



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PENSIONS AND BENEFITS
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April 22, 2021

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State Treasurer

JOHN D. MEGARIOTIS
Acting Director

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

Sent via email to: [REDACTED]

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

RE: Stephen Pace
PERS [REDACTED]
OAL DKT. NOS. TYP 11485-19

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Dear Mr. Gaylord:

At its meeting on March 17, 2021,¹ the Board of Trustees (Board) of the Public Employees' Retirement System (PERS) considered the Initial Decision (ID) of Administrative Law Judge (ALJ) Kathleen M. Calemme, dated February 8, 2021; all exhibits, and Exceptions filed by Deputy Attorney General (DAG) Dominic J. Leone, dated February 19, 2021. After careful consideration, the Board rejected the ALJ's decision reversing the Board's denial of Accidental Disability retirement benefits. The Board directed the Secretary to draft findings of fact and conclusions of law consistent with its determination, which were presented and approved by the Board at its meeting of April 21, 2021.²

The Board adds the following factual findings to those in the ALJ's ID.

¹ Due to health and safety concerns for the public regarding COVID-19, the meeting was conducted via teleconference.

² The Board requested and was granted an extension of time to issue its final administrative determination.

The Board noted that in Mr. Pace's AD application, he [REDACTED] [REDACTED] as the basis for his disability. After [REDACTED], Mr. Pace reported [REDACTED] [REDACTED] P-7. Dr. Andrew Glass ("Dr. Glass"), Mr. Pace's treating physician [REDACTED] [REDACTED], asked Mr. Pace [REDACTED]; Mr. Pace responded [REDACTED]. 1T85:6-8; 1T92:17-19.1. Dr. David Weiss ("Dr. Weiss"), Mr. Pace's medical expert, opined that [REDACTED] [REDACTED] more clarity. 1T71:14-24.³ Dr. Weiss opined that Mr. Pace has [REDACTED] [REDACTED]. 1T16:6-21; 1T40:1-2; P-2. Dr. Weiss also opined that [REDACTED]. Rather, Dr. Weiss asserted that what was relevant was the fact that Mr. Pace received [REDACTED] [REDACTED]. 1T40:9-20. Thus, Dr. Weiss found that Mr. Pace could no longer perform his job following [REDACTED] and [REDACTED] 1T15:19-25; 1T28:3-25; 1T41:6-25; 1T42:1-18; 1T67:20-25; 1T68:1-2. Dr. Weiss found that the [REDACTED] limits Mr. Pace's ability to perform his job duties, specifically [REDACTED]. 1T41:7-24.

Dr. Arnold Berman ("Dr. Berman"), the Board's medical expert, explained that it is not possible, medically, [REDACTED] [REDACTED]. 2T10:4-9; 2T22:1-3. Dr. Berman also referred to [REDACTED]. 2T19:17-24. Dr. Berman found that Mr. Pace is disabled as a result of [REDACTED], that was certainly present for many years and is objectively seen in [REDACTED] [REDACTED]

³ "1T" refers to the July 14, 2020 hearing transcript; "2T" refers to the August 25, 2020 hearing transcript.

elective in nature,

2T13:13-25; 2T12:20-22; 2T14:1-16; 2T31:12-16; 2T33:8-12.

The Board, therefore, modifies the ALJ's factual findings in the ID to include the above facts.

CONCLUSIONS OF LAW

A member of PERS is eligible for AD retirement benefits provided that he or she can establish:

1. that he is permanently and totally disabled;
2. as a direct result of a traumatic event that is a. identifiable as to time and place, b. undesigned and unexpected, and c. caused by a circumstance external to the member (not the result of preexisting disease that is aggravated or accelerated by the work);
3. that the traumatic event occurred during and as a result of the member's regular or assigned duties;
4. that the disability was not the result of the member's willful negligence; and
5. that the member is mentally or physically incapacitated from performing his usual or any other duty.

[Richardson v. Board of Trustees, Police & Firemen's Retirement System, 192 N.J. 189 , 212-13 (2007).]

Of specific importance in this case is the issue of direct result, which was addressed by our Supreme Court in Gerba v. Board of Trustees, Public Employees' Retirement System, 83 N.J. 174 (1980), and Korelnia v. Board of Trustees, Public Employees' Retirement System, 83 N.J. 163 (1980). The Supreme Court noted the legislative purpose in amending the previous pension statutes and introducing the "direct result" requirement was to apply a more exacting standard of medical causation than that used in the workers' compensation law, and to reject, for purposes of awarding AD, the workers' compensation concept that an "accident" can be found in the impact of ordinary work effort upon a progressive disease. Gerba, 83 N.J. at 185-86. The Court stated that:

Where there exists an underlying condition such as osteoarthritis which itself has not been directly caused, but is only aggravated or ignited, by the trauma, then the resulting disability is, in statutory parlance, “ordinary” rather than “accidental” and gives rise to “ordinary” pension benefits.
[Id. at 186.]

The Court concluded that what is now required is a “traumatic event” that constitutes the essential significant or substantial contributing cause of the applicant’s disability. *Ibid.* The Supreme Court’s decision in Richardson reaffirmed both the Gerba and Korelnia decisions. In Richardson, the Court reemphasized that pre-existing conditions that result, or combine to cause, a disability are intended to be excluded from eligibility for AD. *Id.* at 211.

The question of whether a claimant’s disability is the “direct result” of a traumatic event is one necessarily within the ambit of expert medical opinion. Korelnia, 83 N.J. at 171. “[T]he word ‘direct’ connotes relative freedom from remoteness, whether in terms of time, intervention of other attributive causes or the like, or a combination of such factors.” Hillman v. Bd. of Trs., Pub. Emps.’ Ret. Sys., 109 N.J. Super. 449, 461 (App. Div. 1970)(quoting Titman v. Bd. of Trs., Teachers’ Pension & Annuity Fund, 107 N.J. Super. 244, 247 (App. Div. 1969)). The burden of proving “direct result” by competent medical testimony rests solely upon the pension claimant. Gerba, 83 N.J. at 185; Atkinson v. Parsekian, 37 N.J. 43, 149 (1962).

The Board notes that the “direct result” standard is not a “but for” standard, and the fact that a disability occurs after an incident does not mean that the disability has directly resulted from that incident under the statute. The direct-result standard outlined in the AD statutes is “far more exacting than [tort law’s] ‘proximate cause’ standard and, as explained in Gerba, was purposely made to be so by the Legislature.” In re Cordero, No. A-2803-10, at *6 (App. Div. June 19, 2012); see also Torres v. Bd. of Trs., Police & Firemen’s Ret. Sys., No. A-2388-15T3, 2018 N.J. Super. Unpubl. WL3672721, at *6 (App. Div. Aug. 3, 2018) (“The fact that total disability followed the

muscle strain chronologically does not necessarily mean that it was ‘as a result’ thereof. To hold otherwise would be to adopt the false logic of ‘Post hoc, ergo propter hoc.’”)

The ALJ relied on the testimony of Dr. Weiss, a hearsay document, and Dr. Berman’s diminishment of the severity of [REDACTED] despite his impressive knowledge and credentials in determining that [REDACTED] substantially caused Mr. Pace’s disability. ID at 11-12. The Board finds this reliance was misplaced. Dr. Weiss’s testimony did not meet Mr. Pace’s burden of showing how his disability was substantially [REDACTED]. The ALJ focused on the fact that prior to [REDACTED] Mr. Pace was [REDACTED] and, thus, concluded [REDACTED], Mr. Pace would not have been disabled. ID at 4, 12. Direct result, however, is a far more exacting standard. The fact that a disability came after [REDACTED] does not mean that the disability is the direct result of [REDACTED]. In fact, when asked if Mr. Pace would have needed [REDACTED], Dr. Weiss answered no and said “you don’t know.” 1T40:5-9. Furthermore, the Board notes that Dr. Berman referenced a previous [REDACTED] and both experts agreed that Mr. Pace had [REDACTED] to cause his disability. 2T13:13-18; 2T13:6-12; 2T19:17-24; P-2; 1T41:6-25.

In support of the finding that [REDACTED] directly resulted in Mr. Pace’s disability, the ALJ relied on an ambiguous [REDACTED], which was created by a physician who was not called during the hearing and, thus, was not subject to direct or cross-examination and is therefore hearsay. ID at 11. The ALJ cited a portion of [REDACTED] and bolded the wording expressing that [REDACTED] were “most likely recent.” Ibid. The Board reject this finding because, *inter alia*, the document does not define if recent means within the last week, month, year, etc. Ibid.; P-3. This information would be imperative since the 2017 incident took place nearly a year prior to [REDACTED]. Instead, Dr. Berman, a medical expert who was subject to direct and cross-examination (and better credentialed as a

Board-certified [REDACTED] than Dr. Weiss, who is only Board-certified in [REDACTED] [REDACTED]), reliably explained that the incident could not have caused [REDACTED] [REDACTED] 2T10:4-9; 2T22:1-3; P-1; R-4.

Finally, the Board found that the ALJ failed to explain how [REDACTED] directly resulted in Mr. Pace's disability. Instead, in the legal analysis and conclusions section, the ALJ concluded in two sentences that the disability was the direct result of [REDACTED] because "Dr. Weiss presented credible testimony" and, thus, Mr. Pace met his burden. ID at 14. The ALJ failed to explain how the law supports any facts she relied on in determining that [REDACTED] directly caused the disability. Ibid. Accordingly, the Board finds that Mr. Pace has failed to meet his burden of proof that his disability is a direct result of [REDACTED] because(1) he had [REDACTED] [REDACTED] (2) both experts agreed that Mr. Pace had [REDACTED] [REDACTED]; (3) the ALJ applied a "but for" standard, which Dr. Weiss disagreed with, that is not applicable and relied on a hearsay document created by a physician not subject to direct or cross examination, which should be given zero weight in rendering a decision; and (4) Dr. Berman, the better credentialed medical expert, should be given more weight because he reliably explained how the [REDACTED] [REDACTED]

For these reasons, the Board rejected the ALJ's legal conclusion that Mr. Pace's is eligible for AD retirement benefits. This correspondence shall constitute the Final Administrative Determination of the Board of Trustees of the Public Employees' Retirement System.

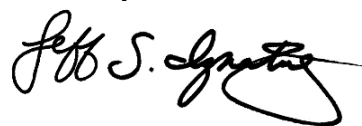
You have the right to appeal this final administrative action to the Superior Court of New Jersey, Appellate Division, within 45 days of the date of this letter in accordance with the Rules Governing the Courts of the State of New Jersey.

GAYLORD POPP, LLC
Samuel M. Gaylord, Esq.
Re: Stephen Pace
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All appeals should be directed to:

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

Sincerely,



Jeff S. Ignatowicz, Secretary
Board of Trustees
Public Employees' Retirement System

G-9/JSI

C: D. Lewis (ET); A. Ginsburg (ET); G. Sasileo (ET); K. Ozol (ET); L. Hart (ET); P. Sarti (ET)
OAL, Attn: Library (ET)
DAG Amy Chung (ET)
Stephen Pace (sent via email to: [REDACTED])