

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court."
Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2959-14T2

MEREDITH KELLY,

Petitioner-Appellant,

v.

BOARD OF TRUSTEES, PUBLIC
EMPLOYEES' RETIREMENT
SYSTEM,

Respondent-Respondent.

Argued November 9, 2016 — Decided May 1, 2017

Before Judges Koblitz and Rothstadt.

On appeal from the Board of Trustees, Public
Employees' Retirement System, PERS No. 2-10-
1047373.

Richard A. Friedman argued the cause for
appellant (Zazzali, Fagella, Nowak, Kleinbaum
& Friedman, attorneys; Mr. Friedman, of
counsel and on the briefs; Edward M. Suarez,
Jr., on the briefs).

Robert E. Kelly, Deputy Attorney General,
argued the cause for respondent (Christopher
S. Porrino, Attorney General, attorney;
Melissa H. Raksa, Assistant Attorney General,
of counsel; Mr. Kelly, on the brief).

PER CURIAM

Appellant, Meredith Kelly, appeals from the Board of Trustees of the Public Employees' Retirement System's (Board) denial of her application for ordinary disability retirement benefits.¹ The Board rejected appellant's application after it adopted, without further comment, the findings and conclusions reached by an Administrative Law Judge (ALJ). On appeal, the parties agree that the ALJ applied the wrong standard of proof to appellant's claim for benefits. The Board argues, however, that it was nevertheless proper for the Board to deny the application because the ALJ's findings established that appellant failed to meet the proper standard and the judge's additional findings were irrelevant. We disagree. We vacate the Board's decision and remand for reconsideration of appellant's application under the appropriate standard.

The relevant facts were generally undisputed and can be summarized as follows. Appellant began to suffer from leg and back pain that was not caused by an accident or injury, beginning in September 2010 while she was employed in a secretarial and clerical capacity as a test proctor at a public community college. Appellant sought treatment from various health providers, but did not obtain sufficient relief from their treatments. In February

¹ See N.J.S.A. 43:15A-42.

2011, she was referred to Dr. Bryan Massoud, a board certified orthopedic surgeon. The doctor reviewed appellant's MRI and found a disc herniation that was pinching her nerve, causing a shooting pain into her left leg. The doctor's clinical examination revealed the presence of muscle spasms and tenderness in her lower back as well as signs of pinching of the nerves – all consistent with the MRI finding. He ordered an x-ray of appellant's pelvis and found that it revealed a narrowing of her left hip joint and signs of arthritis in the left hip. The doctor initially diagnosed appellant with a herniated disc in her back, pinching of the nerve, and arthritis in both hips.

Appellant's back pain intensified and, on April 5, 2011, Massoud performed a discectomy and a foraminotomy, removing appellant's herniated disc and "loose pieces" in the area in an effort to take pressure off the nerves. After the surgery, the doctor observed that appellant's pain continued on her left side radiating to her left buttocks and he prescribed a course of physical therapy while appellant was also being treated for pain management.

In September 2011, appellant applied for ordinary disability benefits. She then saw Massoud on September 30 and explained to him that she was experiencing great difficulty sitting or standing for even ten minutes. Her complaints were corroborated by the

doctor's clinical examination, which showed appellant had spasms and tenderness in her back, limited range of motion, and a decrease in sensation in the left leg. The doctor reviewed a recent MRI and found that it showed evidence of a small, recurrent herniation where he had performed surgery, a herniated disc at another level, and degenerative arthritis of the facet joints of the vertebrae. He diagnosed appellant with a recurrent herniation at the original surgical site; herniation at the other level; status post lumbar discectomy; bilateral osteoarthritis of the hips; and left sacroiliac joint dysfunction. The doctor concluded that appellant should continue treatment for pain management. He also noted appellant is "not in need of any further surgical intervention at this time" but "[u]nfortunately, [she] is disabled and unable to return to work."

On October 3, 2011, Massoud completed a Medical Examination Treating Physician's form in support of appellant's application for ordinary disability retirement benefits. He cited his September 30 diagnosis as the reason for disability retirement benefits.

