Circuit Court for Wicomico County
Case No. C-22-CV-17-000289

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0046

September Term, 2018

WILLIAM J. FOARD

v.

MARYLAND STATE RETIREMENT AND PENSION SYSTEM

Reed,
Beachley,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: March 5, 2021

The Maryland State Retirement and Pension System ("Appellee" or "RPS") awarded William Foard ("Appellant") ordinary disability benefits, but denied him accidental disability benefits. The RPS's Board of Trustees then accepted the RPS's recommendation. Appellant appealed Appellee's decision to the Office of Administrative Hearings ("OAH"). The Administrative Law Judge ("ALJ") upheld Appellee's decision and on April 1, 2014, Appellant petitioned for judicial review by the Circuit Court for Wicomico County. On March 3, 2015, the circuit court affirmed the ALJ's decision and Appellant appealed to this Court. On May 3, 2016, this Court reversed and remanded the case. In a "Proposed Decision on Remand," the ALJ upheld the denial of Appellant's accidental disability benefits. Subsequently, Appellant petitioned for judicial review by the circuit court. On March 5, 2018, the circuit court upheld the ALJ's decision. It is from this denial that Appellant files this timely appeal. In doing so, Appellant brings one question for our review, which we have rephrased for clarity:[1]

> I. Did the ALJ apply the correct legal standard when it upheld the denial of Appellant's "accidental" disability benefits?

For the foregoing reasons, we answer in the affirmative and affirm the decision of the circuit court.

[1] Appellant presents the following question:

> 1. Did the ALJ apply the correct standard of causation in holding that because Mr. Foard's accident aggravated a pre-existing injury, he was therefore disqualified from receiving disability retirement benefits?

FACTUAL AND PROCEDURAL BACKGROUND

Appellant's Medical History Prior to the Alleged Accident

On August 25, 2009, before the incident that is the subject of this appeal, Appellant received treatment for his left knee at Peninsula Orthopedic Associates, P.A. ("Peninsula"). The treating physician diagnosed Appellant with early arthrosis and Appellant requested and received a cortisone injection. On April 28, 2010, Appellant received treatment from Peninsula for a second time. Appellant reported that while lifting a box he "felt something tear" and "something catching" in his knee. Appellant took a Magnetic Resonance Image ("MRI") and the MRI "show[ed] a small cyst on the anterior side of the [anterior cruciate ligament ("ACL")], as well as substantial degeneration of the medical meniscus."

Dr. Jason M. Scopp, a treating physician at Peninsula, discussed surgery with Appellant and obtained his consent for arthroscopic surgery. On July 29, 2010, Dr. Scopp performed arthroscopic surgery on Appellant's left knee. During the surgery, Dr. Scopp noted a partial tear of Appellant's ACL. During an August 2010 visit to Peninsula, Appellant reported moderate pain and was diagnosed with tendinitis. Dr. Scopp cleared him to return to work on January 1, 2011, after he had been out of work for five months.

Appellant's 2011 Accident and Medical Treatment

On March 14, 2011, Appellant, while employed by Dorchester County as a paramedic, was transporting a patient when the patient fell from his gurney. Appellant attempted to keep the patient from hitting the floor, and unfortunately, he injured his left knee in the process. Appellant was diagnosed with having a chondromalacia or tear to his

ACL. On July 19, 2011, Dr. Scopp noted Appellant's complaints of continuing pain, injected his knee with Celestone and Lidocaine, and recommended a follow-up in three months. On October 31, 2011, Appellant had surgery to repair the tear to his knee but the surgery was unsuccessful. On December 20, 2011, Dr. Scopp noted that Appellant remained in "dull constant" pain and advised another consultation in two months. After participating in thirty-three physical therapy sessions, Appellant was discharged from physical therapy on February 24, 2012. Subsequently, Appellant applied for and received Worker's Compensation benefits. Initially the RPS denied ordinary and accidental benefits. Subsequently, after reconsideration, Appellant received ordinary disability retirement benefits. However, Appellant was denied accidental disability benefits. The RPS based its conclusion on its determination that the Claimant's disability was not the natural and proximate result of the March 14, 2011 incident. Appellant appealed this denial to the OAH on July 22, 2013.

At the OAH hearing, Appellant bore the burden of proving his eligibility for accidental disability benefits, pursuant to COMAR 22.06.06.02E(1). Appellant and Dr. Gary Pushkin, an expert witness hired by Appellee to perform an evaluation of Appellant, were the only witnesses at the hearing. Three additional Appellant's physicians' evaluations were submitted into evidence. All three physicians stated that Appellant's 2011 accident caused his disability.

