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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0776-20**

JOHN KIM,

Petitioner-Appellant,

v.

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

Respondent-Respondent.

Argued October 4, 2022 – Decided November 9, 2022

Before Judges Gilson and Gummer.

On appeal from the Board of Trustees of the Police and Firemen's Retirement System, Department of the Treasury, PFRS No. xx4817.

Herbert J. Stayton, Jr. argued the cause for appellant (Stayton Law, LLC, attorneys; Herbert J. Stayton, Jr., on the brief).

Juliana C. DeAngelis, Staff Attorney, argued the cause for respondent (Robert Seymour Garrison, Jr., Director of Legal Affairs, PFRSNJ, attorney; Juliana C. DeAngelis, on the brief).

PER CURIAM

Petitioner John Kim appeals from an October 6, 2020 final administrative determination of the Board of Trustees of the Police and Firemen's Retirement System of New Jersey (the Board) denying his application for accidental disability retirement benefits. Petitioner argues the Board erred in finding that the incident on which he based his claim was not objectively capable of causing a reasonable person in similar circumstances to suffer a disabling mental injury and had not directly caused his disability. Because the Board's decision was supported by substantial credible evidence in the record, we affirm.

I.

On September 23, 1993, petitioner joined the Camden City Police Department. On May 11, 2011, petitioner filed an application for accidental disability retirement benefits based on a July 18, 2008 incident.¹ Kim asserted he was "incapacitated for further service as a [p]olice [o]fficer" due to "orthopedic, psychologic and psychiatric residuals of injury to left hand, anxiety and depression." He stated he had "shot a crime suspect" on July 18, 2008, and

¹ Petitioner also listed a July 27, 2007 accident as a basis for his claim. However, during the subsequent hearing before the administrative law judge (ALJ), petitioner did not present any evidence regarding that accident and, thus, effectively abandoned that aspect of his claim.

since then had "suffered from anxiety, depression, loss of sleep and appetite, and adjustment disorder."

During a May 14, 2012 meeting, the Board found petitioner was "totally and permanently disabled" from the performance of his duties as a direct result of the July 18, 2008 incident and granted him ordinary disability retirement benefits. The Board denied petitioner's application for accidental disability retirement benefits because "the disability did not result from direct personal experience of a terrifying or horror-inducing event that involved actual or threatened death or serious injury, or a similarly serious threat to the physical integrity of the member or another person." The Board determined the July 18, 2008 event to be "inconsequential and . . . not objectively capable of causing a reasonable person in similar circumstances to suffer a disabling mental injury." Finding "no evidence to satisfy the reasonable person standard" regarding the July 18, 2008 incident, the Board denied petitioner's application for accidental disability retirement benefits.

Kim appealed the Board's decision. After some procedural hurdles that are not at issue in this appeal, the Board during its December 10, 2018 meeting reconsidered petitioner's application for accidental disability retirement benefits and again denied it. Reversing its previous determination that petitioner's

disability was a direct result of the July 18, 2008 incident, the Board found his disability was "of multi-causation." The Board otherwise reaffirmed its other findings concerning petitioner's disability and the July 18, 2008 incident. The case proceeded in the Office of Administrative Law as a contested case.

An ALJ conducted a hearing on July 15 and 17, 2019. Three witnesses testified: petitioner; petitioner's expert witness, psychologist Ange Puig; and the Board's expert witness, psychologist Daniel B. LoPreto. Because the Board already had found that Kim was totally and permanently disabled, the parties agreed the focus of the hearing would be on the "psychiatric disability"; whether the 2008 incident that allegedly caused that disability was "inconsequential" and "not objectively capable of causing a reasonable person in similar circumstances to suffer a . . . disabling mental injury"; and if the disability resulted from "direct personal experience of a terrifying or horror inducing event."

