NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
4110 Chain Bridge Road
Fairfax, Virginia 22030-4009

703 246-2221 • Fax 703 246-5496 • TDD 703-352-4139

BRUCE D WHITE CHIEF JUDGE
RANDY I BELLOWS
ROBERT J SMITH
JAN L BRODIE
BRETT A KASSABIAN
MICHAEL F DEVINE
JOHN M TRAN
GRACE BURKE CARROLL
DANIEL E ORTIZ
PENNEY S AZCARATE
STEPHEN C SHANNON
THOMAS P MANN
RICHARD E GARDINER

JUDGES

COUNTY OF FAIRFAX CITY OF FAIRFAX

THOMAS A FORTKORT
JACK B STEVENS
J HOWE BROWN
F BRUCE BACH
M LANGHORNE KEITH
ARTHUR B VIEREGG
KATHLEEN H MACKAY
ROBERT W WOOLDRIDGE JR
MICHAEL P McWEENY
GAYLORD L FINCH JR
STANLEY P KLEIN
LESLIE M ALDEN
MARCUS D WILLIAMS
JONATHAN C THACHER
CHARLES J MAXFIELD
DENNIS J SMITH
LORRAINE NORDLUND
DAVID S SCHELL

RETIRED JUDGES

February 27, 2017

Brian J. Goodman, Esquire
Legal Affairs & Compliance Coordinator
Virginia Retirement System
P.O. Box 2500
Richmond, Va. 23218-25009

Craig A. Guthery, Esq.
FH+H, PLLC
1753 Pinnacle Drive, Floor 12
McLean, VA 22102

Re: Lydia H. Buschenfeldt v. Virginia Retirement System

Case No. CL2016-10067

Dear Counsel:

This matter is before the Court on the "Petition for Appeal" filed by Petitioner Lydia Buschenfeldt challenging the denial of disability benefits by the Virginia Retirement System. For the following reasons, the Petition for Appeal is granted and this matter is remanded to the agency.

Background

Petitioner Lydia Buschenfeldt ("Ms. Buschenfeldt"), following a successful five (5) year teaching career for the Fairfax Public School System was diagnosed with over 20 illnesses in

OPINION LETTER

2011. She petitioned the Virginia Retirement Systems ("VRS") for permanent disability benefits. Upon three denials of disability by the VRS, Ms. Buschenfeldt petitioned this Court to remand her Petition back to the agency on the basis that the VRS applied the incorrect standard for incapacity, granted a presumption of correctness to something that was non-agency action, and violated her due process rights by doing so.

Ms. Buschenfeldt received a letter from the VRS on June 4, 2014 informing her that the medical evidence submitted and the recommendation of the VRS Medical Board supported the denial of her disability application. In the Medical Board Conclusions document attached to her denial letter, the Board stated that Ms. Buschenfeldt's incapacity was found not to be permanent in nature. Upon filing her first appeal, Ms. Buschenfeldt attached additional medical records from various physicians universally agreeing she was disabled from full-time teaching. On November 4, 2014, VRS again denied Ms. Buschenfeldt's petition. Once again, the Medical Board recommendation of denial stated that Ms. Buschenfeldt's incapacity was not permanent in nature.

Pursuant to a Freedom of Information Act ("FOIA") request, Ms. Buschenfeldt discovered that the Medical Board Recommendations upon which VRS relies is actually a private for-profit corporation based in Piscataway, New Jersey called United Review Services ("United"). Ms. Buschenfeldt inquired about the lack of a physician signature[1] on the document and further sought information about who the reviewing physicians were and their credentials. In response, the VRS said that the agency does not require a reviewing physician to sign the recommendations or be identified in any way. At the time of Ms. Buschenfeldt's petitions and appeals, the only oversight VRS provided to United was contract oversight. At oral arguments, counsel for the agency notified the Court that this policy has since changed. To this day, Ms. Buschenfeldt does not know the identity or qualifications of the people who denied her disability claim.

On August 11, 2015, under the supervision of a hearing officer assigned by the VRS, an impartial and independent fact-finding hearing was scheduled. It was neither.

[1] The document was signed by an individual purporting to be social worker and despite the fact that she was employed in New Jersey for a private company, was identified as the "VRS Medical Board Coordinator."

During this hearing, Ms. Buschenfeldt presented four witnesses and testified on her own behalf.[2] The VRS did not present any evidence to rebut the testimony of Ms. Buschenfeldt's witnesses. After the hearing concluded, the hearing officer issued a report recommending that the VRS should again deny Ms. Buschenfeldt's disability application because she had not overcome the presumption of correctness afforded to the Medical Board recommendations.

Virginia Code § 51.1-156.E requires the Petitioner to show that she is (1) mentally or physically incapacitated for the further performance of duty and (2) that the incapacity is likely to be permanent. Ms. Buschenfeldt proposed that the hearing officer erred in two ways. First, he improperly applied the second prong of the statute when he suggested that Ms. Buschenfeldt was not *permanently incapacitated.* The statute only requires that the petitioner show her incapacity is *likely* to be permanent. Second, the hearing officer granted the Medical Board recommendation a presumption of correctness even though the Medical Board used the incorrect standard as set forth herein and then suggested that Ms. Buschenfeldt had not overcome that presumption during what should have been an impartial and independent fact-finding hearing.

VRS opposes this position arguing that notwithstanding the hearing officer's erroneous application of the statute, the agency is afforded a presumption of correctness that this Court may not reverse unless the decision was not supported by substantial evidence. Further, the composition of the Medical Board has been previously challenged and no Court has found the anonymity of the Board to be an issue of law warranting remand.

---

[2] Dr. Walter Atiga, M.D., a Board Certified Cardiovascular physician, opined that Ms. Buschenfeldt's disability is likely to be permanent since dysautonomia is extremely difficult to treat and rarely do patients recover, especially when it is as severe as hers is.

Dr. Colleen Blanchfield, M.D , a Neurologist and Psychologist agreed, stating, "I conclude within medical certainty that Lydia is disabled. Her memory deficits are due to the atrophy in her hippocampus and I do not expect her to improve.

Dr. Andrew H. Heyman, M D., the Program Director of Integrative and Metabolic Medicine at the George Washington University School of Medicine stated, ".... Given the variety of neurological, hormonal, cardiac and metabolic abnormalities, I do not anticipate Mrs. Buschenfeldt ever recovering completely from her complex chronic illness. It is my opinion that she should be placed on disability permanently."

Standard of Review

In reviewing an agency decision under the Virginia Administrative Process Act, it is the Circuit Court's role to review all errors of law *de novo*. Va. Code § 2.2-4027; *Giannoukos v. Va. Bd Of Med. & Dep't of Health Professions*, 44 Va. App. 694, 698 (2005). It is common practice that a reviewing court will review the facts of the case in the light most favorable to sustaining the agency decision and will take due account of the presumption of official regularity afforded to agency action. *Baumann v. Virginia Retirement Sys.*, No. 1194-99-4, 2000 Va. App. LEXIS 632. However, if it is alleged that the agency decision was based on an error of law, it is the burden of the party complaining of agency action to designate and demonstrate an error of law subject to review by the court. Va. Code § 2.2-4027. VAPA limits judicial review to errors of (i) constitutionality; (ii) compliance with statutory authority; (iii) observance of required procedure; and (iv) the substantiality of evidence to support findings of fact. Va. Code §§2.2-4020 and 2.2-4021.

While the amount of deference granted to agency deference depends on the nature of the issue, whether it is legal or factual, deference also turns on whether the issue falls within the area of experience and specialized competence of the agency itself. *Johnston-Willis, Ltd. v. Kenley*, 6 Va. App. 231, 369 S.E.2d 1 (1988). Under the VAPA, the role of the Circuit Court mirrors that of a Court of Appeals, and the Court will apply the substantial evidence standard during review if the review is limited to the facts. *School Bd. v. Nicely*, 12 Va. App. 1051, 408 S.E.2d 545 (1991).Va. Code Ann. § 2.2-4027.

It is well accepted that under the substantial evidence standard, this Court may reject the agency's findings of fact only if a reasonable mind would necessarily come to a different conclusion after having considered the record as a whole. *Virginia Real Estate Comm'n v. Bias*, 226 Va. 264, 308 S.E.2d 123 (1983); *Atkinson v. Virginia Alcohol Beverage Control Comm'n*, 1 Va. App. 172, 336 S.E.2d 527 (1985); *Roanoke Mem. Hosps. v. Kenley*, 3 Va. App. 599, 352 S.E.2d 525 (1987); *Environmental Defense Fund, Inc. v. Virginia State Water Control Bd.*, 15 Va. App. 271, 422 S.E.2d 608 (1992); *Ables v. Rivero*, No. 0873-02-1, 2003 Va. App. LEXIS 83 (Ct. of Appeals Feb. 19, 2003).

However, in reviewing the action, the Court may set aside agency action "even if it is supported by substantial evidence" if the review reveals that the "agency failed to comply with a

substantive statutory directive." *Browning-Ferris Indus. of S. Atl., Inc. v. Residents Involved in Saving the Env't, Inc.*, 254 Va. 278, 492 S.E. 2d 431 (1997). The court may not impose its own judgment on the matter, and should instead suspend the agency's decision and remand the matter with instructions to make additional required factual determinations. *Va. Imps , Ltd v. Kirin Brewery of Am , LLC*, 41 Va. App. 806, 589 S.E.2d 470 2003 Va. App. LEXIS 650 (2003).

Analysis

Petitioner's challenges in this appeal are questions of law that the Circuit Court will review *de novo*. Because the Court is reviewing errors of law and not errors of fact, the respondent's proposition that the Court must grant deference to the agency decision is not applicable. The VRS and the Petitioner do not question the validity of the actual facts in this case, nor does the Court. In reaching this decision, the Court considered two errors of law *de novo*.

In this case, the statutory authority is Va. Code §51.1-156(E), stating in full:

> "After a medical examination of the member or after reviewing pertinent medical records, the Medical Board shall certify that (i) the member is and has been continuously since the effective date of retirement if prior to filing of the notification, mentally or physically incapacitated for the further performance of duty, (ii) the incapacity is *likely to be permanent*, and (iii) the member should be retired."

Upon review of the record, it is clear that the VRS misapplied the substantive statutory directive of certifying that the member was incapacitated for the further performance of duty and that the member's incapacity was *likely* to be permanent. Again, the Court is not questioning the validity of the facts on the record, therefore there is no need for the presumption of regularity and correctness to be applied here.

In interpreting Va. Code §51.1-156(E), this Court finds that the language "for further performance of duties" means the duties from which the applicant is seeking retirement. In this case, that means Ms. Buschenfeldt's duties as an elementary school teacher. Both the hearing officer and the VRS assert that because Ms. Buschenfeldt is able to function as a health coach,

she is not incapacitated per the statute.[3] The VRS and the hearing officer are incorrect. While Courts in the Commonwealth have yet to squarely address this issue, in order to properly analyze what the statutory language "for the further performance of duty" means, this Court looks to cases which are factually distinct from the case at bar, but logically persuasive.

In *Pilot Freight Carriers, Inc. v. Reeves*, 1 Va. App. 435 (1986), the Court of Appeals found that an employee was entitled to continuously receive disability benefits in a Workers' Compensation case even *after* he started a new job because he could not perform the same job he had at the time of injury. *Id.* While the standard for incapacity under Workers' Compensation addresses degrees of earning capacity post-injury and the standard for incapacity for disability under Va. Code §51.1-156(E) does not address earning capacity at all, the logic is persuasive. Following the line of reasoning set forth in *Reeves*, a finding of disability "may stand even when there is evidence of some actual post-injury earnings equaling or exceeding those received before the accident." *Id.* at 440-41. There is no issue of post-injury earnings here, but Ms. Buschenfeldt's incapacity from being an elementary school teacher, the job that she is seeking disability from, is what should control the analysis of disability, not any subsequent job she may have as it did in *Reeves*.

In *Uss v. Va. Ret. Sys.*, 82 Va. Cir. 398, 400 (Fairfax County 2011), the Petitioner presented a similar issue for review. In that case, the petitioner alleged that the VRS's denial of her disability was not supported by substantial evidence on the record. Petitioner maintained that the evidence on the record very clearly indicated that she was disabled from further performance of her duties as an office manager. Upon filing her petition, petitioner cited headaches and fibromuscular dysplasia as her reason for disability. Indeed, the petitioner backed up her claims with medical evidence, but Judge Thacher in his ruling indicated that the Court was unable to weigh conflicting medical evidence and choose which is more persuasive. Judge Thacher stated that while there is evidence that "permits the inference that Ms. Uss suffers from a permanent disability, it does not compel that conclusion." *Id.* at 403. Once again following the line of

[3] This was especially puzzling to the court given the undisputed evidence in the record. The duties as described as an elementary school teacher showed that the level of sustained activity required were well beyond her capacity. Also, the evidence pertaining to her work as a "health coach" involved brief, one client per day, telephonic consultation of limited duration which was also beyond her physical capacity. Either way, the Health Coach position is entirely irrelevant for purposes of her disability as an elementary school teacher as set forth herein.

reasoning in this case, but understanding the factual distinctions, it is clear that Judge Thacher considered the petitioner's disability from the standpoint of her role as an office manager. In analyzing the claim in *Uss*, Judge Thacher relied on the evidence in the record that showed while " . . . Ms. Uss is disabled and unable to perform *her job* due to the headaches, the medical evidence is not unanimous that her condition will be permanent." *Id.* at 402.

The Court in reviewing an error of law *de novo*, as required by Va. Code § 2.2-4027 reads Va. Code §51.1-156(E) in two parts: first, is the applicant disabled from further performance of duty and second is that incapacity likely to be permanent. When applying the first prong, this Court reads the statute as requiring the agency to gather facts, and then to base its recommendation on those facts. Only then can the agency suggest the applicant is or is not disabled from further performance of duty for the job from which she is applying for disability benefits.

Incapacitated from "further performance of duties" as written in the statute would not allow an agency to deny a disability claim made by a professional race car driver if it was shown that she could instead drive a taxi. That is the error made by the VRS in this case. By positing that Ms. Buschenfeldt is able to sit behind a desk and answer phones, and therefore is not likely to be permanently incapacitated, does not properly apply the statutory requirements. Ms. Buschenfeldt cannot stand for extended periods of time, speak at length, bend over, or lift heavy things as required for a teacher and may be incapacitated for further performance of duty as an elementary school teacher.

The VRS contends that this determination is a factual issue left to the discretion of the agency and afforded the presumption of correctness and regularity because there is conflicting medical evidence as to her disability. This Court disagrees. Interpreting statutory language, in this case, Va. Code §51.1-156(E), is a judicial function and misapplying the statute is an error of law to be reviewed *de novo*. Having reviewed the matter *de novo*, this Court finds that the first prong of Va. Code §51.1-156(E) means that incapacity from further performance of duty should be analyzed in the context of the job from which the applicant is seeking disability. The statute should be properly applied in that context on remand.

Furthermore, Ms. Buschenfeldt argues that the hearing officer improperly applied the statutory requirement for disability review by stating in his October 27, 2015 report that Ms.

Buschenfeldt failed to present substantial evidence leading to the permanency of her disability. Upon review of the agency record, it is clear that Ms. Buschenfeldt presented more than a "mere scintilla of evidence" where, considering the record as a whole, a reasonable person would necessarily conclude her numerous illnesses were likely to be permanent. *Uss v. Va Ret. Sys.*, 82 Va. Cir. 398, 400 (2011). Considering this issue *de novo*, Va. Code §51.1-156(E) unequivocally requires the agency, and any of its affiliates, to analyze a member's disability for its likelihood of permanency. The statute does not direct the agency to determine that the member's incapacity is permanent.

While Courts in this Commonwealth have determined that the "likely to be permanent" standard fluctuates during the analysis of a member's claim for incapacity, this Court is unpersuaded that the misapplication of the statutory standard does not constitute a harmless error. Va. Code § 2.2-4019(A)(v) governs the informal, independent fact-finding proceedings in an agency appeal and clearly states that the hearing officer must set forth, in writing, the factual or procedural basis for an adverse decision in the case. While the hearing officer did provide a report relaying the factual reasons denying Ms. Buschenfeldt's claim, he incorrectly described the procedural basis for an adverse decision because he used a higher standard than required. The hearing officer stated that Ms. Buschenfeldt failed to demonstrate substantial evidence as to the permanency of her disability, thereby incorrectly applying the likelihood of permanency standard.

Moreover, the VRS based its decision on the hearing officer's improperly reinstated recommendation. Va. Code § 2.2-4020(C) allows the agency to grant deference to the hearing officer's factual findings, but it does not allow for deference if the hearing officer legally erred while conducting the hearing.

The VRS's final decision report properly applies Va. Code §51.1-156(E) and complies with all statutory directives in rendering its decision. However, while the VRS used the words "is incapacitated" and "likely to be permanent" in its final decision, it is clear from the record that proper standards were not applied throughout the proceedings. Using the correct statutory language does not cure the consistent and incorrect misapplication of the standard. Apart from suggesting that Ms. Buschenfeldt can function in a job wholly different from her teaching career, misapplying prong one of Va. Code §51.1-156(E), after the recitation of the disability standard in

several documents found in the record, it becomes clear that the agency used a higher standard of "will be permanent" when analyzing Ms. Buschenfeldt's claim. Moreover, the VRS relied on the Medical Board Reports and the independent fact finder's recommendations, all of who used the wrong standard.

Conclusion

For these reasons, the Petition for Appeal will be granted and the matter is remanded to the agency for further action. I have entered an order reflecting this ruling.

[redacted]

Very truly yours,

[redacted]

Thomas P. Mann

OPINION LETTER

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Lydia H. Buschenfeldt **Plaintiff,**	)	
v.	)	
Virginia Retirement System **Defendant.**	)	**Law No. CL-2016-10067**

ORDER

IT APPEARING to the Court that, due to the reasons set forth in its Letter Opinion attached hereto, it is:

ORDERED, ADJUDGED, AND DECREED that the Petition for Appeal filed by Petitioner Lydia H. Buschenfeldt is granted and this matter is remanded back to the agency for further proceedings.

[redacted]

ENTERED this 27th day of February, 2017.

[redacted]

Thomas P. Mann
Judge, Circuit Court of Fairfax County

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA