

Circuit Court for Prince George's County  
Case No. CAL1812516

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 0309

September Term, 2019

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DONALD MCDOWELL

v.

DISABILITY REVIEW BOARD OF PRINCE  
GEORGE'S COUNTY FIRE SERVICE  
PENSION PLAN

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Reed,  
Wells,  
Zarnoch, Robert A.  
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Zarnoch, J.

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Filed: March 8, 2021

\*This is an unreported opinion and therefore may not be cited either as precedent or as persuasive authority in any paper, brief, motion, or other document filed in this Court or any other Maryland court. Md. Rule 1-104.

Donald McDowell (“McDowell”), formerly a lieutenant in the Prince George’s Fire/EMS Department appeals a decision of the Circuit Court for Prince George’s County upholding the denial of service-connected disability retirement benefits. McDowell presents five questions for our review. As most issues were not properly argued or preserved for our review, see p 13 *supra*, we have rephrased slightly the two relevant questions as follows:

- I. Was there substantial evidence to support the Disability Review Board’s determination that McDowell is not entitled to service-connected retirement benefits?
- II. Did the Disability Review Board err in admitting Dr. Ghazala Kazi as an expert?

For the reasons set forth below, we affirm the circuit court.

## **BACKGROUND & PROCEDURAL HISTORY**

### **I. Summary of Treatment**

While he was on duty as a fire fighter on October 19, 2015, McDowell developed trouble breathing. He was completing housework at the fire station when his unit was dispatched on a call. After donning his gear and climbing up to the ladder truck, he discovered it was difficult to breathe and was transported to the Prince George’s Hospital. McDowell later sought treatment at Mon General Hospital in Morgantown, West Virginia, on November 9, 2015, complaining of wheezing, a cough and sputum production. Nurse Practitioner Jennifer Morris (“NP Morris”) performed an evaluation and reviewed chest x-rays from Prince George’s Hospital from McDowell’s prior visit. NP Morris noted that his sinuses were nontender bilaterally and his lungs were clear

without infiltrates with no evidence of plural disease. NP Morris ordered lab testing and prescribed Symbicort.

McDowell again sought treatment from NP Morris on November 18, 2015. McDowell reported that his symptoms had worsened and he had only taken Symbicort for two or three days. In the interim, McDowell had been evaluated by an allergist for skin testing, which indicated allergy towards mite, cat, dog and sycamore. NP Morris completed an Attending Physician's Statement/Temporary Disability Form that diagnosed McDowell with "occupational asthma" and "reactive airway disease."

On December 14, 2015, McDowell sought treatment by Antoine E. Azar, M.D. at Johns Hopkins Bayview Medical Center Asthma and Allergy Center. McDowell complained of difficulty breathing, chest tightness, and wheezing after he finished sweeping at the fire house. McDowell noted he had never experienced a similar episode, but he had been exposed to mold, sewage leaks, and asbestos at the fire house. Dr. Azar noted that lab testing was negative for aspergillus and other molds. After performing an examination, Dr. Azar diagnosed McDowell with allergic asthma and allergic rhinitis that was perennial and seasonal. Dr. Azar noted that "recent HRCT was unremarkable for chronic lung disease."

McDowell followed up with NP Morris on February 17, 2016. In her evaluation, NP Morris noted a number of tests that were included in McDowell's work up: an August 2014 chest x-ray indicating clear lungs; November 2015 labs showing elevated IgE levels; a November 2015 allergy skin testing which showed allergy to mite, cat, dog and

sycamore; and an aspergillus intradermal test which was negative. NP Morris diagnosed McDowell with “severe persistent asthma with (acute) exacerbation” and advised that exposure to fire smoke could potentially exacerbate his asthma.

McDowell returned to Dr. Azar in March 2016. McDowell reported that he recently developed significant dyspnea and wheezing within two hours of taking Aleve. Dr. Azar reviewed a brain MRI that showed bilateral sinus disease, specifically “bilateral maxillary polypoid lesions and some ethmoid opacification.” Dr. Azar noted the asthma flare due to using Aleve is “very suggestive of AERD” and “congruent with his recent MRI showing possible sinus polyp disease, which indicates that he likely has a triad of asthma, polyposis, and AERD.” Dr. Azar advised McDowell to “strictly avoid all NSAIDs.”

