

Circuit Court for Anne Arundel County
Case No. C-02-CV-19-001229

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2011

September Term, 2019

ANNE ARUNDEL COUNTY, MARYLAND

v.

JOHN C. CRUM

Fader, C.J.,
Arthur,
Gould,

JJ.

Opinion by Arthur, J.

Filed: February 3, 2021

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

John C. Crum retired from service with the Anne Arundel County Police Department following an injury to his right shoulder. After retiring, Mr. Crum applied for service-connected disability retirement benefits under § 5-5-205 of the Anne Arundel County Code (A.A.C.C.). The County Office of Personnel found that Mr. Crum had a “total and permanent” disability, but that his injury did not arise out of or occur in the course of his employment; thus, the County denied Mr. Crum’s request for service-connected disability retirement benefits. Instead, the County granted him the less lucrative non-service-connected disability retirement benefits under A.A.C.C. § 5-5-205(d)(3)(ii).

Mr. Crum appealed to the Anne Arundel County Disability Review Board, which upheld the Office of Personnel’s decision. Mr. Crum then appealed to the Anne Arundel County Board of Appeals, which affirmed the denial of service-connected disability retirement benefits after finding both that Mr. Crum’s injury was not service-connected and that Mr. Crum was not totally and permanently disabled.

Mr. Crum sought judicial review in the Circuit Court for Anne Arundel County. The circuit court reversed the Board of Appeals’ decision and granted Mr. Crum’s request for service-connected disability retirement benefits. After the court denied a motion to alter or amend the judgment, the County noted a timely appeal to this Court.

Because we determine that the Board had sufficient evidence to find that Mr. Crum’s injury did not arise out of or occur during the course of his employment, we shall reverse the circuit court’s decision that Mr. Crum is entitled to service-connected

disability benefits. We shall, however, affirm the circuit court’s decision that Mr. Crum is totally and permanently disabled. As a result of our decision, Mr. Crum shall be entitled to receive non-service-connected disability retirement benefits.

FACTUAL AND PROCEDURAL BACKGROUND

1. Mr. Crum’s Injuries

Mr. Crum began working as a police officer for the Anne Arundel County Police Department in 2005, at about the age of 27. During his tenure as a police officer, Mr. Crum suffered four service-connected injuries.

The first injury occurred in January 2007 when an automobile rear-ended Mr. Crum’s patrol car. The accident caused Mr. Crum to suffer injuries to his right shoulder, back, and neck. Following the accident, Mr. Crum received workers’ compensation benefits. He participated in six weeks of physical therapy before returning to service.

Mr. Crum was next injured in November 2008 in another motor vehicle collision. He suffered sprains to his left ankle and spine. Mr. Crum received workers’ compensation benefits and attended physical therapy.

In February 2013, Mr. Crum injured his right shoulder again when a suspect attacked him from behind. Mr. Crum received workers’ compensation benefits and attended physical therapy for six weeks.

Before returning to service in 2013, Mr. Crum was examined by Dr. Stanley Friedler, an orthopedist, who prepared an independent medical examination (“IME”) report. Dr. Friedler reported that an MRI showed signs of “minimal acromioclavicular

degenerative change” (i.e., degenerative changes in his shoulder), which Dr. Friedler concluded was unrelated to the injury.¹ Mr. Crum returned to work after six weeks of physical therapy, although he continued to experience a decrease in his right shoulder function.

In 2014, Mr. Crum injured his right shoulder again in an on-the-job motor vehicle collision. Dr. Edward McDevitt, an orthopedist, examined Mr. Crum and referred him to an imaging center for an MRI. The MRI did not reveal any new findings, but indicated that Mr. Crum’s tendinitis and acromioclavicular (“AC”) joint and “capsular degeneration” were “subjectively unchanged” from the 2013 MRI. The MRI also indicated that Mr. Crum suffered from mild rotator-cuff tendinosis. Mr. Crum again participated in six weeks of physical therapy and received workers’ compensation benefits before returning to service.

In August 2016, Mr. Crum continued to have pain in his right shoulder. He scheduled an appointment with his orthopedist, Dr. McDevitt, for October 3, 2016.

In the week before his scheduled appointment with Dr. McDevitt, Mr. Crum exerted his right shoulder multiple times during his employment, including pushing trees that were blocking the road and moving a barricaded door to gain access to a suspect.

On October 2, 2016, the day before the appointment, Mr. Crum assisted a tenant in recovering a motorcycle from a landlord. While pushing the motorcycle, Mr. Crum

¹ “Acromioclavicular degenerative change” refers to degenerative changes in the acromioclavicular joint, where the acromion (the top of the scapula or shoulder blade) joins the clavicle or collarbone. *See Stedman’s Medical Dictionary* 462930 (2014).

experienced pain in his right shoulder. He described the pain as “different” from what he felt in his earlier injuries.

Mr. Crum reported this new injury to Dr. McDevitt at his appointment the following day. Dr. McDevitt diagnosed him with subacromial impingement of the right shoulder.

Unconvinced of this diagnosis, Mr. Crum spent the following year seeking the medical opinion of six additional doctors. On March 3, 2017, Dr. Dahamhuri A. Aklaitis, a neurologist, examined Mr. Crum and diagnosed him with mild carpal tunnel syndrome. On March 15, 2017, Mr. Crum met another orthopedist, Dr. Edwin Fulton, who referred him to a thoracic surgeon, Dr. Stephen Stanziale. On August 2, 2017, Dr. Stanziale examined Mr. Crum for thoracic outlet syndrome² and recommended that Mr. Crum seek a diagnosis from a neurologist. On September 8, 2017, Mr. Crum was examined by yet another orthopedist, Dr. Michael Franchetti, who diagnosed Mr. Crum with arthritis, tendinitis, and impingement syndrome.

During the time when Mr. Crum was seeking a diagnosis for his right shoulder pain, he had been placed on “light duty” with the Telephone Reporting Unit. Mr. Crum remained in this position from October 2016 until September 1, 2017, when the County informed him that he would no longer be permitted to stay on light duty. The County

² Thoracic outlet syndrome is the “collective title for a number of conditions attributed to compromise of blood vessels or nerve fibers (brachial plexus) at any point between the base of the neck and the axilla” or armpit. *Stedman’s Medical Dictionary, supra*, 889330.

told Mr. Crum that he could return to full duty, find another job with the County, or retire. Mr. Crum requested and received an extension so that he could be examined by Dr. Daniel P. Hexter, a neurologist who had been recommended by his vascular specialist

On September 25, 2017, Dr. Hexter diagnosed Mr. Crum with idiopathic brachial plexopathy, or Parsonage-Turner Syndrome (“PTS”), a rare and inoperable condition.³

Dr. Hexter informed Mr. Crum that, as PTS is inoperable, pain management was his only recommended course of treatment.

Accepting Dr. Hexter’s diagnosis of PTS, Mr. Crum determined that he would not be able to return to full duty. Mr. Crum submitted a retirement application to the Office of Personnel, informing the office that he was retiring because of a service-related injury and that he would be seeking a service-connected disability retirement pension.

Since his retirement, Mr. Crum has been working full-time as a driver for an assisted living facility and part-time as an “activities specialist” for Baltimore County Parks.

2. Application for Service-Connected Disability Retirement and Denial by the Office of Personnel and Disability Review Board

In his application to the Office of Personnel, Mr. Crum requested service-connected disability retirement benefits under A.A.C.C. § 5-5-205(d)(2). Service-connected disability retirement benefits are awarded if a “total and permanent disability .

³ The term “idiopathic” denotes “a disease of unknown cause.” *Stedman’s Medical Dictionary* 433960.

. . is the result of bodily injury or disease arising out of and occurring in the course of the participant's employment." A.A.C.C. § 5-5-205(d)(2).

