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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1408-21**

SEAN HART,

Petitioner-Appellant,

v.

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

Respondent-Respondent.

Submitted October 12, 2023 – Decided November 2, 2023

Before Judges Firko and Susswein.

On appeal from the Board of Trustees of the Police and Firemen's Retirement System, Department of the Treasury, PFRS No. xx7201.

Feeley & LaRocca, LLC and Blanco Law Firm, LLC, attorneys for appellant (Pablo N. Blanco and John D. Feeley, of counsel and on the brief).

Robert S. Garrison, Jr., Director of Legal Affairs, attorney for respondent (Thomas R. Hower, Staff Attorney, on the brief).

PER CURIAM

Sean Hart appeals from a final determination of the Board of Trustees (the Board) of the Police and Firemen's Retirement System (PFRS), which denied his application for accidental disability retirement benefits pursuant to N.J.S.A. 43:16A-7(1). A five-day hearing was conducted before an Administrative Law Judge (ALJ) who retired after the hearing and did not issue an initial decision. A subsequent ALJ rendered an initial decision based on the transcripts and documentary evidence only and did not make any credibility determinations. From our review of the record, we are convinced credibility findings are critical in this sharply contested matter. We therefore reverse and remand for further proceedings.

I.

According to Hart, he was injured during an incident on November 1, 2016, during his employment as a corrections officer at the Bergen County jail. While about to serve food to the inmates in the dayroom,¹ Hart maintains an agitated inmate "violently struck [him] in the face" with his fists, and Hart "was just trying to survive." Hart could not state how many times he was punched but testified "it felt like a million" and made him "fear for his life" because the

¹ The dayroom houses seventy inmates who sleep on bunks.

inmate was charged with the murder of two people. Ultimately, the inmate was down on the floor and Hart secured him. The ten-second incident was captured on a one-minute surveillance video. Hart perceived the incident "to be minutes."

Hart was evaluated at an emergency room where he was treated for head, neck, and nasal injuries, and released. Thereafter, Hart underwent a two-level cervical fusion surgery, a nasal reconstruction surgery, a right-knee meniscus surgery, and physical therapy for back pain, which he claims are causally related to the incident. Other than a torn anterior cruciate ligament in his right knee and neck sprain, Hart claimed he had no other pre-existing orthopedic conditions prior to the incident and no prior psychological or psychiatric conditions.

Following the incident in question, Hart claimed he was diagnosed with post-traumatic stress disorder (PTSD) and major depressive order for which he treated with Dr. Nancy Gallina, a psychiatrist, for a year. According to Hart, he lives in "constant fear that it can happen again." Dr. Gallina determined Hart was unable to return to work. Hart did not return to work as a corrections officer and filed an application for accidental disability benefits.

The Board denied Hart's application. The matter was transmitted to the Office of Administrative Law as a contested case. During the hearing before the first ALJ, Hart testified on his own behalf and presented the testimony of

Dr. David Pilchman, an expert in clinical psychology, Dr. Daniel Cowen, an expert in psychiatry, and Dr. David Weiss, an expert in orthopedics. Drs. Pilchman and Cowen agreed Hart suffered from PTSD as a result of the incident. Dr. Pilchman opined Hart "avoids crowds" and had no pre-existing conditions. Dr. Cowen also testified that Hart suffered from major depressive disorder as a result of the incident. Dr. Cowen testified the intensity of the assault—not the length of the incident—is the relevant factor in diagnosing PTSD. Dr. Weiss testified Hart required a two-level cervical fusion because the incident aggravated his pre-existing neck pathology. Dr. Weiss opined that Hart is disabled and cannot return to work as a corrections officer.

The Board's experts, Dr. Richard Filippone, a psychologist, and Dr. Andrew Hutter, an orthopedist, opined Hart is not disabled and can return to work. Dr. Filippone watched the video of the incident and had Hart complete an accidental disability form where he self-reported what happened during the incident. Dr. Filippone opined Hart's report of the incident was "completely discordant" with the video tape he reviewed.

Dr. Filippone stated Hart "amply defended himself, he was never thrown to his feet, he was never disabled or cowering or overwhelmed physically, it was a brief altercation, and, in fact, the inmate dropped his hands to his side after ten

seconds . . . it was hardly a life-threatening event." Dr. Filippone testified that Hart's self-report was "ludicrous" and "not believable, fabrication, a lie."

Dr. Hutter opined Hart is disabled due to his neck injury, but the incident was not the primary cause of Hart's disability and that his cervical changes were degenerative in nature, not the direct result of the incident. Mark Casey, who is employed by the Pension Fraud and Abuse Unit as an investigator, testified on behalf of the Board. Casey testified he reviewed the video, medical documents, and the motor vehicle crash report regarding Hart's prior vehicle accident. Casey testified the "events depicted on the video didn't corroborate [Hart's] version of events."

