



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PENSIONS AND BENEFITS
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March 18, 2020

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Acting Director

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Governor

SHEILA Y. OLIVER
Lt. Governor

Sent via e-mail to: [REDACTED]

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

[REDACTED]
[REDACTED]

RE: Orlando Arce
PERS [REDACTED]
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, 2019,¹ 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.

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

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. Joann Petito-Ross (“Dr. Petito-Ross”), a [REDACTED] who examined Mr. Arce following [REDACTED], reviewed an [REDACTED] performed on March 10, 2009, of Mr. Arce’s [REDACTED]. R-6;
- After reviewing and performing medical and physical examinations on Mr. Arce, Dr. Petito-Ross reported the following:
 - Prior to the [REDACTED] Mr. Arce was seen on [REDACTED], by Dr. Alexander M. Pendino, who diagnosed Mr. Arce with [REDACTED], id. at 6;
 - On the day of the [REDACTED] Mr. Arce had [REDACTED] [REDACTED] id. at 2;
 - As of the [REDACTED] performed on October 31, 2008, Mr. Arce showed [REDACTED] [REDACTED] ibid.;
 - Based on a review of his [REDACTED] Mr. Arce has [REDACTED] [REDACTED], id. at 4;

- A diagnosis is found of [REDACTED]
[REDACTED]
[REDACTED] id. at 5; and
- A prognosis concluding that the:
 - 1) [REDACTED] Mr. Arce, from the [REDACTED]
[REDACTED] id. at 6-7;
 - 2) [REDACTED]
[REDACTED] as a result of [REDACTED]
[REDACTED], and within his professional
opinion and a degree of medical certainty. ibid.; and
 - 3) Mr. Arce [REDACTED]
[REDACTED] and will
not return to [REDACTED], ibid.

CONCLUSIONS OF LAW

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-42.² 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

² 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).

whether the expert's conclusions are based only on the subjective complaints of the patient, rather than objective medical evidence. Angel v. Rand Express Lines, Inc., 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.

Dr. Berman testified that he was unable to corroborate Mr. Arce's [REDACTED] with the [REDACTED] performed during his [REDACTED] on May 3, 2012. Dr. Berman noted that the [REDACTED] dated April 9, 2012, showed [REDACTED], but was not telling as to whether Mr. Arce is totally and permanently disabled because [REDACTED], performed during the [REDACTED] of Mr. Arce, were all completely normal. ID at 16. Dr. Weiss's opinion was based upon his [REDACTED] of Mr. Arce, dated February 12, 2013, but he relies upon his [REDACTED] rather than [REDACTED]. 1T68:18-24. The Board therefore finds that Dr. Berman's testimony is more credible than Dr. Weiss's testimony. See O'Neill v. Bd. of Trs., Pub. Employees' Ret. Sys., Docket No. A-4478-13T1, at *5-*6 (App. Div. Jan. 11, 2016)(per curiam)(testimony of expert who makes "findings based on objective tests performed on [the] petitioner" is more compelling than testimony of an expert who relies on the "petitioner's 'subjective complaints to arrive at his opinion'").

Tellingly, Dr. Weiss was of the opinion that Mr. Arce risked [REDACTED] 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.

Lastly, the Board found that Dr. Berman's opinion is more credible based on his extensive training and experience in the field of [REDACTED], a discipline in which he is Board-Certified. Dr. Weiss is not Board-Certified and has not performed any [REDACTED] 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 [REDACTED] 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 [REDACTED], and it is undisputed that those conditions were symptomatic prior to the [REDACTED], and this condition was aggravated as a result of the [REDACTED]. Thus, the Board found that the [REDACTED] does not constitute the "essential significant or substantial contributing cause of the resultant disability" and therefore rejects the ALJ's finding that the [REDACTED] 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., 83 N.J. 163, 170 (1980); Petrucelli 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.

Here, both Dr. Weiss and Dr. Berman agreed that Arce's [REDACTED] revealed [REDACTED] [REDACTED]. Initial Decision at 18-20. According to Dr. Berman, Arce's [REDACTED]. 3T16:23; 3T17:4. Dr. Weiss admitted that the [REDACTED] could have caused the type of [REDACTED] that Mr. Arce has, but was unable to conclude that because he did not review any [REDACTED] taken prior to [REDACTED]; however, Dr. Petito-Ross was able to review the [REDACTED] and reported [REDACTED],

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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
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