Circuit Court for Baltimore City
Case No. 24-C-19-005248

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0030

September Term, 2021

MATTHEW PETTY

v.

FIRE & POLICE EMPLOYEES' RETIREMENT SYSTEMS OF BALTIMORE CITY

Reed,
Ripken,
Battaglia, Lynne A.,
(Senior Judge, Specially Assigned)

JJ.

Opinion by Reed, J.

Filed: September 6, 2022

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

On October 23, 2014, Matthew Petty ("Appellant"), filed an application for Line of Duty ("LOD") disability retirement benefits with the Fire & Police Employees' Retirement Systems of Baltimore City ("Appellee") based on a thumb injury sustained on August 12, 2013 while working for the Baltimore City Fire Department ("BCFD"). Following two hearings held on October 27, 2015 and December 17, 2015, the hearing examiner denied Appellee's application.

Appellant sought judicial review of the hearing examiner's decision in the Circuit Court for Baltimore City. The circuit court remanded the case because Appellee presented previously undisclosed surveillance video evidence of Appellant lifting ductwork from his truck, without physical difficulty, and a doctor's report reversing his medical assessment that deemed Appellee disabled from performing his job and Appellant's procedural due process rights had been violated. Appellee appealed, and this Court affirmed the decision of the circuit court.

On remand, a hearing examiner held a second hearing on July 16, 2019 ("remand hearing") to allow Appellant to introduce rebuttal evidence. Appellant provided an independent medical evaluation prepared by Dr. Sheldon Milner and attempted to enter demonstrative evidence of ductwork to show what he was lifting from his truck in a surveillance video, which was not allowed into evidence because it was not similar enough in material age or size to the material portrayed in the video. Following the hearing, the hearing examiner denied Appellant's application for LOD benefits.

Appellant brings two questions on appeal, rephrased for clarity:[1]

I. Did Appellee err in denying Appellant Line of Duty ("LOD") Disability Retirement Benefits?

II. Did the hearing examiner err in excluding evidence presented during the second evidentiary hearing?

For the following reasons, we affirm the circuit court's decision.

[1] Appellant posed the following six questions on appeal:

1. Did the [c]ircuit [c]ourt err as a matter of law when it affirmed the decision of the [h]earing [e]xaminer denying Mr. Petty his [L]ine of [D]uty disability retirement benefits?
2. Was the decision of the [c]ircuit [c]ourt[ ] and the [h]earing [e]xaminer denying [appellant] his [L]ine of [D]uty disability retirement benefits[ ] arbitrary, capricious, and unsupported by competent material and substantial evidence in light of the entire record and the preponderance of evidence burden which [appellant] clearly met?
3. Did the [c]ircuit [c]ourt err in affirming the decision of [h]earing [e]xaminer [ ] when, following a remand [o]rder from the Circuit Court of Baltimore City, the [h]earing [e]xaminer totally failed to give any weight to rebuttal evidence produced by the [appellant], and otherwise excluded rebuttal evidence produced by the [appellant], all contrary to the remand [o]rder of the Circuit Court of Baltimore City, thereby acting arbitrarily, capriciously and illegally, and in discriminatory manner against this [appellant].
4. Did the [c]ircuit [c]ourt err as a matter of law when it determined that [Appellant] was not entitled to [L]ine of [D]uty disability retirement benefits, following a determination that he was so disabled by the agency employing him, namely the Fire Department of Baltimore City?
5. Was [appellant] denied due process and basic fairness under the Maryland Declaration of Rights and pursuant to Article 24 Administrative Agencies performing quasi-judicial when, following a [c]ourt [o]rder allowing for the production of rebuttal evidence, that evidence was excluded and/or totally disregarded?
6. Should the decision of the Baltimore City Fire Department as an agency have been considered as presumptively valid by the [h]earing [e]xaminer and Appellee Board?