The hearings commenced in June 2019 and concluded in August 2020. The second ALJ who assumed the burden of rendering an initial decision conducted a conference call² with counsel seven months later who agreed that she would submit an initial decision based on the record rather than start over. The record does not indicate that counsel agreed to waive credibility determinations. In December 2021, the ALJ issued an initial decision based solely on her review of the existing record. The ALJ stated: "Because I am

² The record does not indicate if the conference call was recorded, and no transcript of the call was provided.

basing this [i]nitial [d]ecision on the transcripts and documents that were admitted into evidence by [the prior ALJ], I will not be determining credibility."³

The ALJ determined that the incident resulted in Hart "being struck in the face," as a result of trying to subdue a prisoner. The ALJ noted Hart satisfied the Richardson⁴ criteria to qualify for accidental disability benefits because the incident is "identifiable as to time and place" and was "undesigned and unexpected." However, the ALJ concluded that Hart did not meet his burden of demonstrating by a preponderance of the credible evidence that the incident was the direct cause of his disability, but the injury "merely contributed to an aggravation of his pre-existing degenerative cervical condition." On January 10, 2020, the Board issued its final decision, adopting the ALJ's findings and conclusion. This appeal followed.

The sole argument presented by Hart is that he is entitled to an accidental disability pension because he was involved in a workplace incident that directly resulted in his total disability. Hart contends proof that the incident was the exclusive cause of his total disability is not required.

³ The record closed on November 30, 2021, after respondent filed its submission.

⁴ Richardson v. Bd. of Tr., Police & Firemen's Ret. Sys., 192 N.J. 189, 212-13 (2007).

II.

"Our review of administrative agency action is limited." Russo v. Bd. of Trs., Police & Firemen's Ret. Sys., 206 N.J. 14, 27 (2011). Reviewing courts presume the validity of the "administrative agency's exercise of its statutorily delegated responsibilities." Lavezzi v. State, 219 N.J. 163, 171 (2014). For those reasons, "an appellate court ordinarily should not disturb an administrative agency's determinations or findings unless there is a clear showing that (1) the agency did not follow the law; (2) the decision was arbitrary, capricious, or unreasonable; or (3) the decision was not supported by substantial evidence." In re Virtua-W. Jersey Hosp. Voorhees for a Certificate of Need, 194 N.J. 413, 422 (2008). "The burden of demonstrating that the agency's action was arbitrary, capricious or unreasonable rests upon the [party] challenging the administrative action." In re Arenas, 385 N.J. Super. 440, 443-44 (App. Div. 2006).

"[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." Brady v. Bd. of Rev., 152 N.J. 197, 210 (1997) (quoting Charatan v. Bd. of Review, 200 N.J. Super. 74, 79 (App. Div. 1985)). "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 (1988). That said, appellate courts review de novo an agency's interpretation of a statute or case law. Russo, 206 N.J. at 27.

Pursuant to N.J.S.A. 43:16A-7(a)(1), a PFRS member may apply for accidental disability retirement benefits. In Richardson, 192 N.J. at 212-13, the Court held that a claimant for accidental disability retirement benefits must prove:

- (1) that he [or she] 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; and

(5) that the member is mentally or physically incapacitated from performing his [or her] usual or any other duty.

Relevant here, the Court observed a "permanent and total disability" precludes an employee, due to mental or physical impairment, "from performing his [or her] own or any other available job." Id. at 195. An individual seeking accidental disability retirement benefits must prove a disabling permanent injury, and must produce "such expert evidence as is required to sustain that burden." Patterson v. Bd. of Trs., State Police Ret. Sys., 194 N.J. 29, 51 (2008). Since Hart alleges both a physical and psychiatric injury—in particular a psychiatric injury that resulted from a physical injury—the Patterson standard does not need to be considered. Id. at 14.

On appeal, Hart seeks to have us interpret and clarify the term "direct result," an issue of statutory interpretation, de novo. Hart contends that a traumatic event does not need to be the exclusive cause, but only an essential significant or substantial contributing cause of the disability. See Gerba, 83 N.J. at 187, overruled on other grounds by Maynard, 113 N.J. at 169. In other words, the traumatic event must be the direct cause of the disability, even if it is acting in combination with an underlying physical disease. Id. at 187 (emphasis in the original).

It is important to note that not every petitioner who has a pre-existing condition will be prevented from collecting accidental disability retirement benefits; however, if the disability results from the "aggravation, acceleration, or ignition of the [pre-existing] disease, the disability normally is 'ordinary' rather than 'accidental.'" Ibid. In this case, the correct "inquiry is whether, during the regular performance of [petitioner's] job, an unexpected happening, not the result of pre-existing disease alone or in combination with the work, has occurred and directly resulted in the permanent and total disability of [petitioner]." Richardson, 192 N.J. at 214.

Because the ALJ made no credibility findings here, we cannot conduct meaningful appellate review. Credibility findings are grounded in the judge's consideration of demeanor, body language, and common experience, and constitute part of a judge's fact-finding responsibilities. See State v. Locurto, 157 N.J. 463, 474 (1999). Until the ALJ makes credibility determinations in the matter under review, we cannot address Hart's issue raised on appeal.

III.

The ALJ who presided over the hearings retired and another ALJ—who had no opportunity to assess the credibility of the witnesses or gauge the weight of their testimony—completed the adjudication of the matter by rendering an

initial decision. We recognize the difficult position into which the second ALJ was placed, but nevertheless a determination regarding the credibility of the witnesses is necessary to the ALJ's consideration of the facts in light of the applicable principles of law. Since conflicting versions of the events were presented and several experts opined Hart is not credible, it was incumbent on the ALJ to make that determination herself.

We conclude a remand is needed because no credibility determinations were made. It is sufficiently established that "credibility is an issue which is peculiarly within the jury's [or factfinder's] ken." State v. J.Q., 252 N.J. Super 11, 39 (App. Div. 1991). The question of whether a particular witness is telling the truth is one that the trier of fact must answer using common knowledge about human nature, and observations of the demeanor and character of the witnesses. Ibid. When the issue of credibility is the most important factor in the case, "the conscientious conclusion of the trier of the fact as to which witnesses were more worthy of belief must be given great weight and accepted by the appellate tribunal unless clearly lacking reasonable support." Abeles v. Adams Eng'g Co., 35 N.J. 411, 427 (1961).

This deference is given because the judge's findings are "substantially influenced by [the] opportunity to hear and see the witnesses and have the 'feel'

of the case, which a reviewing court cannot enjoy." Locurto, 157 N.J. at 471. That deference is particularly strong when the evidence is largely testimonial and rests on a judge's credibility findings. Gnall v. Gnall, 222 N.J. 414, 428 (2015).

For example, in the matter of In re License Issued to Zahl, the Board adopted most of the ALJ's findings of facts and affirmed the ALJ's order to revoke the respondent's license. In re License Issued to Zahl, 186 N.J. 341, 349 (2006). To support its decision, the Board noted it gave deference to the decision-making of the ALJ because the ALJ's conclusions rested more on credibility determinations than on medical knowledge. Id. at 350. The Board further noted that although it would have made the same decision based on a review of the transcripts alone, "such credibility judgments 'necessarily are best made by the trier of fact.'" Ibid.

Unlike the ALJ in Zahl, the ALJ here did not make any findings whatsoever in regard to the credibility of the witnesses, thereby limiting the Board's ability to review her initial decision. This case involves contested issues of fact as to how long the incident was and how severely and how many times Hart was struck, which turn on the credibility of the witnesses. And, the medical

experts disagree on Hart's past medical history and the severity of his complaints.


Under N.J.R.E. 703, experts are permitted to rely upon "facts or data in the particular case" made "known" to the expert at or before the hearing and "facts or data" not admitted into evidence. State v. Berry, 140 N.J. 280, 304 (1995). The judge must determine exactly what facts underlie the expert's opinion. Often the opinion is based on assumed facts. Here, the facts underlying Hart's incident are seriously disputed. The weight of the expert's opinion depends on the facts on which the expert bases their opinion. Polyard v. Terry, 160 N.J. Super. 497, 511 (App. Div. 1978). Therefore, it is essential that the ALJ—as the factfinder—determine the credibility of the witnesses here as a first step before articulating findings of fact and conclusions of law. See Lewicki v. N.J. Art Foundry, 88 N.J. 75, 89-90 (1981).

For these reasons, we conclude the Board's denial of Hart's application is unreasonable because the Board adopted the ALJ's initial decision, which lacked credibility determinations. The key issue is causation, which Hart points out "depended largely upon the credibility of the experts who testified at trial." Thus, the ALJ needs to render a decision on credibility in order for the Board to review the matter and for our review of the Board's decision.

We vacate the Board's decision and remand for a new trial in the Office of Administrative Law. We see no reason why the proceeding that follows should be protracted. So there is no question, we direct that the remand proceedings necessitate the recalling of those witnesses who testified about the incident and its alleged causal relationship to Hart's cervical issues and PTSD. The matter is one that largely rises and falls on the credibility of those witnesses, and the ALJ to whom this matter now is assigned cannot possibly make that credibility finding by resort to the transcripts. The ALJ must see and hear those witnesses testify. We offer no opinion on the credibility issues that must be decided on remand.

Reversed, vacated, and remanded for further proceedings. 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