

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO.: A-000920-24 T1

BRIAN MYERS,

Civil Action

Appellant,

On Appeal from

V.

BOARD OF TRUSTEES, PUBLIC  
EMPLOYEES' RETIREMENT  
SYSTEM

Respondent

Initial Decision dated  
September 20, 2024 under OAL  
Docket No. TYP-06891-22  
and upheld by The Board of  
the Public Employee Retirement  
System on October 17, 2024

Sat below:

Hon. Willaim T. Cooper, ALJ

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**Brief and Appendix  
of Appellant  
Brian Myers**

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## **PRELIMINARY STATEMENT**

Mr. Myers was responsible for client's lives who were disabled and unable to care for themselves. (Aa33-Aa35). As a result of his medical conditions, he had been prescribed narcotic medication, including but not limited to morphine, and both experts agreed these medications would impact a person's ability to concentrate and focus. The sole issue is whether, at the time of filing his application for ordinary disability retirement benefits, Mr. Myers was totally and permanently disabled from performing his normal job duties as a Cottage Training Technician. (J-6). N.J.A.C. 17:2-6.7(a)2. See, Bueno v. Bd. of Trs., Teachers' Pension & Annuity Fund, Div. of Pensions & Benefits, 404 N.J. Super. 119, 130 (App. Div. 2008). Mr. Myers produced demonstrative medical evidence, as well as the report and testimony of a Board Certified Neuro-Surgeon, Dr. Nirav Shah, (Aa36-Aa44), and has sustained his burden of proof demonstrating by a preponderance of the evidence that he is disabled from performing his regular or assigned job duties as a Cottage Training Technician. The Board's denial lacked a reasonable basis in the record and constituted a clear misapplication of the governing legal standards. This Court should reverse the Board's decision and order the immediate award of ordinary disability pension benefits to Mr. Myers.

### **PROCEUDRAL HISTORY**

On June 11, 2021, an Application for Disability Retirement with an July 1, 2021, effective retirement date was filed by Mr. Myers. (Aa1-Aa3). On May 18, 2022, the Board determined that Mr. Myers was not disabled and denied his application for disability pension benefits. (Aa5-Aa6). A letter requesting an appeal and the matter be transferred to the Office of Administrative Law was filed on behalf of Mr. Myers. (Aa7). On August 5, 2022, the Board authored a letter transferring the matter to the office of Administrative Law. (Aa ). Hearings were held and Judge Cooper rendered an initial decision on September 20, 2024. (Aa8-Aa24). On October 17, 2024, the Board upheld the Judge decision. (Aa25-Aa26). A Notice of Appeal and Case information Statement were filed with this Court on December 2, 2024. (Aa27-Aa32).

### **STATEMENT OF FACTS**

Mr. Myers was a Cottage Training Technician at the New Lisbon Developmental Center, assigned to Locust Cottage, where he cared for approximately four residents. He testified that he was in charge of approximately four clients. (Aa33-Aa35); (1T8:10-18). He confirmed that the official job description (Aa33-Aa35) accurately reflected his daily responsibilities, which included supervising morning hygiene routines, assisting clients in and out of showers, transferring non-ambulatory clients from wheelchairs to chairs and beds,

making beds, and performing other physically demanding caregiving duties. (1T8:10-18); (1T9:5-13); (1T11:5-25); (1T13:8-12).

Mr. Myers testified that over time, his ability to perform these duties deteriorated due to chronic pain, constant tingling, and neurologic deficits in his arms and shoulders, making lifting, reaching, bending, and transferring clients increasingly painful and unsafe. (1T18:22-25); (1T21:15-20); (1T23:2-19). He further testified that there were no light duty assignments available in his role, and the physical demands were unavoidable and essential to the job. (1T25:10-17). His treating physicians prescribed morphine and medical marijuana to manage his intractable pain, which in turn impaired his concentration, balance, and reaction time, rendering him incapable of safely performing his duties. (1T38:13-25). Despite these limitations and consistent medical documentation, the Board denied his application for ordinary disability pension benefits.

### **STANDARD OF REVIEW**

"Judicial review of an administrative agency action is limited because respect is due to the 'expertise and superior knowledge' of an agency in its specialized field." Francois v. Bd. of Trs. of Pub. Emps.' Ret. Sys., 415 N.J. Super. 335, 347 (App. Div. 2010) (quoting Hemsey v. Bd. of Trs., Police & Firemen's Ret. Sys., 198 N.J. 215, 223 (2009)). "An appellate court affords a 'strong presumption of reasonableness' to an administrative agency's exercise of its



statutorily delegated responsibilities." Lavezzi v. State, 219 N.J. 163, 171 (2014) (quoting City of Newark v. Nat. Res. Council, Dep't of Env't. Prot., 82 N.J. 530, 539 (1980)). To that end, a "reviewing court 'should not reverse'" an administrative agency's decision "unless it is arbitrary, capricious or unreasonable or it is not supported by substantial credible evidence in the record as a whole." Ibid. (quoting Prado v. State, 186 N.J. 413, 427 (2006)).

To determine if an administrative agency's decision is arbitrary, capricious, or unreasonable, this Court must ascertain:

- (1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law;
- (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and
- (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.

[Ibid. (quoting In re Stallworth, 208 N.J. 182, 194 (2011)).]

