FILED, Clerk of the Appellate Division, September 01, 2025, **A-002143-24**, **AMENDED**

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: A-002143-24 T2

KIMBERLY LEFTWICH,

Appellant,

V.

PUBLIC EMPLOYEES' RETIREMENT SYSTEM

Respondent.

Civil Action

On Appeal from

Initial Decision dated December 27, 2024 under OAL Docket No. TYP 08967-24 upheld by The Board of Trustees of the Public Employee's Retirement System On March 20, 2025.

Sat below:

Hon. Mary Ann Bogan, ALJ

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TABLE OF CONTENTS

COVER PAGE. i

TABLE OF CONTENTS. ii

TABLE OF AUTHORITIES. iii

TABLE OF JUDGMENTS, ORDERS AND RULINGS. v

TABLE OF CONTENTS TO APPENDIX. vi

INDEX TO TRANSCRIPTS. viii

PRELIMINARY STATEMENT. 1

PROCEDURAL HISTORY. 2

STATEMENT OF FACTS. 3

STANDARD OF REVIEW. 4

LEGAL ARGUMENT

THE ALJ'S POST-REMAND DECISION IS FUNDAMENTALLY FLAWED BECAUSE IT RELIES ON MEDICAL OPINIONS THAT DIRECTLY CONTRADICT THE BOARD'S UNDISPUTED FINDING THAT MS. LEFTWICH IS PERMANENTLY AND TOTALLY DISABLED(Aa4-Aa6)(Aa49-Aa50)(Aa51-Aa60) 9

POINT II

MS. LEFTWICH HAS SUSTAINED HER BURDEN AND DEMONSTRATED HER DISABILITY WAS SUBSTANTIALLY CAUSED BY THE SEPTEMBER 1, 2015 INCIDENT (Aa41-Aa43)(Aa44-Aa48)(Aa49-Aa50)(Aa51-Aa60). . . 13

CONCLUSION. 24

FILED, Clerk of the Appellate Division, September 01, 2025, A-002143-24, AMENDED

TABLE OF AUTHORITIES

CASES CITED

Allstars Auto. Grp., Inc. v. N.J. Motor Vehicle Comm'n, 234 N.J. 150, 157 (2018) 4, 5

Angel v. Rand Express Lines Inc., 66 N.J. Super 77 (App. Div. 1961). 7, 15

Bialko v. H. Baker Milk Co., 38 N.J. Super., 169, 171 (App. Div. 1955), certif. denied, 20 N.J. 535 (1956) 14

Bueno v. Bd. of Trs., Tchrs.' Pension & Annuity Fund, 404 N.J. Super. 119 (App. Div. 2008). 6,10

Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963) . . . .

Cattani v. Board of Trustees, 69 N.J. 578 (1976) 10,12

Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958). 13

Gerba v. Board of Trustees of the Public Employees' Retirement System, 83 N.J. 174, 186-87 (1980) 10,11

In re Herrmann, 192 N.J. 19, 28 (2007) 5

In re Pub. Serv. Elec. & Gas Co., 35 N.J. 358, 376 (1961). 6

In re Stallworth, 208 N.J. 182, 194 (2011) 4

In re Taylor, 158 N.J. 644, 657 (1999) 6

Johnson v. Salem Corp., 97 N.J. 78, 91 (1984). 7,14

Korelina v. Board of Trustees of the Public Employees' Retirement System, 83 N.J. 163 (1980) 11

FILED, Clerk of the Appellate Division, September 01, 2025, **A-002143-24**, **AMENDED**

Lavezzi v. State, 219 N.J. 163, 171 (2014). 5

Patterson v. Bd. of Trs., State Police Ret. Sys., 194 N.J. 29, 42 (2008). 6, 8

Petrucelli v. Board of Trustees of the Public Employees' Retirement System, 211 N.J. Super. 280 (App. Div. 1986) 11,12,16,18

Richardson v. Board of Trustees, Police and Firemen's Retirement System, 192 N.J. 189 (2007) 8,9,10,12

Russo v. Bd. of Trs., Police & Firemen's Ret. Sys., 206 N.J. 14, 27 (2011) 4

Saccone v. Bd. of Trs., Police & Firemen's Ret. Sys., 219 N.J. 369, 380 (2014) 4

Sager v. O.A. Peterson Const., Co., 182 N.J. 156, 164 (2004) 5,7

Smith v. John L. Montgomery Nursing Home. 327 N.J. Super. 575, 579 (App. Div. 2000). 7

State v. Frost, 242 N.J. Super. 601, 615 (App. Div. 1990), certif. denied, 127 N.J. 321 (1990) 7,14

Zimmerman v. Sussex Cnty. Educ. Servs. Comm'n, 237 N.J. 465, 475 (2019) 4

STATUTES CITED

N.J.A.C. 17:1-6.4 6

N.J.S.A. 43:15A-42 6

N.J.S.A. 43:15A-43 8

FILED, Clerk of the Appellate Division, September 01, 2025, **A-002143-24**, AMENDED

TABLE OF JUDGMENTS, ORDERS AND RULINGS

December 13, 2018 Initial Board of Trustees
Public Employee Retirement System Letter to
Kiberly Leftwich. Aa4-Aa6

September 6, 2022 Initial Decision of Honorable
Mary Ann Bogan, ALJ Aa10-Aa27

October 25, 2022, Letter of the Board of Trustees of the
Public Employees Retirement System
Upholding the Initial Decision. Aa28-Aa29

December 27, 2024, Second Decision of Honorable
Mary Ann Bogan, ALJ Aa77-Aa97

March 20, 2025, Letter of Board of Trustees of the
Public Employees Retirement System
Upholding the Second Decision Aa98-Aa99

FILED, Clerk of the Appellate Division, September 01, 2025, **A-002143-24**, **AMENDED**

TABLE OF APPENDIX

Aa Reference	Description	
Aa1-Aa3	October 2, 2017 Application for Accidental Disability Pension.	2
Aa4-Aa6	December 13, 2018 Initial Board Denial Letter . . .	2
Aa7-Aa8	December 24, 2018, Letter to Board Requesting Transfer to Office of Administrative Law.	2
Aa9	February 27, 2019, Letter Transferring To The Office of Administrative Law.	3
Aa10-Aa27	September 6, 2022 Initial Decision of Honorable Mary Ann Bogan, ALJ.	3
Aa28-Aa29	October 25, 2022 Letter Board of Trustees of the Public Employees Retirement System Upholding the Initial Decision.	3
Aa30-Aa37	Notice of Appeal and Civil Case Information Statement dated December 4, 2022.	3
A38-Aa40	New Jersey Civil Service Job Description	3
Aa41-Aa43	Employer First Report of Accident	4
Aa44-Aa47	Dr. Joan O'Shea Medical Report	4
Aa48	Dr. Steven Kirshner Report	4
Aa49-Aa50	Dr. Laura Ross Medical Exam by Person Physician .	4

FILED, Clerk of the Appellate Division, September 01, 2025, **A-002143-24**, **AMENDED**

TABLE OF APPENDIX PAGE 2

Aa51-Aa60	March 31, 2020, Dr. David Weiss Report	1, 12, 14
Aa61	June 23, 2016 Cervical MRI	17
Aa62-Aa64	November 4, 2016 EMG	17
Aa65-Aa76	March 20, 2024, Appellate Division Opinion. . . .	3
Aa77-Aa97	December 27, 2024 ALJ Bogan's Opinion	3
Aa98-Aa99	March 20, 2025, Board upholding ALJ's Decision . .	3
Aa100-Aa105	March 21, 2025, Notice of Appeal and Case Information Statement	3

FILED, Clerk of the Appellate Division, September 01, 2025, **A-002143-24**, **AMENDED**

INDEX TO TRANSCRIPTS

1T February 2, 2021, testimony of Kimberly Leftwich and Dr. David Weiss Before Honorable Mary Ann Bogan, ALJ

2T May 20, 2021, testimony of Dr. Andrew Hutter Before Honorable Mary Ann Bogan

PRELIMINARY STATEMENT

Kimberly Leftwich requests this Court reverse the decision of the Board of Trustees of the Public Employees Retirement System (the "Board"), for a second time, denying her application for Accidental Disability Retirement Benefits.

