

JACQUELINE BANKS-JONES,
Appellant
v.
BALTIMORE CITY BOARD
OF SCHOOL COMMISSIONERS
Appellee.

BEFORE THE
MARYLAND
STATE BOARD
OF EDUCATION
Opinion No. 16-42

OPINION

INTRODUCTION

This is an appeal of the decision of the Baltimore City Board of School Commissioners (“local board”) to deny the Appellant’s request for assault leave. The local board has filed a motion for summary affirmance maintaining that its decision is not arbitrary, unreasonable or illegal. The Appellant responded to the motion and the local board replied.

FACTUAL BACKGROUND

Appellant was a teacher last assigned to Mary E. Rodman Elementary School (“Rodman”) in Baltimore City. On August 29, 2014, a second grade student who was acting up during dismissal kicked the Appellant in the knee. Appellant reported the incident to the administration and was seen at the Mercy Medical Emergency Department on August 30, 2014.

On September 2, 5, and 12, 2014 and October 3, 10, 22, 2014, Appellant saw medical professionals for the knee injury at Mercy Medical Clinic, which serves as the Medical Review Officer for BCPS. At each of these visits, the doctors cleared the Appellant to return to work with modifications limiting her walking and standing as tolerated and excluding restraint of students. (Discharge Instructions attached to Motion pp.7-12). Appellant also underwent an independent medical exam on November 14, 2014. Willie E. Thompson, M.D. determined that Appellant had reached maximum medical improvement. He diagnosed the injury as a sprain to the right knee, which had resolved as of the exam date. Through his exam, he determined that Appellant had full range of motion in her knee, that she walked a normal gait with no evidence of a limp, and that there was no need for future treatment or to place physical limitations on the Appellant. (CEO 5, 10). On November 19, 2014, Appellant had her final appointment at Mercy Medical Clinic at which she was discharged from care and was cleared for return to work. (Discharge Instructions p.6). Thereafter, Appellant visited several other doctors for treatment, including the Multi-Specialty Healthcare Group, which prescribed physical therapy three times per week. (*See* BTU 4, 5 & 7; CEO 5 & 10; App. Ex. H (Multi-Specialty Health Care Note)).

Several of the Appellant’s medical reports noted that she had underlying conditions of osteoarthritis and degenerative joint disease. (*See* BTU 4; CEO 3 & 5; Discharge Instructions 10/3/14 (p.9), 10/10/14 (p.8) & 10/22/14 (p.7); App. Ex. K (MRI Report)). One of the providers, Dr. Philip Neubauer, stated that Appellant’s “primary problem was arthritic in nature.” (BTU 4). In addition, Appellant’s medical history included information that she had previously broken her right leg/knee as a child, had a prior injury to her right knee in May 2014, and had fallen on the

knee in July 2014. (CEO 5, 9 &10).

As a result of the incident, Appellant also complained of anxiety and post-traumatic stress disorder. Based on an independent evaluation conducted November 4, 2014, Thomas J. Oglesby, M.D. determined that, from a psychiatric perspective, the Appellant had reached maximum medical improvement and that she was able to return to full duty work. It was his opinion that Appellant had not developed post-traumatic stress disorder, but that she was in some emotional pain. He explained that Appellant's emotional issues were related to an incident that occurred three years prior and the feeling of being unprotected and unappreciated. He recommended that she continue to see her therapist once a month for three more visits to assist with her return to work. (CEO 9).

During this period of time, the school system also conducted an investigation. Video surveillance during a 2.5 to 3 hour period while Appellant was running errands revealed that, as of November 3, 2014, Appellant was able to drive, walk up and down inclines, turn, and stand for prolonged periods of time without the use of walking aids. In addition, Appellant's own testimony and social media posts, disclosed that Appellant attended social events, such as sporting events, theater, parties, and graduations as early as October 2014, without the use of walking aids. It also disclosed that Appellant continued to work in her capacity as the owner of RIB Publishing, traveling to Philadelphia and Africa on safari in furtherance of her business. (CEO 11).

