for appellees.

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

After leaving her employment with a school district, Jocelyn Shepherd applied for disability retirement benefits under the School Employees Retirement Act (the Act).[1] The Nebraska Public Employees Retirement Board (the Board) conducted a hearing and denied Shepherd's application. She appealed to the district court for Lancaster County under the Administrative Procedure Act,[2] and that court affirmed the action of the Board. Shepherd filed this timely appeal from that order. We moved the appeal to our docket pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[3] Finding no error, we affirm the judgment of the district court.

FACTS AND PROCEDURAL BACKGROUND

Shepherd was employed by the Millard public school system as an accountant from 1997 until March 2007. Her duties included preparing bank reconciliations and financial reports relating to grants. Upon commencement of her employment, Shepherd became a member of the Nebraska School Employees Retirement System.

Shepherd was diagnosed with relapsing remitting multiple sclerosis in 1999 or 2000. She did not take all the recommended medication for this condition from 2002 to March 2007, because she was attempting to become pregnant. On March 23, 2007, she was seen in an emergency room with complaints of decreased sensation below her waist. After this visit to the emergency room, Shepherd began taking all recommended medications to treat her multiple sclerosis.

On June 21, 2007, Shepherd ceased employment with the Millard public school system. She testified that due to the relapse of her condition, she was no longer able to perform the responsibilities of her job. On May 29, 2008, Shepherd filed an application for disability retirement with the Nebraska Public Employees Retirement Systems, which, pursuant to

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[1] Neb. Rev. Stat. §§ 79-901 to 79-977.03 (Reissue 2008).

[2] § 79-950; Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 2008).

[3] See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

§ 79-951(1), retained a neurologist, Dr. Joel T. Cotton, to examine Shepherd and make a disability determination.

Cotton conducted a neurological examination of Shepherd on August 1, 2008. His examination confirmed that Shepherd suffered from multiple sclerosis, but he could detect "little if any neurological impairment." Cotton further reported that he was unable to substantiate either the medical necessity for Shepherd's use of a walking cane or her subjective complaints of overwhelming fatigue, exhaustion, and lack of energy. Cotton concluded that in his opinion, and to a reasonable degree of medical certainty, Shepherd was not "unable to engage in a substantially gainful activity by reason of any medical[ly] determinable physical or mental impairment which can be expected to result in death or be of life long and indefinite duration." Cotton recommended denial of Shepherd's application for disability retirement.

Based on Cotton's examination and opinions, the Board denied Shepherd's application for disability retirement benefits on August 27, 2008. Shepherd appealed that decision pursuant to § 79-950, and a hearing was held before a hearing officer on February 5, 2009. At the hearing, Shepherd testified that she was 51 years old and had been suffering from symptoms associated with multiple sclerosis since 1999. Shepherd described symptoms of fatigue, weakness, and intermittent numbness in her hands and lower extremities. She stated that these symptoms made it difficult for her to walk and stand. She also described the problems she experienced at work, explaining that her brain function had slowed down and that she was easily distracted, which made completing the normal duties of her job increasingly difficult. Shepherd also testified that she experienced difficulties at work due to her increased urinary frequency and urgency. No other witness testified at the hearing.

In addition to her testimony, Shepherd offered various medical records as evidence of the progression of her disease, the development of her symptoms, and the impact of her condition on her ability to work. The Board offered several exhibits, including Cotton's report. The hearing officer received the medical records and the exhibits offered by the Board.

In a written order, the hearing officer affirmed the denial of Shepherd's application for disability retirement benefits. The hearing officer reasoned:

> By referring this matter to Dr. Cotton for an examination and considering his written report, the Board's decision to deny disability properly conformed to and complied with the . . . statutory requirements. Shepherd's evidence of disability was in the nature of documentary hearsay, which was objected to, and the objection sustained by the hearing officer. Legal counsel for the [Nebraska Public Employees Retirement] System[s] did not have any opportunity to confront or cross-examine any of the medical evidence contained in Exhibits 3 though 32. In the absence of any admissible evidence rebutting or refuting the conclusions of Dr. Cotton, the decision of the Board dated August 25, 2008, must be ratified and affirmed.

This order was accepted and adopted by the Board.

Shepherd appealed to the district court, arguing that the hearing officer erred in treating the medical records as inadmissible "documentary hearsay," because (1) the parties had agreed that the hearing would not be conducted under the formal rules of evidence and (2) the records were received without objection. Shepherd further alleged that if the medical records had been considered, they would have supported a finding that she was disabled within the meaning of the Act.

The district court agreed with Shepherd and concluded that the hearing officer and the Board erred in failing to consider the substantive content of the medical records offered by Shepherd. The court considered those records in its de novo review, but ultimately concluded that Shepherd's evidence was insufficient to rebut Cotton's opinion that Shepherd was not disabled within the meaning of the Act. In its final order, the court noted: "I do not believe this is a case in which I am free [to] roam through the medical records drawing my own conclusions. There must be evidence *in the form of a professional opinion* that Shepherd is unable to engage in substantially gainful activity." (Emphasis in original.) The district court therefore affirmed the decision of the Board denying Shepherd's application for disability retirement benefits.

ASSIGNMENTS OF ERROR

Shepherd assigns, restated, that the district court erred in (1) interpreting the statutory definition of "disability" for purposes of disability retirement under the Act and (2) finding that Shepherd is not disabled based on the evidence.

STANDARD OF REVIEW

[1] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[4]

[2] Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court resolves the questions independently of the conclusions reached by the trial court.[5]

ANALYSIS

In support of her first assignment of error, Shepherd argues that the district court erred as a matter of law by requiring proof in the form of an expert medical opinion that she was "unable to engage in a substantially gainful activity" in order to establish her eligibility for disability retirement.[6] The starting point of our analysis is § 79-902(37), which states that for purposes of the Act, "[d]isability means an inability to engage in a substantially gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or be of a long and indefinite duration." This definition consists of two components

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[4] *TracFone Wireless v. Nebraska Pub. Serv. Comm.*, 279 Neb. 426, 778 N.W.2d 452 (2010); *Children's Hospital v. State*, 278 Neb. 187, 768 N.W.2d 442 (2009).

[5] *In re Adoption of Corbin J.*, 278 Neb. 1057, 775 N.W.2d 404 (2009); *Wilczewski v. Neth*, 273 Neb. 324, 729 N.W.2d 678 (2007).

[6] See § 79-951(1).

linked in a causal relationship: (1) The individual must have a physical or mental impairment of the nature described, and (2) by reason of the impairment, the individual must be unable to engage in a substantially gainful activity. It is undisputed here that Shepherd's diagnosis of multiple sclerosis is an impairment which is "of a long and indefinite duration." But her inability to engage in a "substantially gainful activity" by reason of her multiple sclerosis was very much in dispute.

At the time Shepherd applied for disability benefits, the Act provided a mechanism for resolving issues of this nature at § 79-951(1):

> A member shall be retired on account of disability . . . if a medical examination, made at the expense of the retirement system and conducted by a competent disinterested physician legally authorized to practice medicine under the laws of the state in which he or she practices, selected by the retirement board, shows and the physician certifies to the retirement board that the member is unable to engage in a substantially gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or be of a long and indefinite duration. The medical examination may be waived if, in the judgment of the retirement board, extraordinary circumstances exist which preclude substantial gainful activity by the member. Such circumstances shall include hospice placement or similar confinement for a terminal illness or injury.

We read the plain language of this statute to require expert medical opinion to establish a disability as defined by the Act, except in those extraordinary circumstances where both the existence of a physical or mental impairment and its causal relationship to the employee's inability to engage in a substantially gainful activity are apparent to a layperson. The requirement of medical certification of a disability affecting a person's ability to work is not a novel concept. For example, we have long held in workers' compensation cases that to recover disability benefits, an injured worker must prove by competent medical testimony a causal connection between the

alleged injury, the employment, and the disability.[7] The district judge, by stating that she was not free to "roam through the medical records drawing [her] own conclusions," was simply stating that this was not a case in which a layperson, without the benefit of expert medical opinion, could determine whether there was a causal relationship between Shepherd's physical impairment and her claimed inability to engage in a substantially gainful activity. We agree with that assessment and conclude that the district court did not err in interpreting the applicable law.

By its use of the word "shall," § 79-951(1) requires the Board to retire a member on account of disability if the Board's retained medical examiner opines that the member is disabled as defined by the Act. But we do not read the statute to mean that a contrary opinion from the retained expert, such as Cotton's opinion in this case, precludes the Board or a reviewing court from considering other medical evidence offered on behalf of the member. The Act provides that an aggrieved member may request that the Board review its own actions, and further provides that any final order of the Board may be appealed in accordance with the Administrative Procedure Act.[8] This right of review would be meaningless if the opinion of the Board's retained medical examiner that the member is not disabled were deemed conclusive. The appellees acknowledge that a member "who disagrees with the Board's decision may appeal and has the opportunity to establish by competent medical evidence that he or she is unable to engage in gainful employment."[9] We therefore turn to Shepherd's second assignment of error in which she contends that the judgment of the district court is not supported by competent evidence.

[3,4] On this point, Shepherd's argument is twofold. First, she contends that although the district court correctly considered the medical records which were not considered by the hearing examiner, it did not have an opportunity to observe

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[7] See, e.g., *Money v. Tyrrell Flowers*, 275 Neb. 602, 748 N.W.2d 49 (2008); *Owen v. American Hydraulics*, 254 Neb. 685, 578 N.W.2d 57 (1998).

[8] See § 79-950.

[9] Brief for appellees at 11.

and hear her testimony in conducting its de novo review of the administrative record. Without citation to any authority, she argues that her due process rights have been violated because "no trier of fact has considered all of her evidence and observed her testimony."[10] The district court reviewed the order of the Board in accordance with § 84-917(5)(a), which requires that "the review shall be conducted by the court without a jury de novo on the record of the agency." Shepherd did not contend in the district court, nor did she assign as error in this appeal, that her due process rights were violated by the district court's review de novo on the record pursuant to § 84-917(5)(a). A constitutional issue not presented to or passed upon by the trial court is not appropriate for consideration on appeal.[11] And errors argued but not assigned will not be considered on appeal.[12] Accordingly, we do not reach Shepherd's argument that she was deprived of due process by virtue of the fact that the district court did not rehear her testimony.

For completeness, we note that in argument to the district court, Shepherd did contend that her due process rights were violated by the hearing examiner's refusal to consider the documentary medical evidence which she presented at the administrative hearing. But the district court resolved that issue in Shepherd's favor by determining that the hearing examiner erred in this regard and stating that it would consider the evidence in its de novo review. In appellate review of the district court's order, we do not focus on the findings of the hearing officer. Instead, we review the order of the district court for errors appearing on the record.[13] Shepherd acknowledges that the district court "corrected the hearing officer's evidentiary error."[14]

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[10] Brief for appellant at 26.

[11] *Niemoller v. City of Papillion*, 276 Neb. 40, 752 N.W.2d 132 (2008); *K N Energy v. Village of Ansley*, 266 Neb. 164, 663 N.W.2d 119 (2003).

[12] *Countryside Co-op v. Harry A. Koch Co.*, 280 Neb. 795, 790 N.W.2d 873 (2010); *Vokal v. Nebraska Acct. & Disclosure Comm.*, 276 Neb. 988, 759 N.W.2d 75 (2009).

[13] *Nothnagel v. Neth*, 276 Neb. 95, 752 N.W.2d 149 (2008).

[14] Brief for appellant at 26.

Shepherd also argues that the opinions of the health care providers who treated her, as set forth in the medical records, were entitled to more weight than the opinion of Cotton, who examined her only once. We interpret this argument to be that there is not competent evidence in the record to support the district court's findings.[15] In this context, "competent evidence" means evidence that tends to establish the fact in issue.[16]

Clearly, Cotton's opinion constitutes competent evidence in that it goes to the central fact at issue in this case, namely, whether Shepherd is unable to engage in a substantially gainful activity by reason of her physical impairment. As the district court noted, the record contains no expert medical opinion directly contradicting that of Cotton. And contrary to Shepherd's argument, the medical records completed by the medical professionals who treated her do not unequivocally establish that she is disabled. Indeed, some of the records support Cotton's opinion, at least to some degree. For example, on March 5, 2007, a representative of the Department of Neurology at Creighton University Medical Center completed a U.S. Department of Labor form. This form asked whether it would be necessary for Shepherd to work intermittently or on a less-than-full schedule as a result of her medical condition. The answer given was, "No – will occasionally miss work for neurological appointments and/OR relapses of her multiple sclerosis." The same person indicated on the form that Shepherd was "not incapacitated."

Another health care provider noted on May 8, 2007, that while Shepherd was then unable to work, she could return to her job on a part-time basis on May 14, and that her continuing ability to work would need to be reassessed at that time. A clinical psychologist who examined Shepherd noted in a report dated January 16, 2008, that she had sufficient concentration

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[15] See, *Intralot, Inc. v. Nebraska Dept. of Rev.*, 276 Neb. 708, 757 N.W.2d 182 (2008); *Utelcom, Inc. v. Egr*, 264 Neb. 1004, 653 N.W.2d 846 (2002).

[16] *Ahmann v. Nebraska Dept. of Corr. Servs.*, 278 Neb. 29, 767 N.W.2d 104 (2009); *Hammann v. City of Omaha*, 227 Neb. 285, 417 N.W.2d 323 (1987).

and attention needed for task completion, although she was "slow due to multiple sclerosis." The psychologist also noted that Shepherd was not restricted in activities of daily living, had no difficulty in maintaining social functioning, was able to carry out short and simple instructions under ordinary supervision, could relate appropriately to coworkers and supervisors, and could adapt to changes in her environment. The psychologist concluded that Shepherd "has the mental capacity to assume an entry level job commensurate with her training and experience; however, she presents with slow mobility and significant weakness in speed of recall even though her recall is not generally significantly impaired." He concluded that Shepherd "should continue in supportive counseling" and that the "prognosis for the immediate future seems favorable."

We acknowledge Shepherd's testimony that she felt unable to continue in her job due to her symptoms and the existence of other medical records which support her position testimony to some degree. But under our standard of review, we cannot weigh the evidence and reach our own factual conclusion if there is competent evidence to support the findings of the district court. The opinion expressed by Cotton and the other evidence summarized above clearly constitute competent evidence which supports the findings and judgment of the district court. Accordingly, we find no merit in Shepherd's second assignment of error.

CONCLUSION

For the reasons discussed, we conclude that the judgment of the district court affirming the decision of the Board conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.

AFFIRMED.

WRIGHT, J., not participating.