



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PENSIONS AND BENEFITS
P. O. Box 295

TRENTON, NEW JERSEY 08625-0295
Telephone (609) 292-7524 / Facsimile (609) 777-1779
TRS 711 (609) 292-6683
www.nj.gov/treasury/pensions

ELIZABETH MAHER MUOIO
State Treasurer

JOHN D. MEGARIOTIS
Acting Director

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

January 16, 2020

Sent via e-mail to: [REDACTED]

Law Offices of Daniel J. Zirrieth, LLC
Daniel J. Zirrieth, Esquire

[REDACTED]
[REDACTED]

RE: Dianne Merwin
PERS [REDACTED]
OAL DKT. NO. TYP 05256-2018

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Dear Mr. Zirrieth:

At its meeting on December 11, 2019, the Board of Trustees of the Public Employees' Retirement System (PERS) considered the October 7, 2019, Initial Decision of the Hon. Elissa Mizzone Testa, ALJ, regarding your client, Dianne Merwin's appeal of the Board's denial of her application for Accidental Disability retirement benefits. The Board also considered the exceptions filed by Deputy Attorney General Christopher Meyer, and your reply thereto, dated November 15, 2019. After careful consideration, the Board adopted the ALJ's Findings of Fact and legal conclusion denying Ms. Merwin's application for Accidental Disability retirement benefits but rejected the ALJ's conclusion that she is eligible for Ordinary Disability retirement benefits. Thereafter, the Board directed the Secretary to draft Findings of Fact and Conclusions of Law consistent with its determinations, to be presented to the Board for discussion and review.

At its meeting of January 15, 2020, the Board approved the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

The Board adopted the ALJ's Findings of Fact and the same are incorporated herein. Briefly summarized, Merwin testified that [REDACTED] when she [REDACTED]. ID at 3. After [REDACTED], Merwin sought treatment at the Jersey City Medical Center Emergency Room. Ibid. Merwin was diagnosed with [REDACTED] and was [REDACTED]. Ibid.; P-5. Ms. Merwin applied for Accidental Disability retirement benefits on or about January 31, 2017. ID at 1-2. On January 18, 2018, the Board considered and denied her application, and determined that she was only eligible for a Deferred retirement benefit. ID at 2. The Board also determined that the [REDACTED] [REDACTED] was identifiable as to place and time, undesigned and unexpected, occurred during and as a result of her regular or assigned duties, and was not a result of Ms. Merwin's willful negligence. Ibid. Finally, the Board found that Ms. Merwin was not totally and permanently disabled from the performance of her usual or other duties that her employer was willing to offer. Ibid.

CONCLUSIONS OF LAW

The Board adopted the ALJ's conclusion that Merwin is not eligible for Accidental Disability retirement benefits, finding that the alleged incident did not directly result in a disability. ID at 14. However, the Board rejected the ALJ's legal conclusion that Merwin is eligible for Ordinary Disability retirement benefits because of the totality of all of her medical conditions. ID at 19-20.

The case law provides that a PERS member is entitled to a liberal interpretation of a pension statute, ID at 19, however, "eligibility [itself] should not to be liberally permitted." In re Adoption of N.J.A.C. 17:1-6.4, 454 N.J. Super. 386, 399 (App. Div. 2018). The Board finds that Merwin failed to satisfy her burden of proof that she is eligible for Ordinary Disability retirement

benefits because she failed to establish sufficient credible medical testimony and evidence to support the ALJ's findings.

The ALJ found that Merwin suffered from [REDACTED] as a result of [REDACTED]. ID at 19. However, the Board's expert witness and Independent Medical Examiner (IME), Dr. Steven Lomazow, whom the ALJ found provided more credible testimony, ID at 15, is Board-certified by the [REDACTED], with a specialty certification in the field of [REDACTED] and sub-certified by the [REDACTED] in the field of [REDACTED], was admitted as an expert in [REDACTED] and concluded that the evidence does not demonstrate a credible pattern of [REDACTED] or objective evidence of a total and permanent [REDACTED]. 2T5:21-6:7; 2T8:13-9:15; P-16. Dr. Lomazow also concluded that there was no evidence the [REDACTED] was disabling, as the detailed [REDACTED] evaluations of Dr. George Carnevale and Dr. Angela Adams were unable to state that there were significant [REDACTED]. 2T24:19-25:5. Dr. Lomazow was clear, there is no evidence of a [REDACTED].

