State of New Jersey

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Acting Director

June 22, 2023

Sent via email to: [redacted]

MAGGIANO, DIGIROLAMO & LIZZI, P.C.
Christopher T. DiGirolamo, Esq.
[redacted]

RE: Scott Young
PERS [redacted]
OAL DKT. NO. TYP 03259-18

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Dear Mr. DiGirolamo:

At its meeting of May 17, 20203, the Board of Trustees (Board) of the Public Employees' Retirement System (PERS) considered the Initial Decision (ID) of the Honorable Joann LaSala Candido, ALJ, dated March 1, 2023;[1] all exhibits; the exceptions filed by Deputy Attorney General (DAG) Yi Zhu, dated March 9, 2023; and your reply to exceptions, dated March 24, 2023, as well as your personal statements and those of DAG Zhu in regard to the appeal of your client, Scott Young. The Board noted the exceptions and reply to exceptions. Thereafter, the Board voted to reject the ALJ's decision recommending Accidental Disability retirement benefits ("AD"), thereby reaffirming its original denial. The Board directed the Secretary to draft Findings of Fact and Conclusions of Law consistent with its determination. Findings of Fact and Conclusions of Law were presented to and approved by the Board at its June 21, 2023, meeting.

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

FACTUAL FINDINGS

At its monthly meeting on August 16, 2017, the Board denied Mr. Young's application for AD retirement benefits. The Board found that Mr. Young was totally and permanently disabled from performing his regular and assigned duties, that the [redacted] incident ([redacted]) was identifiable as to time and place, that it occurred during and as a result of Mr. Young's assigned duties, and was not the result of his willful negligence. However, the Board found that the [redacted] incident was not undesigned and unexpected. Finally, the Board determined that Mr. Young's disability is not the result of [redacted], but is the result of [redacted] that was [redacted] by the work effort.

Briefly summarized, in the ID the ALJ found that Mr. Young was employed as a water treatment plant operator. In this position his job was to operate, adjust, regulate, and maintain plant machines and equipment to purify and clarify water for human consumption and industrial uses, along with other related duties. J-6.[2]

The ALJ found that on [redacted] Mr. Young was doing a route from wells and treatment plants at approximately forty to fifty locations throughout their system to test the chlorine residuals in the drinking water. 1T8:15-9:6.[3] The alleged incident occurred during Mr. Young's last stop of the day, the Carr water treatment plant. A sliding gate with a chain and padlock secured the facility. 1T10:11-12:12. The gate would normally stay open during business hours but would be closed after hours and on the weekends. Ibid. The gate was closed that day as it

[2] "J" refers to the Joint Stipulation and Exhibits J1-J10, "P" refers to Petitioner's Exhibits P1-P3, and "R" refers to Respondent's Exhibits R1-R11, which were all admitted into the record during the OAL hearing.

[3] "1T" refers to the hearing transcript dated May 6, 2021; "2T" refers to the hearing transcript dated August 23, 2022.

was a Saturday. Ibid. Over the years, he was able to slide open the gate without any issues, and did so over forty times. 1T15:8-16:18.

When Mr. Young arrived at the Carr Plan he pulled over in front of the gate and grabbed his test kit and booklet. 1T18:15-22:1. He approached the gate and removed the lock. 1T18:21-24; 1T21:13-22:2. Mr. Young attempted to slide the gate open but it did not move like it normally would. 1T18:25-19:4; 1T62:53-63:15. He then exerted more effort into sliding the gate and attempted to lift it in an attempt to move it when [redacted]. 1T19:1-6; 1T34:11-21; 1T63:16-64:13; 1T67:9-23. The gate did not recoil or slam down on him and there was nothing external that [redacted]. 1T64:14-21; 1T65:12-18. Further, he did not lose his footing while attempting to open the gate. Ibid.

Mr. Young testified that one of the guide wheels on the left side of the gate was damaged or defective because it was misaligned and the post of the gate bumped into the steel of that guide wheel instead of rolling underneath it. 1T25:6-19; 1T27:9-21. He did not notice or observe the damaged or defective guide wheel prior to his attempt to open the gate, nor did he see any warnings about the guide wheel at the gate. 1T30:73-31:1. He didn't take notice of the defective guide wheel until he was leaving the plant that day. 1T52:15-22.

The Board first rejects the ALJ's finding that the [redacted] incident was undesigned and unexpected. A PERS member seeking AD bears the burden of proving each of the five (5) prongs established in Richardson. Richardson v. Bd. of Trs., Police & Firemen's Ret. Sys., 192 N.J. 189 (2007) (stating "member must prove" each element); Bueno v. Bd. of Trs., Teachers' Pension & Annuity Fund, 404 N.J. Super. 119, 126 (App. Div. 2008), certif. denied, 199 N.J. 540 (2009).

Regarding the "undesigned and unexpected" prong, an employee who experiences an "event which falls within his job description and for which he has been trained will be unlikely to pass the 'undesigned and unexpected' test." Russo v. Bd. of Trs., Police & Firemen's Ret. Sys.,

206 N.J. 14, 33 (2011). In explaining what is meant by "undesigned and unexpected" the Court reaffirmed and quoted Russo:

> In ordinary parlance, an accident may be found either in an unintended external event or in an unanticipated consequence of an external event if that consequence is extraordinary or unusual in common experience....We are satisfied that disability or death in such circumstances is not accidental within the meaning of a pension statute when all that appears is that the employee was doing his usual work in the usual way.
>
> [Richardson, 192 N.J. at 201 (quoting Russo, 62 N.J. at 154).]

As Richardson pointed out, citing Russo, there are two basic types of "external events:" 1) "an unintended external event;" or 2) "an unanticipated consequence of an intended external event if that consequence is extraordinary or unusual in common experience." Richardson, 192 N.J. at 201. First, the happening of the event is "undesigned and unexpected," while second the consequence of the event is "undesigned and unexpected." In both cases, the external event must occur during and as a result of the performance of regular or assigned duties.

The Board rejected the ALJ's scant analysis of whether the [redacted] incident was undesigned and unexpected. Notwithstanding the minimal analysis, the ALJ still found that the [redacted] incident was undesigned and unexpected because Mr. Young "had no prior knowledge of the fence's faulty guide wheels and it was entirely unanticipated." ID at 16. The Board therefore finds the ALJ's reliance on Young's prior knowledge of the faulty gate was misguided and contradicts the sound holding and analysis of the Appellate Division in its prior decisions involving similar fact patterns.

The Board notes that the Appellate Division has examined the "undesigned and unexpected" prong in many cases with facts similar to those herein. Our courts have consistently held that an injury caused by [redacted] as part of performing intended and regular work duties does not qualify as an undesigned or unexpected event. For example, there was no "undesigned and unexpected" event a petitioner [redacted]

attempting to lift a defective tailgate by himself. Luisi v. Bd. of Trs., Pub. Emps.' Ret. Sys., Docket No. A-3491-17, 2019 WL 2575004 (App. Div. June 24, 2019). Luisi was a laborer for the City of Brigantine and he was directed by his supervisor to drive a dump truck to transport concrete mix to a stone recycling center. Id. at *1. At the recycling center, Luisi raised the truck's bed and the left set of claws broke off, which caused the left side of the truck's tailgate to fall off. Ibid. Recycling center employees refused to help Luisi lift the tailgate back onto the truck so he decided to do it himself. Ibid. Luisi tried to lift the tailgate several times, and, on the final attempt, he injured his back and shoulder. Ibid. The Court held that the definition of an "undesigned and unexpected" event necessarily excludes injuries caused by the actor's pure physical exertion. Id. at *3. Luisi was doing exactly what he intended to do by lifting the tailgate and was injured by a force within his own control. Ibid. Therefore, the court found that his injury was not caused by an undesigned or unexpected external circumstance. Ibid. This holding applies equally to the facts of this case.

In Gambatese v. Bd. of Trs., Pub. Emps.' Ret. Sys., Docket No. A–0879–16, 2018 WL 2207934 (App. Div. May 15, 2018), the Appellate Division affirmed the Board's denial of AD where a maintenance repairer for a county jail injured his arm while trying to open a 500 pound metal door that was malfunctioning. Ibid. Ordinarily, to open the door, a nearby officer located in a control room called the cage would unlock the door, a buzzing sound would occur, and the door would be released. Ibid. However, on this occasion, although Gambatese heard the buzzing sound indicating that the door was open, when he pulled the door handle with his right hand, the door did not open, and while continuously pulling the door, Gambatese tore his right rotator cuff. Ibid. The court found that because Gambatese realized that the door was not opening as it normally would as he pulled but he continued to pull at it, and the door did not slam into him or abruptly close on him, it simply did not open as he continued to apply force against it. Id. at *4.

As a result, Gambatese suffered "an unanticipated consequence of an intended external event" that was neither undesigned nor unexpected. Ibid. Because a rotator cuff injury from continuously pulling a heavy steel door cannot be classified as extraordinary or unusual, the event cannot be found as undesigned and unexpected. Id. at *5. Again, the Board finds the holding applies to the facts herein.

Similarly, in Carmichael v. Bd. of Trs., Pub. Emps.' Ret. Sys., A–2955–12, 2014 WL 1257090 (App. Div. Mar. 28, 2014), the Appellate Division affirmed the Board's decision denying AD to a correction officer who injured her shoulder while manually operating a cell door that was not working properly. The court found that Carmichael tore her rotator cuff while pushing up on the cell lever as it stopped moving. Id. at *3. The court found that there was no allegation that the mechanism recoiled or slammed down on her, but that it simply stopped moving as she continued to apply upward force against it. Ibid. Accordingly, the court found that Carmichael suffered "an unanticipated consequence of an intended external event." Ibid. Because her operation of the cell lever was not undesigned and unexpected, the court found that she had to prove that the unanticipated consequence of that normal intended work activity was "extraordinary or unusual in common experience." Ibid. The court found that a rotator cuff injury from pushing against a large lever can hardly be classified as extraordinary or unusual in common experience. Ibid.

The Board finds that, similar to all the above cases, Mr. Young did not experience an unintended external event as he was doing exactly what he intended – pushing the gate to try to open it as he did many times before. 1T15:8-16:18. There was no external event that caused his injury, as the gate did not recoil or slam down on him and there was nothing external [redacted] 1T64:14-21; 1T65:12-18. He did not slip while attempting to open the gate. Ibid.

To satisfy the undesigned and unexpected prong, Mr. Young must prove that the unanticipated consequence [redacted] of his normal intended work activity (opening the gate) was "extraordinary or unusual" in common experience. The Board rejected the ALJ finding that the [redacted] incident was undesigned and unexpected merely because Young had no prior knowledge or notice that the gate was defective. That is clearly not the legal standard applied under Richardson. As the Appellate Division found in cases similar to the instant matter, the mere fact that petitioners had no prior knowledge or notice about a malfunctioning tailgate, door or lever has no bearing on determining the "undesigned and unexpected" element of the incident and the Board so finds.

Identical to Luisi, Gambatese and Carmichael, sustaining a back injury from a pushing heavy or jammed gate can hardly be classified as "extraordinary or unusual" consequence in our common sense. Mr. Young's back injury was solely due to his own pure physical exertion (a force within his control). As such, the Board rejects the ALJ conclusion and finds that the [redacted] incident was not undesigned and unexpected.

