PEGGY TROUT,	BEFORE THE
Appellant	MARYLAND
v.	STATE BOARD
MONTGOMERY COUNTY BOARD OF EDUCATION,	OF EDUCATION
Appellee	Opinion No. 00-33

OPINION

In this appeal, a former bus operator for the Montgomery County Public School System ("MCPS") claims that she is entitled to accidental disability retirement benefits under the MCPS Employees' Pension System. The local board has submitted a Motion for Summary Affirmance maintaining that its decision denying the benefits is not arbitrary, unreasonable or illegal. Appellant has filed an opposition to the local board's motion.

FACTUAL BACKGROUND

Appellant began her employment with MCPS in 1979 as a bus attendant and later became a bus operator for the school system in 1985. Appellant continued serving the school system as a bus operator until December 15, 1993 when she was involved in a head-on collision with a pickup truck during the course of her employment. Appellant suffered injury and was unable to work.[1] Throughout 1993 and 1994, Appellant saw various doctors and received treatment for her injuries which included a herniated disk, cervical injury, and carpal tunnel syndrome, although she declined surgery for carpal tunnel syndrome.[2]

During 1995, Appellant continued to see doctors because she suffered pain from her injuries. In February, 1995, Ms. Kamenstein, an ADA Specialist for MCPS, contacted Appellant and offered her a newly available position as a teacher's assistant since Appellant was unable to perform her duties as a bus operator. (Tr. 47, 77). The job consisted of working directly with a visually impaired guidance counselor to assist with simple tasks such as reading her schedule, reading phone messages, and getting students for appointments. (Tr. 77). The school system was

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[1]Since the time of the accident, Appellant worked approximately one week in 1995 for MCPS.

[2]Appellant filed a workers' compensation claim, and had several independent medical exams in connection with that claim. In April, 1996, the Workers' Compensation Commission concluded that Appellant suffered an industrial loss of 55% to her body as a whole as a result of the injuries she sustained in 1993. *See* Award of Compensation dated April 19, 1996.

willing to accommodate Appellant's needs and make the position a two day per week position rather than a five day per week position. (Tr. 78). An interview was arranged with the principal of the school on February 13, 1995. (Tr. 77). Appellant went to the interview, however, she declined the position due to driving limitations placed on her by her physician.[3] Ms. Kamenstein testified that she could not arrange transportation accommodations for Appellant who lived outside of the county, nor could she hold the job open for an extended period of time. (Tr. 78-79).[4]

Thereafter, on May 24, 1995, Dr. Mayo Friedlis performed an independent medical exam on Appellant and determined that Appellant was not capable of driving a school bus, should not lift more than thirty pounds, and should avoid doing any overhead work. Dr. Friedlis found Appellant to be employable and disagreed with the driving restriction placed on her by her physician:

> "Range of motion is severely restricted in the neck area in a most curious manner....She will not allow a true examination of the neck motion. On palpation, she does not appear to have that much in the way of soft tissue findings. She is at the same time tender everywhere that I touch in her neck and upper back area. Nevertheless, I am not really finding soft tissue components such as trigger points, banded muscles, twitch responses, or the like.....I do find her employable, but I think driving a school bus would be a bit much for her. I think that she can lift up to 30 pounds, she should avoid overhead work, and she may otherwise be employed, including driving; I simply do not agree with the restriction in driving that has been placed on her." (Exh. 75)

Another position with MCPS became available in June, 1995 involving light clerical duties at the MCPS Department of Transportation in Germantown for four hours per day. Appellant accepted the position, which was later shortened to two hours per day based on her doctor's recommendation. After approximately one week on the job, Appellant did not return to the job site. Appellant testified that she believed the job was for one week only and that she had completed her assignment. Witnesses for the school system testified that Appellant's assignment was not for one week only and that the position was indefinite, although it was designated as temporary.

Appellant complained that she continued to suffer pain. She also developed emotional problems and depression. She continued to see doctors for treatment. Her physician, Dr. Lin,

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[3]Appellant was driven to the interview by her father.

[4]Appellant does not live in Montgomery County, thus some distance is involved in driving to locations where an MCPS position might be available.

found that she had reached maximum medical improvement and had a permanent partial disability, although he continued to change his opinion regarding the degree of disability.

Appellant was granted long term personal illness leave without pay through November 30, 1995. Before her leave was to expire, MCPS advised Appellant to decide whether to come back to an alternate assignment, retire, or resign. Appellant never responded to communications from the school system. On November 30, 1995, Appellant was terminated from her employment as a bus operator. The termination decision was ultimately reversed.[5]

In December, 1995, Appellant's psychologist concluded that she had reached maximum psychological improvement with regard to her mental status and that she was suffering a twenty percent industrial loss due to psychological trauma.

In 1996, Appellant continued to see doctors for her condition. In March, 1996 Appellant was seen by Dr. P. Steven Macedo, who directed that Appellant should not commute for more than 20 minutes at a time, should not lift anything more than ten pounds, and should not work for more than four hours per day.

Appellant applied for accidental disability retirement benefits under the MCPS Employees' Pension System on March 27, 1997. The Disability Retirement Review Board denied Appellant's application for disability retirement on June 17, 1997, explaining the following:

> Based upon the medical records reviewed and the offer of an alternate assignment within your physical restrictions made by the Department of Personnel Services, the Board feels that subsections (a) and (b) of Section 9.3 have not been met.

Appellant appealed the Disability Retirement Review Board's July 17, 1997 decision. A medical review board panel was established. The panel, consisting of three independent physicians, determined that Appellant was "fully capable of working on a full-time basis but that she is not capable of returning to her job as a bus driver."[6] The members of the panel differed in their opinions as to what other types of jobs Appellant could perform, although they all agreed that she could perform the duties of a lunch hour aide.

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[5]Appellant appealed the termination decision. A settlement agreement was reached rescinding Appellant's termination effective November 30, 1995. Although her termination was rescinded, per the settlement agreement, Appellant was not eligible to receive compensation or employee benefits. The agreement provided Appellant with the opportunity to apply for disability retirement benefits.

[6]The doctors comprising the panel are Dr. James E. Callan, Dr. Christopher M. Magee, and Dr. William A. McNamara. These doctors are orthopaedic surgeons.

Based on the opinions of the panel, on February 3, 1998, Appellant's claim was again denied by the Disability Retirement Review Board. The decision was appealed to the Superintendent for MCPS, who referred the matter to a Hearing Officer, Donald P. Kopp. On October 19, 1998, Hearing Officer Kopp remanded the case to the Disability Retirement Review Board for consideration of additional information.[7]

As a result of Hearing Officer Kopp's remand decision, the Disability Retirement Review Board submitted the job descriptions for "Office Assistant 1" and "Teacher Assistant" to the medical review board panel. In response, Dr. McNamara stated:

> It is my opinion that the patient, Peggy Trout, is fully capable of performing the function of an office assistant as well as of a teacher assistant. I do not feel that she can return to work as a bus operator. I feel these two positions as well as that of a lunch hour aide are positions that the patient can manage from a medical standpoint if she were so motivated. . . . The three positions indicated above are fully within the physical capabilities of this patient.

Dr. Magee stated:

> It is my opinion that she is capable of performing the duties required of an office assistants [sic] but that she may have difficulties performing the duties required of a teacher assistants [sic], specifically with regard to her ability to move wheelchairs and related equipment and to assist in the relocation of students.

Dr. Callan stated:

> It is my opinion that this patient is perfectly capable of performing full duties in either of these job descriptions without restrictions. I have specifically noted that the physical demands of Teacher Assistant may require lifting heavy objects or frequent climbing. It is my opinion that the problem that the patient has had with her neck would not restrict her from doing this.
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> I would reiterate that she had a herniated disc at C5-6 which was

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[7]Meanwhile, on June 26, 1998, Appellant was awarded Social Security disability benefits. The administrative law judge for the Social Security Administration recommended that "certification of medical treatment be required and that a continuing disability review be conducted at yearly intervals in order to determine the effects of treatment and whether medical improvement has occurred."

successfully treated surgically and that her subjective complaints are not supported by objective diagnostic studies or findings.

Based on these opinions, Ms. Kamenstein attempted to contact Appellant in December, 1998 to offer her an office assistant position. When Ms. Kamenstein finally reached Appellant by telephone on January 11, 1999 and told her she wanted to discuss the position, Appellant advised her to speak to Appellant's attorney. Ms. Kamenstein declined to discuss it with Appellant's attorney and followed up the conversation in writing. In that letter, Ms. Kamenstein advised Appellant that she would be recommended for termination if Ms. Kamenstein did not hear from her by January 19, 1999. Appellant testified that she advised her attorney of the communication with the school system, but did not ask him to respond. (Tr. 67). Ms. Kamenstein made the termination recommendation, having heard nothing from Appellant regarding the position; however, no action was taken on the recommendation pending the outcome of Appellant's claims for accidental disability retirement. Thereafter, Appellant was advised that the Disability Retirement Review Board had denied her application for accidental disability retirement.

The decision was appealed and the case was heard again by Hearing Officer Kopp who denied the appeal, stating that "MCPS staff has considered all available information, and has made a determination that is supported by the facts in evidence. There is no current evidence of total disability, and the previously presented evidence is not compelling." Hearing Officer Kopp's Report at 4.

Appellant appealed to the local board. The matter was assigned to a hearing examiner for further review and a full evidentiary hearing was held on September 17, 1999. Hearing Examiner William J. Roberts recommended that Appellant be denied accidental disability retirement benefits. Oral arguments were heard by the local board on December 2, 1999. In a 6-1 decision, the local board adopted the findings and recommendations of Hearing Examiner Roberts, and concluded "that the denial of accidental disability retirement benefits was appropriate." Local Board Decision at 2.

ANALYSIS

Appellant's Motion for Summary Affirmance

As a preliminary matter, Appellant filed her own motion for summary affirmance in conjunction with her response to the local board's motion for summary affirmance. The filing of this motion by Appellant in this case is inappropriate since such a motion is filed by the party seeking to affirm the local board decision. Appellant is seeking to reverse the local board decision through an appeal to the State Board.[8] Accordingly, we will consider Appellant's motion for

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[8]It is likely that Appellant is confusing a motion for summary affirmance in a State Board appeal with a motion for summary judgment in a court case. A motion for summary judgment

summary affirmance and memorandum of law in support of motion for summary affirmance as documents supporting her request for appeal and her opposition to the local board's motion.

Substance of the Appeal

Section 9.3 of the Employees' Pension System document is the applicable provision in this appeal. It provides as follows:

> Accidental Disability Retirement. On the application, or action by the superintendent of schools, any member who has been totally and permanently incapacitated for duty as the natural and proximate result of an accident that occurred while in the actual performance of duty at some definite time and place, without willful negligence on the member's part, shall be retired by the superintendent of schools, if the superintendent certifies that:
>
> (a) The member is mentally or physically incapacitated for the further performance of duty;
>
> (b) The incapacity is likely to be permanent;
>
> (c) A member should be retired if no alternate assignment for which the member is qualified or capable of performing can be found.

Both parties agree that Appellant is permanently incapacitated from further performance of her duties as a bus operator. Thus, the controlling issue in determining whether Appellant is entitled to accidental disability retirement is whether there exists an alternative assignment for which Appellant is qualified or capable of performing. *See* Employees' Pension System Document, Section 9.3 (c). The local board has determined that because such assignments do exist, Appellant is not entitled to accidental disability retirement.

Appellant argues that the local board improperly denied her accidental disability retirement and failed to give appropriate consideration to evidence supporting her case. We believe this claim lacks merit. The lengthy record in this case is replete with evidence supporting the local board's determination that Appellant is capable of performing alternate assignments.[9] We concur

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may generally be filed by either party in a case pending before a trial level court.

[9]To the extent that there is contradictory evidence in the record, it is well established that determinations concerning credibility are within the province of the local board as trier of fact. *See, e.g., Board of Trustees v. Novik*, 87 Md. App. 308, 312 (1991), *aff'd*, 326 Md. 450 (1992) ("It is within the Examiner's province to resolve conflicting evidence. Where conflicting inferences can be drawn from the same evidence, it is for the Examiner to draw the inferences.");

with Hearing Examiner Roberts who stated,

> Based upon a preponderance of the evidence, the undersigned cannot conclude that the Appellant is totally disabled from performing in any position with MCPS. And given the fact that the Appellant has failed to cooperate with her employer in at least exploring the possibilities of a position which may be suitable for her, the undersigned cannot conclude based upon the existing record, which is all the undersigned may consider, that there was no alternative assignment for which Ms. Trout may have been qualified and capable of performing within the MCPS school system as required by Section 9.3 of the MCPS Employees' Pension System document in order to qualify for Accidental Disability Retirement.

Hearing Examiner Report at 27-28.

Appellant specifically argues that "none of the doctors [retained by MCPS] have factored in the bilateral carpal tunnel syndrome which was found to be causally related to [Appellant's] injury." To the contrary, the record discloses that the panel considered Appellant's carpal tunnel syndrome as part of her medical history, yet still found her "fully capable of working on a full-time basis". *See* October 1, 1997 panel report. In that same report, Dr. Callan stated that the carpal tunnel syndrome "can be treated very successfully under a local anesthetic with a simple surgery which usually leaves no residual impairment." Additionally, as stated by Hearing Examiner Roberts,

> [S]ufficient information was included in the various medical documents to raise the question of whether or not Ms. Trout took all appropriate and recommended actions in order to complete her recovery and enable her to return to work. Several doctors questioned the severity of the complaints in relation to the identified physical problems, and at least one questioned whether or not Ms. Trout has completed recommended exercises as prescribed. Both Ms. Trout and Mr. Gross have made it clear that Ms. Trout will not undergo the recommended surgical procedure with regard to the carpal tunnel syndrome.