Dr. Pushkin testified to a reasonable degree of medical probability that Appellant was disabled from his job, but his disability was not the natural and proximate result of the 2011 accident. Dr. Pushkin explained that his opinion was based on Appellant's medical

records, including the MRIs which showed extensive documentation of the degenerative condition of his knee prior to the accident. Dr. Pushkin explained that Dr. Scopp's operative note indicated that the ACL was two-thirds intact and that he performed a procedure to enhance its healing. Dr. Pushkin further testified that despite the surgery, Appellant suffered from a partial ACL tear and arthritic change in his knee, and that the only way to get rid of his knee arthritis is to undergo a knee replacement. Dr. Pushkin stated that the MRI taken approximately two weeks after the March 14, 2011, incident showed only degenerative findings and no trauma or acute injury, such as swelling or bone bruising. Dr. Pushkin explained that Dr. Scopp's notes from Appellant's October 31, 2011 surgery, stated that the ACL was greater than 95% intact and that the area around the prior ACL micro fracture was healed. Dr. Pushkin explained that this indicated that the condition of Appellant's ACL was actually improved from Appellant's 2010 arthroscopic surgery.

The ALJ upheld Appellee's decision to award Appellant ordinary disability benefits and not accidental disability benefits. The ALJ concluded that Appellant was unable to meet his burden because "no medical expert had testified in support of [Appellant's] claim." On April 1, 2014, Appellant petitioned for judicial review by the Circuit Court for Wicomico County. On March 3, 2015, the circuit court affirmed the ALJ's decision and Appellant appealed to this Court. The issues before this Court were whether the ALJ improperly concluded that Appellant was required to present live expert testimony and whether the ALJ applied the correct legal standard for causation. *Foard v. Maryland State Retirement and Pension System*, 2016 WL 1749657. (Issued May 3, 2016) We held that Appellant was not required to present live expert testimony and reversed and remanded the

case to the OAH. We declined to address Appellant's second contention. After this court issued its Mandate on June 2, 2016, the circuit court issued an order vacating the Board's decision and remanded the case to the OAH. In the decision after remand, the ALJ upheld the denial of Appellant's "accidental" disability benefits. The ALJ determined that it was unnecessary to conduct any additional proceedings at the OAH. The parties were offered an opportunity to file a brief or memorandum. The Appellant submitted a brief. In response, the Appellee was permitted to submit a letter to the ALJ. The Appellant then responded to the Appellee's letter with a letter. The parties also submitted a joint binder of exhibits. The ALJ also considered a January 7, 2013 report by Dr. Ward submitted by the Appellant and transcribed portions of Dr. Pushkin's testimony from the July 22, 2013 hearing. Subsequently, Appellant petitioned for judicial review by the circuit court. On March 5, 2018, the circuit court upheld the ALJ's decision. It is from this denial that Appellant files his second timely appeal.

STANDARD OF REVIEW

Appellant asks this Court to review the ALJ's decision because he believes that the ALJ applied the incorrect legal standard in determining Appellant's eligibility for accidental disability benefits.

> On appellate review of the decision of an administrative agency, this Court reviews the agency's decision, not the circuit court's decision.'… 'Our primary goal is to determine whether the agency's decision is in accordance with the law or whether it is arbitrary, illegal and capricious.' In other words, [w]e apply a limited standard of review and will not disturb an administrative decision on appeal if substantial evidence supports factual findings and no error of law exists. *Long Green Valley Ass'n v. Prigel Family Creamery*, 206 Md. App. 264, 273-74 (2012) (citing *Halici v. City of Gaithersburg*, 180 Md. App. 238, 248 (2008)).

In general, "[a] court's role is limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law." *Catonsville Nursing Home, Inc. v. Loveman*, 349 Md. 560, 568 (1998).

DISCUSSION

A. Parties' Contentions

Appellant argues that the ALJ erred when it held that Appellant's accident aggravated a preexisting condition and therefore, he was disqualified from receiving accidental disability retirement benefits. Specifically, Appellant contends that the ALJ applied a "sole cause" standard of causation. Appellant asserts correctly that this Court stated in his first appeal that Appellant "is not required to prove that the accident was the sole or exclusive cause of his disability." Appellant contends that the ALJ applied a "sole cause" standard of causation because the ALJ found that if Appellant's accident "exacerbated or aggravated a pre-existing injury or condition, he could not obtain accidental disability retirement benefits as a matter of law."