Next, the Board rejects the ALJ's finding that greater weight should given to Mr. Young's medical expert, Jay Zaretsky, M.D. ("Dr. Zaretsky"), in accessing whether his disability was the direct result of the [redacted] incident. Pursuant to N.J.S.A. 43:15A-43, a member of PERS is eligible for AD only if the member is permanently and totally disabled "as a direct result of a traumatic event." Ibid. "Direct result" was addressed by the Supreme Court in Gerba v. Bd. of Trs., Pub. Emps.' Ret. Sys., 83 N.J. 174 (1980), and Korelnia v. Bd. of Trs., Pub. Emps.' Ret. Sys. 83 N.J. 163 (1980). The Supreme Court noted the legislative purpose of 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 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 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 re-emphasized that preexisting conditions that result in, or combine to cause, a disability are intended to be excluded from eligibility for AD. 192 N.J. 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. When there is competing and conflicting expert testimony, as in this case, the court should weigh each expert's testimony using such factors as whether the expert witness testified in his specialty and whether the expert's conclusions are based only on subjective, rather than objective, medical evidence. Angel v. Rand Express Lines, Inc., 66 N.J. Super. 77, 86 (App. Div. 1961). Once the court accepts a witness as an expert, "the credibility of the expert and the weight to be accorded his testimony rest in the domain of the trier of fact." Id. at 85-86. The testimony of an expert who makes "findings based on objective tests performed on [the] petitioner" is more compelling than, and should be credited over, the testimony of an expert who "relies on the "petitioner's 'subjective' complaints to arrive at his opinion.'" O'Neill v. Bd. of Trs., Pub. Emps.' Ret. Sys., 2016 N.J. Super. Unpub. LEXIS 44, at *6 (App. Div. January 11, 2016) (per curiam).

The ALJ found both Dr. Zaretsky and Board's expert witness, Andrew Hutter, M.D. ("Dr. Hutter") to be credible and competent, but found that Dr. Zaretsky presented a more persuasive opinion than that of Dr. Hutter. ID at 8.

However, the Board rejected this conclusion and finds that Dr. Hutter testified more reliably than Dr. Zaretsky as his conclusions were in line with Mr. Young's medical history, his [redacted]

[redacted] and the opinion of Mr. Young's [redacted] Roy Vingan, M.D. ("Dr. Vingan"), concerning causation.

The record is well-supported in showing that the [redacted] incident did not directly result in Mr. Young's disability. Dr. Hutter relied on the objective medical evidence – namely, [redacted] of Mr. Young's [redacted] shortly after the [redacted] incident. He noted that there were [redacted]. 2T75:19-77:20; J-7; J-8. Dr. Hutter explained that [redacted] are long standing processes that take years to develop. Ibid. After reviewing the [redacted], Dr. Hutter did not find any [redacted]. 2T76:11-23. He further explained that if a [redacted] from the [redacted] incident was present, it would have shown on the [redacted] as a [redacted] Ibid. None of that was evident in the objective testing.

Mr. Young's own [redacted], Dr. Vingan, found that his [redacted] resulted from the [redacted] In agreement with Dr. Vingan, Dr. Hutter believes that the [redacted] incident exacerbated Mr. Young's [redacted], which developed due to [redacted] also known as [redacted]), and that the exacerbation of the [redacted] was the primary reason that he needed [redacted] in [redacted] and the substantial cause of his disability. 2T80:24-81:9; 2T84:10-85:19. Dr. Hutter explained that the [redacted] or [redacted] is a common complication of [redacted] patients who develop [redacted] at the levels next to the previously [redacted] due to [redacted] [redacted]. Ibid. 2T82:12-83:1. He further explained, it is common that patients would [redacted] [redacted] years after the [redacted] due to such complication. 2T81:10-17. As such, Dr. Hutter found that Mr. Young's [redacted]

was the pathology, which developed over the years and existed long before the [redacted] incident. 2T86:6-87:9. The pathology was his [redacted] and his [redacted]. Ibid.

In contrast, the Board finds that Dr. Zaretsky's opinion concerning the causation of Mr. Young's disability is inconsistent with the opinion of Dr. Vingan and lacks support from the medical records. Dr. Zaretsky relied on the [redacted] of Mr. Young's [redacted] and noted that it made no reference for any issues at his [redacted]. 2T27:22-29:12; P-3. Dr. Zaretsky then concluded that because the [redacted] showed [redacted] at different levels from the ones Mr. Young previously [redacted], those [redacted] should be considered a new injury from the [redacted] incident. 2T35:22-36:5; J-7; J-8. The Board rejects this opinion. First, Dr. Zaretsky himself acknowledged that the [redacted] ordered by Mr. Young's treating doctor, Dr. Levin, was merely to check if his [redacted] t, not to spot any changes at other [redacted]. 2T48:6-50:13; R-7. Next, Dr. Zaretsky neglected to explain how [redacted], which are [redacted] that takes years to develop, could be caused by one single incident and be considered an acute or new injury.

In addition, Dr. Zaretsky failed to consider or address Dr. Vingan's opinion on causation (adjacent segment degeneration) as noted in his operative report before the hearing. P-2; R-9. When asked about the [redacted], Dr. Zaretsky agreed that it was well-known and documented in the literature that patients who had a prior [redacted] could develop [redacted] above or below the previously [redacted]. 2T53:2-54:21. Despite the opinion of Dr. Vingan, Dr. Zaretsky held

that Mr. Young does not have [redacted] before the [redacted] incident. 2T55:1-19.

Dr. Zaretsky's opines that the [redacted] incident was "the proximate cause" of Mr. Young's [redacted] and [redacted]. 2T41:25-43:15. He further asserts that, had it not been for the [redacted] incident, he most likely would not have needed the [redacted]. 2T43:20-44:17. However, the "but, for" or "proximate cause" standard is simply not consistent with the statute and case law, which require the more exacting direct result standard which requires that the traumatic event must constitute the "essential significant or substantial contributing cause" of the applicant's disability. Gerba, 83 N.J. at 186. That exacting standard has not been met here.

The Board rejects the ALJ's determination that Dr. Zaretsky's testimony was more persuasive because there was no analysis given to Mr. Young's medical history, the [redacted] and the opinion of the [redacted], Dr. Vingan. ID at 8. Rather, the ALJ only relied on the fact that Young had no issues with performing his job duties prior to the [redacted] incident. Ibid.

The Board finds that such reliance is misguided and has appropriately been rejected by the Appellate Division in Torres v. Board of Trustees, Police & Firemen's Retirement System, No. A-2388-15T3, 2018 WL3672721 (App. Div. Aug. 3, 2018). Torres was a senior corrections officer who was transferring two inmates from a prison to a youth correctional facility when one of the inmates began punching the other inmate. Id. at *2. With the support of the other corrections officers, Torres was able to bring the inmates under control, but immediately felt pain in his groin. Ibid. Upon being transported to the hospital, Torres complained of pain in his groin, neck and shoulder area. Id. at *3. The trial judge stressed the temporal sequence as the foundation of his conclusion – one day Torres was living an active life and working and the next the accident

occurred and seven months later Torres needed complex surgery. Id. at *16. The Appellate Division rejected this analysis and found that it was insufficient to satisfy the direct result standard because it held that "'[t]he fact that total disability followed the muscle strain chronologically does not necessarily mean that it was 'as a result' thereof.'" Id. at *16. The court reasoned that the Board found Torres's underlying degenerative spinal stenosis was "aggravated" or "ignited" by the incident, and was not caused by it; thus the incident at issue was not the substantial contributing cause of Torres's disability under Gerba. Id. at *19.

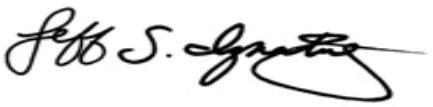
For the reasons stated above, the Board rejects the ALJ's finding that greater weight should be given to Mr. Young's expert witness. The Board finds that Dr. Hutter's testimony is more reliable than that of Dr. Zaretsky concerning the cause of Mr. Young's disability. As a result, the Board rejected the ALJ's conclusion that Mr. Young met his burden of proving that his disability was the direct result of the [redacted] incident.

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. 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. Ignatowitz, Secretary
Board of Trustees
Public Employees' Retirement System

G-11/SD

C: D. Lewis (ET); K. Ozol (ET); C. Law (ET); A. McCormick (ET)
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Scott Young (via regular mail)