



# State of New Jersey

DEPARTMENT OF THE TREASURY  
DIVISION OF PENSIONS AND BENEFITS  
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September 2, 2022

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Sent via email to: [REDACTED]

GAYLORD POPP, L.L.C.  
Samuel M. Gaylord, Esq.

[REDACTED]

RE: Sharon Giles  
TPAF # [REDACTED]  
OAL DKT. NO. TYP 16562-2015

Dear Mr. Gaylord:

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Giles worked as a public schoolteacher in East Orange where she taught economics and entrepreneurship classes to third, fourth, and fifth grade students. Giles v. Bd. of Trs., Teachers' Pension & Annuity Fund, No. A-0640-20 (App. Div. May 19, 2022) (slip op. at 2). On October 27, 2014, [REDACTED]. Ibid. On February 4, 2015, Giles applied for ordinary disability retirement benefits (OD). Ibid. Giles's last day worked was October 27, 2014. Ibid.

On June 5, 2015, Arnold T. Berman, M.D., the testifying medical expert for the Board of Trustees (Board) of the Teachers' Pension and Annuity Fund (TPAF), examined Giles. (2T20:4; J-7). Dr. Berman opined Giles was not totally and permanently disabled from the performance of her regular or assigned job duties as a teacher. (2T19:5-11; 2T30:5-11; J-7; J-8). On July 1, 2015, Giles resigned her teaching position. Giles, slip op. at 2. Giles never requested an accommodation prior to her resignation. (1T91:18-93:14).

On August 6, 2015, the Board considered and denied Giles's application for OD because it found she was not totally and permanently disabled from the performance of her regular or

assigned job duties as a teacher. Giles, slip op. at 2-3. Giles appealed the denial of her application for OD, and the matter was transferred to the Office of Administrative Law (OAL) as a contested case on October 7, 2015. Giles, slip op. at 3. While the matter was pending in the OAL, Giles's testifying medical expert, David Weiss, D.O., eventually examined her on June 25, 2018, nearly three full years after she resigned. (P-2).

After a hearing with testimony from Giles, Dr. Weiss, and Dr. Berman, the administrative law judge issued her initial decision (ID) on July 3, 2020. Giles, slip op. at 3. The ALJ recommended Giles receive OD. Ibid. "[T]he ALJ held [REDACTED] which has left her totally and permanently disabled from working as a teacher or in any other capacity." Giles, slip op. at 6.

On September 3, 2020, the Board considered the ID, the Exceptions filed the Attorney General's office, and the hearing exhibits. (Bd.'s Oct. 2020 FAD at 1). After careful consideration, "the Board modified the ALJ's finding of fact related to Giles's job duties and rejected the ALJ's determination Giles was permanently and totally disabled from employment as a schoolteacher." Ibid. Accordingly, the Board directed the Secretary to draft Findings of Fact and Conclusions of Law consistent with its determination, which the Board voted to adopt on October 1, 2020. Ibid.

Giles appealed the Board's October 6, 2020 final administrative determination to the Superior Court of New Jersey, Appellate Division. Giles, slip op. at 7. On May 19, 2022, the court remanded the matter to the Board "for specific findings of facts and conclusions of law concerning Giles's ability to perform duties in the 'general area of [her] ordinary employment . . .'" Giles, slip op. at 2 (alterations in original) (quoting Skulski v. Nolan, 68 N.J. 179, 206 (1975)).

On June 2, 2022, the Board considered the court's decision and directed the Secretary to draft revised Findings of Fact and Conclusions of Law consistent with the court's opinion. At its meeting of September 1, 2022, the Board voted to adopt the revised findings of fact and

conclusions of law as presented. This will constitute the final administrative determination of the Board in the matter.

**FINDINGS OF FACT**

Dr. Berman testified neither an [REDACTED] nor an [REDACTED] “have any clinical relevance” “unless you examine the patient” because a “huge percentage of the population” has [REDACTED] [REDACTED].” (2T28:1-6). “[REDACTED] and [REDACTED] are accurate [REDACTED] . . . . Whether or not they’re relevant to that particular patient is determined by a [REDACTED] and that is the way the distinction is made.” (2T31:7-12). [REDACTED] must “be tested against the [REDACTED] because . . . these [REDACTED] occur in . . . [REDACTED] (2T25:1822). In other words, despite being [REDACTED], [REDACTED] [REDACTED]. (2T25:23-26:2). Therefore, the way to determine if the [REDACTED] and the [REDACTED] have any clinical relevance is to conduct a [REDACTED] of the patient “to determine whether, based on [REDACTED] there is any evidence of [REDACTED].” (2T26:3-9). Thus, “[REDACTED] are important, [REDACTED] are important, however, they have to be applied to a single patient and can’t be discussed in general.” (2T31:18-20).

Dr. Berman placed little importance on Giles’s [REDACTED] because the [REDACTED] “is almost always positive, close to 100 positive whenever there is [REDACTED] . . . on the [REDACTED]” (2T25:11-26:9). “However, the bottom line is that if they don’t have [REDACTED] based on the [REDACTED] [REDACTED] then they don’t have [REDACTED] and therefore they’re not disabled.” (2T18:25-19:4). Therefore, to verify a patient’s [REDACTED] and determine whether there is any basis to conclude there is a disability, Dr. Berman performs a [REDACTED] that consists of [REDACTED]; “[REDACTED],

[REDACTED] and they're the main aspects, including, of course, the [REDACTED]  
[REDACTED].” (2T10:15-11:8).

Dr. Berman’s examination consisted primarily of evaluation of Giles’s [REDACTED]  
[REDACTED]. (2T9:20-24). Dr. Berman noted Giles was not receiving any [REDACTED] when he  
[REDACTED] in June 2015 prior to her retirement. (2T8:21-24). Dr. Berman observed  
“ [REDACTED] (2T18:1), but he “did not detect any evidence that there  
was [REDACTED],” (2T18:5-7). Giles “ [REDACTED]  
[REDACTED]”. Ibid. Giles’s [REDACTED]”.  
(2T11:9-15). The remainder of Giles’s [REDACTED]  
[REDACTED].” (2T13:17-18).

Giles’s “ [REDACTED]”  
(2T11:15-18). Giles’s “ [REDACTED] (2T11:19). Giles’s [REDACTED]  
[REDACTED] (2T11:20-22). “ [REDACTED]  
[REDACTED]  
[REDACTED].” (2T11:22-24). [REDACTED]  
[REDACTED]. (2T11:1-3).

Dr. Berman explained almost everyone who has [REDACTED]  
[REDACTED]  
[REDACTED]. (1T12:5-14). Rather, the purpose is to determine [REDACTED]  
[REDACTED] Ibid. Dr. Berman “ [REDACTED]  
[REDACTED]  
[REDACTED]” (1T12:2-25).

When Dr. Berman [REDACTED] prior to her retirement, he found “ [REDACTED]  
[REDACTED].” (2T18:18-20). Dr. Berman testified  
[REDACTED]

It's not disabling. If there is [REDACTED], it could be disabling and that's the reason for the distinction and that's the reason for my conclusions." (2T87:13-18).

Dr. Berman testified a patient with "[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]." (2T13:7-16). [REDACTED]. (2T35:21-36:2).

Dr. Berman opined Giles was not totally and permanently disabled from the performance of her regular or assigned job duties as a teacher. (2T19:5-11; 2T30:5-11; J-7; J-8). Dr. Berman reviewed the job description and testified Giles could perform "all" her job duties. (2T29:1-15). Dr. Berman opined Giles [REDACTED]  
[REDACTED]. (2T29:16-24). According to Dr. Berman, "[REDACTED]" (2T30:3-4). Dr. Berman testified Giles could work as a teacher and participate in all activities of daily life. (2T30:5-11).

Dr. Weiss agreed the "basic problem" with Giles was "[REDACTED]" (1T39:11-12). Dr. Weiss testified Giles [REDACTED] (1T48:4-5; 1T52:8-10). Dr. Weiss testified [REDACTED]." (1T54:13-14). Dr. Weiss agreed [REDACTED]." (1T46:6-7).

During the [REDACTED], Dr. Weiss found Giles had "[REDACTED]" (1T71:4-5). While Dr. Weiss diagnosed Giles with [REDACTED] [REDACTED] he conceded he could not know if Giles had [REDACTED]. (1T72:5-12; P-2). Dr. Weiss testified Giles's "[REDACTED]" and "[REDACTED]"

██████████ (1T49:9-19). Dr. Weiss did not find any evidence of ██████████  
██████████. (1T74:6)

Dr. Weiss opined Giles was totally and permanently disabled from working as a teacher because “[s]he ██████████ five times a day, ██████████  
██████████ five to six hours per day while teaching five days a week, ██████████  
██████████ over five periods 20 students per class.” (1T60:3-8). Dr. Weiss agreed his diagnosis was based the ██████████  
██████████ as well as reviewing the ██████████ from January and April 2015 and the ██████████ from April 2016. (1T69:4-8). Dr. Weiss admitted he could only speak to when he saw Giles, which was not until June 2018, and his ██████████ (1T72:18-21).

**CONCLUSIONS OF LAW**

The Board finds Giles is not totally and permanently disabled from the performance of her regular or assigned job duties as a teacher, is not totally and permanently disabled from the performance of duties in the general area of her ordinary employment, and is not totally and permanently disabled from the performance of her regular or assigned job duties as a teacher even with reasonable accommodation. “The applicant for ordinary disability retirement benefits has the burden to prove that he or she has a disabling condition and must produce expert evidence to sustain this burden.” Bueno v. Bd. of Trs., Teachers’ Pension & Annuity Fund, 404 N.J. Super. 119, 126 (App. Div. 2008) (citing Patterson v. Bd. of Trs., State Police Ret. Sys., 194 N.J. 29, 50-51 (2008)). The applicant must also “establish incapacity to perform duties in the general area of his ordinary employment” rather than just showing inability to perform the specific job for which they were hired. Id. at 130 (quoting Skulski v. Nolan, 68 N.J. 179, 205 (1975)). The applicant for OD must also prove “[s]he was disabled and could not function in h[er] position even with reasonable accommodation.” Ensslin v. Bd. of Trs., Police & Firemen’s Ret. Sys., 311 N.J. Super. 333, 336 (App. Div. 1998). Thus, the applicant must meet “an extraordinarily high

threshold that culls out all minor injuries; all major injuries that have fully resolved; all partial or temporary disabilities; and all cases in which a member can continue to work in some other capacity. Patterson, 194 N.J. at 43 (quoting Richardson v. Bd. of Trs., Police & Firemen's Ret. Sys., 192 N.J. 189, 195 (2007)).

First, the Board rejects the ALJ's finding Giles is totally and permanently disabled from the performance of her regular or assigned job duties as a teacher. The Board finds the ALJ incorrectly weighed the opinion of Dr. Weiss over Dr. Berman. (ID at 13). The Board rejects the ALJ's finding Dr. Weiss presented more reliable testimony than Dr. Berman because the ALJ erred in minimizing the absence of a clinical correlation between Giles's [REDACTED]. Dr. Berman reliably found Giles's [REDACTED].

For example, the ID states "[Dr.] Berman administered several [REDACTED], which he did not identify," but then goes on to name every [REDACTED] Dr. Berman performed, which Dr. Berman clearly stated on the record. (ID at 9; 2T11:1-24). The Board therefore rejects the ALJ's finding Dr. Berman did not identify the [REDACTED] on which he based his opinion. Dr. Berman conducted a relatively unremarkable [REDACTED] (ID at 9). Dr. Berman found no [REDACTED]. Ibid. The [REDACTED] and [REDACTED] were not [REDACTED]. (ID at 10). Put simply, while Giles has a [REDACTED], Dr. Berman found [REDACTED].

Overall, Dr. Berman only found evidence of [REDACTED]. (ID at [REDACTED]).

10). When comparing Giles's condition with her job description, Dr. Berman reliably opined she is able to fully perform the duties of her employment and the objective evidence supports this opinion. Ibid. By contrast, Dr. Weiss's ultimate opinion that Giles is totally and permanently disabled is unsupported by [REDACTED] in the record. Dr. Weiss utilized the [REDACTED], an admittedly [REDACTED] based on Giles's [REDACTED], and the [REDACTED]. (ID at 7). Further, Dr. Weiss's use of the American Medical Association guidelines in rendering his opinion on disability is improper as New Jersey has not adopted these guidelines and therefore his opinion is entirely unhelpful in determining whether Giles is totally and permanently disabled for purposes of OD. (ID at 7-8).

It was also improper for the ALJ to credit Dr. Weiss's testimony over Dr. Berman's because [REDACTED] took place almost three full years after Giles resigned. See, e.g., Fineberg v. Bd. of Trs., Teachers' Pension & Annuity Fund, No. A-5224-17T2, 2019 N.J. Super. Unpub. LEXIS 2010, at \*4 (App. Div. Oct. 1, 2019) (agreeing the Board's expert was "entitled to greater weight than that of Dr. Weiss because [the Board's expert] examined [Fineberg] closer to the date of her departure"). Dr. Weiss's diagnosis was based on: (1) [REDACTED] [REDACTED] (1T69:4-8; 1T72:18-21). However, only the [REDACTED] predate Giles's resignation and, by Dr. Weiss's own admission, he does not know for certain whether Giles had [REDACTED] at the time she resigned. And, again, without a [REDACTED], the [REDACTED] hold no independent value.