Appellee responds that this Court should affirm the ALJ's decision because it applied the correct standard. Specifically, Appellee contends that this Court "repeatedly has held that an administrative decision to deny accidental disability is supported by substantial evidence where, as here, the evidence is that [Appellant] had pre-existing, symptomatic degenerative arthritis." Appellee asserted that the requisite causal linkage between Appellant's accident and his disability is lacking because substantial evidence established that his disability was not due to his accident, but is due to his longstanding

documented preexisting condition.

Next, Appellee argues that there was substantial evidence to support the ALJ's decision that Appellant did not meet the standard for accidental disability benefits. Specifically, Appellee contends that the ALJ has discretion to accept any explanation for Appellant's disability that is supported by substantial evidence. As such, Appellee maintains that substantial evidence supports the ALJ's proposed decision that Appellant's permanent disability resulted from his longstanding degenerative condition and not the March 14, 2011, incident. Finally, Appellee asserts that the ALJ came to the correct conclusion because Appellant's disability was due to a degenerative condition and was not the natural and proximate result of the 2011 incident. Appellee argues that Appellant's argument that the ALJ applied an improper sole cause standard has no merit, because this argument mischaracterizes the ALJ's decision and Dr. Pushkin's testimony. Appellee argues that the ALJ found that the 2011 incident played no role in Appellant's disability. Appellee maintains that the circuit court found that the 2011 incident was not the natural and proximate cause of Appellant's disability.

B. Analysis

Appellant contends that the ALJ erred when she held that Appellant's accident aggravated a preexisting condition and therefore, he was disqualified from receiving accidental disability retirement benefits. Appellant argues that the ALJ applied a "sole cause" standard of causation. This is not apparent after our review. We highlighted this issue for the ALJ in our opinion.

Our court in footnote 1 of the opinion stated:

> For her assistance on remand, we remind the ALJ that the correct standard for determining causation in this context is that a disability was "a natural and proximate result of an accident," and that the claimant is not required to prove that the accident was the sole or exclusive cause of his or her disability. Maryland Code Ann., State Pers. & Pens. Section 29-109(b); *Eberle v. Baltimore County*, 103 Md. App. 160 (1995).
> *Foard v. Md. State Ret. & Pension Sys*., No. 24, Sept. Term, 2015, Slip Op. at 2 n.1 (filed May 3, 2016).

Also, the ALJ established that the claimant has the burden of proof. The ALJ says she undertook "a close examination of the relevant medical records and the chronology of events both before and after the Incident." This is apparent to the court.

The ALJ reviewed the relevant statutory law. After that the ALJ found that Appellant was eligible for "ordinary" disability benefits. Title 29 of the State Personnel and Pensions prescribes:

> (a) The Board of Trustees shall grant an ordinary disability retirement allowance to a member if:
> (1) the member has at least 5 years of eligibility service; and
> (2) the medical board certifies that:
> (i) the member is mentally or physically incapacitated for the further performance of the normal duties of the member's position;
> (ii) the incapacity is likely to be permanent; and
> (iii) the member should be retired.

Md. Code Ann., State Pers. & Pens. § 29-105(a). Under the statute any member can receive ordinary disability benefits if the board certifies that the member cannot perform his or her duties any longer. Here, Appellant fits the criteria to receive ordinary disability benefits because he can no longer perform his duties due to his disability. However, to receive accidental disability benefits the statute states that a member must meet the following qualifications:

Eligibility for accidental disability retirement allowance

> (b) Except as provided in subsection (c) of this section, the Board of Trustees shall grant an accidental disability retirement allowance to a member if:
>
> (1) the member is totally and *permanently incapacitated for duty as the natural and proximate result of an accident* that occurred in the actual performance of duty at a definite time and place without willful negligence by the member; and
>
> (2) the medical board certifies that:
>
> (i) the member is mentally or physically incapacitated for the further performance of the normal duties of the member's position;
>
> (ii) the incapacity is likely to be permanent; and
>
> (iii) the member should be retired.

Md. Code Ann., State Pers. & Pens. § 29-109(b) (emphasis added).