Mr. Crum claimed that he had become totally and permanently disabled after he assisted in recovering the tenant's motorcycle on October 2, 2016. Mr. Crum claimed that this incident further exacerbated his previous service-connected right shoulder injuries. Mr. Crum submitted his medical records to the Office of Personnel. Those records included Dr. Hexter's diagnosis of PTS, as well as the conflicting reports from the other physicians.

Because the medical records presented to the Office of Personnel consisted of conflicting diagnoses, Cheryl Wyngarden, a Personnel Analyst with the Office of Personnel, requested that Mr. Crum be examined by Dr. Robert Smith, an orthopedist.

Mr. Crum was examined by Dr. Smith on December 8, 2017. Based on that examination and Mr. Crum's medical reports, Dr. Smith diagnosed Mr. Crum with arthritis of the acromioclavicular or "AC" joint. Dr. Smith informed the Office of Personnel that, based on the diagnostic studies and his examination of Mr. Crum, there was no "clinical or objective evidence" of PTS. Instead, Dr. Smith concluded that Mr. Crum's continued pain was caused by non-service-connected AC joint arthritis.

The Office of Personnel relied on Dr. Smith's diagnosis of AC joint arthritis and denied Mr. Crum's request for service-connected disability retirement benefits. The Office of Personnel did, however, find that Mr. Crum was totally and permanently

disabled. Consequently, it awarded Mr. Crum non-service-connected disability retirement benefits.

Mr. Crum appealed the Office of Personnel's denial of his request to the Disability Retirement Pension Review Board, which upheld the Office of Personnel's determination. Mr. Crum then appealed to the Anne Arundel County Board of Appeals.

3. The Board of Appeals' Denial of the Request for Service-Connected Disability Retirement Benefits

The Anne Arundel County Board of Appeals held a three-day hearing to determine whether Mr. Crum was eligible for service-connected disability retirement. During the hearing, the Board was presented with conflicting diagnoses of Mr. Crum's right shoulder injury.

Dr. Hexter, Mr. Crum's neurologist, testified that he had conducted a nerve conduction study and an electromyography test, both of which led to "unremarkable" results. Dr. Hexter explained that, based on the reported "combination of pain and numbness and tingling," he had diagnosed Mr. Crum with PTS. Dr. Hexter opined, to a reasonable degree of medical certainty, that "[b]ased on the patient's description of heavy exertion and a stretch injury, that that's likely the preceding factor of his brachial plexus injury or disorder." Dr. Hexter formed this conclusion based on "the patient's report."

Dr. Hexter explained that PTS is "often preceded by a viral infection or a vaccination or heavy exertion." Because Mr. Crum's "symptoms started after this stretch injury," Dr. Hexter believed that the injury was "likely a contributing factor" to PTS.

Dr. Hexter testified that the common name for PTS is “idiopathic brachial plexitis” and that “idiopathic” means “we can’t find a demonstrable cause or diagnosis.” Dr. Hexter stated that PTS is rare and “poorly understood.” During his 10 years of practicing medicine, he had diagnosed only 10 patients with PTS. Of those 10 patients, eight of the cases were “self-limiting,” in that the condition “will resolve on its own” within “[o]ne or two years.” Dr. Hexter acknowledged that Mr. Crum’s condition had not shown signs of improving over time.⁴

Dr. Smith, the orthopedist who had examined Mr. Crum at the request of the Office of Personnel, testified that he had gone through “all of the diagnoses that were given in an attempt to explain Mr. Crum’s chronic shoulder pain.” He had “ruled out” cervical radiculopathy “by the EMG [electromyography] testing that [Mr. Crum] had.” Dr. Smith did not agree with the diagnosis of thoracic outlet syndrome, because Mr. Crum did not have the “changes in his upper extremity consistent with thoracic outlet syndrome.” Dr. Smith had reviewed the x-ray that had been ordered by Dr. Stanziale, the thoracic surgeon, and had observed “some minor degenerative changes” or “[m]inimal spondylotic change.” “Spondylosis,” Dr. Smith said, “is a fancy word for arthritis.”