When Massoud saw appellant again, he reviewed another MRI performed on November 3, 2011, that did not show recurrent disc herniation as the prior MRI had shown, but revealed post-surgical scar tissue that was not seen in the September MRI, and showed

continuation of the degeneration of the facet joints that had been seen in September. Appellant did not complain of leg pain, but continued to complain of lower back pain and bilateral hip pain. The doctor's clinical examination of her leg was negative. He did, however, note appellant had paraspinal muscle spasms across the belt line and limited range of motion in her lower back. At this visit, Massoud also discussed surgical options to treat degenerative disc disease.

In response to appellant's application for disability benefits, the Board arranged for her examination by Dr. Arnold T. Berman, a certified orthopedic surgeon. The doctor saw appellant on February 2, 2012, at which time he performed an examination that lasted approximately thirty minutes. Berman issued his report on the same date, opining that the degenerative conditions seen on the MRI "would be normal for someone of [appellant's] age and height and weight and there are arthritic abnormalities which [he did] not believe" to be the cause of her symptoms. He diagnosed appellant as having a herniated lumbar disc, with "excellent results post-operative," and could not recommend her for ordinary disability retirement benefits.

After Berman issued his February 2012 report, the Board denied appellant's application on March 21, 2012, finding that she was not totally and permanently disabled. Appellant appealed and the

matter was transferred to Office of Administrative Law to be heard by an ALJ as a contested case.

Appellant saw Massoud again in July 2012 and he reviewed an MRI taken earlier that month. Massoud found a "positive straight leg raise bilaterally with reproduction of back pain" and a continuation of "severe" paraspinal muscle spasms in appellant's lower back. The MRI showed no recurrent disc herniation, but displayed moderate to mild degenerative disc disease, post-surgical scarring along the disc margin, a small disc bulge and mild degenerative arthritis, and a small bulge at another level. Although there was a disc bulge – rather than a disc herniation – Massoud emphasized that there is no correlation between the size of the disk bulge and the amount of pain it can cause, which he stated "varies quite a bit." Massoud diagnosed appellant with disabling back pain resulting from degenerative disc disease.

Berman issued a supplementary report on December 10, 2012, in which he discussed additional records that were provided to him. He concluded that the additional information did "not change [his] opinions that were outlined in [his February] report."

Appellant and Drs. Massoud and Berman testified at the hearing before the ALJ that began on December 13, 2013. Appellant testified that her primary duties at work included distributing and proctoring tests and providing clerical assistance to students

from behind a counter. She testified about the onset of her pain that occurred in 2010 and explained that her April 2011 surgery relieved her lower back pain "a bit" but "never relieved [her] leg pain."²

Massoud testified as to his treatment of appellant, explained her complaints and his various diagnoses. He stated that her surgery relieved appellant of the pain that radiated down her left leg, but her back pain never resolved. He testified that although appellant initially experienced an improvement in her back pain following surgery, it began to deteriorate over time. Massoud opined that it was possible for appellant's degenerative disc disease to advance quickly enough to render her totally and permanently disabled within a year of its first appearance.

Massoud also testified that based on her job description and the nature of her work, he was of the opinion, to a reasonable degree of medical probability, that appellant was not capable of performing the duties of a secretary/clerk due to her medical condition. The doctor concluded she was totally and permanently disabled as a result of lumbar degenerative disc disease and osteoarthritis of the hips.

² Massoud's contemporaneously created office visit notes from July 15, 2011, however, stated that her "leg pain has resolved."

Berman testified to a different view of appellant's condition. He stated that during his examination of appellant, he found only "slight pain on a range of a motion" and "no evidence of spasm" in appellant's lower back. He also explained that the straight leg raise test he performed on appellant was negative. He testified that she was able to walk without a limp, climb on and off the exam table, and had a full range of motion. These observations indicated normal nerve functioning. Berman diagnosed appellant with a herniated lumbar disc that was unrelated to an accident or trauma³ and fully resolved through surgery. In Berman's opinion, appellant had a "wonderful surgical result" on her herniated disc and pinched nerve, Massoud's treatment of her was reasonable, necessary, and appropriate, and she suffered only "normal" degenerative changes of the hip and lumbar spine. He explained he saw nothing that would restrict appellant from performing her "sedentary job" as a secretary. Berman disputed Massoud's opinion that degenerative disc disease was capable of advancing quickly enough to render someone totally disabled within several months of its first appearance.

³ On cross-examination, Berman clarified his February 2, 2012 report, in which he wrote that appellant had suffered an "injury" to her spine in an "accident," and explained that the mistake was "a generic category of writing a report" and that appellant really did not have an accident, but suffered "a gradual onset of pain."

