

ROGER L. CLARK,

Appellant

v.

MONTGOMERY COUNTY
BOARD OF EDUCATION,

Appellee

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 00-45

OPINION

In this appeal, a former building services manager for the Montgomery County Public School System ("MCPS") claims that he is entitled to service-connected disability retirement benefits under the MCPS Employees' Pension System based on injuries allegedly sustained on March 2, 1998, during the course of his employment. 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 his employment with MCPS in 1973 as a building services worker and later became a building services manager. While on duty on March 2, 1998, Appellant fell down some stairs, hitting his back on a rail and twisting his back.¹ After the accident, Appellant continued to work at the MCPS Rocking Horse Road Center until mid-July 1998. Appellant missed several work days and described attempts to perform his normal duties during this time as painful.² Tr. 31 - 34.

The record discloses that Dr. Alvaro Sanchez conducted an orthopaedic consultation of Appellant on April 2, 1998. Dr. Clark also saw Appellant on April 9 and April 30, recommending epidural injections for Appellant's injury. On May 19, 1998, Appellant was seen by Dr. William Vetter, orthopaedist. Dr. Vetter referred Appellant for epidural steroids and verified that Appellant could return to work on May 20, 1998 through June 20, 1998 restricted to light duty

¹Appellant was 48 years old at the time of the incident.

²Although not at issue in this case, Appellant testified that he had previously suffered back injury while lifting a table during the course of his employment in 1993 and subsequently underwent two surgeries to correct the injury. Tr. 24. Appellant returned to work in March, 1995 as a Building Services Manager 2 at Rocking Horse Road Center and had no problems with performing his work as a result of the injury. Tr. 27. Appellant filed a Workers' Compensation claim which was denied. Appellant also testified that he was in a motor vehicle accident in 1997 that was not connected to his job duties. Tr. 69. Following the accident, Appellant returned to his job duties without difficulties.

work with no lifting over 10 pounds.

Meanwhile, on April 27, 1998, Appellant submitted to MCPS an Application for Retirement Allowance Estimate for a non-service connected disability. On May 27, 1998, the Disability Retirement Review Board ("DRRB") deferred action on the application pending the receipt of additional medical information.

Thereafter, on June 4, Dr. Sanchez ascertained that Appellant could return to work as of June 5, 1998. Appellant was then examined by Dr. John M. Huffman, who administered steroid injections on June 17 and June 24, 1998. On July 6, 1998, Appellant again saw Dr. Sanchez who found no basis for Appellant to medically retire, despite Appellant's desire to do so.

On September 17, 1998, Dr. W.E. Thompson performed an orthopaedic examination on Appellant concluding that Appellant was "fully capable of engaging in gainful employment with restrictions." Dr. Thompson indicated that Appellant "should be restricted to lifting objects weighing no more than 20 pounds. There should be [sic] kneeling, crawling, or climbing and the patient should not be placed in a position where there is repeated bending at the waist. The above restrictions are not permanent but should stay in place for sixty days to allow for further conditioning, then they can be reviewed and hopefully relaxed." *See* 9/17/98 Report of Dr. W.E. Thompson.

The DRRB again reviewed Appellant's application for non-service connected disability retirement. *See* 10/8/98 Letter to Appellant from Wolfe. The DRRB deferred action on the request pending an independent orthopaedic exam. Thereafter, Appellant changed his application from non-service connected disability retirement to service-connected disability retirement (accidental). *See* 10/22/98 Letter to Wolfe from Appellant and 10/30/98 Letter to Appellant from Wolfe.

The independent medical exam was conducted by Dr. Clifford Hinkes on November 5, 1998. Dr. Hinkes indicated that Appellant's subjective complaints far outweighed the objective evidence and pathology, that he could find no significant pathology to be present, and that Appellant should have recovered from the March 2, 1998 twist on the stairs promptly without any significant medical problem. Dr. Hinkes concluded that Appellant suffered no permanent injury, was fit for duty and able to work as a building service manager for MCPS, and that Appellant did not qualify for either an accidental service-connected disability retirement or for non-service connected retirement. *See* 11/5/98 Report of Dr. Hinkes. Based on Dr. Hinkes report, the DRRB denied Appellant's application, finding that he failed to qualify for a service-connected disability retirement. *See* 12/10/98 Letter to Appellant from Wolfe.

Appellant appealed the DRRB's December 10, 1998 decision. A three member medical review board panel was established pursuant to section 9.7 of the MCPS Employees' Pension System. The panel, consisting of three independent physicians, reviewed the materials in Appellant's case and determined that Appellant was not qualified for a service connected

disability.³ See 2/12/99 Report of Magee, 2/16/99 Report of McNamara, and 2/23/99 Report of Callan.

Based upon the reports of the medical review board panel, the DRRB again denied Appellant's application for service-connected disability retirement. The decision was appealed to the local superintendent who referred the matter to his designee, Robert H. Hacker. A hearing was held on May 11, 1999. At that time, Mr. Hacker did not render a decision; rather he requested that Kurt R. Wolfe, Risk Management Specialist, and Appellant submit additional medical records that were missing from the record.

Thereafter, Appellant was examined on May 14, 1999 by his orthopaedist, Dr. Vetter, who asserted that Appellant "will not again be able to perform the work required of his usual and customary job." See 5/14/99 Report of Vetter. However, in response to a request for an explanation of his opinion from the Workers' Compensation Administrators for MCPS, Dr. Vetter stated that "I have no evidence to determine one way or another whether the patient is honestly disabled" and that "additional evidence would be needed before one could determine whether there were elements of exaggeration or malingering." See 6/28/99 and 7/2/99 Reports of Vetter.

Appellant was also examined on June 14, 1999, by Dr. Harvey N. Mininberg, orthopaedist, who found that Appellant was "entitled to 45% impairment of the whole person, 15% due to his injury on March 2, 1998 and 30% due to his previous injury to his low back and subsequent two operative procedures." See 6/14/99 Report of Mininberg. Further, an independent medical evaluation was conducted on August 12, 1999 by Dr. George Balis, orthopaedic surgeon. Dr. Balis observed that:

. . . He [the Appellant] walks with a cane. He has a very slow, pronounced gait. He has minor grunting and groaning under his breath while attempting to walk. I asked him to walk without the cane and he took very slow steps, limping dramatically on his right lower extremity. Despite all of this, he was able to walk on his toes and heels relatively well bilaterally across the room.

A dramatic difference occurred in the claimant's observed gait in the exam room and in my office and when he was casually observed walking outside my office toward his car in the parking lot. He essentially was carrying the cane without a limp and I saw him bend over, open his car door and casually and easily get into his driver's seat without any of the quite dramatic activity in the office trying to get out of a chair and to walk!! (emphasis in original).

³The doctors comprising the panel were Dr. James E. Callan, Dr. Christopher M. Magee, and Dr. William A. McNamara, all orthopaedic surgeons.

Dr. Balis agreed with the reports of the medical review board. He indicated that Appellant could return to work as a building service manager and that the March 2, 1998 injury was a lumbar strain that had subsequently resolved. *See* 8/12/99 Report of Balis.

Another hearing was held on September 7, 1999, and the additional records were reviewed. Mr. Hacker concluded that Appellant was not entitled to service-connected disability retirement. The local superintendent concurred with Mr. Hacker's recommendation and denied Appellant's appeal on September 22, 1999.

Appellant appealed to the local board. In response, the local superintendent stated:

Mr. Clark has not offered compelling medical evidence that supports his claim that he is totally and permanently incapacitated from duty. There exists a difference in opinion of orthopaedic physicians. Mr. Clark has offered reports from his Kaiser Permanente physician, Dr. William Vetter. Dr. Vetter opined that Mr. Clark could return to work with lifting limitations. He felt he would be best suited to semi-sedentary work. Other treating physicians agreed with lifting restrictions, however, noted the lack of objective findings in relationship to Mr. Clark's subjective complaints.

Physicians selected by the Disability Retirement Review Board (DRRB) to examine Mr. Clark and to review records all opined that he was capable of returning to work in his previous position of building service manager and that his injury of March 3, 1998, was a soft tissue injury that has resolved. Dr. George Balis, who examined Mr. Clark as recently as August 1999, also agrees with the reports of the other DRRB orthopaedic physicians.

See 10/19/99 memorandum from local superintendent to local board.

The matter was assigned to a Hearing Examiner for further review, and a full evidentiary hearing was held on March 16, 2000. Hearing Examiner William J. Roberts recommended that Appellant be denied accidental disability retirement benefits. Oral arguments were heard by the local board on June 19, 2000. In a unanimous decision, the local board adopted the findings and recommendations of the Hearing Examiner, and concluded "that the denial of accidental disability retirement benefits was appropriate." Local Board Decision at 2.

The local board further noted that Appellant may return to work as a building services manager or that he may request reassignment to a different position for which he is qualified. *See* local board decision and order. Appellant has declined to return to work.

ANALYSIS

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

9.3 Service-Connected Disability Retirement: A member in the service of the Montgomery County Public Schools who is not eligible to retire on a normal retirement date may be retired by the superintendent of schools on a service-connected disability retirement if the member meets all of the following requirements:

(a) the member is totally incapacitated for duty, or partially and permanently incapacitated for duty, as the natural and approximate (sic) result of an accident occurring or an occupational disease incurred while in the actual performance of duty at some definite time or place, without willful negligence on the member's part.

(b) the member has passed at time of employment, or subsequent thereto, but prior to becoming disabled a physical examination as may be required by the superintendent of schools.

(c) the member has made application for service-connected disability retirement at least thirty and not more than ninety days before being retired.

(d) the member is not eligible for nonservice-connected disability retirement. (Exs. 59 & 60).

In this appeal, the parties disagree as to whether Appellant is totally and permanently incapacitated from further performance of his duties as a building services manager and thus entitled to accidental disability retirement benefits.

Appellant essentially argues that the local board improperly denied his accidental disability retirement and failed to give appropriate consideration to evidence supporting his 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 not totally and permanently incapacitated for duty as a result of his accident on March 2, 1998.⁴ We concur with Hearing Examiner Roberts

⁴To 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

who stated,

On the basis of a preponderance of the evidence of record, which is all that the undersigned may consider, the Hearing Examiner finds that the Appellant does not suffer from an incapacity as a natural and proximate result of the occurrence described by the Appellant occurring on March 2, 1998 at the MCPS Rocking Horse Road Center.

Having concluded that the Appellant does not suffer from an incapacity from the occurrence described by the Appellant, the Hearing Examiner cannot conclude that the Appellant is totally incapacitated for duty, or partially and permanently incapacitated for duty, as the natural and proximate result of an accident occurring or an occupational disease incurred while in the actual performance of his duties and, therefore, the Hearing Examiner finds that the Appellant is not eligible for service-connected disability retirement in accordance with Section 9.3 of the MCPS Employees' Retirement System.

Hearing Examiner Report at 26-27.

Appellant specifically argues that the local board failed to accept the conclusion of his treating doctor, Dr. Vetter, who stated that Appellant had a "permanent/partial disability constraining him to sedentary work. Contemplating that assessment is restriction from any significant bending, stooping, squatting, lifting, or spending prolonged periods of time on his feet." See 5/14/99 Report of Vetter. To the contrary, the record discloses that the local board considered the entire record, as well as the findings and recommendations of Hearing Examiner Roberts, who stated as follows:

Where the views of Dr. Vetter and the independent physicians employed by MCPS seem to differ are the conclusions to be drawn from those more or less agreed upon facts. Whereas Dr. Vetter appears to take the position that, since Mr. Clark had a prior injury and prior surgery to his back, Dr. Vetter is not prepared to discount the subjective complaints of the Appellant absent some compelling evidence to the contrary; the independent physicians appear to take the position that, notwithstanding the prior back injury and prior back surgeries, from which Appellant fully recovered, they cannot conclude if the Appellant's subjective complaints are well founded, absent some concrete objective

inferences can be drawn from the same evidence, it is for the Examiner to draw the inferences."); *Board of Education v. Paynter*, 303 Md. 22, 36 (1985)(same).

evidence of existing pathology relating to the March 2, 1998 incident indicating a cause of those complaints.

Hearing Examiner Report at 19. The Hearing Examiner further explained that there existed additional compelling evidence in the record on this matter. He stated in his report:

As the reader will recall, the Appellant's own orthopaedic physician stated, ' . . . I have no evidence to determine one way or another whether the patient is honestly disabled. . . Additional evidence would be needed before one could determine whether there were elements of exaggeration or malingering.' (Ex. 33). The undersigned finds that the elusive 'additional evidence' alluded to by Dr. Vetter, in fact, is reflected in a subsequent independent medical evaluation and orthopaedic report prepared by Dr. George P. Balis on August 12, 1999.

In great detail, Dr. Balis documented in his report a number of inconsistencies between Appellant's complaints and his observed activities both in and outside of Dr. Balis' office. In addition to the apparent remarkable improvement by the Appellant in Dr. Balis' parking lot as opposed to in the examining room as previously quoted, Dr. Balis also documented certain inconsistencies which took place in the examining room itself. . . .

Hearing Examiner Report at 20 - 21. Based upon our review of the record, we agree with the Hearing Examiner's assessment of Dr. Balis' observations and conclusions. There is substantial evidence that supports the local board's decision.

Although Appellant argues in his reply to the local board's motion that Dr. Balis' characterizations of him are biased, false, and irrelevant, the Hearing Examiner found Appellant's explanation for Dr. Balis' observations to be "insufficient, evasive, and not credible." Moreover, Hearing Examiner Roberts found Dr. Balis' report "to be an accurate contemporaneous written report of his observations of the Appellant on August 12, 1999." *See* Report of Roberts at 23. We find nothing in the record to discount this conclusion.

As an additional matter, in his reply to the local board's motion, Appellant for the first time maintains that the decision denying him accidental disability retirement is based on discrimination because he is a "50 year old Black male janitor with only a high school education." However, Appellant has failed to present any evidence to support this allegation. Moreover, the State Board has consistently declined to address issues that have not been reviewed initially by the local board. *See Chase Craven v. Board of Education of Montgomery County*, 7 Op. MSBE 870 (1997) (failure to challenge suspension before local board constituted waiver); *Earl Hart v. Board of Education of St. Mary's County*, 7 Op. MSBE Opinion 740 (1997) (failure to raise issue of age discrimination below constituted waiver on appeal). We therefore find that Appellant has waived

this issue by failing to raise it with the local board.

CONCLUSION

In summary, we find that the materials contained in the voluminous record are sufficient to support the local board's decision. Accordingly, we adopt the findings and recommendations of Hearing Examiner Roberts and affirm the decision of the Board of Education of Montgomery County denying Appellant accidental disability retirement benefits.

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October 25, 2000