On November 17, 2014, the Workers' Compensation Commission ("WCC") held a hearing on a claim filed by the Appellant regarding the August 29, 2014 injury. By order dated November 20, 2014, the WCC noted that Appellant had been paid accident leave from September 2, 2014 to September 5, 2014 and for September 12, 2014. The WCC awarded additional temporary total disability benefits from September 13, 2014 to November 14, 2014. (Appeal, Ex.D). The WCC found a causal connection between the August 29, 2014 incident and the knee injury through November 14, but held that Appellant had achieved maximum medical improvement for the injury at that time. The WCC also found that Appellant had suffered anxiety related to the August 29, 2014 injury, but had achieved maximum medical improvement for all related psychological injuries. The WCC further found that Appellant did not sustain post-traumatic stress as a result of the injury.

Pursuant to the WCC award, the school system paid the Appellant temporary total disability for the noted time period. The school system also paid Appellant the difference in her temporary total disability amount and her full salary amount for that time period. The school system restored Appellant's sick leave for that time period as well. (Motion, Ex.2 and CEO 2).

In preparation of the Appellant's return to work, on November 14, 2014, Jerome Jones, Labor Relations Manager at the time, issued a memoranda to the principal of Rodman regarding work accommodations to be implemented for Appellant. He indicated that the school was able to accommodate any limitations identified by the doctors, namely walking and standing and no restraint of students. He explained that despite these limitations, Ms. Jones could perform the essential functions of her teaching position because she can regulate how much she walks, stands or sits while giving instruction, and because she is not required to restrain students. (CEO 6). Appellant, however, did not make any attempt to return to work.

Meanwhile, on October 30, 2014, Appellant filed a Uniform Grievance Report requesting that she be paid assault leave without loss of pay or use of her sick leave according to Article 15.5 of the contract between the Baltimore Teachers Union (“BTU”) and the local board. (Motion, Ex.1). The school system conducted a Level III hearing. By letter dated December 4, 2014, Lydia Henderson, Employee and Labor Relations Associate, advised Appellant that her grievance was denied because her absence from work failed to meet the standards for assault leave. She explained as follows:

Maryland Code Annotated Education Article 6-111 reserves the use of Assault Leave for “an employee . . . who is absent due to a physical disability that results from an assault while in the scope of board employment.” Ms. Jones visited Mercy Medical Clinic where she was diagnosed with a knee sprain and pain with underlying osteoporosis and degenerative joint disease. In the Worker’s Compensation claim filed following the August 29, 2014 incident, Ms. Jones asserted that her injury was an exacerbation of an injury that occurred in May 2014. Thus, the diagnosis given by Mercy Medical Clinic as well as Ms. Jones’ own admission indicate the presence of a condition that predates the incident which occurred on August 29, 2014; thus no causal relationship between that incident and Ms. Jones’ injury has here been established.

(Motion, Ex.2; CEO 3).

On December 5, 2014, Appellant filed a Level IV grievance before the local board. (Ex.1). The local board assigned the matter to a hearing examiner for review.

Meanwhile, prior to the hearing, the Appellant continued to be evaluated for her knee injury by Multi-Specialty Healthcare. On May 28, 2015, Howard Stern, M.D., from Multi-Specialty Health Care, issued a follow-up report stating that Appellant continues to have right knee pain that is causally related to the August 29, 2014 incident. He noted that she had a total of 58 therapy sessions including physical therapy, chiropractic therapy, and aquatic therapy, and that she had reached maximum medical improvement. He recommended a sedentary desk job that would not require any significant extended periods of standing. (Appeal). On September 3, 2015, James B. Meredith, Ph.D. stated that the Appellant had been receiving psychological services due to severe emotional stress, but that the Appellant could return to work on September 8, 2015 restricted to administrative duty only with no classroom work. (Appeal).

In December 2015, the Appellant requested an accommodation of a classroom assistant based on her physical limitations to standing, walking, carrying and crouching. The Equal Employment opportunity manager responded that BCPS was unable to accommodate the request because the Appellant had submitted medical documentation from Dr. Meredith indicating that Appellant could not return to classroom work. At the time, there were not any non-classroom sedentary positions available. Appellant was referred to the Office of Labor Relations to discuss alternatives.