Following the hearing, on February 28, 2014, the ALJ issued a written Initial Decision, in which she found Massoud's opinions to be "more persuasive" than Berman's. The judge made forty-nine findings of fact, including findings about appellant's work history, her pain, treatment, and the two doctors' opinions. After considering the applicable law, the judge described appellant's burden of proof. The judge stated:

[A]ppellant bears the burden of establishing by a preponderance of the credible evidence that she is physically incapable of performing the general clerical duties of a secretary and proctor. Additionally, if proven she cannot perform those duties, it must be explored whether [the] Community College has other work for her to perform, and if not, whether appellant is generally unemployable by other employers.

The ALJ concluded that appellant had not satisfied her burden because neither doctor stated appellant could not "perform duties in the general area of her ordinary employment, or cannot perform other duties at [the] Community College, or work for other employers."

Appellant filed exceptions with the Board to the ALJ's Initial Decision, citing several material errors in the ALJ's analysis of the evidence and explaining that the ALJ disregarded critical aspects of Massoud's testimony and reports. Appellant also specified certain instances where the ALJ mischaracterized or

overlooked testimony and documentary evidence in the record that directly contradicted several of the ALJ's factual findings. Finally, appellant explained that the ALJ misstated and misapplied the law and argued appellant was not required to show general unemployability, but rather her incapacity to perform duties of her ordinary employment.

In the Board's reply to appellant's exceptions, it agreed with the ALJ's conclusion that appellant had not satisfied her burden of proof, but sought clarification because the ALJ's finding that Massoud's opinions were more persuasive contradicted some of the ALJ's factual findings. Accordingly, the Board remanded the matter to the ALJ for further clarification to explain how the judge disregarded "Massoud's opinion given her finding that his opinions were more persuasive" and to clarify several of her factual findings that appellant argued were not supported by the record.

The ALJ considered the issues remanded by the Board without further submissions by the parties. On October 27, 2014, the judge issued her Initial Decision on Remand and again found Massoud's opinions to be more persuasive than Berman's testimony. The ALJ determined, however, "fifty percent of appellant's reason for filing for disability, pain in her lower back and left leg, has been resolved and she no longer has leg pain due to successful

medical and physical therapy treatment." The ALJ again concluded that appellant had "not establish[ed] by a preponderance of the credible evidence that she is totally and permanently physically disabled and incapable of performing the general duties of a secretary and test proctor or alternative job duties at [the] Community College, or that she is generally unemployable by other employers."

Appellant filed exceptions, again citing material errors in the ALJ's analysis of the evidence and identifying key factual components that the ALJ disregarded, which established the factual and medical basis for Massoud's conclusion that appellant was permanently and totally disabled. She also specified instances in the record that directly contradicted the ALJ's findings. Finally, appellant argued again that the ALJ misstated and misapplied the standard of proof that an applicant for ordinary disability retirement benefits must meet in order to prevail.

In its reply, the Board asserted that even though the ALJ found Massoud's opinions to be more persuasive, the ALJ was free to reject medical findings as "contra[ry to] the weight of the evidence" and to "disagree[] with the ultimate opinion [Massoud] made based on those findings."

On January 21, 2015, the Board considered the parties' exceptions, voted to summarily adopt the recommendation of the ALJ, and denied appellant's application. This appeal followed.

On appeal, appellant argues that Board's decision to adopt the findings and conclusions of the ALJ was "arbitrary, capricious and unreasonable" because they were unsupported or contradicted by the evidence. She also contends the ALJ, and therefore the Board, failed to apply the correct legal standards to her claims.

The scope of our review in an appeal from a final decision of an administrative agency 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)). We will uphold the agency's decision "unless there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record." Ibid. (quoting Herrmann, supra, 192 N.J. at 27-28). We are not, however, "bound by an agency's interpretation of a statute or its determination of a strictly legal issue." Ibid. (quoting Mayflower Sec. Co. v. Bureau of Sec., 64 N.J. 85, 93 (1973)). Therefore, we will "not disturb an administrative agency's determinations or findings unless there is a clear showing that (1) the agency did not follow the law; (2) the decision was arbitrary, capricious, or unreasonable; or (3) the decision was not supported by substantial evidence." In re Virtua-West Jersey

Hosp. Voorhees for a Certificate of Need, 194 N.J. 413, 422 (2008) (citations omitted).

