

Circuit Court for Montgomery County
Case No. 436710V

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 3388

September Term, 2018

MONTGOMERY COUNTY, MARYLAND

v.

JOANN RICHARDS

Kehoe,
Nazarian,
Shaw Geter,

JJ.

Opinion by Nazarian, J.

Filed: February 21, 2020

* 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.

Joann Richards was a Montgomery County police officer for almost thirty years. She developed hearing loss and tinnitus (commonly known as a ringing in the ears) in her right ear and applied for workers' compensation benefits. After a hearing, the Maryland Workers' Compensation Commission (the "Commission") awarded benefits, including permanent partial disability benefits, for tinnitus for industrial loss of use of the body as an "other cases" loss under Section 9-627(k) of the Labor and Employment Article. The County sought judicial review of the permanent partial disability benefit award in the Circuit Court of Montgomery County. The circuit court affirmed the Commission's decision and the County appeals. In accordance with our recent opinion in *Montgomery County v. Cochran*, 243 Md. App. 102 (2019), *cert. granted*, Petition Docket No. 379, Sept. Term, 2019 (Md. Feb. 11, 2020), we reverse the judgment of the circuit court and remand the case to the circuit court with instructions to remand to the Commission for further proceedings consistent with this opinion.

I. BACKGROUND

On March 20, 2016, Ms. Richards filed a claim for workers compensation benefits for occupational disease, specifically for "[h]earing loss and tinnitus over 29 years of police work." Ms. Richards's expert witness described her bilateral hearing loss and right-sided tinnitus:

[Ms. Richards] is a 54-year-old retired Montgomery County police officer. She joined the force on September 14, 1987, retiring on June 1, 2016. She was exposed to significant noise exposure from the sirens as well as the microphone on her right lapel. She also worked as a firearms instructor. She has noticed a decline in her hearing over the past several years and was

fitted with a right-sided hearing aid 2 years ago. This did help her with background noise situations. . . . The tinnitus is constant in nature and makes it difficult to fall and stay asleep at night. She uses both a fan and a sound app on her phone to try to mask out the tinnitus.

Ms. Richards does show a bilateral sensorineural hearing loss, worse on the right. With a reasonable degree of medical certainty, her years of noise exposure to the gunshots, siren noise, and right shoulder microphone directly led to this hearing loss. It is reassuring that she has had a negative MRI prior to ruling out any retrocochlear pathology. The left ear does not yet qualify for a rating, but the right ear shows a 15% mononeural hearing impairment, which yields a 5% impairment of the whole person according to the AMA Guide to Permanent Impairment, 4th Edition. This is coupled with an additional 5% for the constant right-sided tinnitus which interferes with activities of daily living, such as falling and staying asleep. This yields a final impairment rating of 10%. I would recommend a pair of bilateral digital hearing aids for both hearing improvement and tinnitus masking.

The County's expert agreed that Ms. Richards suffered from tinnitus in her right ear:

[Ms. Richards] could not think of specifically why noise exposure might be lateral on the right than the left though there were several times when she was instructing in using a weapon that the instructee would discharge the weapon a close range possibly in front of one ear rather than the other. At this point, she reports that her hearing is stable and she still uses the right ear hearing aid. Her right ear rings much more than the left. . . . She says that TV remains loud at home in order for her to hear clearly. She complains of tinnitus that is much bothersome at night and noticeable when it is quiet. She finds that [] problematic when there are a lot of people talking.

The tinnitus provides a 2% hearing impairment for the right ear.

On June 2, 2016, Ms. Richards retired.

On November 4, 2016, the Commission held a hearing on, among other things, whether Ms. Richards had “sustain[ed] an occupational disease arising out of in and in the course of employment.” On the same day, the Commission issued a Compensation Order stating “that the claimant sustained an occupational disease of hearing loss right ear [sic] arising out of and in the course of employment” and awarding benefits in the form of “causally related medical expenses (reimbursement for hearing aid for the right ear),” including hearing aids. The Compensation Order did not reference tinnitus. The Commission also indicated that Ms. Richards’s case “will be held for further consideration . . . as to whether the claimant has sustained permanent partial disability”

On July 25, 2017, the Commission held another hearing. At that hearing, Ms. Richards testified about the extent of her hearing loss and the extent to which the ringing in her ears interfered with her daily life:

[COUNSEL FOR MS. RICHARDS]: Can you please tell His Honor what problems are you having specifically with regard to your hearing at this time.

