

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1433-20**

SERGIO DONA,

Petitioner-Appellant,

v.

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

Respondent-Respondent.

Argued January 19, 2023 – Decided February 7, 2023

Before Judges Mayer and Bishop-Thompson.

On appeal from the Board of Trustees of the Police and Firemen's Retirement System, Department of the Treasury, PFRS No. xx8935.

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

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

PER CURIAM

Petitioner Sergio Dona (Dona) appeals from a December 15, 2020 final agency decision issued by respondent Board of Trustees (Board) of the Police and Firemen's Retirement System (PFRS), denying his application for accidental disability retirement benefits. We affirm.

We recite the facts from the testimony adduced at the hearings before an administrative law judge (ALJ). For fourteen years, Dona worked as a corrections officer at the Camden County Department of Corrections (CCDOC), working six o'clock in the evening until six o'clock in the morning. He worked with as many as forty inmates in the prison's "mental health block," which included inmates undergoing drug detoxification. Dona's duties included walking the prison block every five minutes and checking on the inmates.

On April 5, 2016, while walking the prison block, Dona discovered an inmate "banging his head against a concrete wall." He notified his sergeant, who ordered Dona to enter the cell and restrain the inmate. Dona explained the inmate was coming off a street drug that caused aggressive behavior. Dona attempted to restrain the inmate "as best as [he] could," but the inmate became combative. According to Dona, it took about five to ten minutes for "everybody else to come back in and try to help [him] restrain [the inmate]."

Dona suffered injuries while restraining the inmate. Specifically, his hands were "black and blue" and his knees and ankles were swollen. After the incident, Dona went to the hospital where he received treatment to his foot, ankles, knees, and hands. He was also treated for a headache. According to an x-ray taken at the hospital, Dona had "an oblique fracture" in his left pinky finger. However, x-rays of Dona's left wrist and left foot revealed no significant injuries.

Thereafter, Dona received treatment from two workers' compensation doctors, Brian Zell, M.D., and Michael Rivlin, M.D. Dr. Zell cleared Dona to return to work in July 2016. In August 2016, Dr. Rivlin released Dona to return to his job at the CCDOC without restrictions. Although Dona returned to work at the CCDOC in August, one month later, his personal doctor advised him to stop working. During the short time period he returned to work at the CCDOC, Dona testified his "foot was swelling," he could not "grip" when patting down inmates, and he could not "take the pain from walking around . . . every five minute[s]." Dona also explained he could not qualify for continued use of his firearm due to limitations in his dominant left hand.

In or around January 2017, Dr. Zell ordered a functional capacity evaluation (FCE) to assess Dona's performance with respect to various physical

tasks. In a January 10, 2017 written report, the evaluator indicated Dona's performance on "[t]he MTM walking test was somewhat inconsistent" and noted "each trial [of the walking test] was better than the previous, so there was no fatigue issue. In addition, his limp decreased and there was more equal stance time between legs with each trial." According to the FCE report, Dona's "ankles showed no swelling either before or after the FCE. He moved well on and off of [the] treatment table, and when walking into the examination room there was no indication of an antalgic gait." The FCE found Dona's "limitations [were] due to his pain complaints." Additionally, while Dona "reported frequent swelling in his . . . ankles, this was not identified after the [three]-hour FCE." Regarding Dona's ability to walk, the FCE indicated "inconsistency between repetitive trials of walking during the MTM test."

On January 25, 2017, Dr. Zell re-examined Dona. After reviewing the FCE report, Dr. Zell found evidence of low effort by Dona during the grip test. However, he offered no opinion regarding diminished capacity related to Dona's left ankle based on the FCE results. To the contrary, in his January 25, 2017 report, Dr. Zell noted the FCE walking test indicated "each trial was better than the previous with no fatigue issues and the limp that apparently was present when [he] first started got less as time and distance continued." After

considering the FCE report, Dr. Zell concluded Dona could return to medium capacity work and recommended "no further treatment."

One month after Dr. Zell's re-examination, Dona filed an application for accidental disability retirement benefits based on the April 5, 2016 incident. The Board denied Dona's application, finding he was not "totally and permanently disabled from the performance of [his] regular and assigned job duties."

Dona appealed the Board's decision. On September 12, 2017, the Board referred the appeal to the Office of Administrative Law and the matter was assigned to an ALJ for a hearing. The ALJ held hearings on December 10, 2018 and June 4, 2020.

During the hearings, Dona testified on his own behalf. The ALJ also heard medical testimony from Jeffrey Lakin, M.D., on behalf of the Board, and David Weiss, M.D., on behalf of Dona. Both doctors examined Dona prior to testifying. Dr. Lakin examined Dona in May 2017. Later that year, Dr. Weiss examined Dona.

Dr. Weiss's testimony

Dr. Weiss testified he saw Dona on one occasion and prepared two written medical reports: an October 26, 2017 report for workers' compensation purposes and a November 6, 2018 report for the hearing before the ALJ. Dr. Weiss's

opinions were based upon Dona's reported medical history and "ongoing complaints," a review of Dona's medical records, and a "hands-on orthopedic exam."

Dr. Weiss testified the x-ray of Dona's left hand revealed an oblique fracture in his pinky finger. He further testified that Dona suffered a "nerve issue" in his left foot. Following Dona's brief return to work in September 2016, Dr. Weiss explained that Dona had difficulty "going up and down the steps, climbing, [and] walking." Dr. Weiss also testified that Dona exhibited "decreased grip strength in the left hand" and complained of "clumsiness" in that hand. According to Dr. Weiss, Dona reported an eight out of ten pain level in his left hand and ten out of ten pain level in his left foot.

