UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1390

September Term, 2013

CHRISTINE MARIE HAJEK

v.

ANNE ARUNDEL COUNTY, MARYLAND

Kehoe,
Reed,
Eyler, James R.
(Retired, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: December 23, 2015

Appellant, Christine Marie Hajek, appeals from the order of the Circuit Court for Anne Arundel County affirming in part and reversing in part the decision of the Board of Appeals of Anne Arundel County ("CBA"). The circuit court affirmed the CBA's decision requiring Ms. Hajek to fully exhaust her treatment options for post-traumatic stress disorder before seeking a disability retirement from the Anne Arundel County Fire Department. That court, however, reversed and remanded the CBA's decision requiring Ms. Hajek to demonstrate she was unable to work in *any* job as a result of her disability, because that determination was based on an erroneous interpretation of law. Ms. Hajek appeals from this order and presents a single question for our review, which we have rephrased[1] as follows:

> Whether the County Board of Appeals erred where it required appellant to demonstrate exhaustion of all reasonable treatment options in order to show she had a "total and permanent disability" as required by Anne Arundel County Code, art. 5, § 5-4-206 (2005).

[1] Ms. Hajek originally presented the following question:

> Is the Board of Appeals' decision to apply the County's plainly erroneous "policy" that "an appellant must prove that he or she exhausted all reasonable treatment options . . . before a finding of total and permanent disability can follow," by requiring Ms. Hajek to seek treatment options opposed by her treating doctors, legally correct and supported by substantial evidence in the record?

Appellee, Anne Arundel County (the "County"), cross-appeals from the same order of the circuit court and presents a single question of its own, which we have rephrased[2] as follows:

> Whether the circuit court erred where it remanded the case to the CBA for further proceedings according to the correct standard in § 5-4-206, notwithstanding its finding that the CBA committed no error in considering evidence of appellant's course of treatment.

Although we answer Ms. Hajek's question in the negative, we nevertheless hold that substantial evidence is lacking to support the CBA's finding that Ms. Hajek is not entitled to a disability retirement. Therefore, we also hold that the County's cross appeal is moot. We explain.

FACTUAL AND PROCEDURAL BACKGROUND

Ms. Hajek was a ten-year veteran paramedic with the Anne Arundel County Fire Department (the "Department"). Before joining the Department, she was employed as a veterinary technician, where she developed an interest in emergency medicine. Seeking to pursue this interest, she joined the Department. Ms. Hajek is also the founder and president of a horse rescue organization with an annual revenue of approximately one-million dollars.

[2] The County originally presented the following question:

> Did the circuit court err by ordering a remand of the case to the Board of Appeals after it concluded that it was not erroneous for the Board to consider evidence that Hajek had not availed herself of reasonable treatment options?

During her tenure with the Department, Ms. Hajek consistently received satisfactory performance reviews for her assigned responsibilities and skills development. She struggled initially, however, with demonstrating productivity and with her interpersonal skills. Ms. Hajek was disciplined twice during her tenure and her verbal communications with colleagues were described as unintentionally "abrasive." Despite these areas of weakness, over time her performance improved to the point where she received fully satisfactory reviews.

On September 18, 2009, Ms. Hajek's progress suffered an adverse event after she responded to a suicide call. Upon arriving at the scene, she discovered the deceased was in fact a friend and colleague from the Department. This affected her deeply and, in the days after the call, Ms. Hajek experienced obsessive thoughts about the call and an inability to sleep. She was also highly agitated and aggressive toward those around her. Although Ms. Hajek took advantage of crisis counseling offered by the County, she was unable to make any progress with her anxiety symptoms. She explained that, even with counseling, she still experienced nightmares and flashbacks to the scene, including olfactory flashbacks (*i.e.*, sudden recollections of smells from the scene of the suicide).

