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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-0448-16T4

JAMES DEFEO,

Petitioner-Appellant,

v.

BOARD OF TRUSTEES, PUBLIC
EMPLOYEES' RETIREMENT SYSTEM,

Respondent-Respondent.

Argued January 10, 2018 — Decided March 9, 2018

Before Judges Alvarez and Currier.

On appeal from the Board of Trustees, Public
Employees' Retirement System, PERS No.
2-802491.

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

Amy Chung, Deputy Attorney General, argued the
cause for respondent (Christopher S. Porrino,
Attorney General, attorney; Melissa H. Raksa,
Assistant Attorney General, of counsel; Paul
Davis, Deputy Attorney General, on the brief).

PER CURIAM

Petitioner James DeFeo appeals from the August 18, 2016 final
decision of respondent, the Board of Trustees of the Public

Employees' Retirement System (PERS), which adopted the June 9, 2016 initial decision of an Administrative Law Judge (ALJ) affirming respondent's denial of petitioner's application for accidental disability retirement benefits. After reviewing petitioner's contentions in light of the record and applicable principles of law, we affirm.

Petitioner was employed as a municipal utility maintenance worker when he was injured at a jobsite in January 2012. He was treated and discharged from the emergency room. Testing performed on his right arm and head were normal. In March 2012, petitioner underwent a surgical decompression of his right radial nerve. In June, he was diagnosed with a mild traumatic brain injury and post-concussive syndrome, but was cleared to work on limited light duty.

In November 2012, petitioner underwent a functional capacity evaluation (FCE), which revealed some limitations in his ability to lift and grasp with his right arm. The evaluation also noted that petitioner performed all aspects of the testing with low effort, including the testing of his legs and non-injured left side. Having not returned to work, petitioner was terminated by his employer on December 12, 2012.

Petitioner had been involved in an automobile accident in 2009 in which he sustained injuries to his left knee, right wrist,

lower back and neck. He was under the care of a doctor for migraine headaches at the time of the workplace accident. Although petitioner denied ever losing any time from work as a result of back pain or migraines, he was still taking medication for both ailments as of the time of the workplace injury.

In February 2013, petitioner filed an application for accidental disability retirement benefits. PERS denied the application, finding that petitioner was "not totally and permanently disabled from the performance of [his] regular and assigned job duties." Petitioner appealed the denial, and the matter was transferred to the Office of Administrative Law.

After hearing testimony from petitioner and neurologists on behalf of both parties, the ALJ issued an initial decision on June 9, 2016. Although he found both experts to be credible, the ALJ concluded that the diagnoses noted by petitioner's expert were based solely on petitioner's subjective complaints, unsupported by any objective findings.¹ The expert had listed the duties of a utility maintenance worker that petitioner could no longer perform and then opined that he was permanently and totally unable to perform the duties of his job. The ALJ stated there was no

¹ MRI's of petitioner's right wrist and brain were normal. An EMG of the right arm was within normal limits.

"explanation as to how th[o]se diagnoses amounted to total and permanent medical disabilities."

Respondent's expert opined that petitioner's complaints of numbness in three fingers on his right hand did not conform to any known nerve distribution. Without any abnormal findings on any objective test, the expert concluded that petitioner was not totally and permanently disabled from performing the normal duties of his job.

The ALJ considered the five-prong test set forth under Richardson v. Bd. of Trs., Police and Firemen's Ret. Sys., 192 N.J. 189, 212-13 (2007), which a petitioner must meet to be eligible for an accidental disability pension. See N.J.S.A. 43:15A-43. Left for his determination was whether petitioner had demonstrated he was "permanently and totally disabled . . . as a direct result of a traumatic event."² Richardson, 192 N.J. at 212.

