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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2506-16T1

UGO BELLOMO,

Petitioner-Appellant,

v.

BOARD OF TRUSTEES, POLICE AND
FIREMEN'S RETIREMENT SYSTEM,

Respondent-Respondent.

Argued May 1, 2018 — Decided May 10, 2018

Before Judges Carroll and Mawla.

On appeal from the Board of Trustees of the
Police and Firemen's Retirement System,
Department of Treasury, PFRS No. 3-80471.

Patrick P. Toscano, Jr., argued the cause for
appellant (The Toscano Law Firm, LLC,
attorneys; Patrick P. Toscano, Jr., on the
briefs).

Robert S. Garrison, Jr., argued the cause for
respondent (Gurbir S. Grewal, Attorney
General, attorney; Melissa H. Raksa, Assistant
Attorney General, of counsel; Robert S.
Garrison, Deputy Attorney General, on the
brief).

PER CURIAM

Petitioner Ugo Bellomo appeals from a decision by the Board of Trustees, Police and Firemen's Retirement System (Board), denying him accidental disability retirement benefits. The Board adopted an initial decision by the Administrative Law Judge (ALJ), which determined petitioner was not totally and permanently disabled due to his regular or assigned work duties, but instead concluded petitioner withdrew from employment due to an impending criminal prosecution. We affirm.

The following facts are taken from the record. Petitioner was employed with the Newark Police Department as a police officer in July 1996. In January 2007, petitioner was operating a marked patrol vehicle in pursuit of a suspected drug dealer, when the vehicle slid on loose gravel and struck a pole. Petitioner continued to work after this accident.

On November 3, 2012, while off-duty, petitioner was involved in an incident in which another driver cut him off, and petitioner pointed his service weapon at the other driver in response. On March 15, 2013, a grand jury indicted petitioner on a charge of fourth-degree aggravated assault. As a result, on April 2, 2013, the Newark Police Department issued a Preliminary Notice of Disciplinary Action (PNDA) seeking termination of petitioner's employment due to the indictment. In June 2013, petitioner sought to participate in the pre-trial intervention (PTI) program, and

was advised by his criminal defense attorney he would forfeit public employment as a result of doing so.

On September 30, 2013, petitioner applied for accidental disability retirement benefits, based on the 2007 accident. He alleged he had injured his neck, lower back, and both shoulders.

Petitioner continued to work until January 9, 2014.¹ The next day, petitioner entered PTI, and ended his employment as a police officer.

On October 6, 2014, the Board considered and denied petitioner's application. The Board determined the 2007 accident was identifiable as to time and place, was undesigned, and unexpected. The Board found the accident occurred during and as a result of petitioner's regular and assigned work duties, and was not the result of petitioner's own willful negligence. Notwithstanding, the Board denied the application for accidental disability because it found petitioner was not totally and permanently disabled from the performance of his regular and assigned work duties, and there was no evidence in the record the 2007 accident directly resulted in a total and permanent

¹ The Board was not aware of the indictment and disciplinary charges when it considered petitioner's application for accidental disability retirement benefits. It first learned of the charges while the matter was pending in the Office of Administrative Law (OAL).

disability. The Board also found petitioner's application was untimely because it was not filed within five years of the accident. The Board concluded petitioner qualified for deferred retirement.

Petitioner appealed, and the matter was transferred to the OAL. During the hearing, the Board sought to introduce evidence of the 2012 crime. Petitioner's objection to the introduction of this evidence was sustained by the ALJ because the issue had not been referred to the OAL for consideration.

The ALJ issued an initial decision recommending an award of accidental disability retirement benefits. The ALJ considered the testimony of petitioner and his experts, Dr. Richard Boiardo and Dr. Michael Vives, and determined them to be credible.

The ALJ found petitioner had proved he was totally and permanently disabled as a direct result of the 2007 accident, and his continued work and failure to file for benefits was the result of a delayed manifestation of the disability. The ALJ found the expert testimony convincing on the issue of permanency and causation. The ALJ accepted Dr. Boiardo's opinions petitioner had restricted range of motion in his neck, lower back, and shoulders. The ALJ credited Dr. Boiardo's opinion petitioner had a high tolerance for pain, which allowed him to work for six years after the 2007 accident. The ALJ also relied upon the examination of

Dr. Vives, which found multi-level lumbar disc degeneration with advanced disc disruption and an extruded disc on the left side.