The Board's decision does not warrant this Court's discretion as it fails to rely on credible evidence in the record. Judge Mary Ann Bogan (the "ALJ") this time relied on opinions suggesting Ms. Leftwich was able to return to work full duty in order to support the conclusion that her condition was degenerative ignoring the Board's position which was that Ms. Leftwich was disabled. The judge choose to rely on opinions of Ms. Leftwich's treating Physicians, Dr. O'Shea and Dr. Kirshner, at certain times during their care and not their ultimate opinions outlined in the documentation. (Aa44-Aa48). By relying on selected medical documents at certain times the Judge supports what she wants the conclusion to be which is Ms. Leftwich had a degenerative condition which "likely would not have remained asymptomatic," despite there being no medical proof supporting that position. (Aa24).

The Board's decision is based upon the ALJ's opinion whose lynchpin was that simply because there was some degenerative findings in the medical evidence subsequent to the work accident, and at certain times the doctors felt she could return to work, the disability was an aggravation of a pre-existing condition.

However, there is no medical proof pre-dating the work injury. There is no proof she was having any issue performing any aspect of her job prior to the work accident, and if the Board's position were given any credence it creates a path to deny any pension member their benefits because any member eligible for disability pension benefits would have some degenerative process occurring despite whether or not there is a specific work accident. What the ALJ failed to consider was whether the work accident, despite the degenerative findings, was the substantial cause of her disability. Her failure to discuss that issue, along with her unsupported conclusion that Ms. Leftwich's degenerative condition would not have remained 'asymptomatic", is exactly what allows this Court to review this agency's decision.

PROCEDURAL HISTORY

On October 2, 2017, Ms. Leftwich applied for her Accidental Disability Pension. (Aa1-Aa3). On December 13, 2018, the Board of Trustees considered and denied Ms. Leftwich's application for Accidental Disability Retirement Benefits (ADRB), but determined that she was totally and permanently disabled from the performance of her job and granted Ordinary Disability Retirement Benefits. (Aa4-Aa6).

In rendering its decision, the Board determined that the incident described as occurring on September 1, 2015 was identifiable to time and place, was

undesigned and unexpected, occurred during and as a result of Petitioner's regular and assigned duties and was also not the result of Ms. Leftwich's willful negligence. Further, the Board determined that although the event was caused by an external circumstance, Ms. Leftwich's disability was the result of a pre-existing disease alone or a pre-existing disease that was aggravated or accelerated by the work effort. (Aa4-Aa6). On December 24, 2018, Ms. Leftwich appealed the Board's decision. (Aa7-Aa8). The matter was transferred to the Office of Administrative law on February 27, 2019. (Aa9). On September 6, 2022, the ALJ rendered her decision. (Aa10-Aa27). The Board, on October 25, 2022, upheld the ALJ's decision. (aa28-Aa29). Petitioner's appeal commenced on December 4, 2022. (Aa30-Aa37). On March 20, 2024, this Court rendered its decision and remanded the matter back to the pension board. (Aa65-Aa76). The matter was then transferred back to Judge Bogan who authored another opinion denying Ms. Leftwich her benefits on December 27, 2024. (Aa77-Aa97). On March 20, 2025, the Board upheld the judges decision (Aa98-Aa99), and on March 21, 2025, this appeal was filed. (Aa100-Aa105).

STATEMENT OF FACTS

Ms. Leftwich was employed at New Lisbon as a Senior Therapy Program Assistant. 1T8:9-19; (Aa38-Aa40). Prior to working at New Lisbon Ms. Leftwich was employed at Ewing Residential. 1T9:1-7. As a Senior Therapy Program

Assistant at New Lisbon, she was an event planner and created the programs for the activities for the women's unit. 1T9:8-13. She would plan their luncheons, holiday planning, clothes shopping, and other such activities. 1T9:17-19. She would work eight hour shifts but the timing of her shift would change to meet the criteria of the unit. 1T10:10-17. There were approximately 25 to 30 patients in the women's unit at New Lisbon. 1T11:2-4. Prior to 2015, Ms. Leftwich was not having trouble with her neck or left shoulder. 1T12:18-21.

On September 1, 2015, Ms. Leftwich was in the unit preparing for an outing. (1T13:7-11). While kneeling down a patient came up behind Ms. Leftwich and attacked her. (1T13:10-18). Ms. Leftwich was struck more than five times, (1T23:24-24:3), and also grabbed by her hair. (1T14:1-3). Ms. Leftwich followed proper procedure and reported to the nurse and filled out an incident report. (1T14:1-8); (Aa41-Aa43). She was then sent to the infirmary. (1T16:11-16). Ms. Leftwich returned to work. (1T27:1-17). Ms. Leftwich continued to work despite having pain, swelling, and soreness. (1T27:20-24). Ms Leftwich went on to receive medical treatment with Dr. O'Shea and Dr. Kirshner. (Aa44-Aa48). Finally, in December of 2016, her treating orthopedic doctor, Dr. Laura Ross, completed a Medical Examination By a Personal or Treating Physician Form opining she was disabled and that her disability was directly caused by the work

injury; (Aa49-Aa50), an opinion supported by the medical evidence and Dr. Weiss' opinion. (Aa51-Aa60).

STANDARD OF REVIEW

Judicial review of quasi-judicial agency determinations is limited. Allstars Auto. Grp., Inc. v. N.J. Motor Vehicle Comm'n, 234 N.J. 150, 157 (2018) (citing Russo v. Bd. of Trs., Police & Firemen's Ret. Sys., 206 N.J. 14, 27 (2011)).

"[A]n appellate court reviews agency decisions under an arbitrary and capricious standard." Zimmerman v. Sussex Cnty. Educ. Servs. Comm'n, 237 N.J. 465, 475 (2019) (citing In re Stallworth, 208 N.J. 182, 194 (2011)). "An agency's determination on the merits '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.'" Saccone v. Bd. of Trs., Police & Firemen's Ret. Sys., 219 N.J. 369, 380 (2014) (quoting Russo, 206 N.J. at 27). The party challenging the administrative action bears the burden of making that showing. Lavezzi v. State, 219 N.J. 163, 171 (2014).

On appeal, the judicial role in reviewing all administrative action is generally limited to three inquiries:

> (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.
>
> [Allstars Auto. Grp., 234 N.J. at 157 (quoting Stallworth, 208 N.J. at 194).]

"When an agency's decision meets those criteria, then a court owes substantial deference to the agency's expertise and superior knowledge of a particular field." In re Herrmann, 192 N.J. 19, 28 (2007). "Deference controls even if the court would have reached a different result in the first instance." Ibid.