Petitioner testified about the July 18, 2008 incident. He was working as a patrolman that day. At approximately 10:00 p.m., petitioner responded to a call from dispatch regarding armed men breaking into an establishment. Petitioner heard shuffling feet by the garbage dumpsters near the building's back entrance. He took out his service weapon, identified himself as a police officer, and ordered: "[n]ow, put your hands up and . . . come towards me." No one

responded. Petitioner saw a man holding a revolver turn around. Petitioner told him to drop his gun. When the man failed to obey and the petitioner perceived that the barrel of the gun was pointing at him, petitioner discharged his weapon. Petitioner heard someone running. Another police officer joined petitioner. Petitioner and the other officer pursued the person he had heard running. After several minutes, petitioner and the other officer found a man laying down on the ground. Petitioner believed he had shot and killed him but, in fact, the man was unharmed. No gun was found. Later that evening, another officer brought petitioner to the hospital. Petitioner's blood pressure was "elevated"; hospital staff gave him medication to "calm [him] down" and "relax [him]." He was released from the hospital that day.

After the incident, petitioner continued to work for the Camden City Police Department, fluctuating between light- and active-duty status until he retired in 2011. For a couple of months after the incident, petitioner took anti-depression, anti-anxiety, and sleep medication. He received treatment from a psychologist or psychiatrist for a couple of years. Prior to the July 18, 2008 incident, he had not been treated by a psychologist or psychiatrist.

Petitioner also testified about workplace harassment he had experienced in connection with his Korean heritage. According to petitioner, he was

subjected to ridicule and racial slurs throughout his career, beginning in the police academy. Petitioner's complaints about the abuse "never went anywhere." The abuse affected his life at home; he became "irritable," had trouble sleeping, and had "verbal altercations" with his spouse, which "affected the children."

Dr. Puig first saw petitioner in 2008 on a referral from the workers' compensation program. Petitioner told Dr. Puig about the July 18, 2008 incident; he did not tell her then about the workplace harassment. After seeing him once, Dr. Puig diagnosed petitioner with post-traumatic stress disorder (PTSD) and opined he could not return to work. According to Dr. Puig, petitioner was "hyper vigilant," was "ruminating about the event," and was unable to sleep, focus, or concentrate. After about a year of treating him, Dr. Puig believed petitioner had not improved and that his inability to work was permanent.

Dr. Puig did not see petitioner again until 2017. Petitioner's counsel had asked Dr. Puig to evaluate petitioner and prepare a report. During interviews conducted for this evaluation, petitioner told Dr. Puig about "traumatic exposures while working at the Camden Police Department due to a hostile, racist, psychologically and physically threatening work environment." In his

June 13, 2018 report, Dr. Puig opined petitioner "was already chronically traumatized by these [harassment] events" and the July 18, 2008 incident "was the catalyst which brought all of his PTSD symptomatology and psychobiological state into chaos from which he has not been able to recover and places him in a position that he would be unable . . . to return to police work at any time." Additionally, Dr. Puig found "[t]he central source of [petitioner's] traumatic exposure at [sic] PTSD symptomatology stems primarily . . . from his work environment due to hostile and, at times, dangerous [work atmosphere] as he expressed life-threatening situations by a segment of his police peers." Dr. Puig concluded petitioner's "exposure to his hostile work environment, life-threatening situations and continued verbal and psychological harassment . . . meets the standards which would indicate psychological injury at the time of his work as a police officer."

Dr. LoPreto evaluated petitioner on January 18, 2012. In his initial report, Dr. LoPreto found petitioner to be "totally and permanently disabled" and that his disability was "a direct result of the accident of [July 18, 2008]" and was "not associated with or was accelerated by a pre-existing condition." Dr. LoPreto testified Dr. Puig's PTSD diagnosis was "incorrect" because Dr. Puig had made that diagnosis only ten days after the July 18, 2008 incident and PTSD

should not be diagnosed until at least a month after the underlying incident. Dr. LoPreto posited "[t]he correct diagnosis would have been acute stress disorder," which typically resolves within a month.