The Board's expert, Dr. Andrew Hutter, opined petitioner complained of muscle sprain and strain, which did not render him totally and permanently disabled. Dr. Hutter concluded petitioner's 2007 injuries had resolved, and his physical condition was not the result of the 2007 accident. The ALJ gave greater weight to the opinion of petitioner's experts.

The ALJ concluded petitioner was totally and permanently disabled as a direct result of the 2007 accident. The ALJ recommended granting accidental disability retirement benefits.

The Board rejected the initial decision because the ALJ did not admit the information about petitioner's criminal matter into evidence. The Board noted when petitioner's application was considered on October 16, 2014, it was unaware of the criminal charges against petitioner and that he had forfeited his employment with the Newark Police Department as a condition of dismissing the criminal charges in return for PTI. The Board remanded the matter to the OAL, and directed the ALJ to consider the evidence of petitioner's indictment and reasons for his employment termination.

On November 9, 2016, the ALJ issued a second decision, this time recommending denial of accidental disability retirement

benefits. The ALJ recounted the chronology of petitioner's disciplinary and criminal proceedings and noted petitioner knew his employer sought his removal in April 2013, several months before he applied for accidental disability retirement benefits. The ALJ found the timing of petitioner's retirement application appeared "to be suspicious." The ALJ found petitioner's September 30, 2013 application for accidental disability retirement benefits requested a retirement date of January 1, 2014, yet petitioner continued to work until January 10, 2014, when he entered PTI. As a result, the ALJ concluded it was more probable than not petitioner left his employment because of the consequences of his criminal case and not because of a physical disability.

The ALJ reconsidered the medical evidence and found the repeat MRI of petitioner's neck on August 29, 2013, and MRI of petitioner's back on September 5, 2013, both indicated petitioner's condition had not significantly progressed since post-accident MRIs in 2009. The ALJ noted the 2013 MRI of the neck showed it was only "moderately" worse than in 2009, and the 2013 MRI of the back stated his condition was only "mildly" worse than in 2009. Finally, the ALJ noted there was no evidence in the record petitioner sought continuous medical treatment from the date of the 2007 accident until the present.

The ALJ concluded the evidence demonstrated petitioner left his employment because of the consequences of his criminal matter, not his physical disability. The ALJ found petitioner was not entitled to accidental disability retirement benefits under N.J.S.A. 43:16A-7, noting the plain language of the statute requires the member be unable to work due to a physical disability, and petitioner had continued to work until he faced criminal charges.

The Board adopted the ALJ's decision and denied petitioner accidental disability retirement benefits. This appeal followed.

I.

We begin by reciting our standard of review. "On judicial review of an administrative agency determination, courts have but a limited role to perform." Gerba v. Bd. of Trs., 83 N.J. 174, 189 (1980). An administrative agency's determination will not be disturbed where the agency's findings are supported by sufficient credible evidence. Ibid. "[A]n appellate court does not substitute its judgment of the facts for that of an administrative agency." Campbell v. N.J. Racing Comm'n, 169 N.J. 579, 587 (2001). "If the Appellate Division is satisfied after its review that the evidence and the inferences to be drawn therefrom support the agency head's decision, then it must affirm even if the court

feels that it would have reached a different result itself." Ibid. (quoting Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 588 (1988)).

"Ordinarily, an appellate court will reverse the decision of the administrative agency only if it is arbitrary, capricious or unreasonable or it is not supported by substantial credible evidence in the record as a whole." Henry v. Rahway State Prison, 81 N.J. 571, 579-80 (1980). "[A] presumption of reasonableness attaches to the action of an administrative agency and the party who challenges the validity of that action has the burden of showing it was arbitrary, unreasonable or capricious." Boyle v. Riti, 175 N.J. Super. 158, 166 (App. Div. 1980) (citation omitted).

Petitioner contends the Board's decision should be reversed because the conclusion was arbitrary, capricious, and unreasonable. He argues the Board erred in concluding his separation from employment was not based upon the work-related injuries resulting in permanent disability. Additionally, petitioner argues the medical evidence shows his condition progressed from 2009 to 2013, when he applied for accidental disability retirement benefits. He argues the information related to his indictment, which the ALJ considered, was not in evidence in the proceeding.

Our Supreme Court has stated:

[T]o obtain accidental disability benefits, a member must prove:

1. that he is permanently and totally disabled;
2. as a 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.

[Richardson v. Bd. of Trs., 192 N.J. 189, 212-13 (2007).]

