



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PENSIONS AND BENEFITS
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September 21, 2023

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JOHN D. MEGARIOTIS
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Governor

TAHESHA WAY, ESQ.
Lt. Governor

Sent via email to: [REDACTED]

CLEARY, GIACOBBE, ALFIERI JACOBS, LLC
Matthew Giacobbe, Esq.

[REDACTED]

RE: G [REDACTED] M [REDACTED]
PERS [REDACTED]
OAL DKT. NO. TYP 01012-21

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Dear Mr. Giacobbe:

At its meeting on August 16, 2023, the Board of Trustees (Board) of the Public Employees' Retirement System (PERS) considered the Initial Decision (ID) of the Honorable Susan Scarola, Administrative Law Judge (ALJ), dated June 15, 2023, exceptions filed by DAG Yi Zhu, dated June 26, 2023, your reply thereto, dated June 29, 2023, and statements by your associate, Edward Jerejian, Esq. and DAG Zhu. After careful consideration, the Board rejected the ALJ's decision recommending that G [REDACTED] M [REDACTED] (M [REDACTED]) be permitted to change his retirement option selection from Option A to the Maximum Option. Thereafter, the Board directed the undersigned to draft Findings of Fact and Conclusions of Law consistent with its determination. These Findings of Fact and Conclusions of Law were presented to and approved by the Board at its meeting of September 20, 2023.¹

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

By way of background, M ██████ applied for Service retirement benefits on June 21, 2019, effective September 1, 2019, under Option A. At its meeting on July 17, 2019, the Board approved M ██████ application. In February, 2020, M ██████ sought to change his retirement option selection from Option A to the Maximum Option. On September 16, 2020, the Board considered and denied M ██████ request in accord with N.J.A.C. 17:2-6.3. M ██████ filed a timely appeal, and the matter was transferred to the Office of Administrative Law as a contested case.

FINDINGS OF FACT

The Board made the following findings of fact.

M ██████ worked in various offices within the Department of Treasury for approximately forty-three years before he retired in 2019 at the age of 69. ID at 3. On or about January 9, 2018, M ██████ talked to a pension counselor and received an *Estimate of Retirement Benefits* (Estimate) from the Division of Pensions and Benefits (Division) by mail. He read through the Estimate and was aware of the differences among the various retirement options, including Maximum Option and Option A, which were explained in detail on the second page of the Estimate. M ██████ was also aware of the 30-day limitation for pension retirees to make changes, including option changes, as noted on the third page of the Estimate. Ibid.

In June, 2019, M ██████ decided to retire,: he claims it has always been his intention to take the Maximum Option. ID at 4. On June 21, 2019, M ██████ filed his retirement application online. J-2. He completed the application by himself without consulting a pension counselor. Ibid. He had a discussion with his partner, Jennifer, and he states that he intended to select the Maximum Option. M ██████ does not remember the reason, but he in fact selected Option A in the application, designating Jennifer as his Option A beneficiary.

On July 9 and 10, 2019, M ██████ received two Quotations of Retirement Benefits from the Division, each of which listed his retirement option selection as Option A. ID at 7.

M ██████ states that he did not notice that both Quotations listed his option selection as Option A.² T39:19-40:5. But he did notice a \$5 difference between the estimated monthly benefits under Maximum Option in those two Quotations, and he called the Division to inquire as to why there was such a difference. ID at 7.

On or about July 17, 2019, M ██████ received the Board's letter approving him for Service retirement benefits effective September 1, 2019 under Option A. ID at 7. On or about September 26, 2019, M ██████ received a letter from the Division, which confirmed his retirement allowance and listed his retirement date, type, payment option (Option A), monthly allowance, survivor pension benefits, and beneficiary. R-6.

Over six months later, in February 2020, M ██████ wrote to the Division seeking to change his retirement option from Option A to the Maximum Option. ID at 2. On March 2, 2020, the Division denied M ██████ request. R-8. He appealed to the Board and, on September 16, 2020, the Board denied his request to change his retirement option. J-5. M ██████ filed a timely appeal of the Board's decision and the matter was transferred to the Office of Administrative Law (OAL). ID at 3.

At the OAL hearing, M ██████ testified that his mother had dementia and her health condition was deteriorating in 2019 to the extent that she needed a full-time nurse and a home aide, as well as a wound specialist for bedsores and ulcers. Ibid. M ██████ held a durable power of attorney and banking power of attorney for his mother in 2018, and he thereupon began making all medical, legal, and financial decisions for her until her death in December 2019. ID at 4. In the summer of 2019, M ██████ was also handling his transition at work and trying to find a successor to take over the programs he was running, which caused additional stress. Ibid. Moreover, M ██████ had concerns about his daughter in the

² Both Quotations clearly show that Option A was selected. ID at 7.

summer of 2019, as she had pregnancy complications due to high blood pressure, which led to ER visits in July, August, and, later, in October 2019. Ibid. However, M ██████ did not need to provide any actual care to his daughter, as her husband and mother were taking care of her. T47:2-48:11. In addition, around the time of his retirement M ██████ and Jennifer became engaged and subsequently were planning their wedding, which added to the stressful demands on him before and after his retirement became due and payable on October 1, 2019.. ID at 5.

According to M ██████, he was so stressed during this time that he could not focus on his own retirement papers and finances at all. ID at 7. Nevertheless, he was in communication with his accountant in August 2019 about his tax returns, personal finances, and retirement plans. Ibid.

M ██████ contends that he made a mistake in selecting Option A when he filled out his retirement application due to the emotional distress he was experiencing. ID at 9.

Sean Hiscox, PhD. (“Dr. Hiscox”) testified on behalf of M ██████ and as an expert in the field of psychology. T72:10-15. According to Dr. Hiscox, at the time M ██████ completed his pension application, he was suffering from an adjustment disorder with mixed anxiety and depression. T75:1-79:24. The primary stressor was the decline and, later, the passing of his mother, along with other stressors such as his daughter’s pregnancy complications, his impending retirement, and his wedding plans. Ibid. Dr. Hiscox testified that the adjustment disorder overwhelmed M ██████ emotionally, caused chronic sleep problems, fatigue, and difficulty focusing, all of which negatively impacted M ██████ decision-making capacity while he was completing the pension paperwork. Ibid. Dr. Hiscox believes this adjustment disorder led to M ██████ making a mistake in his option selection. Ibid. Dr. Hiscox opined that M ██████ was incapacitated by his adjustment disorder with respect to

decision-making capabilities from summer 2019, past his October 1, 2019 due-and-payable date, and into January 2020. T79:4-24.

Dr. Hiscox admitted, M ██████ was not completely incapacitated, but he was struggling in several areas that affected his decision-making abilities. T87:15-88:1. Dr. Hiscox acknowledged that M ██████ was able to serve as the power of attorney for his mother and manage her medical, financial, and legal affairs competently, but he nonetheless believed the adjustment disorder made M ██████ more susceptible to making errors in tasks that required attention to detail, particularly when it came to his own matters. T88:2-89:13. But Dr. Hiscox admitted that he was not aware of any other mistakes made by M ██████ due to his adjustment disorder and emotional distress while managing his mother's affairs and the transition at work, and keeping track of his daughter's needs – the option-selection mistake was the only one. T92:16-25.

CONCLUSIONS OF LAW

The Board made the following conclusions of law.

PERS members who are eligible for service retirement may apply for such benefit under N.J.S.A. 43:15A-47 and N.J.S.A. 43:15A-48. Under PERS rules, a member may withdraw, cancel or change a retirement application before it becomes due and payable; thereafter, the benefit is irrevocable. See N.J.A.C. 17:2-6.2; N.J.A.C. 17:2-6.3. Specifically, N.J.A.C. 17:3-6.2 states “[a] member's retirement allowance shall not become due and payable until 30 days after the date the Board approved the application for retirement or one month after the date of the retirement, whichever is later.” N.J.A.C. 17:3-6.3 states in pertinent part:

(a) Except as provided by 17:3-6.1 and 6.7, a member shall have the right to withdraw, cancel or change an application for retirement at any time before the member's retirement allowance becomes due and payable by sending a written

request signed by the member. Thereafter, the retirement shall stand as approved by the Board.

[N.J.A.C. 17:3-6.3 (emphasis added).]

Notwithstanding this rule, retirees have from time to time sought to modify their retirement applications after the due-and-payable period. While an administrative agency has inherent authority to reopen and modify its previous orders, reconsideration must be exercised reasonably, and an application to reopen must be made with reasonable diligence. Skulski v. Nolan, 68 N.J. 179, 196 (1975). To reopen a matter, a showing of “good cause, reasonable grounds and due diligence” is required. See Steinmann v. Dep’t of Treasury, 116 N.J. 564, 573 (1989).

New Jersey courts recognize that “the right to exercise a pension option necessarily implies the capacity to do so.” Harris ex rel. Harris v. Bd. of Trs., Pub. Emps.’ Ret. Sys., 378 N.J. Super. 459, 465 (App. Div. 2005) (citing Bumbaco v. Bd. of Trs., 325 N.J. Super. 90, 97 (App. Div. 1999)). Thus, in very few limited precedents, New Jersey courts have found that the “good cause, reasonable grounds and due diligence” requirement was met to allow a pension member to change their retirement selection after the due-and-payable date.

In Bumbaco, the Appellate Division concluded that a deceased retiree’s combination of physical and emotional burdens arising from his terminal cancer prevented his taking timely action to convert his group life insurance during the thirty-one days following retirement in which such conversion is permitted. 325 N.J. Super. 90. The court reasoned that Bumbaco’s incapacity during the thirty-one-day option period deprived him of the full benefit the legislature intended to provide him, and held that his widow was entitled to a tolling of the time limitation to permit her to convert the insurance. Id. at 97.

In Harris, the Appellate Division tolled the time period to permit a widower to modify his late wife’s option selection in light of her incapacity due to her terminal cancer during

the thirty-day period. 378 N.J. Super 459. The court found that Harris, like Bumbaco was deprived of the benefit of the full time to make the desired changes to her pension, as established by uncontroverted evidence. Id. at 466.

In Minsavage for Minsavage v. Board. of Trustees, Teachers' Pension & Annuity Fund, 240 N.J. 103, 105 (2019), the Supreme Court held that a widow could modify the retirement application of her recently deceased husband, he had selected a type of retirement for which he was ultimately ineligible. David Minsavage died of cancer after he accumulated twenty-four years and nine months of teaching service—just short of the twenty-five years required for early retirement. Ibid. Because he did not qualify for early retirement, the Board determined that his widow was entitled only to the return of his pension contributions and a group life insurance benefit. Id. at 106. Had Minsavage selected and qualified for ordinary disability, his widow would have been entitled to pension benefits as his beneficiary. Ibid. The Court held that the Board should have given Mrs. Minsavage an opportunity to present evidence that her husband had been incapacitated at a time when he could have changed his retirement option and that she exercised reasonable diligence to modify his pension selection for good cause upon reasonable grounds. Id. at 110. The Court remanded to allow Mrs. Minsavage to try to prove that David had qualified for ordinary disability retirement and that, but for incapacity relating to his terminal cancer, he would have changed his retirement selection to ordinary disability to provide for his family. Ibid.

Our courts have also held that a member's terminal illness does not automatically establish incapacity of the pension member and toll the statutory period. In Brown v. Teachers' Pension and Annuity Fund, A-346-2005, 2006 WL 1418615 *1 (App. Div. May 25, 2006), the Appellate Division affirmed the Board's denial of petitioner's request to reopen and modify the retirement option chosen by his deceased ex-wife, Ms. Brown. Ibid. That court found that there was insufficient evidence to suggest that the effects of Ms. Brown's

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terminal illness on her mind and body rendered her incapable of making the retirement selection change during the thirty-day statutory period, and that they could not infer from the record that Ms. Brown would have elected to change her original retirement selection were it not for her terminal illness. Id. at *3.

Here, the evidence provided fails to substantiate M ██████ alleged incapacity during his pre-retirement period. M ██████ may have experienced significant stress prior to his retirement in late September 2019, given his responsibilities in caring for his mother, concerns regarding his daughter's pregnancy, and a demanding workplace transition. Nevertheless, it is evident that he exhibited high functionality during this time. He continued working and identified and trained his successor, and he acted with the power of attorney for his mother, making crucial legal, financial, and medical decisions on her behalf.

Moreover, M ██████ mental acuity during the period between June and October 2019 is further demonstrated by his engagement in communication and discussion with his accountant concerning retirement planning and tax filing. These facts surrounding M ██████ actions prior to his retirement undermine the ALJ's finding of incapacity. Thus, the Board rejects the ALJ's finding that M ██████ has demonstrated good cause and reasonable ground to reopen his application due to incapacity.

The Board notes that stresses M ██████ experienced after October 1, 2019 are not directly relevant to the question whether he was incapacitated at a time in which he could have changed his option selection. If M ██████ was indeed incapacitated between June 2019 and October 1, 2019, then the significant stresses he experienced after his pension became due and payable, including his daughter's continuing difficulties with her pregnancy, his mother's continued decline and passing, and his planning for his wedding, would be relevant to determining whether he acted reasonably diligently after the stressful period was

alleviated. But the seeming increases in stress after October 1, 2019 do not factor into the analysis of the period between his application and his due-and-payable date.

Moreover, it is well-settled that “[t]he weight to which an expert opinion is entitled can rise no higher than the facts and reasoning upon which that opinion is predicated.” Johnson v. Salem Corp., 97 N.J. 78, 91 (1984) (citation omitted). “The testimonial and experiential weaknesses of the witness, such as (1) his status as a general practitioner, testifying as to a specialty, or (2) the fact that his conclusions are based largely on the subjective complaints of the patient or on a cursory examination, may be exposed by the usual methods of cross-examination.” Angel v. Rand Express Lines, Inc., 66 N.J. Super. 77, 86 (App. Div. 1961). Here, Dr. Hiscox’s opinion has significant limitations and is contradicted by M ██████ own testimony. Dr. Hiscox evaluated M ██████ years after his alleged incapacity resolved. Further, he conceded that M ██████ was not completely incapacitated in June 2019 through January 2020, as he was able to competently serve as the power of attorney for his mother, managing her medical, financial, and legal affairs. Dr. Hiscox posited that the emotional distress and family issues M ██████ experienced during that period increased the probability of his making mistakes. Nonetheless, Dr. Hiscox could not identify one other mistake actually made by M ██████ due to his emotional distress and alleged adjustment disorder. Dr. Hiscox acknowledged that M ██████ had no prior history of mental health conditions, and his opinion and diagnosis were based solely on subjective statements provided by M ██████ and his wife, not on any objective or contemporaneously-observed medical evidence.

Essentially, what M ██████ has managed to establish, at most, is that he was stressed and distracted due to family and work issues around the time of his retirement, and may have made an error when completing his retirement application, and somehow failed to appreciate the mistake despite the numerous correspondences indicating that his payment

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option was Option A, and, later, several months of benefit payments under Option A. But the record clearly demonstrates that he maintained high functionality during this period, successfully transitioning from his long career, attending to the needs of his mother, and even noticing a minor difference in retirement estimates he had received. Unlike the cases of Bumbaco, Harris, and Minsavage, there is no indication that M [REDACTED] suffered substantial physical and emotional burdens that rendered him incapable of making the desired change to his retirement application. Consequently, the Board rejects the ALJ's conclusion that M [REDACTED] demonstrated that his application should be reopened to allow a change of retirement option. M [REDACTED]

Therefore, the Board rejects the ALJ's recommendation that M [REDACTED] be permitted to change his retirement option selection from Option A to the Maximum Option. 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

Matthew Giacobbe, Esq.

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C: J. Ehrmann (ET)
OAL, Attn: Library (ET)
DAG Yi Zhu (ET)
G [REDACTED] M [REDACTED] (via regular mail)