SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0504-16T3

ROBERT W. GAVEN,

Petitioner-Appellant,

v.

BOARD OF TRUSTEES,
PUBLIC EMPLOYEES'
RETIREMENT SYSTEM,

Respondent-Respondent.

Argued November 28, 2017 - Decided February 8, 2018

Before Judges Fasciale and Sumners.

On appeal from the Public Employees' Retirement System, PERS No. 2-10-199040.

Joseph F. Polino argued the cause for appellant (Polino and Pinto, PC, attorneys; Joseph F. Polino, on the brief).

John A. Lo Forese argued the cause for respondent (Christopher S. Porrino, Attorney General of New Jersey; Melissa H. Raksa, Assistant Attorney General, of counsel, John A. Lo Forese, on the brief).

PER CURIAM

Robert Gaven appeals from a final agency decision by the Board of Trustees Public Employees' Retirement System (the Board) denying him accidental disability benefits. We affirm because we disagree with Gaven's contention that there does not exist sufficient credible evidence in the record to support the Board's findings that Gaven failed to show his permanent and total disability was a direct result of work-related accidents.

To secure accidental disability benefits under N.J.S.A. 43:15A-43, an applicant must prove several elements. Russo v. Bd. of Trs., Police & Firemen's Ret. Sys., 206 N.J. 14, 30 (2011). We need not recite those elements except the one in dispute — whether plaintiff is permanently and totally disabled from the accidents in question. See ibid.

In 1991, Gaven injured his cervical spine in an accident while working as a road supervisor with the Township of Delran. He had surgery on his cervical spine at C5 and C6. He contends the injury was fully resolved, and he was physically able to work following a six-week period of convalescence. Twelve years later, he maintains his ability to work changed because of two work-related accidents.

On February 15, 2003, Gaven suffered a slip and fall accident while removing snow and ice at work, which resulted in two broken ribs and a concussion. From the record, it does not appear that

he missed any time from work, but was limited to light duty until he had another accident a few months later.

On May 29 of the same year, after patching large potholes with a co-worker, Gaven was catapulted off the back of a trailer when a hot tar tamper he was holding onto suddenly fell off the back of the trailer. He contends he immediately felt intense pain in his neck that travelled down through both of his arms. Gaven never returned to work due to stiffness and numbness in his arms, legs, and neck, which caused a loss of motor control.

On July 21, 2004, the Board denied Gaven's application for accidental disability retirement benefits arising from the 2003 accidents; finding that neither of the accidents qualified as a traumatic event under N.J.S.A. 43:15A-43, and that his permanent and total disability was not a direct result of the accidents. The Board, instead, granted him the lesser benefit of ordinary disability retirement. Gaven filed a timely appeal and the matter was transmitted to the Office of Administrative Law (OAL). In the meantime, over a year later in November 2005, Gaven had surgery to remove a herniated disc at C3-C4 and to fuse discs at C3-C4 and C6-C7.

For reasons that are unclear in the record, an OAL hearing was not held until three diverse dates in 2014,[1] after the matter had been reassigned to another ALJ in June 2013. In an initial decision dated May 12, 2016, the ALJ found that, although there was no dispute that Gaven's spinal injury caused him permanent and total disability, he did not qualify for accidental disability benefits. The ALJ reversed the Board's determination that Gaven's May 29, 2003 accident qualified as a traumatic event under N.J.S.A. 43:15A-43, as interpreted by Richardson v. Bd. of Trs., Police & Firemen's Ret. Sys., 192 N.J. 189, 212-13 (2007).[2] The ALJ determined, however, there was insufficient proof that Gaven's disability was not a direct result of either accident in 2003.

On August 17, 2016, the Board voted to adopt the recommendations of the initial decision.

Before us, Gaven challenges the Board's factual findings. He argues the Board's ruling that his disability was not the direct result of the 2003 accidents was arbitrary because the ALJ disregarded the fact that his spinal injury from the 1991 accident

[1] The record closed on April 17, 2015.

[2] Although the Board's July 21, 2004 denial of Gaven's application found that neither accident was a traumatic event, the initial decision stated that the Board only contended at the hearing that the May 29, 2003 accident was non-traumatic.

had resolved through surgery, and that his disability occurred only after the subsequent accidents. We disagree.

From our review of the record, the ALJ thoroughly evaluated Gaven's testimony, Gaven's voluminous medical records, and most importantly, the competing opinions of the parties' medical experts — neither of whom treated Gaven — as to whether Gaven's disability was the direct result of the 2003 accidents. The ALJ explained her findings:

> Although [Gaven's expert] presented competent, concise and clear testimony, is clearly accomplished in her field, and presented her opinions in a manner so as to be easily followed, her testimony and opinions emanating therefrom are ultimately undermined by her insistence that herniations in [Gaven's] cervical spine at level C3-[C]4 are new injuries caused by the incident of February 15, 2003, despite being presented with an MRI showing such herniation to be present in 2001. As a result, I give greater weight to and **ADOPT** the opinions offered by [the Board's expert], and **FIND** that the incidents of February 15, 2003, and May 29, 2003, resulted in cervical sprain with aggravation of pre-existent discogenic neck problems . . . , but that there is insufficient evidence in the record to state, within a degree of medical certainty, that it is more likely than not that the incidents rendered [Gaven] permanently and totally disabled from the performance of his duties.

According deference to the Board's fact-finding, Circus Liquors, Inc. v. Governing Body of Middletown Twp., 199 N.J. 1, 9-10 (2009), we conclude its decision is neither "arbitrary,

capricious, or unreasonable, or . . . lacks fair support in the record." Russo, 206 N.J. at 27 (quoting In re Herrmann, 192 N.J. 19, 27-28 (2007)). We are satisfied "that the evidence and the inferences to be drawn therefrom support" the agency's decision that Gaven's disability is not the direct result of the 2003 accidents but from cervical spine degeneration. Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 588 (1988). Thus, we will not disturb the determination that Gaven is not entitled to accidental disability benefits.

Affirmed.