"[A]lthough the scope of review of an agency's decision is circumscribed, an appellate court's review of an agency decision is 'not simply a pro forma exercise in which [the court] rubber stamp[s] findings that are not reasonably supported by the evidence.'" Mejia v. N.J. Dep't of Corr., 446 N.J. Super. 369, 376-77 (App. Div. 2016) (alterations in original) (quoting In re Taylor, 158 N.J. 644, 657 (1999)); accord Malacow v. N.J. Dep't of Corr., 457 N.J. Super. 87, 93 (App. Div.

2018). However, "we are not bound by an agency's construction of a statute just as we are not bound by its other, strictly legal determinations." *Patel v. N.J. Motor Vehicle Comm'n*, 200 N.J. 413, 420 (2009).

"[P]ension statutes are 'remedial in character' and 'should be liberally construed and administered in favor of the persons intended to be benefited thereby.'" *Klumb v. Bd. of Educ. of Manalapan-Englishtown Reg'l High Sch. Dist., Monmouth Cnty.*, 199 N.J. 14, 34 (2009) (quoting *Geller v. Dep't of Treasury, Div. of Pensions & Annuity Fund*, 53 N.J. 591, 597-98 (1969)). They must also "be liberally construed in favor of public employees . . . [because] they constitute deferred compensation earned by the employee during his years of service." *Widdis vs. Pub. Emp. Ret. Sys.*, 238 N.J. Super. 70, 78 (App. Div. 1990).

To qualify for ordinary disability retirement benefits, a petitioner must establish by a preponderance of the credible evidence that he or she is "physically or mentally incapacitated for the performance of duty and should be retired." *N.J.S.A. 43:15A-42*. To meet that standard, an applicant must prove they have "a disabling condition and must produce expert evidence to sustain this burden." *Bueno v. Bd. of Trs., Tchrs.' Pension & Annuity Fund*, 404 N.J. Super. 119, 126 (App. Div. 2008) (citing *Patterson*, 194 N.J. at 50-51). The applicant "must establish incapacity to perform duties in the general area of [their] ordinary employment[,] rather than merely showing [an] inability to perform [their] specific

job[.]" Id. at 130 (quoting Skulski v. Nolan, 68 N.J. 179, 205-06 (1975)). The applicant must also show that the disabling condition is total and permanent. Patterson, 194 N.J. at 42. While deference is afforded to an agency's expertise, courts owe no deference to an agency's interpretation of the governing legal standard or to factual findings lacking credible support. Russo vs. Bd. Of Trs., Police & Firemen's Ret. Sys., 206 N.J. 14, 27 (2011). Particularly in pension matters, pension boards may not disregard unrebutted, competent medical evidence without a reasonable basis. Mount v. Board of Trustees, Police & Firemen's Ret. Sys., 233 N.J. Super 419, 428 (App. Div. 1989).

Here, there was no competent medical evidence presented supporting the position that Mr. Myers was not totally and permanently disabled. There was no residuum of legally competent medical evidence presented, other than Dr. Lomazow's report and opinion, that Mr. Myers was not disabled; an opinion which ignored what he did for a living and the medications he was taking as prescribed by the authorized treating doctor. (Aa53-aa141).

Accordingly, the ALJ should have rendered a decision finding Mr. Myers disabled. By adopting the ALJ's decision, the Board repeated the ALJ's error. The ALJ and Board should have decided the entitlement to Ordinary Disability benefits based on the competent evidence produced at the hearing. If the ALJ had done so



he would have found him to be permanently and totally disabled from the performance of his regular or assigned job duties.

## **LEGAL ARGUMENT**

### **POINT I**

#### **MR. MYERS SUSTAINED HIS BURDEN OF PROOF DEMONSTRATING HE IS PERMANENTLY AND TOTALLY DISABLED FROM PERFORMING HIS JOB AS A COTTAGE TRAINING TECHNICIAN (Aa36-Aa44); (Aa53-Aa141)(2T37:13-15); (2T42:6-12)**

N.J.S.A. 43:15A-42 provides that a member of PERS is eligible for Ordinary Disability Benefits only if the member is permanently and totally disabled from the performance of their regular or assigned job duties. *Ibid.* The applicant bears the burden of proving the existence of a permanent and total disability. Patterson v. Bd. of Trs., State Police Ret. Sys., 194 N.J. 29, 42 (2008). Additionally, the applicant must prove that the disability was “physically or mentally incapacitat[ing] . . . at the time the member left employment.” N.J.A.C. 17:1-6.4. The applicant also “must establish incapacity to perform duties in the general area of his ordinary employment rather than merely showing inability to perform the specific job for which he was hired.” Skulski v. Nolan, 68 N.J. 179, 205-06 (1975).

It is further well-settled that “the 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) (internal citation omitted). In this regard it is within the province of the finder of facts to determine

the credibility, weight, and probative value of the expert testimony. State v. Frost, 242 N.J. Super. 601, 615 (App. Div.), certif. denied, 127 N.J. 321 (1990). “The testimony 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).

Proof of permanent and total disability must include more than petitioner’s subjective testimony. It should include expert witnesses whose testimony is given weight according to whether the expert testifies in his or her own specialty and whether that expert’s conclusions are based on the petitioner’s subjective complaints, a cursory examination, and/or comprehensive medical treatment. The burden of proof in an ordinary disability retirement claim is on the claimant, who must prove his or her claim by a preponderance of the legally competent and credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962); Getty v. Prison Officers’ Pension Fund, 85 N.J. Super. 383, 390 (App. Div. 1964).