"An appellate court may not 'engage in an independent assessment of the evidence as if it were the court of first instance.'" Sager v. O.A. Peterson Const., Co., 182 N.J. 156, 164 (2004) (quoting State v. Locurto, 157 N.J. 463, 471 (1999)). If "an appellate court finds sufficient credible evidence in the record to support the agency's conclusions, that court must uphold those findings, even if the court believes that it would have reached a different result." Ibid. (citing In re Taylor, 158 N.J. 644, 657 (1999)). Sufficient or substantial credible evidence, in this context, is defined as

"such evidence as a reasonable mind might accept as adequate to support a conclusion." In re Pub. Serv. Elec. & Gas Co., 35 N.J. 358, 376 (1961).

A member of the Public Employees' Retirement System (PERS) is eligible for accidental disability retirement benefits if he or she is "physically or mentally incapacitated for the performance of duty and should be retired." N.J.S.A. 43:15A-42; N.J.A.C. 17:2-6.7(a)(2). The burden is on the member to establish "he or she has a disabling condition," and the member "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 v. Bd. of Trs., State Police Ret. Sys., 194 N.J. 29, 50-51 (2008)). Importantly, the member must also show the disabling condition is total and permanent. See Bueno, 404 N.J. Super. at 124; Patterson, 194 N.J. at 42.

This Court only needs to consider whether the Board's finding that petitioner's disability was an aggravation of a pre-existing condition, and that the work injury was not the substantial cause of her disability, could have been reached on sufficient credible evidence in the record? If not, did petitioner show by a preponderance of the credible evidence that the work assault was the substantial cause of her disability?

"The credibility of [an] expert and the weight to be accorded [their] testimony rests in the domain of the trier of fact." Angel v. Rand Express Lines, Inc., 66 N.J. Super. 77, 85-86 (App. Div. 1961). The evidence of a single witness standing alone, if believed, may constitute sufficient credible evidence. See, e.g., Sager, 182 N.J. at 164; Smith v. John L. Montgomery Nursing Home. 327 N.J. Super. 575, 579 (App. Div. 2000).

It is noted 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). 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. 1990), certif. denied, 127 N.J. 321 (1990); Angel, 66 N.J. Super at 86.

Here, the ALJ, and the Board, took out their crystal ball and determined, without any medical support, that Ms. Leftwich's condition would have been disabling someday, and therefore, her disability was caused by an aggravation of a pre-existing condition, (Aa24), and the work accident was not the substantial cause of her disability. (Aa24). This is the very reason this Court can review this matter. This conclusion is reached and upheld with no medical evidence in support of the theory. Prior to the work accident, she had no trouble doing any

FILED, Clerk of the Appellate Division, September 01, 2025, **A-002143-24**, **AMENDED**

aspect of her job. She was not under the care of any doctor for her neck and shoulder, and to conclude it would have just happened anyway is unsupported by the medical evidence, and supports the proposition older pension members need not apply because they would not be eligible for Accidental Disability Pension benefits because of some degenerative process occurring.

LEGAL ARGUMENT

POINT I

THE ALJ'S POST-REMAND DECISION IS FUNDAMENTALLY FLAWED BECAUSE IT RELIES ON MEDICAL OPINIONS THAT DIRECTLY CONTRADICT THE BOARD'S UNDISPUTED FINDING THAT MS. LEFTWICH IS PERMANENTLY AND TOTALLY DISABLED(Aa4-Aa6)(Aa49-Aa50)(Aa51-Aa60)

The legal cornerstone of this case—binding on both the agency and the administrative tribunal—is the Board of Trustees' December 13, 2018 determination that Petitioner Kimberly Leftwich *is permanently and totally disabled* from the performance of her regular duties. (Aa4-Aa6). That finding, which formed the basis of its award of ordinary disability retirement benefits, is not in dispute and was not reversed on appeal. (Aa65-Aa76).

Notwithstanding this foundational determination, Judge Bogan, in her remand opinion dated December 27, 2024, (Aa77-Aa97) inexplicably gives weight to medical expert opinions—namely those of Dr. O'Shea, Dr. Kirshner, and Dr. Ross—which conclude that Ms. Leftwich was "not disabled" and could perform

full work duties without restriction. These conclusions, upon which the judge relies in rejecting Dr. Weiss's opinion, are irreconcilable with the Board's own final decision acknowledging total and permanent disability. Further, the Judge's reliance on these doctors opinion's that she could return to work doesn't further explain the dates in time when those opinions were made. Thus, the Judge concludes that her pre-existing condition is what makes her totally disabled. Ms. Leftwich returned to work and continued to receive medical care because she wanted to work and not have to pension out. The Judge's selective reliance on opinions in time during the treatment demonstrate her bias and determination to simply deny Ms. Leftwich her Accidental Disability Pension benefits. The Judge ignores the ultimate opinion of the doctors she relies on which is that she is disabled and the work accident was the cause of the disability. (Aa49-Aa50).

This reliance on medical opinions before treatment had ended renders Judge Bogan's decision arbitrary, capricious, and contrary to law. The administrative adjudicator cannot, on remand, give controlling weight to medical testimony that directly contradicts a settled finding by the Board—especially where that finding (i.e., disability) was not in dispute or remanded for reconsideration.

As the Appellate Division recognized in *Manalapan Realty, L.P. v. Twp. of Comm. of Manalapan*, 140 N.J. 366, 378 (1995), while factual findings by administrative tribunals are given deference, questions of law, including the correct

application of findings to legal standards, are reviewed de novo. The law does not permit an ALJ to accept or rely upon opinions that contradict the agency's own final, uncontested determination regarding the existence of a permanent disability. Moreover, credibility determinations premised on logically inconsistent medical opinions are not entitled to deference. As the Supreme Court explained in *Johnson v. Salem Corp.*, 97 N.J. 78, 91 (1984), "[t]he weight to which an expert opinion is entitled can rise no higher than the facts and reasoning upon which that opinion is predicated." Where the ALJ relies on doctors who only explicitly rejected the existence of disability at certain times during her care, who were recommending a three level cervical fusion surgery, and despite the Board's concession that Ms. Leftwich was in fact disabled—such reliance fatally undermines the credibility and legal sufficiency of the ALJ's conclusions regarding the issue of the pre-existing disability being the cause of her overall disability.

This Court should also consider that both Dr. O'Shea and Dr. Kirshner recommended a three-level cervical fusion—a highly invasive surgical procedure—based on objective diagnostic findings including multi-level herniations and cord compression at C4-C7. These recommendations belie any claim that Ms. Leftwich was not disabled. Indeed, the recommendations are consistent with Dr. Weiss's unequivocal opinion that she is permanently and

FILED, Clerk of the Appellate Division, September 01, 2025, **A-002143-24**, **AMENDED**

totally disabled due to the September 1, 2015 traumatic event, and Dr. Ross' opinion that she was disabled and it was due to the work accident. (Aa49-Aa50).

Dr. Weiss's causation analysis was grounded in the absence of any prior symptoms, the sudden onset of debilitating pain following the assault, and the aggressive course of treatment thereafter. His conclusion that the work incident substantially contributed to and directly caused the disability is unrefuted by any competent legal standard. This satisfies the essential, significant, or substantial contributing cause requirement under *Gerba v. Bd. of Trs.*, 83 N.J. 174, 187 (1980), and *Petrucelli v. Bd. of Trs.*, 211 N.J. Super. 280, 288–89 (App. Div. 1986), particularly where the condition was previously asymptomatic.