Appellant also alleges that MCPS never offered Appellant suitable alternative employment. Appellant focuses on issues regarding two positions which were available in 1995: a teacher's assistant position for a visually impaired guidance counselor and an office assistant position with the MCPS Department of Transportation. Although there is sufficient evidence in the record to conclude that these positions were offered to Appellant and that she was capable of

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Board of Education v. Paynter, 303 Md. 22, 36 (1985)(same).

performing the duties with accommodation, we agree with Hearing Examiner Roberts that these positions are not dispositive of whether Appellant is entitled to accidental disability retirement because they substantially predated Appellant's application for benefits in 1997 and her treating physician's most recent assessments of her condition.[10] *See* Hearing Examiner Report at 22.

The relevant position in this case is the office assistant position that Ms. Kamenstein attempted to offer Appellant in January, 1999. Ms. Kamenstein was able to contact Appellant on January 11, 1999 to discuss the position with her, while Appellant's accidental disability retirement claim was pending. However, before Ms. Kamenstein had the opportunity to do so, Appellant cut her off and told her to speak to her lawyer. Ms Kamenstein informed Appellant that she was not going to contact Appellant's lawyer. (Tr. 66). Ms. Kamenstein's January 12, 1999 letter to Appellant states as follows:

> As a follow-up to January 11, 1999, when I telephoned you and attempted to offer you an office assistant position, you were reluctant to speak with me and informed me to call your attorney. I respectfully declined, and therefore, again, I am requesting that you call me to discuss your employment.
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> If I do not hear from you by January 19, 1999, I will have no choice but to recommend your termination from Montgomery County Public Schools (MCPS).

Neither Appellant nor her attorney contacted Ms. Kamenstein regarding the position.

It is true that Ms. Kamenstein contacted Appellant while the accidental disability retirement claim was pending. However, once Appellant received Ms. Kamenstein's phone call on January 11, and certainly when she received Ms. Kamenstein's January 12 letter, we believe it was incumbent upon her and her attorney to respond within the designated time frame. Instead, Appellant and her attorney chose to ignore the communications regarding employment. As stated by Hearing Officer Roberts:

> Not only did the Appellant fail to explore whether she could perform the duties expected of her in that position, she refused to even discuss the nature of the position with Ms. Kamenstein, she failed to have her attorney contact MCPS regarding the potential position, and she and her counsel failed to respond to Ms. Kamenstein's January 12, 1999 correspondence.

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[10] Appellant claims that she was never offered a permanent position as an alternate assignment. However, there is nothing in Section 9.3 that requires the school system to offer her a permanent position. In any event, the record discloses that the school system had a permanent position which was available to Appellant. (Tr. 99).

Hearing Examiner Report at 27. Thus, based on the evidence in the record, we find that there was an alternative assignment available, but Appellant failed to respond to the school system's attempts to contact her regarding the assignment.

With regard to the medical review board panel, Appellant contends that the panel is not "independent" because it was selected by the Chairperson of the Disability Retirement Review Board. We believe this mere allegation is insufficient to demonstrate that the panel is biased.[11] As previously stated, credibility issues are resolved by the trier of fact. Obviously, the local board found the determinations made by the doctors on the panel to be credible. The fact that Appellant disagrees with the opinions of these doctors does not make them biased.[12]

Appellant also argues that none of the doctors on the panel are capable of providing an opinion on the psychological component of the case. While this may be true, Appellant's claim here misses the point. Appellant has not presented any convincing evidence that her psychological condition renders her incapable of performing an alternative assignment for MCPS. Rather, we find that the materials contained in the voluminous record are sufficient to support the local board's decision.

CONCLUSION

For these reasons, we adopt the findings and recommendations of Hearing Officer Roberts and affirm the decision of the Board of Education of Montgomery County denying Appellant accidental disability retirement benefits.

Raymond V. Bartlett

Philip S. Benzil

JoAnn T. Bell

Reginald Dunn

George W. Fisher, Sr.

ABSTAIN*
Walter S. Levin, Esquire

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[11]Members of the panel are ineligible to participate in the Employees' Pension System. *See* Employees' Pension System Document, Section 9.7

[12]Additionally, the fact that these doctors did not physically examine Appellant goes towards credibility. We note that it is very common for doctors to render medical opinions on an individual's condition based on record review alone.

Marilyn D. Maultsby

Judith McHale

Edward Root

Walter Sondheim, Jr.

John Wisthoff

*Walter S. Levin, Esquire, a newly appointed member of the State Board of Education, did not participate in the deliberation of this appeal.

July 25, 2000