Circuit Court for Garrett County
Case No. C-11-CV-22-000002

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1346

September Term, 2022

MICHAEL J. DENNIS

v.

MARYLAND STATE RETIREMENT AND PENSION SYSTEM

Wells, C.J.,
Nazarian,
Storm,
(Specially Assigned),

JJ.

Opinion by Wells, C.J.

Filed: November 7, 2023

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for persuasive value only if the citation conforms to Md. Rule 1-104(a)(2)(B).

Appellant Michael Dennis reported suffering injuries from two workplace accidents while working at the Garrett County Department of Social Services (GCDSS). After GCDSS determined it could not accommodate Dennis's related request for a reasonable accommodation, Dennis was excused from work and placed on Family Medical Leave Act (FMLA) leave for six months. At the exhaustion of available FMLA leave, GCDSS notified Dennis that because the Insured Workers' Insurance Fund informed the agency that Dennis could not perform his job duties, and it could offer no similar positions to accommodate his physical restrictions, Dennis needed to resign or he would be terminated. When Dennis did not respond to GCDSS by the deadline provided, GCDSS terminated him. Dennis then applied for ordinary and accidental disability with appellee, the Maryland State Retirement and Pension System (MSRPS), and was denied. Dennis appealed and his application was resubmitted for reconsideration. A physician contracted by MSRPS found that Dennis was not permanently disabled from performing his job duties, and that he did not suffer any disability as a result of the accident alleged on his application. Based on this finding, MSRPS affirmed its denial. Dennis appealed to the Circuit Court for Garrett County, Maryland. Dennis timely appealed to this Court and submitted three issues for our review, which we have consolidated and rephrased into the following:[1]

[1] Dennis's questions presented, verbatim, read:

1. Did the Administrative Law Judge err by deciding against Appellant in an arbitrary and capricious manner?

2. Did the Administrative Law Judge lack substantial evidence to reach the final decision?

1. Did the ALJ err in finding that Dennis did not suffer from a condition rendering him permanently incapable of fulfilling his job duties at GCDSS?

2. Did the ALJ legally err in finding that Dennis was not entitled to disability retirement because such a finding conflicts with his termination by GCDSS?

For the reasons that follow, we answer 'no' to the first issue, do not reach the merits of the second issue, and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Dennis began working for GCDSS on January 17, 2007. From 2007 to 2012, Dennis was a foster care supervisor. From 2012 to November 2016, Dennis was a family preservation services supervisor. On November 1, 2016, Dennis voluntarily demoted to the Social Worker II position. At least as early as 2015, Dennis was evaluated by a doctor after complaining of lower back pain. Apparently, though, no medical condition prevented him from performing his essential job functions at that time, up until October 11, 2016.

The Two Workplace Injuries & Early Doctors' Visits

On October 11, 2016, Dennis filed an injury report with the GCDSS Department of Human Resources stating that, while at work, he bent over to throw some paper away and hit his head on a metal cabinet above the trash can and injured the front left side of his head. Two days later, Dennis visited Dr. Crowell, an orthopedic doctor, complaining of neck pain. Dennis reported that the onset of the pain was two days prior, after he hit his head at work.

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3. Was Appellant's termination from employment for medical reasons flagrantly inconsistent with the state's decision to deny him ordinary and accidental disability?

On November 14, 2016, Dennis filed another injury report, explaining that on November 11 he injured his back when lifting three children into car seats. On November 15, Dennis relayed the incident at his physical therapy appointment, stating it had increased his pain.

On November 17, Dennis visited Dr. Mesbah Dowla, a gastroenterology specialist. Two visit reports were made. The first notes Dennis's neck and back pain and the incident when he hit head on the cabinet at work. A second report mentions the incident lifting the children and says Dennis will be out of work until his next visit.[2] On December 1, Dr. Dowla stated that Dennis could return to work and resume his full regular work duties the following day, December 2. After each of his subsequent visits with Dr. Dowla on December 8, December 15, and January 5, 2017, Dr. Dowla noted that Dennis could continue working, with no mention of any physical restrictions. But Dennis's primary care physician, Dr. Buckingham, advised to the contrary. Dr. Buckingham wrote a note on January 9, 2017, stating Dennis could not lift over twenty-five pounds, and another note on January 30, 2017, stating it was problematic for Dennis to endure car rides longer than forty-five minutes due to a separate ailment, Dennis's inflammatory colitis.

Dennis's Request for a Reasonable Accommodation

Following the two workplace injuries, and in the midst of these doctors' visits, on December 30, 2016, Dennis submitted a Reasonable Accommodation Request Form to GCDSS, citing colitis and inflammatory colitis and muscle spasms in his back. He noted

[2] Dennis's testimony at the hearing before the ALJ indicates two reports may have been made because he had two separate appointments; one for each injury.

that these conditions prevent him from "lifting or transporting children" and wrote that a "lifting restriction is directly related to a work-related injury case currently open with workman's comp." He requested an accommodation limiting his duties so that he could refrain from lifting or transporting children, or to be transferred to a unit that does not require either task.

On January 31, 2017, Dr. Robert Toney, the State Medical Director (SMD) to whom Dennis was referred by the Department of Human Services, performed a workability evaluation of Dennis. In his February 2 report, Dr. Toney opined:

> [I]t is my impression that Mr. Dennis is able to perform his job duties if he is given certain accommodations. Given Mr. Dennis' history of inflammatory colitis, he will likely need the accommodation of not having to transport children because of potential need for him to exit the car emergently to use the restroom. It is my impression that this accommodation will likely need to be permanent.
>
> It is also my impression that Mr. Dennis may need a temporary restriction of no lifting more than 25 pounds. He is in the process of being referred to a chiropractor. It is my impression that this restriction should be lifted in the next six to eight weeks, if not, Mr. Dennis can be referred back to our office to reassess his long-term prognosis.
>
> If Mr. Dennis cannot be accommodated on a permanent basis by not transporting children because of his inflammatory colitis, then it is my recommendation that the appropriate administrative actions be taken.

On February 9, GCDSS Department of Human Resources sent Dennis a letter in response to his request for reasonable accommodation. It explained that after its review of the SMD's Report, because transporting children is an essential function of the Social Worker II position, GCDSS was unable to accommodate Dennis's request. Because of this, GCDSS was placing Dennis on FMLA leave effective immediately through March 16,

2017, and then on March 17, 2017, Dennis would be granted a new FMLA entitlement of 480 hours.

Dennis's Doctors' Visits while on FMLA

After an April 3, 2017, visit with Dennis, Dr. Buckingham wrote in a note "to whom it may concern" that Dennis had been "under FMLA provisions due to a severe course with colitis," but it was now in remission and accordingly, Dennis "is ready to go back to full duties as it relates to his colitis limitations." However, in Dr. Buckingham's own report notes, he followed the good news about Dennis's colitis with the caution that "[t]he back is still a limiting issue as the twisting and reach/bending causes severe pain." On May 12, however, Dr. Buckingham wrote a letter stating that Dennis could *not* return to work until June 9, 2017. The letter also said:

> I'm happy to report that his weight lifting limitations are no longer needed. He continues to struggle with on going back issues from the work-related injury sustained on 11/10/2016. From my point of view he has no current work restrictions. However, it is my understanding that he is currently awaiting a ruling on his workman's comp case that is related to the above date. Seeing as this case is still open and pending a judgement, I feel it is inappropriate for me to somehow dictate what that ruling/limitation should be. He is obviously still struggling from the injury on 11/10/2016, so further limitations to his work function should be guided by the pending ruling in early June.

On June 14, 2017, Dr. Buckingham wrote a letter saying that he had reviewed Dennis's work duties and because those duties

> have not materially changed from the duties and requirements that caused his work injury on 10/11/2016 . . . I simply don't see how it is possible for [Dennis] to return. The restrictions that would allow him to work would be as follows:
>
> 1. He can't twist or bend.

2. He can't sit for longer than 15 without being able to move and change positions.
3. The above precludes driving for any extended period.
4. He would have a 10 pound lift/carry restriction.

These restrictions are related specifically and solely to the **closed fracture of the ninth vertebra**.

(Emphasis in original). Dr. Buckingham noted that the next step was for Dennis to consult with a Physical Medicine and Rehabilitation specialist, and that "we are trying to get this cleared through Workman's Comp."

On July 25, 2017, Dr. William Russell, a board-certified doctor of Physical Medicine & Rehabilitation, performed an Independent Medical Evaluation (IME) of Dennis on the referral of the Insured Workers' Insurance Fund (IWIF).[3] Dr. Russell reported there was no causal relationship between Dennis's current complaints and the two workplace injuries. Dr. Russell found "no anatomical confirmation of a compression fracture," said Dennis should be "encouraged to return to work," and that he "does not have any 'permanent' impairment to the head, neck, or back, i.e., 0%, in consideration of the AMA Guides to the Evaluation of Permanent Impairment, Fourth Ed., and the Maryland codes for the five factors of pain, loss of function, loss of endurance, weakness, and atrophy."

Dennis presented for a number of doctors' visits—with both Dr. Buckingham and

[3] IWIF "provides workers' compensation insurance coverage to Maryland businesses, and acts as claims administrator for all State employees for Workers' Compensation Insurance." https://msa.maryland.gov/msa/mdmanual/25ind/html/45injf.html. Thus, this evaluation was not specifically for purposes of another potential reasonable accommodation, but for Dennis's Workers' Compensation claim, which is at not at issue in this appeal.

the physician assistants in the employ of Dr. Leslie Foster, Dennis's pain physician—and a whole-body bone scan, primarily for pain in his lower back, between August 15, 2017 and March 2, 2018. After a December 20, 2017 visit, Dr. Foster stated that the ten pound lifting restriction would remain in place until Dennis had an epidural steroid injection.

On March 8, 2018, Dr. Russell performed another IME for the IWIF. Dr. Russell noted that for this specific IME, he reviewed the records from Dennis's appointments from August 15, 2017, to March 2, 2018, but did not have a report of the bone scan performed. His opinion changed from his previous report regarding Dennis's ability to return to work. He wrote:

> I do not think that [Dennis] can perform the essential functions of his job, based upon needing to be able to do work at a medium physical demand capacity. [Dennis] was seen by Dr. Toney back in January or February last year. He recommended a return to work in modified duty capacity. [Dennis] states this is not available to him. Consideration could be given to him continuing in a counseling/social work capacity but not having to do physical requirements of someone and some sort of aide capacity.

Regarding an impairment rating, Dr. Russell wrote that he would issue a supplemental report addressing a permanency rating after Dennis received the epidural steroid injections.

Dennis's Termination by GCDSS

On March 16, 2018, the GCDSS Department of Human Services sent Dennis a letter. The letter recounted that Dennis 1) had been absent from work since February 10, 2017 for medical reasons; 2) that after a workability evaluation by the SMD on January 31, 2017, the SMD "determined [Dennis was] unable to perform the full duties of [his] Social Worker II position without permanent accommodations" and stated that if permanent accommodations could not be made, "appropriate administrative action should be taken;"

3) that "GCDSS was unable [to] accommodate [Dennis's] medical restrictions;" 4) that Dennis was put on FMLA in February 2017 until it expired on 3/17/2017, at which time he was granted a new FMLA entitlement of 12 weeks which ran through 6/9/2017; and 5) that as of the end of the day on 6/9/2017, Dennis had exhausted all forms of available leave and was placed on Leave Without Pay status. The letter proceeded to say DHS had been

> informed by IWIF on 2/28/2018 that [Dennis] ha[s] a 10lb lifting restriction. After a search of vacant DHS positions in Garrett and Allegany counties, it has been determined that no vacant positions meet your barriers and qualifications.
>
> Your inability to perform the essential functions of a Social Worker II with or without accommodations has created an undue hardship to the department. As you remain unable to perform the essential job duties of the Social Worker II position in which you are currently employed, it has become necessary to consider freeing your position.

Regarding retirement disability, the form provided:

> The State Retirement Agency can provide you with counseling regarding the various retirement options available to you, assess your eligibility for retirement, and process the appropriate paperwork. You may apply for a normal service retirement or an early service retirement if you meet the age and service criteria. If you are permanently unable to perform the normal duties of your position due to an injury or illness, you may be eligible for either: ordinary retirement (any incapacitating illness or medical condition); or accidental (injury sustained on the job) disability retirement. Your claim will be reviewed by the Medical Board of the State Retirement Agency, which will make a recommendation concerning approval to the Board of Trustees. If you have questions relative to service and disability retirement, you may contact your retirement coordinator.

The letter explained that employees who resign in good standing are eligible for reinstatement within three years of separation. It also detailed ways the employee might search for other work with the State. The letter concluded by instructing Dennis to take the next four weeks to review the letter, investigate his options, and plan for his transition from

his current position. It then states, "If you have not voluntarily separated from your current position by April 18, 2019, it will be necessary for us to take appropriate steps to vacate it." It adds "if your circumstances have changed, and your health care provider now certifies that you are able to return to the full performance of the essential functions of your current position," to contact DHS staff with supporting medical documentation so that they can take the appropriate steps to return the individual to work.

On May 11, 2018, the State gave Dennis notice of his termination. The notice stated as the cause for his termination:

> Mr. Michael Dennis is charged with violations of the following:
>
> Code of Maryland Regulations (COMAR) 17.04.05.03 B (2) that the employee is an individual with a disability who with a reasonable accommodation cannot perform the essential functions of the position.

The explanation for termination states:

> Mr. Dennis has been absent from work since 2/10/2017 for medical reasons. Mr. Dennis' FMLA protection ended 6/9/2017. However, Mr. Dennis has been unable to return to work for medical reasons. Mr. Dennis was provided with an options letter on 3/16/2018 and advised in writing that he should either need to return to work, resign his position, retire from state service, or be terminated from his position. Mr. Dennis chose not to respond.
>
> Given the nature of Mr. Dennis' medical absence, the findings of the doctors and the adverse effect his absence has had on the other members of the [GCDSS], the only appropriate action is termination. The charge stated above is sufficient to support termination.

MSRPS's Denial of Disability Retirement for Dennis

On July 15, 2019, the Maryland State Retirement Agency received Dennis's application for accidental disability. In the section under which the applicant is instructed to describe the accident, Dennis listed the sole date as "10/11/2016." Under description, he

wrote, "While bending over to put papers in the trash, I hit my head [o]n the corner of a metal cabinet injuring my head, neck and back. Then on 11/10/2016 my back got worse when I had to lift three small children into the car at work." Under the Physician's Medical Report section, Dr. Buckingham checked 'yes' to indicate that Dennis is "permanently and totally incapacitated from a . . . physical condition for the further performance of the normal duties of his . . . position."

On November 11, 2019, the Medical Board released its report recommending that Dennis be denied both accidental and ordinary disability, saying the "medical evidence submitted does not support a conclusion that the member is permanently incapacitated or unable to perform his job duties," and further, that it was recommending denial of accidental disability specifically because Dennis's "disability is not the result of an accident on 10/11/16." On December 5, 2019, MSRPS officially denied Dennis's claim for disability retirement benefits at the Medical Board's recommendation. Dennis appealed, and the claim was resubmitted for reconsideration.

On February 10, 2020, Dennis was seen by Dr. Buckingham, who wrote a letter "to whom it may concern," opining that if Dennis were to have to lift children in and out of vehicles today, as he used to, he would re-injure himself, and concluded that Dennis "simply cannot do the role that he once served at the social services office."

On September 15, 2020, Dr. Gary Pushkin, an orthopedic surgeon contracted by MSRPS, performed an IME of Dennis to determine whether he was "permanently disabled from the performance of [his] job duties," and if found disabled, on what basis, and whether the disability is "the natural and proximate result of the accident on October 11, 2016[.]"

Among the list of items Dr. Pushkin reported reviewing, are Dennis's "position description" (#10) and "task analysis sheets" (#11). Dr. Pushkin included two numbered statements under the "Opinion" heading: the first that Dennis "is not permanently disabled from the performance of his job duties," and second, that "[t]here is no disability as the natural and proximate result of the accident of October 11, 2016."

On October 22, 2020, based on Dr. Pushkin's IME, the Medical Board upheld its original November 2019 recommendation to deny Dennis accidental disability and ordinary disability. On November 17, 2020, the MSRPS Board of Trustees informed Dennis by letter of its decision to accept the Medical Board's recommendation to deny him disability retirement benefits. Dennis appealed that determination and on July 15, 2021, the case was transmitted to the Office of Administrative Hearings (OAH).

Dennis's Hearing before the ALJ

> On September 13, 2021, a hearing was held before the ALJ to address two issues:
>
> (1) Is [Dennis] mentally or physically permanently incapacitated for the further performance of his normal duties as a Social Worker II?
>
> (2) If so, is his disability the natural and proximate result of an accident that occurred in his actual performance of duty at a definite time and place and without his willful negligence?

Dennis and Dr. Pushkin were the only witnesses to testify.

On December 8, 2021, the ALJ issued his decision, holding that Dennis did not meet his burden of proving an affirmative answer to the first issue by a preponderance of the evidence, and thus the ALJ did not find it necessary to address the second issue of causation. The ALJ opined that he "did not find [Dennis's] testimony regarding his

disability completely credible" based on certain inconsistencies. The ALJ noted that Dennis "did not present any testimony by his treating or other evaluating physicians, and their opinions were not subject to examination. As a result, significant inconsistencies in their opinions were left unexplained." The ALJ recounted in detail the testimony of the sole expert witness, Dr. Pushkin, who testified that none of the conditions with which he diagnosed Dennis permanently disabled Dennis from performing his Social Worker II job duties. The ALJ found Dr. Pushkin to be thorough and credible, and that his opinion was corroborated by Dr. Buckingham's May 15, 2017 opinion and Dr. Russell's July 25, 2017 opinion that Dennis could return to work without any restrictions, as well as Dr. Toney's January 31, 2017 opinion that the twenty-five-pound lifting restriction was temporary. The ALJ found Dr. Buckingham and Dr. Russell's later opinions that Dennis was unable to perform his job unpersuasive, since "the record does not support any reason for" those doctors changing their opinions, which "are inconsistent with Dr. Pushkin's credible expert opinion." Because the ALJ found Dennis was not permanently disabled from doing his job, he found it unnecessary to address the issue of causation.

Dennis appealed the ALJ's decision to the Circuit Court for Garrett County, Maryland. A hearing was held on September 2, 2022, and on September 9, the court issued an order affirming the decision of the ALJ.

Dennis then timely appealed to this Court, asking, first, that we reverse the ALJ and grant him accidental disability pension under SPP § 20-109(b), but that if we find he is not eligible for accidental, to grant him ordinary disability pension under SPP § 29-105(a). If instead this Court finds neither award appropriate, Dennis asks that we vacate the decision

of the ALJ and "order a new hearing or further consideration and proceedings."

We will supply additional details where they are relevant to our analysis.

DISCUSSION

Standard of Review

In a previous appeal of a denial of disability benefits by the MSRPS, this Court applied the following standard of review explicated by our Supreme Court:[4]

> When reviewing the decision of an administrative agency, we review the agency's decision directly, not the decision of the circuit court. *Anderson v. General Casualty,* 402 Md. 236, 244, 935 A.2d 746, 751 (2007). A reviewing court will affirm the decision of the agency when it is supported by substantial evidence appearing in the record and it is not erroneous as a matter of law. *Comptroller v. Blanton,* 390 Md. 528, 535, 890 A.2d 279, 283 (2006); *Ramsay, Scarlett & Co. v. Comptroller,* 302 Md. 825, 834, 490 A.2d 1296, 1300–01 (1985). Because an agency's decision is presumed *prima facie* correct, we review the evidence in the light most favorable to the agency. *Comptroller v. Citicorp,* 389 Md. 156, 163, 884 A.2d 112, 116 (2005). Indeed, "it is the agency's province to resolve conflicting evidence and where inconsistent inferences can be drawn from the same evidence it is for the agency to draw the inferences." *Id.* at 163–64, 884 A.2d at 116 (quoting *Ramsay,* 302 Md. at 835, 490 A.2d at 1301). When we review an agency decision that is a mixed question of law and fact, we apply "the substantial evidence test, that is, the same standard of review we would apply to an agency factual finding." *Longshore v. State,* 399 Md. 486, 522 n. 8, 924 A.2d 1129, 1149 n. 8 (2007).

Thomas v. State Ret. & Pension Sys. of Maryland, 184 Md. App. 240, 248 (2009), *aff'd*, 420 Md. 45 (2011) (quoting *Comptroller v. Science Applications*, 405 Md. 185, 192–93, (2008)) (cleaned up). "The substantial evidence test is defined as 'whether a reasoning

[4] At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022.

mind reasonably could have reached the factual conclusion the agency reached.'" *Brandywine Senior Living at Potomac LLC v. Paul*, 237 Md. App. 195, 210 (2018) (quoting *Layton v. Howard Cnty. Bd. of Appeals*, 399 Md. 36, 48–49 (2007)). Additionally, in determining whether the administrative agency erred, the reviewing court "reviews an agency's decision 'solely on the grounds relied upon by the agency.'" *Becker v. Falls Rd. Cmty. Ass'n*, 481 Md. 23, 42 (2022) (quoting *Dep't of Health & Mental Hygiene v. Campbell*, 364 Md. 108, 123 (2001)).

"We review questions of law de novo, although we give weight to an agency's interpretation of a statute it is charged with enforcing where the interpretation is longstanding and falls within the agency's area of expertise." *Matter of McCloy*, 257 Md. App. 668, 684 (2023) (quoting *Brown v. Handgun Permit Rev. Bd.*, 188 Md. App. 455, 467 (2009)). "On the other hand, 'a reviewing court is under no constraints in reversing an administrative decision which is premised solely upon an erroneous conclusion of law.'" *Id.* (quoting *Mayor & City Council of Balt. v. Proven Mgmt., Inc.*, 472 Md. 642, 667 (2021)).

