

Circuit Court for Baltimore City
Case No. 24-C-18-00305

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 3492

September Term, 2018

JOSEPH WEBER

v.

FIRE AND POLICE EMPLOYEE'S
RETIREMENT SYSTEM

Reed,
Wells,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Zarnoch, J.

Filed: December 28, 2020

*This is an unreported opinion and therefore may not be cited either as precedent or as persuasive authority in any paper, brief, motion, or other document filed in this Court or any other Maryland court. Md. Rule 1-104.

Fire fighter Joseph Weber (“Weber”) appeals the Circuit Court for Baltimore City’s decision upholding the denial of line-of-duty disability retirement. Weber presents two questions for our review, which we have rephrased slightly as follows:

- I. Was there substantial evidence to support the hearing examiner’s determination that Weber is not entitled to line-of-duty retirement because his disability was caused by a “significant prior degenerative condition”?
- II. Did the circuit court err as a matter of law when it determined that Weber was not entitled to line-of-duty retirement because his disability was caused by a pre-existing condition?

For the reasons set forth below, we affirm the circuit court.

BACKGROUND & PROCEDURAL HISTORY

While he was on duty on November 7, 2015, Weber attempted to place a ladder on the exterior of a building during a dwelling fire and injured his neck and back. Weber sought treatment at the Mercy Medical Center Emergency Room on the same day, complaining of pain in the lumbar area of his spine. Weber underwent an x-ray of his lumbar spine, which noted that “there did appear to be some mild degenerative disc disease.” The emergency room physician diagnosed Weber with a “cervical paraspinal muscle strain” and a “lumbar paraspinal muscle strain.”

Weber followed up at the Public Safety Infirmery (“PSI) for evaluation on November 9, 2015. Weber complained of lower back pain. A PSI provider diagnosed him with a cervical paraspinal muscle strain and a lumbar paraspinal muscle strain. On November 19, 2015, Weber underwent a cervical spine MRI, where it was discovered that he suffered from severe stenosis at the C5-6 level due to a large disc herniation, and

spinal cord myelomalacia.¹ Dr. Clayton Dean, Weber’s treating provider and orthopedic surgeon who interpreted the MRI, recommended immediate surgery. Dr. Dean determined Weber was “a neurologic disaster waiting to happen.”

Dr. Dean performed a C5-6 anterior cervical discectomy and fusion on November 24, 2015. Weber’s post-operative diagnosis was severe C5-6 spinal stenosis and cervical myelopathy and cervical spinal cord myelomalacia. Dr. Dean noted he observed severe persistent neurologic compression and encountered large extensive osteophyte formation during surgery.

In a follow up visit, Weber complained of residual numbness to his left leg and lack of circulation. In December 2015, Weber began complaining about his lower back. Dr. Dean recommended an MRI which indicated lumbar degenerative changes with disc protrusion. Dr. Dean referred Weber for physical therapy. In a follow up in March 2016, Dr. Dean noted Weber was making good progress with physical therapy and recommended continued physical therapy.

On May 10, 2016, Weber underwent an independent medical evaluation with Dr. Neal Naff. Dr. Naff took Weber’s medical history, performed an evaluation, and reviewed his medical records. Dr. Naff opined that “the patient sustained a traumatic herniated cervical disc on the date of his injury of November 7, 2015” and that the treatment was “necessary and causally related to the date of the accident.” Dr. Naff did

¹ Myelomalacia describes changes seen within the spinal cord on an MRI which indicates a loss of spinal cord volume, or the softening of the spinal cord. Myelomalacia – Definition, Myelopathy (Dec. 21, 2020), <https://myelopathy.org/myelomalacia-definition/>

not recommend surgery for Weber's low back complaints. Dr. Naff noted that Weber's "prognosis for returning to full duty at work is good," but that he would not be able to return to his full duties as a fire fighter at that time. He believed Weber would reach "maximum medical improvement" by November 2016.

Weber continued to undergo physical therapy through June 2016. In July 2016, Weber underwent a nerve conduction study and electromyography. This study diagnosed Weber with multilevel cervical disc degeneration, multilevel cervical spondylosis/facet arthropathy, cervical stenosis, and left C5-6 and left C6-7 radiculopathy.

On December 6, 2016, Weber underwent another independent medical evaluation with Dr. Shepard. Dr. Shepard concluded Weber had a 35% disability to the cervical spine and a 25% disability to the lumbar spine. Dr. Shepard noted that Weber's condition is "causally related to the occupational injury of November [7], 2015 which rendered a pre-existent spondylitic and pathological disk condition symptomatic necessitating surgery." In January 2017, Dr. Shepard provided an addendum stating that he thought the sole reason for Weber's disability was the injury on November 7, 2015 because Weber did not manifest any prior symptoms or complaints prior to the accident.

Weber applied for line-of-duty disability benefits relating to his November 2015 accident on January 10, 2017. In addition to extensive medical records, Weber provided statements from Drs. Levy and Dean, who both indicated that the symptoms first appeared on November 7, 2015, and that Weber had never had the same or similar condition.