After reviewing Dr. Puig's June 13, 2018 report, Dr. LoPreto issued an addendum report on November 1, 2018. According to Dr. LoPreto, petitioner had not disclosed to him the workplace harassment described at length in Dr. Puig's report. Because of that previously-undisclosed information and his understanding of Dr. Puig's new conclusion being "this is multi causal, this is not just one event, this is a series of events," Dr. LoPreto "c[ould] no longer attribute [petitioner's] disability, significantly and substantially, to the work event of July of 2008. It was one of many." In his addendum report, Dr. LoPreto concluded:

I would now consider his psychological condition to be of multi-causation, versus significantly and substantially caused by the specific work event of [July 18, 2008]. While the current reviewer makes no assumption of the existence of a hostile work environment, it is clear that [petitioner's] general psychological make-up and interpersonal sensitivity working within the challenges and responsibilities of law enforcement, is more causative of his psychological condition than the direct result of a traumatic event that is identifiable to time and place.

In addition to the testimony of these witnesses and the reports of Drs. Puig and LoPreto, the record evidence also included the reports of psychologist Jennifer Kelly, who had conducted a "psychological fitness-for duty-examination re-evaluation" of petitioner on September 23, 2010, and psychiatrist Joel B. Glass, who had treated petitioner after the July 18, 2008 incident. In her September 23, 2010 report, Dr. Kelly concluded petitioner was "psychologically unfit for duty." In his April 26, 2011 report, Dr. Glass opined petitioner was permanently and totally disabled, stated petitioner had an onset of symptoms after the July 18, 2008 incident, and diagnosed petitioner as having insomnia, anxiety, depression, and PTSD. Neither Dr. Kelly nor Dr. Glass made any reference to the alleged workplace harassment in their reports.

In a September 8, 2020 written decision, the ALJ found Dr. LoPreto's testimony to be credible and Dr. Puig's testimony that petitioner's disability was a result of the July 18, 2008 injury to be not credible. She also found that petitioner's "testimony about the incident was not credible in terms of being traumatic and the direct cause of any anxiety." Instead, the ALJ determined petitioner's "mental disability . . . was a result of long-standing issues with his coworkers and personal issues which led to his anxiety and depression" and that "petitioner did not suffer from PTSD as a result of the 2008 work incident."

Citing Richardson v. Board of Trustees, Police and Firemen's Retirement System, 192 N.J. 189, 212-13 (2007), the ALJ concluded petitioner's disability was "not the direct result of the 2008 incident." Citing Patterson v. Board of Trustees, State Police Retirement System, 194 N.J. 29, 34 (2008), the ALJ concluded "the circumstances surrounding the July 2008 event were not such that a reasonable person would experience any disabling mental injury," noting that petitioner had not been shot and had not injured anyone. The ALJ held petitioner was not entitled to accidental disability retirement benefits and affirmed the Board's denial of his application for those benefits.

Petitioner filed exceptions with the Board. After reviewing the record, the Board adopted the ALJ's decision, thereby denying his application for accidental disability retirement benefits. Petitioner appeals from the Board's decision.

On appeal, petitioner asserts he met the Patterson and Richardson standards. He argues Dr. LoPreto's testimony should be given little weight. He contends the ALJ's findings of fact and conclusions of law are not supported by the record or case law, the ALJ did not correctly analyze the issue of direct result, and the ALJ's credibility findings were conclusory. The Board maintains it reasonably determined petitioner did not meet the Patterson or Richardson

standards and, thus, was not entitled to accidental disability retirement benefits. Before us, petitioner also argues Dr. LoPreto's testimony was a net opinion and should not have been considered. Because he did not raise that argument before the ALJ, it is not properly before this court, and we do not consider it. See Allico v. Ocean Beach & Bay Club, 456 N.J. Super. 124, 145 (App. Div. 2018).

II.

Our review of an administrative agency determination is limited. Allstars Auto Grp., Inc. v. N.J. Motor Vehicle Comm'n, 234 N.J. 150, 157 (2018). 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 Trs., Police & Firemen's Ret. Sys., 206 N.J. 14, 27 (2011) (quoting In re Herrmann, 192 N.J. 19, 27-28 (2007)); see also J.K. v. N.J. State Parole Bd., 247 N.J. 120, 135 (2021). Under this standard, our review is guided by three inquiries: "(1) whether the agency's decision conforms with relevant law; (2) whether the decision is supported by substantial credible evidence in the record; and (3) whether, in applying the law to the facts, the administrative agency clearly erred in reaching its conclusion." Conley v. N.J. Dep't of Corr., 452 N.J. Super. 605, 613 (App. Div. 2018).

"[T]he test is not whether an appellate court would come to the same conclusion if the original determination was its to make, but rather whether the factfinder could reasonably so conclude upon the proofs." Charatan v. Bd. of Rev., 200 N.J. Super. 74, 79 (App. Div. 1985); see also Sager v. O.A. Peterson Constr., Co., 182 N.J. 156, 164 (2004). "Where . . . the determination is founded upon sufficient credible evidence seen from the totality of the record and on that record findings have been made and conclusions reached involving agency expertise, the agency decision should be sustained." Gerba v. Bd. of Trs., Pub. Emps.' Ret. Sys., 83 N.J. 174, 189 (1980), overruled on other grounds by Maynard v. Bd. of Trs., Tchrs' Pension & Annuity Fund, 113 N.J. 169, 177 (1988).

We are not bound by an agency's statutory interpretation or other legal determinations. Russo, 206 N.J. at 27. Nevertheless, we accord deference to statutory interpretation by the agency charged with enforcing the statute. Zimmerman v. Sussex Cnty. Educ. Servs. Comm'n, 237 N.J. 465, 475-76 (2019). "Such deference has been specifically extended to state agencies that administer pension statutes" because "a state agency brings experience and specialized knowledge to its task of administering and regulating a legislative enactment within its field of expertise." Piatt v. Police & Firemen's Ret. Sys., 443 N.J.

Super. 80, 99 (App. Div. 2015) (quoting In re Election L. Enf't Comm'n Advisory Op. No. 01-2008, 201 N.J. 254, 262 (2010)). We defer to an agency's "[r]easonable credibility determinations." In re Pontoriero, 439 N.J. Super. 24, 35 (App. Div. 2015).

Petitioner is a member of the Police and Firemen's Retirement System. That pension plan grants accidental disability retirement benefits 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." N.J.S.A. 43:16A-7(a)(1). Accordingly, a claimant seeking accidental disability retirement benefits must prove five factors:

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.

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

See also Mount v. Bd. of Trs., Police & Firemen's Ret. Sys., 233 N.J. 402, 421 (2018). If the Board finds a claimant "is not eligible for accidental disability since the incapacity is not a direct result of a traumatic event occurring during and as a result of the performance of the [claimant's] regular or assigned duties," the claimant "will be retired on an ordinary disability retirement allowance." Mount, 233 N.J. at 419 n.4 (quoting N.J.A.C. 17:4-6.7). The "direct result" requirement was intended "to impose a more exacting standard of medical causation." Gerba, 83 N.J. at 185. When an underlying condition is aggravated by the trauma, the resulting disability is not accidental. Id. at 186. The traumatic event must "constitute[] the essential significant or the substantial contributing cause of the resultant disability." Ibid.

In Patterson, the Court determined the standard governing a claim for accidental disability retirement benefits premised on "a permanent mental disability as a result of a mental stressor, without any physical impact." 194 N.J. at 33. Following the "direct result" requirement in N.J.S.A. 43:16A-7(a)(1) and Richardson, the Court in Patterson held a petitioner making a claim

premised on "a permanent mental disability as a result of a mental stressor, without any physical impact" must prove his disability "result[ed] from direct personal experience of a terrifying or horror-inducing event that involves actual or threatened death or serious injury, or a similarly serious threat to the physical integrity of the member or another person." Id. at 33-34. Furthermore, the event that is the basis of the claim must not be "inconsequential but . . . objectively capable of causing a reasonable person in similar circumstances to suffer a disabling mental injury." Id. at 34. In other words, the Court limited "accidental disability recovery to stressors sufficient to inflict a disabling injury when experienced by a reasonable person in similar circumstances." Id. at 49-50.