In sharp contrast, Dr. Hutter's position—that the disability was inevitable due to pre-existing degeneration—is speculative, and legally insufficient. Even Dr. Hutter conceded that he could not say with medical probability that the surgical recommendation would have existed *but for* the work-related assault. The Supreme Court in *Gerba* made clear that a traumatic event need not be the sole cause, but must be the substantial one—a standard that Dr. Weiss's testimony plainly satisfies and Dr. Hutter's does not negate.

Finally, the ALJ's conclusion that "Dr. Weiss did not reconcile" his conclusions with earlier medical records that purportedly found no restrictions is legally irrelevant. Once the Board determined Ms. Leftwich was disabled, such

FILED, Clerk of the Appellate Division, September 01, 2025, **A-002143-24**, **AMENDED**

records cannot form a lawful basis to deny accidental benefits. The sole remaining question on remand was whether the work incident was the substantial cause—not whether she was disabled at all

POINT II

MS. LEFTWICH HAS DEMONSTRATED HER DISABILITY WAS SUBSTANTIALLY CAUSED BY THE SEPTEMBER 1, 2015 INCIDENT (Aa41-Aa43)(Aa44-Aa48)(Aa49-Aa50)(Aa51-Aa60)

Ms. Leftwich has demonstrated that her disability was substantially caused by the September 1, 2015 incident. N.J.S.A. 43:15A-43 governs and sets forth the requirements for members of the Public Employees' Retirement System to receive accidental disability retirement benefits. The statutory language describing the relevant requirement reads as follows. A member must be "permanently and totally disabled as a direct result of a traumatic event occurring during and as a result of the performance of her regular or assigned duties [.]" Ibid.

Richardson v. Board of Trustees, Police and Firemen's Retirement System, 192 N.J. 189 (2007), addressed the "traumatic event" standard under N.J.S.A. 43:16A-7(1). The Court held that a PFRS member may be awarded accidental disability retirement benefits if the member establishes:

1. that he is permanently and totally disabled;
2. as a direct result of a traumatic event that is
    a. identifiable as to time and place,
    b. undesigned and unexpected, and

c. caused by a circumstance external to the member (not the result of pre-existing disease that is aggravated or accelerated by the work);

3. that the traumatic event occurred during and as a result of the member's regular or assigned duties;

4. that the disability was not the result of the member's willful negligence; and

5. that the member is mentally or physically incapacitated from performing her usual or any other duty.

[Id. at 212-13.]

Several examples of conditions that did and did not satisfy the enunciated "traumatic event" standard were provided by the Richardson Court. The Court noted that a gym teacher who develops arthritis from the repetitive effects of her work over the years has not suffered a traumatic event. Such a disability is the result of degenerative disease from repetitive exercises and movements and is not related to an event that is identifiable as to time and place. On the contrary, the same gym teacher who trips over a riser, is injured and becomes permanently and totally disabled as a result of the fall has satisfied the accidental disability standard due to the fact that the accident is identifiable as to time and place. The polestar of the inquiry is whether, during the performance of her or her job, an unexpected happening, not the result of pre-existing disease alone or in combination with the work, has occurred and directly resulted in the permanent and total disability of the member. Richardson, supra, 192 N.J. at 213.

The Supreme Court in Cattani v. Board of Trustees, 69 N.J. 578 (1976) held that accidental retirement benefits can be awarded where a pre-existing disease is combined with a traumatic event. The Court found that "a basis for an accidental disability pension would exist if it were shown that the disability directly resulted from the combined effect of a traumatic event and a preexisting disease." Id. at 586. Relevant to that determination, an important distinction exists between (1)a preexisting condition combined with ordinary work or even extra strenuous work effort that creates disability, and (2) a preexisting condition combined with a traumatic event to create disability. The former is not an accidental disability as described by the statute, while the latter can be if the traumatic event is the substantial contributing factor. Id. at 585-86.

Four years later, in Gerba v. Board of Trustees of the Public Employees' Retirement System, the Supreme Court specified that:

> [A]ccidental disability in some circumstances may arise even though an employee is afflicted with an underlying physical disease bearing causally upon the resulting disability. In such cases, the traumatic event need not be the sole or exclusive cause of the disability. As long as the traumatic event is the direct cause,i.e., the essential significant or substantial contributing cause of the disability, it is sufficient to satisfy the statutory standard of an accidental disability even though it acts in combination with an underlying physical disease.
>
> [83 N.J. 174, 186-87 (1980) (emphasis added).]

On the same day Gerba was decided, the Court also issued its opinion in Korelina v. Board of Trustees of the Public Employees' Retirement System, 83 N.J. 163 (1980). There, again, the Court explained the governing principles as follows:

> The Statutory standards for an accidental disability are two-fold and require the disability be the 'direct result' of a traumatic event. They also require that the disability not be the result of a 'cardiovascular, pulmonary or musculoskeletal condition which was not a direct result of a traumatic event. '
>
> N.J.S.A. 43:15A-43. While the statutory definition stresses that the resulting disability must be 'direct' in terms of its traumatic origins, it does not require that the antecedent trauma be the exclusive or sole cause of the disability.
>
> [Id. at 169-170 (citing Gerba, supra, 83 N.J. at 186-87).]

Six years later, the above Supreme Court holdings were applied in Petrucelli v. Board of Trustees of the Public Employees' Retirement System, 211 N.J. Super. 280 (App. Div. 1986). Petrucelli was a case involving a fall that caused a non-symptomatic preexisting spinal condition to morph into total disability. There, the Court stated:

> The claimant in Gerba lost because the undisputed record established that he had symptomatic developmental arthritis for a decade and that the employment event only contributed to the progression of the disease. Id. at 188. The companion case Korelnia, 83 N.J. at 170, also recognized that in the proper circumstance 'an accidental disability may under certain circumstances involve a combination of both traumaticandpathologicalorigins.'
>
> In the case before us we conclude that the 'direct result' test was legally satisfied. As noted, there was no issue of credibility. Claimant was a very active 49-year-old man performing a strenuous job. He had no prior back problems of any kind. After her severe fall down a nine-

> step stairway, all concede he is permanently and totally disabled because of her now-symptomatic low-back problem. We are satisfied that if claimant here cannot recover after a severe trauma, superimposed on a non-symptomatic structural anomaly, which triggered a symptom complex resulting in total disability, no claimant could ever recover accidental benefits in any circumstance where there exists a quiescent underlying condition which had caused no trouble and might never cause any trouble. We conclude that such a narrow and crabbed 'directness' test was never intended by the Legislature nor condoned by the Supreme Court in Gerba.
>
> [Petrucelli, supra 211 N.J. Super. at 288- 89.]

In this case, Ms. Leftwich is not required to prove that the incident was the sole cause of her permanent disability rather she is only required to provide proof that the incident was the substantial contributing cause of her permanent disability. Gerba, supra, N.J. 83 at 186-187. It should be noted that Richardson v. Board of Trustees, Police and Firemen's Retirement System, 192 N.J. 189, 199 (2007),which is relied upon by both sides in this appeal, directly reaffirms Cattani, Gerba and Korelina.