[MS. RICHARDS]: If I’m not wearing the hearing aid -- it’s hit or miss if I actually catch an entire conversation. Like right now when you were talking with your head down behind the monitor I caught every third word. I knew you were talking but I could not get the whole conversation.

If there is a lot of background noise someone has to really kind of be looking at me. Even with the hearing aid I do have difficulty. It’s not a 100 percent solution. I do hear better from this (indicating) ear on this (indicating) side [than] I do on the right side.

If I'm watching TV without a hearing aid and other people are with me they will complain the TV is too loud.

Talking in conversations if I'm not wearing the hearing aid I'm talking too loud. That seems to be the overall concern for people if I'm not wearing a hearing aid.

[COUNSEL FOR MS. RICHARDS]: You are wearing your hearing aid today, correct?

[MS. RICHARDS]: I am.

[COUNSEL FOR MS. RICHARDS]: Do you wear that most of the time?

[MS. RICHARDS]: Yes.

[COUNSEL FOR MS. RICHARDS]: You are currently working; is that correct?

[MS. RICHARDS]: I am.

[COUNSEL FOR MS. RICHARDS]: Where are you currently working?

[MS. RICHARDS]: I am in a civilian position with the Gaithersburg City Police Department with their symptoms support manager and their IT.

[COUNSEL FOR MS. RICHARDS]: Are you having any problems with your hearing in relation to that job?

[MS. RICHARDS]: Just at meetings. We have a large conference table. If you are at the far end and a bunch of other side conversation [sic] are occurring even with the hearing aid it's hard to understand sometimes what is going on. It's a lot of background noise.

[COUNSEL FOR MS. RICHARDS]: **With regards to the tinnitus, we're not sure how it's pronounced, tell His Honor what problems you have with the ringing in your ears?**

[MS. RICHARDS]: **I say ringing in the ears because I'm not sure either.**

It's constant. It's loud. You kind of train your brain to try to ignore it for the most part. Right now it's ringing. It's a high pitch.

Mostly when I'm trying to sleep it kind of when it's quiet it wakes me up a little bit. But it's been constant throughout.

Definitely right ear more than the left. It is bothersome in the sense of trying to kind of multitask.

[COUNSEL FOR MS. RICHARDS]: Your current job with Gaithersburg you are not exposed to the high noise levels like you were with Montgomery County; is that correct?

[MS. RICHARDS]: No, I have a desk job.

(emphasis added).

On August 14, 2017, the Commission issued a written Award of Compensation that awarded permanent partial disability compensation for an 11.25% “loss of use of the right ear” and for a 3% industrial loss of use of the body as the result of Ms. Richards’s tinnitus under LE § 9-627(k) as an “other cases” loss.¹

On September 8, 2017, the County sought judicial review of the Commission’s Award of Compensation on the record in the circuit court and filed an accompanying memorandum of law. On June 19, 2018, Ms. Richards (through counsel) filed a one-paragraph response to the County’s petition that did not address its merits but instead indicated Ms. Richards’s intent to participate. Her counsel appeared at the hearing before the circuit court on December 20, 2018, but the court granted the County’s oral motion to preclude him from presenting argument as a consequence of failing to file a timely responsive memorandum.

¹ The Commission’s Compensation Order stated, in relevant part:

PERMANENT PARTIAL DISABILITY: Resulting in 11.25% loss of use of the right ear; and a further permanent partial disability under “Other Cases” amounting to 3% industrial loss of use of the body as the result of an injury to the tinnitus [sic]; at the rate of \$343.00, payable weekly, beginning March 24, 2016, for a period of 29.0625 weeks.

The County did present argument at the December 20 hearing, and the court issued an oral ruling on the record at the close of the hearing:

Okay. So, in looking at the award of the commission and reading the transcript I, I believe what the commission did, is that as a result of loud noises, that this officer was exposed to during the course of her years on the force, that you sustained hearing loss that met the parameters under the [statute] to [be] compensable, and so, the commission properly awarded the 11.25 percent loss of the, use of the right ear.

Additionally, the commission found that based upon her testimony that she had tinnitus, that that was a separate issue that affected her -- well, it, it amounted to an industrial, a loss of industrial use overall of the body because of the ongoing tinnitus issue, and awarded a three percent industrial loss of the use of the body.

And so, I think that the commission was authorized to do that to determine there was hearing loss, which is, which is essentially the, the loss of a use of a body part, and was compensable, and then also found that there was an ongoing issue caused by the tinnitus of three percent of the, of the body, and therefore, appropriately made that award.

So accordingly I'll, I'll affirm the award of the, of the commission.

The County filed a timely notice of appeal. Ms. Richards did not file a responsive brief, but her counsel appeared at oral argument and advised us that in light of this Court's intervening decision in *Cochran*, 243 Md. App. 102, Ms. Richards does not oppose the County's position.

II. DISCUSSION

The County identifies a single issue, which we rephrase: Did the Commission err in awarding Ms. Richards permanent partial disability benefits for tinnitus as part of her

occupational deafness claim?² Based on our holding in *Cochran*, we hold here that the Commission did err, and we reverse the circuit court’s decision affirming the Commission’s award.

When reviewing workers’ compensation awards in cases where the claimant sought review on the record (rather than a *de novo* review involving a new evidentiary hearing), we look through the decision of the circuit court and evaluate the Commission’s decision directly. *W.R. Grace & Co. v. Swedo*, 439 Md. 441, 452–53 (2014). Our task, as the Workers’ Compensation Act provides, is to “determine whether the Commission: (1) justly considered all of the facts about the . . . occupational disease . . . ; (2) exceeded the powers granted to it under [the Act]; or (3) misconstrued the law and facts applicable in the case decided.” Maryland Code, § 9-745(c) of the Labor and Employment Article (“LE”).³ Put more simply, we must confirm the Commission’s decision “unless [we] determine[] that the Commission exceeded its authority or misconstrued the law or facts.” *Richard Beavers Constr., Inc. v. Wagstaff*, 236 Md. App. 1, 13 (2018) (citing *Uninsured Empl’rs’ Fund v. Pennel*, 133 Md. App. 279, 288–89 (2000)). And in a case such as this one, in which the facts are not in dispute, we are “under no constraint” to affirm the Commission’s decision if it is “premised solely upon an erroneous conclusion of law.” *Pro-Football, Inc. v.*

² The County phrased the Question Presented as follows:

Did the trial court err in awarding Appellee permanent partial disability benefits for tinnitus under LE § 9-627(k)?

³ The Maryland Workers’ Compensation Act (the “Act”) is codified at Title 9 of the Labor and Employment Article of the Maryland Code. Unless otherwise indicated, all statutory citations herein are to Maryland Code (1991, 2016 Repl. Vol.) of that article.

McCants, 428 Md. 270, 283 (2012) (cleaned up); *accord Calvo v. Montgomery Cty.*, 459 Md. 315, 325 (2018) (“Although the Commission is entitled to deference in its interpretation of the statute it administers, we may still consider whether its legal conclusions were erroneous.”).

In *Montgomery County v. Cochran*, we addressed an issue almost identical to the question before us here. In that case, we considered whether the Commission erred in awarding permanent partial disability benefits, as an “other cases” loss within an occupational deafness claim under LE § 9-627(k), to a firefighter who suffered from hearing loss and tinnitus. 243 Md. App. at 112. We held that the Commission erred because the firefighter’s tinnitus was not compensable as occupational deafness. *Id.* at 129–30. We held as well that if a claimant succeeds in establishing compensability for tinnitus as an occupational disease, it would be proper for the Commission to award permanent partial disability benefits for that condition as an “other cases” loss under LE § 9-627(k). *Cochran*, 243 Md. App. at 133.

As we explained in *Cochran*, the Act provides by its express terms that tinnitus is compensable only as an occupational disease, not as occupational deafness. *Id.* at 130–31. To prove an occupational disease, LE § 9-502 requires a claimant to establish a “disablement” or “[a]ctual incapacity from employment (whether total or partial).”⁴ *Id.* at

⁴ LE § 9-502(a) defines “disablement” as:

the event of a covered employee becoming partially or totally incapacitated: (1) because of an occupational disease; and (2) from performing the work of the covered employee in the last occupation in which the covered employee was injuriously

115 (*quoting Miller v. Western Elec. Co.*, 310 Md. 173, 187 (1987)). Moreover, the incapacity “must relate to the requirements of the job last performed under the hazards of the disease.” *City Council of Balt. v. Schwing*, 116 Md. App. 404, 420 (1997); *accord Belschner v. Anchor Post Prods., Inc.*, 227 Md. 89, 93 (1961), *superseded by statute on other grounds as stated in Crawley v. Gen. Motors Corp.*, 70 Md. App. 100, 107–08 (1987).

In contrast, occupational deafness does not require proof of disablement or actual incapacitation. *Cochran*, 243 Md. App. at 116 (*citing Green*, 398 Md. 512 (2007); *Yox v. Tru-Rol Co., Inc.*, 380 Md. 326 (2004); *Tru-Rol Co., Inc. v. Yox*, 149 Md. App. 707 (2003), *aff’d*, 380 Md. 326 (2004); *Crawley*, 70 Md. App. 100). Instead, claimants must show that their hearing loss falls within the technical parameters defined in LE § 9-650, which sets forth technical standards for hearing tests and a mathematical formula for calculating the claimant’s average hearing loss, but *not* for measuring or calculating the extent of a claimant’s tinnitus. *Cochran*, 243 Md. App. at 130–31. In short, tinnitus is not compensable as occupational deafness and only is compensable as an occupational disease, which does require a showing of disablement. *Id.* at 132–33.

As in *Cochran*, the record does not suggest that Ms. Richards raised, or that the Commission decided, whether her tinnitus was compensable under the statutory scheme for occupational diseases, or specifically whether tinnitus caused actual incapacitation from employment. Instead, the Commission found Ms. Richards’s tinnitus compensable as occupational deafness and, on that basis, awarded permanent partial disability benefits

exposed to the hazards of the occupational disease.

under LE § 9-627(k) as an “other cases” loss. Although, to be fair, neither the Commission nor the circuit court had the benefit of our decision in *Cochran* when they made their rulings, we agree with the County, and Ms. Richards concedes, that the Commission erred in awarding benefits to Ms. Richards for tinnitus as part of her occupational deafness claim.

We mean in no way to diminish Ms. Richards’s suffering from tinnitus. The record reveals that tinnitus affects her day-to-day life in very real ways. Her expert reported that her “tinnitus is constant in nature and makes it difficult to fall and stay asleep at night” and that she “uses both a fan and a sound app on her phone to try to mask out the tinnitus.” The County’s expert agreed that Ms. Richards “complains of tinnitus that is much bothersome at night and noticeable when it is quiet. She finds that [] problematic when there are a lot of people talking.” And Ms. Richards herself confirmed the ringing is “constant” and interferes with her sleep:

It’s constant. It’s loud. You kind of train your brain to try to ignore it for the most part. Right now it’s ringing. It’s a high pitch.

Mostly when I’m trying to sleep it kind of when it’s quiet it wakes me up a little bit. But it’s been constant throughout. Definitely right ear more than the left. It is bothersome in the sense of trying to kind of multitask.

Even so, the Commission did not consider, and therefore did not decide, whether Ms. Richards’s tinnitus met the definition of an occupational disease, including the requirement that it caused actual incapacitation, either total or partial, from performing the duties of the last occupation she performed “under the hazards of the disease.” *Schwing*,

116 Md. App. at 420.⁵ Accordingly, and in light of *Cochran*, we reverse the decision of the circuit court and remand to that court with instructions to remand the case to the Commission for further proceedings consistent with this opinion, including the County’s request that it be granted a credit.

**JUDGMENT OF THE CIRCUIT COURT
FOR MONTGOMERY COUNTY
REVERSED AND REMANDED WITH
INSTRUCTIONS TO REMAND TO THE
WORKERS’ COMPENSATION
COMMISSION FOR PROCEEDINGS
CONSISTENT WITH THIS OPINION.
APPELLEE TO PAY COSTS.**

⁵ The County asserts in its brief that in *Cochran*, the Commission found that “there was no disablement under LE § 9-502” and that “[i]n Mr. Bowen’s case, the inability to socialize, communicate and sleep did not amount to a disablement.” But the County’s characterization of the Commission’s decision and our holding in *Cochran* is incorrect. In *Cochran*, nothing in the record suggested, and the firefighter did not argue, that the Commission was ever presented with or decided the question of whether his tinnitus met the requirements of a general occupational disease under LE § 9-502, including the question of whether the tinnitus rose to the level of a “disablement” or “actual incapacitation.” Accordingly, we held that “[b]ecause Mr. Bowen sought compensation for tinnitus as part of his occupational deafness claim and did not attempt to establish disablement, the Commission erred in awarding him benefits for tinnitus.” *Cochran*, 243 Md. App. at 129. We did not hold that the firefighter’s tinnitus “did not amount to a disablement”—that question was not before us.