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Although it is posted on the internet, this opinion is binding only on the
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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2336-15T2

BELINDA DODSON,

Petitioner-Appellant,

v.

BOARD OF TRUSTEES OF THE PUBLIC
EMPLOYEES' RETIREMENT SYSTEM,

Respondent-Respondent.

Argued May 23, 2017 - Decided June 23, 2017

Before Judges Koblitz and Mayer.

On appeal from the Board of Trustees of the
Public Employees' Retirement System,
Department of Treasury.

Samuel M. Gaylord, argued the cause for
appellant (Gaylord Popp, LLC, attorneys; Mr.
Gaylord, of counsel and on the brief).

Nonee Lee Wagner, Deputy Attorney General,
argued the cause for respondent (Christopher
S. Porrino, Attorney General, attorney;
Melissa H. Raksa, Assistant Attorney General,
of counsel; Ms. Wagner, on the brief).

PER CURIAM

Appellant Belinda Dodson appeals from a final agency decision of the Board of Trustees of the Public Employees' Retirement System (Board) denying her request for accidental disability retirement benefits. We affirm.

Dodson worked as a juvenile detention officer at the Camden County Youth Center (Center). On May 24, 2010, Dodson was injured during a fight at the Center. She went to a local hospital for treatment, but was not admitted.¹

In 2010, Dodson was treated for her injury by Dr. Brahman Levy. Dodson also received orthopedic care from Drs. Steven Kirshner, Steven Valentino and Youssef Josephson and pain management from Dr. Adam Sackstein. Dodson went to physical therapy three times per week for two consecutive weeks. She also received epidural injections in her lower back.

Dodson applied for accidental disability retirement benefits alleging the 2010 incident caused a permanent and disabling injury to her back that left her unable to perform her job. The Board sent Dodson for an independent medical evaluation (IME) with Dr. Bernard Weiss. Dr. Weiss concluded that Dodson was totally and

¹ In 2003, Dodson was injured during a fight at the Center resulting in a herniated disc in her lower back. Dodson received treatment for the 2003 injury, and returned to her job at the Center on a full-duty basis.

permanently disabled due to an aggravation of a pre-existing degenerative condition in her spine, not as a result of a traumatically induced event on May 24, 2010.

The Board awarded ordinary disability retirement benefits to Dodson, but denied her request for accidental disability retirement benefits. Dodson requested a hearing, and the Board referred the matter to the Office of Administrative Law (OAL).

Dr. Arnold Berman was appointed to serve as the Board's IME doctor prior to Dodson's OAL hearing, replacing Dr. Weiss. To prepare for the hearing, Dr. Berman re-examined Dodson. He found Dodson did not suffer a permanent injury.

Based upon Dr. Berman's re-evaluation of Dodson, the Board revisited its original decision regarding disability retirement benefits. The Board again denied Dodson's request for accidental disability retirement benefits. The Board found Dodson's injury was not directly related to the 2010 incident, and Dodson was not permanently disabled from performance of her job function and assigned duties. However, the Board allowed Dodson to continue receiving ordinary disability retirement benefits until the conclusion of her appeal or her return to work at the Center.

A hearing was held before an administrative law judge (ALJ). The ALJ heard testimony from Dodson, Dr. Barry Fass² for appellant and Dr. Berman for the Board.

Based upon the evidence adduced at the hearing, the ALJ concluded, in a written decision, that Dodson "failed to demonstrate by a preponderance of the credible evidence that she is permanently and totally disabled from the performance of her regular and assigned duties."

The ALJ considered Dodson's subjective complaints of pain in her lower back, especially when she walked up or down stairs, and pain radiating down her leg causing numbness in her heel and two of her toes. The ALJ also reviewed the magnetic resonance imaging (MRI) film taken four days after the 2010 incident. Based upon the testimony, the ALJ determined that the 2010 MRI showed long-standing degenerative disc disease at the L4-L5 and the L5-S1 levels, the same area injured in the 2003 incident. The 2010 MRI film showed no disc herniation in Dodson's spine, and no new injury to the L4-L5 level.

The ALJ also considered the doctors' testimony related to Dodson's discogram taken on December 15, 2010. Dr. Fass and Dr.

² Dr. Fass was not Dodson's treating doctor. Dr. Fass examined Dodson for the limited purpose of testifying on her behalf at the hearing. Dodson had an opportunity to call her treating doctors to testify at the hearing but elected not to do so.

Berman disputed the findings on Dodson's discogram. According to Dr. Fass, Dodson's discogram showed a grade three annular tear at the L4-L5 level and opined that the 2010 incident aggravated her 2003 back injury at the same level. Dr. Fass also testified that Dodson had a new lumbar bulge in her spine, in addition to a lumbar sprain and lumbar nerve damage. Conversely, Dr. Berman opined that Dodson had no new injuries according to the 2010 imaging studies and no aggravation of her injury from the 2003 incident.

The ALJ found Dr. Berman's reliance on the 2010 MRI film rather than the 2010 discogram appropriate given the accuracy and reliability of an MRI film as compared to the medically controversial discogram test. Additionally, the ALJ accepted Dr. Berman's explanation that annular tears, as seen in the discogram, are often age-related rather than the result of a traumatic injury. The ALJ further credited Dr. Berman's testimony that if a tear occurred on May 24, 2010, as claimed by Dr. Fass, one would expect to see such a finding on the MRI film taken four days later. The ALJ also accepted Dr. Berman's testimony that Dodson's reflex and muscle tests were normal upon objective testing and physical examination. According to Dr. Berman, her complaints of pain on range of motion and other touch tests reflected Dodson's subjective statements as to pain, and were nothing more than symptom magnification. The ALJ concurred with Dr. Berman's medical opinion

that any injury to Dodson's spine from the 2003 incident had resolved based upon Dodson's return to work full-time and her active lifestyle after the 2003 incident.

After considering the evidence, the ALJ concluded that Dodson "has not established by a preponderance of the evidence that she is entitled to accident disability retirement pursuant to N.J.S.A. 43:15A-43 due to the fact that her injury is the result of a pre-existing condition which has clinically resolved." Thus, the ALJ concluded that Dodson's back injuries in 2003 and 2010 resolved and that Dodson was not totally and permanently disabled. The ALJ determined Dodson was not eligible for either ordinary disability retirement benefits or accidental disability retirement benefits.

The Board adopted the ALJ's decision and denied Dodson's application for accidental disability retirement benefits.

On appeal, Dodson claims the ALJ applied the wrong legal standard because she was required to prove only that the 2010 incident was a "substantial contributing cause," and not the direct cause of her "permanent disability," and thus disqualification on the basis of a "pre-existing condition" was error. She also claims there was not sufficient credible evidence in the record to deny Dodson's application for accidental disability retirement benefits.

Our review of an administrative agency decision is limited. In re Herrmann, 192 N.J. 19, 27 (2007). We will sustain a Board's decision "unless there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record." Russo v. Bd. of Trustees, Police & Firemen's Ret. Sys., 206 N.J. 14, 27 (2011) (quoting In re Herrmann, supra, 192 N.J. at 27-28). We are not bound by an agency's statutory interpretation or other legal determinations. Ibid.

N.J.S.A. 43:15A-43 governs accidental disability retirement benefits to a public employee who is a member of the Public Employees' Retirement System. The statute provides:

A member who has not attained age 65 shall, upon the application of the head of the department in which he is employed or upon his own application or the application of one acting in his behalf, be retired by the board of trustees, if said employee is permanently and totally disabled as a direct result of a traumatic event occurring during and as a result of the performance of his regular or assigned duties, on an accidental disability allowance.

[N.J.S.A. 43:15A-43.]

As the Supreme Court held in Gerba v. Board of Trustees of the Public Employees' Retirement System, 83 N.J. 174, 186 (1980), "what is now required by N.J.S.A. 43:15A-43 is a traumatic event that constitutes the essential significant or the substantial contributing cause of the resultant disability." Importantly,

nothing in Gerba altered an applicant's burden to demonstrate a total and permanent disability in order to receive accidental disability retirement benefits.

Dodson argues that she met the five part test for accidental disability retirement benefits established by the Supreme Court in Richardson v. Board of Trustees, Police and Firemen's Retirement System, 192 N.J. 189, 212-13 (2007). However, the first prong of the Richardson test requires an applicant to show that he or she is totally and permanently disabled. Ibid. If an applicant fails to meet his or her burden under the first prong of the analysis, there is no entitlement to accidental disability retirement benefits.

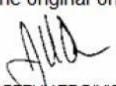
Here, the ALJ made credibility determinations after listening to the competing and contradicting medical evidence provided by Drs. Fass and Berman on the issue of Dodson's permanent and total disability. We find no error in the Board's deference to the ALJ's credibility determinations regarding the experts' testimony. The significance accorded to an expert's opinion is weighed in the context of the expert's explanation of the foundation for his or her opinion, and the facts upon which he or she relies to form that opinion. See State v. Townsend, 186 N.J. 473, 494-95 (2006); Ocean County v. Landolfo, 132 N.J. Super. 523, 528 (App. Div. 1975). The ALJ determined that Dr. Berman was better trained and

qualified in his field than Dr. Fass. Moreover, the ALJ concluded that Dr. Berman's testimony was consistent with the medical evidence in the record.³ Thus, the ALJ rendered his determination based upon his finding Dr. Berman to be more credible than Dr. Fass.

Because the ALJ determined Dodson was not disabled, the "direct result" or the proximate cause prong of the Richardson analysis was unnecessary. The record in this case contains sufficient credible evidence to support the Board's conclusion that Dodson was not disabled. Because we affirm the Board's decision that Dodson failed to prove she was totally and permanently disabled, we need not address the issue of causation.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION

³ Drs. Kirshner, Valentino and Weiss did not testify during the hearing. The reports and opinions of non-testifying doctors are hearsay. See Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 599 (1988) (while hearsay is admissible in administrative proceedings, courts require legal and competent evidence in the record to support diagnoses).