Because the Board adopted the ALJ's application of the law, we focus on the legal standard applied by the ALJ and conclude that it was incorrect and once the proper standard is considered, the facts found by the ALJ and adopted by the Board provide substantial support for finding appellant satisfied her burden.

In order to establish her entitlement to ordinary retirement benefits, an applicant must establish an incapacity to perform duties in the general area of her regular employment, rather than merely showing an inability to perform his or her specific job. See Bueno v. Bd. of Trs., Teachers' Pension & Annuity Fund, 404 N.J. Super. 119, 130-31 (App. Div. 2008), certif. denied, 199 N.J. 540 (2009).⁴ An applicant is not required "to show physical inability to perform substantially different duties or to produce evidence of general physical unemployability . . . when the

⁴ The ALJ relied upon Bueno to determine appellant's burden of proof. Her interpretation of Bueno's holding was incorrect. In that case, we affirmed the denial of a teacher's application for ordinary disability benefits that was based upon her being harassed by staff members at a particular school. We agreed with the Board that the teacher did not sustain her burden because she failed to demonstrate an inability to teach at other schools. We observed that her disability from performing a specific job at a specific school did not prevent her from performing her general area of ordinary employment as a teacher at other schools. Ibid. The same circumstances do not exist in the present case.

'employer has work for [the applicant] in the general area of his employment.'" Id. at 130 (alteration in original) (quoting Skulski v. Nolan, 68 N.J. 179, 206 (1975)). It is only "where the employer has no work for the employee in the general area of his or her ordinary employment, th[at] the employee may be required to 'show physical inability to perform substantially different duties or to produce evidence of general physical unemployability.'" Ibid. (quoting Skulski, supra, 68 N.J. at 206). Under those circumstances, an applicant is required to establish she was totally and permanently disabled from performing her original position and that which was offered to her after the injury or illness, and she is not entitled to reject the latter because of a personal preference for a disability pension. Id. at 131. An applicant is not entitled to benefits by merely "establishing incapacity to perform duties in the general area of [her] ordinary employment" for a particular employer at a particular location. Ibid. (alteration in original) (quoting Skulski, supra, 68 N.J. at 205).

In determining the applicable standard for appellant's claim, we look to the evidence. The evidence established that appellant's employer had work for her performing her usual tasks. There was no evidence presented that the community college offered her any other type of work that she could have performed or otherwise.

Also, her disability was not caused by being employed at her specific employer's specific location. She was not required, therefore, to demonstrate an inability to perform substantially different duties or to produce evidence of general physical employability as the ALJ determined. Contrary to the ALJ's determination, the fact that neither Massoud nor Berman opined that appellant could not "perform other duties at [the] Community College, or work for other employers" was meaningless and did not compel the denial of appellant's claim.

The dispute that the ALJ was to resolve was whether appellant suffered from disc degeneration that rendered her incapable of performing her clerical and secretarial duties as a test proctor. The medical experts who testified took different views as to whether appellant suffered from that disease and, if she did, whether it rendered her disabled. Appellant adduced evidence that the ALJ found more credible than the evidence presented by the Board. This finding provided support for a determination that appellant satisfied the proper burden of proof. Appellant and Massoud testified to her inability to perform the duties of her secretarial/clerical position, which, in any event, would not be any different if she worked for another employer. Appellant testified that her back pain was exacerbated when she bent over to retrieve or lift files for students, that she could not perform

her tasks given her back pain, and her doctor attributed the pain to her disease. All of this evidence addressed each of the elements of appellant's burden of proof.

The ALJ's requirement that appellant prove she could not perform substantially different duties or was generally unemployable was legally unsupported. Also, her finding that appellant's leg pain had diminished, resulting in resolution of fifty percent of appellant's claim, did not resolve the dispute about appellant's disability. The ALJ's legal conclusions should not have been adopted by the Board.

Because we are remanding this matter to the Board for reconsideration, we do not address the balance of appellant's arguments regarding the sufficiency of the evidence.

The final agency decision is vacated and the matter remanded to the Board for reconsideration of appellant's application for ordinary disability retirement benefits under the appropriate standard.

Vacated and remanded. We do not retain jurisdiction.

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


CLERK OF THE APPELLATE DIVISION