Dr. Smith testified that during his examination of Mr. Crum on December 8, 2017, he had reviewed the reports and IMEs that had been prepared by Mr. Crum’s other doctors, including the IME that had been prepared by Dr. Friedler in 2013. In November

⁴ During oral arguments, the County described Dr. Hexter’s diagnosis of non-self-limiting PTS as the “rarest of the rare.”

2016, Dr. Friedler had first stated that it was his impression, within a reasonable degree of medical certainty, that Mr. Crum was suffering from an acute cervical strain or sprain; tendonitis and capsulitis of the right shoulder; and a rotator cuff tear. Because the injuries to the right shoulder were “worse” in 2016 than they had been after the 2013 and 2014 incidents, Dr. Friedler had believed the complaints were “causally related” to the injury that Mr. Crum suffered in moving the motorcycle on October 2, 2016.

Dr. Smith explained that after Mr. Crum received additional testing, including an MRI, Dr. Friedler had re-diagnosed Mr. Crum with a focal edema (or swelling) at the “superior aspect of the humerus [the upper arm] and proximal acromion without fracture,” moderate osteoarthritis of the AC joint, and mild rotator-cuff tendonitis. Dr. Smith explained that in May 2017 Dr. Friedler had again changed his diagnosis to account for the opinion of Dr. Stanziale, the thoracic surgeon, who diagnosed Mr. Crum with thoracic outlet syndrome. Dr. Smith also stated that Dr. Franchetti’s diagnosis of an impingement syndrome was “unlikely” and unsupported by the evidence.

Dr. Smith then testified that he had reviewed the MRI of Mr. Crum’s right shoulder that Dr. McDevitt had ordered in 2014. According to Dr. Smith, the MRI showed “degeneration” – “basically an arthritic joint . . . in 2014.” Dr. Smith explained that “these types of changes actually take several years . . . to develop.” Dr. Smith opined that Mr. Crum had these changes even before the work-related injury that he suffered in February 2013.

Dr. Smith further testified that he had reviewed the results of the MRI that Mr. Crum underwent in November 2016. According to Dr. Smith, the MRI showed that Mr. Crum had a “focal edema,” or swelling, in his right shoulder that is “consistent with a contusion.” This, to Dr. Smith, indicated that Mr. Crum had “struck his shoulder and caused a contusion.” Dr. Smith testified that the other finding from the November 2016 MRI was that the “osteoarthritis or degenerative change of the AC joint . . . was not significantly changed from the prior MRI study that was done back in 2014.”

Dr. Smith found it to be significant that there was no significant change between the 2014 MRI and the 2016 MRI. He explained that, had Mr. Crum experienced an “aggravation” or “insult” to the AC joint when he moved the motorcycle in October 2016, the later MRI would have shown a change. Because the study showed no change, he inferred that the “structure” was “stable.” He added that the rotator cuff too was “essentially the same” in both the 2016 study and “the prior study.”

Dr. Smith testified that he had “ruled out” Dr. Hexter’s diagnosis of PTS for several reasons. He explained that “the hallmark” for severe cases of PTS is “muscle atrophy around the shoulder girdle.” Mr. Crum, however, “never showed a lot of muscle atrophy.” Of the “numerous doctors,” who examined Mr. Crum, “[t]he only doctor who mentioned any atrophy was Dr. McDevitt.” After Mr. Crum saw Dr. McDevitt, “nobody mentioned any atrophy.”

Dr. Smith stated that in his own examination of Mr. Crum he “didn’t find any atrophy” and that “Dr. Hexter didn’t mention any atrophy on his examination of Mr.

Crum either.” Based on his examination and the reports of the other doctors, Dr. Smith concluded that if Mr. Crum had “had Parsonage Turner Syndrome, it was probably the idiopathic variety and it recovered [i.e., resolved] without sequela.” Similarly, Dr. Smith concluded that if Mr. Crum had once had PTS, it was “probably idiopathic in origin, not traumatic.” Although Mr. Crum has osteoarthritis of his AC joint, Dr. Smith believed that he already had before the incident on October 2, 2016. Dr. Smith did not believe that “any of his job injuries,” “particularly” the injury on October 2, 2016, “caused his arthritis or even aggravated it.”

Dr. Smith’s “final opinion” was that Mr. Crum had “preexisting” “arthritis in his AC joint.” Dr. Smith stated Mr. Crum’s other reported symptoms, such as “feeling thunderstorms” as they come on, are not “unusual complaint[s] with people who have arthritis.”

On cross-examination, Dr. Smith stated that arthritis would contribute to hand numbness and arm pain, as would mild carpal tunnel syndrome. He reiterated that if Mr. Crum had PTS, “it was idiopathic in nature, and there was no residual” impact. “It resolved,” as cases of PTS “usually do.” Dr. Smith agreed that Mr. Crum sustained “some type of injury” from moving the motorcycle, but he insisted that the “chronic complaints of shoulder pain” were not “related to his job activities or that specific injury.”

Mr. Crum testified before the Board and explained that, after pushing the motorcycle on October 2, 2016, he had experienced a pain “distinctly different” from

what he had experienced in “any of [his] previous injuries.” He explained why he felt that he could no longer work as a police officer:

I can’t hold onto things. I can’t maintain my grip. The onset of my loss of grip and loss of control of my right hand is random. I can predict the pain generally. I can feel thunderstorms coming on now, but it’s the loss of – the loss of utility of my right hand is random . . . Being empowered to use legal force, I don’t think that’s a safe symptom to carry. Having to restrain subject, I don’t think that’s a safe symptom to carry with me. I considered myself a liability.

The Board heard testimony from Jessica Rozek and Stuart M. Lacey, Mr. Crum’s acquaintances from Maryland Kunst des Fechtens (“MKdF”), a club focused on medieval German martial arts (including fencing with a longsword). Ms. Rozek testified that Mr. Crum participated in classes and trainings “less and less” over time and was no longer a member of the club. Ms. Rozek also testified that Mr. Crum had “officially” resigned from the club on September 23, 2016, a little more than a week before he injured himself while pushing the motorcycle. Ms. Rozek stated that before resigning Mr. Crum had been attending the club sporadically. Although she did not know whether Mr. Crum had injured his shoulder while competing at the club, she knew that he had a shoulder injury. Mr. Lacey knew Mr. Crum had been suffering from pain in his right shoulder before resigning from MKdF, but was not aware of the cause.⁵

⁵ The County cross-examined Ms. Rozek at length about the activities of the club, including the types of swords used and the injuries she had suffered while active in the club. Because the Board concluded that Mr. Crum’s participation in MKdF did not cause his disability, we refrain from discussing the full extent of this testimony here.

Mr. Crum testified that he had “probably” stopped doing push-ups before October 2, 2016. As early as 2013, Mr. Crum had “pulled back on training” (with MKdF) because of pain in his shoulder. By August 2016, he had “already stopped fencing,” but he claimed to have done so for “philosophical and political reasons.”

Cheryl Wyngarden, the pension analyst with the Office of Personnel assigned to Mr. Crum’s case, testified that she had referred Mr. Crum to Dr. Smith to “better understand [his] condition.” Ms. Wyngarden explained that “[t]here were a lot of questions unanswered” – “a lot of uncertainty as to what exactly was wrong with him.” In particular, Dr. Friedler thought that the injuries were related to fencing, not to work.

On April 11, 2019, the Board issued an order upholding the Disability Review Board’s denial of Mr. Crum’s application for service-connected disability retirement benefits. In its order, the Board stated that Mr. Crum had “failed to produce convincing medical evidence that his disability arose out of and occurred in the course of his employment as a police officer with the Anne Arundel County Police Department.” The Board found, “after weighing all the evidence and evaluating the relative merits of the testimony,” that “Dr. Smith’s conclusion that Mr. Crum suffers from arthritis [was] most likely.” Therefore, the Board denied the application for service-connected disability retirement benefits.⁶

⁶ One member of the Board dissented, stating that Mr. Crum had met his burden because “[t]here was no credible medical evidence that [he] sustained injuries, or even aggravated his job-induced injuries, outside of his employment as a police officer.”

