



State of New Jersey

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October 6, 2020

Sent via email to: [REDACTED]

GAYLORD POPP, L.L.C.
Samuel M. Gaylord, Esq.

[REDACTED]

RE: Sharon Giles

[REDACTED]
OAL DKT. NO. TYP 16562-2015

Dear Mr. Gaylord:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

At its meeting on September 3, 2020, the Board of Trustees (Board) of the Teachers' Pension and Annuity Fund (TPAF) considered the Initial Decision ("ID") of Administrative Law Judge (ALJ) Irene Jones, dated July 3, 2020, the Exceptions¹ filed by Deputy Attorney General Jeffrey Padgett, dated August 11, 2020 and the exhibits with regard to your client's appeal of the Board's decision denying her application for Ordinary Disability retirement benefits. After careful consideration, the Board determined to modify the ALJ's finding of fact as to Ms. Giles's job duties and reject the ALJ's recommendation that Ms. Giles is eligible for Ordinary disability retirement benefits thereby reaffirming its original determination. Accordingly, the Board directed the Secretary to draft Findings of Fact and Conclusions of Law consistent with its determination for consideration at its October 1, 2020 meeting.

At its meeting of October 1, 2020², 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 These exceptions are timely as neither party received the Initial Decision until July 29, 2020.

² Due to health and safety concerns for the public regarding COVID-19, the meeting was conducted via teleconference.

The Board noted that the ALJ found that the Ms. Giles is permanently and totally disabled from her employment as a school teacher due to the condition of her back. ID at 14. For the reasons set forth below, the Board rejects the ALJ's finding that Ms. Giles is permanently and totally disabled and that she is eligible for Ordinary Disability retirement benefits.

In reference to Giles's job requirements, the ALJ found that:

teaching is a demanding position; it requires not only intellect, but physical stamina, to keep up with active young children. As [Giles] testified, it requires one to immediately be able to engage in fire and active-shooter drills. As an elementary teacher, one is constantly bending, stooping, walking, and moving. It is not a job for one who is not physically fit.

[ID at 13.]

This finding must be rejected because it conflates how Ms. Giles subjectively and specifically taught with the general requirements of being a teacher. The proper standard looks to her general employment as a teacher, not to specific self-reported tasks. See Skulski v. Nolan, 68 N.J. 179, 205-06 (1975). Based on the job description, there is no reason someone in Ms. Giles's condition could not perform the general functions of a teacher, which involves planning lessons and verbally communicating with students. J-4. This is true even though she might struggle with specific aspects of her actual job, such as standing for long periods of time or walking up and down stairs. These specific problems might have been resolved with a simple accommodation by her employer, but Ms. Giles never requested an accommodation. 1T91:18-93:4; 1T93:2-14; see Ensslin v. Bd. of Trs., Police & Firemen's Ret. Sys., 311 N.J. Super. 333, 336 (App. Div. 1998) (applicants for OD must prove they are "disabled and could not function in [their] position even with reasonable accommodation"); see also Grieco-Hicks v. Bd. of Trs., Teachers' Pension & Annuity Fund, 2017 N.J. Super. Unpub. LEXIS 1159, at *12 (App. Div. May 11, 2017) (affirming denial of AD, where "[t]here was no evidence that even if [an art teacher] used a wheelchair, she would be unable to move about a classroom to guide and teach art students, particularly if reasonable accommodations to classroom layout were made"). The majority of the specific duties Ms. Giles stated she could not perform were not in her official job description, but particular to her specific teaching assignment (walking up and down stairs, morning

cafeteria duty). J-4; cf. DeFeo v. Bd. of Trs., Pub. Emps.' Ret. Sys., 2018 N.J. Super. Unpub. LEXIS 537, at *7 (App. Div. Mar. 9, 2018) (inability to “perform all of the duties required of [a] job . . . does not amount to the inability to perform [the] job”), certif. denied, 234 N.J. 9 (2018). Therefore, it cannot be said that Ms. Giles is permanently and totally disabled from her general employment as a teacher.

The ALJ incorrectly weighed the opinion of Ms. Giles’s expert, Dr. David Weiss, over that of the Board’s expert, Dr. Arnold Berman. ID at 13. The Board rejects the ALJ’s finding that Dr. Weiss presented more reliable testimony than that of Dr. Berman because the ALJ erred in minimizing the absence of a clinical correlation between Ms. Giles’s complaints and diagnostic tests and Dr. Berman’s hands-on testing. Dr. Berman reliably found that Ms. Giles’s subjective complaints do not have a sufficient objective basis.

The ALJ states that “[Dr.] Berman administered several objective tests to evaluate [Giles’s] subjective complaints, which he did not identify,” but then goes on to name every objective test Dr. Berman performed, which Dr. Berman clearly stated on the record. ID at 9; 2T11:1-24. The Board therefore rejects the ALJ’s finding that Dr. Berman did not identify the objective tests on which he based his opinion. Dr. Berman conducted a relatively unremarkable physical examination of Ms. Giles that showed no major deficits and a negative straight leg raise test (indicating a lack of radicular pain) ID at 9. He found no measurable atrophy in her calf and thighs, indicating normal use. Ibid. He also found normal strength, reflexes, and sensory input in both Ms. Giles’s lumbar and cervical spines. Ibid. The 2015 MRI and 2016 EMG were not clinically correlated during the physical testing. ID at 10. Put simply, while Ms. Giles has a degenerative condition in her back causing her some pain, it is not disabling radicular pain.

Overall, Dr. Berman only found evidence of age-related degeneration in Ms. Giles’s lower back, common to the normal aging process, with no clinical correlation of radiculopathy. ID at 10. When comparing Giles’s condition with her job description (with no physical requirements), Dr. Berman reliably opined that she is able to fully perform the duties of her employment and the objective evidence supports this opinion. Ibid.

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By contrast, Dr. Weiss's ultimate opinion that Ms. Giles is totally and permanently disabled is unsupported by objective evidence in the record. Dr. Weiss utilized the PROMIS rating system, an admittedly subjective test based on Giles's self-reported disability rating. ID at 7. He also used the Roland Morris Questionnaire -- again, a test where the results are entirely based on the self-reporting of the examinee. Ibid. Further, Dr. Weiss's use of the American Medical Association guidelines in rendering his opinion on disability is improper as New Jersey has not adopted these guidelines and therefore his opinion is entirely unhelpful in determining whether Ms. Giles is totally and permanently disabled for purposes of OD. ID at 7-8; See 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).

Finally, Dr. Weiss's examination took place in 2018, over three years after Ms. Giles applied for OD, and, there is no way he could know for certain what conditions she had at the time she retired. 1T35:14-18. . Fineberg v. Bd. of Trs., Teachers' Pension & Annuity Fund, 2019 N.J. Super. Unpub. LEXIS 2010, at *4 (App. Div. Oct. 1, 2019) (affirming denial of OD, based in part on ALJ's finding that opinion of Board's expert was "entitled to greater weight than that of Dr. Weiss because he examined [Fineberg] closer to the date of her departure").] As no EMG test was performed until April 2016, it cannot be said whether the EMG would be positive at the time Ms. Giles retired. Ibid. Again, without a clinical correlation the 2016 EMG and 2015 MRI hold no independent value.

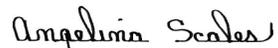
For these reasons, the Board's final agency decision rejected the ALJ's finding of permanent and total disability and denied Ordinary Disability retirement benefits.

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 from 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

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Sincerely,



Angelina Scales, Secretary
Board of Trustees
Teachers' Pension and Annuity Fund

G-4/as

c: Sharon Giles (Sent via email to: [REDACTED])
D. Lewis (ET); L. Milton (ET); S. Glynn (ET); K. Ozol (ET); L. Figueroa (ET); P. Sarti (ET); L.
Hart (ET)
DAG Jeffrey Padgett (ET); DAG Connor Martin (ET); DAG Amy Chung (ET)
OAL, Attn: Library (ET)