The issue to be determined in this matter is whether, at the time of filing his application for disability retirement allowance, Mr. Myers was totally and permanently disabled from performing his normal job duties. (Aa33-Aa35); N.J.A.C. 17:2-6.7(a)2. See, Bueno v. Bd. of Trs., Teachers' Pension & Annuity

Fund, Div. of Pensions & Benefits, 404 N.J. Super. 119, 130 (App. Div. 2008) (finding that a teacher did not meet the necessary burden of proof because the circumstances of her disability were limited to performing a specific job at a specific school, and did not prevent her from performing as a teacher at another school). Because “[m]edicine is an art as well as a science” the fact-finder should look not just at the findings from objective tests, but also look at the subjective evidence, “such as the information provided by patients and the observations of the examining physician, [which] also play an important role in the diagnosis of medical problems.” Ballinger v. PERS, TYP 10256-04, Initial Decision (September 12, 2005), adopted, Bd. of Trs. (Oct. 20, 2005), <http://njlaw.rutgers.edu/collections/oal/>.

Credibility is the value that the fact finder gives to the testimony of a witness – this contemplates an overall assessment of the witness’ story in light of its rationality, internal consistency, and manner in which it “hangs together” with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir., 1963). A fact finder is expected to base decisions of credibility on their common sense, intuition, or experience. Barnes v. United States, 412 U.S. 837 (1973). The credibility of each witness is to be judged separately; but after testing the credibility of each witness’ testimony, In re Polk, 90 N.J. 550 (1982), permits the fact finder, as an additional factor to determine the truth or falsity, to examine the testimony of all witnesses to



determine similarities in their factual allegations. Credibility is not dependent on the number of witnesses and the finder of fact is not bound to believe the testimony of any witness. In re Perrone, 5 N.J. 514 (1950).

In New Jersey, when the medical testimony offered is in conflict, greater weight should be given to the treating physicians, rather testimony from a physician who only conducts a single examination in order to become an expert medical witness. Bober v. Independent Plating Corp., 28 N.J. 160, 167 (1958); Bialko v. H. Baker Milk Co., 38 N.J. Super. 169, 171 (App. Div. 1955).

Dr. Nirav Shah, Board Certified Neuro-Surgeon, specializing in back surgery, testified on behalf of Mr. Myers. Dr. Shah was aware of Mr. Myers job as a CTT, where he had to take care of clients. (Aa33-Aa35). Dr. Shah testified that a person with cervical radiculopathy would be complaining of pain, and pain that would radiate and headaches. (1T49:1-9). These were in fact the complaints Mr. Myers provided his treating doctor, Dr. Matthew Lesneski (Aa53-Aa141) and Dr. Shah (Aa36-Aa44).

Dr. Lomazow testified that there are no diagnostic tests for a headache. (2T36:1-8). He testified that migraine headaches can be debilitating. (2T37:13-15). He also testified that radiculopathy can be debilitating. (2T40:9-12). Dr. Lomazow testified that he was aware that a CTT was a physical type job and would want someone who was responsible for people's lives to be able to focus

and concentrate. (2T40:13-20). Dr. Lomazow knew that Mr. Myers was under the care of a doctor, Dr. Lesneski (Aa53-Aa141), and that he was being prescribed morphine, medical marijuana and a muscle relaxer. (2T42:6-12). Dr. Lomazow admitted that the cocktail of medication would impact a person's ability to focus and concentrate. (2T42:6-12).

In this case, the issue of Mr. Myers ordinary disability rests generally upon an assessment of the credibility of the expert medical witnesses. When medical opinions differ, "[t]heir probative force must be evaluated by a number of factors." Bober v. Indep. Plating Corp., 28 N.J. 160, 167 (1958). As a general rule, "the credibility of the expert and the weight to be accorded his testimony rest in the domain of the trier of fact" consideration is accorded such factors as professional status, the area of expertise and the basis for the conclusions reached. Angel v. Rand Exp. Lines, 66 N.J. Super. 77, 85-86 (App. Div. 196). The testimony of a treating physician who has only seen the patient once. Bialko v. H. Baker Milk Co., 38 N.J. Super. 169, 171 (App. Div. 1955), certify. denied, 20 N.J. 535 (1956); accord, Bird v. Somerset Hills Country Club, 309 N.J. Super. 517, 522-23 (App. Div. 1998); Bober, supra, 28 N.J. at 167.

In this matter, the Court has before it the opinion of a Board Certified Neuro-Surgeon versus that of a neurologist. The Court has the opinion of the treating doctor, Dr. Lesneski (Aa53-Aa141), diagnostic studies (Aa45-Aa52) and

the medical records which demonstrate the medications which were being prescribed to Mr. Myers' by his treating doctors.

Under N.J.S.A. 43:15A-42, an applicant is entitled to ordinary disability retirement benefits upon demonstrating that:

1. They are permanently and totally disabled from the performance of their regular and assigned duties; and
2. The disability is not a result of a willfully negligent act.

Mr. Myers' uncontroverted testimony and medical records establish that he cannot safely perform the essential physical functions of his job including lifting, transferring, and bathing clients due to his neurologic condition, chronic pain, and the debilitating side effects of prescribed medications including morphine. The Board's own expert testified of the impact these medications would have on an individual and how it could negatively impact their ability to work. (2T40:13-20).

In such circumstances, New Jersey courts have held that denying benefits constitutes an abuse of discretion. *Mount*, 233 N.J. Super. at 428. The Board erred in disregarding this consistent, credible evidence. The statutory standard requires evaluating whether an applicant can perform their regular and assigned job duties, not whether other work might be available or accommodations possible. *Bueno v. Bd. of Trs., Teachers' Pension and Annuity Fund*, 404 N.J. Super. 119, 127 (App. Div. 2008). Mr. Myers unequivocally testified there was no light duty option in his role, and the physical demands of lifting, transferring, bathing clients were inherent



and unavoidable. (Aa4); (1T25:10-17). The Board's apparent consideration of hypothetical alternative assignments or speculative light duty work is legally irrelevant and improper.

### **CONCLUSION**

Based on the foregoing arguments, and the competent medical evidence before this Court, Mr. Myers has sustained his burden of proof and demonstrated he is disabled from the performance of his job or any other alternative job his employer could offer, and therefore, is entitled to receive his ordinary disability pension benefits.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Samuel M. Gaylord', is written over a horizontal line.

Samuel M. Gaylord, Esq.

cc: Payal Ved, D.A.G



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VIA eCOURTS

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Re: B.M. v. Board of Trustees, Public Employees'  
Retirement System  
Docket No. A-920-24

On Appeal from a Final Administrative Determination  
of the Board of Trustees, Public Employees'  
Retirement System

**REDACTED** Letter Brief of Respondent, Board of  
Trustees, Public Employees' Retirement System on the  
Merits of the Appeal

Dear Ms. Hanley:

Please accept this redacted letter brief on behalf of Respondent, the Board  
of Trustees, Public Employees' Retirement System ("Board") on the merits of  
the appeal.



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### **PROCEDURAL HISTORY AND STATEMENT OF FACTS**<sup>1</sup>

Appellant B.M.<sup>2</sup> appeals the Board’s October 16, 2024 denial of ordinary disability retirement benefits. (Pa27-29).<sup>3</sup> B.M. was employed by the New Lisbon Developmental Center as a cottage training technician for approximately eleven years. (1T7:9-14). As a cottage training technician, B.M. worked the 7:30 a.m. to 4:00 p.m. shift at Locust Cottage, the highest functioning cottage at New Lisbon Developmental Center. (1T7:10-11; 1T8:3-23; 1T38:4-9). B.M. was responsible for four clients and helped them by monitoring breakfast,

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<sup>1</sup> Because the procedural history and fact are closely related, these sections are combined for efficiency and the court’s convenience.

<sup>2</sup> B.M.’s name is redacted because his appeal contains confidential medical information.

<sup>3</sup> “Pa” refers to B.M.’s appendix; “Pb” refers to his brief. “CRa” refers to the Board’s confidential appendix. “1T” refers to the March 14, 2024 hearing transcript; “2T” refers to the May 10, 2024 hearing transcript.

performing their morning hygiene, and assisting with completing their tasks for the day. (1T8:20-23; 1T9:18-10:3; 1T11:10-19; 1T13:13-23).

In particular, B.M. had one low-functioning client that required additional care and attention. (1T11:20-23). B.M. was required to move that client, who weighed about 160 pounds, between chairs, wheelchairs, and shower chairs throughout his shift. (1T12:10-22). For most of B.M.'s workday, he provided hands-on assistance to the low functioning client with the support of an aide, if there was extra staff available. (1T12:23-13:1). B.M.'s other three clients were higher functioning, so they knew the routine and did not require as much attention. (1T11:15-19; 1T14:7-11).

Sometime around 2013 or 2014, B.M. started experiencing back and neck problems. (1T32:13-18). B.M.'s lower back and neck pain would extend into his arms about halfway to his elbow causing pain and a "[c]onstant tingling" sensation. (1T19:21-25; 1T20:5-11). Prior to submitting his ordinary disability ("OD") retirement application, B.M. had been treated primarily by Matthew J. Lesneski, M.D., anesthesiology and pain medicine, and was receiving branch block injections, physical therapy, and medication. (1T21:4-6; 1T22:3-9; 1T29:9-18; 1T32:23-25). One of the medications Dr. Lesneski prescribed B.M. was morphine, which B.M. has been taking since approximately 2014 or 2015.

(1T22:10-14; 1T33:5-9). Eventually, in 2022, Dr. Lesneski diagnosed B.M. with chronic pain syndrome. (1T33:10-16).

B.M. also began experiencing migraines about ten years earlier, and was treated by neurologist Arun Kachroo, M.D. (1T33:18-24). B.M. began taking medication to treat his migraines prior to applying for OD. (1T33:25-34:7; 1T27:19-21).

B.M. testified that he had experienced a work incident in 2020 where a client threw him to the ground and jumped on his back, which caused a back injury but no concussion. (1T36:3-16). However, Dr. Lesneski's records do not mention any work-related incidents in 2020 or even 2021.<sup>4</sup> (Pa53-141). Further, B.M. did not provide any documentation of an accident report or records from Concentra Medical Center, where he allegedly received physical therapy following the accident. (1T37:1-4; Pa11).

In January 2021, B.M. began experiencing problems "lifting and twisting" at work, which he performed for the low-functioning client at least five times a day. (1T25:10-23). B.M. experienced pain in his lower back and neck. (1T25:24-26:1). In April 2021, B.M. stopped working for New Lisbon Developmental Center. (1T35:2-5). In June 2021, B.M. applied for OD because

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<sup>4</sup> B.M. had mistakenly reported to his expert that this incident occurred on July 1, 2021, but that was actually the date of his retirement. (1T35:15-23).

he “was facing disciplinary charges for missing so much time” from work. (1T26:6-11).

On May 18, 2022, the Board considered and denied B.M.’s application for OD; the Board found B.M. was not totally and permanently disabled from performing his regular and assigned job duties. (Pa5-6). B.M. appealed and the matter was transferred to the Office of Administrative Law. (Pa7). During the hearing, B.M. testified on his own behalf, and presented the testimony of Nirav Shah, M.D. (1T). Steven Lomazow, M.D. testified on behalf of the Board. (2T).

B.M. asserted he was unable to perform his job duties due to the pain in his neck and lower back. (1T25:24-26:1). B.M. did not believe he would be able to perform specific job duties including “the lifting, the twisting, and turning when you have to pull” as a cottage training technician. (1T4:25-5:2; 1T30:14-24). B.M. claimed he was currently experiencing “tingling” in the right side of his lower back and a “clamping” sensation to his neck. (1T18:20-19:20; 1T20:5-22). B.M. was treated primarily by Dr. Lesneski’s office and continued to take the prescribed medications. (1T30:7-9).

B.M.’s expert, Dr. Shah, concluded that B.M. was disabled and cannot return to his pre-injury, unrestricted capacity and that the 2021 work-related injury was a substantial contributing factor to B.M.’s current brain and spine



condition. (1T45:6-10; 1T84:3-10). Yet, Dr. Shah's physical examination of the cervical and lumbar spine did not reveal any significant objective findings. (Pa40-41). Examination of B.M.'s cervical spine showed subjective findings of tenderness and pain on range of motion. (1T70:9-19; 1T54:4-5; 1T56:8-9; Pa40-41). Reflex testing and motor strength testing were normal; there was no spasm in the cervical spine. (1T71:1-3; 1T71:13-14; 1T72:18-20; 1T72:8-10). The Hoffman's test, which is mainly used for spinal cord injuries in the neck, was negative. (1T71:4-9; Pa40). Notably, Dr. Shah did not perform the Spurling's Test, which indicates whether a nerve is pinched in the cervical spine. (1T71:15-72:7). Dr. Shah further explained that "what really matters is what the patient's complaints are versus what the documentation is." (1T71:20-22).

According to Dr. Shah, examination of the lumbar spine revealed subjective findings of tenderness and limited range of motion. (1T72:11-15). The only objective finding in the lumbar spine was a mild spasm. (1T72:16-17). Motor strength and sensory testing were normal. (1T72:18-20). As with the cervical spine, Dr. Shah did not test for radiculopathy. (1T72:21-73:9). Specifically, he did not perform the Straight Leg Raising Test, because he had "the benefit of the MRI, [B.M.'s] symptoms, the diagnoses of other treating providers. [B.M.] clearly has lumbar radiculopathy. No need to reproduce that and give more pain and suffering to a patient when we already know the

diagnosis.” (1T72:21-73:4). Dr. Shah also did not perform the Sitting Root Sign Test because “it was obvious to [him] that [B.M.] had radiculopathy.” (1T73:5-9).

In addition to the physical examination, Dr. Shah reviewed the MRI of the lumbar spine dated July 14, 2021 (“2021 MRI”). (1T73:15). Dr. Shah noted a herniation at the L5-S1, but also qualified that the MRI showed age-related, normal degenerative changes. (1T73:16-18; 1T75:14-16). With respect to clinically correlating the results of the MRI with his hands-on examination, Dr. Shah opined that the presence of mild spasm in the lumbar spine substantiated the diagnosis of herniation and radiculopathy. (1T76:2-18).

After his examination and review of the records, Dr. Shah diagnosed B.M. with “[c]oncussion with persistent post-concussive syndrome”; “[m]ild traumatic brain injury”; and “[p]osttraumatic spinal injuries, neck and back.” (1T76:19-22; Pa41). Dr. Shah’s post-concussive syndrome diagnosis was based on B.M.’s “escalating migraine condition.” (1T77:6-21). Dr. Shah conceded that there was no “exact verbiage” in the medical records diagnosing B.M. with a concussion, but said there were “hints” at it. (1T77:22-78:2). Notably, Dr. Shah did not list migraines as one of the diagnoses, but claimed it falls beneath “the umbrella of the mild traumatic brain injury.” (1T78:20-25). Dr. Shah also

conceded he did not review any MRI of the cervical spine, CT or CAT scans of the brain, or Dr. Kachroo's records. (1T68:7-14; 1T77:3-5; 1T78:16-19).

Dr. Shah confirmed that he relied on B.M.'s subjective statements to determine if he met the criteria for a concussion. (1T82:13-15). Furthermore, while Dr. Shah opined "[B.M.] sustained post traumatic brain and spine injuries that were causally related to the that prior accident," he did not identify any reference to a workplace accident or incident in Dr. Lesneski's treatment notes in his report. (1T79:5-20; Pa36-44). Additionally, although Dr. Shah referred to "contemporaneous treatment records" to support his diagnoses, his report did not identify which records he was referring to. (1T80:19-82:1; Pa43).

In contrast to Dr. Shah, the Board's expert, Dr. Lomazow, testified there was "no evidence" B.M. was totally and permanently disabled from a neurological standpoint. (2T27:24-28:8; CRa3). Dr. Lomazow noted the side effects B.M. experienced from taking a "cocktail of medications" could not be considered total and permanent disabilities. (2T45:7-16). Dr. Lomazow's neurological examination, which tested the cranial nerves, was normal. (2T21:13; 2T22:5-24). Dr. Lomazow performed motor function testing, reflex testing, and sensory testing. (2T22:24-23:2). He also tested for an "impingement in the brain or spinal cord." (2T23:3-4). Following these tests, Dr. Lomazow looked for a "Babinski Sign" which is usually found in patients

with central nervous system disease. (2T23:3-6). Next, Dr. Lomazow observed B.M.'s gait, to see if there was a "characteristic gait[] of people with back or hip pain." (2T23:8-10). Lastly, Dr. Lomazow performed a mental examination, which is a superficial exam that looks to see if the patient appears anxious or depressed. (2T12:22-13:2). None of Dr. Lomazow's testing produced any positive or remarkable objective results. (2T23:17-23). Dr. Lomazow was not able to corroborate B.M.'s subjective complaints of pain. (2T23:20-24:9).

With respect to migraine testing, Dr. Lomazow explained that there is no one specific test for migraines and headaches. (2T24:10-25:1). The diagnosing doctor has to look at the history of the patient, the neurologic examination results, and the patient's response to medications if applicable. (2T24:14-17; 2T37:5-7). Dr. Lomazow further explained that migraines are a disease usually found among young people. (2T16:3-7; 2T24:16-17). When headaches develop later in life, it is "almost always" a result of degenerative disease of the spine. (2T24:17-19). However, Dr. Lomazow did not believe B.M. had migraines based on his age. (2T24:23-24). Further, Dr. Lomazow agreed with Dr. Kachroo's opinion that B.M.'s headaches are not disabling. (2T15:8-16:7). Dr. Lomazow also noted that Dr. Kachroo, who was treating B.M. for headaches, did not indicate post-concussion syndrome or any type of brain injury in his reports. (2T15:13-22; Pa45-46).

Dr. Lomazow explained that some of findings in the 2021 MRI by the radiologist were age-related degenerative changes. (2T19:11-20:8; 2T20:9-15). Dr. Lomazow also noted that the “nooks and crannies” visible in the MRI of the lumbar spine are seen “on everybody.” (2T20:3-8). He testified that there “is no such thing” as a “Normal MRI” after the age of forty. (2T19:14-16). The results of B.M.’s neurologic examination did not clinically correlate to the findings in the MRI because B.M. “had a very normal neurological examination.” (2T21:7-13).

On March 17, 2022, Dr. Lomazow prepared an addendum because he was provided additional medical records. (2T28:9-15; CRa4-5). He was primarily provided with additional records from Dr. Lesneski’s office. (2T28:12-18). He noted that none of these records mentioned a post-concussion syndrome or a traumatic brain injury diagnosis. (2T28:23-29:23).

On September 5, 2023, Dr. Lomazow prepared a second addendum after receiving additional records from Dr. Shah. (2T30:14-24; CRa6). Dr. Lomazow noted that Dr. Shah diagnosed “aggravation of injury to the cervical spine” but he had not reviewed an MRI “to see what was before and what is now” to support this diagnosis. (2T32:25-33:3). Additionally, Dr. Lomazow noted that there was nothing in Dr. Shah’s report to support the “concussion with persistent post-

concussive syndrome” and “mild traumatic brain injury” diagnoses. (2T33:4-10).

On September 20, 2024, the ALJ issued an initial decision and affirmed the Board’s denial of B.M.’s application for OD retirement benefits. (Pa8-24). The ALJ found that B.M. was credible, but “only to a certain degree” because “based upon a review of the medical records, he magnified his symptoms, the onset of those symptoms, and how they affect his ability to perform his job duties.” (Pa18). The ALJ found B.M. did not provide any documentation of an accident report or treatment records from the alleged work accident, nor was there any indication that this incident was reported to the Human Resources Department. (Pa11). The ALJ also noted in Dr. Lesneski’s reports from February 2022, B.M. had complained that he had a rough few days after helping his brother move, his back pain was tolerable, he stretches daily, and the medications provide relief for daily functioning. (Pa17).

With respect to the experts, while the ALJ found that both experts were qualified, Dr. Shah’s opinion lacked objective evidence because he did not perform testing for radiculopathy and because he relied heavily on B.M.’s subjective statements. (Pa19). In contrast, because Dr. Lomazow relied on objective evidence and was consistent with the treatment records, the ALJ found Dr. Lomazow’s opinion to be more persuasive. (Pa19-20). In particular, the



ALJ noted that Dr. Lesneski's treatment records lacked the objective evidence of a total and permanent disability and contained many of B.M.'s subjective complaints. (Pa18). Accordingly, the ALJ determined B.M. did not satisfy his burden of proving that he was totally and permanently disabled from the performance of his duties. (Pa21). The petition was dismissed and the Board's decision to deny OD to B.M. was affirmed. (Pa21).

At its meeting of October 16, 2024, the Board adopted the initial decision affirming the Board's denial of B.M.'s application for OD retirement benefits. (Pa25). This appeal followed.

### **ARGUMENT**

#### **THE BOARD'S DENIAL OF ORDINARY DISABILITY RETIREMENT BENEFITS IS REASONABLE AND SUPPORTED BY SUBSTANTIAL CREDIBLE EVIDENCE.**

Judicial "review of administrative agency action is limited." Russo v. Bd. of Trs., Police & Firemen's Ret. Sys., 206 N.J. 14, 27 (2011). "An administrative agency's final quasi-judicial decision will be sustained unless there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record." Ibid. (quoting In re Herrmann, 192 N.J. 19, 27 (2007)). "The burden of demonstrating that the agency's action was arbitrary, capricious or unreasonable rests upon the [party] challenging the

administrative action.” In re Arenas, 385 N.J. Super. 440, 443-44 (App. Div. 2006).

The weight accorded to expert testimony “is within the competence of the fact-finder.” LaBracio Fam. P’ship v. 1239 Roosevelt Ave., Inc., 340 N.J. Super. 155, 165 (App. Div. 2001). “The choice of accepting or rejecting testimony of witnesses rests with the administrative agency, and where such choice is reasonably made, it is conclusive on appeal.” Oceanside Charter Sch. v. N.J. State Dep’t of Educ., 418 N.J. Super. 1, 9 (App. Div. 2011) (quoting In re Application of Howard Sav. Bank, 143 N.J. Super. 1, 9 (App. Div. 1976)). “A reviewing court ‘may not substitute its own judgment for the agency’s, even though the court might have reached a different result.’” In re Stallworth, 208 N.J. 182, 194 (2011) (quoting In re Carter, 191 N.J. 474, 483 (2007)). Thus, deference is particularly appropriate when the Board has adopted the findings of the ALJ because the ALJ had the opportunity to hear “live testimony” and “judge the witnesses’ credibility.” Clowes v. Terminix Int’l, Inc., 109 N.J. 575, 587 (1988).

To qualify for ordinary disability retirement benefits, a Public Employees’ Retirement System (“PERS”) member must prove he “is physically or mentally incapacitated for the performance of duty and should be retired.” N.J.S.A. 43:15A-42. The applicant “has the burden to prove that he or she has a disabling

condition and must produce expert evidence to sustain this burden.” Bueno v. Bd. of Trs., Teachers’ Pension & Annuity Fund, 404 N.J. Super. 119, 126 (App. Div. 2008) (citing Patterson v. Bd. of Trs., State Police Ret. Sys., 194 N.J. 29, 50-51 (2008)). The applicant must meet “an extraordinarily high threshold that culls out all minor injuries; all major injuries that have fully resolved; all partial or temporary disabilities; and all cases in which a member can continue to work in some other capacity.” Patterson, 194 N.J. at 43 (quoting Richardson v. Bd. of Trs., Police & Firemen’s Ret. Sys., 192 N.J. 189, 195 (2007)).

Based on the record presented below, the Board reasonably denied B.M.’s application for ordinary disability retirement benefits because he failed to offer expert testimony based on objective findings to establish that he was totally and permanently disabled. The ALJ’s reasonably found Dr. Lomazow’s credible testimony deserved greater weight than Dr. Shah’s testimony because it was more persuasive and consistent with B.M.’s medical history; this finding warrants deference. See Angel v. Rand Express Lines, Inc., 66 N.J. Super. 77, 86 (App. Div. 1961) (finding the weight granted to medical evidence and expert testimony depends on such factors as whether the expert witness testified in his or her specialty and whether the expert’s opinions and conclusions are based only on subjective, rather than objective, medical evidence). Further, an ALJ’s credibility determinations are entitled to deference on appeal because only the

factfinder has had the benefit of directly observing a witness's demeanor and other details that are not transmitted in transcripts and documentary evidence. In re Taylor, 158 N.J. 644, 660 (1999).

Thus, on the record presented, the ALJ reasonably determined that Dr. Lomazow's testimony was more credible and persuasive. (Pa20). Dr. Lomazow's complete and thorough examination on January 10, 2022, did not reveal any objective findings sufficient to establish a total and permanent disability at the time B.M. left employment in April 2021. (CRa3). In addition, Dr. Lomazow's opinion that B.M. was not totally and permanently disabled is corroborated by B.M.'s own treating physicians and the 2021 MRI. (Pa46; 2T15:8-16:7; 2T21:7-13). Dr. Kachroo, who treated B.M.'s headaches, noted that he was not treating B.M. for disabling pain. (Pa46). Dr. Kachroo's opinion is consistent with Dr. Lomazow's opinion that the headaches B.M. suffered were not disabling and would not alter his ability to perform his job duties. (2T15:8-16:7). With respect to the 2021 MRI, Dr. Lomazow was not able to clinically correlate with the findings with objective testing because he had "a very normal neurologic examination." (2T21:7-13).