In reasoning that petitioner was not permanently and totally disabled, the ALJ stated:

[Petitioner's expert] made findings which, when compared to the demands of petitioner's duties as a utility maintenance man, did not lead to a conclusion that petitioner could not perform any of the duties of his job. Rather, [petitioner's expert's] findings led to the

² The parties had stipulated to the remaining three factors of the test.

conclusion that petitioner would not be able to perform all of the required duties of a utility maintenance man. However, this does not equal an inability to perform a job. According to each treating doctor and the FCE, petitioner demonstrated ability for light restricted work, and he demonstrated ability for some essential job duties as set forth in his job description. Petitioner's condition was not enough to cause petitioner to be totally disabled and unable to perform his work duties. His duties were of such a nature that he could continue working, as well as undertaking and performing many of the functions required of him. Therefore, [respondent's expert] presented a more persuasive opinion as to the petitioner's ability to perform the functions of his job.

The ALJ also found that petitioner had not demonstrated that his symptoms were a direct result of the work accident.

PERS affirmed the ALJ's decision on August 18, 2016. On appeal, petitioner argues that he is totally and permanently disabled as a direct result of the work related accident and is therefore eligible for accidental disability retirement benefits.

Our review of an administrative agency's decision is limited. Russo v. Bd. of Trs., Police & Firemen's Ret. Sys., 206 N.J. 14, 27 (2011). We will sustain the 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." Ibid. (quoting In re Herrmann, 192 N.J. 19, 27-28 (2007)). As the reviewing court, we "may not substitute [our] own judgment for the agency's, even

though [we] might have reached a different result." In re Stallworth, 208 N.J. 182, 194 (2011) (quoting In re Carter, 191 N.J. 474, 483 (2007)).

While we generally "afford substantial deference to an agency's interpretation of [the] statute that the agency is charged with enforcing[,]" we are "in no way bound by the agency's interpretation of a statute or its determination of a strictly legal issue." Richardson, 192 N.J. at 196 (first citing R&R Mktg., LLC v. Brown-Forman Corp., 158 N.J. 170, 175 (1999); and then quoting In re Taylor, 158 N.J. 644, 658 (1999)). We review an agency's interpretation of a statute or case law de novo. Russo, 206 N.J. at 27.

Applying our highly deferential standard of review, we conclude that there is substantial credible evidence in the record to support respondent's finding that petitioner failed to demonstrate an entitlement to accidental disability retirement benefits. We affirm.

Pursuant to N.J.S.A. 43:15A-43, a member of PERS may be retired on an accidental disability pension 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 regular or assigned duties." In Richardson, 192 N.J. at 212-13, the Court held that in order to qualify for accidental disability

retirement benefits, a member of the retirement system must establish:

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; an[d]
5. that the member is mentally or physically incapacitated from performing his usual or any other duty.

[192 N.J. at 212-13.]

It is an "extraordinarily high threshold" for petitioner to meet, one "that culls out all minor injuries; all major injuries that have fully resolved; all partial or temporary disabilities; and all cases in which a member can continue to work in some other capacity." Patterson v. Bd. of Trs., State Police Ret. Sys., 194 N.J. 29, 43 (2008) (quoting Richardson, 192 N.J. at 195); see also Thompson v. Bd. of Trs., Teachers' Pension & Annuity Fund, 449

N.J. Super. 478, 487 (App. Div.), certif. granted, 230 N.J. 565 (2017). As the Court stated in Patterson, a petitioner who "can continue to work in some other capacity" is unlikely to be found permanently and totally disabled. 194 N.J. at 43 (quoting Richardson, 192 N.J. at 195).

Petitioner's expert opined that he could not perform all of the duties required of his job. That, however, does not amount to the inability to perform a job. The treating doctors advised petitioner could perform light restricted work. He, therefore, could have continued working, performing many of the functions denoted in his job duties. We rely on the ALJ's assessment of the experts' credibility as he "is better positioned to evaluate the witness' credibility, qualifications, and the weight to be accorded [to his or] her testimony." In re Guardianship of D.M.H., 161 N.J. 365, 382 (1999).

We are satisfied that respondent's finding that petitioner was not permanently and totally disabled was not arbitrary, capricious or unreasonable. Petitioner has not met his heavy burden of demonstrating the Richardson elements. As a result, petitioner is not eligible for accidental disability retirement benefits.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION