Circuit Court for Baltimore City
Case No. 24-C-16-002227

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 26

September Term, 2017

LARRY KEATON

v.

MARYLAND STATE RETIREMENT AND PENSION SYSTEM

Berger,
Arthur,
Friedman,

JJ.

Opinion by Arthur, J.

Filed: February 28, 2018

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

The Board of Trustees of the Maryland State Retirement and Pension System denied an employee's application for disability retirement benefits, based on the employee's failure to prove that he was permanently incapacitated from the performance of his normal job duties. The Circuit Court for Baltimore City affirmed that decision.

On appeal, the employee contends that the decision was premised on an error of law and unsupported by substantial evidence. He further contends that the circuit court abused its discretion by declining to grant him leave to offer additional evidence. Because we see no merit in these contentions, we affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

A. Mr. Keaton's 2009 Injury and Initial Treatment

Larry Keaton has worked as an engineering technician with the Maryland State Highway Administration since 1976, when he was 20 years old. For most of his career, he worked primarily from a desk on tasks related to drafts, deeds, property descriptions, and wage records under construction contracts.

On May 21, 2009, Mr. Keaton was walking through a hallway at his workplace when several boxes fell off a hand truck from a height of about four feet. At least one box landed on his left foot, on which he was wearing a sneaker. Before that day, he had no previous injuries to his left foot and no history of pain in that foot.

Within an hour the accident, Mr. Keaton started to feel a "burning" pain in his left foot. He sought emergency treatment at Bon Secours Hospital. X-rays of his foot did not reveal any fractures. He was discharged with a prescription for an anti-inflammatory

medication. Upon his return to work,[1] he continued to experience intermittent pain and discomfort in his left foot, especially while walking.

About a week after the injury, Mr. Keaton obtained an evaluation from Dr. Eric Weisbrot, a practitioner of family medicine. Dr. Weisbrot diagnosed Mr. Keaton with an acute contusion of the left foot. Over the next several weeks, Mr. Keaton underwent physical therapy with a chiropractor, Dr. Eric Fisher. The left-foot pain diminished initially, but after a while the improvement ceased. The pain persisted, not only when he Mr. Keaton put weight on his foot but also when he was at rest.

Within a few weeks after the injury, Mr. Keaton submitted a workers' compensation claim regarding his medical expenses, but he did not seek compensation for missed work days. The Workers' Compensation Commission determined that he had sustained a workplace injury as alleged on May 21, 2009.[2]

About three months after the injury, Mr. Keaton consulted with Dr. Clifford Jeng, an orthopedic surgeon. Dr. Jeng described the condition as "left foot pain after a crush injury." Dr. Jeng informed Mr. Keaton that surgery was unavailable to treat his symptoms and that "time is really the only thing that w[ould] allow the foot to heal."

At a follow-up examination about 10 months after the accident, Mr. Keaton

[1] Mr. Keaton went to the hospital on Friday, May 22, 2009. He returned to work on May 26, 2009, the Tuesday after the Memorial Day holiday.

[2] Mr. Keaton later submitted a second claim, asserting that he "pulled his low back and [left] foot" while lifting boxes and trash cans at work on September 9, 2009. The Workers' Compensation Commission nevertheless found that Mr. Keaton did not sustain an accidental injury as alleged on that date.

indicated that the pain on the outside of his foot was about "60% improved." He continued to complain of pain on the bottom of his foot, which Dr. Jeng characterized as "plantar metatarsalgia pain."[3] Dr. Jeng informed Mr. Keaton that he might "never be 100% fully recovered."

B. Further Evaluations from 2010 through 2013

In connection with the workers' compensation case, Mr. Keaton was examined in July 2010 by Dr. Robert Macht, a general surgeon. Mr. Keaton reported that he felt "moderate to severe pain" in his left foot on a daily basis; that he had "stopped running, jumping and squatting"; that he had "problems with prolonged walking and standing"; that he had "difficulty using stairs"; and that he "walk[ed] slower than before." Dr. Macht nevertheless found that "[n]o weakness or atrophy [was] present" and that "[s]ensation, range of motion and gait" were intact. Overall, Dr. Macht opined that Mr. Keaton had a "15% permanent partial impairment of his left foot[,]" which was "causally related to the May 21, 2009 accident."

Dr. Douglas Shepard, an orthopedic surgeon, reached different conclusions from an examination in December 2010. Dr. Shepard's report emphasized that Mr. Keaton

[3] Metatarsalgia is defined as "a cramping burning pain below and between the metatarsal bones where they join the toe bones." *Metatarsalgia*, MERRIAM-WEBSTER MEDICAL DICTIONARY, https://www.merriam-webster.com/medical/metatarsalgia (last visited Feb. 8, 2018). The metatarsal bones are the five elongated bones between the tarsus (bones of the ankle) and the phalanges (bones of the toes). Together, the metatarsal bones "form the front of the instep and ball of the foot." *Metatarsal*, MERRIAM-WEBSTER MEDICAL DICTIONARY, https://www.merriam-webster.com/medical/metatarsal (last visited Feb. 8, 2018).

appeared to walk "without obvious limp or antalgic gait pattern"[4] or "obvious imbalance or weakness"; that he "display[ed] full range of motion in the ankle and forefoot"; and that X-ray findings were negative. Dr. Shepard commented that Mr. Keaton's "complaints seem[ed] to outweigh the clinical findings and mechanism of injury," i.e., that his subjective complaints were inconsistent with the objective findings. In Dr. Shepard's opinion, Mr. Keaton had "sustained a 3% impairment of his left foot" and there were "no contraindications to his carrying out all his work tasks without limitation."

On December 16, 2010, the Workers' Compensation Commission determined that Mr. Keaton had sustained a "9% loss of use of the left foot[,]" and awarded him compensation for permanent partial disability.

Around 2010, Mr. Keaton's job duties changed. Although his title remained "Engineer Technician III," he was assigned to work with a computer support team. His primary responsibilities were to manage an inventory of portable computer equipment, to maintain a network of printers and copiers, and to archive documents such as plans and plats. Those tasks required him to be on his feet, performing physical activity (standing, walking, lifting, and carrying) throughout much of the day. During 2011, his supervisors modified some of his duties, by permitting him to move certain objects (such as packs of

[4] An antalgic gait is "[a] gait pattern specifically modified to reduce the amount of pain a person is experiencing[.]" *Antalgic Gait*, MCGRAW-HILL CONCISE DICTIONARY OF MODERN MEDICINE (2002), https://medical-dictionary.thefreedictionary.com/antalgic+gait (last visited Feb. 8, 2018). "[T]he term is usually applied to a rhythmic disturbance in which as short a time as possible is spent on the painful limb and a correspondingly longer time is spent on the healthy side." *Id.*

paper or sets of plans) one at a time.

In November 2011, Mr. Keaton sought treatment at Multi-Specialty HealthCare, complaining that his left-foot pain was worsening. Dr. Daniel Schechter, an orthopedics specialist, observed that Mr. Keaton's gait was "minimally antalgic to the left" and that the "[s]trength and range of motion" in his left foot was "diminished when compared to the right[.]" Among other things, Dr. Schechter recommended "[l]ight duty with no lifting greater than 30 pounds[.]"

Mr. Keaton underwent a new course of physical therapy, under the care of Dr. Constantine Misoul, an orthopedic surgeon at Multi-Specialty HealthCare. Six weeks later, Dr. Misoul discontinued the therapy, concluding that the symptoms had not improved. In addition to various pain management suggestions, Dr. Misoul recommended that Mr. Keaton "be on permanent restriction from lifting more than 30 pounds."

During 2013, Mr. Keaton revisited his workers' compensation case, asserting that his condition had worsened. He underwent new examinations from Dr. Macht and Dr. Shepard. Dr. Macht commented that Mr. Keaton was "getting worse" and that he now had "decreased sensation" and "loss of range of motion" in one of his toes. Dr. Macht concluded that Mr. Keaton now had "a 25 percent permanent partial impairment of his left foot" as a result of the 2009 accident. Dr. Shepard, by contrast, sustained his previous conclusions that Mr. Keaton had sustained only a "3% impairment" and that he could "continue working . . . on a full time basis." In September 2013, the Workers'

Compensation Commission issued a supplemental award, finding that Mr. Keaton "[n]ow ha[d] a permanent partial disability resulting in 14% loss of use of the left foot[.]"

Despite Mr. Keaton's limitations and the modifications to his duties, he continued to work full time and to receive satisfactory scores in all categories on his annual performance reviews.

C. Mr. Keaton's Claim for Disability Retirement Benefits

As a long-time State employee, Mr. Keaton was also a member of the State Retirement and Pension System. Members who are unable to work may qualify for two types of disability retirement benefits: an ordinary disability retirement allowance or an accidental disability retirement allowance. For a member to be eligible for either type of allowance, a medical board must certify that: "(i) the member is mentally or physically incapacitated for the further performance of the normal duties of the member's position; (ii) the incapacity is likely to be permanent; and (iii) the member should be retired." Md. Code (1993, 2015 Repl. Vol.), §§ 29-105(a)(2), 29-109(b)(2) of the State Personnel and Pensions Article ("SPP").

A member qualifies for an ordinary disability retirement allowance if, in addition to the requisite certification from the medical board, "the member has at least 5 years of eligibility service." SPP § 29-105(a)(1). The criteria for accidental disability benefits "are significantly more stringent" than those for ordinary disability benefits. *Reger v. Washington Cnty. Bd. of Educ.*, 455 Md. 68, 123 (2017). A member is entitled to an accidental disability retirement allowance if, in addition to the requisite certification from

the medical board, "the member is totally and permanently incapacitated for duty as the natural and proximate result of an accident that occurred in the actual performance of duty at a definite time and place without willful negligence by the member[.]" SPP § 29-109(b)(1). Compensation for an accidental disability is more generous than compensation for an ordinary disability. *Compare* SPP § 29-106, *with* SPP § 29-110.

In March 2013, Mr. Keaton applied for accidental disability retirement benefits. On his application, he claimed that he was permanently disabled as a result of the workplace accident that occurred on May 21, 2009. He described his disability as "loss of function" and "loss of endurance" related to the pain in his left foot. He stated that this pain recurred whenever he was lifting heavy objects or whenever he was standing or walking for long periods of time. He supported his application with an evaluation from Dr. Misoul.

A Medical Board consisting of three physicians reviewed his application and concluded that "the medical evidence submitted does not support a conclusion that [Mr. Keaton] is <u>permanently</u> disabled or unable to perform his job duties." (Emphasis in original.) The Medical Board recommended that the Board of Trustees deny his claim for accidental and ordinary disability benefits. Mr. Keaton asked the Medical Board to reconsider its decision. After reviewing additional records, the Medical Board again recommended that he be denied disability benefits. The Board of Trustees accepted the Medical Board's recommendation. Mr. Keaton then asserted his appeal rights by requesting a hearing before an administrative law judge of the Office of Administrative

Hearings.