FACTUAL & PROCEDURAL BACKGROUND

After extinguishing a fire at a building on August 12, 2013, Appellant went into the building to open up walls and fell several times, eventually falling through the floor. As a result, Appellant sustained injuries to his right thumb and sought medical treatment at Baltimore City's Public Service Infirmary ("PSI") at Mercy Hospital on August 14, 2013, where Appellant was seen by Dr. Vipul Nanavati, a hand specialist. Over the next week, Appellant was seen by Dr. Keith Lee and Dr. Nanavati in his follow up appointments. Appellant was diagnosed with a fracture and collateral ligament tear at the ulnar nerve and received treatment for his injury, which included pain medication and a splint for his thumb. Appellant was immobilized for four weeks and was scheduled to be evaluated after the four weeks had passed. On September 4, 2013, Dr. Nanavati noted good progress, but advised Appellant to always wear his splint and Appellant was still restricted to "no strenuous use of his right hand . . . "

On October 2, 2013, Dr. Nanavati again noted positive progress in Appellant's thumb, advised discontinued use of the splint, and physical therapy. Appellant began physical therapy the following day, which lasted from October 17, 2013 through December 5, 2013. During one of his check-ups, Appellant reported pain during activities but could still do carpentry tasks if longer break times were allotted.

After an MRI revealed that the Appellant's ligament had not healed properly, Dr. Nanavati performed surgery on Appellant on January 9, 2014. Appellant continued physical therapy following his thumb surgery from February 18, 2014 through April 18, 2014. During physical therapy, Appellant reported, "increased grip flexibility and

decreased overall pain intensities [,]" and had completed "home remodeling activities including hanging and carrying dry wall, hammering, and use of other tools, without pre/post-operative splinting." On March 31, 2014, Appellant reported that his thumb was improving considerably, but had some instances of dropping items which was believed to be in connection with pain onset in his thumb. On April 14, 2014, during a functional capacity evaluation ("FCE"),

> [t]he [Appellant] demonstrated a minor range of motion deficit in the right thumb. He had a 4+l5 strength in the right thumb with the exception of radial abduction. The incision on the ulnar aspect of the right thumb was well healed. The [Appellant] reported no pain with palpitation to the right thumb. The [Appellant] did however report that the thumb was "sore" and "achy in the bone." The [Appellant] "demonstrated the ability to perform work in the Very Heavy Physical Demand Category of Work." He was able to lift 130 pounds floor to waist, 105 pounds medic-waist, and 55 pounds waist to overhead. In addition, he carried 105 pounds bilaterally and demonstrated 105 pounds pushing forces and 103 pounds of pulling forces. It was further noted that he could climb a ladder, vertical climb, drag a 165-pound rescue dummy and climb stairs repetitively while wearing an empty oxygen tank. The [Appellant] demonstrated equivalent capabilities with both hands. Pain of 0/10 was reported at the beginning of testing and pain as 1/10 was reported after functional testing. Increased pain was reported with repetitive gripping. In spite of showing the ability to work in this category [Appellant] still complained of sharp pain in his right thumb, difficulty grasping items and dropping items. This raised safety concerns given his occupation. Therefore, [Appellant] was advised to enter a work conditioning program in order to be able to grip and grasp without pain so that he could return to work as a firefighter.

Appellant completed a work conditioning program through a program called "Rehab at Work". Upon completion of a work conditioning program, on May 21, 2014, Dr. Nanavati noted during an appointment that,

> the avulsion was fully healed in its anatomic location. Some fullness and thickness were noted over the area of the incision . . . the thumb joint was perfectly lined up, the collateral ligament was perfectly intact, there was no

> instability of the joint and no hypertrophic changes or calcifications in the thumb and no evidence of arthritis.

In the same appointment, Appellant specifically asked Dr. Nanavati to note in his reports reported pain, discomfort, and inability of fine manipulation, gripping, and grasping. Dr. Nanavati also noted Appellant was able to type on his smartphone without any difficultly, causing Dr. Nanavati's reported skepticism of Appellant's subjective statement of pain.

On June 26, 2014, Appellant was deemed permanently unable to return to work during a follow up visit at PSI with Dr. James Levy, M.D., the official physician for the BCFD. At that exam, Appellant had "an incomplete fist, limited full flexation of the thumb and tenderness over the surgical site." Dr. Levy cited "the [Appellant's] concern about his grip, ladder climbing, and emergency vehicle driving as disabling factors." On August 14, 2014, in the work condition discharge summary, it was noted that Appellant demonstrated the ability to do heavy work but suffered from an occasional sharp pain in the right hand that caused him to drop items. On September 25, 2014, Dr. Lee continued the Appellant as "off-duty" due to his personal reports of pain in the right thumb and reported difficulty grasping and dropping items.