I. The ALJ's finding is supported by substantial evidence.

A. Parties' Contentions

Dennis asserts the ALJ acted arbitrarily and capriciously in accepting Dr. Pushkin's opinion that Dennis could perform his required workplace tasks, because Dr. Pushkin performed only a "perfunctory IME" and had never seen the corresponding task analysis. According to Dennis, the task analysis was "never seen by counsel for RPS, never introduced into evidence, never seen by the ALJ, and thus is absent from the record." Thus,

Dennis concludes, it is unclear what Dr. Pushkin was basing his opinion on, and his testimony was "not thorough and credible" as it contradicted his written report and revealed he did not recall his methodology, process, or the documents he reviewed. Dennis emphasizes that Dr. Pushkin disagreed "with four medical doctors and multiple people responsible for employing [Dennis]," and yet it was Dr. Pushkin's testimony that the ALJ chose to find credible. He adds that the ALJ mischaracterized the other four doctors' opinions as inconsistent and unpersuasive. For essentially these same reasons, Dennis asserts the ALJ's decision is not supported by the reasons stated, nor by the record when considered as a whole. Dennis also takes issue with the ALJ's finding that Dennis was not "completely credible," as Dennis would interpret his testimony differently.

MSRPS counters that all that is required for this Court to affirm the denial of the award is "more than a scintilla of evidence" that Dennis does not suffer from a medical condition rendering him permanently incapacitated from performing his job. MSRPS says this threshold is surpassed by Dr. Pushkin's expert opinion and the medical information on which he based it—including his physical examination of Dennis, multiple MRI reports, a bone scan report, and "a volume of medical records containing no evidence of a permanently incapacitating condition." MSRPS emphasizes that Dennis's criticisms focus on the ALJ's assessment of his credibility, the ALJ's decision to credit Dr. Pushkin's opinion over the other doctors' opinions, and the inferences made by the ALJ—but it is well-established that credibility findings and inferences are within the exclusive province of the factfinder and thus not grounds for reversal.

B. Analysis

Eligibility for ordinary disability retirement is governed by section 29-105(a) of the State Personnel and Pensions Article of the Annotated Code of Maryland ("SPP"):

> (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., SPP § 29-105(a). Eligibility for accidental disability retirement is governed by SPP § 29-109(b), in relevant part:

> (b) . . . 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., SPP § 29-109(b). In a hearing on whether the claimant is entitled to either benefit, the burden is on the claimant. COMAR 22.06.06.02E(1). Because the ALJ below rested his decision solely on his finding that Dennis did not prove he is permanently incapacitated for the further performance of his normal duties as a Social Worker II, we limit our review to that ground. *Becker*, 481 Md. at 42.

Substantial Evidence

We cannot say that a reasoning mind *could not* have "reasonably . . . reached the factual conclusion" that Dennis was not permanently disabled from performing the duties of the Social Worker II job based on the evidence in the record. *Brandywine*, 237 Md. App. at 210. Critically, and as the ALJ emphasized in his opinion, the only expert to present testimony at the hearing was Dr. Pushkin. Dennis presented no testimony by his treating or other evaluating physicians, leaving nuances or changes of opinion by some of those physicians unexplained, while Dr. Pushkin was able to elaborate on his opinion and have more complex points illuminated on cross-examination. Dr. Pushkin testified to listening to Dennis describe his symptoms and by having him fill out a symptom diagram, reviewing the 493 pages of medical records in the file, analyzing Dennis's job description, and physically examining Dennis's neck, lower back, and hip. Dr. Pushkin testified to his reported impression that Dennis had a scalp laceration; musculoligamentous sprain-strain cervical spine, post-traumatic; pre-existing degenerative arthritis cervical spine; degenerative arthritis lumbosacral spine; and possible nondisplaced T9 compression fracture. Dr. Pushkin testified to the bases of his opinion that Dennis was not permanently incapacitated from performing his job duties, and specifically, from lifting small children:

- "Simply, [Dennis] had functional ranges of motion of his mid and lower back. He had a normal neurologic exam. He had no signs of atrophy. And putting those together and then using resources such as the AMA guides for workability to return to work, which I am familiar with, I made those – it was my opinion that he was able to perform his job duties."

- Regarding the diagnosis of muscular sprain/strain of the cervical spine, Dr. Pushkin testified that "[i]t's terminology that we use to say

that someone had a soft tissue injury to their neck or to their back. It implies that there's no particular damage to the bone nor fractures or dislocations." He explained that this diagnosis was based on Dennis's "subjective complaints of neck pain following his injury."

- Dr. Pushkin testified to diagnosing Dennis with pre-existing degenerative arthritis of the cervical spine and degenerative arthritis in the lumbosacral spine based on X-rays. He explained that because arthritis develops over a period of years, an injury in October would not cause arthritis to show up on X-rays taken within months of that injury.

- Regarding Dennis's back, Dr. Pushkin testified: "Of his lower back, he -- his back was normal it appears. There was no tenderness. There was no spasm. He had – he could bend about three quarters of the way down to the floor. He could bend backwards and side to side. He didn't have complete full range of motion that we see in a younger person. But he certainly had a very functional range of motion and motion that is not unusual for a 64 year old person. He had discomfort in his lower back. He had pain. I looked at signs of malingering… the MRI of the lumbosacral spine just showed that he has degeneration. The impression there was lumbar spine myelosis. He had arthritis at L4-5 and at L5-S1. So the two disks at the lower part of the lumbar spine. . . there's no evidence of a fracture or dislocation… The arthritis that is there on the March first MRI scan would not have developed from November.

- Dr. Pushkin testified that the lifting restrictions were not necessary based on his opinion that Dennis's ninth vertebrae had a healed fracture, and lifting would not make it worse.

- Dr. Pushkin testified that he did not diagnose Dennis with intercostal neuralgia as another doctor had, since a pain management doctor performed a nerve block, and the block did not completely relieve Dennis's pain.

Dennis asserts that Dr. Pushkin's conclusion, which the ALJ chose to credit, was not supported by the record as a whole, given the opinions of his other treating and evaluating, non-testifying doctors—namely, Dr. Buckingham and Dr. Russell—that Dennis was permanently incapacitated from performing his job duties. Dr. Pushkin testified

to disagreeing with any doctor's opinion that Dennis was permanently incapacitated from performing his job duties, and even testified to his belief to a reasonable degree of medical probability that Dennis was capable of doing his job back in May 2018 when he was terminated, and thus his disagreement with GCDSS. It is not clear that Dr. Pushkin's opinion is a clear-cut "outlier," given the evolving opinions of different doctors in the record, as well as the nuances of those doctors' opinions (i.e., Dr. Toney did recommend a lifting restriction for Dennis, but said it was only temporary). Even if it is, we are not convinced that that means that the ALJ's decision to credit that opinion was not supported by substantial evidence from the record as whole. "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement . . . that courts consider the whole record." *State Ins. Comm'r v. Nat'l Bureau of Cas. Underwriters*, 248 Md. 292, 307 (1967) (quoting *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 488 (1951)). Here, the ALJ noted that he reviewed all of Dennis's treating and evaluating doctors' opinions and medical reports, and he specifically addressed why he did not find the opinions of Dr. Buckingham and Dr. Russell—which Dennis relied on heavily—to be as reliable as that of Dr. Pushkin.

Contradicting Non-testifying Doctors Opinions

This relates to Dennis's contention that the ALJ's characterization of the doctors finding him disabled as "inconsistent" and "unpersuasive" is "mistaken" and "flawed." In

explaining why he found Dr. Buckingham and Dr. Russell's opinions less reliable, the ALJ described some inconsistencies he perceived:

> For instance, there is no explanation for Dr. Buckingham removing all of [Dennis's] work restrictions on May 15, 2017, but then imposing several work restrictions, including a ten-pound lifting restriction, just one month later. Similarly, there is no explanation for Dr. Russell stating on July 25, 2017, that [Dennis] should return to work because he did not have a compression fracture or any permanent impairment to his head, back, or neck, but then stating on March 8, 2018 that [Dennis's] medical condition prevented him from performing the essential functions of his job.

While Dennis asserts these evolutions of opinion can be explained, what he is actually doing is drawing inferences from the contexts of the doctors' notes. For instance, he says in his opening brief, "Dr. Russell does not expressly state why his opinion developed; however, it is easy to **infer**: In 2017, Dr. Russell had medical information from a more limited period." (Emphasis added). We reiterate that it is the exclusive province of the factfinder to resolve conflicting evidence and to draw inferences where inconsistent inferences can be drawn. *Thomas*, 184 Md. App. at 248. The inferences drawn by the ALJ about these doctors' opinions are not unreasonable, much less grounds for reversal.

Dr. Pushkin's Credibility & The "Task Analysis"

Dennis also challenges the credibility the ALJ assigned to Dr. Pushkin, specifically because Dr. Pushkin ultimately realized and admitted that, despite what he wrote in his report, he must have never seen the "task analysis" for Dennis's position. Dennis argues the task analysis is crucial to the ultimate issue of his disability because Dennis "had seen it before, and he recalled it required him 'to be able to lift children up to 45 pounds and put them in car seats and carry them. Carry them up and down stairs, across uneven ground,

snow and ice and that kind of thing, which I simply could not do,'" as he testified at trial. Without having seen the task analysis, Dennis says it is unclear what Dr. Pushkin based his opinion on. We address this contention with two points.

First, we can hardly see how we, or the ALJ, could find this illusory document—which by Dennis's own admission is not in the record,[5] nor detailed in the record or testimony other than the brief statement quoted above by Dennis—to discredit the opinions of MSRPS and Dr. Pushkin. We do not have it before us, nor did the ALJ, to determine what difference the document might have made to Dr. Pushkin's assessment. Moreover, we see no evidence in the record that even those doctors who ultimately opined that Dennis

[5] At the hearing, Counsel for Dennis asked Dr. Pushkin if he had seen Dennis's job description, to which Dr. Pushkin responded he had. Then, Counsel asked if Dr. Pushkin had seen "the task analysis sheet prepared by Dennis's personal supervisor." The following dialogue ensured:

> Dr. Pushkin: I seem to recall I did. Can you direct me to a page?
>
> Counsel for Dennis: No, I can't direct you to a page because I don't believe it's in the record. Did you see anything besides those that were in the record? And the ones that came shortly thereafter.
>
> Dr. Pushkin: No.

Dennis's counsel proceeded to ask Dr. Pushkin if at the time he rendered his opinion he had the task analysis sheet. Dr. Pushkin responded, "Well, I believe we established that I have never seen [the] task analysis sheet." Counsel for MSRPS objected, explaining "nobody here has seen the task analysis. I haven't seen it. It's not in the record. It's a document that's not anywhere here in this hearing. . . . I just want to make clear that we're referring to a document that's not in evidence and it was never provided to me." The judge allowed the line of questioning, but responded to Counsel for MSRPS, "Okay. So far, I don't even know that there exists a task analysis." Counsel for Dennis did not ask any further questions on the task analysis sheet.

was permanently incapacitated from performing his job reviewed the "task analysis."[6] In fact, Dr. Russell's March 8, 2018 opinion that Dennis could not "perform the essential functions of his job" was expressly "based upon [Dennis] needing to be able to do work at a medium physical demand capacity." When Counsel for Dennis discussed Dr. Russell's IME with Dr. Pushkin, Dr. Pushkin was familiar with the standard and Dr. Russell's opinion:

> **Counsel for Dennis**: So, IWIF hired Dr. William Russell and on page 331 of that report, Dr. Russell tells the Workers' Comp carrier, I do not think that the examinee, Mr. Dennis . . . can perform the essential functions of his job based upon needing to be able to work at a medium physical demand capacity. Correct?
>
> **Dr. Pushkin**: That's what he says. Yes.
>
> **Counsel for Dennis**: And you're disagreeing with IWIF's doctor as well. Correct?
>
> **Dr. Pushkin**: I am because there's nothing in his physical examination that shows he cannot do his job duties.
>
> **Counsel for Dennis**: Let me ask you this. What do you understand to be the lifting requirements of a job of a medium demand physical capacity?
>
> **Dr. Pushkin**: Medium physical demand capacity by OSHA is lifting up to 50 pounds.
>
> **Counsel for Dennis**: Okay. So assuming that his job was deemed to be of medium physical capacity, you would expect him to have to lift 50 pounds or more. Correct? Or up to 50 pounds.

[6] Although Dennis testified that the "task analysis" was given to the SMD (Dr. Toney), the only record the SMD's report noted reviewing that sounds similar to a "task analysis" is "[t]he job position description for a Social Worker II." A document titled "Position Description" *does* appear in the record, includes "transportation of clients" as a job duty, and its only reference to lifting is an unchecked box that says, "Work involves special physical demands such as lifting 50 pounds or more[.]"

Dr. Pushkin: Yes.

If both doctors assumed Dennis's job required "medium physical capacity" lifting (which appears to be consistent with Dennis's recounting of his "task analysis" requiring that he lift children up to forty-five pounds), we do not understand how the ALJ could reasonably discredit only one doctor's opinion on that basis alone.

Our second response to this contention is that even without the mysterious "task analysis" sheet, the record contained evidence of the job duty that Dennis consistently complained he was unable to do after his work injuries: lifting children, and specifically in and out of car seats. This complaint was apparent from other doctors' reports, such as Dr. Buckingham, who often commented on Dennis's inability to perform this task.[7] Dr. Pushkin's report recounts the November 10, 2016 injury Dennis described, when he lifted a child who "weighed about 40 pounds." And the report introduction also states that Dennis was given an opportunity to provide further information he felt pertinent at the end of the evaluation, when he could have informed Dr. Pushkin of the specific job duties which he felt unable to perform. Finally, Dr. Pushkin's report lists the "Position description" as a document he reviewed, which *is* in the record, and which even Dennis cites to exclusively in his opening brief for his description of the "Essential Work" of the Social Worker II

[7] For instance, in his February 10, 2020 note on Mountain Laurel Medical Center letterhead, Dr Buckingham writes "With [Dennis's] job at social services he used to have to interact with the children; lifting them in and out of vehicles multiple times day. If he was to do this type of work today he would re-injure himself and/or cause more significant damage." Dr. Pushkin's report noted that he reviewed medical records from Mountain Laurel Medical Center.

position.[8] This is also the title of the *only* document relating to Dennis's work duties that the SMD, Dr. Toney, noted reviewing. When Dr. Pushkin was asked both on direct and cross-examination about his opinion of Dennis's ability to lift children, he repeatedly testified that he did have an opinion:

> **Counsel for MSRPS**: In your opinion are there any job duties, any listed in his job description that he's permanently unable to perform?
>
> **Dr. Pushkin**: No.
>
> **Counsel for MSRPS**: To be specific, in your opinion, is he permanently restricted from lifting children, small children?
>
> **Dr. Pushkin**: No.
>
> **…**
>
> **Counsel for Dennis**: Do you know how often Mr. Dennis would be called upon to lift 40- or 50-pound children?
>
> **Dr. Pushkin**: I had whatever it said in his job description.
>
> **Counsel for Dennis**: Okay. And do you know—do you have an opinion regarding whether Mr. Dennis was capable of carrying 40- and 50-pound children?
>
> **Dr. Pushkin**: Yes, I do.
>
> **Counsel for Dennis**: And I think you stated that it was your opinion that he is able to do that. Correct?
>
> **Dr. Pushkin**: Yes.

In short, there was substantial evidence from which the ALJ could have found that

[8] See note 6 above for a description of this document. Although it does not specifically state that a Social Worker II need to be able to live forty-five-pound children in and out of car seats, the sheet does say that the employee must transport children.

Dr. Pushkin was familiar with Dennis's physical job requirements—particularly the duty at the heart of Dennis's alleged disability and reasonable accommodation request. It was up to the ALJ to determine whether Dr. Pushkin's not having seen this "task analysis" sheet, and despite Dr. Pushkin's note to the contrary in his report, made him or his opinion any less credible. Based on the evidence above, we will not disturb that finding.

Dennis's Credibility

Finally, Dennis takes issue with the ALJ finding him not credible in his discussion of his disability. The ALJ based this finding, first, on Dennis initially denying he had been treated for lower back pain prior to the 2016 accidents, "which is directly contrary to the medical records showing that he received treatment for this same complaint on February 9, 2015." The ALJ also cited Dennis's testimony that after he injured his head on the metal cabinet it bled a lot, but that when he described the same injury to Dr. Dowla on November 17, 2016, he said there was only a minimal amount of bleeding. The ALJ noted that when Dennis went to physical therapy on November 11, 2016, he made no mention of the November 10, 2016 injury. Finally, the ALJ took issue with Dennis's varying descriptions of the November 10, 2016 injury, as either being caused by assisting a resistant forty-pound child out of a car seat, or, lifting three children into a vehicle. Each of these discrepancies is, in fact, born out in the record.

In his opening brief, Dennis provides explanations to mitigate each discrepancy, claiming either that the record and testimony bear out a different reality, or that the noted inconsistency is so trivial, if even inconsistent at all, that it should not have affected the ALJ's judgment. First, we do not find Dennis's explanations from the record to be as clear

as he suggests. For instance, regarding his 2015 visit for lower back pain, he claims that the medical record and testimony are clear that he was concerned he had a kidney stone (not about the back pain itself). The medical record says:

> Patient to be evaluated for low back pain. It does not radiate. He states that the current episode of pain started 2-3 months ago. He does not recall any precipitating event or injury. He denies any associated symptoms. He has not found anything that helps relieve the pain. It is in the right lower back. There is no radiation to the legs; no bowel/bladder sx; no fever; no paresthesias. He was worried that it could be a kidney stone but there is no flank pain, urinary sx, or radiation to the RLQ. He has no h/o kidney stones.

There is no indication from the record or testimony that the pain *was* caused by kidney stones. The "Assessment" entered was "low back pain." We do not think that Dennis's thought at the time that his pain might have been due to a kidney stone renders the ALJ's finding of an inconsistency in his testimony arbitrary or capricious.

Regarding Dennis's not mentioning his November 10 back injury at his appointment the following day, he explains in his brief that he did not mention it initially because he

> thought he had simply aggravated an existing injury, and he had no real opportunity to discuss it anyway during the routine traction appointment. However, he did mention it just a few days later during his November 15, 2016, physical therapy appointment, by which time he realized there was problem beyond mere aggravation of an existing condition.

After providing this explanation, Dennis asserts:

> This aligns much more neatly and reasonably than making the leap and heavy **inference** that [Dennis] did not mention it because it was exaggerated or false.

(Emphasis added). In Dennis's own words, he is arguing that the ALJ should have made a different inference. It is for the factfinder to draw inferences where inconsistent inferences

can be drawn. *Thomas*, 184 Md. App. at 248.We will not disturb the ALJ's findings on the ground that drawing a different inference may have been reasonable.

Regarding the other inconsistencies noted by the ALJ, we simply reiterate that credibility determinations are the sole province of the factfinder, and the ALJ had the benefit of viewing Dennis and hearing his testimony in person and could ascribe what he felt was the appropriate amount of weight to any perceived inconsistencies in testimony.

We do not find any of the ALJ's conclusions to be arbitrary or capricious, and we do find that his conclusion is supported by substantial evidence in the record as a whole.

II. It was not litigated below whether it was legally inconsistent for DSS to terminate Dennis and MSRPS to deny him disability retirement.

A. Parties' Contentions

Dennis asserts that his termination by DSS for medical reasons was inconsistent with MSRPS's decision to deny him disability, and that, according to this Court in *Biscoe v. Baltimore City Police Dept.*, 96 Md. App. 1, 20 (1993), when such an inconsistency exists, the legislative decision to provide a disability pension for the person medically unable to perform their job must prevail over an employer subject to that pension system making the administrative decision to terminate the employee for being unable to perform their duties.

MSRPS counters that its standard for determining eligibility to disability retirement (certification by the Medical Board of the individual's permanent incapacity for further performance of duty) and DSS's standard for dismissing an employee for medical reasons (whether an employee is currently unable to perform the essential functions of the position

with reasonable accommodation) are distinct, and thus MSRPS is not bound by a prior personnel decision. MSRPS adds that GCDSS's decision to terminate Dennis had no preclusive effect in this proceeding; it satisfies neither the elements of res judicata nor those of collateral estoppel. Finally, MSRPS argues that *Biscoe* is distinguishable from the instant case and does not provide authority for this Court to reverse the ALJ and grant Dennis benefits.

B. Analysis

We decline to reach the merits of this argument because this issue, although an interesting one, was not fully litigated, or even the focus of the hearings before the ALJ or in the circuit court.

The only reference made to this argument in the ALJ's decision is a statement recounting that at the hearing Dennis "argued that it would be patently inconsistent to allow the GCDSS to terminate him because it could not accommodate his disability and then deny him retirement benefits for that same disability." The issue was not listed as one of the two issues before the ALJ in his order, nor did the ALJ address the issue elsewhere in the order. And although it appears some pages of the transcript are not included in the record, we do not see in the large portion that is in the record any place where Dennis argues that his termination by DSS and denial of retirement by MSRPS is legally inconsistent. Counsel for Dennis does focus a good bit of cross-examination of Dr. Pushkin on highlighting all the people and doctors Dr. Pushkin's opinion contradicts, but the line of questioning does not take the approach that this amounts to a legal inconsistency; only a factual one, seemingly attempting to discredit Dr. Pushkin. The circuit court appeared to

notice the lack of focus on this as well, opining:

> The situation does present some question of consistency. However, the propriety of [Dennis's] termination was not the subject of this administrative hearing. The issue before the ALJ was whether [Dennis] satisfied the statutory requirements of the State Personnel & Pensions Article[,] not whether his earlier termination as appropriate.

Although we look through the circuit court opinion and review only the ALJ's decision, we happen to reach the same conclusion regarding our ability to address this issue: "[I]f issues are presented to the trial court, but not decided by the trial judge, the issues generally cannot be raised on appeal." *Troxel v. Iguana Cantina, LLC*, 201 Md. App. 476, 511 (2011) (citing *Burdette v. LaScola*, 40 Md. App. 720, 733 (1978)). We do not find it appropriate to exercise our discretion to address this issue.

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