In making the instant determination, it is necessary to assess and weigh the credibility of the witnesses for the purpose of making factual findings as to the disputed facts. Credibility is the value that a finder of facts gives to a witness' testimony. Cinque v. Bd. of Trs. of the Pol. & Firemen's Ret. Sys., TYP 13374-08 & CSV 3777-08 (consolidated), Initial Decision (Mar. 18, 2010), adopted, Sec'y, Bd. of Trs. (May 18, 2010) <http://njlaw.rutgers.edu/collections/oal/>. It requires an overall assessment of the witness' story in light of its rationality, internal

consistency, and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself," In that "[i]t must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Perrone, 5 N.J. 514, 522 (1950). A trier of fact may reject testimony as "inherently incredible" and may also reject testimony when "it is inconsistent with other testimony or with common experience" or "overborne" by the testimony of other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

The outcome of this case turns on the credibility of the medical experts. Dr. David Weiss opined that Ms. Leftwich's disability was substantially caused by the September 1, 2015 incident. Dr. Weiss testified that although there were pre-existing findings on the diagnostic studies Ms. Leftwich, prior to the incident, was asymptomatic. She was performing her job without restriction and not having any trouble performing any aspect of her responsibilities. (1T54:23-55:3).

Dr. Hutter, the States' examining doctor, testified that Ms. Leftwich had pre-existing degenerative changes, but was aware that prior to the work accident the degenerative issues were not impacting her in any way especially at work. Dr. Hutter testified that the medical records revealed she had a work accident. Further,

Dr. Hutter stated he was provided no information to suggest that Ms. Leftwich was on any restricted or light duty prior to the September 1, 2015, incident. (2T24:1-15).

As a general rule, "where the medical testimony is in conflict, greater weight should be accorded to the testimony of the treating physician" as opposed to the testimony of an evaluating physician, who has only met with the employee on one occasion. Bialko v. H. Baker Milk Co., 38 N.J. Super., 169, 171 (App. Div. 1955), certif. denied, 20 N.J. 535 (1956); However, this guidepost is not unwaivable. That a physician has been selected and is paid by the Board is "hardly a basis to discount her testimony" in favor of the treating physician, who is presumably paid by the patient. Reizis v. Bd. of Trs., Teachers Pension and Annuity Fund, 91 N.J.A.R.2d (TYP) 16, 21. 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) (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) her status as a general practitioner, testifying as to a specialty, or (2) the fact that her 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). Other factors to consider include whether the expert's opinion finds support in the records from the other physicians, and the information upon which the expert has based her conclusions. And, the premises upon which the expert's observations are based, coupled with the expert's ultimate conclusions, may be contradicted by rebuttal experts and other evidence of the opposing party. Ibid.

In this case, the evidence is clear. Dr. Weiss evaluated Ms. Leftwich on March 31, 2020, 1T37:10-18, and took a history and reviewed the medical records. (Aa51-Aa60). Dr. Joan O'Shea and Dr. Steven Kirshner recommended that Leftwich undergo a three level ACDF or anterior cervical discectomy with fusion. (1T39:13-21).

Dr. Weiss did not see any medical records that indicated that Ms. Leftwich had prior cervical spine issues, shoulder issues, or prior treatment records of her cervical spine or left shoulder prior to the September 2015 incident. (1T40:18-22). Dr. Weiss conducted a physical examination of Ms. Leftwich which revealed ongoing bilateral, paravertebral and trapezius splenius capitis muscle spasms, (1T41:16-21), a positive Travell's trigger points bilaterally, (1T42:21-25), and reduced strength in her biceps and triceps were 4/5 on the left arm and 5/5 on the right arm. (1T43:11-14). Ms. Leftwich also had decreased sensation in both of her

FILED, Clerk of the Appellate Division, September 01, 2025, **A-002143-24**, **AMENDED**

upper arms, 1T43:19-24, and her range of motion in both of her arms was reduced in abduction and forward elevation. 1T45:13-17. (Aa53-Aa54).

Dr. Weiss reviewed Dr. O'Shea's report. (Aa44-Aa47). Dr. O'shea noted three herniated discs on an MRI. (1T48:25-49:3). She also noted that there was spinal cord compression. (1T50: 9-12). Ms. Leftwich did advise Dr. Weiss she did not want to get surgery but did have some injections. (1T51: 1-6).

Dr. Weiss diagnosed Ms. Leftwich with a chronic post-traumatic cervical sprain, three level disc pathology with herniations at C4-C5 through C6-C7, cervical radiculitis, and she had an aggravation of a pre-existing age related quiescent condition of degenerative disc disease and osteoarthritis of the cervical spine. 1T54:4-6. Dr. Weiss opined that Ms. Leftwich's disability was the direct result and substantially caused by the September 1, 2015 incident. 1T54:23-55:3; (Aa56-Aa58); (Aa41-Aa43).

This Court doesn't need to find that the incident in question "caused" her disability. Ms. Leftwich must show that the incident in question is the "substantial cause of her disability." Petrucelli v. Board of Trustees of the Public Employees' Retirement System, 211 N.J. Super. 280 (App. Div. 1986). Dr. Hutter testified there was no way to know but for this incident when or even if Ms. Leftwich would have had needed a three level cervical fusion. (2T26:16-22).

There is no doubt that Ms. Leftwich had some degenerative process in her neck and shoulder. The answer to that is: so what. The initial issue before this Court is whether there is credible evidence to support the ALJ and Board's decision. There is no credible evidence which supports the made up theory of it would have happened anyway. That said, this Court must then answer did the work assault substantially cause her disability? The ALJ's opinion is that the medical evidence in this case is distinguishable from Petrucelli. (Aa24). It isn't. The only medical evidence in the records comes after the work accident, which shows some degenerative processes occurring. However, to conclude, as the Board did, that she would have had the severity of the problem anyway, someday is simply a theory with not medical support.

Prior to the work accident, Ms. Leftwich was performing all aspects of her job. She testified she had no issues doing any part of her job. There is no discipline for abuse of sick time, there are no pre-existing medical records suggesting medical care prior to the work accident and no issues regarding any aspect of the performance of her job. She gets assaulted. She receives medical care. She has an MRI (Aa61), an EMG (Aa62-Aa64), and several of her treating surgeons recommend significant surgical procedures subsequent to the attack. She undergoes evaluations which opine that she is disabled from performing her job;

especially that of Dr. Weiss (Aa1-Aa60) and her treating physician, Dr. Laura Ross. (Aa49-Aa50).

So, the question to this Court is what is more likely? Is it more likely that Ms. Leftwich needed this medical care when she did because she was assaulted at work resulting in the recommendation for a three level cervical fusion (Aa46) OR did the problem with her shoulder and neck magically developed as a result of a pre-existing condition. Petrucelli v. Board of Trustees of the Public Employees' Retirement System, 211 N.J. Super. 280 (App. Div. 1986). The medical evidence before the Court inclusive of Dr. Weiss' testimony and report (Aa51-Aa60) supports the conclusion that the work assault was the substantial cause of her disability. Therefore, it is respectfully submitted that Ms. Leftwich has met her burden demonstrating that the September 1, 2015, incident was the substantial cause of her disability. The Board's decision should be reversed and Ms. Leftwich granted her Accidental Disability pensions benefits.

FILED, Clerk of the Appellate Division, September 01, 2025, **A-002143-24**, **AMENDED**

CONCLUSION

For these reasons, the Board's denial of Ms. Leftwich's accidental disability pension should be reversed and her benefits granted.

