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Governor

SHEILA Y. OLIVER *Lt. Governor* 

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March 18, 2020

ELIZABETH MAHER MUOIO State Treasurer

JOHN D. MEGARIOTIS

Acting Director

Sent via e-mail to:

BERGMAN & BARRETT Attorneys at Law Michael T. Barrett, Esg.

RE: Orlando Arce

**PERS** 

OAL DKT. NO. TYP 14203-2013 S

Dear Mr. Barrett:

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

At its meeting on February 19, 2020, the Board of Trustees (Board) of the Public Employees' Retirement System (PERS) reviewed the Initial Decision (ID) of the Honorable Patricia M. Kerins, ALJ, dated December 30, 2019; and the exceptions filed by Dominic Leone, Law Clerk, dated January 13, 2020, and all exhibits in the record. Thereafter, the Board voted to adopt the ALJ's determination affirming the Board's denial of Accidental Disability (AD) retirement benefits. The Board also determined to modify the factual record to include additional findings of fact, and reject the ALJ's recommended decision as to Mr. Arce's eligibility for Ordinary Disability (OD) retirement benefits and the finding that the incident directly resulted in a disability. Accordingly, the Board directed the Secretary to draft findings of fact and conclusions of law consistent with its determination for consideration at its March 18, 2020, meeting.

At its meeting of March 18, 2020, the Board voted to adopt the findings of fact and conclusions of law as presented. This will constitute the final administrative determination of the Board in this matter.

<sup>&</sup>lt;sup>1</sup> The Board requested and was granted an extension of time to issue its final determination.

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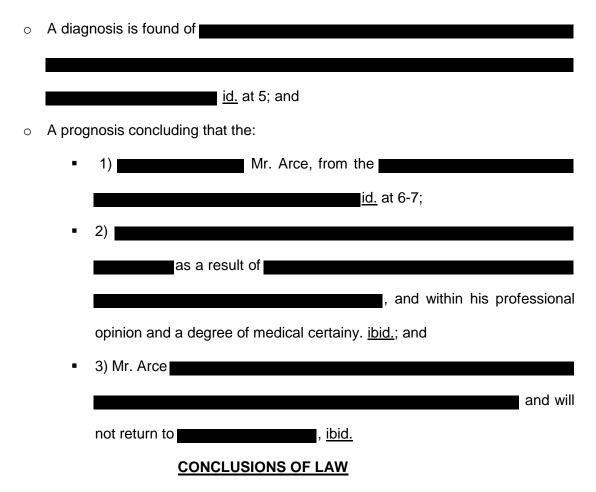
## **FINDINGS OF FACT**

The Board first noted that the ALJ cites to four exhibits that were never admitted into evidence, namely P-1, P-2, P-3, and P-6. ID at 2-5, 17. The regulations governing the conduct of hearings in the Office of Administrative Law require that the ID "be based exclusively on 1) [T]he testimony, documents, and arguments accepted by the judge for consideration in rendering a decision..." N.J.A.C. 1:1-18.1. To the extent the ALJ relied upon any document or evidence not admitted into evidence, the Board rejects those factual findings.

The Board next voted to make additional findings of fact with regard to causation, and to reject the ALJ's finding as to causation.

Dr. Jo	ann Petito-Ross ("Dr. Petito-Ross"), a who examined Mr. Arce following
	, reviewed an performed on March 10, 2009, of Mr. Arce's
R-6;	
After reviewing and performing medical and physical examinations on Mr. Arce, Dr. Petit	
Ross	reported the following:
0	Prior to the Mr. Arce was seen on ,
	by Dr. Alexander M. Pendino, who diagnosed Mr. Arce with
	<u>id.</u> at 6;
0	On the day of the Mr. Arce had
	<u>id.</u> at 2;
0	As of the performed on October 31, 2008, Mr. Arce showed
	<u>ibid.</u> ;
0	Based on a review of his Mr. Arce has
	, <u>id.</u> at 4;

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The Board voted to reject the ALJ's legal conclusion that Mr. Arce is eligible for OD, as he failed to establish that he is physically or mentally incapacitated for the performance of duty at the time that he separated from service. See N.J.S.A. 43:15A-42.<sup>2</sup> In order to establish eligibility, the member must present objective medical evidence, including expert testimony, rather than mere subjective complaints. Thus, the weight afforded to the medical expert is dependent upon

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<sup>&</sup>lt;sup>2</sup> The ID seems to suggest that the threshold to establish that a member is disabled from performing their regular and assigned duties differs depending on whether the member applies for an OD or AD. The Board rejects this interpretation of the statute. ID at 25. See, e.g., Patterson v. Bd. of Trs., State Police Ret. Sys., 194 N.J. 29, 42 (2008) (finding that only meaningful distinction between two standards is that OD "need not have a work connection"); Bueno v. Bd. of Trs., Teachers' Pension & Annuity Fund, 404 N.J. Super. 119, 126 (App. Div. 2008) (affirming Board's denial of OD "on the ground that [petitioner] is not totally and permanently disabled from the performance of her regular and assigned duties") (emphasis added), certif. denied, 199 N.J. 540 (2009).

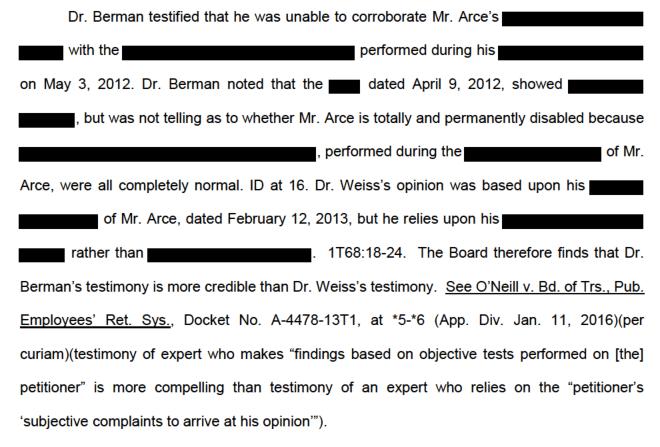
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whether the expert's conclusions are based only on the subjective complaints of the patient, rather than objective medical evidence. <u>Angel v. Rand Express Lines, Inc.</u>, 66 N.J. Super. 77, 86 (App. Div. 1961).

Based upon the above, the Board rejected the ALJ's recommendation that Mr. Arce is entitled to an OD. The Board found that the opinion of Dr. Arnold Berman, the Board's Independent Medical Examiner, is more credible than that of Mr. Arce's expert, as Dr. Berman relied upon the objective medical evidence in the record in forming his conclusion. Conversely, Dr. Weiss relied almost entirely upon Mr. Arce's subjective complaints. ID at 17-18.



Tellingly, Dr. Weiss was of the opinion that Mr. Arce risked should he return to work, seemingly conceding that Mr. Arce could return to work now, but that the risk of returning to perform the job is not worth the benefit. 1T74:8-10.

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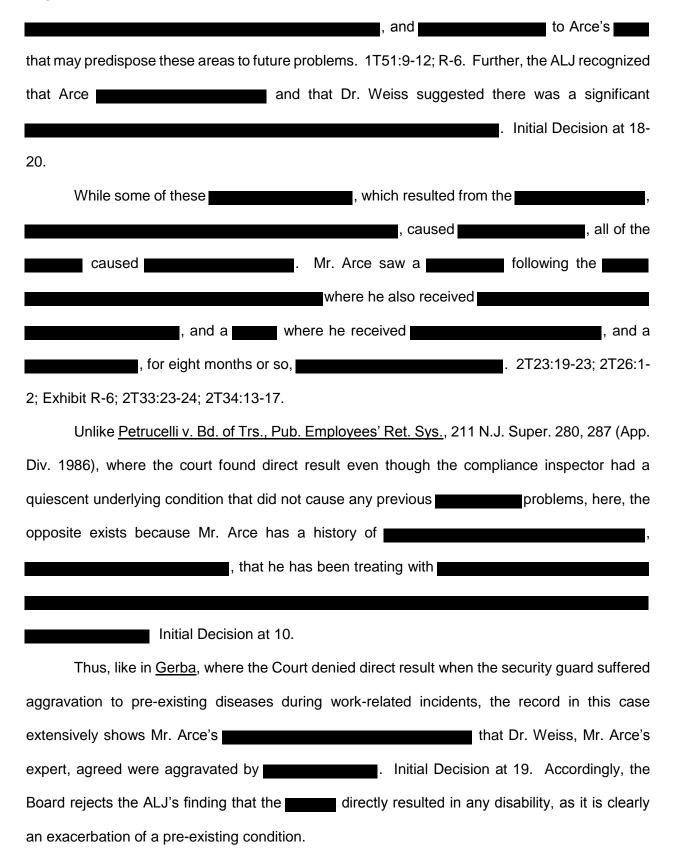
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Lastly, the Board found that Dr. Berman's opinion is more credible based on his extensive training and experience in the field of \_\_\_\_\_\_\_, a discipline in which he is Board-Certified. Dr. Weiss is not Board-Certified and has not performed any \_\_\_\_\_\_ since his medical training in the 1970's. 1T9:17, 10:3; R-7. Therefore, the Board found that Dr. Berman's opinion is more reliable than Dr. Weiss's and the Board rejects the ALJ's finding that Mr. Arce is entitled to an OD.

The Board also rejected the ALJ's finding that the directly resulted in Mr. Arce's disability. Even assuming, arguendo, that Mr. Arce is totally and permanently disabled, it is clear Mr. Arce had pre-existing conditions and it is undisputed that those conditions were symptomatic prior to the does not constitute the "essential significant or substantial contributing cause of the resultant disability" and therefore rejects the ALJ's finding that the directly resulted in his disability pursuant to N.J.S.A. 43:15A-43. See also Gerba v. Bd. of Trs., Pub. Employees' Ret. Sys., 83 N.J. 174, 188 (1980); Korelnia v. Bd. of Trs., Pub. Employees' Ret. Sys., 211 N.J. Super. 280, 287 (App. Div. 1986). While a member's disability may in some circumstances result from the combination of a pre-existing condition and a traumatic event, the "stringent test of medical causation" must be established by "sufficient credible evidence in the record." Ibid.

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For these reasons, the Board adopts the ALJ's decision that Mr. Arce is not entitled to an

AD, modifies the ALJ's findings of fact as set forth above, and rejects the ALJ's conclusion of law

that Mr. Arce is eligible for OD. The Board also rejected the ALJ's determination that the incident

directly resulted in any disability. Accordingly, this correspondence shall constitute the Final

Administrative Determination of the Board of Trustees of the Public Employees' Retirement

System.

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 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

fel S. Smit

Board of Trustees

Public Employees' Retirement System

G-10/JSI

C: D. Lewis (ET); L. Milton (ET); S. Glynn (ET); K. Ozol (ET); L. Figueroa (ET); P. Sarti (ET)

Dominic Leone, Law Clerk (ET)

OAL, Attn: Library (ET)

Orlando Arce