The ALJ cites *Eberle* in its Proposed Decision on Remand for the principle that the standard for accidental disability retirement benefits is more stringent than the standard for ordinary disability retirement benefits. *Eberle v. Baltimore County*, 103 Md. App. 160 (1995) (which cites *Burr v. Maryland State Retirement and Pension System*, 217 Md. App. 196, 209 (2014). In *Eberle*, Elmer James Eberle, the appellant, worked as a meat cutter in 1957 and sustained a work-related injury to his right knee. As a result of his injuries, the appellant received medical treatment and surgery to his right knee. In 1983, the appellant

obtained employment with the Baltimore County Government where he worked as a truck driver. On September 15, 1987, the appellant sustained serious injury to his right knee while in the course of his employment. It was found that the appellant sustained 45% "permanent partial disability of the right leg" with "35% due to the accidental injury on September 15, 1987 and [10%] due to a pre-existing condition." *Id.* at 162. Subsequently, the appellant injured his left knee while he was working and underwent surgery. However, the appellant continued to experience problems with both knees and underwent total knee replacement on his right knee. On May 12, 1992, the appellant applied for accidental disability retirement benefits with the Board of Trustees of the Employees' Retirement System of Baltimore County ("the Board"). The Board denied the appellant's request for accidental disability retirement benefits because it was unable to conclude that the appellant's "permanent disability was 'a natural and proximate result of his accidents.'" *Id.* at 163. The appellant appealed the Board's decision to this Court and we upheld the Board's decision. We stated the following:

> Dr. Meshulam found that ten percent (10%) of [appellant's] impairment "pre-date[d] the injuries of September 15, 1987, and [was] due to his prior right medial meniscectomy." No medical report indicated that [appellant's] disability was caused by his injuries at work. Neither did any report specifically conclude that [appellant] would have suffered this disability in the absence of these injuries. Based on the medical reports that were riddled with references to a preexisting degenerative arthritis problem in addition to hypertension and a chronic overweight problem, it was not [an] error for the Board of Appeals to conclude that [appellant's] disability was not the natural and proximate result of the accidental injuries he suffered.

Eberle v. Baltimore County, Md., 103 Md. App. 160, 174-175 (1995).

In *Fire and Police Employees' Retirement System of City of Baltimore v. Middleton*,

192 Md. App. 354 (2010), Amy Middleton, the appellee, a Baltimore City police officer, while on duty received a call that a fellow officer needed assistance. The appellee did not reach her destination because the call was cancelled. When the appellee returned to her post the appellee started to feel pain to her lower back and received medical treatment the following day. The appellee was placed on light duty until September 11, 2006, and remained on full duty until March 15, 2007. The appellee reported that she had chronic lower back pain and three doctors recommended that the appellee's back pain prevented her from performing her essential function as a police officer. Subsequently, the appellee applied for line-of-duty disability, which was denied by a hearing examiner from the Fire and Police Employees' Retirement System, the appellant. However, the hearing officer did award the appellee non-line-of-duty disability. The hearing examiner found:

> [T]he [appellee] did prove by the preponderance of the evidence that she has suffered an illness or injury of such a nature that she is totally and permanently incapacitated for the further performance of the duties of her job classification as a police officer[.] However, the [appellee] did not prove by the preponderance of the evidence that her disability was a result of an injury arising out of or in the course of her duties as a ... [p]olice [o]fficer.

Middleton, 192 Md. App. at 358. The appellee appealed the hearing examiner's decision to the Circuit Court for Baltimore City. The circuit court reversed the hearing officer's decision and the appellant filed a timely appeal to this Court. This Court reversed the circuit court's decision and upheld the hearing officer's decision. We explained:

> In *Eberle*, we stated that in order for an injury to be accidental under the Baltimore County Code, it must result from some unusual strain or exertion or some unusual condition because the statutory definition of accidental did not include unexpected results not produced by accidental causes. Therefore, an unexpected result attributable to a predisposition to a pre-existing physical condition was not an accidental injury……

> The facts in this case are similar to those in *Eberle.* Both the appellee and Eberle were diagnosed with pre-existing degenerative conditions. Both suffered accidents at work that exacerbated these problems and eventually rendered them unable to work in the same capacity as they had before the accident. As in *Eberle,* we are convinced that there was relevant and substantial evidence from which a reasonable mind could conclude that the appellee's disability was not the result of the injuries sustained in the course of duty.

Middleton, 192 Md. App. at 363-364.