Respectfully submitted,

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cc: RAQUEL YVONNE BRISTOL, D.A.G.
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FILED, Clerk of the Appellate Division, November 06, 2025, **A-002143-24**, **AMENDED**

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Re: Kimberly Leftwich v. Board of Trustees, Public Employees' Retirement System
Docket No. 2143-24

On Appeal from a Final Agency Decision of the Board of Trustees, Public Employees' Retirement System

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

Dear Ms. Hanley:

Please accept this letter brief and appendix on behalf of respondent, the Board of Trustees ("Board"), Public Employees' Retirement System ("PERS"), on the merits of the appeal.

TABLE OF CONTENTS

PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS........ 2

ARGUMENT

THE BOARD'S DENIAL OF LEFTWICH'S APPLICATION FOR ACCIDENTAL DISABILITY RETIREMENT BENEFITS IS REASONABLE AND SHOULD BE AFFIRMED 9

CONCLUSION 19

PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

Appellant, Kimberly Leftwich, appeals the Board's denial of her application for accidental disability retirement benefits. Leftwich enrolled in PERS incident to her employment as a Senior Therapy Program Assistant for the New Lisbon Developmental Center in 1998. (Aa10).[2] As a Senior Therapy Program Assistant Leftwich was an event planner and created the programs for the activities for the women's unit. (Aa12; 1T9:17-19).

On September 1, 2015, Leftwich sustained injuries to her neck and shoulder when she was punched by a patient. (Aa12; Rca1). Leftwich went to

[1] Because they are closely related, these sections are combined for efficiency and the court's convenience.

[2] "Aa" refers to Leftwich's appendix; "Aca" refers to her confidential appendix; "Ab" refers to her brief. "Rca" refers to the Board's confidential appendix.

FILED, Clerk of the Appellate Division, November 06, 2025, **A-002143-24**, **AMENDED**

the work infirmary but finished working the rest of the workday. Ibid. Leftwich waited until the following day to seek medical treatment. (Aa13; Rca1-8). She took two days off from work after the September 1, 2015 incident. (Aa13). She then returned to work full duty and reported difficulty performing her duties. Ibid.

In November 2015, Leftwich was involved in a non-work-related motor-vehicle accident in which a drunk driver crashed into the rear of her car. Ibid. Leftwich suffered a fractured ankle from the collision. Ibid. She then resigned in May 2016. Ibid.

On October 2, 2017, Leftwich filed an application for accidental disability retirement benefits based on injuries to her neck and left shoulder from the 2015 work-related incident including "cervical herniated discs . . . pain which travels down [her] left arm . . . a tear in [her] rotator cuff in [her] left shoulder" and "vertigo." (Aa1). On December 13, 2018, the Board found Leftwich was totally and permanently disabled from the performance of her regular and assigned job duties and granted her ordinary disability retirement benefits. (Aa4). However, the Board denied Leftwich's application for accidental disability because it found her "disability is the result of a pre-existing disease alone or a pre-existing disease that is aggravated or accelerated by the work effort." Ibid.

FILED, Clerk of the Appellate Division, November 06, 2025, **A-002143-24**, **AMENDED**

Leftwich appealed the Board's decision and the matter was transferred to the Office of Administrative Law for a hearing. (Aa7-9). During the hearing, Leftwich testified on her own behalf and presented testimony of her medical expert, David Weiss, D.O. (Aa13-16). Andrew Hutter, D.O., testified on behalf of the Board. (Aa16-18).

Dr. Hutter performed independent medical examinations of Leftwich on February 8, 2018, and October 16, 2018. (Aa16; Rca9-13; Rca14-17). Leftwich reported subjective complaints of pain in her neck and shoulder, dizziness and vertigo, with daily pain in her neck that radiated into her left hand. (Aa16). Leftwich resisted any attempts of range of motion of her neck or shoulder and did not allow Dr. Hutter to conduct "an effective examination of her shoulder." Ibid.

Dr. Hutter reviewed an MRI and an x-ray of Leftwich's cervical spine and an MRI of Leftwich's left shoulder. (Aa16-17; Aca61; Rca18). He noted degeneration in her left shoulder acromioclavicular (AC) joint but no rotator cuff tear. (Aa16-17; Rca19). Dr. Hutter opined the spinal changes seen on the MRIs were all degenerative in nature and could not have been caused by the September 1, 2015 incident because the images were taken shortly after the incident and degenerative changes of that type take several years to develop. (Aa16-18). By reviewing the actual MRI films, Dr. Hutter confirmed there was

no evidence of any acute injuries caused by the 2015 incident present in the MRIs. Ibid.

Dr. Hutter found the evaluation done by Leftwich's treating physician, Dr. Ross, to be significant. (Aa17; Aca62-64). On October 27, 2015, two months after Leftwich was hit by the patient on September 1, 2015, Dr. Ross found that Leftwich had no medical restrictions with respect to her job duties. (Aa17). Additionally, reports from Dr. Kirshner and Dr. O'Shea, respectively dated August 3, 2018, and December 16, 2016, stated that Leftwich was capable of working full duty. (Aca46; Aca48; Rca20-21).

Dr. Hutter also reviewed an EMG that showed there was no pressure on any of the nerves in Leftwich's neck. (Aa17; Aca62-63). The June 23, 2016 x-ray revealed only "degenerative changes" throughout her cervical spine, especially prominent between C5-6 and C6-7, "which could not have been caused by the 2015 work-related incident." (Aa17). According to Dr. Hutter, such degenerative changes develop from age-related wear and tear and would likely have required Leftwich to seek treatment in the future. Ibid. Dr. Hutter concluded Leftwich's disability was "substantially caused" by pre-existing degenerative changes and the 2015 work-related incident. Ibid. Dr. Hutter concluded Leftwich's disability was "substantially caused" by pre-existing degenerative changes and the 2015 work-related incident. Ibid. Thus, Dr.

Hutter agreed that Leftwich was totally and permanently disabled but did not opine that her disability was directly caused by the September 1, 2015 work incident. (Aa17-19).

Conversely, Dr. Weiss opined Leftwich's disability was the direct result of the September 1, 2015, incident. (Aa15-16). Yet, Dr. Weiss also testified Leftwich had "an aggravation of a pre-existing age-related condition of degenerative disc disease and osteoarthritis of the cervical spine." Ibid. Dr. Weiss conceded all of Leftwich's multi-level spinal changes seen in the October 7, 2015 MRI of her cervical spine were pre-existing degenerative changes because those types of changes do not develop quickly, and he agreed her spine could have disabled her over time without any intervening traumatic event. (Aa14-15).

Additionally, Dr. Weiss assessed Leftwich's left shoulder diagnosis as strain and sprain, post-traumatic rotator-cuff tendinopathy, and post-traumatic impingement syndrome. (Aa15). Despite diagnosing radiculitis based on Leftwich's subjective complaints, Dr. Weiss also conceded Lefwich's EMG indicated no radiculopathy and the Spurling maneuver was negative for radicular pain as well. (Aa15; Aca62-64). Dr. Weiss also measured no atrophy in either arm when he performed his independent medical evaluation on March 31, 2020, which was four years, six months, and thirty days after the 2015 work-related-

incident and nearly four years after she stopped working. (Aa13-14). Finally, Dr. Weiss conceded Leftwich continued to work for approximately eight months after the 2015 work-related-incident. (Aa15-16).

