



# State of New Jersey

DEPARTMENT OF THE TREASURY  
DIVISION OF PENSIONS AND BENEFITS  
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November 23, 2020

ELIZABETH MAHER MUOIO  
*State Treasurer*

JOHN D. MEGARIOTIS  
*Acting Director*

PHILIP D. MURPHY  
*Governor*

SHEILA Y. OLIVER  
*Lt. Governor*

Sent via email to: [REDACTED]

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

[REDACTED]

RE: Randall Schifflbein  
PERS [REDACTED]  
OAL DKT. NO. TYP 18704-17

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Dear Mr. Gaylord:

At its meeting on October 21, 2020,<sup>1</sup> the Board of Trustees (Board) of the Public Employees' Retirement System (PERS) considered the September 1, 2020<sup>2</sup> Initial Decision (ID) of the Honorable John S. Kennedy, ALJ, and voted to adopt the ALJ's factual findings but rejected the ALJ's recommendation that your client, Mr. Schifflbein, is eligible to receive Accidental Disability retirements. The Board directed the undersigned to draft findings of fact and conclusions of law consistent with its determinations for its review at its meeting of November 18, 2020. The following was presented to the Board at its meeting of November 18, 2020. After careful consideration, including consideration of your statements and the statements of Deputy Attorney General Jakai Jackson at the meeting,<sup>3</sup> the Board adopted these findings of fact and conclusions of law.

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<sup>1</sup> Due to health and safety concerns for the public regarding COVID-19, the meeting was conducted via teleconference.

<sup>2</sup> The Board requested and was granted an extension of time to issue its final administrative determination.

<sup>3</sup> The Board considered the exceptions of DAG Austin Edwards at its October 21, 2020 meeting.

**FINDINGS OF FACT**

The Board voted to adopt the ALJ's findings of fact in the ID, and to make additional findings of fact based on the record. The Board determined that additional findings of fact are necessary concerning Mr. Schiffelbein's condition [REDACTED] at issue before the court. The Board first noted that Mr. Schiffelbein was [REDACTED] [REDACTED] which was not the result of any work-related duty. This [REDACTED] [REDACTED]. ID at 3. The Board noted that Mr. Schiffelbein was [REDACTED] [REDACTED]. The record shows that during the ten years prior to [REDACTED] Mr. Schiffelbein treated with [REDACTED] about four times in total. After the [REDACTED], his [REDACTED] [REDACTED]. Ibid. Moreover, Mr. Schiffelbein experienced [REDACTED] (ID at 4). These [REDACTED] [REDACTED] [REDACTED] [REDACTED] (ID at 4).

Objective medical testing illustrated Mr. Schiffelbein's [REDACTED] [REDACTED]. Ibid. The November 24, 2015 [REDACTED] revealed [REDACTED] [REDACTED]. Ibid. The objective testing shows that Mr. Schiffelbein [REDACTED] [REDACTED]. Additionally, [REDACTED] [REDACTED] reveal no changes. ID at 5; R-8.

**CONCLUSIONS OF LAW**

The Board thereafter rejected the ALJ's conclusion that Mr. Schiffelbein is eligible for Accidental Disability retirement benefits (AD). The Board first considered the legal standard set forth in N.J.S.A. 43:15A-43, which mandates that members of PERS are eligible for AD only if they are permanently and totally disabled "as a direct result of a traumatic event." Ibid. The "direct result" requirement was to apply a more exacting standard of medical causation than that used in workers' compensation law, and to reject, for purposes of awarding AD, the workers' compensation concept that an "accident" can be found in the impact of ordinary work effort upon a progressive disease. Gerba v. Bd. of Trs., Pub. Emps.' Ret. Sys., 83 N.J. 174, 185-86 (1980).

The Court stated that:

Where there exists an underlying condition such as osteoarthritis which itself has not been directly caused, but is only aggravated or ignited, by the trauma, then the resulting disability is, in statutory parlance, "ordinary" rather than "accidental" and gives rise to "ordinary" pension benefits.

[Id. at 186.]

The Court concluded that what is now required is a "traumatic event" that constitutes the essential significant or substantial contributing cause of the applicant's disability. Ibid. The Supreme Court's decision in Richardson v. Board of Trustees, Police & Firemen's Retirement System, 192 N.J. 189 (2007), reaffirmed Gerba. In Richardson, the Court re-emphasized that pre-existing conditions that result or combine to cause a disability are intended to be excluded from eligibility for AD. 192 N.J. at 189.

The burden of proving "direct result" by competent medical testimony rests solely upon the claimant. Gerba, 83 N.J. at 185; see also Atkinson v. Parsekian, 37 N.J. 43, 149 (1962). The question of whether a claimant's alleged disability is the direct result of a traumatic event is one necessarily within the ambit of expert medical opinion. Korelnia v. Bd. of Trs., Pub. Emps.' Ret. Sys., 83 N.J. 163, 171 (1980). The weight granted to expert testimony depends on such factors

as whether there is evidence to support the medical testimony. Angel v. Rand Express Lines, Inc., 77 N.J. Super. 77, 86 (App. Div. 1961).

With the above framework in mind, the Board noted that Mr. Schiffelbein's Accidental Disability application was based on his [REDACTED] [REDACTED]. J-2. However, he had [REDACTED] [REDACTED]. The Board finds that this condition was [REDACTED] [REDACTED]. While an applicant'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. These [REDACTED], which surfaced and were being [REDACTED], were obviously [REDACTED] and Mr. Schiffelbein sought [REDACTED] [REDACTED]. For example, Mr. Schiffelbein was [REDACTED] [REDACTED].

In the ID, the ALJ gave greater weight to the testimony of Dr. Weiss than that of Dr. Berman, simply because Dr. Berman was unaware of the [REDACTED]. ID at 7. The Board rejects this finding. The ALJ noted that Dr. Berman was unaware of the [REDACTED] at the time he evaluated Mr. Schiffelbein.

Berman also testified that he did not review any additional medical documents between the two reports. Dr. Berman's two reports render two separate opinions regarding causation. The evidence seems to support that Dr. Berman had all the same information available to him when he rendered both opinions. Therefore, I deem his testimony to be less credible than that of Dr. Weiss.

[Ibid.]

The Board finds that the ALJ should have considered the findings of Mr. Schiffelbein's expert, Dr. Weiss, as to Mr. Schiffelbein's [REDACTED] immediately prior

to [REDACTED] and given these findings more weight. Prior to 2015, Mr. Schiffelbein was receiving [REDACTED]. ID at 3. In 2015, he [REDACTED] [REDACTED], his same complaints only months later after [REDACTED]. R-1; R-2; R-3. [REDACTED] for this [REDACTED] consisted of [REDACTED] [REDACTED] [REDACTED]. ID at 3. “[Schiffelbein] was [REDACTED] [REDACTED] [REDACTED] ID at 4 (emphasis added).

The ALJ further noted, Dr. “Weiss reviewed petitioner’s November 24, 2015, [REDACTED] which illustrated . . . [REDACTED] [REDACTED]. A November 24, 2015, [REDACTED] [REDACTED]. (P-4.)” Ibid. Dr. “Weiss opined that petitioner [REDACTED] [REDACTED].” Ibid. Just the fact that “[Dr. Weiss’s] review of the medical records indicates that petitioner was getting better and [REDACTED] [REDACTED] (ibid.) clearly suggests that Mr. Schiffelbein was [REDACTED] [REDACTED] and the Board so found.

The Board also rejected the ALJ’s reliance on Petrucelli v. Board of Trustees, Public Employees’ Retirement System, 211 N.J. Super. 280 (App. Div. 1986). In Petrucelli, the member was awarded AD after he fell descending a flight of stairs, which triggered a previously asymptomatic condition. Id. at 281-83. The Appellate Division found that because the member was symptomatic prior to the incident, was wholly unaware that he had a degenerative condition

until the incident, and could have continued working until retirement age even with that pre-existing condition, that the member was eligible for AD. *Id.* at 284, 286, 288-289. Here, unlike in Petrucelli, the Board finds that Mr. Schiffelbein [REDACTED]. Mr. Schiffelbein was [REDACTED]. Therefore, the Board finds this case distinguishable from the facts on which the Petrucelli court relied to grant AD. Rather, the facts here show that Mr. Schiffelbein had [REDACTED]. An individual with a pre-existing condition may qualify for AD but, if the disability is caused by an “underlying condition . . . which itself has not been directly caused, but is only aggravated or ignited by the trauma,” then the individual only qualifies for ordinary disability retirement benefits. Gerba, 83 N.J. at 186. Here, record evidence shows -- and Dr. Weiss agreed -- that [REDACTED] merely [REDACTED]. Therefore, the Board rejected the ALJ’s legal conclusion that Mr. Schiffelbein is entitled to AD.

For these reasons, the Board rejected the ALJ’s legal conclusion that Mr. Schiffelbein’s disability directly resulted [REDACTED]. 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.

GAYLORD POPP, L.L.C.  
Samuel M. Gaylord, Esq.  
Re: Randall Schiffelbein  
November 23, 2020  
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All appeals should be directed to:

Superior Court of New Jersey  
Appellate Division  
Attn: Court Clerk  
PO Box 006  
Trenton, NJ 08625

Sincerely,

A handwritten signature in black ink, appearing to read "Jeff S. Ignatowitz". The signature is fluid and cursive, with a large loop at the end.

Jeff Ignatowitz, Secretary  
Board of Trustees  
Public Employees' Retirement System

G-3/JSI

C: D. Lewis (ET); L. Milton (ET); S. Glynn (ET); K. Ozol (ET); L. Hart (ET); P. Sarti (ET)  
DAG Austin Edwards (ET); DAG Jakai Jackson (ET); OAL, Attn: Library (ET)  
Randall Schiffelbein (Sent via email to: [REDACTED])