With her symptoms showing no signs of abatement, Ms. Hajek rapidly used her personal leave hours. She ultimately determined she needed to file a workers' compensation claim and also sought a transfer to another station within the Department. As an incident to the filing of her workers' compensation claim, she was referred to a mental health professional. Additionally, Ms. Hajek was placed on a light duty assignment in the Department of Health and Records, and attended therapy sessions twice a week

during this time. Her therapist during this period diagnosed her with post-traumatic stress disorder (PTSD) and an anxiety disorder. Notwithstanding this diagnosis, Ms. Hajek stated she and her therapist determined she could return to the field as a paramedic in December 2009.

For several months thereafter, Ms. Hajek was able to perform her duties successfully and even experienced an abatement of her symptoms. This was not for long. Approximately one year after the 2009 suicide call, in September 2010, Ms. Hajek responded to a suicide call at a prison facility in Jessup, Maryland. Her symptoms began to re-surface after this call. She stated she experienced nightmares again; that her hands would sweat and her heart would race; and that she also experienced nausea, vomiting, and diarrhea. Ms. Hajek believed her symptoms were particularly exacerbated when she heard calls coming in over the station radio. After a stressful call involving a cardiac incident that was successfully resolved, she began to fear receiving what she termed "bad" or "serious" calls. Whenever a call came in over the radio, Ms. Hajek frequently experienced physical symptoms such as heart palpitations and intestinal cramps. To cope with her PTSD symptoms, particularly her inability to sleep, she began to consume anywhere between two to four bottles of wine a night.

By January 2011, Ms. Hajek's ability to perform her duties became so impaired that she sought indefinite leave via the Family and Medical Leave Act ("FMLA"). Toward the end of her FMLA leave period, she received a letter from the Department notifying her that, if she were unable to return to full-duty status by the end of her leave, she would

receive a non-disciplinary discharge from employment. Ms. Hajek decided to seek a service-connected disability retirement in March 2011.

On June 29, 2011, Andrea Fulton, a personnel officer for the County, sent Ms. Hajek a letter regarding her application for a disability retirement. Ms. Fulton explained that the County's Disability Pension Review Board (the "Board") affirmed her decision to deny Ms. Hajek's request for a disability retirement. The Board determined she had not met the requirements for eligibility set forth in Anne Arundel County Code ("Code"), art. 5, § 5-4-206. To that end, Ms. Fulton denied Ms. Hajek's request pursuant to the Board's recommendation.

Ms. Hajek appealed to the County Board of Appeals for Anne Arundel County (the "CBA") seeking review of the Board's decision. The CBA held eight evening hearings between October 2011 and May 2012, and affirmed Ms. Fulton's determination in a September 28, 2012, opinion. The prefatory paragraphs of the opinion explained that a successful applicant for a disability pension under Code § 5-4-206 would have to demonstrate she was contributing to the pension plan "immediately prior to the date of disability" and that she suffers from a "total and permanent disability." Although the CBA acknowledged that PTSD is a disability within the scope of the statute, it determined Ms. Hajek could not demonstrate she was totally and permanently disabled.

The CBA examined the requirements for a total and permanent disability in § 5-4-206(b), which states:

> A participant has a total and permanent disability if the Personnel Officer determines, on the basis of a medical examination by one or more physicians selected by the

> Personnel Officer, that the participant is wholly and permanently prevented as a result of bodily injury or disease *from engaging in any occupation or employment for remuneration or profit or continuing as an employee in the participant's regular assignment or in some other assignment within the Fire Department*.

(emphasis added). The tribunal interpreted this language as requiring Ms. Hajek to demonstrate she was completely unable to engage in any occupation or employment—whether it was within the Fire Department or elsewhere. It also explained the County followed a policy requiring applicants to exhaust all reasonable treatment options before it could find a total and permanent disability. The CBA considered this policy and determined Ms. Hajek had not exhausted her treatment options, precluding a finding of total and permanent disability. Accordingly, as she could not demonstrate she was completely unable to work and that she had exhausted all reasonable treatment options, the CBA determined Ms. Hajek was not entitled to a disability pension.

Undeterred by the CBA's opinion, however, Ms. Hajek petitioned the Circuit Court for Anne Arundel County for judicial review of the administrative body's decision. The circuit court held a hearing on April 8, 2013, and, after consideration of the record, issued its opinion on August 13, 2013. The circuit court reversed the CBA and remanded the case because it determined the tribunal had made a reversible error of law in reading the statute to require Ms. Hajek to demonstrate she was unable to engage in any employment or occupation.[3] Despite the CBA's legal error, the circuit court affirmed its consideration of

[3] As noted *supra*, Code § 5-4-206 requires an applicant to demonstrate her disability precludes her "from engaging in any occupation or employment for remuneration or profit (continued…)

the County's exhaustion requirement as a relevant inquiry in the analysis of total and permanent disability.

Although the circuit court reversed the CBA and remanded the case, Ms. Hajek timely noted an appeal on September 10, 2013. The County timely noted its cross-appeal on September 20, 2013.

DISCUSSION

A. Parties' Contentions

Ms. Hajek argues the CBA applied an erroneous reading of Code § 5-4-206 and, accordingly, the tribunal's decision was arbitrary, capricious, and not supported by substantial evidence. She contends her PTSD diagnosis falls within the plain language of the statute and, accordingly, she is eligible for a disability pension. Despite the plain language of the statute, she explains the CBA erred where it followed the County's policy of requiring an applicant to demonstrate exhaustion of all reasonable treatment options. This policy, Ms. Hajek argues, is not supported by the language of the statute, does not appear in the code, and appears to have been created for the sole purpose of her case. Moreover, even if the policy were applicable, she contends the finding that she did not try

(…continued)

or continuing as an employee in the participant's regular assignment or in some other assignment within the Fire Department." (emphasis added). The circuit court determined that the CBA's reading of the "or" in the excerpted portion of § 5-4-206 as a conjunctive particle, *i.e.*, as "and," was a reversible error of law. It explained that principles of statutory construction would render the clause "continuing as an employee in the participant's regular assignment or in some other assignment within the Fire Department" redundant and would lead to an illogical result.

all reasonable treatment options is not supported by substantial evidence. Ms. Hajek states the CBA's conclusion regarding exhaustion was incorrect because it wrongly determined she refused to undergo eye movement desensitization and reprocessing ("EMDR") and immersion therapies, or take certain psychotropic medications.

The County argues Ms. Hajek was unable to meet the requirements of the statute. First, it contends Ms. Hajek is unable to support with substantial evidence that her illness was permanent, and that she had not exhausted all reasonable treatment options per County policy. Second, the policy requiring exhaustion of all reasonable treatment options is, according to the County, consistent with the language of the statute.

The County also filed a cross-appeal, arguing the circuit court's remand was error. The County contends, notwithstanding the circuit court's finding that the treatment exhaustion policy was consistent with law, the remand was inappropriate. The County does not explain why the remand was error but insists it was unnecessary given that Ms. Hajek had not demonstrated a disability per § 5-4-206(c).

Ms. Hajek briefly responds to the County's cross-appeal and argues that the cross-appeal is waived. She explains the County cannot pursue the cross-appeal because it failed to support its argument with any record citations or citations to authority. She further contends the circuit court was well-within its authority to order a remand to the CBA.

B. Standard of Review

The present case comes to this Court for the review of a decision by an administrative tribunal. When we review the decision of an administrative agency or tribunal, we assume the same posture as the circuit court and limit our review to the

agency's decision. *Anderson v. Gen. Cas. Ins. Co.*, 402 Md. 236, 244 (2007). The circuit court's decision acts as a lens for review of the agency's decision, or in other words, "we look not *at* the circuit court decision but *through* it." *Emps. Ret. Sys. of Balt. Cnty. v. Brown*, 186 Md. App. 293, 310 (2009) (emphasis in original).

We review the agency's decision in the light most favorable to the agency because it is *prima facie* correct and entitled to a presumption of validity. *Anderson v. Dept. of Pub. Safety & Corr. Servs.*, 330 Md. 187, 210 (1993).

The overarching goal of judicial review of agency decisions is to determine whether the agency's decision was made in accordance with the law or whether it is arbitrary, capricious, or illegal. *Long Green Valley Ass'n v. Prigel Family Creamery*, 206 Md. App. 264, 274 (2012). This is a limited scope of review and we do not disturb the agency's decision if its factual findings are supported by substantial evidence and there are no errors of law. *Id.* Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Catonsville Nursing Home, Inc. v. Loveman*, 349 Md. 560, 569 (1998) (internal citations omitted). We are not bound, however, to affirm those agency decisions based upon errors of law and may reverse administrative decisions containing such errors. *Id.*

C. Analysis

i. Exhaustion of Treatment Options

The Court of Appeals has stated that "[i]n a judicial review of administrative action the court may only uphold the agency order if it is sustained by the agency's findings *and for the reasons stated by the agency*." *Harford County v. Preston*, 322 Md. 493, 505 (1991)

(emphasis added). The reasons stated by the CBA for denying Ms. Hajek disability retirement benefits are twofold. First, the CBA based its decision on its finding that "[Ms. Hajek] can engage in an occupation or employment for remuneration or profit [outside the Department], but does not wish to do so." Second, the CBA explained its belief that "Ms. Hajek has not obtained maximum medical improvement . . . due to her refusal to use reasonable treatment modalities such as different medications, EMDR or Immersion Therapy." As noted above, the circuit court determined the CBA committed reversible error insofar as it read § 5-4-206 to require Ms. Hajek to prove she is permanently unable to engage in *any* employment or occupation–whether or not within the Department–due to her PTSD. As neither party is challenging this determination of the circuit court on appeal, we concern ourselves only with whether the circuit court was correct in remanding the case to the CBA to determine whether Ms. Hajek's "rejection of treatment . . . 'wholly and permanently' prevented [her] from returning to work [at the Department]."

Ms. Hajek asks us to determine that the treatment exhaustion policy is inconsistent with the law, or in the alternative that the CBA made an arbitrary or capricious decision based on this policy. Although we find the policy to be consistent with the law, we hold that the CBA's decision was not supported by substantial evidence and was therefore arbitrary and capricious.

a. Statutory Interpretation

Whether the treatment exhaustion policy is consistent with Code § 5-4-206 is a question of law, which we review *de novo*. Ms. Hajek contends the policy requiring exhaustion of all reasonable treatment options has no basis in the language of Code § 5-4-

206. We do not agree. It is our view that the plain language of the statute supports this policy. Furthermore, previous Maryland appellate cases in the analogous area of worker's compensation have held that not only are disability benefits similar to worker's compensation, but that an individual seeking worker's compensation benefits must demonstrate she sought all reasonable treatment options.

To resolve the present question of law, we must undertake a statutory interpretation of the County Code. Our primary task when conducting statutory interpretation is "to ascertain and effectuate the intent of the Legislature." *Kushell v. Dep't of Natural Res.*, 385 Md. 563, 576 (2005) (citing *Collins v. State*, 383 Md. 684, 688 (2004)). The start of such an inquiry is with the plain language of a statute, interpreted via the "ordinary, popular understanding of the English language." *Kushell*, 385 Md. at 576 (citing *Deville v. State*, 383 Md. 217, 223 (2004)). A court may not add or delete language to reflect an intent other than that evidenced by the plain language of the statute, nor should the statute be read such that any "word, clause, sentence or phrase is rendered superfluous or nugatory." *Kushell*, 385 Md. at 576–77 (citing *Price v. State*, 378 Md. 378, 387 and *Collins*, 383 Md. at 691). Plain language must be considered in the context of the entire statutory scheme and not in isolation. *Kushell,* 385 Md. at 577 (citing *Deville*, 383 Md. at 223 and *Navarro-Monzo v. Washington-Adventist*, 380 Md. 195, 204 (2004)).

A personnel member of the Fire Department is deemed eligible for a disability pension on the first day of the month that the individual "is determined to have a total and permanent disability and was making employee contributions to the plan immediately prior

to the date of disability." Code § 5-4-206(c)(1). Section 5-4-206(b) explains the scope of "total and permanent disability":

> A participant has a total and permanent disability if the Personnel Officer determines, on the basis of a medical examination by one or more physicians selected by the Personnel Officer, that the participant is *wholly and permanently* prevented as a result of bodily injury or disease from engaging in any occupation or employment for remuneration or profit or continuing as an employee in the participant's regular assignment or in some other assignment within the Fire Department.

(emphasis added).

The language of the statute is consistent with the definition of "wholly and permanently disabled" in Black's Law Dictionary: "completely and continuously unable to perform work for compensation or profit." BLACK'S LAW DICTIONARY 1735 (9th ed. 2009). It follows that a Fire Department employee entitled to disability benefits is one whose disability renders her completely unable to earn a living—in any capacity, within the Fire Department—for the remainder of her life. A successful applicant for disability benefits must be able to demonstrate to the personnel officer that her disability completely precludes her from working, both at present and in the future. Part and parcel of this showing is a demonstration of the finality of the disability, *i.e.*, that the applicant has undertaken efforts to treat the injury or disease, to no avail. If there is a possibility the applicant may, with reasonable treatment, be able to perform work at some point in the future, the disability does not render her "completely and continuously unable to perform work for compensation or profit." Allowing a person less than "wholly and permanently"

disabled to receive disability benefits would result in a contravention of the plain language of the statute and the intention of the legislature.

Moreover, there is support for this required showing in workers' compensation case law. Maryland cases explain that disability pension benefits are similar to workers' compensation payments for the purposes of an offset provision in the Maryland Code. *See Fikar v. Montgomery Cnty.*, 333 Md. 430, 436 (1994) ("[W]hile ordinary retirement benefits may not trigger the offset, it is well settled that *disability* pension benefits are 'similar' to workers' compensation payments and will trigger the offset[.]" (emphasis in original)). The two types of benefits are treated similarly because of their shared intent, *i.e.*, to compensate an injured worker for the loss of earning capacity. *Id.* at 436. This Court has previously thought it helpful to analogize to workers' compensation cases when resolving causation questions that arise from the disability pension plans of Maryland localities. *See*, *e.g.*, *Hersl v. Fire & Police Emps.' Ret. Sys.*, 188 Md. App. 249, 268 (2009). Given the comparable treatment of disability pensions and workers' compensation in Maryland's courts, analogies to workers' compensation law are persuasive in addressing the issue of the CBA's treatment exhaustion policy presented by this appeal.

The Court of Appeals has stated clearly that, for employees seeking workers' compensation,

> it is the duty of an injured employee to accept any medical or surgical assistance available to him, which offers a *reasonable hope* for the lessening of any disability resulting from the injury for which he is compensated, provided such assistance involves no real risk to life or health, nor is likely to cause such pain or inconvenience which as a *reasonably prudent* man he could not be expected to undergo.

R.N. McCulloh & Co. v. Restivo, 152 Md. 60, 66 (1927) (emphasis added). An individual may not, therefore, refuse to submit to reasonable treatment options and expect to receive or continue to receive compensation for her injuries. *See Moore v. Component Assembly Sys., Inc.*, 158 Md. App. 388, 396–96 (2004); *see also Dickson Constr. & Repair Co. v. Beasley*, 146 Md. 568, 577 (1924) (quoting *Schiller v. Balt. & Ohio R.R. Co.*, 137 Md. 235, 246 (1920)); *Watts v. J.S. Young Co.*, 245 Md. 277, 280 (1967) (explaining that workman's compensation may be withheld if the claimant unreasonably refuses to undergo surgery). The necessity of this reasonableness requirement is to determine whether or not the refusal of treatment created a break in the causal chain between employment and injury. *Moore*, 158 Md. App. at 398–401.

