

IN THE MATTER OF DONNA DUTO \* BEFORE THE COUNTY  
12335 Boncrest Drive \*  
Reisterstown, MD 21136 \* BOARD OF APPEAL  
RE: DECISION OF BOARD OF TRUSTEES/ \* FOR  
DENIAL DISABILITY RETIREMENT \* BALTIMORE COUNTY  
\* Case No.: CBA-11-015

\* \* \* \* \*

**OPINION**

This case comes before the Board as a result of a decision dated December 16, 2010, in which the Medical Board for the Employees' Retirement System of Baltimore County's denied the Petitioner's request for Disability Retirement. The Medical Board was unable to certify that Applicant is "...mentally or physically incapacitated for the further performance of duty and the condition does not result in permanent physical disability.". This decision was appealed to the Board and a hearing was held before the Board of Appeals on June 28, 2011 (Day #1) and concluded on July 14, 2011 (Day #2). Appellant Duto was represented by Scott B. Baron, Esquire and the Employees' Retirement System of Baltimore County was represented by Suzanne Berger, Assistant County Attorney, Baltimore County Office of Law. Closing arguments were on the record at the close of the hearing on July 14, 2011. No closing briefs were filed.

**FACTS**

The pertinent facts with respect to this matter are as follows:

- Ms. Duto was born on January 15, 1972. She completed twelve (12) years of high school and received her GED Certificate.
- Ms. Duto was married at seventeen (17) and divorced at age twenty-one (21). She had one (1) child by that marriage.

- She was married for a second time at age twenty-two (22) and divorced at age thirty-eight (38). She had a second child as a result of that marriage.
- At the present time Ms. Duto is not married, but living with her fiancé in her parent's home located in Reisterstown, Maryland.
- Her work history consisted of working at a Royal Farms Store for approximately six (6) months and then operating a Child Care Center at her home for approximately five (5) years.
- On September 1, 2001, Ms. Duto was hired by Baltimore County and started working as a Bus Driver in the Baltimore County School System.

Her medical records reveal as follows:

- Ms. Duto's problems with dizziness appeared to begin in April 2004, when she saw her personal physician, Dr. Harold Bob, after complaining that she had dizzy spells for a two (2) day period prior to seeing the doctor.
- Ms. Duto had intermittent headaches and was having difficulty sleeping.
- On April 24, 2004, Ms. Duto saw John A. Ruth, Jr., M.D., Otolaryngologist. At that time she complained of a thirteen (13) day history of vertigo. She claimed at upon waking on Easter morning she became extremely dizzy when she rolled on to her left side, with the sense of movement. She stated that she had nausea and also vomiting.
- Ms. Duto was seen by Dr. Ruth, Jr., on April 24, 2004, June 3, 2004, April 9, 2007, April 28, 2007, May 12, 2007, May 31, 2007 and June 28, 2007. At the June 28, 2007 office visit, Dr. Ruth, Jr., referred Ms. Duto to Dr. David Zee, an authority on dizziness at Johns Hopkins Hospital for further evaluation and management.

➤ Dr. David S. Zee reviewed Ms. Duto's past history and indicated that she had dizziness problems beginning in April of 2007, when she hit her head while working with a portable table. Ms. Duto stated that she was bothered by persistent dizziness, vertigo and nausea virtually whenever she was awake. She informed Dr. Zee that she had severe migraine headaches beginning in her early 20s. She stated they could be quite severe and could last more than four (4) hours. Dr. Zee's impression at that time was that she probably had a benign positional vertigo syndrome that was exacerbated by the recent head injury.

➤ Shortly after the July 2007 visit with Dr. Zee, Ms. Duto had a MRI which was reportedly within the normal limits.

➤ Dr. Zee saw Ms. Duto again on July 18, 2008, still complaining of dizziness. Dr. Zee recommended that she increase the dosage of Cymbalta up to ninety (90) mg. for a month or two and see how she did. He also recommended that she try some type of exercise program, such as brisk walking or bicycle riding and find some type of program, such as table tennis, that would be helpful. Additional blood testing was ordered.

➤ On October 11, 2007, Ms. Duto was examined by Dr. Mike Lyons of Concentra Medical Center. Dr. Lyons evaluated Ms. Duto with respect to her symptoms of vertigo and his opinion was that her symptoms were unlikely to improve in the foreseeable future and therefore she could not return to her regular job as a Bus Driver.

➤ On February 20, 2008, Dr. Lyons again examined Ms. Duto with respect to her vertigo problems and advised Baltimore County that the Agency grant disability retirement.

➤ On October 19, 2008, Ms. Duto was admitted to the Carroll Hospital Center with Sleep Apnea. She was diagnosed with mild obstructive sleep apnea syndrome and severe periodic limb movement disorder. It was recommended that sleep apnea be treated with an oral appliance and/or treatment with several types of medicine.

➤ Ms. Duto applied for Social Security Disability and in support of that Petition, her attorney filed a brief and also a Medical Report of her personal physician, Dr. Harold Bob. Dr. Bob's records indicated that Ms. Duto was unable to perform the lifting of any object from zero (0) to fifty (50) pounds or carry any object weighing from zero (0) to fifty (50) pounds. She could never bend, squat, climb or reach. In addition, Dr. Bob felt she should not be exposed to major changes in temperature and humidity, drive a motor vehicle, be exposed to dust, fumes and gases, stress or anything else.

In support of her position that she was totally disabled, as stated above, her attorney filed a brief. On page six (6) of that brief he states:

"Ms. Duto is unable to perform any other work considering her residual functional capacity and work experience. As previously discussed, claimant has extensive physical limitations that would prevent her from working any other job that is described by the Department of Labor in the *Dictionary of Occupational Titles*. Ms. Duto is unable to perform any job that falls under the category of "Professional, Technical, and Managerial Occupations" because these jobs would require repeated standing and movement of which claimant is unable to do. As a result of Ms. Duto's severe vertigo, she may only sit for up to one hour

continuously in an 8-hour workday and may not stand or walk for a continuous period in an 8-hour workday. See attached Exhibit A. Further, claimant may never lift or carry anything of any weight and may never bend, squat, climb or reach. *Id.* As a result of her vertigo, claimant is unable to user (*sic*) her hands for simple grasping, pushing and pulling of arm controls and fine manipulation. *Id.* In the medical report dated May 13, 2009 from Dr. Harold Bob, the claimant's treating physician, states that claimant is totally disabled from any work activity. *Id.*"

On August 27, 2009, Administrative Law Judge, Douglas R. Due, granted Ms. Duto disability benefits under the Social Security Act. In his decision, the Administrative Law Judge notes the opinions of Dr. John Ruth, Dr. David Zee and Dr. Mike Lyons, as well as, Dr. Harold Bob.

### TESTIMONY AND EVIDENCE

#### A. APPELLANT'S TESTIMONY

Donna Duto testified on her own behalf.

- She affirmed the treatment which she had received from her various doctors which has been set forth above.
- In addition, she indicated that she has good days and bad days.
- She stated that her medicine would work for awhile and then she would get used to it and the nausea and dizziness would return.
- She stated that she would get nauseas and start throwing-up if she was in a vehicle.
- She stated that the more she walks or bends, the more nauseas she gets.
- She stated that when she looks right or left, her eyes started shaking.

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- She stated that she can not stay focused and her memory is not good at all and she can not remember to take her medicine.

On cross-examination, Ms. Duto stated that her head is constantly spinning; that it makes her eyes shake and her stomach nauseas. She also indicated that she had stopped driving her vehicle when she got sick, but she had started driving a few weeks before she saw Dr. Lyon. She stated that she would not drive on the highway. She indicated that she had a driver's license with no restrictions. However, her insurance company was giving her "a hard time".

Ms. Duto stated that the more she walks and bends the more nauseas she gets. She stated that she can not sit up for a total of one (1) hour per day and could not stand or walk for that period of time. She can watch television but could not use a computer because she would have to move her eyes from left to right. She did however admit that she has a Facebook page and that she has been creating and attempting to sell jewelry on Facebook.

Ms. Duto stated that the letter which she received dated November 14, 2007 from the Board of Education indicated that she was offered the opportunity to review several different jobs, but she was not interested in any of the jobs that were offered. She did not feel that she could do a bus attendant job, since she could not handle a wheelchair and would get nauseated if she was in a vehicle.

The Appellant stated that she has not lived on her own and that her fiancé moved in after her divorce in January of 2010. She also stated that she had a knee problem and when she tries to squat her right foot tingles. Therefore, she can not squat.

In support of Ms. Duto, her fiancé Richard Nisewonger testified.

- He stated that he had known Ms. Duto approximately three (3) years and first met her in 2009. He moved in with her in January of 2010.
- He stated that she is constantly getting dizzy and is always sweating.

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- He felt that she had good days and bad days.
- On good days she could get up and go to the store.
- He stated that she does not go out and socialize, but she went on a camping trip on the 4<sup>th</sup> of July and was miserable. She stayed in the camper in bed and laid down; then she sat in a chair.
- He stated that she rarely gets on the computer anymore. He tried to help her with the computer and she lost interest in the Website in approximately one (1) month.
- He stated that Ms. Duto would go into her garden on good days but then she would sit in a lawn chair most of the time.

Upon cross-examination, Mr. Nisewonger stated that Ms. Duto can not stand for long periods of time. She could not stand longer than ten (10) minutes. He stated that she could never lift or carry anything of any weight. She could lift a pillow or a blanket. He stated that she could not stand or bend and he has never seen her squatting.

According to his testimony on July 14, 2011, she has not driven herself for a long time.

**B. ERS TESTIMONY AND EVIDENCE**

Counsel for the Employee Retirement System (ERS) presented four (4) witnesses. Three (3) witnesses were Investigators from the Maryland Claims and Investigation Company, a private investigative group, that had been retained to conduct surveillance of Ms. Duto. Surveillance was conducted at various times from Thursday, February 28, 2008 to Saturday, June 25, 2011.

Investigator Lloyd McElhenny testified that he began surveillance on February 28, 2008. He did not observe Ms. Duto on February 28, 2008, February 29, 2008 and March 6, 2008.

⇒ On March 15, 2008, McElhenny stated that Ms. Duto was observed from 1:17 P.M. until 6:15 P.M. The Investigator took video films of Ms. Duto during that time which

were shown to the Board. The video revealed that Ms. Duto spent some time working in the garden; squatting and plating bulbs, using a trowel and also a long handled shovel. She bent down to pick up her puppy and also went to the store with a male person. She accompanied a male, believed to be her husband, to Walmart, Sam's Club and another market called Aldi's.

⇒ On April 18, 2008, Ms. Duto was observed in her yard again squatting and working in the yard.

⇒ On September 24, 2009, Investigator Bill Dewan took additional video of Ms. Duto driving to the gas station, backing in and out of parking spaces twisting her head and stopping at various places such as a tanning salon, a pet pantry and liquor store. She was observed texting on her cell phone and was observed from approximately 10:00 A.M. until 2:00 P.M., driving, walking, bending and texting on her cell phone.

⇒ On October 7, 2009, Ms. Duto was observed driving her own vehicle from Reisterstown to the Department of Education Disability Services Office in Timonium, Maryland. She did not travel on the Baltimore Beltway. She was observed from 9:15 A.M. until 12:18 P.M., at that point the Investigator lost contact after she had entered a McDonald's drive-in restaurant and headed down York Road going through a construction area.

⇒ Ms. Duto and her fiancé were also observed on June 8, 2011 walking to Franklin Middle School from a parking lot, approximately eleven (11) minutes away from the school. They returned home after attending a graduation at Franklin Middle School.



⇒ Ms. Duto was observed on June 21, 2011, coming in and out of her residence smoking and taking a dog outside.

⇒ On June 24, 2011, Ms. Duto was observed in the yard with her fiancé from approximately 10:00 A.M. until 12:39 P.M., opening up a camper. It appeared that she was airing it out. During that period she was squatting next to her fiancé who was putting a support pole in the camper. She went in and out of the camper, bending, squatting and leaning in and out of the camper.

All of the above incidents were recorded on video tape and viewed by the Board.

In addition, the ERS presented Dr. Peter Oroszlan, who conducted an Independent Medical Evaluation of Ms. Duto on October 12, 2010. Dr. Oroszlan took a medical history from Ms. Duto and reviewed the records of Dr. Ruth, Dr. David Zee, Dr. Mike Lyons and Dr. Harold Bob. Dr. Oroszlan prepared a report which he submitted to the Board. In his report, he stated that Ms. Duto complains of sensations in her chest, right wrist pain, aching pain in the right hip and the left hip, needle sensation in her right foot, her right knee was swollen two (2) months ago and pops in and out; she also complains of lower back pain, dizziness, headaches and allergies.

Dr. Oroszlan stated as follows:

"From the medical point of view there is no specific medical contra-indication for her to perform all the duties of a bus driver without restrictions. Her history of rarely recurring and short lived benign positional vertigo in one particular recumbent position does not prevent her from performing the duties of a bus driver consistently, safely, and without undue hazard to self, others, and property."

He went on to state:

"Whether at this stage, and after what has transpired over the past three and a half years, she should be entrusted with driving a school bus is another separate issue and not connected to her claimed health related problems and complaints, physical or emotional."

It must be noted that in his report Dr. Oroszlan indicated that in April and May of 2008, Ms. Duto was under surveillance over several days and she was observed to have normal activities; including gardening, bending down, reading and cutting a hedge, etc.

### DECISION

The Appellant, Ms. Duto, bears the burden of proof to show that the decision of the Medical Board of the Employee Retirement System was incorrect. In support of her position she has submitted many medical reports, including those from Dr. Lyons, Dr. Zee and Dr. Bob, as well as, Dr. Ruth. All of these reports are based upon the subjective statements made by Ms. Duto to the physicians. These reports were submitted to Social Security in support of her claim for disability under the Social Security Act.

Dr. Bob's report states that Ms. Duto can not ever bend, squat, climb or reach.

Dr. Lyon's report states that she can no longer drive a car and that the last time she drove was October 11, 2007. Dr. Lyons's report was dated February 20, 2008.

Ms. Duto testified before the Board that she suffered from extreme dizziness and nausea, particularly when she was riding in a vehicle. She stated that she planted the garden, but she was not able to do yard work. She also stated that she had knee problems and does not squat; that her balance is so bad, that she had to grab a wall.

Her fiancé testified before the Board on July 14, 2011, that Ms. Duto can not stand longer than ten (10) minutes. He also stated that bending over makes her dizzy and he has never seen her squat. He stated that she has not driven herself for a long time.

These statements were all contradicted by the video surveillance films which were taken by private investigators. The video showed Ms. Duto on seven (7) different days over a three (3) year period squatting, bending, driving herself and walking, all activities which she claimed she could not do. The three (3) most recent days were in January 2011.

Ms. Duto tried to explain away the videos stating that she has good days and bad days. The fact that she has stated to her doctors and to this Board that she could not do certain things and would never be able to do them, is contradicted by the surveillance tapes.

Section 5-1-221 of the *Baltimore County Code* (BCC) requires that an employee applying for ordinary disability retirement will qualify if the Medical Board, "after a medical examination of such member, shall certify that such member is mentally or physically incapacitated for the further performance of duty, that such incapacity is likely to be permanent, \*\*\*".

It should be noted that this law states "incapacitated for the further performance of duty", not further performance of previous duty.

The Board agrees with Dr. Oroszlan that Ms. Duto should probably not be a school bus driver for the school system. However, the Board does feel that she is probably able to perform one of the jobs, such as Building Service Worker, Cafeteria Worker, Grounds Worker, Bus Attendant, or Automotive Service Worker, set forth in the letter of September 14, 2007 to her by Mary E. Roney, Personnel Analyst, Baltimore County Public Schools; since these jobs were offered to her at that time.

The Board believes that the facts in this case support the December 16, 2010 decision of the Medical Board not to certify that Ms. Duto is mentally or physically incapacitated for the further performance of duty and that her condition does not result in permanent physical disability. The Board will deny Applicant's request for Ordinary Disability Retirement benefits.

**ORDER**

**THEREFORE, IT IS THIS** 17<sup>th</sup> day of August, 2011 by the Board of Appeals of Baltimore County

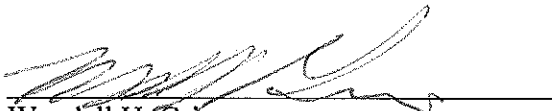
**ORDERED** that the decision of the Board of Trustees of the Employees' Retirement System of Baltimore County dated December 16, 2010, denying the application of Donna Duto for ordinary disability retirement benefits, is hereby **AFFIRMED**; and it is further


**ORDERED** that the application of Donna Duto for ordinary disability retirement benefits be and is hereby **DENIED**.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.

**BOARD OF APPEALS  
OF BALTIMORE COUNTY**

  
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Lawrence S. Wescott, Chairman

  
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Wendell H. Grier

  
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Andrew M. Belt