

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Melinda K. Graham,
Appellant,

v.

Antelope County Board of Equalization,
Appellee.

Case No: 19H 0001

Decision and Order Reversing the Decision
of the Antelope County Board of
Equalization

For the Appellant:
Melinda K. Graham,
Pro Se

For the Appellee:
Joseph E. W. Abler
Antelope County Attorney

This appeal was heard before Commissioners Robert W. Hotz and James D. Kuhn.

I. THE SUBJECT PROPERTY

The Subject Property is a residential parcel located in Antelope County. The parcel is improved with a 1,732 square foot home. The legal description and property record card for the Subject Property are found at Exhibit 2:1-2.

II. PROCEDURAL HISTORY

Melinda K. Graham (the Taxpayer) filed an application for a homestead exemption pursuant to Neb. Rev. Stat. § 77-3508 on or about March 20, 2019.¹ The Antelope County Assessor, Kelly Mueller (Mueller) disapproved the application on or about June 17, 2019.² On July 15, 2019, the Taxpayer requested a hearing before the Antelope County Board of Equalization (the County Board).³ The County Board conducted a hearing on July 23, 2019, and denied the application.⁴

The Taxpayer appealed the decision of the County Board to the Tax Equalization and Review Commission (the Commission). The Commission held a hearing on March 9, 2021, with Commissioner Hotz presiding. Exhibits 1 through 5 were admitted into the record.

¹ Exhibit 2:4-6.

² Exhibit 2:3.

³ Exhibit 2:7.

⁴ Exhibit 2:3, 2:8-10.

III. STANDARD OF REVIEW

The Commission's review of the determination by a county board of equalization is de novo.⁵ When the Commission considers an appeal of a decision of a county board of equalization, a presumption exists that the board has faithfully performed its official duties in making a decision and has acted upon sufficient competent evidence to justify its action.⁶ That presumption remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence adduced on appeal to the contrary.⁷ The order, decision, determination or action appealed from shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or arbitrary.⁸ Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.⁹

In an appeal, the Commission may determine any question raised in the proceeding upon which an order, decision, determination, or action appealed from is based. The Commission may consider all questions necessary to determine taxable value of property as it hears an appeal or cross appeal.¹⁰ The Commission may also take notice of judicially cognizable facts and in addition may take notice of general, technical, or scientific facts within its specialized knowledge, and may utilize its experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to it.¹¹ The Commission's Decision and Order shall include findings of fact and conclusions of law.¹²

⁵ Neb. Rev. Stat. § 77-5016(8) (Reissue 2018), *Brenner v. Banner County Bd. Of Equal.*, 276 Neb. 275, 286, 753 N.W.2d 802, 813 (2008). "When an appeal is conducted as a 'trial de novo,' as opposed to a 'trial de novo on the record,' it means literally a new hearing and not merely new findings of fact based upon a previous record. A trial de novo is conducted as though the earlier trial had not been held in the first place, and evidence is taken anew as such evidence is available at the time of the trial on appeal." *Koch v. Cedar County Freeholder Bd.*, 276 Neb. 1009, 1019 (2009).

⁶ *Brenner* at 283, 811 (Citations omitted).

⁷ *Id.*

⁸ Neb. Rev. Stat. § 77-5016(9) (Reissue 2018).

⁹ *Omaha Country Club v. Douglas County Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

¹⁰ Neb. Rev. Stat. § 77-5016(8) (Reissue 2018).

¹¹ Neb. Rev. Stat. § 77-5016(6) (Reissue 2018).

¹² Neb. Rev. Stat. § 77-5018(1) (Reissue 2018).

IV. HOMESTEAD EXEMPTIONS

The Commission has the power and duty to hear and determine appeals of decisions of any county board of equalization granting or rejecting an application for a homestead exemption.¹³

Neb. Rev. Stat. § 77-3508 provides, in relevant part:

(1)(a) All homesteads in this state shall be assessed for taxation the same as any other property, except that there shall be exempt from taxation, on any homestead described in subdivision (b) of this subsection, a percentage of the exempt amount as limited by section 77-3506.03. The exemption shall be based on the household income of a claimant pursuant to subsections (2) through (4) of this section.

(b) The exemption described in subdivision (a) of this subsection shall apply to homesteads of:

...

(ii) Individuals who have a permanent physical disability and have lost all mobility so as to preclude locomotion without the use of a mechanical aid or prosthesis;

...

(c) Application for the exemption described in subdivision (a) of this subsection shall include certification from a qualified medical physician, physician assistant, or advanced practice registered nurse for subdivisions (b)(i) through (b)(iii) of this subsection Such certification ... shall be made on forms prescribed by the Department of Revenue.¹⁴

Neb. Rev. Stat. § 77-3510 provides, in part:

On or before February 1 of each year, the Tax Commissioner shall prescribe forms to be used by all claimants for homestead exemption or for transfer of homestead exemption. Such forms shall contain provisions for the showing of all information which the Tax Commissioner may deem necessary to (1) enable the county officials and the Tax Commissioner to determine whether each claim for exemption under sections 77-3506, 77-3507, and 77-3508 should be allowed and (2) enable the county assessor to determine whether each claim for transfer of homestead exemption pursuant to section 77-3509.01 should be allowed. It shall be the duty of the county assessor of each county in this state to furnish such forms, upon request, to each person desiring to make application for homestead exemption or for transfer of homestead exemption. The forms

¹³ Neb. Rev. Stat. § 77-5007(7) (Reissue 2018).

¹⁴ Neb. Rev. Stat. § 77-3508 (Reissue 2018). This section was amended by LB 512 in the 2019 legislative session, with an effective date of September 1, 2019. Among other things, the amendment changes “without the use of a mechanical aid or prosthesis” to “without the use of a mechanical aid or a prosthetic device as defined in section 77-2704.09.” 2019 Neb. Laws LB 512, Section 26. It is well established that statutes covering substantive matters in effect at the time of the transaction or event govern, not later enacted statutes. *Dragon v. Cheesecake Factory*, 300 Neb. 548, 556, 915 N.W.2d 418, 424 (2018). All real property in Nebraska is assessed as of January 1 of each tax year, Neb. Rev. Stat. § 77-1301, and the homestead exemption (if granted) would run from January 1, 2019. Accordingly, we find that the law in effect on January 1, 2019, is the applicable law in this appeal.

so prescribed shall be used uniformly throughout the state, and no application for exemption or for transfer of homestead exemption shall be allowed unless the applicant uses the prescribed form in making an application.

350 Neb. Admin. Code, Ch. 45, provides, in relevant part:

002.14 Prosthetic device means a device that permanently or temporarily replaces a missing part or a nonfunctioning part of the human body.

002.16 Qualified disabled claimant means an owner of a homestead who was disabled on or before January 1 of the year for which the claim is made, and whose household income, as determined by the Tax Commissioner, is less than the maximum income among; and

002.16A Who has a permanent physical disability and has lost all mobility precluding locomotion without the regular use of a mechanical aid or prosthetic device....¹⁵

004.05 Additional information must be submitted with the Form 458, for the following categories of exemption during the first year an exemption is requested, or if the exemption was not approved in either of the two prior years:

004.05A For purposes of an exemption claimed as a qualified disabled individual, the applicant must file with the application a certification from a qualified medical physician, physician's assistant, or advanced practice registered nurse, on a form prescribed by the Department affirming the status of the claimant.

V. FINDINGS OF FACT

The Taxpayer is the owner of the Subject Property and she was the owner on January 1, 2019.

