UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0890

September Term, 2015

PAMELA BRUNNER

v.

MARYLAND STATE RETIREMENT AND PENSION SYSTEM

Krauser, C.J.,
Meredith,
Berger,

JJ.

Opinion by Berger, J.

Filed: June 29, 2016

This appeal involves a dispute regarding the denial of appellant Pamela Brunner's ("Brunner's") request for accidental disability retirement benefits ("accidental disability") from appellee, the Maryland State Retirement and Pension System ("RPS"). Brunner contends that the RPS erred in denying her accidental disability after an injury she sustained while working for Montgomery County Public School System. Nearly five years after her injury, Brunner filed an application to receive accidental disability. The medical board of the RPS recommended approving Brunner for ordinary disability benefits, but denied her application for accidental disability benefits. The medical board's decision was approved by the trustees of the RPS. Brunner then appealed the trustees' decision to the Office of Administrative Hearings ("OAH"). A hearing was held before an Administrative Law Judge ("ALJ"), who ultimately recommended that the RPS's decision to deny Brunner accidental disability be affirmed. The RPS trustees then adopted the ALJ's recommendation and denied Brunner's claim for accidental disability. Brunner then filed a petition for judicial review in the Circuit Court for Montgomery County, where the ALJ's decision was affirmed.

On appeal, Brunner presents three issues for our review,[1] which we consolidate and

[1] The issues, as presented by Brunner, are:

> I. Whether the Court erred when it upheld the Administrative Law Judge's (ALJ) decision to not qualify the testimony of orthopedist Dr. Michael Franchetti, MD as "expert testimony?"
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> II. Whether the Court and the ALJ failed to consider the 2006 Independent Medical Examination by orthopedist Dr. Raymond D. Drapkin, MD?

(continued...)

rephrase as follows:

> I. Whether the ALJ erred by failing to consider evidence offered by Brunner.
>
> II. Whether the ALJ's conclusion that Brunner's fall was not the natural and proximate cause of her disability was supported by substantial evidence.

For the reasons set forth below, we shall affirm the judgment of the Circuit Court for Montgomery County.

FACTUAL AND PROCEDURAL BACKGROUND

Between 1994 and 2005, Brunner was employed as a special education paraeducator for the Montgomery County Public School system. Before that, Brunner had been a substitute teacher with the school system since 1985. As a paraeducator, Brunner worked with students who had physical, sensory, emotional, and learning disabilities. Moreover, her job required significant lifting, bending, and physically attending to students who may require extensive assistance. On December 10, 2003, Brunner was assisting students on a school bus trip when the bus stopped at a McDonald's restaurant. The record reflects that it was snowing outside on December 10, 2003. As Brunner exited the school bus she slipped on the top step and slid on her back onto the ground. Within ten minutes, Brunner experienced darting and piercing pain in her lower back. Immediately after her fall, Brunner

[1] (...continued)

> III. Whether the Court and the ALJ erred in giving significant weight to the materially flawed 2009 Independent Medical Examination by orthopedist Dr. Robert Franklin Draper, Jr?

reported the incident to a school official, but she nevertheless continued to work. Shortly thereafter, Brunner was assisting students from their wheelchairs which exacerbated her pain.

Eight days after her initial fall, Brunner saw a physician to whom she reported that she suffered a fall on the school bus, and was assaulted by her teenage daughter. A radiology report containing five x-rays of her back indicated that Brunner had a "normal lumbosacral spine." Approximately three months later, in March of 2004, Brunner returned to the doctor where MRIs and a medical examination showed "discogenic disease" and areas of osteoarthritis in her cervical spine and "lumbar degenerative changes." Moreover, her treating physician advised Brunner to refrain from work and prescribed muscle relaxers and physical therapy. Shortly thereafter, in June of 2004, Brunner filed a worker's compensation claim. On July 20, 2004, the commission found that she sustained an injury arising out of and in the course of her employment. In so doing, Brunner was awarded $354.00 per week for the continuance of her temporary total disability.

In the fall of 2004, Brunner returned to work, but she continued to have physical problems. Initially, Brunner requested to be transferred to another group of children to minimize her physical exertion. Eventually, Brunner's responsibilities were reduced to caring for only one child. Even with the accommodations, however, Brunner's position required much walking, which caused her pain in her leg and lower back. In March of 2005, Brunner was officially terminated for unsatisfactory performance.

Thereafter, in July of 2007, the Workers' Compensation Commission terminated Brunner's temporary total disability, and found that she was permanently 10% partially disabled. The commission awarded Brunner $114.00 per week for a period of 50 weeks. The commission further found that "the disability of the claimant's cervical spine is not causally related to the accidental injury." In September of 2008, a year and two months after the Workers' Compensation Commission determined that Brunner was 10% partially disabled, and almost five years after her original injury, Brunner submitted her application for accidental disability retirement benefits to the RPS.

In May of 2009, the Medical Board of the RPS recommended that Brunner receive ordinary disability retirement benefits, but recommended denial of accidental disability retirement benefits. The RPS concluded that Brunner's "disability was not the natural and proximate result" of the December 2003 accident. The RPS later reviewed its decision and considered additional medical information, and in May of 2010, the RPS upheld its original decision to deny Brunner accidental disability.

Brunner then appealed the RPS's decision to the Maryland Office of Administrative Hearings ("OAH") on September 10, 2010. The OAH held a hearing on October 3, 2011, and the only issue before the OAH was whether Brunner's disability was the "natural and proximate result" of her fall. At the hearing, Brunner testified on her own behalf. Brunner testified about the circumstances surrounding her fall. When asked whether she had symptoms prior to her fall in 2003, Brunner responded: "Oh, not at all, no. . . ." On direct

examination, Brunner was confronted with two records indicating that Brunner reported "hip pain" and "hip pain . . . radiating to back." Brunner's counsel asked her "[i]s that the pain that you were talking about in your right hip, is that different from or was that -- how long did that go for?" To which Brunner responded with the question "Was that after the accident?" Brunner later affirmatively denied having any pre-existing back injuries prior to her fall.

Brunner also offered a transcript from a deposition of Doctor Michael Franchetti ("Franchetti"). In the transcript, Franchetti recognized that Brunner had "some age-related degenerative changes in her neck" and "some degenerative changes" in her lumbosacral spine. Franchetti ultimately opined, however, that Brunner's ailments "are the result of the December 10, 2003 work injuries." The ALJ noted that the transcript from Franchetti's opinion was "conclusory, and expressed without substantial foundation." Notably, Franchetti did not testify at the OAH hearing because Brunner claimed that she could not afford to have him appear physically or participate via telephone. Indeed, the ALJ observed that "it appears clear that [Brunner] has no intention of having Dr. Franchetti provide live testimony." Nevertheless, the ALJ permitted Brunner to submit a transcript of Franchetti's deposition and a report that "she would give weight to it as if it were offered as an affidavit."

The RPS, for its part, offered testimony from Doctor Robert Franklin Draper ("Draper"), who was accepted as an expert in orthopedics and orthopedic surgery. Draper conducted an independent medical evaluation of Brunner and reviewed her medical history

and medical records. From both Brunner's records and his examination of Brunner, Draper concluded that Brunner likely suffered from degenerative disc disease that existed long before her fall. Draper acknowledged that Brunner's fall likely exacerbated her back pain, but Draper ultimately concluded that "this disability is not caused by the accident of December 10, 2003," but instead by Brunner's "preexisting pathology."

After considering all of the evidence presented at the OAH hearing, the ALJ concluded in her proposed decision issued on December 9, 2011, that Brunner "has not shown, by a preponderance of the evidence, that the December 10, 2003 work-related fall was the 'sole natural and proximate cause' of her disability as the case law has defined those terms." Accordingly, the ALJ determined that Brunner had failed to satisfy her burden so as to entitle her to accidental disability benefits.

Brunner then filed exceptions to the ALJ's recommendations. A hearing was scheduled for Brunner's exceptions, which was postponed several times at Brunner's request. Ultimately, the exceptions hearing occurred on March 18, 2014, and Brunner was absent. The trustees of the RPS then rendered their final decision adopting the reasoning of the ALJ. Brunner then filed a petition for judicial review of the ALJ's decision in the Circuit Court for Montgomery County. The circuit court heard argument for the administrative appeal on June 4, 2015. At the conclusion of the hearing, the trial judge affirmed the decision of the administrative agency, and a final judgment was entered the following day. This timely appeal followed. Additional facts will be discussed as necessitated by the issues presented.

DISCUSSION

I. Standard of Review

Pursuant to Md. Code (1984, 2014 Repl. Vol., 2015 Suppl.), § 10-222(h)(3) of the State Government Article ("SG"), we may only reverse or modify the decision of an administrative agency if that decision is:

> (i) unconstitutional;
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> (ii) exceeds the statutory authority or jurisdiction of the final decision maker;
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> (iii) results from an unlawful procedure;
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> (iv) is affected by any other error of law;
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> (v) is unsupported by competent, material, and substantial evidence in light of the entire record as submitted; or
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> (vi) is arbitrary or capricious.

SG § 10-222(h)(3).

"'On appellate review of the decision of an administrative agency, this Court reviews the agency's decision, not the circuit court's decision.'" *Long Green Valley Ass'n v. Prigel Family Creamery*, 206 Md. App. 264, 273 (2012) (quoting *Halici v. City of Gaithersburg*, 180 Md. App. 238, 248 (2008)); *Ware v. People's Counsel for Balt. Cnty.*, 223 Md. App. 669, 680 (2015) ("In an appeal from a judgment entered on judicial review of a final agency decision, we look 'through' the decision of the circuit court to review the agency decision itself."). Moreover,

> "Our review of the agency's factual findings entails only an appraisal and evaluation of the agency's fact finding and not an independent decision on the evidence. This examination seeks to find the substantiality of the evidence. That is to say, a reviewing court . . . shall apply the substantial evidence test to the final decisions of an administrative agency . . . In this context, substantial evidence, as the test for reviewing factual findings of administrative agencies, has been defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

Tomlinson v. BKL York LLC, 219 Md. App. 606, 614 (2014) (alterations omitted) (quoting *Catonsville Nursing Home, Inc. v. Loveman*, 349 Md. 560, 568-69 (1998)).

While we largely defer to the factual findings of an administrative agency, "reviewing courts are under no constraint to affirm an agency decision premised solely upon an erroneous conclusion of law." *Ins. Comm'r for the State v. Engelman*, 345 Md. 402, 411 (1997). Indeed, "with respect to an agency's conclusions of law, we have often stated that a court reviews *de novo* for correctness." *Schwartz v. Md. Dept. of Natural Res.*, 385 Md. 534, 554 (2005). Accordingly, in the present appeal we will defer to the factual findings of the ALJ so long as they are supported by substantial evidence. We will, however, review any legal determination under the *de novo* standard.

II. The ALJ Did Not Err in Failing to Consider Evidence Offered by Brunner.

Brunner claims that the ALJ erred by failing to admit Dr. Franchetti's opinion as expert testimony. Moreover, Brunner contends that the ALJ "fail[ed] to consider" and "completely ignore[d]" Dr. Franchetti's and Dr. Raymond D. Drapkin's (Drapkin's) independent medical examinations. At first blush, these arguments sounds as if Brunner is

alleging that the ALJ made an erroneous evidentiary decision regarding the admission of evidence at the administrative hearing. This concern, however, is allayed for two reasons. First, Dr. Franchetti could not have offered expert testimony, because he never offered "testimony," expert or otherwise, which the ALJ could have excluded. To the contrary, despite the great lengths the RPS and the ALJ went to in order to accommodate Brunner and afford her the opportunity to call Dr. Franchetti so that he may provide testimony, it was clear that Brunner "ha[d] no intention of having Dr. Franchetti provide live testimony."

Secondly, a cursory review of the record demonstrates that, notwithstanding the fact that Dr. Franchetti's and Dr. Drapkin's opinions were not offered in the form of testimony, the assertion that the ALJ failed to consider their opinions is objectively false. The ALJ's opinion expressly provides:

> **[T]he Clamant provided a DVD of Dr. Franchetti's interview** conducted by her attorney.
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> > At the hearing, the parties stipulated to Dr. Draper's designation as an expert in orthopedics and orthopedic surgery. Although Dr. Franchetti, who did not appear at the hearing, was not so designated, his recitation of his qualification and experience in the DVD interview indicated a similar level of expertise, and **I am considering both physicians as comparable in qualification.**
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> Although each physician's diagnosis of the Claimant's condition was comparable, their ultimate determination of causation diverged.
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> **Dr. Franchetti's interview essentially mirrored his 2007 and 2011 reports. His opinion that the Claimant's**

> **condition is essentially totally attributable to the December 10, 2003 incident was conclusory, and expressed without substantial foundation.** Although his 2011 report directly states that the Claimant's accident worsened her preexisting back and neck conditions, he did not sufficiently explain why he believed the 2003 incident remained the natural and proximate cause of the Claimant's inability to work.
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> . . .
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> **Taking both experts into account**, along with the other evidence presented, I find that prior to the 2003 incident, the Claimant experienced and reported pain in her lower back. **Although Dr. Franchetti's report implied that since her prior complaints abated, the pain resolved,** I find that the Claimant's problems with her back were ongoing over a number of years.

(emphases added).

Moreover, in her opinion, the ALJ observed that:

> On October 2, 2006, Dr. Raymond D. Drapkin, an orthopedic surgeon, performed an independent medical examination (IME) of [Brunner]'s 2004 and 2006 MRIs. Dr. Drapkin noted that [Brunner] had no evidence of any disc herniations, but that she sustained a lumbar disc bulge at L5-S1 with lumbar radiculopathy as a result of her December 10, 2003 work injury.

Accordingly, Brunner's assertion that the ALJ "fail[ed] to consider" and "completely ignore[d]" Dr. Franchetti's and Dr. Drapkin's opinions is wholly unsupported by the record in this case. To the contrary, Brunner's argument "fails to consider" and "completely ignores" the ALJ's written opinion where she clearly identified and considered Dr. Franchetti's and Dr. Drapkin's respective assessments of Brunner's disability. Indeed, contrary to Brunner's assertion that "no reference is made in ALJ Helfand's 'discussion'

section . . . to the DVD of Dr. Franchetti's deposition," the ALJ expressly indicates that she reviewed the DVD and concluded that both experts have "a similar level of expertise." Likewise, the ALJ expressly noted that:

> On October 2, 2006, Dr. Raymond D. Drapkin, an orthopedic surgeon, performed an independent medical examination (IME) on the Claimant for a Workers' Compensation evaluation. Dr. Drapkin also reviewed the Claimant's 2004 and 2006 MRIs. Dr. Drapkin noted that the Claimant had no evidence of any disc herniations, but that she sustained a lumbar disc bulge at L5-S1 with lumbar radiculopathy as a result of her December 10, 2003 work injury.

In sum, Brunner's assertion that the ALJ capriciously ignored her evidence grossly misstates the record in this case. Moreover, to the extent that Brunner argues--as she did at oral argument--that the ALJ, when acting in the capacity of a fact finder, is obligated to afford equal weight to the conflicting opinions of both parties' witnesses, such a contention is wholly without merit. *See e.g.*, *Longshore v. State*, 399 Md. 486, 499 (2007) ("Making factual determinations, *i.e.* resolving conflicts in the evidence, and weighing the credibility of witnesses, is properly reserved for the fact finder. . . . In performing this role, the fact finder has the discretion to decide which evidence to credit and which to reject." (internal citations omitted)). At best, Brunner's position constitutes an overstated argument that the ALJ's decision was unsupported by substantial evidence under the guise of an evidentiary challenge. For the reasons stated in Part III, *infra*, we reject that argument.

III. The ALJ's Decision Was Supported by Substantial Evidence.

The sole question that the ALJ was tasked to adjudicate was whether Brunner's disability was the "natural and proximate result of" her fall off the school bus. In making this determination, "the hearing examiner has discretion to accept any explanation for a disability which is supported by substantial evidence." *Fire & Police Emp. Ret. Sys. of Balt. v. Middleton*, 192 Md. App. 354, 362 (2010). The "substantial evidence" test is defined as "whether a reasoning mind reasonably could have reached the factual conclusion the agency reached." *Layton v. Howard Cnty. Bd. of Appeals*, 399 Md. 36, 48-49 (2007) (internal quotation omitted).

"'In applying the substantial evidence test . . . . [we] must review the agency's decision in the light most favorable to the agency, since decisions of administrative agencies are prima facie correct and carry with them the presumption of validity.'" *Pollock v. Patuxent Inst. Bd. of Review*, 374 Md. 463, 476-77 (2003) (quoting *Jordan Towing, Inc. v. Hebbville Auto Repair, Inc.*, 369 Md. 439, 451 (2002)). "Furthermore, not only is the province of the agency to resolve conflicting evidence, but where inconsistent inferences from the same evidence can be drawn, it is for the agency to draw the inferences." *Id*. at 477 (internal quotations omitted).

In this case there was substantial evidence supporting the ALJ's finding that Brunner's fall was not the natural and proximate cause of her disability. Indeed, Draper--after an examination and a comprehensive review of Brunner's medical records--opined that Brunner suffered from degenerative disc disease prior to her fall on

December 10, 2003. Draper's opinion, and the ALJ's conclusions were also supported by documentary evidence supporting Draper's conclusion that Brunner complained on multiple occasions of low back pain radiating from her left hip prior to her fall.

Brunner further complains that the ALJ's finding that Brunner's "2003 fall, exacerbated her inexorable development of degenerative disease" was not supported by any of the evidence. First, as a factual matter, Brunner's statement is simply unsupported by the record. Indeed, Franchetti opines that "the injuries sustained . . . on December 10, 2003 absolutely had objectively worsened her preexisting neck and back condition." Moreover, Draper opined that Brunner's injury "gave the patient a simple temporary aggravation of a preexisting pathology." Accordingly, there was evidence, offered by both parties, from which the ALJ could have concluded that the "2003 fall, exacerbated her inexorable development of degenerative disease."

Secondly, assuming *arguendo* that the ALJ's conclusion that the 2003 fall exacerbated Brunner's injury was unsupported by the evidence, that fact alone does affirmatively establish that the 2003 fall was the natural and proximate cause of Brunner's disability. Indeed, the relevant question in this appeal is not whether there was substantial evidence to support the ALJ's finding that the 2003 fall exacerbated Brunner's prior condition. Rather, the relevant question is whether there is substantial evidence to support the ALJ's conclusion that the 2003 fall was not the natural and probable cause of Brunner's disability. Accordingly, it is not sufficient for Brunner to merely disprove the RPS's argument that the fall did not exacerbate Brunner's ailments. Instead, Brunner bears the

burden to affirmatively show by the preponderance of the evidence that her disability was the natural and proximate result of her fall. In this case the ALJ found that Brunner "ha[d] not shown, by a preponderance of the evidence, that the December 10, 2003 work-related fall was the 'sole natural and proximate cause' of her disability as the case law has defined those terms."

Although the degree of deference we afford to the factual findings of the ALJ is already quite high, our holding is buttressed by the failure of the ALJ to be persuaded of a particular fact, rather than her being affirmatively persuaded:

> [I]t is far easier to sustain as not clearly erroneous the decisional phenomenon of not being persuaded than it is to sustain the very different decisional phenomenon of being persuaded. Actually to be persuaded of something requires a requisite degree of certainty on the part of the fact finder (the use of a particular burden of persuasion) based on legally adequate evidentiary support (the satisfaction of a particular burden of production by the proponent). There are with reasonable frequency reversible errors in those regards. Mere non-persuasion, on the other hand, requires nothing but a state of honest doubt. It is virtually, albeit perhaps not totally, impossible to find reversible error in that regard.

Starke v. Starke, 134 Md. App. 663, 680-81 (2000); *accord Pollard's Towing, Inc. v. Berman's Body Frame & Mech., Inc.*, 137 Md. App. 277, 289-90 (2001) ("Far less is required to support a merely negative instance of non-persuasion than is required to support an affirmative instance of actually being persuaded of something.").

In this case, Brunner failed to persuade the ALJ that her disability was the natural and proximate result of her fall on December 10, 2003. The ALJ was free to find Draper's

opinions more credible than Fanchetti's "conclusory" assessment. To be sure, Draper's testimony that Brunner's disability was the result of preexisting degenerative disc disease constitutes substantial evidence supporting the ALJ's finding. Moreover, Draper's testimony was supported by medical records originating before the alleged fall. Indeed, the RPS's evidence, if believed, was more than sufficient to refute Brunner's claim that her disability was the natural and proximate result of her fall on December 10, 2003.

In her briefs, Brunner gives a comprehensive overview of all the evidence presented to the ALJ that suggest that Brunner's fall was the natural and proximate cause of her disability. The ALJ, however, was under no obligation to accept Brunner's interpretation, so long as the conclusion that the ALJ ultimately drew was supported by substantial evidence. Taken in total, Brunner's claims amount to a mere disagreement as to the weight the ALJ afforded to the evidence offered by Brunner. Our role on appeal, however, is not to determine whether we agree with the assessment made by the ALJ after considering all of the evidence. Rather, we merely seek to determine whether there is a minimum quantum of evidence which "a reasonable mind might accept as adequate to support a conclusion." *Tomlinson*, *supra*, 219 Md. App. at 614 (internal quotation omitted).

In this case, the ALJ concluded that Brunner had "not shown, by a preponderance of the evidence, that the December 10, 2003 work-related fall was the 'sole natural and proximate cause' of her disability." We hold that there is clearly sufficient evidence in the

record to support this conclusion. We, therefore, affirm the judgment of the Circuit Court for Montgomery County.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. APPELLANT TO PAY COSTS.