On September 6, 2022, the Administrative Law Judge issued her Initial Decision. (Aa10-25). The ALJ concluded that Dr. Hutter's testimony was more persuasive and convincing than Dr. Weiss's. (Aa20). The ALJ found that both experts came to similar diagnoses after examining Leftwich, in that there was an aggravation of pre-existing, age-related degenerative disc disease and osteoarthritis. (Aa24). The ALJ noted Dr. Weiss's testimony acknowledging that Leftwich's degenerative changes pre-existed the 2015 incident and could have disabled her over time without any external trauma. Ibid. The ALJ thus found that Leftwich's disability was not the direct result of the 2015 instead but instead was caused by a chronic, degenerative and pre-existing condition. (Aa24). On October 24, 2022, the Board adopted the ALJ's September 6, 2022, Initial Decision. (Aa28-29).

On March 20, 2024, this court vacated the Board's October 24, 2022 final agency decision, and instructed the matter be remanded for amplified causation findings in accordance with Gerba v. Board of Trustees, Public Employees' Retirement System, 83 N.J. 174 (1980). Leftwich v. Bd. Of Trs., Pub. Emps.' Ret. Sys., No. A-1023-22 (App. Div. Mar. 20, 2024) (slip op. at 11). (Aa65-76).

FILED, Clerk of the Appellate Division, November 06, 2025, **A-002143-24**, **AMENDED**

In accordance with this court's directive, the ALJ issued an amended Initial Decision on remand on December 27, 2024. (Aa77-97). The ALJ again found Leftwich's "degeneration is a normal function of aging, and while it may [have been] exacerbated by a traumatic event, the events that occurred here were not so major as to be the cause of the degeneration." (Aa94). The ALJ also found that "[b]oth testifying medical experts concurred that [Leftwich] was able to work immediately after the work incident and was able to perform her regular duties." Ibid. The ALJ noted Leftwich's own expert conceded the degenerative changes seen in Leftwich's spine could disable an individual over time by themselves without any external trauma, and that his diagnosis of radiculitis was consistent with objective findings. (Aa93-94). The ALJ also found it significant that Leftwich returned to work for more than eight months before resigning in May 2016 because it showed Leftwich was capable of working after the September 1, 2015 incident. (Aa94). The ALJ, therefore, concluded that Leftwich "failed to sustain her burden to prove that the work incident on September 1, 2015, was the essential significant or substantial contributing cause of her disability." Ibid.

On March 20, 2025, the Board adopted the ALJ's December 27, 2024, Initial Decision on remand and denied Leftwich's application for accidental disability. (Aa98-99). This appeal followed. (Aa100).

ARGUMENT

THE BOARD'S DENIAL OF LEFTWICH'S APPLICATION FOR ACCIDENTAL DISABILITY RETIREMENT BENEFITS IS REASONABLE AND SHOULD BE AFFIRMED.

Judicial "review of administrative agency action is limited." Russo v. Bd. of Trs., Police & Firemen's Ret. Sys., 206 N.J. 14, 27 (2011) (citing In re Herrmann, 192 N.J. 19, 27 (2007)). The Board and similar "agencies have 'expertise and superior knowledge . . . in their specialized fields.'" Hemsey v. Bd. of Trs., Police & Firemen's Ret. Sys., 198 N.J. 215, 223 (2009) (quoting In re License Issued to Zahl, 186 N.J. 341, 353 (2006) (alteration in original)). As such, reviewing courts "afford[] 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)).

"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." Russo, 206 N.J. at 27 (quoting Herrmann, 192 N.J. at 27-28). "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-

FILED, Clerk of the Appellate Division, November 06, 2025, **A-002143-24**, **AMENDED**

44 (App. Div. 2006). The court "may not vacate an agency determination because of doubts as to its wisdom or because the record may support more than one result," but is "obliged to give due deference to the view of those charged with the responsibility of implementing legislative programs." In re N.J. Pinelands Comm'n Resolution PC4-00-89, 356 N.J. Super. 363, 372 (App. Div. 2003).

Deference is particularly appropriate when the Board has adopted the findings of the ALJ because the ALJ has the opportunity to hear "live testimony" and "judge the witnesses' credibility." Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 587 (1988). Moreover, the weight granted to the medical evidence and expert's testimony depends on such factors as whether the expert witness testified in his specialty and whether the expert's conclusions are based only on subjective, rather than objective, medical evidence. Angel v. Rand Express Lines, Inc., 66 N.J. Super. 77, 86 (App. Div. 1961).

It is equally well-settled that "[t]he 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) (quoting N.J. Rules of Evidence (Annot. 1984), comment 7 to Evidence Rule 56, at 360). And, once the court accepts the witness as an expert, the credibility of the expert and the weight to be accorded his testimony rest in the domain of the trier of fact.

Angel, 66 N.J. Super. at 85-86; see also State v. Frost, 242 N.J. Super. 601, 615 (App. Div. 1990) (holding that it is within the province of the finder-of-facts to determine the credibility, weight, and probative value of the expert testimony).

"Like all of the public retirement systems, the [PERS] includes provisions for the grant of ordinary and accidental disability benefits." Patterson v. Bd. of Trs., State Police Ret. Sys., 194 N.J. 29, 42 (2008) (citing N.J.S.A. 43:16A-6; N.J.S.A. 43:16A-7). The principal difference between ordinary and accidental disability retirement "is that ordinary disability retirement need not have a work connection." Id. at 42-43 (citing N.J.S.A. 43:16A-6; Kasper v. Bd. of Trs., Tchrs.' Pension & Annuity Fund, 164 N.J. 564, 573-74 (2000)).[3] "Essentially, a qualified member who is permanently disabled for any reason will qualify for ordinary disability." Id. at 42. The PERS only allows for accidental disability retirement benefits, however, if the member is "permanently and totally disabled as a direct result of a traumatic event occurring during and as a result of the performance of his [or her] regular or assigned duties." N.J.S.A. 43:15A-43(a).

---

[3] The other difference is that accidental disability retirees receive significantly greater benefits than those provided to ordinary disability retirees. The ordinary disability awarded by the Board entitles Leftwich to at least 43.6% of her final compensation. N.J.S.A. 43:15A-45. An accidental disability award would entitle her to "72.7% of h[er] actual annual compensation for which contributions were being made at the time of the occurrence of the accident." N.J.S.A. 43:15A-46.

A PERS member seeking accidental disability retirement benefits must prove:

> 1. that [s]he is permanently and totally disabled;
>
> 2. as a direct result of a traumatic event that is
>
> > a. identifiable as to time and place,
> >
> > b. undesigned and unexpected, and
> >
> > c. caused by a circumstance external to the member (not the result of preexisting disease that is aggravated or accelerated by the work);
>
> 3. that the traumatic event occurred during and as a result of the member's regular or assigned duties;
>
> 4. that the disability was not the result of the member's willful negligence; and
>
> 5. that the member is mentally or physically incapacitated from performing [her] usual or any other duty.
>
> [Richardson v. Bd. of Trs., Police & Firemen's Ret. Sys., 192 N.J. 189, 212-13 (2007).]

In other words, a PERS member seeking an accidental disability retirement must prove "she suffered a total and permanently disabling injury 'as a direct result of an identifiable, unanticipated mishap.'" Brooks v. Bd. of Trs., Pub. Emps. Ret. Sys., 425 N.J. Super. 277, 284-85 (App. Div. 2012) (quoting Richardson, 192 N.J. at 213).

The inclusion of the "direct result" requirement was intended "to impose a more exacting standard of medical causation." Gerba, 83 N.J. at 185-86. "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 traumatic event must "constitute[] the essential significant or substantial contributing cause of the ultimate disability." Id. at 188.