On October 23, 2014, Appellant applied for "Line of Duty" ("LOD") Disability Retirement. After his application, the City of Baltimore's Fire and Police Employee's Retirement System ("Appellee") hired a private investigator who recorded video of Appellant unloading scrap metal of various sizes with his gloved hands and showed no visible signs of discomfort, pain, or weakness in his hands. The investigator also noted Appellant was also able to grip his keys in his hand with no discomfort.

On February 12, 2015, Dr. Louis Halikman, M.D., examined Appellant at the request of Appellee. Dr. Halikman concluded that Appellant is unable to carry out his job duties at BCFD. Accordingly, Appellant was terminated from BCFD due to his injury. However, at some point after his examination with Appellant, Dr. Halikman was shown the surveillance video and concluded "[Appellant] is not disabled and . . . is capable of working at his regular job as a firefighter".

On October 27, 2015, Judy Smylie, the hearing examiner, held a hearing regarding Appellant's LOD disability benefits. During the hearing, two previously undisclosed pieces of evidence were entered into evidence. Appellee presented a video surveillance recording which showed Appellant lifting metal material from the back of his truck. Additionally, Appellee also presented the second report by Dr. Halikman reversing his earlier determination that Appellant was permanently disabled from performing his job at BCFD based on the video surveillance recording.

In a written decision on December 17, 2015, the hearing examiner found that based on the testimony, argument, and evidence in the record, Appellant had not met his burden of proving that he was permanently disabled and denied disability benefits. Appellant appealed to the Circuit Court of Baltimore City.

On September 12, 2016, the Circuit Court for Baltimore City declined to address the merits of the case and remanded the case to allow for rebuttal evidence from Appellant addressing the previously undisclosed video surveillance recording and Dr. Halikman's second report on procedural due process grounds. Appellee appealed the circuit court's

decision, and on April 2, 2019, this Court affirmed the circuit court decision to remand the case back to the hearing examiner regarding Appellant's LOD Disability Retirement.

The hearing examiner, Ms. Smylie, held an administrative hearing in accordance with this Court's remand order on July 16, 2019 to allow Appellant to present additional evidence rebutting Appellee's surveillance video. During the remand hearing, Appellant provided an independent medical evaluation prepared by Dr. Sheldon Milner as rebuttal evidence. Appellant also attempted to enter demonstrative evidence of ductwork to show what he was lifting from his truck in the surveillance video. The hearing examiner excluded the evidence because there was not enough similarity between the ductwork presented in the hearing with the ductwork in the surveillance video. The hearing examiner made this determination based on the varying sizes and age (e.g., older ductwork from the Appellant's house versus newer ductwork presented in the hearing) of the material the presented ductwork was composed of.

Following the remand hearing, the hearing examiner issued a second decision finding that Appellant did not meet the burden of proof proving he was permanently disabled. The hearing examiner explained that Appellant met all the requirements to receive benefits, with one exception – failing to show enough evidence that Appellant's sustained injuries exist to a degree that completely prevents Appellant from carrying out his job duties at the BCFD.

The hearing examiner concluded that imaging results on May 21, 2014 by Dr. Nanavati showed objective evidence that Appellant had completely and fully recovered. Moreover, the hearing examiner stated that the claim of disability was "based primarily on

the [Appellant's] subjective claims of pain, instability, and lack of grip strength. It is noteworthy that the Claimant specifically asked Dr. Nanavati to note his reports . . . " However, the hearing examiner noted that the credibility of the statement s called into question by conflicting evidence, where Dr. Nanavati observed behavior that contradicted Appellant's report, the Appellant repeatedly reported no pain in the right thumb in follow up exams and work hardening sessions, Appellant lifted 130 pounds in weight, demonstrated the ability to perform work in the "Very Heavy Physical Demand Category of Work," and freely engaging in strenuous home renovations. In examining all the testimonial and medical examination evidence, the hearing examiner denied Appellant's application for LOD benefits.