N.J.S.A. 43:16A-7(1) states:

The application to accomplish [accidental disability] retirement must be filed within five years of the original traumatic event, but the board of trustees may consider an application filed after the five-year period if it can be factually demonstrated to the satisfaction of the board of trustees that the disability is due to the accident and the filing was not accomplished within the five-year period due to a delayed manifestation of the disability or to other circumstances beyond the control of the member.

"The applicant for . . . disability retirement benefits has the burden to prove that he or she has a disabling condition and must produce expert evidence to sustain this burden." Bueno v. Bd. of Trs., Teachers' Pension & Annuity Fund, Div. of Pensions & Benefits, 404 N.J. Super. 119, 126 (App. Div. 2008). "[T]he applicant must establish incapacity to perform duties in the general area of his ordinary employment rather than merely showing inability to perform the specific job for which he was hired." Skulski v. Nolan, 68 N.J. 179, 205-06 (1975).

Here, the ALJ concluded:

[Petitioner] failed to establish by a preponderance of the credible evidence that he is entitled to accidental disability retirement benefits under N.J.S.A. 43:16A-7. Although, at the initial hearing, two doctors credibly testified on his behalf that he was permanently and totally disabled, the evidence taken on remand leads to a different conclusion that it is more probable than not that [petitioner] left employment because of the consequences of his criminal matter and not because of a physical disability.

. . . .

[W]hen [petitioner] applied for accidental disability benefits on September 30, 2013, he was aware that he would have to forfeit his job as a condition of his acceptance into the PTI program. While [petitioner] testified . . . the criminal matter did not affect his decision to apply for accidental disability benefits, the credibility of these assertions is doubtful due to the fact that [petitioner] applied for PTI on or about June 19, 2013, and

because [his attorney] advised him that he would lose his job as a result of his acceptance into the PTI program. In particular, when asked, "Did you advise him that he would not be able to return to work as a police officer as a result of PTI?" [Petitioner's attorney] responded, "Well, yes, I always knew that." Thus, it is more likely than not that [petitioner] knew that he would lose his job due to the criminal matter well before he applied for accidental disability retirement benefits.

. . . .

In view of the dates of the indictment, the PNDA, and the PTI application, together with [petitioner]'s awareness that he would lose his employment, all of which preceded his application for accidental disability retirement benefits, the timing of his retirement application appears to be specious.

In addition, the results of the repeat MRI of the neck on August 29, 2013, and of the back on September 5, 2013, both indicated that [petitioner]'s condition had not significantly progressed since the MRIs of 2009. The 2013 MRI report for his neck stated that his condition was only "moderately" worse than in 2009, and the 2013 MRI report for his back stated that his condition was only "mildly" worse than in 2009. Moreover, while [petitioner] asserts that he "sought continuous medical treatment from the date of the accident and until the present" . . . there is no credible evidence to support this claim. Instead, the 2013 MRI reports appear to be the only medical records in evidence that show that he received medical attention for his neck and back since 2009. . . . Yet a few months after his indictment, after his employer issued a PNDA for his removal, and after he filed the PTI application, [petitioner] decided it was time to retire

because physically he couldn't do his job. However, as discussed above, he continued to work for more than three months after he applied for his accidental disability retirement benefits and until he was forced to leave his job due to his acceptance into the PTI program.

While, at the hearing, two doctors testified that [petitioner] was permanently and totally disabled, the evidence taken on remand leads to the conclusion that [petitioner] left his employment because of the consequences of his criminal matter and not because of a physical disability. . . . Further, it is more likely than not that, when he applied for accidental disability benefits, [petitioner] already knew he would lose his job as a consequence of the criminal matter. As such, [petitioner] failed to show by a preponderance of credible evidence that he left his employment due to a permanent and total disability rather than due to his acceptance into the PTI program.


We agree with the Board the ALJ reasonably concluded petitioner was not credible in his assertion he left his employment due to a physical disability, but instead left because of the consequences of his criminal matter. Petitioner continued to work until January 10, 2014, the date he was required to forfeit his employment as a condition of his entry into PTI, not due to a medical disability. The medical evidence supported the conclusion petitioner's condition had progressed only slightly since the 2007 accident. Moreover, petitioner's attorney stated he informed petitioner his admission into PTI would result in forfeiture of

his job. For this reason, petitioner's assertion the record lacked evidence of his indictment is without merit.

The Board's decision petitioner was not totally and permanently disabled, and left work due to criminal charges rather than a total and permanent disability was supported by sufficient credible evidence in the record. The decision was not arbitrary, capricious, or unreasonable.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION