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**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-0861-20**

**PATRICIA TOSCANO,**

**Petitioner-Appellant,**

**v.**

**BOARD OF TRUSTEES,  
PUBLIC EMPLOYEES'  
RETIREMENT SYSTEM,**

**Respondent-Respondent.**

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Argued April 6, 2022 – Decided May 9, 2022

Before Judges Whipple, Geiger and Susswein.

On appeal from the Board of Trustees of the Public Employees' Retirement System, Department of the Treasury, PERS No. xx-8655.

Samuel M. Gaylord argued the cause for appellant (Szaferman, Lakind, Blumstein & Blader, PC, attorneys; Samuel M. Gaylord, on the brief).

Allyson V. Cofran, Deputy Attorney General, argued the cause for respondent (Matthew J. Platkin, Acting Attorney General, attorney; Melissa H. Raska,

Assistant Attorney General, of counsel; Allyson V. Cofran, on the brief).

## PER CURIAM

Petitioner Patricia Toscano appeals from a final agency decision of the Board of Trustees (Board) of the Public Employees' Retirement System (PERS) denying her application for ordinary disability retirement benefits under N.J.S.A. 43:15A-42. The Board adopted the initial decision of the Administrative Law Judge (ALJ), who found Toscano was "ineligible for either an accidental disability pension or an ordinary disability pension."<sup>1</sup> We affirm in part, vacate in part, and remand.

We take the following facts from the record. Toscano was employed by the Green Brook Board of Education as a paraprofessional for seventeen years. In that role, she worked with special needs children on various tasks, including taking notes for them, ensuring they stayed on task and focused, and helping them maintain composure both physically and verbally.

Toscano suffered significant injuries from accidents at work in 2013 and 2016. Toscano's job duties included ensuring that her assigned student stayed on task and focused throughout the day and did not get "out of control"

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<sup>1</sup> Toscano originally applied for accidental disability retirement benefits under N.J.S.A. 43:15A-43. Ultimately, the Board denied eligibility for both accidental and ordinary disability retirement benefits. Toscano no longer challenges the denial of accidental disability retirement benefits.

verbally or physically. In October 2013, Toscano was assigned to an eleven-year-old autistic student who was often "very physical"—"he could hit, bite, and headbutt you," requiring Toscano to maintain control over him. She sometimes had to seek assistance from someone "certified to physically restrain a student when they become physical."

On October 18, 2013, Toscano was working directly with one student. She briefly got up to retrieve an item for the student. As she moved around a table seated with multiple students, Toscano asked a student to move his chair so she could pass. The student swiftly moved his chair, causing Toscano to fall. She landed on her left side, "black[ed] out," and "saw . . . black and stars."<sup>2</sup> Toscano experienced "agonizing pain" in her left arm, fractured her left elbow, injured her left wrist, and underwent surgery on her wrist and hand due to nerve damage.

Due to her injuries, Toscano remained out of work until March 2014. During that period, she received treatment for a concussion and medication side effects from Dr. Erin Elmore, who was provided by the workers' compensation carrier.

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<sup>2</sup> The medical records showed conflicting information regarding whether Toscano lost consciousness from the fall.

In December 2013, Toscano underwent a neuropsychological evaluation by Karen Tennyson, Ph.D., a clinical neuropsychologist. Dr. Tennyson reviewed Toscano's medical history and administered a battery of tests. At the time of the evaluation, Toscano was prescribed Topomax for nausea and Oxycodone for pain. She continued to complain of nausea, vomiting, severe headaches, blurred vision, tingling hands and pain in her limbs, ears, and gums, which occurred after her first accident. Toscano's medical history included breast cancer, irritable bowel syndrome, renal disease, discoid lupus, rheumatoid arthritis, and numerous surgeries, including a bilateral mastectomy with reconstruction, bilateral oophorectomy, colon resection, and six rectal surgeries. Testing revealed that Toscano's full-scale IQ was in the borderline range, as were her working memory index and processing speed index. In numerous respects, Toscano scored in the low end of average. Dr. Tennyson reported that throughout the evaluation, Toscano's mood appeared mildly depressed, anxious, and somatically focused, but two tests revealed symptom validity. Dr. Tennyson noted, however, that "there were several occasions during testing where [Toscano] appeared to provide slightly exaggerated and atypical responses."

Dr. Tennyson issued a January 2, 2014 report. She diagnosed Toscano with post-concussion syndrome and undifferentiated somatoform disorder.

Toscano's cognitive skills fell in the low average to average range, which was deemed "fairly consistent" with her ninth-grade education. Dr. Tennyson reported that Toscano's "level of anxiety likely impacted her performance" on certain tests as did her "excessive[]focus on her physical symptoms[.]"

Dr. Tennyson noted that "[t]he physical symptoms [Toscano] reports including headaches and nausea are consistent with post[-]concussion syndrome; however, she reported these symptoms to such a degree during the evaluation that these symptoms appeared somewhat exaggerated as the level of disability she reported is not consistent with her level of injury." Dr. Tennyson concluded that "the majority of [Toscano's] complaints are either somatic (such as preoccupation with her injuries and nausea) or psychological/emotional (such as anxiety, depression and frustration with her slowed recovery)." Dr. Tennyson opined that despite Toscano's medical history, "it is likely that her physical complaints and excessive somatic focus are in excess of what would be expected and do not fully explain all of her physical complaints, which meets [the] criteria for a diagnosis of a somatoform disorder."<sup>3</sup> Dr. Tennyson recommended that Toscano receive psychotherapy to

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<sup>3</sup> The diagnostic criteria for somatic symptom disorder, formerly known as somatoform disorder, are:

address her "tendency to excessively focus on somatic complaints as well as her high level of depression and anxiety."

On March 10, 2016, Toscano tripped over a music box while guiding a student during music class, fell backwards, landed on her left arm and tilted her neck back, seriously injuring her neck and reinjuring her left arm. Toscano felt "sizzles" that felt like "painful electricity" in her neck. The same

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A. One or more somatic symptoms that are distressing or result in significant disruption of daily life.

B. Excessive thoughts, feelings, or behaviors related to the somatic symptoms or associated health concerns as manifested by at least one of the following:

1. Disproportionate and persistent thoughts about the seriousness of one's symptoms.
2. Persistently high level of anxiety about health or symptoms.
3. Excessive time and energy devoted to these symptoms or health concerns.

C. Although any one somatic symptom may not be continuously present, the state of being symptomatic is persistent (typically more than [six] months).

[American Psychiatric Association, Desk Reference to the Diagnostic Criteria from DSM-5 161 (2013).]

See also Green v. N.J. Mfrs. Ins. Co., 160 N.J. 480, 488 (1999) (stating that a somatoform disorder "occurs when a patient reacts to stress by subconsciously developing physical symptoms for which there is no physical cause").

medical facility that initially treated Toscano believed she suffered another concussion, refractured her left arm, and reinjured her left elbow. She was transported by ambulance to an emergency room.

Toscano returned to work approximately forty-five days later but continued to experience headaches, neck pain, and difficulty walking and standing. She continued to receive treatment from Dr. Elmore through workers' compensation.

Toscano completed the 2016 school term and went back to work the next term, but stated she was having "severe trouble" working, complaining of headaches, neck pain, and difficulty walking and standing due to "severe pain" and tingling sensations. Toscano continued working until February 2017, when she was put on bed rest by her neurosurgeon, Dr. Charles A. Gatto, due to the risk of spinal cord injury. Dr. Gatto diagnosed Toscano with "[c]ervical stenosis with cervical kyphosis and cervical disk herniation with progressive symptoms at [levels] C4-5 and C5-6 and C6-7." In March 2017, Toscano underwent three-level cervical fusion surgery with fixtures. Following the surgery, she was unable to work for approximately six months and received workers' compensation disability benefits.

Following the neck surgery, Toscano wore a neck brace for four and one-half months. When the neck brace was removed, she experienced severe

pain on the right side of her face. An MRI revealed that the neck brace had permanently dislocated Toscano's jaw. In July 2017, Toscano began treatment for her dislocated jaw with David Schor, D.D.S, a temporomandibular joint specialist. She was also referred to a neurologist for neuropathy. Toscano continued to receive workers' compensation disability benefits until April 2018.<sup>4</sup>

Toscano returned to work in the Fall of 2017 but had trouble performing her job duties. She continued to experience severe pain at work, complaining of headaches, neck pain, and difficulty walking and standing from severe pain in her feet and legs, mostly on the right side, along with tingling in her feet, hands, and fingertips. On March 4, 2018, Dr. Elmore declared her disabled and advised her not to return to work. She continued to receive workers' compensation benefits until April 2018. She has not worked since.

According to her employer, Toscano's job duties were to:

Assist the teacher with individualized instruction under the guidance and direction of the classroom teacher.

Assist the pupils, where appropriate, to and from assigned classrooms.

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<sup>4</sup> The record on appeal does not reflect if Toscano sought, obtained, or was denied total or partial permanent disability workers' compensation benefits. We note that Toscano's treating physicians and Dr. Tennyson were selected and provided by the workers' compensation carrier.

Assist, where appropriate, in loading and unloading pupils from transportation buses or vans.

Assist pupils in various work experience projects, such as crafts, research, etc.

Assist in testing of students.

Maintain student conduct, ensuring that students are seated properly, behaving appropriately and are abiding by regulations as established by the classroom teacher and building principal.

Assist in student dismissal, following safety guidelines and stressing calm and safe behavior.

Monitor indoor/outdoor play activities during lunch and recess periods.

Report all incidents of student accident, vandalism, or unusual circumstances to the building principal in a timely manner.

Maintain proper student conduct in school cafeteria, ensuring that students are seated properly, are cleaning their areas before leaving tables, are behaving appropriately and are abiding by regulations as established by the building principal.

Perform other duties as assigned by the classroom teacher and/or the building principal.

On April 28, 2018, Toscano applied for accidental disability retirement benefits, listing May 1, 2018 as her retirement date. Her employer, Green Brook Board of Education, certified that no other job was available to Toscano. Toscano's disability application stated:

While in the course of my employment my feet were struck by a student pushing in his chair which caused me to fall unexpectedly sustaining injury to my head[,] jaw[,] neck[,] left elbow[,] and left hand. As a result of this fall my left elbow was fractured my left hand required surgery[.] I needed a [three-]level cervical fusion I have a permanently dislocated jaw and treat with a neurologist for neuralgia[,] post-concussion syndrome and chronic pain syndrome[,] as well as a pain manager who provides injections. The combination of these disabilities prevents me from returning to my job as a paraprofessional.

The application was supported by Dr. Elmore's April 9, 2018 medical examination report. The report stated that Dr. Elmore began treating Toscano on April 3, 2018, and listed findings of jaw pain, decreased cervical range of motion, upper extremity paresthesia, and neuralgia, and noted Toscano underwent a three-level cervical fusion on March 29, 2017, following the work injury on March 10, 2016. Dr. Elmore diagnosed Toscano with cervical radiculopathy and trigeminal neuralgia. She opined that Toscano was totally and permanently disabled and no longer able to perform her job duties. Dr. Elmore indicated that Toscano's disability was likely to be stable but there was a possibility that Toscano might improve to a degree to be able to perform her job duties. Dr. Elmore also opined that Toscano's permanent and total disability was a direct result of an accident that occurred during the performance of her regular assigned duties.

The Board retained Dr. Steven Lomazow, a Board-certified neurologist, to perform an independent medical evaluation (IME). Dr. Lomazow opined that Toscano's 2013 and 2016 injuries "render[ed] her disabled. She did not do well after her cervical fusion which was more a consequence of the second injury than the first." Dr. Lomazow concluded that it was "the accumulative effect of both injuries which caus[ed] her to be disabled at this time." He "disagree[d] with Dr. Charles' contention that this woman [was] malingering." Dr. Lomazow found "temporomandibular evidence of a total dislocation of the right jaw."

On November 7, 2018, the Board deemed Toscano "totally and permanently disabled from the performance of her regular and assigned duties" as defined by "N.J.S.A. 43:15A-43 and relevant case law." However, the Board voted to postpone its decision as to accidental disability "for clarification from" Dr. Lomazow "on the issue of direct result." The Board requested submission of Toscano's entire "medical records from [her] physicians, as well as any follow-up medical documentation, related to the October 18, 2013 incident." The Board indicated that following receipt of the requested documentation, "Dr. Lomazow [would] issue an addendum to his report." The case would then be referred to the Medical Review Board (MRB) for a recommendation, followed by consideration by the Board. In the interim,

the Board granted Toscano ordinary disability retirement benefits effective May 1, 2018, based on its finding that Toscano was totally and permanently disabled.

After reviewing Toscano's medical records from twenty-one medical providers, an IME report, a second opinion report, and four imaging studies, Dr. Lomazow issued a January 28, 2019 addendum to his report. Dr. Lomazow characterized Dr. Tennyson's neuropsychological report as "rather damning," noting Dr. Tennyson found Toscano "was grossly exaggerating her complaints and questioned the fact whether she had a concussion at all." However, Dr. Lomazow acknowledged that Toscano "did not return to work after a second injury where she had essentially a failed cervical fusion." He nevertheless "changed [his] opinion with respect to the degree of problems that Ms. Toscano has." Dr. Lomazow further noted that Toscano's "treating neurologist, Dr. Reznik, returned her to full duty on January 13, 2014[,] with a diagnosis of post[-]concussion syndrome. There may have been some transient cognitive problems relating to the Topamax the patient was using for prophylaxis of headaches." Based on his review of the additional records, Dr. Lomazow opined that Toscano "is not totally and permanently disabled from a neurological standpoint."

On March 20, 2019, after considering the addendum to Dr. Lomazow's report and the recommendation of the MRB, the Board "reversed its previous decision and determined that Ms. Toscano [was] not totally and permanently disabled from the performance of her regular and assigned duties[,]" and denied Toscano's application for accidental disability retirement benefits. The Board concluded "there is no evidence in the record of direct causation of a total and permanent disability from either incident." The Board directed the cessation of ordinary disability retirement benefits "as she is not eligible to receive such benefits." It noted that Toscano qualified for a deferred retirement and is eligible to begin collecting monthly retirement benefits on the first day of the month following her sixtieth birthday.

Toscano appealed the Board's determination. The appeal was transferred to the Office of Administrative Law (OAL) as a contested case. Toscano, Dr. Elmore, and Dr. Lomazow testified at the two-day hearing. Seventeen exhibits were presented, including Toscano's job description, medical reports, IME reports, curricula vitae, and Dr. Tennyson's neuropsychological evaluation. On August 28, 2020, the ALJ issued an initial decision and order.

Toscano claimed she injured her "whole spinal cord" during the 2013 fall. The ALJ noted, however, the Dr. Elmore's records from January 30, 2014, reported that a review of an MRI of Toscano's cervical spine showed

"multilevel degenerative disease without any significant neural compression nor any significant stenosis."

Dr. Elmore treated Toscano for her "concussion" and temporary medication side effects that included loss of speech and impaired vision. Toscano claimed she was forced to return to work when workers' compensation stopped providing treatment even though she claimed she was unable to drive or function at that point. Toscano stated she was "weaned off" the medication and returned to work on March 11, 2014.

After returning to work, Toscano had difficulty doing her job and walking, and experienced "tingling and sizzling pain throughout [her] body," and limited use of her left arm and hand, that were "a lot weaker" since the fall. She testified that she could no longer fully extend her left arm. Toscano nevertheless finished out the 2014 school year and worked the next term, but experienced daily "severe headaches," had "severe pain throughout [her] body," and had problems standing or sitting, causing her to frequently call out sick because she could not "get out of bed" due to the pain and headaches.

Following the March 2016 accident, Toscano returned to work in May 2016, but continued being treated by physicians through workers' compensation. Toscano completed the 2016 school term and went back to work the next term, but stated she was having "severe trouble" working,

complaining of headaches, neck pain, and difficulty walking and standing due to "severe pain" and tingling sensations.

In addition to treatment by Dr. Elmore, Toscano recounted that she was eventually placed on bed rest due to risk of further spinal injury and underwent a three-level spinal fusion surgery performed by Dr. Gatto on March 29, 2017, followed by six physical therapy sessions. She wore a neck brace for four and one-half months after the surgery and upon its removal, doctors discovered she had a permanently dislocated jaw. She stated that Dr. Gatto recommended that she see a neurologist for her pain. Toscano returned to Dr. Elmore in early 2018, who recommended rest and prescribed medications.

Toscano remained on medical leave for six months and collected workers' compensation disability benefits. She returned to work in the Fall of 2017, but said she still had difficulty performing her duties. Toscano was weaned off narcotic medications but was still prescribed Tramadol, Cymbalta, Baclofen, and Lorazepam.

Dr. Schor provided Toscano with a TMJ appliance, which relieved some of her discomfort, and administered Marcaine shots in her joint because her pain was so severe. She also received nasal nerve blocks from Dr. Schor to numb the nerves in her sinus area. Toscano suffered temporary Bell's Palsy

from the Marcaine. Dr. Schor recommended facial surgery, which Toscano underwent on December 24, 2018.

Toscano testified that her medical conditions affected her life and her ability to do her job, from the time she tried to wake up, while getting ready for work, and at work. Her medications rendered her unable to focus, keep up with students' tasks, or pay attention to teachers. Her last day at work was March 4, 2018.

Toscano has an extensive prior medical and surgical history. She was diagnosed with breast cancer in 2000, had a section of her colon removed in 2001, and underwent numerous other surgeries.

Dr. Elmore testified that she is Board-certified in neurology. She treats patients for pain, cognitive issues and other neurologically related problems. Dr. Elmore began treating Toscano in 2014. During an April 2018 examination, Toscano reported facial and neck pain.

The ALJ found that "Dr. Elmore's diagnosis of trigeminal neuralgia is a pain syndrome, so there are no objective indicators like muscle weakness or parathesia that can be objectively identified by examination. This diagnosis is based entirely upon the reporting of the patient[,] and Dr. Elmore had to rely on Toscano's subjective reporting." While Toscano had no "focal objective

findings" for her facial pain syndrome, Dr. Elmore indicated that would be expected.<sup>5</sup>

Dr. Elmore acknowledged that pain and headaches are subjective symptoms, not an underlying cause, "and individuals react to pain differently." She noted that Toscano reported "pins and needles-type pain," which indicates that the pain could be sourced to nerve pain, and can be "idiopathic," making it difficult to diagnose the source. Dr. Elmore was unable to identify the source of Toscano's reported pain. She noted, however, that the spinal injury must be considered a possible source of the pain. Dr. Elmore opined that Toscano's disability is a combination of pain and the after-effects of the pain medication, such as fatigue, somnolence, and attention/focus problems.

Dr. Lomazow testified for the Board as an expert in the field of neurology. He examined Toscano on August 18, 2018. He noted that Toscano's neck was not as flexible as it would normally be, as expected following cervical fusion surgery. Dr. Lomazow found Toscano "was totally and permanently disabled as a result of a combination of the two injuries that she had . . . and, after the surgery, she got acutely worse."

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<sup>5</sup> There was a focal finding of right facial palsy, but that was a temporary side-effect of the injections that Toscano received. Moreover, as noted by the ALJ, "[t]he effects of her medications are part of Toscano's disability."

After reviewing additional medical records, including Dr. Tennyson's neuropsychological evaluation report, Dr. Lomazow changed his opinion, noting that Dr. Tennyson found "Toscano's problem was neuropsychological in nature. Basically, that she had . . . a somatization disorder . . . and many of her symptoms are related to her excessive awareness of her physical functions." He further noted that Dr. Tennyson found "there was a component of anxiety and depression." Dr. Lomazow opined that Toscano was "psychologically incapable of returning to work" after her injuries and subsequent surgery.

On cross-examination, Dr. Lomazow acknowledged that he did not perform a neuropsychological evaluation. After reviewing Dr. Tennyson's report, he concluded that Toscano has

a very fragile psyche, she's been injured twice, she's never going back to work, she's disabled because she's a woman with a somatization disorder and she's never going to stop being somaticizing, and now she's got reasons, organic reasons for it to be worse, so I do believe she's disabled, but from a neuropsychiatric standpoint.

Dr. Lomazow noted that the cervical fusion surgery left scarring and residual effects. He opined that given Toscano's "personality, she was never going to get better after that surgery." Dr. Lomazow concluded that the spinal surgery performed by Dr. Gatto "validated Toscano's somatoform disorder, worsening her condition to the point she could no longer work. He further opined that

Toscano was "most probably" disabled neuropsychologically as of April 2018, when she last worked. Dr. Lomazow found "the likelihood of her coming back to functional status at this point is minimal."

Dr. Lomazow stated that "people who somaticize . . . [are] not faking" or malingering. "Psychologically, she's at the end of her rope." Dr. Lomazow found "there was no objective evidence of injury—'her reflexes were intact, her motor function was intact, her sensory function was intact' so the 'rest of it was psychological in nature.'" He nevertheless commented "that she may be totally and permanently disabled, but there is an utter lack of objective evidence from a neurologic standpoint, and [Dr. Tennyson's] neuropsychiatric report points to more of a neuropsychiatric or psychiatric disability."

The ALJ recounted the times Toscano had been released by her physicians to return to work without restrictions. Dr. Chang, an orthopedist, cleared Toscano to return to work at partial duty (no lifting more than one to two pounds) in January 2014, and for full duty in September 2014. Dr. Elmore initially released Toscano to work without restrictions in December 2016. Dr. Stephen Freifeld, a facial surgeon, released Toscano to work without restrictions in September 2017. Dr. Schor declined to issue a disability certificate in October 2017. Dr. Charles cleared Toscano to work without

restrictions in January 2018. Dr. Yanow cleared Toscano to return to work on an unspecified date.

Ultimately, in April 2018, Toscano was terminated by her employer because her absence was no longer medically excused. She applied for accidental disability retirement benefits later that month.

The ALJ found Toscano's complaints were "entirely subjective and not verified by objective means. Her disability claim relies entirely on her self-reported complaints of pain that are unsupported by any objective evidence of injury to provide an identifiable source of her self-reported pain." She also found "that Toscano's subjective complaints of pain are a less-than-reliable foundation on which to base a disability diagnosis." The ALJ concluded "that Dr. Lomazow's finding that Toscano is 'not totally and permanently disabled from a neurological standpoint' . . . presents a more compelling case than Dr. Elmore's case that Toscano is disabled from chronic and constant neurological pain based solely upon Toscano's subjective reporting of symptoms of chronic pain."

The ALJ determined that Toscano

has failed to prove by a preponderance of the credible evidence that she is permanently and totally disabled from her regular and assigned duties as a paraprofessional, or that she is physically incapacitated from performing her usual or any other

duty that her employer is willing to offer as a result of her reported disabilities of chronic neurological pain.

As to Dr. Lomazow's opinion that Toscano is "most probably" psychologically disabled as a result of her somatoform disorder, the ALJ noted that Toscano's application was based on physical injuries, not psychological disability. Therefore, an application for disability benefits based on a psychological disorder was not properly before the Board. The ALJ nevertheless concluded that Toscano "ha[d] not sustained her burden to demonstrate that she is totally and permanently disabled from the performance of her job duties as a result of a psychological disorder on the present record." He found Dr. Lomazow's opinion regarding Toscano's psychological condition, "without the benefit of performing any independent neuropsychological examination or diagnosis of his own, amount[ed] to an inadmissible net opinion." The ALJ further found that Dr. Tennyson's hearsay report was not supported by "a residuum of other competent, non-hearsay evidence."

Finally, the ALJ also found that Toscano did not qualify for accidental disability retirement benefits because she failed to meet her burden to demonstrate her claimed physical disability or any asserted psychological disability was a direct result of the on-the-job incidents in October 2013 and March 2016.

On October 21, 2020, the Board adopted the ALJ's decision affirming the denial of Toscano's application for accidental and ordinary disability retirement benefits. This appeal followed.

Toscano raises the following point for our consideration:

[PATRICIA] TOSCANO IS TOTALLY AND PERMANENTLY DISABLED FROM THE PERFORMANCE OF HER REGULAR AND ASSIGNED JOB DUTIES AS A PARAPROFESSIONAL INSTRUCTIONAL AIDE.

"Judicial review of an administrative agency action is limited' because respect is due to the 'expertise and superior knowledge' of an agency in its specialized field." Francois v. Bd. of Trs. of Pub. Emps.' Ret. Sys., 415 N.J. Super. 335, 347 (App. Div. 2010) (quoting Hemsey v. Bd. of Trs., Police & Firemen's Ret. Sys., 198 N.J. 215, 223 (2009)). "An appellate court affords a 'strong presumption of reasonableness' to an administrative agency's exercise of its statutorily delegated responsibilities." Lavezzi v. State, 219 N.J. 163, 171 (2014) (quoting City of Newark v. Nat. Res. Council, Dep't of Env't. Prot., 82 N.J. 530, 539 (1980)). To that end, a "reviewing court 'should not reverse'" an administrative agency's decision "unless it is arbitrary, capricious or unreasonable or it is not supported by substantial credible evidence in the record as a whole." Ibid. (quoting Prado v. State, 186 N.J. 413, 427 (2006)).

The party challenging the administrative action bears the burden of making that showing. Ibid.

To determine if an administrative agency's decision is arbitrary, capricious, or unreasonable, we must ascertain:

(1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.

[Ibid. (quoting In re Stallworth, 208 N.J. 182, 194 (2011)).]

When undertaking that process, "[t]he choice of accepting or rejecting testimony of witnesses rests with the administrative agency, and where such choice is reasonably made, it is conclusive on appeal." Oceanside Charter Sch. v. Dep't of Educ., 418 N.J. Super. 1, 9 (App. Div. 2011) (quoting In re Howard Sav. Bank, 143 N.J. Super. 1, 9 (App. Div. 1976)). Deference is "especially appropriate when the evidence is largely testimonial and involves questions of credibility." In re Return of Weapons to J.W.D., 149 N.J. 108, 117 (1997) (citing Bonnco Petrol, Inc. v. Epstein, 115 N.J. 599, 607 (1989)). It is not our place to second-guess or substitute our judgment for that of the agency and, therefore, 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).

"[A]lthough the scope of review of an agency's decision is circumscribed, an appellate court's review of an agency decision is 'not simply a pro forma exercise in which [the court] rubber stamp[s] findings that are not reasonably supported by the evidence.'" Mejia v. N.J. Dep't of Corr., 446 N.J. Super. 369, 376-77 (App. Div. 2016) (alterations in original) (quoting In re Taylor, 158 N.J. 644, 657 (1999)); accord Malacow v. N.J. Dep't of Corr., 457 N.J. Super. 87, 93 (App. Div. 2018). However, "we are not bound by an agency's construction of a statute just as we are not bound by its other, strictly legal determinations." Patel v. N.J. Motor Vehicle Comm'n, 200 N.J. 413, 420 (2009).

"[P]ension statutes are 'remedial in character' and 'should be liberally construed and administered in favor of the persons intended to be benefited thereby.'" Klumb v. Bd. of Educ. of Manalapan-Englishtown Reg'l High Sch. Dist., Monmouth Cnty., 199 N.J. 14, 34 (2009) (quoting Geller v. Dep't of Treasury, Div. of Pensions & Annuity Fund, 53 N.J. 591, 597-98 (1969)). They must also "be liberally construed in favor of public employees . . . [because] they constitute deferred compensation earned by the employee

during his years of service." Widdis v. Pub. Emp. Ret. Sys., 238 N.J. Super. 70, 78 (App. Div. 1990).

Like all public retirement systems, PERS provides for both ordinary and accidental disability retirement benefits. N.J.S.A. 43:15A-42, -43. The principal difference between ordinary and accidental disability retirement "is that ordinary disability retirement need not have a work connection." Patterson v. Bd. of Trs., State Police Ret. Sys., 194 N.J. 29, 42 (2008). To qualify for ordinary disability retirement benefits, a petitioner must establish by a preponderance of the credible evidence that he or she is "physically or mentally incapacitated for the performance of duty and should be retired." N.J.S.A. 43:15A-42. To meet that standard, an applicant must prove they have "a disabling condition and must produce expert evidence to sustain this burden." Bueno v. Bd. of Trs., Tchrs.' Pension & Annuity Fund, 404 N.J. Super. 119, 126 (App. Div. 2008) (citing Patterson, 194 N.J. at 50-51). The applicant "must establish incapacity to perform duties in the general area of [their] ordinary employment[,] rather than merely showing [an] inability to perform [their] specific job[.]" Id. at 130 (quoting Skulski v. Nolan, 68 N.J. 179, 205-06 (1975)). The applicant must also show that the disabling condition is total and permanent. Patterson, 194 N.J. at 42.

In determining whether appellant has met her burden of proof, we look to the evidence produced during the OAL hearing. Of particular relevance in this matter are the governing principles concerning medical experts. Generally, "where the medical testimony is in conflict, greater weight should be accorded to the testimony of the treating physician" as opposed to an evaluating physician who has examined the employee on only one occasion. Bialko v. H. Baker Milk Co., 38 N.J. Super. 169, 171 (App. Div. 1955); accord Mernick v. Div. of Motor Vehicles, 328 N.J. Super. 512, 522 (App. Div. 2000). "Nevertheless, expert testimony need not be given greater weight than other evidence nor more weight than it would otherwise deserve in light of common sense and experience." Torres v. Schripps, Inc., 342 N.J. Super. 419, 430 (App. Div. 2001) (citing In re Yaccarino, 117 N.J. 175, 196 (1989)). Accordingly, "[t]he factfinder may accept some of the expert's testimony and reject the rest." Ibid. (citing Todd v. Sheridan, 268 N.J. Super. 387, 401 (App. Div. 1993)).

Moreover, "a factfinder is not bound to accept the testimony of an expert witness, even if it is unrebutted by any other evidence." Id. at 431 (citing Johnson v. Am. Homestead Mortg. Corp., 306 N.J. Super. 429, 438 (App. Div. 1997)). "Indeed, a judge is not obligated to accept an expert's opinion, even if the expert was 'impressive.'" State v. M.J.K., 369 N.J. Super. 532, 549 (App.

Div. 2004) (quoting State v. Carpenter, 268 N.J. Super. 378, 383 (App. Div. 1993)).

In turn, "the weight to which an expert opinion is entitled can rise no higher than the facts and reasoning upon which that opinion is predicated." State v. Jenewicz, 193 N.J. 440, 466 (2008) (quoting Johnson v. Salem Corp., 97 N.J. 78, 91 (1984)). "This is particularly true when, as here, the factfinder is confronted with directly divergent opinions expressed by the experts." M.J.K., 369 N.J. Super. at 549. The factfinder, rather than a reviewing court, "is better positioned to evaluate the witness' credibility, qualifications, and the weight to be accorded her testimony." In re Guardianship of D.M.H., 161 N.J. 365, 382 (1999) (citing Bonnco, 115 N.J. at 607).

Here, the Board adopted the ALJ's factual findings and legal conclusions. The ALJ concluded that:

petitioner has failed to prove by a preponderance of the credible evidence that she is permanently and totally disabled from her regular and assigned duties as a paraprofessional, or that she is physically incapacitated from performing her usual or any other duty that her employer is willing to offer her as a result of her reported disabilities of chronic neurological pain.

The petitioner did not apply for disability benefits on the basis of psychological disability and, on this record, the petitioner has failed to meet [her] burden to prove that she is permanently and totally

psychologically disabled as a result of somatoform disorder.

The ALJ found that Dr. Lomazow credibly opined that Toscano was not disabled due to neurological pain, he further opined based on Dr. Tennyson's report that Toscano "is 'most probably' psychologically disabled as a result of her somatoform disorder," and "there was a 'minimal" possibility that psychological treatment and therapy may enable Toscano to return to a functioning status which would further undercut any finding of a permanent disability as required to sustain [Toscano's] claim for [ordinary disability retirement benefits] on the basis of a psychological disability."

The ALJ recognized that "[a]though psychological conditions may prove to be sufficiently disabling to justify granting disability benefits," Toscano's application for accidental disability retirement benefits stated that the cause of her disability were physical injuries to her head, jaw, left elbow, and left hand caused by the on-the-job accidents in October 2013 and March 2016. The ALJ concluded that disability "based on physical injuries sustained in the 2013 and 2016 incidents" was the only issue "properly considered on the present appeal." The ALJ noted that "[w]hile a disability applicant can 'reapply for a disability retirement based on a new incident date or different or additional medical condition,' they must submit a new application for retirement with a new retirement date[,]" quoting N.J.A.C. 17:1-7.10(i).

The ALJ went further, concluding that Toscano "ha[d] not sustained her burden to demonstrate that she is totally and permanently disabled from the performance of her job duties as a result of a psychological disorder on the present record." The ALJ noted that Dr. Lomazow did not perform a neuropsychiatric evaluation of Toscano. "[H]is opinion [was] based upon his review of the evaluation and report of Dr. Tennyson." The ALJ concluded that Dr. Lomazow "lack[ed] the requisite direct knowledge of Toscano and her psychological condition to provide a factual basis on which to offer his diagnosis of her neuropsychological condition." The ALJ rejected Dr. Lomazow's opinion about Toscano's neuropsychological condition as an inadmissible net opinion.

The ALJ further noted that while testifying experts may utilize facts and data derived from other medical providers, Dr. Lomazow was "not relying on Dr. Tennyson's report to establish objective facts upon which to formulate his own diagnosis, but rather [was] only accepting the diagnosis reached by Dr. Tennyson and repeating it as his own opinion." "In this case, Dr. Lomazow's opinion regarding Toscano's psychological state amounts to no more than his accepting and reciting the conclusions documented in the report of Dr. Tennyson." The ALJ reasoned:

To accept such an opinion, as offered here, would, in essence, admit the psychological diagnoses and

conclusions of a non-testifying medical professional contained in their report by offering it as the basis for Dr. Lomazow's opinion on Toscano's psychiatric disability without the benefit of Dr. Lomazow performing any independent neuropsychological examination/diagnosis of Toscano on his own. To allow this would, in effect, improperly admit the non-testifying professionals' psychological evaluations into these proceedings without the accompanying testimony (and subsequent cross-examination) of those professionals regarding their diagnoses and conclusions. See Konop v. Rosen, 425 N.J. Super. 391, 405 (App. Div. 2012) (noting inadmissibility of opinions embedded in medical reports where declarant is not produced as a witness at trial); Nowacki v. Cmty. Med. Ctr., 279 N.J. Super. 276, 282-83 (App. Div. 1995) (medical opinions in hospital records inadmissible where opponent is deprived of opportunity to cross examine declarant on basis for diagnosis or cause of condition in question); Solis v. PERS, TYP 03400-06, Final Decision (Jan. 22, 2008), <http://njlaw.rutgers.edu/collections/oal/search.html> (finding it "improper for [an] ALJ to have considered for its truth the complex diagnoses contained" in a report of a non-testifying medical expert in violation of N.J.R.E. 808).

Dr. Lomazow's recitation of Dr. Tennyson's neuropsychological diagnosis of Toscano, without the benefit of performing any independent neuropsychological examination or diagnosis of his own, amounts to an inadmissible net opinion.

[(alteration in original).]

Toscano had no opportunity to cross-examine Dr. Tennyson, who did not testify during the hearing. Dr. Tennyson's report was an inadmissible hearsay

out-of-court written statement used by Dr. Lomazow to prove the truth of its contents. See N.J.R.E. 801; N.J.R.E. 802.

We recognize that the rules of evidence are relaxed in administrative proceedings. See N.J.A.C. 1:1-15.1(c) ("Parties in contested cases shall not be bound by statutory or common law rules of evidence or any formally adopted in the New Jersey Rules of Evidence except as specifically provided in these rules."). Instead, the residuum rule applies, which provides that "[s]ubject to the judge's discretion to exclude evidence under N.J.A.C. 1:1-15.1(c) or a valid claim of privilege, hearsay evidence shall be admissible in the trial of contested cases." N.J.A.C. 1:1-15.5(a). "Notwithstanding the admissibility of hearsay evidence, some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness." N.J.A.C. 1:1-15.5(b); accord Weston v. State, 60 N.J. 36, 50-51 (1972); Negron v. Dep't of Corr., 220 N.J. Super. 425, 432 (App. Div. 1987). In addition, "[e]vidence rulings shall be made to promote fundamental principles of fairness and justice and to aid in the ascertainment of truth." N.J.A.C. 1:1-15.1(b). To that end, "[an ALJ] may, in his or her discretion, exclude any evidence if its probative value is substantially outweighed by the risk that its admission will . . .

[c]reate substantial danger of undue prejudice or confusion." N.J.A.C. 1:1-15.1(c).

Toscano did not claim that she was psychologically disabled by somatic symptom disorder. The Board raised that issue as a defense but produced no competent evidence supporting it. Dr. Lomazow candidly admitted that he did not perform a neuropsychological evaluation and that he "'sort of short-circuit[ed]' the proper evaluation process." He nevertheless changed his earlier opinion that Toscano was permanently and totally disabled from work based in large part on Dr. Tennyson's earlier evaluation.

Importantly, Dr. Tennyson's neuropsychological evaluation took place in December 2013. Toscano's subsequent 2016 accident took place years thereafter. Toscano suffered a refractured left arm, concussion, and injuries to her neck and left elbow from the 2016 fall. She underwent a three-level cervical fusion surgery in 2017, and suffered a permanently dislocated jaw from the neck brace she wore while recovering from that surgery. Dr. Tennyson's hearsay report obviously predated those significant events and her conclusion that Toscano's symptoms were either somatic or psychological/emotional should not have been considered in evaluating the validity of the pain and symptoms she reported from those subsequent injuries. For example, it is hardly surprising that a permanently dislocated jaw would

cause pain and headaches. Nor is it surprising that a three-level cervical fusion and the underlying degenerative changes would impose physical limitations.

Here, there was no legally competent evidence presented that Toscano suffered from somatic symptom disorder. Thus, there was no residuum of legally competent evidence presented that Toscano suffered from somatic symptom disorder. Accordingly, the ALJ should not have rendered a decision on the merits of a psychological claim that Toscano never raised or a related defense that the Board did not prove. By adopting the ALJ's decision, the Board repeated that error. Instead, the ALJ and Board should have decided the ordinary disability application based on the competent evidence adduced during the hearing.

As we have noted, Toscano has endured a lengthy medical history that includes numerous serious medical conditions, injuries, and surgeries. Her ability to work is affected by a three-level cervical fusion, permanently dislocated jaw, and neuralgia resulting from her dislocated jaw, degenerative spinal changes, and hand and wrist injuries. Because Toscano is only challenging the denial of ordinary retirement disability benefits, it does not matter if those medical conditions and resulting pain were job-related. What does matter is whether the aggregate impact of those conditions rendered her totally and permanently disabled from performing her job duties. That impact

includes the resulting level of pain experienced by Toscano because of her particular pain tolerance.

Different individuals have widely varying pain tolerance. Although pain is subjective and largely unprovable by objective medical evidence, the pain experienced from orthopedic injuries and neuralgia can be disabling. We are reminded of "the doctrine of the particularly susceptible victim." Ostrowski v. Azzara, 111 N.J. 429, 438 (1988). Just as the defendant in a personal injury case "must take the plaintiff as he finds him," ibid., so too the Board must consider Toscano's disability as affected by her individual ability to tolerate pain. The Board's decision did not consider Toscano's ability to work from that perspective.

We vacate the denial of ordinary disability retirement benefits and remand for the Board to reconsider its decision. We do not foreclose Toscano from filing a new application to include any psychologically based disability.

In sum, the unchallenged denial of Toscano's application for accidental disability retirement benefits is affirmed. The denial of her application for ordinary disability retirement benefits is vacated and remanded to the Board for further proceedings consistent with this opinion.

Affirmed in part, vacated in part, 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