On March 16, 2016, the hearing examiner conducted the hearing on Appellant's assault leave request.¹ Appellant was represented by her union representative. In a decision issued April 14, 2016, the hearing examiner recommended that the local board deny Appellant's grievance and the relief sought. (Motion, Ex.3). The hearing examiner explained that while it was clear that Appellant was injured during the scope of her employment on August 29, 2014, it was also clear that medical documentation supported that as of November 14, 2014 she had reached maximum medical improvement from the injury, was discharged by her medical providers and was cleared to return to work. The hearing examiner further explained that the school system provided the accommodations requested by Appellant's medical providers for return to work, but the Appellant declined to return. The hearing examiner also pointed out that although the Appellant maintained that she was unable to work with the accommodations, her injuries did not appear to limit her other life activities, as demonstrated through surveillance and Appellant's own social media posts which disclosed Appellant walking, standing, driving and going about her daily activities without the use of walking aids, and even included a trip to Africa. The hearing examiner concluded that Appellant had failed to produce evidence that she was unable to return to work with the accommodations provided. *Id.*

The hearing examiner also explained that Appellant failed to produce sufficient evidence that her continued pain post November 14, 2014 was attributable to the August 29, 2014 incident, rather than to her preexisting conditions. She noted the medical diagnosis of underlying osteoarthritis² and degenerative joint disease and notation by one doctor that the problem was arthritic in nature. *Id.*

On April 25, 2016, Appellant filed exceptions to the hearing examiner's recommendation. The CEO filed a response. (Motion, Ex.4). On May 12, 2016, the local board, relying on the hearing examiner's Findings of Fact, Conclusions of Law, and Recommendations, voted to affirm the hearing examiner's recommendation and deny the Appellant's request for assault leave. (Motion, Ex.5)

This appeal followed.

STANDARD OF REVIEW

Decisions of a local board involving a local policy or a controversy or dispute regarding the rules and regulations of the local board are considered *prima facie* correct. The State Board may not substitute its judgment for that of the local board unless the decision is arbitrary, unreasonable, or illegal. *See* COMAR 13A.01.05.05A.

LEGAL ANALYSIS

Assault Leave

Appellant maintains that she is entitled to assault leave pursuant to section 6-111 of the Education Article and section 15.5 of her union contract based on the injury that she sustained to her knee on August 29, 2014. It is the local board's position, however, that the Appellant has

¹ There is no explanation in the record regarding the length of time between the Appellant's request and the hearing. Nor does the Appellant raise it as an issue in the case.

² The hearing examiner mistakenly references "osteoporosis" instead of "osteoarthritis." (Ex.3 at 2).

already received all of the leave for which she was entitled.

Section 6-111 of the Education Article states that “[a]n employee of a county board who is absent due to physical disability that results from an assault while in the scope of board employment shall be kept on full pay status instead of sick leave during the period of absence.” The provision also allows county boards to establish rules and regulations for eligibility and use of assault leave, including a requirement that the employee provide a signed statement justifying use of assault leave and a certificate from a licensed physician stating the nature and duration of the disability if medical attention is required.

Section 15.5 of the contract between BTU and the local board covers job-related injury. It provides as follows:

- A. Employees who sustain injuries occurring in connection with their assigned duties and not as a result of their own negligence shall be eligible for leave of absence without loss of pay up to a maximum of one year from the date of the job-related injury. The leave is subject to the approval of the Board’s MRO or designee. The employee shall submit to re-examination by the Board’s MRO or designee periodically as required, but at least every three (3) months. In any case where the injury requires an extended leave of absence the Board may request that the employee be considered for retirement because of accidental disability.

No employee shall be entitled to receive Workers’ Compensation benefits for temporary total disability during the time, or covering the period, that said employee is receiving his or her full salary for job injury leave as outlined above.