Appellant appealed the decision to the Circuit Court of Baltimore City, which affirmed the hearing examiner's decision. *In the Matter of the Petition of Matthew Petty*, No. 24-C-19-005248 (Md. Cir. Ct. Feb.12, 2021). The circuit court also declined to remand the case for a new hearing as requested by Appellant, after the hearing examiner did not allow one of Appellant's demonstrative pieces into evidence because it was within the hearing examiner's discretion to accept the piece into evidence. *Id.* at 40.

On March 3, 2021, Appellant timely filed this appeal.

DISCUSSION

I. Denial of Line of Duty ("LOD") Disability Retirement Benefits

A. STANDARD OF REVIEW

> When [an appellate court] reviews the decision of an administrative agency, we employ the same standards as would the circuit court, and the inquiry is not whether the circuit court erred, but rather whether the administrative

> agency erred. Review of most quasi-judicial state administrative decisions, such as the present one, is governed by the Maryland Administrative Procedure Act.

Consumer Prot. Div. v. Morgan, 387 Md. 125, 160 (2005). The Maryland Administrative Procedure Act gives this Court, *inter alia*, the discretion to decide whether an administrative decision was supported by substantial evidence in light of the entire record as submitted or is arbitrary or capricious.[2] *See* Md. Code Ann., State Gov't § 10-222 (h)(3)(v); (vii). The review of a final decision by an administrative agency is limited to determining whether an agency had substantial evidence to support its decision at the time it was rendered. *Consumer Prot. Div.*, 387 Md. at 160.

[2] Maryland Code, State Government, §10-222. Judicial review states:

. . .

> (h) In a proceeding under this section, the court may:
>
> (1) remand the case for further proceedings;
>
> (2) affirm the final decision; or
>
> (3) reverse or modify the decision if any substantial right of the petitioner may have been prejudiced because a finding, conclusion, or decision:
>
> (i) is unconstitutional;
>
> (ii) exceeds the statutory authority or jurisdiction of the final decision maker;
>
> (iii) results from an unlawful procedure;
>
> (iv) is affected by any other error of law;
>
> (v) is unsupported by competent, material, and substantial evidence in light of the entire record as submitted;
>
> (vi) in a case involving termination of employment or employee discipline, fails to reasonably state the basis for the termination or the nature and extent of the penalty or sanction imposed by the agency; or
>
> (vii) is arbitrary or capricious.

. . .

Md. Code Ann., State Gov't § 10-222 (h).

When the record contains substantial evidence supporting the agency's determination, this Court will refrain from substituting our judgment for that of the administrative agency. *Id.* "In applying the substantial evidence test, a reviewing court decides 'whether a reasoning mind reasonably could have reached the factual conclusion the agency reached.'" *Bd. of Physician Quality Assur. v. Banks*, 354 Md. 59, 68 (1999) (citing *Bulluck v. Pelham Wood Apts.*, 283 Md. 505, 512 (1978)). Further, the decision made by an administrative body is presumed to be prima facie correct. *Marsheck v. Board of Trustees of Fire & Police Employees' Retirement System of the City of Baltimore*, 358 Md. 393, 402 (2000); *Terranova v. Board of Trustees of Fire & Police Emps. Ret. Sys. of Baltimore City*, 81 Md. App. 1, 9 (1989) (citing *Baltimore Lutheran High Sch. Ass'n, Inc. v. Emp. Sec. Admin.*, 302 Md. 649, 662-63 (1985)).

B. PARTIES' CONTENTIONS

Appellant asserts that the circuit court erred in affirming the decision of the hearing examiner because the decision was "arbitrary, capricious, and unsupported by competent material and substantial evidence in light of the entire record and required burden of proof."

Appellant declared

> [t]he only evidence that he could not [sic] perform his duties as a fire fighter was Dr. Halikman's second report . . . There was insubstantial evidence to support the finding of the [h]earing [e]xaminer, and the affirming of the same by the Circuit Court for Baltimore City.

Lastly, Appellant asserts that the hearing examiner and Appellee is "without Fire Department expertise" and determined that Appellant was deemed "not disabled based on the slimmest scintilla of evidence . . . "

However, Appellee asserts that there was substantial evidence before the hearing examiner in which the hearing examiner took into consideration. Appellee asserts hearing examiner's decision is "presumptively correct and may not be disturbed on review except when arbitrary, illegal, capricious, or discriminatory." BALT. CITY CODE ART. 22 §33(1)(12)**;** Appellee supports their assertion by referencing the medical evidence cited by the hearing examiner in support of her decision, such as Dr. Nanavati's objective expert orthopedic opinion that Appellant was not disabled and the Appellant engaging in physically demanding tasks both in his home and in physical training with no observed pain. Further, in weighing the evidence before the hearing examiner, Appellee states that it is the administrative agency, as the fact-finder, who assesses the evidence, citing *Terranova v. Bd. Of Trustees of Fire & Police Employees Ret. Sys. of Baltimore City*, 81 Md. App. 1 (1989).

ANALYSIS

A hearing examiner denied Appellant LOD disability benefits filed under BALT. CITY CODE, ART. 22 § 34 (e-2).[3] Benefits for LOD disability can only be awarded based

[3] Baltimore City Code, Article 22, Section 34 (e-1), Line of Duty Disability Benefits, states:

(1) A member shall be retired on a line-of-duty disability retirement if:

(i) a hearing examiner determines that the member is totally and permanently incapacitated for the further performance of the duties of his or her job classification in the employ of Baltimore City, as the result of an injury arising out of and in the course of the actual performance of duty, without willful negligence on his or her part; and

(ii) for any employee who became a member on or after July 1, 1979, the application for line-of-duty disability benefits is filed within 5 years of the date of the member's injury.

on permanent physical incapacity to do the job. *Couret-Rios v. Fire & Police Employees' Ret. Sys. of City of Baltimore*, 468 Md. 508, 511 (2020). The hearing examiner has the power to determine whether the member is totally and permanently incapacitated. BALT. CITY CODE ART. 22 § 34 (e)(1)(i). The decision made by an administrative body is presumed to be prima facie correct. *Marsheck*, 358 Md. at 402.

It is undisputed that Appellant sustained injuries in a serious on the job incident. At issue in this case is the July 16, 2019 determination by the hearing examiner to deny Appellant's LOD benefits because of the conflicting evidence before her from testimony, video surveillance, and medical evaluations.

A. Hearing Examiner's Credibility

Appellant questioned the hearing examiner's credibility, arguing that the hearing examiner lacked the expertise to determine the outcome of the case. In their brief, Appellant stated,

> It just makes no sense whatsoever that the Fire Department would terminate someone medically from employment due to a line of duty disability after over 19 years of service, and then have a separate entity without Fire Department expertise determine that the individual was not disabled based on the slimmest scintilla of evidence, convincingly rebutted.

> (2) Application and filing deadline. To retire under this subsection, the member must:
>
> (i) apply to the Board of Trustees, on a form approved by the Board; and
>
> (ii) submit the application to the Board no later than 1 year following the member's last day of City employment.
>
> . . .

BALT. CITY CODE ART. 22 § 34 (e)(1-2).

However, as stated by the Court of Appeals,

> [u]nder Article 22, Section 33(l)(1), of the Baltimore City Code, F&P hearing examiners are selected on the basis of "demonstrated knowledge and competence in disability claims evaluation." In addition, under § 33(l)(12), the determination of the hearing examiner is "presumptively correct" and "may not be disturbed on review except when arbitrary, illegal, capricious, or discriminatory."
>
> Due to the expertise of the hearing examiners, in reviewing administrative decisions this Court "must not itself make independent findings of fact or substitute its judgment for that of the agency."

Couret-Rios, 468 Md. at 527–28. Thus, to Appellant's dismay, this Court must presume that the hearing examiner is competent and that their determination is presumptively correct.