However, Dr. Lomazow testified on cross-examination that he believes Merwin "is [REDACTED]." 2T35:17-36:4. In contrast, on direct examination, when asked if he reached an opinion regarding Merwin's [REDACTED], he stated: "No. I was asked to opine on the [REDACTED]. I did note the [REDACTED] [of Dr. Emanuel Hirso and Dr. Carnevale]." 2T25:24-26:8. The ALJ found that "[T]his opinion that Merwin is [REDACTED] cannot be ignored simply because Lomazow only rendered a [REDACTED] and did not conduct [REDACTED]." ID at 10. Thus, the Board finds that such an opinion is outside of the IME's expertise as a [REDACTED], and accordingly rejects the ALJ's reliance on it as it lacks reliability. Put simply, the record lacks any medical testimony concerning

a [REDACTED], as neither expert medical witness testified in that area. Moreover, Dr. Lomazow did not conduct a [REDACTED] performed no [REDACTED], and therefore the Board rejects the ALJ's conclusion that Merwin established eligibility for Ordinary Disability retirement benefits.

While the Board recognizes a relationship between the medical fields of [REDACTED] [REDACTED], Dr. Lomazow only performed a [REDACTED] and was only admitted as an [REDACTED] and not [REDACTED]. Likewise, Dr. Anca Bereanu, who testified on behalf of Merwin, was only admitted as an expert in [REDACTED] and not [REDACTED]. To accept the testimony of a [REDACTED] would be to ignore the distinction between the two specialties.

Further, Dr. Lomazow did not state this opinion based on a reasonable degree of [REDACTED] certainty and did not perform any [REDACTED] testing of his own. Instead, he relied on the testing performed by Dr. Carnevale, which found a [REDACTED] [REDACTED], but no "significant or consistent evidence of [REDACTED] [REDACTED]." 2T21:21-23:23; P-10. Dr. Carnevale did not make a disability determination and, crucially, Dr. Lomazow did not opine that Merwin is permanently [REDACTED] [REDACTED].

As the ALJ acknowledged, there was no expert testimony offered to address Merwin's [REDACTED] ID at 11. It is well-settled that without expert medical testimony Merwin cannot carry her burden of proof that she is [REDACTED]. See Patterson v. Bd. of Trs., State Police Ret. Sys., 194 N.J. 29, 50-51 (2008) (member seeking disability retirement benefits must produce expert evidence to sustain burden of proof). Put simply, as there were no [REDACTED] experts presented at the hearing, the testimony regarding the nature of Merwin's [REDACTED] treatment, and prognosis was limited. Without a fully developed record regarding Merwin's [REDACTED] the conclusion that Merwin is [REDACTED]

Daniel J. Zirrith, Esquire
Re: Dianne Merwin
January 16, 2020
Page 5

disabled is not reliable and the Board rejects the ALJ's legal conclusion that she sustained her burden to establish eligibility for Ordinary Disability retirement benefits.

Based on the above, the Board adopted the ALJ's Findings of Fact, as well as the legal conclusion that Merwin is not eligible for Accidental Disability retirement benefits. However, the Board rejected the ALJ's legal conclusion that she is eligible for Ordinary Disability 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 S. Ignatowitz, Secretary
Board of Trustees
Public Employees' Retirement System

G-7/JSI

C: D. Lewis (ET); L. Milton (ET); L. Hart (ET); P. Sarti (ET)
DAG Meyer (ET)
OAL, Attn: Library (ET)
Dianne Merwin