Weber underwent another cervical spine MRI in September of 2017 which documented degenerative changes. In October 2017, Weber was seen by P.A. Mark Hesseltine at the Kaiser Permanente orthopedic department, who diagnosed him with degenerative disc disease and degenerative joint disease with myelopathy.

On January 4, 2018, Weber underwent an additional independent medical evaluation by Dr. Halikman. Dr. Halikman personally examined Weber, the images of the MRIs and X-rays, and his extensive medical records. Dr. Halikman opined that Weber has cervical myelopathy which most likely predated the accident. He noted that Weber had advanced degenerative cervical disc disease, and then “a disc herniation rendered his condition severely symptomatic necessitating early surgery.”

A hearing was held on February 26, 2018 with respect to Weber’s application for line-of-duty disability. After the hearing, the hearing examiner issued a finding denying Weber’s application for line-of-duty disability benefits, but found that Weber was eligible for non-line-of-duty disability benefits.

The examiner held that Weber’s incapacity was “a result of a significant prior degenerative condition.” This conclusion was predicated on the reports and diagnostic tests read by Dr. Dean. The examiner noted that Dr. Dean read the MRIs which noted “severe pre-existing condition, necessitating surgery immediately.” Further, the examiner found that the lumbar complaints were due to degenerative changes and the surgery revealed large osteophyte formation. The examiner’s decision that Weber was not eligible for line-of-duty disability benefits was based on the requirement that “the impairment

causing his incapacity is the direct result of a bodily injury arising out of and in the course of the actual performance of duty.”

Weber then appealed the decision of the hearing examiner to the circuit court. The circuit court found that there was substantial evidence to support the hearing examiner’s finding that there was a pre-existing condition at the C-5/C-6 where the injury eventually occurred.

This timely appeal follows.

STANDARD OF REVIEW

This Court reviews the decision of the administrative agency, not the decision of the circuit court. *See Hubbel v. Bd. of Trs. of Fire & Police Empls.’ Ret. Sys.*, 192 Md. App. 742, 749 (2010). Our review is limited to determining whether substantial evidence supports the agency’s findings “and to determine if the administrative decision is premised upon an erroneous conclusion of law.” *Montgomery v. Eastern Correctional Inst.*, 377 Md. 615, 625 (2003) (Internal citations and quotations omitted). The retirement system statute at issue in this appeal sets forth its own standard of review, stating “[t]he final determination of the hearing examiner is presumptively correct and may not be disturbed on review except when arbitrary, illegal, capricious, or discriminatory.” Balt. City Code, Art. 22 § 33(1)(12)(2017). When the record contains conflicting evidence, “it is the agency’s province to resolve conflicting evidence and to draw inferences from that evidence.” *Bd. of Physician Quality Assur. v. Banks*, 354 Md. 59, 68 (1999).

DISCUSSION

The Baltimore City Code provides for two kinds of disability retirement benefits: line-of-duty and non-line-of-duty. *See* Balt. City Code, Art 22, § 34. Members are eligible for line-of-duty disability benefits if their disability caused a total and permanent incapacitation, and if the incapacitation is a result of an injury arising out of and in the course of the actual performance of duty. *See id.* §34(e-1). On the other hand, non-line-of-duty benefits are available to an applicant who is mentally or physically incapacitated and the incapacity is likely permanent, though the applicant is not required to prove that the injury arose out of the actual performance of duty. *See id.* § 34(c)(1). The difference between line-of-duty disability and non-line-of-duty disability is:

If the injury arose out of or in the course of the actual performance of the duty, then the claimant who is totally incapacitated is entitled to special disability benefits; if the injury was caused by any other means, then the claimant who is totally incapacitated is entitled to ordinary disability benefits.

Marsheck v. Bd. of Trs. of Fire & Police Empls.' Ret. Sys. of City of Balt., 358 Md. 393, 410 (2000). The standard to prove line-of-duty disability is more stringent than that required for non-line-of-duty disability, and therefore it is more difficult to qualify for line-of-duty disability retirement benefits.

Weber claims he is entitled to line-of-duty benefits due to the back injury he sustained on November 7, 2015. He argues that the hearing examiner's finding that his incapacity was result of a significant prior degenerative condition was arbitrary. Weber argues that the finding was arbitrary because the examiner improperly substituted her lay opinion for that of the medical professionals. Weber maintains that the hearing examiner

misconstrued Dr. Dean's records when it concluded that the large disc herniation at C5-C6 existed prior to the accident. Further, Weber again presents statements from additional medical providers whose opinions differed with respect to whether there was a pre-existing condition.

The Fire and Police Employee's Retirement System (the "F&P Retirement System"), on the other hand, argues that there was substantial evidence from which the hearing examiner made its decision. The F&P Retirement System notes that the hearing examiner reviewed over 500 pages of medical evidence and weighed the credibility of Weber's physicians. They argue that Dr. Halikman indicated numerous times that Weber suffered from chronic, degenerative changes and that the work injury aggravated the pre-existing condition, in addition to Dr. Dean's records that indicate Weber suffered from severe C5-C6 stenosis, cervical myelopathy, and cervical spinal cord myelomalacia. The F&P Retirement System contends, therefore, that the hearing examiner properly evaluated the evidence and assigned weight to that evidence, and therefore, non-line-of-duty retirement benefits were properly awarded. We agree.

The hearing examiner concluded that Weber's disability was "the result of a significant prior degenerative condition." The hearing examiner "gave substantial weight" to Dr. Dean's reports. The facts that support the examiner's determination to deny line-of-duty disability benefits were as follows. Weber previously wrenched his back in 2003. In 2010, Weber again experienced back pain after sleeping in an awkward position. Though Weber had no prior diagnosis of degenerative back issues, when he was

injured on November 7, 2015, he was diagnosed with “severe stenosis at the C5-6 level due to a large disc herniation.” Weber’s emergency room lumbar spine x-rays were evaluated on November 13 and indicated “degenerative changes and nothing acute.” His subsequent MRI showed there was disc herniation at C5-6 “causing marked flattening of the cervical cord with prominent myelomalacic changes, marked canal stenosis, prominent bilateral neural foramen narrowing.” Dr. Dean described the severity of his diagnosis, noting “if we do not get his spinal cord decompressed immediately, that anything as simple as a minor trauma could lead to a neurologic catastrophe including quadriplegia.”

Additional medical reports before the hearing examiner mentioned Weber’s degenerative back issues. Weber’s MRI on December 28, 2015 noted lumbar degenerative changes that contributed to stenosis. Weber underwent a nerve conduction study that noted a diagnosis of “multilevel cervical disc degeneration, multilevel cervical spondylosis/facet arthropathy, cervical stenosis, and left C5-6 and left C6-7 radiculopathy.” In an independent evaluation by Dr. Shepard, he noted Weber suffered from a “pre-existent spondylitic and pathological disc condition.” Dr. Halikman’s independent evaluation stated that Weber’s condition “most likely predated the accident,” and he had “advanced degenerative cervical disc disease at C5-6 and then a disc herniation rendered his condition severely symptomatic necessitating early surgery.” Based on the numerous medical reports that abounded with references to a preexisting degenerative condition, the hearing examiner had substantial evidence to conclude that

Weber's disability was not a direct result of an injury arising out of and in the course of the actual performance of his job duties.

Weber also contends that he is eligible to receive line-of-duty benefits even if there is evidence of a pre-existing condition because he was not disabled until the accident on November 7, 2015. Weber argues that though the incapacitation must be a result of an injury arising out of the course of actual performance of his job, it does not need to be the only injury. Citing *Hersl*, Weber maintains that it is an issue of proximate causation, stating that despite a pre-existing condition, he was not occupationally disabled from working until the accident. *See Hersl v. Fire and Police Empls.' Ret. Sys.*, 188 Md. App. 249 (2016). Weber's reliance on *Hersl* is misplaced.

Hersl involved considerably different circumstances. In *Hersl*, the claimant injured his shoulders and knees when he fell down a set of stairs and a man landed on top of him. *Hersl*, 188 Md. App. at 252-53. Prior to surgery to repair his shoulder, the claimant suffered a massive heart attack. *Id.* at 254. After having surgery on both shoulders, the claimant filed for line-of-duty disability benefits with respect to his shoulder and leg issues. *Id.* at 255-57. Two medical evaluations of the claimant noted 100% disability due to the shoulder and leg injuries. *Id.* at 256-58. The hearing examiner acknowledged that no doctor said the disability was related to the heart condition. *Id.* at 258. Despite this, the examiner concluded that the cause of claimant's disability was the heart disease, which did not arise out of and in the course of the actual performance of duty, thus the claimant was only eligible for non-line-of-duty disability benefits. *Id.* The

hearing examiner also determined that there was insufficient evidence that the claimant's shoulder injuries were likely to be permanent, despite multiple medical professionals indicating that the injuries were permanent. *Id.* at 263. This Court evaluated whether there was sufficient evidence to support the hearing examiner's conclusions and found that the examiner substituted his lay opinion for that of the medical experts when they found that the disability was caused by the heart condition, rather than the shoulder condition. *Id.* at 264.

Weber's case is clearly distinguishable. In *Hersl*, the claimant suffered an injury to his shoulders and legs while on duty, but then suffered a heart attack while awaiting surgery. The claimant's application for line-of-duty benefits was with respect to the injuries to the shoulders and legs, supported by numerous doctors who noted that those injuries, not the claimant's heart attack, caused 100% disability. The hearing examiner in *Hersl* ultimately disregarded all medical evidence and determined without any factual basis that the claimant's injury was due to his heart condition. The hearing examiner in this case had numerous medical opinions that document Weber's degenerative disc disease that preceded his injury on November 7. Unlike the claimant in *Hersl*, Weber's application for line-of-duty benefits was with respect to his lower back injury, which numerous medical professionals diagnosed as a pre-existing degenerative condition. The hearing examiner is permitted to resolve conflicting evidence and determine which expert opinions are credible. The hearing examiner in this case determined that the expert opinions indicating that Weber had severe pre-existing degenerative changes of the

cervical spine and lumbar spine were the most credible. A reasonable mind could conclude from all of the evidence, as the hearing examiner did, that Weber's pre-existing condition caused his disability.

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