Next, Appellant asserts that the hearing examiner's written decision following the July 16, 2019 hearing was "arbitrary, capricious, and unsupported by competent material and substantial evidence in light of the entire record and required burden of proof." The hearing examiner's conclusion — that the Appellant failed to show enough evidence that Appellant's sustained injuries exist to a degree that completely prevents Appellant from carrying out his job duties at the BCFD — was not "arbitrary, illegal, capricious, or discriminatory." BALT. CITY CODE ART. 22 §33(1)(12). As discussed in further detail in the sections below, the hearing examiner considered conflicting medical reports from different doctors, reports from Appellant's physical therapy, and evidence of Appellant freely undertaking strenuous home renovations. In reviewing the evidence before the hearing examiner, this Court

> cannot say, therefore, that the determination of the hearing examiner was "arbitrary, illegal, capricious, or discriminatory." BALT. CITY CODE ART. 22

> §33(1)(12). Nothing about that conclusion is unreasonable and we refuse to 'make independent findings of fact or substitute [our] judgment for that of the agency.'" Md.-National Capital Park Planning Comm'n v. *Anderson*, 395 Md. 172, 180–81, (quoting *Balt. Lutheran High Sch. Ass'n*, 302 Md. at 662).

Couret-Rios, 468 Md. at 538.

B. Substantial Evidence Test

In reviewing the hearing examiner's factual findings, we must apply the substantial evidence test to the final decision. *Travers v. Baltimore Police Dept.*, 115 Md. App. 395, 419 (1997). "Under the substantial evidence standard, a reviewing court must uphold an agency's determination if it is rationally supported by the evidence in the record, even if the reviewing court, left to its own judgment, might have reached a different result." *Id.* at 420. "The weighing of the evidence and the assessment of witness credibility is for the finder of fact, not the reviewing court." *Terranova*, 81 Md. App. at 13. In reviewing the decision using the substantial evidence test, we disagree with Appellant.

This Court holds that the hearing examiner's decision is supported by substantial evidence. We agree with the circuit court in their conclusion that the hearing examiner "had an enormous amount of evidence that she relied on [such as] medical evidence [and] opinion evidence by the different experts." Transcript of Record at 39, *In the Matter of the Petition of Matthew Petty*, No. 24-C-19-005248 (Md.Cir.Ct. Feb.12, 2021). The hearing examiner summarized in great detail the medical reports and outcomes from Appellant's medical examinations with Dr. Nanavati, Dr. Lee, and Dr. Halikman from the inception of his treatments on August 14, 2013, through the end of his treatment in 2014. The surgery, physical therapy, and work hardening and conditioning sessions are also taken into

consideration. Surveillance video shot by an investigator hired by Appellee capturing the Appellant unloading scrap metal from his pick-up truck was also considered.

During the remand hearing, the hearing examiner admitted rebuttal evidence from a physical examination report from Dr. Milner. Dr. Milner's report concluded that Appellant's "right thumb has sixty percent permanent partial impairment . . . and the right thumb injury precludes the [Appellant's] ability to safely return to work as a firefighter . . . "

The hearing examiner also noted in her decision that

> objective medical evidence in the record shows that [Appellant] recovered from the injury. The MRI and C-Arm imaging results on May 21, 2014 showed that the avulsion fracture was fully healed, the joint was lined up, there was no evidence of arthritic changes. There was no instability of the joint and no hypertrophic changes or calcifications. While some fullness and thickness were noted over the area of the incision, Dr. Nanavati did not opine that those changes would be [sic] prevent the [Appellant] from the full use of his hand.

Moreover, the hearing examiner considered the Appellant's claims "of pain, instability, and lack of grip strength". The hearing examiner noted Appellant's claims were subjective in nature, that Appellant specifically requested the report of pain to be included in Dr. Nanavati's report on the medical record, and Dr. Nanavati "observed behavior by the claimant which belied his subjective claims." Dr. Nanavati, in his report stated,

> It is important to note that I walked out of the room to look at the MRI and when I came back in the room[,] [Appellant] was hunched over on his phone using his thumbs without any difficulty typing away on his smart phone device using his thumbs to type in a very rapid pace.
>
> Therefore, I have to question exactly how much pain [ ] this gentleman [is] in when he can type on his smart phone without any difficulty or stress . . .

> I do believe he can use his hand because I think it is healed, and I do not think that pain should stop him from being functional . . .

Further, Appellant's claims are called into question by other evidence, such as: (1) the April 14, 2014 FCE, where Appellant reported soreness[4] but no pain with palpitation to the right thumb and Appellant lifted 130 pounds in weight, further demonstrating the ability to perform work in the "Very Heavy Physical Demand Category of Work"; (2) absence of pain during the many work hardening sessions; (3) Appellant freely engaging in strenuous extracurricular home renovations; and (4) Dr. Halikman's later determination that Appellant is not disabled upon viewing the surveillance video.

Thus, the record reflects that the hearing examiner had substantial evidence in which, at balance between the objective and subjective evidence, a reasonable person could arrive at the decision made by the hearing examiner. For these reasons, we do not hold the hearing examiner's decision to be arbitrary, capricious, and unsupported by competent material and substantial evidence. Whether we agree with hearing examiner's decision or not, under *Travers* and *Terranova*, it is not proper for this court to weigh the evidence or make any assessments of witness credibility. Thus, we decline to do so.

C. Decisions by the Hearing Examiner

Appellant, in their brief, questioned if "the decision of the Baltimore City Fire Department as an agency should have been considered as presumptively valid by the [h]earing [e]xaminer and Appellee Board." For context, the Baltimore City Fire and Police

[4] "The [Appellant] reported no pain with palpitation to the right thumb. The [Appellant] did however report that the thumb was "sore" and "achy in the bone."

Employee's Retirement System (F&P), Appellee, is a separate entity from the Baltimore City Fire Department. The F&P Retirement System is a benefit system statutorily established to provide retirement allowances and death benefits to firefighters and police officers paid by the Mayor & City Council of Baltimore. *Couret-Rios*, 468 Md. at 512; *see* Balt. City Code, Art. 22, §§ 29–49. The hearing examiner is the fact finder in an administrative hearing held when there are disputes about F&P benefits.

On September 24, 2014, the BCFD entered a disposition deeming Appellant "permanently unable to perform all the essential functions of a firefighter." There is nothing in the record that indicates that the hearing examiner disputes the validity of the fire department's determination, so the question seems moot as presented. However, arguendo, it seems that Appellant in posing this question, would have the hearing examiner, by default, align their decision with that of the BCFD. However, as two separate entities, each Appellee and the BCFD have the agency to make their own separate determinations on an issue.

The hearing examiner made their own independent determination on the matter of Appellant's benefits for their agency, which is well within their purview. Further, the hearing examiner has the power to determine whether the member is totally and permanently incapacitated, and that decision is also presumed to be prima facie correct and presumptively valid by this Court. BALT. CITY CODE ART. 22 § 34 (e)(1)(i); *Bereano*, 403 Md. at 732.

D. Weight of Dr. Sheldon Milner's Medical Examination Report

Appellant argues that the hearing examiner, when considering rebuttal evidence of a medical examination by Dr. Sheldon Milner, M.D. "evidencing a 60% [partial] disability of the right thumb[,] . . . [the medical examination] was not given any weight whatsoever." However, it is not this Court's role to act as a finder of fact to assess the credibility of Appellant's claims. *Terranova*, 81 Md. App. at 13 (1989). "Furthermore, not only is it 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." *Baltimore Lutheran High Sch. Ass'n, Inc. v. Emp. Sec. Admin.*, 302 Md. 649, 663 (1985).

It is reflected in the record that the hearing examiner considered Dr. Milner's medical examination as conflicting rebuttal evidence, as evidenced through documentation and a summary of the medical evaluation prepared by Dr. Sheldon Milner in the hearing examiner's report. Dr. Milner's report was in conflict with other evidence presented supporting the notion that Appellant was not totally and permanently incapacitated. It seems to this Court that the hearing examiner, as the fact finder, made their determination in light of this evidence. This Court is limited in the scope of review on the weight given each piece of evidence and must defer to the hearing examiner's inferences and determinations.

II. Demonstrative Rebuttal Evidence at the Remand Hearing

A. Standard of Review

Generally, administrative agencies are not bound to the technical rules, but such agencies must observe the basic rules of fairness to parties appearing before them. *Cecil*

Cty. Dep't of Soc. Servs. v. Russell, 159 Md. App. 594, 612 (2004); *Hyson v. Montgomery County Council*, 242 Md. 55 (1966). The concept that an administrative proceeding must be fundamentally fair to the parties pervades Maryland's administrative law. *Cecil Cty. Dep't of Soc. Servs. v. Russell*, 159 Md. App. at 613.