Moreover, assuming arguendo Giles was experiencing [REDACTED] when Dr. Weiss [REDACTED], it still does not follow that Giles is entitled to OD. "[T]he plain text of the [TPAF disability] statutes do[] not explicitly say that a disability retirement applicant must have left public service due to a disability." In re Adoption of N.J.A.C. 17:1-6.4, 17:1-7.5 & 17:1-7.10, 454 N.J. Super. 386, 399 (App. Div. 2018). However, "[i]t is obvious . . . there is no



such explicit text in the enabling statutes because it is common sense that disability retirees leave their jobs due to a purported disability. After all, the employee seeks disability retirement benefits.” Ibid. See also Rooth v. Bd. of Tr., Pub. Emps.’ Ret. Sys., 472 N.J. Super. 357, 365-66 (App. Div. 2022) (noting an OD applicant must prove she retired due to a total and permanent disability that was present at the time the member left employment).

Here, Dr. Berman opined Giles was not totally and permanently disabled from the performance of her regular or assigned job duties as a teacher when she resigned effective July 1, 2015, based on his [REDACTED]. Only Dr. Berman had firsthand knowledge of [REDACTED] contemporaneous with her resignation. Dr. Weiss opined Giles was totally and permanently disabled from the performance of her regular or assigned job duties as a teacher, but he admitted his opinion was largely based on [REDACTED] [REDACTED] that took place three years after she resigned. Therefore, even assuming arguendo Giles was [REDACTED] when Dr. Weiss examined her, Giles cannot show [REDACTED] when she resigned three years prior. Therefore, Giles cannot show she is entitled to OD because Giles’s [REDACTED] does not prove she was disabled when she resigned.

Second, the Board finds Giles is not totally and permanently disabled from the performance of duties in the general area of her ordinary employment. The ALJ found:

teaching is a demanding position; it requires not only intellect, but physical stamina, to keep up with active young children. As [Giles] testified, it requires one to immediately be able to engage in fire and active-shooter drills. As an elementary teacher, one is constantly bending, stooping, walking, and moving. It is not a job for one who is not physically fit.

[ID at 13.]

The ALJ conflated how Giles subjectively and specifically taught with the general requirements of being a teacher. Under Skulski and Bueno, the proper standard looks to her general employment as a teacher, not to specific self-reported tasks. Based on the job description, there is no reason

someone in Giles's condition could not perform the general functions of a teacher, which involves planning lessons and verbally communicating with students. (J-4). The Board rejects the invitation to find [REDACTED] [REDACTED] totally and permanently disabled from working as an elementary school teacher.

Finally, the Board finds Giles is not totally and permanently disabled from the performance of her regular or assigned job duties as a teacher even with reasonable accommodation. This is true even though she might struggle with specific aspects of her actual job, such as [REDACTED] [REDACTED]. These specific problems might have been resolved with a simple accommodation by her employer, but Giles never requested an accommodation. See Grieco-Hicks v. Bd. of Trs., Teachers' Pension & Annuity Fund, 2017 N.J. Super. Unpub. LEXIS 1159, at \*12 (App. Div. May 11, 2017) (affirming denial of AD, where "[t]here was no evidence that even if [an art teacher] used a wheelchair, she would be unable to move about a classroom to guide and teach art students, particularly if reasonable accommodations to classroom layout were made"). The majority of the specific duties Giles stated she could not perform such as [REDACTED] were not in her official job description, but particular to her specific teaching assignment.

Moreover, Dr. Berman opined Giles could [REDACTED] [REDACTED]. Therefore, the only evidence Giles may even have needed an accommodation is her [REDACTED] [REDACTED]. Thus, Giles cannot show she is totally and permanently disabled from the performance of her regular or assigned job duties as a teacher even with reasonable accommodation. DeFeo v. Bd. of Trs., Pub. Emps.' Ret. Sys., 2018 N.J. Super. Unpub. LEXIS 537, at \*7 (App. Div. Mar. 9, 2018) (inability to "perform all of the duties required of [a] job . . . does not amount to the inability to perform [the] job").

Samuel M. Gaylord, Esq.  
Re: Sharon Giles  
September 2, 2022  
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For these reasons, the Board's final agency decision rejected the ALJ's finding of permanent and total disability and denied OD.

You have the right if you wish to appeal this final administrative action to the Superior Court of New Jersey, Appellate Division, within 45 days from the date of this letter in accordance with the Rules Governing the Courts of the State of New Jersey. All appeals should be directed to:

Superior Court of New Jersey  
Appellate Division  
Attn: Court Clerk  
PO Box 006  
Trenton, NJ 08625

Sincerely,

A handwritten signature in blue ink, appearing to read "Saretta Dudley", enclosed in a rectangular box.

Saretta Dudley, Secretary  
Board of Trustees  
Teachers' Pension and Annuity Fund