The Court in Patterson cited examples of petitioners able to "vault the traumatic event threshold": "a permanently mentally disabled policeman who sees his partner shot; a teacher who is held hostage by a student; and a government lawyer used as a shield by a defendant." Id. at 50. Cases decided after Patterson offer additional examples of when Patterson's high threshold was met. In Russo, a police officer, who had been hospitalized for smoke inhalation and had developed PTSD after failing to rescue a man from a burning home, hearing him cry out for help, and seeing his remains removed from the house, met the standard. 206 N.J. at 19-20, 34-35. In Mount, a hostage negotiator, who

had been diagnosed with PTSD after a hostage-taker with whom he had been negotiating for several hours was killed while the two were speaking on the telephone, satisfied Patterson's threshold requirement. 233 N.J. at 429.

The ALJ found petitioner's testimony about the July 18, 2008 incident "not credible in terms of being traumatic," Dr. Puig's opinion about PTSD being related to the incident not credible, and Dr. LoPreto's testimony credible. Those credibility findings plus the undisputed facts – the person petitioner shot at was not harmed, no one shot at petitioner, no gun was recovered from the crime scene, and petitioner was treated on the day of the incident only for elevated blood pressure and was released that day – supports the ALJ's determination, which the Board adopted, that petitioner did not meet the Patterson threshold in that he did not establish the July 18, 2008 event was a consequential event "objectively capable of causing a reasonable person in similar circumstances to suffer a disabling mental injury." Id. at 34.

The ALJ also found petitioner had failed to establish pursuant to the Richardson standard that his disability was the direct result of a traumatic event. That finding also was supported by substantial credible evidence: Dr. LoPreto's testimony and report, Dr. Puig's report, and even petitioner's testimony. According to petitioner, he had endured decades of race-based workplace

harassment. Dr. LoPreto in his report and testimony and Dr. Puig in his report addressed the impact that workplace harassment had had on petitioner's mental health and provided the basis for the ALJ's conclusion that petitioner's disability was not the direct result of the July 18, 2008 incident.

Petitioner urges us to give little weight to Dr. LoPreto's opinions and, instead, to defer to Drs. Puig, Glass, and Kelly, thereby disregarding the ALJ's credibility findings. We have no legal or factual basis to do so. "[T]he choice of accepting or rejecting the testimony of witnesses rests with the administrative agency, and where such choice is reasonably made, it is conclusive on appeal." Renan Realty Corp. v. State, Dep't of Cmty. Affairs, Bureau of Hous. Inspection, 182 N.J. Super 415, 421 (App. Div. 1981); see also City of Long Branch v. Liu, 203 N.J. 464, 491 (2010) (explaining the fact finder has the role of assessing the credibility and weight to be given to expert testimony); In re Guardianship of D.M.H., 161 N.J. 365, 382 (1999) (appellate courts defer to trial judge's credibility findings regarding expert witnesses and the judge's "fact-findings based thereon" because the trial judge "is better positioned to evaluate the witness' credibility, qualifications, and the weight to be accorded [their] testimony"). It is not our place to second guess or substitute our judgment for that of the ALJ or the Board. We do not "engage in an independent assessment

of the evidence as if [we] were the court of first instance." State v. Locurto, 157 N.J. 463, 471 (1999); see also Philadelphia Newspapers, Inc. v. Bd. of Rev., 397 N.J. Super. 309, 317 (App. Div. 2007) (holding "[t]here should not be an independent assessment of the evidence by the appellate court").

The ALJ's credibility determinations were reasonably made. Drs. Glass and Kelly give no indication in their reports that they were aware of petitioner's alleged workplace harassment. When Drs. LoPreto and Puig became aware of it, they wrote reports in which they opined about the effect of that alleged harassment on petitioner's mental health, concluding the combined effect of that harassment and the July 18, 2008 incident, not just the incident, had caused his disability. Thus, as found by the ALJ, petitioner's disability was not the direct result of the July 18, 2008 incident.

We are satisfied the ALJ's finding that petitioner had failed to meet the Patterson and Richardson standards was legally correct and was supported by substantial credible evidence in the record. We discern nothing arbitrary, capricious, or unreasonable about the Board's adoption of the ALJ's decision.

Affirmed.

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


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