Katie Leach, M.D., an internal medicine physician, conducted an Independent Medical Examination on March 21, 2016. Dr. Leach noted that McDowell was referred to a pulmonologist who diagnosed him with bronchospasm and allergy induced asthma. Dr. Leach ultimately diagnosed McDowell with “allergy induced asthma which is triggered by environmental factors such as smoke, raw sewage, asbestos and other noxious stimuli.”

McDowell returned to Dr. Leach on July 27, 2016 complaining of intermittent exacerbation of this condition. Dr. Leach reviewed a CT scan of McDowell’s maxillofacial sinuses from June 26, 2016, and found “severe bilateral maxillary sinusitis, and the ethmoids are approximately 90% opacified, the frontal sinuses are completely

opacified, the ostiomeatal complexes are occluded by mucosal thickening and a moderate amount of fluid in the bilateral sphenoid sinuses.” Dr. Leach amended her diagnosis to include pan sinusitis and recommended that McDowell be placed on disability.

A second Independent Medical Examination was conducted by Ghazala Kazi, M.D. in August 2016. McDowell explained the October incident and advised that there was 5,000 gallons of raw sewage beneath the fire house and that he had also been exposed to asbestos. Dr. Kazi reviewed medical records and x-ray reports, and performed an examination. She opined that “[t]he causation of the asthma in most cases is not known” because it is “not clear if Mr. McDowell’s symptoms are worse at work.” Dr. Kazi noted that it is possible his wheezing and shortness of breath was due to “adult onset asthma that happen[ed] to manifest at work that particular day.”

Dr. Kazi issued an Addendum Report on August 29, 2016 following her review of additional medical records from Prince Georges Hospital, NP Morris and Dr. Leach. Dr. Kazi noted McDowell’s allergies towards mite, cat, dog, and sycamore, and his positive test for aspergillosis. Based on the information she reviewed from these records, Dr. Kazi determined that McDowell’s asthma was caused by allergies and he also suffers from severe allergic sinusitis. Dr. Kazi stated with a reasonable degree of medical certainty that “his asthma is caused by different types of allergies commonly found in most environments...and not due to his work place exposure or his work as a firefighter.”

McDowell returned Dr. Azar in September 2016 to review a sinus CT and brain MRI, both showing bilateral extensive sinus disease. McDowell noted that he was seen

by an ear, nose and throat (“ENT”) specialist who informed him “his sinus disease is due to allergies and to consider immunotherapy.” In his assessment, Dr. Azar noted that “recently developed asthma flare with the use of Aleve, [is] suggestive of AERD,” but recommended McDowell return to an ENT to evaluate his sinus disease for polyps.

McDowell underwent a third Independent Medical Evaluation by Louis E. Steinberg, M.D. on January 4, 2017. Dr. Steinberg reviewed his medical records, chest x-ray from December 28, 2016, and performed his own examination. Dr. Steinberg noted that despite working as a fire fighter in Prince George’s County for approximately twelve years, “[h]e never had any chronic respiratory symptoms, neither [a]sthma nor chronic sinusitis, until he had an acute asthma attack.” Dr. Steinberg opined that his asthma is under control and can be classified as mild and intermittent, though his symptoms become worse, “especially during hot, humid weather.” Dr. Steinberg explained to a reasonable degree of medical certainty that McDowell’s disability is asthma, and the cause of the disability “may be debatable,” but the prolonged exposure to raw sewage and mold is the likely cause.

A fourth Independent Medical Evaluation was performed on March 20, 2017 by Dr. Leach. Her diagnosis remained unchanged, i.e. allergy induced asthma. Dr. Leach stated that the condition is related to prolonged exposure to occupational toxins. Dr. Leach opined that McDowell’s condition is “solely as a result of his job as a firefighter.”