- B. Absence due to disability resulting from an assault will be covered by an assault leave. This leave will not be charged to sick leave. The teacher will be in full pay status for the duration of the disability.

These provisions work together to ensure protection for BCPS teachers who cannot work due to a physical injury resulting from an assault in the course of employment. They entitle the teacher to full salary benefits for the duration of the leave and protect against use of the teacher’s sick leave to cover the absence.

In this case, Appellant received her full pay through November 14, 2014 through accident leave, the WCC award, and the school system’s payment of the difference between the WCC award and Appellant’s full salary amount. In addition, the school system restored all of Appellant’s sick leave that was used during the time period August 29 through November 14, 2014. (Motion, Ex.2 and CEO 2). Thus, the only issue in this case is whether the Appellant is entitled to assault leave after November 14, 2014.

The local board argues that the Appellant is not entitled to the assault leave beyond the November 14, 2014 date because the Appellant was cleared to return to work and chose not to do

so, despite the school system's offer of accommodations to allow Appellant to sit and walk as tolerated and not to have to restrain students. The local board's position is substantiated by medical documentation provided by Mercy Medical Clinic, Dr. Thompson, and Dr. Oglesby clearing the Appellant both physically and mentally to return to work at that time.

The WCC order denying the WCC award after the November 14 date lends further support to this conclusion. In addition, it appeared that the Appellant was able to engage in various life activities, as demonstrated through the surveillance observations and social media posts. While such observations do not rise to the level of a medical evaluation, they show that the Appellant was able to manage activities such as attending recreational events and going on interstate and foreign travel, without the use of walking aids. It was reasonable for the local board to rely on the medical documentation and other observations in finding that the Appellant could return to work with accommodations as of November 14, 2014. The Appellant failed to present evidence that, beginning November 15, 2014, she was unable to return to work with accommodations. Indeed it was not until May 2015, that the Appellant submitted any further medical documentation about the knee injury.

With regard to the Appellant's knee issues beyond November 14, 2014, the local board found that the Appellant had not presented sufficient evidence that the continued knee problems were a result of the August 29, 2014 injury rather than the underlying medical conditions. The medical documentation in the record indicates a diagnosis of osteoarthritis and degenerative joint disease that predates the injury. Appellant had a prior injury to the knee as a child, a prior injury three months before the incident, and a fall to the knee one month prior to the incident. In addition, one of the doctors indicated that Appellant's "primary problem is arthritic in nature." Although the record before the local board contains at least one medical note that relates the continuing pain to the August 29, 2014 injury, it was not unreasonable for the local board to rely on the other existing medical documentation in the record.

We note that in *Eberle v. Baltimore County*, 103 Md. App. 160 (1995), the Court considered whether the Baltimore County Board of Appeals' denial of an individual's claim for accidental disability benefits related to a knee injury was proper. The Board of Appeals held that the individual suffered from degenerative arthritis in his knees and did not meet the burden of proving a causal connection between the present disability and the two accidents he sustained at work. The Court held that an unexpected result attributable to a pre-existing condition is not "accidental injury" because it is not a "natural and proximate result" of the accidents. Despite the absence of expert testimony that the employee's disability would have resulted even without the accidental injuries, the Court found sufficient record evidence that the disability was not a "natural and proximate result" of the injuries. This was based on evidence of the preexisting degenerative arthritis, a preexisting injury to the knee 33 years prior, and other prior injury to the knee.

Although it was not an assault leave case, we find *Eberle* instructive. Like the employee in *Eberle*, the Appellant here suffered a work related injury to a knee with preexisting conditions. To the extent that the Appellant is "disabled," that disability is not the natural and proximate result of the knee injury she received on August 29. In our view, it was reasonable for the local board to find that the disability was not a result of the assault on August 29, 2014, but rather an exacerbation of a pre-existing condition, given the medical documentation of the underlying

osteoarthritis and degenerative joint disease, and the medical opinion that the injury was arthritic in nature.

Appellant argues that the local board failed to have her re-examined by the board's medical review officer ("MRO") every three months as provided by section 15.5 of the BTU contract for employees who remain out of work for job-related injuries. The Appellant misconstrues the provision.³ Section 15.5(A) requires an employee who is out of work on an approved leave of absence for a job-related injury to submit to re-examination by the MRO periodically as required, but at least every three months. Appellant, however, was not out of work on an approved leave of absence. Rather, she was deemed fit to return to work on November 14, 2014. While the Appellant initially had several visits with the MRO, she was discharged as of November 19, 2014 with no need for further treatment. Appellant simply chose not to return to work.

Additional Evidence

The Appellant has attached the following evidence to her State Board appeal that was not previously reviewed by the local board: (1) May 12, 2015, medical note from Diego Proano, D.C., at Baltimore Work Rehab, LLC; (2) November 11, 2015 and April 21, 2016 medical notes from Charlotte A. Watts, at University of Maryland Family and Community Medicine, recommending that Appellant be placed in a sedentary position because she cannot perform the duties of a teacher; (3) May 17, 2016 medical note from Gary A. Klein, M.D., stating that the Appellant is permanently disabled as an elementary school teacher due to anxiety and depression resulting from the August 29, 2014 injury; and (4) June 21, 2016 letter from the State Retirement Agency approving accidental disability retirement. (Appeal, Exs.C & H; and Attachments to App's Resp. to Motion). The State Board may consider new evidence or remand the appeal to the local board for the limited purpose of receiving the additional evidence if the Board finds that the evidence is material to the case and that the Appellant offered good reason for failing to present the information to the local board. COMAR 13A.01.05.04(C).

None of this additional evidence should be considered by the State Board in this case. Appellant could have submitted the notes from Dr. Proano and Dr. Watts in the local board appeal, but has provided no reason why she failed to do so. With regard to the note from Dr. Klein, Appellant had ample opportunity to seek evaluations of her mental health status prior to her appeal to the local board and she has not presented any reason why such an evaluation could not have been submitted at an earlier time. Finally, the letter from the State Retirement Agency is not material to this case because the decision-making process for accidental disability retirement is a separate and distinct matter with an entirely different determination process than the process followed here. The State Retirement Agency did not have before it the entire record of proceedings that was before the local board.

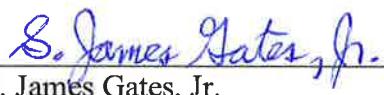
³ Although the Appellant claims this is a violation of due process, her allegation is really a claim that the local board failed to adhere to the BTU contract provisions. With regard to due process, Appellant received all of the process to which she was entitled, including a full evidentiary hearing before the local board's hearing examiner.

CONCLUSION

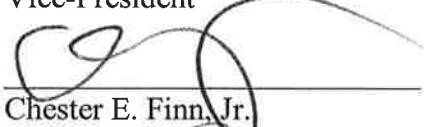
For the reasons stated above, we affirm the decision of the local board denying the Appellant assault leave.



Andrew R. Smarick
President



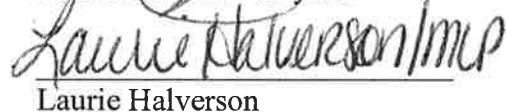
S. James Gates, Jr.
Vice-President



Chester E. Finn, Jr.



Michele Jenkins Guyton



Laurie Halverson



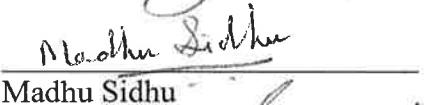
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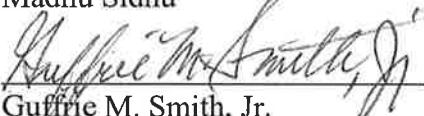
Janette O'Neill-González



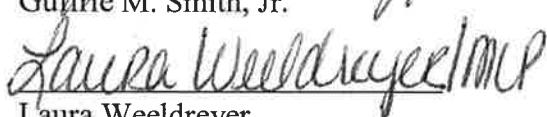
Barbara J. Shreeve



Madhu Sidhu



Guffrie M. Smith, Jr.



Laura Weeldreyer

October 25, 2016