The Taxpayer was diagnosed with Multiple Sclerosis (MS) in 2006. She testified that she is unable to walk without falling if she does not use a brace, a cane, a walker, a wheelchair, or some combination of these devices. She is able to ambulate using just the brace when on familiar terrain or when she is having "a super good day," but she does so by "wall-walking," using a wall or other objects to support herself. She tries to challenge herself to live a complete life, including exercise and activities with her family and the community. On the advice of her neurologist, she joined a gym in 2016 and has remained a member since then. The Taxpayer has

¹⁵ 350 NAC Chapter 45 was most recently updated July 3, 2013, and because subsequent changes to its authorizing statute, Neb. Rev. Stat. Section 77-3508(1)(b)(ii), were not incorporated into its relevant provisions as of January 1, 2019, we are careful to interpret the law in that context. See 2016 Neb. Law, LB 776, Section 6, which reads: "(1)(b)The exemption described [in] this subsection shall apply to homesteads of: ... (1)(b)(ii) Individuals who have a permanent physical disability and have lost all mobility so as to preclude locomotion without the use of a mechanical aid or prosthesis...."

generalized right-side weakness caused by MS, as well as a condition called “foot-drop,” which is caused by a combination of several medical conditions: MS, diabetes, and fibromyalgia. The Taxpayer uses foot and ankle braces to hold her foot in a typical standing or walking position so she does not trip over her own toes. The braces may be worn under a sock or boot and hidden from view.

The application for homestead exemption, known as Form 458, includes a Certification of Disability for Homestead Exemption, which is Form 458B. For the Taxpayer’s application, this certification was completed and signed by Daniel M. Wik, M.D., on March 20, 2019.¹⁶ Wik was one of the Taxpayer’s doctors; either Wik or his Advanced Practice Registered Nurse (APRN) has seen the Taxpayer once a month since approximately 2016.

The Form 458B Wik completed has several options for the licensed medical practitioner to select, including “This applicant does NOT meet any of the exemptions listed above.”¹⁷ Wik selected the option stating, “Individual with a permanent physical disability who has lost all mobility that precludes locomotion without the use of a mechanical aid or prosthesis.”¹⁸ After this selection, Wik amended the form with his own handwriting, stating “Must wear ankle foot orthotic with ambulation and exercise. Must use cane on uneven surfaces for ambulation stabilization. Gait impairment. Without these devices locomotion is aberrant and compensatory.”¹⁹ The Taxpayer filled out some information on the form including Wik’s phone number and address. No one completed the space for Wik’s “National Provider Identifier (NPI) Number.”²⁰ The Taxpayer provided the NPI number, 1093752883, during the hearing.

Sara Musilek, a clerk with the Antelope County Assessor’s Office, testified in support of the County Board’s decision denying the Taxpayer’s homestead exemption application. Musilek compiled the evidence in Exhibit 2:14-51, which is a collection of photographs and videos of the Taxpayer, taken by Musilek or retrieved from the Taxpayer’s Facebook page, purporting to show the Taxpayer locomoting, exercising, and dancing without the aid of a mechanical aid or prosthesis.

¹⁶ Exhibit 2:6.

¹⁷ Id.

¹⁸ Id.

¹⁹ Id.

²⁰ Id.

Musilek testified that she observed the Taxpayer dancing at a Valentine's dance for approximately two hours without using a walker or wheelchair; she acknowledged that the Taxpayer had a cane during this time but was not "fully relying on it at all." The Taxpayer testified that she and her son took frequent breaks from dancing when they both sat down.

Musilek testified that she had observed the Taxpayer at a water park crossing between "lily pads," "using a lot of strength in her arms and her feet, trying to jump from one lily pad to the next," and going up stairs and down a waterslide. Musilek conceded that the Taxpayer was wearing a foot brace and fell while moving between the lily pads. The Taxpayer testified that she used her children and the railing of the stairs for support, while taking frequent breaks, to climb the stairs for the waterslide.

Musilek photographed, made video recordings, or retrieved Facebook images of the Taxpayer dancing at a concert while wearing a foot brace but without relying on a cane, walking on uneven rocks during a fishing event without hesitation and without using a cane, and moving steel fencing at a cornhole tournament after hanging her cane on a fence segment. The Taxpayer testified that she was using a foot brace during all the events photographed or described by Musilek.

Deb Branstiter, the Antelope County Treasurer, testified at the hearing. Branstiter was aware of the Taxpayer's application for the homestead exemption, so on June 25, 2019, she wrote a letter to Mueller informing her of two events in which Branstiter observed the Taxpayer. First, on January 25, 2019, Branstiter and her husband attended a supper at a local Lutheran church, where Branstiter observed the Taxpayer balancing a grey dish tub with one arm while clearing tables with the other arm, weaving in and around the table and other people, not using a cane, wheelchair, or walker. Second, on March 14, 2019, Branstiter observed the Taxpayer scooping snow in front of a fitness center without using a cane, wheelchair, or walker. Branstiter did not know whether the Taxpayer was wearing a brace on either occasion; the Taxpayer testified that she was wearing a brace on both occasions.

Kelly Mueller, the Antelope County Assessor since 2015, testified at the hearing. Mueller explained that Neligh is a small community of 2,599 people. Mueller is a member of the same gym as the Taxpayer and has seen the Taxpayer exercising there on numerous occasions without

a walker or cane. Mueller testified that she checked to see whether the Taxpayer was wearing a brace on these occasions and saw that she was not. The Taxpayer testified that she was wearing a brace under her sock on these occasions, or else that she was standing still while exercising with the support of a family member.

When Mueller received the Taxpayer's application for the homestead exemption, she observed that the space for Dr. Wik's national provider identifier (NPI) number had been left blank.²¹ She called an employee of the Department of Revenue, who told her that she could call the doctor and discuss the case. Mueller called Dr. Wik's office and stated that she would deny the application if the form was not completed. Mueller and the Taxpayer disagreed as to whether Mueller notified the Taxpayer that the NPI number was missing and provided the Taxpayer an opportunity to correct the form before denying the application.

Mueller reviewed the definition of "qualified disabled claimant," and determined that the Taxpayer had not "lost all mobility precluding locomotion without the regular use of a mechanical aid or prosthetic device."²² Potential reasons for denial listed on the Form 458R include "Application is incomplete," and "Application does not include adequate documentation to meet disability requirements."²³ Mueller initially testified that her observations of the Taxpayer were the basis for her denial of the application, but later testified that the lack of the provider identifier number was also a factor in the denial. After consulting with the Department of Revenue, Mueller selected "Other" on the Form 458R as the reason for rejecting the application, adding, "Applicant does not meet the requirements for homestead disability."

VI. ANALYSIS

Mueller, the County Assessor, testified that she had two reasons for rejecting the Taxpayer's homestead exemption application. First, that the Taxpayer (or Dr. Wik) failed to fill in the blank on Form 458B where it called for Wik's NPI number. And second, the assertion of the county assessor that she had the authority to ignore or invalidate Dr. Wik's certification that the

²¹ Exhibit 2:6.

²² Testimony of Mueller, see 350 Neb. Admin. Code, Ch. 45 § 002.16.

²³ Exhibit 2:3.

Taxpayer met the medical criteria for the exemption based upon her own observations and medical opinions. Both of these assertions are problematic.

We analyze these reasons given by the county assessor in the context of the statute prescribing the use of Form 458B. Section 77-3510 delegates to the Tax Commissioner the discretion to determine what information is necessary in order to enable the county officials to determine that an applicant's claim should be allowed. The statute does not delegate further discretion to the county assessor (or anyone else) to disregard or invalidate the medical judgment made by the medical professional who authored the certification. Rather, the statute prescribes an unambiguous method for relying upon using the form created by the Tax Commissioner. The use of Form 458B is the sole statutory method prescribed to determine the requisite medical qualifications of the applicant. And that is precisely what Dr. Wik certified. He checked the box indicating that his patient, the Taxpayer, was an, "Individual with a permanent physical disability who has lost all mobility that precludes locomotion without the use of a mechanical aid or prosthesis." His handwritten amendment to the form did not negate, but rather elaborated, on that conclusion, when he said that Graham "[m]ust wear ankle foot orthotic with ambulation and exercise. Must use cane on uneven surfaces for ambulation stabilization. Gait impairment. Without these devices locomotion is aberrant and compensatory." As a result, the Taxpayer's filing of the Form 458B in support of her Homestead Exemption Application constituted the required medical certification for the county assessor to rely upon to determine qualification.

The absence of Dr. Wik's NPI number did not leave the question of medical qualification unanswered, as suggested by Mueller. There is no evidence that the certification was inauthentic or that it was falsified, and Mueller was able to contact Wik's medical office without the NPI number. We do not reach the conclusion, as the county assessor did, that absent the NPI number, the certificate is invalid. Mueller and the Taxpayer disagreed as to whether Mueller had given the Taxpayer an opportunity to correct the omission before denying the application, but the Taxpayer provided the required information during the hearing.

This appeal raises other troubling issues regarding the methodology used by elected officials of Antelope County and some of their employees in the determination of property tax obligations. Various county officials made video recordings and took photographs of the Taxpayer allegedly moving without any prosthesis or mechanical device. Some of these

photographs and recordings were taken at community events, but others were made at a gym and at the public swimming pool, where most Nebraskans would neither expect nor wish to be photographed by their county officials. These same officials also retrieved photographs from the Taxpayer's social media pages and provided sworn statements about their observations of her day-to-day activities, including family and church activities. In each case, the Taxpayer testified that she was wearing a foot brace under a sock, boot, or other clothing, that she was not actually moving, or that she was being physically supported by a friend or family member.

We find that the best evidence of whether the Taxpayer "has a permanent physical disability and has lost all mobility precluding locomotion without the regular use of a mechanical aid or prosthetic device" is the certification authorized by statute, prescribed by the Tax Commissioner, and signed by Dr. Wik. None of the county officials who testified were medical professionals or were otherwise medical experts. Dr. Wik, on the other hand, was a doctor who had been treating the Taxpayer for the medical conditions described above as often as once per month for several years. Wik's Form 458B certification constitutes clear and convincing evidence that the decision of the County Board was arbitrary or unreasonable, and the decision should be reversed.

VII. CONCLUSION

The Commission finds that there is competent evidence to rebut the presumption that the County Board faithfully performed its duties and had sufficient competent evidence to make its determination. The Commission also finds that there is clear and convincing evidence that the County Board's decision was arbitrary or unreasonable.

For all the reasons set forth above, the decision of the County Board is vacated and reversed.

VIII. ORDER

IT IS ORDERED THAT:

1. The decision of the Antelope County Board of Equalization determining the taxable value of the Subject Property for tax year 2019 is vacated and reversed.
2. The Subject Property shall receive the appropriate homestead exemption for tax year 2019.

3. This Decision and Order, if no appeal is timely filed, shall be certified to the Antelope County Treasurer and the Antelope County Assessor, pursuant to Neb. Rev. Stat. § 77-5018 (Reissue 2018).
4. Any request for relief, by any party, which is not specifically provided for by this Decision and Order is denied.
5. Each party is to bear its own costs in this proceeding.
6. This Decision and Order shall only be applicable to tax year 2019.
7. This Decision and Order is effective for purposes of appeal on May 12, 2021.²⁴

Signed and Sealed: May 12, 2021

Robert W. Hotz, Commissioner

SEAL

James D. Kuhn, Commissioner

²⁴ Appeals from any decision of the Commission must satisfy the requirements of Neb. Rev. Stat. § 77-5019 (Reissue 2018) and other provisions of Nebraska Statutes and Court Rules.