



State of New Jersey

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

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

ELIZABETH MAHER MUOIO
State Treasurer

JOHN D. MEGARIOTIS
Acting Director

Sent via email to: [REDACTED]

ALTERMAN & ASSOCIATES, LLC
Timothy Prol, Esq.

[REDACTED]

RE: Lois Simpson
PERS [REDACTED]
OAL DKT. NO. TYP 14245-18

Dear Mr. Prol:

At its meeting on June 16, 2021,¹ the Board of Trustees (Board) of the Public Employees' Retirement System (PERS) considered the Initial Decision of Administrative Law Judge (ALJ) Ernest M. Bongiovanni (ALJ), dated May 13, 2021, the exceptions filed by DAG Conner Martin, dated May 26, 2021, and both your and DAG Martin's personal statements, with regard to your client, Ms. Simpson's appeal. After careful consideration, the Board rejected the ALJ's decision reversing the Board's denial of Accidental Disability retirement benefits. The Board directed the undersigned 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 July 21, 2021.²

The ALJ found that Ms. Simpson was eligible for accidental disability retirement benefits ("AD"), based on his conclusion that her disability is the direct result of the December 1, 2015,

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.

incident. ID at 13. After careful consideration, the Board voted to make additional findings of fact and to reject the ALJ's conclusion that Ms. Simpson is eligible for AD retirement benefits.

FINDINGS OF FACT

The Board first rejected the ALJ's finding that Dr. Becan's medical opinion was more reliable than Dr. Hutter's, because Dr. Hutter formed his opinion based on the objective medical evidence in the record, rather than Dr. Becan, who relied solely upon the subjective complaints of Ms. Simpson. Rather, the Board found that Dr. Hutter reliably testified that Ms. Simpson is disabled due to [REDACTED], rather than [REDACTED]. 2T22:14-18; R-2; R-3.

The Board found that the record before the ALJ establishes that Dr. Hutter properly relied upon objective medical findings in the [REDACTED] from 2013 (nearly three years before the 2015 incident) and 2016 noting [REDACTED]. R-5; R-7. Specifically, the 2013 [REDACTED] revealed [REDACTED] caused by [REDACTED] between [REDACTED]. R-7. The 2016 [REDACTED] noted [REDACTED], but no [REDACTED]. R-5; 2T15:15-16:6. The Board found that Dr. Hutter reliably testified that [REDACTED] [REDACTED]. 2T16:20-17:12. Thus, the Board finds that Simpson's disabling [REDACTED] was directly caused by the [REDACTED], not the 2015 incident.

Rather than considering the objective [REDACTED] findings, the ALJ gave the [REDACTED] "little or no weight" because they had been reviewed and compared to one another by Dr. Shamash, who did not testify. ID at 10. Although he did not testify, hearsay is admissible in the OAL, and the Board found the ALJ erred by not considering and affording proper weight the objective [REDACTED] findings.

The Board also found that the medical evidence in the record matches the [REDACTED] [REDACTED], as Ms. Simpson only complained of [REDACTED]. R-6. [REDACTED]

██████████ whereas a ██████████. 2T37:7-19; R- 2; R-3; R-6. Dr. Hutter credibly and reliably opined that, based on the objective medical records and his thorough evaluation, ██████████, Simpson was unlikely to need ██████████ after the 2015 incident. R-2. As Dr. Becan testified, ██████████ caused by the 2015 incident worsened ██████████. 1T75:14-25. Thus, the Board rejected the ALJ's finding that the 2015 incident was the substantial contributing cause of Simpson's disability because it merely exacerbated Simpson's ██████████. ID at 13.

Finally, the Board found that Dr. Giordano's operative reports fully support Dr. Hutter's conclusions, as Dr. Giordano initially planned a ██████████ but opted for a ██████████ ██████████ as "██████████ findings revealed . . . ██████████ and ██████████ at L3-4." P-9. Again, the Board found that the objective medical evidence in record establishes that the ██████████ was the significant or substantial contributing cause of Ms. Simpson's disability, not the 2015 incident.

CONCLUSIONS OF LAW

N.J.S.A. 43:15A-43 mandates that 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 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 Appellate Division applied the direct result standard in Petrucci v. Bd. of Trs., Pub. Emps. Ret. Sys., 211 N.J. Super. 280 (App. Div. 1986), holding that an asymptomatic preexisting condition can combine with a traumatic event to satisfy the “direct result” requirement, but only where the preexisting condition is stable and “might never cause any trouble.” Id. at 287. Direct result “means much more than disability resulting from the aggravation or acceleration of a pre-existing disease even though unusual or excessive work effort is involved.” Cattani v. Bd. of Trs., Police & Firemen’s Ret. Sys., 69 N.J. 578, 585 (1976). The Supreme Court’s decision in Richardson v. Bd. of Trs., Police and Firemen’s Ret. Sys., 192 N.J. 189 (2007), set forth a five-prong test that must be satisfied by an AD applicant:

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 pre-existing 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 their usual or any other duty.

[Id. at 212-13.]

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. Id. at 211.

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. 143, 149 (1962). To qualify for AD, an 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 v. Bd. of Trs., State Police Ret. Sys., 194 N.J. 29, 43 (2008) (quoting Richardson, 192 N.J. at 195).

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. The weight accorded to that expert opinion “is within the competence of the fact-finder.” LaBracio Family P’ship v. 1239 Roosevelt Ave., Inc., 340 N.J. Super. 155, 165 (App. Div. 2001).

In light of the legal analysis required as above, the Board rejected the ALJ’s finding that the 2015 incident directly resulted in Ms. Simpson’s disability. It remains undisputed that Ms. Simpson’s [REDACTED] started prior to the 2015 incident. R-5. The testimony of both Simpson and Dr. Becan, along with the medical records, confirm that after the 2012 incident she was [REDACTED]. 1T48:5-8; 1T89:16-21; 1T91:19-22; R-2; R-4; R-7. The ALJ did not afford sufficient weight to Ms. Simpson’s 2013 [REDACTED] after the 2012 incident. Ibid. Contrary to the ALJ’s finding, and inconsistent with his own analysis, Simpson’s [REDACTED] [REDACTED]. ID at 13. Therefore, the Board finds that the ALJ plainly misapplied Petrucci, because it is clear that Ms. Simpson had been [REDACTED], and that the incident exacerbated her [REDACTED]. In addition, the ALJ’s analysis under Gerba is also misplaced, as Ms. Simpson failed to shoulder her burden of proving that the 2015 incident directly resulted in her disability.

ALTERMAN & ASSOCIATES, LLC
Timothy Prol, Esq.
Re: Lois Simpson
July 22, 2021
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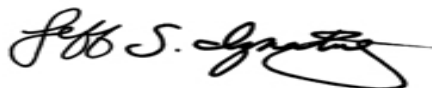
For these reasons, the Board rejected the ALJ's legal conclusion that Ms. Simpson is eligible for AD retirement benefits. This correspondence shall constitute the Final Administrative Determination of the Board of Trustees of the Public Employees' Retirement System.

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.

All appeals should be directed to:

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

Sincerely,



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

G-8/JSI

C: D. Lewis (ET); A. McCormick (ET); G. Sasileo (ET); K. Ozol (ET); L. Hart (ET); P. Sarti (ET);
OAL, Attn: Library (ET)
DAG Connor Martin (ET)
Lois Simpson (Sent via email to: [REDACTED])