B. PARTIES' CONTENTIONS

Appellant contends that the hearing examiner erroneously excluded demonstrative rebuttal evidence during the remand hearing, stating that the "demonstrative evidence of ductwork produced at the hearing was relevant and was sufficient to rebut Dr. Halikman's findings with regard to him reversing his opinion of Mr. Petty's disability." Appellant states, "[the circuit court] clearly intended for rebuttal testimony not just to be allowed in to formalize a record, but to be considered and given appropriate weight."

Appellee contends that the hearing examiner rightfully found the ductwork lacked sufficient probative evidentiary value and reliability to be entered into evidence because, "by Appellant's own admission," the ductwork was a different size, shape, weight, and model than the ductwork shown on the surveillance video.

C. ANALYSIS

During the remand hearing, Appellant introduced ductwork material as demonstrative evidence[5] to rebut surveillance video in which Dr. Halikman used as a basis of his medical evaluation reversal. In the surveillance video, Appellant is shown to be

[5] Demonstrative evidence is evidence that "played no part in the controversy about which the trial is being conducted and is not itself substance evidence, but is used merely to illustrate or to explain a witness's testimony." Real and demonstrative evidence, 5 Maryland Evidence, § 403:3.

unloading scrap metal from his truck to a facility where he sold the scrap metal. To rebut the surveillance video, Appellant brought material from his home to court that Appellant asserts was "similar in nature to that which [Appellant] was unloading from his truck."

Appellee objected on the grounds that the ductwork material Appellant presented was not similar in size or aged material that was tossed in the video, but the hearing examiner gave Appellant an opportunity to present the evidence. During an exchange between Appellant and Appellee at the remand hearing, Appellant affirmed that the ductwork presented in court was of a different age, size, and weight from that in the video surveillance recording.

> [Appellee]: So the surveillance showed you loading ductwork on June 15, 2015. Was this ductwork removed from your house at the same time as the other ductwork or was it removed at a later time?
>
> [Appellant]: So you are misunderstanding me. This is a piece of ductwork that is from my house. It's not the old ductwork. The old ductwork was all taken out and removed.
>
> . . .
>
> [Appellant]: [T]he stuff I was pulling off of the truck was 5-foot lengths. I didn't have 5-foot length. This is about 2.5 foot length. So twice this would be the weight of the stuff I was pulling off of my truck . . .
>
> [Appellee]: So what I'm hearing from you is on the video what you can see is you removing larger rectangular ductwork, which weighs more than the ductwork that you just brough instead, correct? That's what –
>
> [Appellant]: Both.
>
> [Appellee]: – that's what you just said.
>
> [Appellant]: No. Both. I was bringing both. I, off my truck, I unloaded both 6-inch and rectangular square duct or rectangular duct off of my truck. I didn't have any rectangular duct to bring in.

> [Appellee]: With regard to that particular piece, I think we've established that it's not representative of everything that was on the video. It's a different size, and it's a different model, meaning this is newer ductwork, whereas the other ductwork was older . . .
>
> [Hearing Examiner]: I do not believe that given the fact that this is new and what you pulled out of your house is old, I just can't be sure that it's close enough to what you were moving to be – to have evidentiary value. I mean as – housing – the things that you use to build houses, as they get newer, they get better at making them. And I can't say that this is the same as what you pulled out of your house five years ago, four years ago. I don't even know how old your house is. So it could be way older than that. So I just don't think that there's enough similarity or that I can be sure that there is enough that I can rely upon it to make my decision. So I'm not going to admit it.

The hearing examiner gave Appellant the opportunity to present the evidence on the record. Appellant established that the ductwork presented in court was different in age, shape, weight, and size. Appellee objected and stated their grounds for objection. Both parties were given an opportunity to weigh in on the admission of the evidence before the hearing examiner excluded the evidence, and as such, this Court believes that the hearing examiner's determination to exclude the demonstrative evidence was fair to both parties.

CONCLUSION

For the reasons stated above, we affirm the circuit court's decision.

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