Maryland's workers' compensation statute and Anne Arundel County's disability pension statute for Fire Department members are both intended to compensate an injured worker for the loss of earning capacity due to injuries sustained in the course of employment. *Compare* Maryland Code, Labor & Employment Article § 9-101(b)(1)–(3) ("'Accidental personal injury' means: (1) an accidental injury that arises out of and *in the course of employment*; (2) an injury caused by a willful or negligent act of a third person directed against a covered employee *in the course of employment* . . .; or (3) a disease or infection that naturally results from an accidental injury *that arises out of and in the course of employment* . . .") (emphasis added) *with* Code § 5-4-206(c)(2) ("A participant is not eligible to commence receiving a disability retirement pension on and after the participant's normal retirement date unless the disability is the result of a bodily injury or disease *arising*

out of and occurring in the course of the participant's active performance of duties.") (emphasis added). In addition, courts in Maryland treat workers' compensation and disability pensions as analogous to each other, such that an employee may not receive benefit payments under both statutes simultaneously if the benefits received are "similar." *See Fikar*, 333 Md. at 435. Disability benefits must be offset against workers' compensation in order to avoid a double recovery arising from the same injury. *Id.*

Given the similarity between the two types of compensation, it is a requisite that an injured Fire Department member demonstrate she sought available reasonable medical or surgical treatments. *Cf. Restivo*, 152 Md. at 66 (injured employees have a duty to accept reasonable medical or surgical treatment). The County Code has a causation requirement written into the language of the statute. *See* § 5-4-206(c)(2) ("[T]he disability is the result of a bodily injury or disease *arising out of* and occurring in the course of the participant's active performance of duties.") (emphasis added). As in a workers' compensation case, we think that a Department personnel member injured in the course of employment must demonstrate she did not break the causal chain between her employment and injury by refusing reasonable treatments.[4] *Cf.* Watts, 245 Md. at 280 ("The claimant's intentional

[4] We agree with the circuit court's finding that "[i]t would not be reasonable, for example, for a Fire Fighter to break her arm in the line of duty, refuse to follow a doctor's recommendation that the arm be placed in a cast, and then be awarded disability benefits because she could no longer fully use the arm." However, in that hypothetical case there would undoubtedly be testimony from a physician that, to a reasonable degree of medical certainty, the Fire Fighter's injury would not have been permanent but for her refusal to place her arm in a cast. Therefore, we ultimately must determine whether there exists substantial evidence to support the CBA's finding that Ms. Hajek's PTSD would not be permanent had she not "refus[ed] to use reasonable treatment modalities such as different medications, EMDR or Immersion Therapy."

and unreasonable conduct breaks the chain of causation between his employment and the injury. To the extent that the claimant's disability is found to relate to his arbitrary refusal, *it does not arise out of his employment . . . and is non-compensable under the Workmen's Compensation statute.*" (emphasis added) (internal quotation marks omitted). We do not, however, require an injured employee to submit to unreasonable treatments. Only those treatments that "offer[] a reasonable hope for the lessening of any disability resulting from the injury for which [s]he is compensated" should be considered by the county personnel officer in determining whether or not an employee is "wholly and permanently" disabled. *See Restivo*, 152 Md. at 66.

We agree with the circuit court that the CBA committed no error in considering Ms. Hajek's course of treatment with regard to her claim for disability benefits arising from her PTSD diagnosis. Claimants are required to demonstrate their pursuit of all reasonable treatment options in workers' compensation claims, and we think it appropriate they do the same in disability pension claims given the similarity between the two types of benefits.

b. Substantial Evidence

Because we presume the tribunal's decision is prima facie correct and avoid engaging in an independent analysis of the evidence, *see Montgomery Cnty. v. Butler*, 417 Md. 271, 284 (2010), we do not analyze the evidence to determine whether Ms. Hajek's refusal of the available treatment options, including the EMDR treatments, was reasonable. We may only determine if there exists substantial evidence to support the CBA's finding that "Ms. Hajek has not obtained maximum medical improvement [ ] due to her refusal to use reasonable treatment modalities[.]"

As stated above, our standard for the judicial review of administrative decisions is narrow. We must review whether the decision of the administrative tribunal was arbitrary, capricious, or illegal. *Long Green Valley Ass'n*, 206 Md. App. at 274. Accordingly, we examine whether the decision of the administrative tribunal was made according to the law and was supported by substantial evidence. *Id.* An agency's finding is said to be supported by substantial evidence if "reasoning minds could reasonably reach that conclusion from facts in the record before the agency, by direct proof, or by permissible inference." *Comm'r, Baltimore City Police Dep't v. Cason*, 34 Md. App. 487, 508 (1977). Despite the highly deferential nature of this standard, it is not satisfied in the present case.

The CBA found Ms. Hajek "has failed to prove that she suffers a total and permanent disability." As indicated above, the first basis for this finding was the CBA's reading of § 5-4-206 to require a disability retirement applicant to prove she is unable to be employed for remuneration or profit within or without the Fire Department. The County, however, concedes this reading is incorrect and that Ms. Hajek is only required to prove her inability to be employed in her "regular assignment or in some other assignment within the Fire Department." Code § 5-4-206(b). Additionally, the evidence that Ms. Hajek's PTSD is chronic and permanent,[3] that it is completely service-connected, and that because of it she

[3] All three experts testified that Ms. Hajek's PTSD is chronic and permanent. In fact, when Dr. Leeb, the County's own expert, was asked whether Ms. Hajek's PTSD was permanent, he answered: "At the moment, given the current state of her treatment, yes I would say so."

is unable to continue as an employee within the Fire Department,[4] is uncontroverted. Therefore, our resolution of this appeal hinges on whether substantial evidence supports the second stated basis for the CBA's finding, which was that Ms. Hajek's PTSD would not be chronic and permanent but for "her refusal to use reasonable treatment modalities such as different medications, EMDR or Immersion Therapy." Because there is no evidence in the record whatsoever that had Ms. Hajek pursued some or all of these treatment options sooner her PTSD would not be chronic and permanent, we hold that substantial evidence does not support the CBA's decision to deny Ms. Hajek disability retirement benefits.

The CBA concluded not only that Ms. Hajek had refused such "reasonable treatment modalities" as "different medications, EMDR and Immersion Therapy," but also that she did not attend therapy as frequently as was recommended and that she continued to self-

[4] Drs. Eisenberg, Sheehan, and Leeb all testified that Ms. Hajek is permanently disabled from her regular assignment as a paramedic within the Department. In addition, Anne Arundel County Fire Department Battalion Chief Matthew Tobia testified that "the [F]ire [D]epartment unfortunately does not have the ability to carry individuals . . . permanently in an alternate work assignment." Battalion Chief Tobia is the same individual who undersigned a letter to Ms. Hajek dated March 15, 2011, stating:

> The purpose of this letter is to inform you that a review of your records indicates that you were placed on Family Medical Leave Act (FMLA) January 1, 2011. As of this date you have used 49 days of the twelve (12) week or sixty (60) days leave allotted to you under FMLA. Please be aware that *if for any reason you are unable to return to work in a full duty status at the end of the twelve (12) week or sixty (60) day FMLA period, the Fire Department may begin to process your separation from employment as a non-disciplinary discharge.*

(emphasis added).

medicate by abusing alcohol in spite of her doctor's directive to stop. Had she been more prudent and "reasonable" regarding her treatment, the CBA opined, she would not be suffering from chronic and permanent PTSD. The CBA is certainly entitled to this opinion. However, for it to be the basis for denying benefits to a disability retirement applicant under § 5-4-206, it must be "reasonably [supported by] . . . facts in the record before the agency, by direct proof, or by permissible inference," *Comm'r, Baltimore City Police* Dep't, 34 Md. App. at 508, and there are simply no facts in the record to support that, to *any* degree of medical probability, Ms. Hajek's PTSD would not be permanent had she pursued an alternate course of treatment.