Before the hearing took place, the Disability Unit of the State Retirement Agency requested that Mr. Keaton submit to an independent medical evaluation from Dr. Gary Pushkin, an orthopedic surgeon. In a report dated August 5, 2014, Dr. Pushkin concluded: "It is my opinion based on the complete review of all the records as well as my physical examination and history taken of Mr. Keaton today that Mr. Keaton is not permanently disabled from performing his job duties and that he has not sustained a disability as a natural and proximate result of the accidents of May 21, 2009 and/or September 30, 2009."

After reviewing Dr. Pushkin's report, the Medical Board again recommended the denial of the application. The Board of Trustees accepted that recommendation. Mr. Keaton promptly renewed his request for an appeal before an administrative law judge.

During 2015, while his administrative appeal was pending, Mr. Keaton sought further treatment from Dr. Yvonne Ozuzu, a podiatrist. Dr. Ozuzu requested an MRI of Mr. Keaton's left foot. The radiologist, Dr. Andrew Yang, found "early arthritic changes" along with a "hammertoe deformity involving the second, third, fourth, and fifth toes." Dr. Ozuzu diagnosed Mr. Keaton with "[a]rthritis/degenerative" in addition to metatarsalgia. Dr. Ozuzu advised Mr. Keaton of various measures that might help him manage his pain, but she informed him that "crush injuries tend to create prolonged pain that may never go away." Dr. Ozuzu also wrote a note to his employers stating that he was "only abl[e] to lift 30 pounds[.]"

D. The Hearing in the Office of Administrative Hearings

An administrative law judge from the Office of Administrative Hearings heard Mr. Keaton's case on September 21, 2015. Counsel for Mr. Keaton and counsel for the State Retirement and Pension System jointly agreed to admit a 164-page exhibit binder into evidence. Among other things, the binder included the written evaluations from the various doctors who had treated or examined Mr. Keaton's foot.

Mr. Keaton testified on his own behalf. He recounted that he started to feel pain in his left foot soon after boxes fell onto his foot on May 21, 2009. He explained that the pain had developed to the point where it was "always there," even while he was sitting on the witness stand. His doctors had informed him that the pain was likely to be permanent. He said that "lifting . . . brings on more pain[,]" and that he had difficulty walking normally or at anything other than a slow pace. He reported that he was currently using prescription orthotics, that he occasionally took Tylenol, and that he did strengthening exercises at home at the recommendation of his doctors. He estimated that he had missed around 30 days of work since his injury, including days when he attended physical therapy, days when his doctors told him to rest, or days when he "called in sick" because he felt unable to work.

Mr. Keaton characterized his current job as "[m]ore physical" than it had been in 2009. Specifically, his job required him to lift and carry items such as computer equipment, paper, toner, and sets of plans to be scanned.[5] To compensate for the pain, he

[5] During his testimony, Mr. Keaton referred to a "Position Description" that he

would try to put "less weight" on his foot and he would frequently "sit down and relax" until he felt better. He said that he was "not able to . . . lift heavy equipment, like the other employees" in his section, and that he was no longer doing "[s]ome of the duties" associated with his position. In summary, he said: "[M]y physical ability to do things like I want to is not there because of the injury."

The State Retirement and Pension System offered Dr. Pushkin as an expert in orthopedic medicine. Dr. Pushkin had formed opinions based on Mr. Keaton's job description, the in-person examination from August 2014, and all medical records including the latest evaluations from Dr. Ozuzu in 2015. Dr. Pushkin expressed two main opinions: (1) that Mr. Keaton was able to perform his normal job duties; and (2) that the pain in his foot was unrelated to the workplace accident from May 21, 2009.

In Dr. Pushkin's opinion, the medical evaluations showed "no objective reason why Mr. Keaton would require any limitation in his job duties[.]" Dr. Pushkin stated that, aside from a finding of "diffuse tenderness under his toes," his own examination of Mr. Keaton's left foot "was essentially a normal exam." Dr. Pushkin noted that Mr. Keaton had "full range of motion of his foot," with no observable "abnormalities" and "no evidence of any muscle atrophy or wasting." Dr. Pushkin recited similar

had filled out and that his supervisors had verified in February 2013. On that document, he listed his job title as "Computer Equipment Coordinator." One section of the form asked him to describe the physical abilities required by his work, such as "lifting Approx. 30 pounds, climbing, excessive standing, bending, crawling, [etc.]." (Emphasis in original.) He wrote that those physical abilities were required for 40% of his time operating a computer, 50% of his time removing and replacing computer equipment, 35% of his time moving boxes, and 15% of his time pushing a cart.

observations made by other doctors.

Citing the 2015 MRI results that showed arthritis and hammertoe deformities, Dr. Pushkin further opined that the "the problems that Mr. Keaton has in his foot are of a degenerative nature" and "not related to those boxes falling on his foot." Dr. Pushkin noted that the earliest reports showed a contusion above the three toes on the outside of his foot, and that "the majority of the findings on the MRI are on the other side of his foot, not where the box hit." Dr. Pushkin emphasized that Mr. Keaton was "a 60 year old man" by the time of that MRI. According to Dr. Pushkin, the area where Mr. Keaton felt the most pain, below the bones leading to his second toe, was "just a common area . . . where patients get degenerative changes in their foot and subsequent pain."

Despite Mr. Keaton's complaints of pain, Dr. Pushkin opined that the "objective evidence" did not support "any restrictions" on his physical activity. Dr. Pushkin concluded, based on the "normal physical examinations" of Mr. Keaton's foot, that he had the "capacity" to lift heavy objects, even if he might feel pain while doing so. Dr. Pushkin further opined that Mr. Keaton was not "at risk of . . . further injury or worsening" his condition "by carrying heavy weights."

E. <u>The Proposed Decision from the Administrative Law Judge</u>

The administrative law judge issued a proposed decision on October 18, 2015. The primary factual findings were that Mr. Keaton "performs all duties of his position, with accommodations such as pushing one box of paper in a cart instead of several and lifting fewer items at a time" and that he "is not mentally or physically incapacitated for

the further performance of the normal duties of his position."

In his analysis, the administrative law judge recognized that Mr. Keaton needed to show that he is "incapacitated for the further performance of normal duties of his position" in order to be eligible for either ordinary or accidental retirement benefits. *See* SPP §§ 29-105(a)(2)(i), 29-109(b)(2)(i). In this regard, the administrative law judge observed that Mr. Keaton "continues to perform his job, although over time his responsibilities have been modified to accommodate his limitations." The administrative law judge recounted Dr. Pushkin's expert testimony about Mr. Keaton's capacity to do his job and noted that Mr. Keaton "did not present any expert witness testimony to counter the persuasive testimony of Dr. Pushkin[.]" The administrative law judge reasoned: "Although some of [Mr. Keaton's] treating physicians recommended either light duty or limited lifting, the majority of the medical records persuasively demonstrated that [Mr. Keaton] has the capacity to perform all of the duties he is assigned as an Engineer Technician III."

In sum, in the administrative law judge's assessment, "a preponderance of the evidence support[ed] the conclusion that [Mr. Keaton] is not permanently disabled." Accordingly, the proposed decision recommended that the Board of Trustees deny Mr. Keaton's application for ordinary and accidental disability retirement benefits.

Mr. Keaton filed exceptions, asserting that he had "met his burden" of proving that he was disabled as a result of a workplace accident. The Medical Board, after further review, once again upheld its recommendation that Mr. Keaton be denied ordinary and

accidental disability benefits. After an exceptions hearing, the Board of Trustees adopted the Medical Board's recommendation. On March 16, 2016, the Board of Trustees issued its final decision denying Mr. Keaton's claim for disability benefits.

F. Judicial Review Proceedings in the Circuit Court

Mr. Keaton filed a timely petition for judicial review in the Circuit Court for Baltimore City, challenging the decision of the Board of Trustees.

In August 2016, while his petition was pending, Mr. Keaton consulted with Dr. Norman Siddiqui, another podiatrist. Dr. Siddiqui wrote a two-page letter to Dr. Ozuzu, confirming the prior assessments of metatarsalgia and hammertoe deformities on the second, third, fourth, and fifth toes of the left foot.

In his memorandum in support of his petition, Mr. Keaton argued that the decision should be reversed because the administrative law judge "did not consider the . . . impressions and observations" of three doctors: Dr. Macht, Dr. Misoul, and Dr. Siddiqui. Mr. Keaton included a copy of Dr. Siddiqui's letter as an exhibit to his memorandum. In response, the State Retirement and Pension System pointed out that Dr. Siddiqui's letter from 2016 was not part of the administrative record from 2015.

Three weeks before the scheduled hearing, Mr. Keaton filed a motion seeking leave "to offer Dr. Siddiqui's evaluation as additional evidence of the worsening condition of his left foot." The State Retirement and Pension System opposed the motion, arguing that the new document was "merely cumulative" and "not material" to the case.

The circuit court heard arguments on January 30, 2017. Through counsel, Mr. Keaton announced that he was no longer seeking an outright reversal of the decision, but only seeking a remand, based on the argument that the administrative law judge had improperly "excluded" the medical records that he had submitted. The State Retirement and Pension System argued that the administrative law judge had "evaluated all of the evidence" and had "appropriately concluded" that Mr. Keaton had failed to prove his disability claim.

On February 3, 2017, the circuit court issued a memorandum and order denying Mr. Keaton's petition for judicial review. The court concluded that substantial evidence in the record supported the decision to deny the application for disability retirement benefits. The circuit court denied Mr. Keaton's motion for leave to offer additional evidence, stating that "Dr. Siddiqui's evaluation is not material to [Mr. Keaton's] case."

After the entry of judgment, Mr. Keaton noted this timely appeal.

DISCUSSION

Mr. Keaton's challenge to the decision of the Board of Trustees of the State Retirement and Pension System comes to this Court by way of the Administrative Procedure Act. In a judicial review proceeding under the Act, the circuit court may:

> (1) remand the case for further proceedings;
>
> (2) affirm the final decision; or
>
> (3) reverse or modify the decision if any substantial right of the petitioner may have been prejudiced because a finding, conclusion, or decision:
>
> > (i) is unconstitutional;

> (ii) exceeds the statutory authority or jurisdiction of the final decision maker;
>
> (iii) results from an unlawful procedure;
>
> (iv) is affected by any other error of law;
>
> (v) is unsupported by competent, material, and substantial evidence in light of the entire record as submitted;
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> (vi) in a case involving termination of employment or employee discipline, fails to reasonably state the basis for the termination or the nature and extent of the penalty or sanction imposed by the agency; or
>
> (vii) is arbitrary or capricious.

Md. Code (2014), § 10-222(h) of the State Government Article ("SG").

Under this statute, the court's role is a "narrow" one, which "goes very little beyond its inherent power of review to prevent illegal, unreasonable, arbitrary or capricious administrative action." *Md. State Ret. & Pension Sys. v. Martin*, 75 Md. App. 240, 244 (1988) (citations and quotation marks omitted). The court "must review the agency's decision in the light most favorable to the agency, since decisions of administrative agencies are prima facie correct, and carry with them the presumption of validity." *Courtney v. Bd. of Trs. of Md. State Ret. Sys.*, 285 Md. 356, 362 (1979) (citations and quotation marks omitted); *see also Thomas v. State Ret. & Pension Sys. of Md.*, 420 Md. 45, 54 (2011).

In his appeal, Mr. Keaton asks this Court to vacate the circuit court's judgment and direct that this matter be remanded for a new hearing in the Office of Administrative Hearings. He raises three issues. The first two issues concern the findings of fact and

conclusions of law made by the administrative law judge:

> 1. Whether the administrative judge erred as a matter of law when he determined that Keaton was required to present live expert testimony.
>
> 2. Whether there is substantial evidence in the record to support the administrative judge's recommendation that Keaton was not eligible for ordinary or accidental disability benefits as a result of a workplace accident.

The final issue concerns the circuit court's order denying his request for leave to offer additional evidence:

> 3. Whether the circuit court abused its discretion pursuant to § 10-222(f)(2) of the State Government Article when it denied Keaton's motion to offer additional evidence on the basis that the evidence was not material.

For the reasons discussed below, we reject each of these challenges. In our judgment, the administrative law judge did not rule that Mr. Keaton was required to present live expert testimony; substantial evidence supported the administrative law judge's findings; and the circuit court acted within its discretion when it denied the request to supplement the record.

I. <u>The Proposed Decision of the Administrative Law Judge</u>

After a hearing on the denial of disability retirement benefits, the administrative law judge is required to "prepare a summary of the testimony, comment on credibility and demeanor of the witnesses, and prepare written findings of fact and conclusions of law[.]" Code of Maryland Regulations ("COMAR") 22.06.06.02(G)(1). Mr. Keaton's primary challenge focuses on those findings and conclusions from the proposed decision from the administrative law judge.

Mr. Keaton theorizes that the administrative law judge evaluated his claim under a

mistaken belief that a claimant needed to present live expert witness testimony to prove a disability claim. He contends that, in light of the relatively less formal nature of the administrative proceedings, a claimant can prove a disability claim entirely through medical records. According to Mr. Keaton, the administrative law judge either failed to consider or failed to afford any weight to the medical records that supported his claim. In sum, he argues that the administrative law judge "erred when he ruled that [Mr.] Keaton was required to present live expert witness testimony."

This entire challenge rests on an inaccurate characterization of the decision under review. In fact, the administrative law judge did not rule that Mr. Keaton was required to present live expert witness testimony.

During the hearing, counsel for the State Retirement and Pension System advanced two main points. First, counsel argued that there was "no indication, . . . in any of the medical records" that Mr. Keaton was "unable to do his job." Second, counsel argued that, "[t]o the extent" that one might "find Mr. Keaton disabled from the further performance of duty," Mr. Keaton had failed to present the "expert evidence" that some court opinions have held to be necessary to "establish the cause" of such a disability.

In the proposed decision, the administrative law judge acknowledged the second point, by writing: "[T]he issue of causation is a complicated medical issue that requires an expert opinion based on sound scientific principles. *Wilhelm v. State Traffic Safety Comm'n*, 230 Md. 91 (1962); *Giant Foot, Inc. v. Booker*, 152 Md. App. 166, 178, *cert. denied*, 378 Md. 614 (2003)." The administrative law judge expressed some skepticism

about whether Mr. Keaton could prove causation without presenting "any expert witness testimony to counter the persuasive testimony of Dr. Pushkin, the Agency's expert." Yet the administrative law judge also explained: "Even before determining the causation of alleged disability, the threshold requirement of incapacitation must be shown." The administrative law judge then reasoned: "Because I cannot find that [Mr. Keaton] is totally and permanently incapacitated for duty, I need not reach a determination as to whether his alleged incapacitation was the natural and proximate result of the May 21, 2009 injury."[6]

Any fair reading of this proposed decision shows that its outcome did not turn on the presence or absence of expert testimony about the cause of a medical condition. The administrative law judge expressly stated that he did not reach the issue of the cause of a disability because he otherwise found, by a preponderance of the evidence, that Mr. Keaton was not disabled. For that very reason, the administrative law judge concluded that Mr. Keaton had failed to establish even the more lenient criteria of a claim for ordinary disability retirement benefits, which may be awarded regardless of the cause of

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[6] Mr. Keaton contends that expert opinion testimony is not required to prove medical causation in administrative proceedings. As support for that proposition, he points to an unreported opinion of this Court. An unreported opinion of this Court "is neither precedent within the rule of stare decisis nor persuasive authority" (Md. Rule 1-104(a)), and may not be cited for either of those purposes. *See* Md. Rule 1-104(b). Furthermore, "'it is the policy of this Court in its opinions not to cite for persuasive value any unreported federal or state court opinion.'" *Margolis v. Sandy Spring Bank*, 221 Md. App. 703, 718 n.10 (2015) (quoting *Kendall v. Howard County*, 204 Md. App. 440, 445 n.1 (2012), *aff'd*, 431 Md. 590 (2013)). In any event, the case upon which Mr. Keaton attempts to rely is inapposite because the administrative law judge in that case actually reached the issue of causation.

the disability. The statements about the lack of expert testimony on causation were not material to the decision.

Neither the hearing transcript nor the text of the proposed decision supports Mr. Keaton's suggestion that the administrative law judge "excluded" the various medical records that he offered in support of his disability claim. At the hearing, counsel for both parties agreed to the admission of the 164-page exhibit binder, which included the extensive medical records. The administrative law judge expressly "admitted as evidence" "pages 1 through 164" of the joint exhibit, and counsel for both parties freely cited pages of that exhibit throughout the hearing. The proposed decision expressly identified the joint exhibit as a source of evidence, along with the testimony from Mr. Keaton and the expert testimony from Dr. Pushkin. The proposed decision did not include any ruling excluding or limiting the admissibility of certain evidence.

The substance of the proposed decision belies Mr. Keaton's assertion that the administrative law judge "relied solely" on the live testimony from the agency's expert and "the perceived absence" of live expert testimony on behalf of Mr. Keaton. The proposed decision included a four-page summary of "Findings of Fact," only a few of which derived from the testimony of Dr. Pushkin. It included facts derived from Mr. Keaton's testimony and his job description. It described the initial evaluations by Dr. Weisbrot and the physical therapy progress reports by Dr. Fisher, without mentioning those doctors by name. It recounted evaluations by Dr. Jeng, Dr. Shepard, and Dr. Ozuzu (none of whom testified at the hearing), alongside the evaluation by Dr. Pushkin (who

did). The factual summary reveals that the administrative law judge made his findings "[a]fter reviewing the evidence in th[e] case," as expressly stated, and not solely based on the testimony of Dr. Pushkin.

Mr. Keaton nevertheless complains that, although the record "encompassed thirteen (13) medical professional[s'] observations and impressions," the administrative law judge "*only* cited the findings of Drs. Jeng, Shepard, Pushkin[,] and Ozuzu[.]"[7] Mr. Keaton offers no explanation of why it would have been necessary for the fact-finder to identify every medical evaluator by name. Even Mr. Keaton seems to believe that some of the treatment records were too insignificant to warrant any mention: his brief mentions only ten of the doctors who evaluated him.[8]

Mr. Keaton takes issue with the administrative law judge's failure to mention those evaluations that were most favorable to him. But although the proposed decision did not specifically mention the evaluations from Dr. Schechter, Dr. Misoul, and Dr. Macht, it did acknowledge the substance of their recommendations. The analysis stated: "Although some of the Claimant's treating physicians recommended either light duty or limited lifting, the majority of the medical reports persuasively demonstrated that the

[7] Mr. Keaton fails to acknowledge that the proposed decision also paraphrased reports by Dr. Weisbrot and Dr. Fisher, albeit without mentioning them by name.

[8] In addition to the doctors already mentioned in this opinion, a single sentence of Mr. Keaton's brief cites an April 2012 report from Dr. Brian Belgin, a podiatrist, on a referral from Dr. Koren Jenkins. Mr. Keaton does not even attempt to explain any significance of that report, other than to say that it was "non-specific" about the cause of his foot pain.

Claimant has the capacity to perform all of the duties he is assigned as Engineer Technician III." This sentence reveals that the administrative law judge did in fact consider the recommendations from those three doctors, but weighed them less heavily than the other reports that were discussed in detail.

Mr. Keaton further argues that the administrative law judge erred by stating that Dr. Pushkin's opinion about Mr. Keaton's capacity to work "was not contradicted by other expert testimony." Mr. Keaton argues that this "conclusion is erroneous as a matter of law in light of the medical records of Dr. Allan Macht[.]" He points out that Dr. Macht concluded that "there is a 25 percent permanent partial impairment of [Mr. Keaton's] left foot" and that the impairment was "causally related to his May 21, 2009 accident." From reading the proposed decision, it is evident that the administrative law judge was more persuaded by the counter-evaluations by Dr. Shepard, who opined that Mr. Keaton had only a three percent impairment, which would not prevent him from working. While expressly crediting the opinion testimony from Dr. Pushkin, the administrative law judge favorably recited Dr. Shepard's assessment that the "complaints of pain" seemed "to be inconsistent with the objective evidence of injury."

Even if the administrative law judge had been required to accept the opinion of Dr. Macht over the opinion of Dr. Shepard (which he was not required to do), a finding of a permanent partial impairment would not necessarily contradict the conclusion that Mr. Keaton had no disability. During the hearing, Dr. Pushkin explained that "[i]mpairment refers to . . . an inability . . . for a body part to function normally[,]" but that a finding of

disability is an "assessment of how the impairment of that body part affects someone's ability to do their job." Thus, according to Dr. Pushkin, "the finding of an impairment" does not "necessitate the conclusion that someone is disabled."

In sum, we agree with the State Retirement and Pension System that Mr. Keaton's argument "is based on a misreading of the record." The text of the proposed decision shows that the administrative law judge considered the medical evaluations of the doctors who did not testify, and not just that of Dr. Pushkin. Thus, the administrative law judge never even made the ruling that Mr. Keaton contends was in error.

Where an agency has committed no error of law, review of the agency's factual findings is limited to determining whether those findings are supported by substantial evidence. *Md. State Ret. & Pension Sys. v. Martin*, 75 Md. App. at 244-45; *see also Thomas v. State Ret. & Pension Sys. of Md.*, 184 Md. App. 240, 248 (2009), *aff'd*, 420 Md. 45 (2011). In what is essentially a reiteration of the same points from his primary argument, Mr. Keaton contends the decision under review was unsupported by substantial evidence. There is no merit to this secondary argument.

Under the substantial evidence test, the review of an agency's factual findings is limited to determining "whether a reasoning mind reasonably could have reached the factual conclusion the agency reached." *Courtney v. Bd. of Trs. of Md. State Ret. Sys.*, 285 Md. at 362 (citation and quotation marks omitted); *Md. State Ret. & Pension Sys. v. Martin*, 75 Md. App. at 245 (citation and quotation marks omitted). In applying this test, the Court of Appeals has emphasized that a court should not substitute its own judgment

for the expertise of the administrative agency. *Courtney v. Bd. of Trs. of Md. State Ret. Sys.*, 285 Md. at 362; *Md. State Ret. & Pension Sys. v. Martin*, 75 Md. App. at 245.

"[N]ot only is it the province of the agency to resolve conflicting evidence, but where inconsistent inferences from the same evidence can be drawn, it is for the agency to draw the inferences." *Courtney v. Bd. of Trs. of Md. State Ret. Sys.*, 285 Md. at 362; *Md. State Ret. & Pension Sys. v. Martin*, 75 Md. App. at 245; *see also Thomas v. State Ret. & Pension Sys. of Md.*, 184 Md. App. at 248. Accordingly, where the Board of Trustees is "confronted with conflicting expert medical opinion[,]" it is "the function of the Board to weigh the testimony and to judge its reliability." *Courtney v. Bd. of Trs. of Md. State Ret. Sys.*, 285 Md. at 364. For example, in the *Courtney* case, the Court of Appeals upheld the Board's denial of accidental disability retirement benefits where two expert physicians gave conflicting opinions about whether the claimant's disability had resulted from a workplace incident. *Id.* at 364-65.

As Mr. Keaton rightly concedes, Dr. Pushkin rendered an expert medical opinion that Mr. Keaton is not disabled from performing his job duties. That testimony, even standing alone, would be sufficient to support the finding that Mr. Keaton is not disabled. Moreover, Dr. Shepard opined in 2010 that Mr. Keaton could work without limitation and confirmed that assessment in 2013. In addition, Mr. Keaton's testimony and his employment records showed that he had continued to work full time since his injury and that his employer had modified his duties to accommodate his limitations. This evidence added further support to the ultimate conclusion of the Board of Trustees.

The other evidence offered by Mr. Keaton showed, at most, a difference of opinion about his condition. Some doctors weighed his subjective complaints of pain more heavily than others did. Dr. Macht opined that Mr. Keaton had a 25 percent partial impairment of his left foot, but Dr. Shepard concluded that he had only a three percent partial impairment in that foot. Three doctors had recommended certain lifting restrictions, but Dr. Pushkin expressed his belief that those recommendations were unfounded. In light of these conflicting medical opinions, "it cannot be said that the Board was arbitrary, capricious or unreasonable in refusing . . . to accept the views favorable to [Mr. Keaton's] contentions." *Courtney v. Bd. of Trs. of Md. State Ret. Sys.*, 285 Md. at 364-65 (citation and quotation marks omitted).

II. Order Denying Motion for Leave to Offer Additional Evidence

In addition to his challenge to the underlying decision, Mr. Keaton contends that the circuit court abused its discretion by denying his motion for leave to offer additional evidence.

Under the Administrative Procedure Act, "[j]udicial review of disputed issues of fact shall be confined to the record for judicial review[.]" SG § 10-222(f)(1). In a narrow exception, the court may require the agency to "supplement[]" that record by taking "additional evidence" under certain conditions. *Id.* The statute provides:

> The court may order the presiding officer[9] to take additional evidence on terms that the court considers proper if:

[9] SG § 10-202(g) defines the "'[p]residing officer'" as "the board, commission, agency head, administrative law judge, or other authorized person conducting an administrative proceeding under this subtitle."

> (i) before the hearing date in court, a party applies for leave to offer additional evidence; and
>
> (ii) the court is satisfied that:
>
> > 1. the evidence is material; and
> >
> > 2. there were good reasons for the failure to offer the evidence in the proceeding before the presiding officer.

SG § 10-222(f)(2).

In this case, several months after he petitioned for judicial review, Mr. Keaton sought further treatment from Dr. Norman Siddiqui, a podiatrist. In August 2016, Dr. Siddiqui examined Mr. Keaton and reviewed radiographic images of his foot. As summarized in a two-page report, Dr. Siddiqui found a "[h]ammer digit deformity" of the second, third, fourth, and fifth toes on the left foot, along with "[m]etatarsalgia" of the forefoot, with pain primarily under the second and third toes. Dr. Siddiqui concluded:

> In this case, the patient's concern is that this all related to his work injury that occurred back in 2009. I have explained to the patient that he definitely has contractures of toes 2 and 3 at the level of the [metatarsophalangeal joints] which is causing fat pad irritation and likely the hammertoe deformities and causing symptoms and pain, and this is obvious compared to the contralateral side; however, it is hard to know if this is directly related or is a sequela of the injury that occurred back in 2009. . . .

Although Dr. Siddiqui's report was not part of the administrative record, Mr. Keaton appended a copy of the report to his memorandum to the circuit court. He cited Dr. Siddiqui's finding of "digit deformity" on the second, third, fourth, and fifth toes on the left foot as evidence that, he said, was "not sufficiently considered" by the agency.

In its responsive memorandum, the State Retirement and Pension System observed

that Dr. Siddiqui's letter was not part of the record for judicial review. The agency noted that SG § 10-222(f) "only permits the court to order that additional evidence be taken *before the agency*[,]" but "does not permit the court to receive the evidence itself." *Consumer Prot. Div. Office of Att'y Gen. v. Consumer Pub. Co., Inc.*, 304 Md. 731, 749 (1985) (applying predecessor statute to SG § 10-222(f)).

About three weeks before the scheduled hearing date, Mr. Keaton filed a motion under SG § 10-222(f), seeking leave "to offer Dr. Siddiqui's evaluation as additional evidence of the worsening condition of his left foot." Mr. Keaton insisted, without any further explanation, that the letter was "material because it offers further documentation of [Mr. Keaton]'s impairment." Opposing that motion, the State Retirement and Pension System characterized Dr. Siddiqui's report as "nothing more than an additional treatment record," which was "merely cumulative of the information already included in the administrative record." At the hearing before the circuit court, counsel for Mr. Keaton asked that the "additional evidence . . . rendered in 2016" by Dr. Siddiqui should be "part of the remand" that he was requesting. Counsel for Mr. Keaton did not elaborate any further on the materiality of Dr. Siddiqui's report. In the final order denying Mr. Keaton's petition for judicial review, the circuit court also denied his motion for leave to offer additional evidence.

On appeal, Mr. Keaton contends that the circuit court was required to grant his motion. Mr. Keaton correctly conceded that SG § 10-222(f) "leaves within the discretion of the trial judge the decision whether to order the [agency] to take additional evidence

that was not offered in the proceedings below." *Coomes v. Md. Ins. Admin.*, 232 Md. App. 285, 313-14, *cert. granted*, 454 Md. 677 (2017). SG § 10-222(f)(2)(ii) requires that the court be "satisfied" that the proffered evidence is material and that there were good reasons why it was not offered before the agency. Even if the court is "satisfied" that those conditions are met, the statute states that the court "may" order the agency to receive the additional evidence (SG § 10-222(f)(2)(ii)), but it does not require the court to do so. In light of this permissive language, this Court has said that "the statute confers upon the court *complete discretion* to allow [or disallow] additional evidence[.]" *Gigeous v. E. Corr. Inst.*, 132 Md. App. 487, 506 (2000) (emphasis added).

This Court has often explained that "[a]n abuse of discretion is said to occur where no reasonable person would take the view adopted by the trial court, or when the trial court acts without reference to any guiding rules or principles." *Comptroller of the Treasury v. Clise Coal, Inc.*, 173 Md. App. 689, 707 (2007) (citation and quotation marks omitted). Here, the circuit court's well-reasoned ruling was quite the opposite of an abuse of discretion. The court wrote:

> . . . In order for additional evidence to supplement the record for judicial review, the evidence must: (1) be material; and (2) there must be a good reason for the failure to offer the evidence. Md. Code Ann., State Gov't § 10-222(f). Materiality "is a broad concept that is generally understood to include any evidence which is reasonably capable of influencing a tribunal's decision, but it does not require that the evidence will necessarily do so." *Breedon* [*v. Maryland State Dep't of Educ.*], 45 Md. App. [73,] 84 (1980).
>
> In the instant case, Dr. Siddiqui's evaluation is not material to Petitioner's case. The issue before [the administrative law judge] and the Trustees was whether Petitioner suffers from a medical condition that renders him totally and permanently incapacitated from the further

> performance of his job. In his evaluation. Dr. Siddiqui opined that "it is hard to know if [the current injury] is directly related or is a sequela of the injury that occurred back in 2009." Moreover, Dr. Siddiqui does not indicate that petitioner is disabled from his job or otherwise discuss Petitioner's ability to perform his duties. Accordingly, Dr. Siddiqui's evaluation is not material to Petitioner's case, and this Court need not consider whether good reasons exist for the failure to provide the evaluation. . . .

In sum, the circuit court was not satisfied that the latest in a long series of medical evaluations was material to the issue of whether Mr. Keaton was disabled. Dr. Siddiqui's report at most provided additional corroboration of his chronic pain and ongoing impairment, which had already been thoroughly established by other doctors. Dr. Siddiqui did not render an opinion about whether Mr. Keaton's condition resulted from the 2009 injury, nor did he render an opinion about whether his condition would prevent him from performing his job functions.

As mentioned previously, the administrative law judge expressly credited the expert testimony from Dr. Pushkin. In his testimony, Dr. Pushkin had already acknowledged that an MRI from 2015 showed that Mr. Keaton was "developing some hammertoe deformities in the second, third, fourth, and fifth toes." Dr. Pushkin stated that the "hammertoes" revealed on the MRI examination are a "possible explanation of why a patient develops pain in the second metatarsal," but he opined that those issues were "fairly common" for a man of Mr. Keaton's age. Dr. Pushkin also discussed Dr. Ozuzu's diagnosis of metatarsalgia, but concluded overall that Mr. Keaton's condition would not prevent him from performing his normal job functions. In sum, the expert opinion on which the decision relied had already accounted for information that was not

materially different from the information that Dr. Siddiqui later reported in his letter from August 2016.

Under the circumstances, the circuit court did not abuse its discretion by deciding that the additional evidence offered by Mr. Keaton was not reasonably capable of affecting the decision. The circuit court was under no obligation to remand the case to supplement the administrative record with even further documentation of the medical findings that had already been considered in the earlier denial of Mr. Keaton's disability claim.[10]

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[10] Even if we concluded that the circuit court somehow exceeded the bounds of its discretion by declining to grant leave to offer Dr. Siddiqui's report into evidence, we would be unable to conclude that any such error affected the ultimate result here. "[T]o send the case back to the [agency] to consider the evidence, on the facts of this case would be inconsistent with judicial economy and efficiency." *Motor Vehicle Admin. v. Mohler*, 318 Md. 219, 234 (1990) (citation omitted).