The Board added that it was “unconvinced” as to whether Mr. Crum had “explored all options available to remedy his condition.” The Board agreed with Dr. Smith’s evaluation that, if Mr. Crum had once suffered from PTS, it had resolved. The Board also agreed with Dr. Smith’s diagnosis of osteoarthritis of the AC joint, which Dr. Smith believed could be resolved with surgery. As Mr. Crum had not “explored the recommended surgery,” the Board concluded that Mr. Crum was not “totally and permanently disabled until such time as those options are explored and deemed unsuccessful.”

4. Judicial Review in the Circuit Court

Following the Board’s denial of his request, Mr. Crum petitioned for judicial review of the Board’s decision in the Circuit Court for Anne Arundel County. After a hearing, the circuit court reversed the Board’s decision and granted Mr. Crum’s request for service-connected disability benefits. In reaching its decision, the court found that Mr. Crum had met his burden of proving, first, that he was “permanently disabled” and, second, that his injury arose out of and occurred in the course of his employment. The court reasoned that before October 2, 2016, “Mr. Crum was performing his duties.” “He was able to work as a police officer without restrictions.” Only after the injury he sustained in moving the motorcycle was Mr. Crum “unable” to perform his duties.

The County noted a timely appeal.

QUESTIONS PRESENTED

The County raises three questions on appeal, which we have modified for brevity:⁷

- 1) Whether the Anne Arundel County Board of Appeals' finding that Mr. Crum did not have a total and permanent disability was supported by substantial evidence.
- 2) Whether the Anne Arundel County Board of Appeals' finding that Mr. Crum's disability did not arise or occur due to occupational causes was supported by substantial evidence.

As to the first question, we shall reverse the Board's conclusion that Mr. Crum is not totally and permanently disabled. As to the second question, we shall affirm the Board's conclusion that Mr. Crum's injury was not service-connected. Consequently, we shall affirm the circuit court's decision in part and reverse it in part.

STANDARD OF REVIEW

In reviewing the final decision of an administrative agency, including the Board of Appeals, this Court "looks through" the circuit court's decision and "evaluates the decision of the agency." *People's Counsel for Baltimore Cty. v. Surina*, 400 Md. 662,

⁷ The County presented the following questions:

- 1) Was the decision of the Anne Arundel County Board of Appeals finding Mr. Crum's disability to have not arisen out of occupational causes supported by substantial evidence?
- 2) Was the decision of the Anne Arundel County Board of Appeals finding Mr. Crum not to be totally and permanently disabled supported by substantial evidence?
- 3) Did the Circuit Court err in finding that the Anne Arundel County Board of Appeals' decision lacked the necessary support of substantial evidence?

681 (2007); *Bd. of Trs. for the Fire & Police Employees' Ret. Sys. v. Mitchell*, 145 Md. App. 1, 8 (2002) (stating that “[o]ur role” in reviewing an administrative decision “is precisely the same as that of the circuit court”). The Board’s decision is “presumed valid.” *Board of Physician Quality Assurance v. Banks*, 354 Md. 59, 68 (1999) (quoting *CBS Inc. v. Comptroller*, 319 Md. 687, 698 (1990)). Thus, this Court’s review of the Board’s decision is “limited to determining if there is substantial evidence in the record as a whole to support the [Board’s] findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law.” *Id.* at 67-68.

The Board’s finding will be “disturb[ed]” only if the decision is “arbitrary, illegal, capricious[,] or discriminatory.” *Fire & Police Employees' Ret. Sys. of City of Baltimore v. Middleton*, 192 Md. App. 354, 365 (2010). This Court “may set aside an agency’s fact finding only when the finding is ‘unsupported by competent, material, and substantial evidence in light of the entire record as submitted.’” *Motor Vehicle Admin. v. Shepard*, 399 Md. 241, 252 (2007) (quoting *Spencer v. State Board of Pharmacy*, 380 Md. 515, 529 (2004)). Thus, “[i]f there [is] evidence of [a] fact in the record before the agency, no matter how conflicting, or how questionable the credibility of the source of the evidence, [this Court] has no power to substitute its assessment of credibility for that made by the agency[.]” *Terranova v. Bd. of Trs. of the Fire & Police Emps. Ret. Sys.*, 81 Md. App. 1, 12-13 (1989) (citations and emphasis omitted).

DISCUSSION

The County principally contends that the circuit court erred in reversing the Board’s denial of Mr. Crum’s request for service-connected disability retirement benefits, because Mr. Crum failed to prove that his disability was service-connected and because the Board had substantial evidence on which to base a finding that Mr. Crum’s injury was not service-connected. In addition, the County contends, at least nominally, that the circuit court erred in reversing the Board’s conclusion that Mr. Crum was not disabled at all.

A. Statutory Framework

To be eligible for either non-service-connected or service-connected disability retirement benefits under the Anne Arundel County Code, participants have the burden of proving, first, that they suffered a “total and permanent disability.” A disability is “total and permanent” under the Code if a medical examination proves that “the participant is wholly and permanently prevented as a result of bodily injury or disease from engaging in any occupation or employment for remuneration or profit or continuing as an employee in the participant’s regular assignment or in some other assignment within the Police Department.” A.A.C.C. § 5-5-205(b).

To be awarded service-connected disability retirement benefits, the participant must prove that the disability is “the result of bodily injury or disease arising out of or occurring in the course of the participant’s employment.” A.A.C.C. § 5-5-205(d)(2). If the total and permanent disability arose out of and occurred “in the course of the participant’s employment, the participant is entitled to receive an annual disability

retirement pension equal to the greater of the participant's accrued benefit or 66 2/3%" of either the participant's "final average basic pay" or the "final average basic pay that the participant would have received had the participant been promoted to the higher classification." *Id.*

However, if the "total and permanent" disability is "a result of a non-duty-related cause, the participant is entitled to receive an annual disability retirement pension equal to the participant's accrued pension as of the participant's date of disability, computed in accordance with the provisions of § 5-5-203, or 20% of the participant's final average basic pay, whichever is greater." A.A.C.C. § 5-5-205(d)(3)(ii).

B. Total and Permanent Disability

Although the County disputes the circuit court's conclusion that Mr. Crum's disability was service-connected, it now agrees that the question of whether Mr. Crum is disabled at all was not properly before the Board. Because the Office of Personnel had awarded Mr. Crum non-service-connected disability benefits, the County had already determined that Mr. Crum was "totally and permanently" disabled before the Board of Appeals, unbidden by the County, volunteered the opposite conclusion. The Office of Personnel, in fact, could not have awarded non-service-connected disability benefits to Mr. Crum if it had not made the initial finding that Mr. Crum was totally and permanently disabled.

In its brief, the County makes no attempt to justify the Board's conclusion that Mr. Crum was not totally and permanently disabled. In these circumstances, the County has

waived any objection to the circuit court’s conclusion that Mr. Crum is totally and permanently disabled. *See, e.g., Klauenberg v. State*, 355 Md. 528, 552 (1999) (stating that “arguments not presented in a brief or not presented with particularity will not be considered on appeal”); *accord Beck v. Mangels*, 100 Md. App. 144, 149 (1994); *see* Md. Rule 8-504(a)(6) (requiring a brief to contain “[a]rgument in support of the party’s position on each issue”).

During oral argument, the County assured this Court that it did not and would not contest whether Mr. Crumb is disabled. Counsel for the County told us that “[t]he non-service-connected disability retirement has been awarded and is not being reconsidered” and that “[t]he county is not going to go back and overturn the granting of non-service-connected disability retirement.”

In addition, the County expressed its disagreement with the Board’s statement that Mr. Crum could not be considered totally and permanently disabled until Mr. Crum “explored all options available,” such as surgery. During oral argument, counsel for the County stated that the County “does not require” employees to undergo surgery instead of retiring on account of a disability that the surgery might remedy.

We take the County at its word. Therefore, we shall affirm the circuit court’s conclusion that Mr. Crum was totally and permanently disabled under § 2-5-505. There is no question that Mr. Crum is entitled to disability retirement benefits. The only question is whether he is entitled to service-connected disability retirement benefits.

C. Service-Connected Disability

The County argues that Mr. Crum failed to meet the burden of proving that his right shoulder injury arose out of or occurred during the course of his service. The County also argues that the Board had the discretion to find Dr. Smith’s diagnosis of degenerative osteoarthritis more compelling than Dr. Hexter’s diagnosis of PTS.

This Court does not consider “whether the inference drawn is the right one or whether a different inference would be supported. The test is reasonableness, not rightness.” *Mayor & Aldermen of City of Annapolis v. Annapolis Waterfront Co.*, 284 Md. 383, 398-99 (1979). As this Court must affirm the Board’s decision if the Board relied on evidence that “a reasonable mind might accept as adequate to support a conclusion,” *Catonsville Nursing Home, Inc. v. Loveman*, 349 Md. 560, 569 (1998), we shall uphold the Board’s finding.

In the context of judicial review of fact-finding by circuit court judges, this Court has stated that it is almost impossible for judges to be clearly erroneous when they are simply not persuaded of something. *See, e.g., Bricker v. Warch*, 152 Md. App. 119, 137 (2003). The same is true in the case of administrative agencies. The Board was not required to be persuaded by Mr. Crum’s contentions, even in the absence of any evidence to the contrary. The Board, therefore, did not err in concluding that Mr. Crum had failed to prove that his disability was service-connected.

In any event, the Board relied on substantial evidence in finding that Mr. Crum’s career-ending disability was caused by arthritis in the AC joint, a preexisting

degenerative condition, and not by PTS resulting from the incident with the motorcycle on October 2, 2016. Over the course of the hearing, the Board reviewed conflicting medical reports, test results, and diagnoses from Mr. Crum's rotation of seven doctors. The Board could reasonably determine, based on clinical evidence and diagnostic results, that Mr. Crum had been experiencing symptoms of arthritis in his right shoulder as early as 2013. Dr. Smith testified that Mr. Crum had been exhibiting signs of osteoarthritis in his 2013 MRI. Dr. Smith further testified that because osteoarthritis develops slowly over time, Mr. Crum's arthritis had been emerging for several years before the incident on October 2, 2016. Furthermore, Dr. Smith concluded that Mr. Crum's arthritis had not changed in scope between 2014 and 2016, leading the Board to conclude that his condition did not occur during or worsen during his course of employment.

Additionally, the Board relied on substantial evidence in finding that if Mr. Crum did once have PTS, the condition had since resolved. Dr. Smith explained that Mr. Crum's examinations and diagnostic tests did not show the signs of atrophy that would have been present if he was continuing to suffer from PTS. Dr. Hexter could not confirm "within a reasonable degree of medical certainty" that the motorcycle-pushing incident caused Mr. Crum's PTS. The Board, thus, could reasonably conclude that Mr. Crum no longer had PTS, if he ever did.

Based on the substantial evidence in the record, including the testimony of medical professionals, medical tests and records, and Mr. Crum's own testimony, the Board drew the reasonable conclusion that Mr. Crum's injury did not arise out of or occur

during his service as a police officer. Therefore, we shall affirm the Board's decision denying Mr. Crum's service-connected disability retirement and awarding Mr. Crum non-service-connected disability retirement.

**JUDGMENT OF THE CIRCUIT COURT
FOR ANNE ARUNDEL COUNTY,
AFFIRMED IN PART AND REVERSED IN
PART. COSTS TO BE DIVIDED EVENLY
BETWEEN THE PARTIES.**