First, the County asserts Ms. Hajek is not totally and permanently disabled due to her failure to undergo EMDR therapy. However, when Dr. Leeb was asked what effect EMDR would have had on Ms. Hajek, he responded:

> I had no idea. I don't know. My suggestion was, again, simply a suggestion. Something to try that is relatively quick, relatively easy in terms of cost and even effort to do and you would know within two months max whether or not she'd get any benefit from it. That was it.

This treatment method, which again was "simply a suggestion" by the County's expert, who had "no idea" whether it would improve Ms. Hajek's condition, was expressly opposed by Ms. Hajek's own treating psychiatrist, Dr. Sheehan, who testified that he "question[s] the scientific validity of [EMDR]."

The County further contends Ms. Hajek's PTSD would not be permanent had she begun psychotropic medication treatment sooner. This claim, however, is also unsubstantiated in the record. Dr. Leeb–again, the County's own expert–could not say one

way or the other whether an earlier or variant psychotropic medication regimen would have altered the course of Ms. Hajek's mental health condition. Likewise, Dr. Eisenberg could only "speculate[e]" regarding what effect earlier psychotropic medication treatment would have had on the permanency of Ms. Hajek's PTSD, but opined it would have had no effect. He stated "the literature suggests that medication and psychotherapy are an effective combination, but . . . [do not] cure[] or prevent[]." Dr. Sheehan testified more definitively on this issue. When asked "whether or not [Ms. Hajek's] taking psychotropic medications, including the ones you prescribed, or any others, any earlier in her treatment would have necessarily cured the permanency of her disease, or mitigated its symptoms?," he responded "it would not have changed the overall course of her disease, that she was disabled."

The County contends substantial evidence to support the CBA's finding exists in Ms. Hajek's refusal to take all steps it deems "reasonable" that would have had *any* probability of curing her disease, even if some of those steps were expressly opposed by her own doctor. However, there is not a scintilla of evidence in the record that if Ms. Hajek had begun psychotropic medication treatment sooner or underwent immersion therapy that her PTSD would be any less chronic or permanent today. Similarly, there is very little evidence that EMDR would have had any positive effect. Even Dr. Leeb, who based his expert testimony on a study Ms. Hajek's treating psychiatrist believes is scientifically invalid, admitted he had "no idea" whether EMDR would have made a difference. Suffice it to say that despite the highly deferential nature of the substantial evidence standard of

review, the CBA's finding that Ms. Hajek "failed to prove that she suffers a total and permanent disability" is unsubstantiated in the record and cannot be upheld.

Therefore, we hold that Ms. Hajek is qualified for disability retirement benefits under Code § 5-4-206 and remand to the CBA for further proceedings consistent with this opinion.

ii. The County's Cross-Appeal

The County cross-appeals from the circuit court's order affirming in part and reversing in part the CBA's decision. Its single contention on cross-appeal is that the circuit court should not have remanded the matter to the CBA. The County maintains that when the circuit court found the CBA committed no error in considering evidence of Ms. Hajek's course of treatment for her PTSD, that court should not have remanded the case on the question of the proper standard in § 5-4-206. In light of our holding, we dismiss this cross-appeal as moot.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED IN PART AND REVERSED IN PART. COSTS TO BE PAID BY ANNE ARUNDEL COUNTY. CASE REMANDED TO THE COUNTY BOARD OF APPEALS OF ANNE ARUNDEL COUNTY FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.