The Appellant in his brief cites *Middleton* arguing that:

> This court wrote the claimant in an accidental disability case does not have to "hermetically seal" himself against pre-existing conditions. Rather, the law is simply to the effect that the preexisting condition cannot produce an unexpected result that would not naturally ensue from the accident. (*Id.).* There can be no such concern here: The accident was traumatic, of the sort that might produce a disabling knee injury for anyone, regardless of any preexisting medical history. Critically, Dr. Pushkin himself acknowledged he could not opine Mr. Foard would have become disabled without the March 14, 2011 injury. (E. 451-457; R 414-420) Indeed, Doctor Pushkin expressed no opinion as to whether Mr. Foard would have become disabled by the March 14, 2011 injury absent pre-existing arthritis.

The Appellee cites *Middleton* for the principle that:

> "An administrative decision to deny accidental disability is supported by substantial evidence where, as here, the evidence is that a claimant had pre-existing, symptomatic, degenerative arthritis, even if a subsequent accident exacerbates that condition. *Id*. at 363-64.

The Appellee asserts that Appellant's "reliance on *Middleton* is misplaced; in fact, that case supports the Board of Trustees' denial of his claim". We agree. In this case, the ALJ correctly applied the correct standard in denying the award of accidental disability benefits. We have repeatedly held that there must be substantial evidence to deny a claimant accidental disability benefits. Here, the record shows that Appellant had degenerative arthritis, a pre-existing condition. It may be true that Appellant's accident may have

exacerbated his condition. However, there was substantial evidence in the record for the ALJ to conclude that Appellant's injuries were not *the natural and proximate* result of the 2011 accident. In a multipage and detailed explanation, the ALJ explained the findings of the physicians and how it supported her finding. She noted that Dr. Pushkin relied on the objective evidence consisting of the claimant's MRIs and operational notes, which showed no new injury. He also concluded there was no indicia of traumatic injury. The ALJ discounted the Worker's Compensation medical reports because they are "frequently not analogous." She also discounted the claimant's efforts to describe the Appellant's disability in percentages, even though it is apparent that Maryland courts have engaged in analysis which employs percentages under the circumstances presented in this case. However, the ALJ's explanation of how the physician's reports explained the cause of the Appellant's injury adequately explains her findings and conclusions in this case. She directly explained why the claimant's three physician's reports that supported his eligibility for accidental disability benefits, who described the disability in percentage ratings, which are prevalent in worker's compensation cases analysis, are "not necessarily relevant in a determination of accidental disability." She noted that Dr. Pushkin addressed why each physician's analysis and conclusions were not persuasive in explaining why the complainant's condition was a result of the worsening of a chronic degenerative problem rather than a new injury. The facts in this case are similar to *Eberle* and *Middleton*. Specifically, Appellant was diagnosed with a pre-existing degenerative condition, suffered an accident at work that exacerbated his condition and eventually rendered him unable to work in the same position. As such, we find that there was relevant and substantial evidence "from

which a reasonable mind could conclude that [Appellant's] disability was not the result of the injuries sustained in the course of duty." *Middleton*, 192 Md. App. at 364. As we noted in *Middleton*, a hearing examiner "has discretion to accept any explanation for a disability" as long as it is supported by substantial evidence. *Middleton*, 192 Md. App. at 362. Here, there is substantial evidence to support the ALJ's decision. Specifically, Appellant's medical records show that Appellant had issues with his knees two years prior to the March 14, 2011, incident. Appellant's 2010 MRI and July 2010 surgery revealed that he had an ACL tear, meniscus degeneration, and chondromalacia to his knee. Dr. Pushkin testified that Appellant's 2011 accident failed to show any objective change to his knee after his 2010 surgery that can be attributable to the accident. Moreover, the ALJ held in her decision:

> After considering the medical opinion offered by the five physicians who reviewed [Appellant's] medical records and examined [Appellant], I found Dr. Pushkin's finding and explanation most convincing. He methodically set out his analysis of the objective findings in light of [Appellant's] application for accidental disability benefits and fairly concluded that, although [Appellant] was unable to perform the duties of his former employment as a paramedic, his disability resulted from the worsening of a chronic degenerative condition. Dr. Pushkin based his opinion on [Appellant's] extensive medical and surgical records, including three MRIs and attendant reports, his physical examination of [Appellant]. Dr. Pushkin's thorough analysis, extensive credentials and cogent explanations rendered his opinion highly reasonable and ultimately persuasive.

Accordingly, we hold that there was substantial evidence in the record to indicate that Appellant's disability was not *the natural and proximate* result of the March 2011 incident.

JUDGMENT OF THE CIRCUIT COURT FOR WICOMICO COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.