Dr. Shah, on the other hand, failed to perform a complete objective examination. He did not conduct the Spurling's test, the Straight Leg Raising test, or the Sitting Root Sign test to confirm radiculopathy in the cervical spine

and lumbar spine. (1T71:15-73:9) Dr. Shah assumed the 2021 MRI, B.M.'s symptoms, and the treating physicians' diagnoses were sufficient evidence to diagnose lumbar radiculopathy. (1T72:24-73:2). Dr. Shah claimed performing these tests would only cause unnecessary pain to the patient. (1T73:2-4). The only remarkable objective result from Dr. Shah's examination was the presence of a mild spasm in the lumbar spine. (1T49:9-19; 1T54:5-9; Pa41). Dr. Shah opined that the presence of a mild spasm supported his radiculopathy diagnoses. (1T62:14-20; 1T76:13-18). Dr. Shah's testing did not produce any objective results in the cervical spine.

Moreover, Dr. Shah diagnoses were not based on objective testing results or his observations of B.M. (1T76:24-78:25). Instead, the diagnoses were based solely on B.M.'s subjective statements and the alleged work incident. (1T76:24-78:25; Pa 41-44). Dr. Shah even conceded that "what really matter[ed]" was the patient's complaints. (1T71:20-22). Despite not seeing any documents or treatment records surrounding the workplace incident, Dr. Shah concluded based off of B.M.'s subjective statements that B.M. suffered from concussion with persistent post-concussive syndrome, mild traumatic injury, and posttraumatic spinal injuries. (Pa12-13; Pa19; 1T76:24-78:25; Pa41-44).

Similarly, Dr. Shah failed to review many of B.M.'s previous medical records and failed identify exactly which records he referenced to support his

conclusions. (Pa36-44). Specifically, Dr. Shah made diagnoses about B.M.'s head and neck without sufficient objective evidence. In fact, Dr. Shah only reviewed Dr. Lesneski's records, which do not contain any treatment records related to a concussion or post-concussive syndrome, or even migraines.<sup>5</sup> (Pa36-41; Pa53-141). In many of Dr. Lesneski's reports, under the review of systems section, indicate that "no migraine" is reported. (Pa99; Pa102; Pa105; Pa107; Pa119; Pa137).

Dr. Shah also conceded that there was no "exact verbiage" in the treatment records diagnosing B.M. with a concussion to support his post-concussive syndrome diagnosis. (1T77:22-78:2). In fact, he claimed there were "hints" at a concussion in the reports. (1T77:22-78:2). However, Dr. Shah qualified that this conclusion was based on B.M.'s subjective statements. (1T82:2-20). Dr. Shah claimed that his neurological diagnoses were based on the "escalating migraine condition," but the only reference to migraines were notes in Dr. Lesneski's records that B.M. received treatment for migraines from another physician. (1T77:6-21; Pa59; Pa81; Pa94; Pa97; Pa100; Pa103; Pa106; Pa122; Pa125; Pa136). Dr. Shah's report reveals that he did not review Dr. Kachroo's

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<sup>5</sup> Dr. Lesneski's records note that B.M. was treating with Dr. Kachroo for migraines, but there is no indication that Dr. Lesneski's office was treating B.M. for migraines. (Pa59; Pa81; Pa94; Pa97; Pa100; Pa103; Pa106; Pa122; Pa125; Pa136).

reports and his testimony indicates he believes he did not have them. (Pa36-44; 1T68:7-14).

Ultimately, based on this record, the ALJ reasonably determined Dr. Lomazow's opinion deserves greater weight than Dr. Shah's opinion because Dr. Lomazow relied on clinical findings of the objective medical tests to support the conclusion that B.M. is not totally and permanently disabled. (Pa19-20). In contrast, Dr. Shah's opinion was based on B.M. subjective complaints regarding his pain, absent any objective findings. (Pa19). Dr. Shah even stated that his main concern is the patient's complaints over the patient's records. (1T71:20-22). In adopting this approach, Dr. Shah inevitably gave more weight to B.M.'s subjective complaints and failed to explain how his clinical findings led to the conclusion that B.M. was totally and permanently disabled. Dr. Shah's conclusions contradict the clinical findings of his own examination, which was incomplete and limited.

Finally, the ALJ reasonably determined B.M.'s testimony regarding his symptoms and his ability to perform his job duties was not credible. (Pa18). B.M. inconsistently provided information to Dr. Shah and Dr. Lomazow. (1T65:10-25; 2T14:4-13; 2T31:9-20). B.M. informed Dr. Shah of his alleged 2020 work incident, but never mentioned this alleged incident to Dr. Lomazow, even though Dr. Lomazow examined him well over a year before Dr. Shah.

(1T65:10-25; 2T14:4-13; 2T31:9-20). Further, Dr. Lomazow was not provided any information regarding the alleged incident even when B.M. provided additional medical records for addendum reports. (CRa4-6). B.M. also did not provide any incident report or treatment records contemporaneous to the alleged incident. (Pa11). In fact, none of the treatment records provided refer to the alleged incident.

Along with not providing documentation about the alleged 2020 work incident or reporting it to Dr. Lomazow during his examination, B.M.'s own statements indicate he was not disabled. For example, B.M. told Dr. Lesneski that he helped his brother move and his medication allowed him to perform his activities of daily living in February 2022 approximately eight months after he left employment and applied for ordinary disability retirement benefits in June 2021. (Pa17; Pa1). Accordingly, the Board reasonably determined, based on the lack of credibility of B.M.'s testimony and the lack of any objective evidence from Dr. Shah, that B.M. did not satisfy his burden of proving he was totally and permanently disabled. (Pa21; Pa25).



**CONCLUSION**

For these reasons, the Board's decision should be affirmed.

Respectfully submitted,

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