In Petrucelli v. Board of Trustees, Public Employees' Retirement System, 211 N.J. Super. 280 (App. Div. 1986), a case relied on by Leftwich (Ab16-17), a compliance investigator was seriously injured while descending a stairwell that was still under construction. Id. at 281-84. Petrucelli "fell face-first down the . . . stairwell in spread-eagle fashion," slammed his head into the wall at the bottom of the stairwell, and spent two weeks in traction recovering. Id. at 283. After the fall, Petrucelli's diagnostic imaging disclosed some degenerative change, including "grade I spondylolisthesis at the L-5/S-1 level." Ibid. The Board of Trustees of the Public Employees' Retirement System determined Petrucelli was "permanently and totally disabled as a result of 'pre-existing long-standing arthritis'" and denied his application for accidental disability retirement benefits. Id. at 281.

On appeal, the Petrucelli court noted the medical experts agreed: (1) "Petrucelli's past medical history was completely negative for any back problems"; (2) Petrucelli "had some quiescent, non-symptomatic arthritic and structural changes demonstrable on x-ray which were activated into painful symptomatology as a result of the severe fall"; and (3) the fall "initiated" Petrucelli's pain. Id. at 284-85. Therefore, the main issue on appeal was whether or not Petrucelli's disability was the direct result of the traumatic event or the result of a pre-existing condition. Id. at 284.

The court held "the 'direct result' test was legally satisfied" because Petrucelli was an active man with a strenuous job and an asymptomatic back prior to the fall who was rendered permanently and totally disabled when his lower-back became symptomatic after the fall. Id. at 248-85. The court noted the State's expert conceded, absent the fall, "Petrucelli could have worked to age 62, as planned, and retired uneventfully." Id. at 289. As such, the court concluded whether or not Petrucelli "would have developed low-back symptoms independently of the 1981 fall, and when he would have done so, [wa]s entirely speculative." Ibid.

As noted by the ALJ (Aa24), the facts in this matter are readily distinguishable from Petrucelli. Unlike in Petrucelli, both testifying experts agreed Leftwich's degenerative changes pre-existed the incident and could have

disabled her over time without any external trauma. Ibid. Further, Leftwich's workplace injury was not "severe" like in Petrucelli. That is demonstrated by the lack of any acute injury on Leftwich's MRIs and x-ray, that she did not receive any emergency medical treatment, and she returned to work right after the incident and did not seek additional treatment until the next day. (Aa12-16; Aa 91). Additionally, unlike in Petrucelli, Leftwich returned to work full duty for approximately eight months after the incident. (Aa16; Aa18). Thus, the ALJ's determination that while the 2015 incident may have aggravated or accelerated the degenerative changes present in Leftwich's cervical spine, it was not the substantial or significant contributing cause of her eventual disability is supported by sufficient credible evidence on this record. (Aa24; Aa91).

Here, the Board's determination that the 2015 work-related incident was not the "the essential significant or substantial contributing cause" of Leftwich's disability is supported by ample record evidence. Gerba, 83 N.J at 186. Any injuries that resulted from that incident had no significant effect on Leftwich's medical condition other than aggravating the preexisting degenerative arthritic condition in her cervical spine. (Aa24; Aa46; Aa48; Aa91). This is confirmed by Leftwich's treating doctors' medical records including Dr. O'Shea and Dr. Kirshner, two neurosurgeons, both of whom recommended that Leftwich return to work full duty without restrictions following the 2015 work-related incident.

(Aa19; Aa46; Rca12-13). Leftwich did, in fact, return to work for over eight months following the 2015 work-related incident, before leaving work the following year in May 2016. (Aa13).

With this appeal, Leftwich asserts this court should reject the Board's decision because it adopted the ALJ's post-remand decision, which Leftwich argues improperly relied on medical opinions that contradict the Board's finding that Leftwich is totally and permanently disabled. (Ab9-13; Aa98-99). However, the Board does not dispute that Leftwich is permanently disabled. And, the ALJ expressly adopted the undisputed fact that the Board found Leftwich totally and permanently disabled from the performance of her job duties on December 13, 2018. (Aa79).

As this court directed, the sole issue to be determined upon remand was whether "the work-related cause was 'the essential' significant or substantial contributing cause" of Leftwich's ultimate permanent disability. (Aa75) (quoting Gerba, 83 N.J. at 187). And the ALJ on remand concluded that Leftwich did not satisfy her burden on that point. (Aa89).

The ALJ detailed Dr. Hutter's testimony, finding that the 2015 incident "was not the direct cause of petitioner's disability because a significant portion of petitioner's disability was a pre-existing degenerative condition." (Aa86; Aa88). This was "more persuasive and convincing than that of Dr. Weiss"

because: (1) Dr. Weiss acknowledged that the MRIs "reflected age-related degenerative changes"; (2) Dr. Weiss found it "significant" that two doctors recommended surgery but failed to recognize that both doctors "based their recommendation for surgery on petitioner's three herniated discs and spinal cord compression, which were determined not to be related to the incident"; (3) Dr. Weiss did not "reconcile" his opinion with the two doctors determination that petitioner was "able to perform all of her work duties without restriction"; and (4) "Dr. Weiss acknowledged that petitioner's degenerative changes pre-existed the incident and could have disabled her over time without any external trauma." (Aa87). The ALJ also found it important that, in additional to Drs. Kirshner and O'Shea finding that Leftwich was capable of working full duty without restriction after the incident, Dr. Ross also found the same just two months after the incident. Ibid. In short, after reviewing all of the medical testimony, the ALJ found that "[t]he work incident would not be the substantial cause [of petitioner's disability] where . . . objective findings in the MRIs and x-rays clearly demonstrated a significant pre-existing degenerative condition." (Aa91).

Leftwich agrees that "[t]he outcome of this case turns on the credibility of the medical experts." (Ab18). As noted, the ALJ's assessment of the credibility of the medical experts, as adopted by the Board, is clearly outlined on this record and entitled to deference. The ALJ found that "the opinion of Leftwich's

medical expert is inconsistent with the post-incident treatment record." (Aa93). The judge was not persuaded by petitioner's claim of direct causation "by simply stating that she had no difficulty performing her duties before the work incident." Ibid.

In short, petitioner did not meet her burden of proof because the record showed that "petitioner's degeneration is a normal function of aging, and while it may be exacerbated by a traumatic event, the events that occurred here were not so major as to be the cause of the degeneration." (Aa94). The ALJ and the Board applied the correct causation standard under Gerba. (Aa4; Aa23). The ALJ expressly and correctly stated, the work incident

> need not be the sole or exclusive cause of the disability. As long as the traumatic event is . . . the essential significant or substantial contributing cause of the disability, it is sufficient to satisfy the statutory standard . . . even though it acts in combination with an underlying physical disease.
>
> [Aa92 (quoting Gerba, 83 N.J. at 187) (emphasis in original).]

The ALJ's findings, adopted by the Board, that the September 2015 incident was "not the direct cause of petitioner's disability" is supported by the record and entitled to deference.

FILED, Clerk of the Appellate Division, November 06, 2025, **A-002143-24**, **AMENDED**

CONCLUSION

For these reasons, the Board's final agency decision to deny Leftwich's application for accidental disability retirement benefits should be affirmed.

Respectfully submitted,

MATTHEW J. PLATKIN
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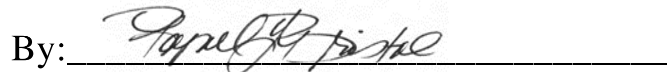

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