## **II. Prince George’s County Fire Service Pension Plan**

The Prince George’s County Fire Service Pension Plan (“the Plan”) provides for two different types of disability retirement benefits: service-connected disability and non-service connected disability. § 4.3(c)(1) and (2). Members are eligible for service-connected disability if they are “permanently and totally disabled in the line of duty such that he is unable to perform the duties of any occupation.” § 4.3(c)(1)(b). On the other hand, a member is eligible for non-service connected disability if “his disability was not caused by an injury or sickness suffered as a result of his performance of his duties.” § 4.3(c)(2).

The process to determine disability benefits begins with a written application to the Medical Advisory Board (“MAB”). § 4.3(b)(1). The MAB shall conduct a medical examination of the Participant and submit a written opinion “with regard to the nature, cause, degree of permanence and effect of the alleged disability” to the Disability Review Board (“DRB”). The DRB “shall review the written opinion” of the MAB and “render a preliminary determination.” § 4.3(b)(1). If the Participant disagrees with the DRB’s preliminary determination, he may request a formal hearing before the DRB. § 4.3(b)(2).

The Plan specifically notes that

[I]f the disability is determined by the Disability Retirement Board to have resulted from lung disease heart disease, or hypertension, or any condition of impairment caused by lung disease, heart disease, or hypertension resulting in total or partial disability, the Disability Review Board shall find that such disability was caused by an injury or sickness suffered as a result of the performance of his duties as an Employee, unless said evidence shall demonstrate to a reasonable degree of medical certainty that his disability was not caused by an injury or sickness suffered as a result of his performance of his duties as an Employee.

§ 4.3(b)(3). Further, to qualify for service-connected benefits, “the Participant must show that the injury or illness was directly and substantially caused by an employment related accident, occurrence or condition.” § 4.3(b)(3). The Plan notes that “[a] pre-existing physical or mental condition found in the Participant which is aggravated by an employment related accident, occurrence or condition and renders the Participant disabled, does not give rise to a service-connected disability.” *Id.*

### **III. Procedural History**

McDowell filed a Statement of Disability in February 2017, stating he suffered from a service connected disability, specifically a “reactive airway disease.” The MAB reviewed McDowell’s medical records in support of his application for disability. The MAB issued findings of fact on March 2, 2017, finding that his “history of asthma prevents him from performing his duties as a Fire Fighter” and he “should be retired on disability retirement.” After reviewing McDowell’s medical documentation and the MAB Finding of Fact, the DRB found McDowell was disabled and the disability was non-service connected.<sup>1</sup> McDowell requested a formal hearing.

A hearing was held on November 29, 2017 with respect to McDowell’s application for service-connected disability benefits. After the hearing, the DRB issued a finding that McDowell’s “disability was of long duration, but that his disability was not service-connected.” McDowell then appealed the decision of the DRB to the circuit court.

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<sup>1</sup> The DRB initially issued an improper statement, notifying McDowell that his disability was service-connected. The DRB issued a Notice the following day correcting the preliminary determination.



The circuit court found that there was substantial evidence to support the DRB’s finding that McDowell’s disability was not service-connected, that he suffered from “adult onset asthma that was exacerbated by aspirin-exacerbated respiratory disease,” and that his exposures “to mold, asbestos, raw sewage, or smoke did not cause his asthma or AERD.”

This timely appeal follows.

### STANDARD OF REVIEW

This Court reviews the decision of the administrative agency, not the decision of the circuit court. *See Hubbel v. Bd. of Trs. of Fire & Police Empls.’ Ret. Sys.*, 192 Md. App. 742, 749 (2010). Our review is limited to determining whether substantial evidence supports the agency’s findings “and to determine if the administrative decision is premised upon an erroneous conclusion of law.” *Montgomery v. Eastern Correctional Inst.*, 377 Md. 615, 625 (2003) (Internal citations and quotations omitted). The agency’s decisions “are *prima facie* correct, and carry the presumption of validity” and the decisions are viewed in the “light most favorable to the agency.” *Mayberry v. Bd. of Educ. of Anne Arundel Cnty.*, 131 Md. App. 686, 701 (2000). When the record contains conflicting evidence, “it is the agency’s province to resolve conflicting evidence and to draw inferences from that evidence.” *Bd. of Physician Quality Assur. v. Banks*, 354 Md. 59, 68 (1999).

### DISCUSSION

#### I. Sufficiency of the Evidence

McDowell claims the DRB erred when it found he was not entitled to service-connected benefits because, in his interpretation, under § 4.3(b)(3) of the Plan, “the Board shall find that a respiratory illness, such as Appellant’s condition, is service-connected.” (emphasis in original). McDowell argues that the DRB erred by “[f]ailing to properly apply the presumption of service-connected disability in §4.3(b)(3) of the Plan.” The Plan, on the other hand, argues that there was substantial evidence to support the decision. The Plan notes that the numerous medical providers diagnosed McDowell with allergic asthma and allergies, as well as AERD, and the extensive medical records establish that McDowell’s disability is unrelated to occupational exposures or caused by a “sickness suffered as a result of his performance of his duties.” The Plan contends, therefore, that the hearing examiner properly evaluated the evidence and assigned weight to that evidence, and therefore, non-service connected retirement benefits were properly awarded. We agree.

The DRB reviewed the medical records and made a preliminary determination that McDowell was disabled, but that the disability was not caused by an injury suffered as a result of his performance of his duties. After a formal hearing, the DRB found there was insufficient evidence to prove that McDowell’s condition was causally related to the performance of his duties and found his disability was not service connected. The facts that support the DRB’s determination to deny service-connected disability benefits were as follows.

McDowell saw Dr. Azar who diagnosed him with allergic asthma and allergic rhinitis, noting his allergies were seasonal and the symptoms and late onset were not uncommon. Dr. Azar performed and reviewed numerous tests, including a pulmonary function test, spirometry test, and laboratory testing for mold. Dr. Azar also noted McDowell's HRCT was unremarkable for chronic lung disease. At another appointment with Dr. Azar in March 2016, he noted that McDowell's brain MRI indicated bilateral sinus disease and opined that McDowell "recently developed asthma flare with the use of Aleve which is very suggestive of AERD" and "this is also congruent with his recent MRI showing possible sinus polyp disease which indicates that he likely has a triad of asthma, polyposis, and AERD."

Dr. Kazi performed an Independent Medical Examination. Dr. Kazi reviewed medical records and documents, x-ray reports, and performed an examination of McDowell. Dr. Kazi diagnosed McDowell with "adult onset asthma, which is common among general population." In her addendum, Dr. Kazi noted she reviewed additional medical records and notes, and opined that despite McDowell's diagnosis of allergy induced asthma triggered by environmental factors, she concluded that McDowell's asthma was "caused by different types of allergies commonly found in most environments (mite, cat, dog, and sycamore) and not due to his work place exposure or his work as a firefighter."

At McDowell's hearing on retirement benefits, he testified that he began at the fire house in August 2014, and as time progressed the odor of the sewage got stronger and he

observed signs of black mold in April 2015. McDowell testified that he was transferred to another fire house while renovations were made. McDowell noted that between August 2014 to the October 2015 incident, he did not have any noticeable allergies or allergy attacks. McDowell also testified that he never experienced adverse reactions to Aleve, Ibuprofen and other NSAIDs prior to the October 2015 incident. Finally, he testified that he most frequently has issues during the summer and when it's hot and humid or during strenuous exercise.

Dr. Kazi testified that that she reviewed McDowell's symptoms, treatment received, past medical history and occupational history. Dr. Kazi diagnosed McDowell with adult onset asthma and agreed with Dr. Azar who concluded that McDowell had AERD. Dr. Kazi explained that AERD is not caused by mold or any other environmental factors, and is not uncommon among individuals with asthma. Dr. Kazi testified that three conditions must be present to meet the diagnosis of AERD: severe sinus infection, polyposis or polyps, and high levels of leukotriene in the blood. McDowell had all three conditions, and Dr. Azar made the AERD diagnosis after McDowell suffered from a severe asthma attack within two hours after taking Ibuprofen. An MRI of the brain showed severe sinus congestion and a CT scan showed sinuses were 90% congested, confirming the diagnosis.

With respect to McDowell's exposure to mold, asbestos, raw sewage, and smoke, Dr. Kazi testified to a reasonable degree of medical certainty that these did not cause his symptoms or conditions. Dr. Kazi explained that asbestos exposure can cause chronic

conditions like cancer, but not allergic asthma, and mold can cause certain types of asthma, but not McDowell's specific type of asthma. Similarly, McDowell's lab work showed that special antibodies in the blood that react to mold were not present and that he was negative for *Aspergillus* (or mold) findings. Further, Dr. Kazi testified that McDowell's type of asthma develops mostly in men in their 30s and 40s, and certain environmental factors can irritate the condition, but not cause it.

McDowell also contends that he is eligible to receive service-connected disability benefits because he suffers from a respiratory illness and § 4.3(b)(3) of the Plan creates a presumption that the condition is service-connected. Under this subsection, if McDowell's disability is determined to have resulted from "lung disease, heart disease, or hypertension," or "any condition of impairment caused by lung disease, heart disease, or hypertension," then the DRB shall find it is a service-connected disability. § 4.3(b)(3). McDowell improperly interprets §4.3(b)(3) of the Plan. A "respiratory illness" is not covered by the presumption of a service-connected disability under this subsection, and McDowell was not diagnosed with lung disease, heart disease, or hypertension.

Based on the numerous medical reports and testimony with references to allergic asthma and AERD that are not caused by exposure to environmental factors present at the fire house, the DRB had substantial evidence to conclude that McDowell's disability was not a direct result of an injury arising out of an in the course of the actual performance of his job duties.

## II. Dr. Kazi's Expert Opinion

McDowell makes several arguments in opposition to the DRB's admission and reliance on Dr. Kazi's expert opinion. McDowell argues that Dr. Kazi was unqualified to give her expert opinion because she "lacked expertise" on AERD and because Dr. Kazi "failed to obtain information necessary to form and render an opinion." The Plan maintains that all arguments with respect to the admission of Dr. Kazi as an expert were waived because they were not preserved. We agree.

McDowell failed to object to Dr. Kazi being admitted as an expert in the field of occupational medicine. McDowell only objected to the possibility of qualifying Dr. Kazi as an expert in pulmonology or other areas of medicine. Dr. Kazi was ultimately admitted as an expert in the field of occupational medicine. McDowell later objected to Dr. Kazi's expert opinion on McDowell's diagnosis of AERD and whether it was caused by substances he was exposed to at work because "she did not have the expertise to render an opinion." At its core, McDowell is again objecting to Dr. Kazi's qualifications as an expert. As McDowell failed to properly preserve the issue of Dr. Kazi's qualifications as an expert in occupational medicine for appeal, we decline to address it.

McDowell also argues that the DRB never produced a report from Dr. Kazi indicating the basis of her opinion that his disability was caused by AERD. Instead, McDowell contends, he received an article discussing AERD with a letter that indicated Dr. Kazi would discuss the article in support of her testimony. McDowell admits that the Plan was not required to submit a list of witnesses and documents. The Plan contends that

under the Rules of Administrative Procedure, there is no requirement to provide a list of witnesses or evidence.

Under the Rules of Administrative Procedure adopted by the DRB of the Prince George’s County Police and Fire Service Pension Plan, “[a]t least seven (7) working days prior to the formal hearing, a Participant shall submit to the ... DRB ... a list of witnesses which the participant intends to call and any additional written evidence...” § 9(b) of the Disability Review Board Rules of Administrative Procedure. There is no requirement that the Plan also provide this information. McDowell fails to cite to any authority that would compel the Plan to provide this information in advance of the formal hearing.

We find, as did the circuit court, that the DRB’s decision was supported by substantial evidence, and that a reasoning mind could reasonably have reached the agency’s conclusion.

**JUDGMENT OF THE CIRCUIT COURT  
FOR PRINCE GEORGE’S COUNTY  
AFFIRMED. COSTS TO BE PAID BY  
APPELLANT.**