Upon physically examining Dona, Dr. Weiss found he had tenderness below the knuckle of his fractured pinky finger. Dr. Weiss also testified Dona had pain when he extended his ring finger.

Dr. Weiss also performed a grip strength test on Dona's left hand. After repeating the test three times, the doctor testified the results of all three tests were consistent and indicated Dona had limited grip function. Dr. Weiss found no evidence of malingering during the testing. According to Dr. Weiss, the grip strength test revealed Dona only had an eighteen-kilogram grip strength in his

left hand, well below the normal grip strength of thirty kilograms. The doctor concluded Dona's grip strength in his left hand was "markedly abnormal" for a person of his age.

Dr. Weiss then reported his findings upon physical examination of Dona's left foot, which revealed pain and tenderness in various joints and ligaments. The doctor testified Dona had "burning like pain shooting up the foot" due to a neuroma affecting the nerves in his left foot. Dr. Weiss performed a manual motor strength test on Dona's left foot and found "measurable atrophy" in the left calf muscle. Dr. Weiss explained the atrophy could be attributed to "disuse when he walks on the foot" or nerve damage revealed on an electromyography (EMG) test.

Dr. Weiss also testified regarding Dona's FCE. According to Dr. Weiss, an FCE measures how much strain individuals can tolerate before they "block out" due to pain or fear of further injury. The test also evaluates capacity, which measures what individuals are able to perform in their assigned job. Dr. Weiss testified that Dona scored a "medium" on the FCE, meaning he can lift "twenty to fifty pounds occasionally," "sit and stand up to ninety minutes," and "[w]alk about four hours a day." Dr. Weiss explained Dona's job at the CCDOC required significantly more than he was capable of doing based on the FCE results.

Additionally, Dr. Weiss testified Dona had problems with weapons control and could not qualify for use of his firearm at the CCDOC given the injury to his dominant left hand.

Regarding Dona's left hand, Dr. Weiss diagnosed a non-displaced oblique fracture in his pinky finger, extensor tendonitis, and developing stenosis tenosynovitis in "the left long finger," which caused tenderness in the flexor tendon. Regarding Dona's ankle, Dr. Weiss diagnosed a neuroma, peroneal tendonitis, and an ankle strain and sprain in the tibiotalar joint and deltoid ligament. While Dr. Weiss acknowledged Dona suffered a prior ankle injury in 2013, he explained the April 2016 incident caused Dona's disability because Dona fully recovered from the earlier ankle injury and returned to work without restriction after that injury.

Dr. Weiss testified Dona could not return to work due to the injuries to his hand and ankle. While Dr. Weiss did not find Dona "totally disabled," explaining Dona "can do sedentary to light duty and maybe medium duty work," the doctor testified Dona could not return to work as a corrections officer at the CCDOC.

Dr. Lakin's testimony

Dr. Lakin testified that he evaluated Dona to determine whether Dona was disabled as a result of the April 2016 incident. The doctor issued a written report containing his findings and conclusions. The doctor formed his conclusions after reviewing Dona's medical history, treatment history, social and work history, medical records, and a physical examination.

Dr. Lakin testified that Dona complained of pain in his left hand, left knee, left ankle, and lower back. As part of his evaluation, Dr. Lakin also reviewed Dona's job requirements, records from Dona's family physician, notes and medical records from the workers' compensation doctors, and the EMG and FCE reports.

During his physical examination, Dr. Lakin noted no tenderness in Dona's fractured finger. He also found Dona had "full motion of his wrist and his digits" and full grip strength. Dr. Lakin testified there was no evidence of any muscle atrophy in Dona's hand. Nor did he find any evidence of carpal tunnel syndrome or nerve damage in Dona's hand. According to Dr. Lakin, "the function of [Dona's] hand . . . objectively was completely unremarkable with excellent strength and excellent motion." He diagnosed a fracture in Dona's finger, but testified the fracture had healed at the time of the physical examination. While

Dr. Lakin found tenderness around Dona's ankle, he described it as minimal. The doctor further testified Dona's knee and lower back were "normal" based on the physical examination. Additionally, he found no tenderness in Dona's foot and stated Dona's foot had "excellent strength, excellent motion and no instability." Dr. Lakin found no evidence of any permanent injury based on his physical examination or any other information that he reviewed.

After reviewing additional records,¹ Dr. Lakin issued an addendum to his earlier written report. Dr. Lakin disagreed with Dr. Weiss's diagnosis because there was no evidence of a neuroma on the MRI of Dona's left foot or on physical examination. Regarding Dr. Weiss's diagnoses of Dona's left hand, Dr. Lakin testified his own physical examination did not support Dr. Weiss's conclusions.

After reviewing the results of Dona's FCE, Dr. Lakin testified "there were a couple of inconsistent . . . results suggesting low effort," including during Dona's performance of the walking test. Dr. Lakin also testified Dona's workers' compensation doctors did not find any indication of decreased grip strength. Similarly, Dr. Lakin concluded Dona had normal grip strength in his left hand.

¹ The additional records included Dr. Weiss's written report, x-rays, magnetic resonance imaging (MRI) scans, and notes from Dona's workers' compensation doctors.

After reviewing the additional information, Dr. Lakin maintained Dona failed to demonstrate a "total and permanent disability as a result of [the] work accident."

The ALJ's decision

The ALJ issued a written decision on November 17, 2020. While the ALJ found Dona "testified credibly," she concluded that "his subjective complaints of pain were not corroborated objectively by his treating physicians." The ALJ deemed Dr. Lakin's testimony "to be more persuasive and entitled to greater weight" than Dr. Weiss's testimony based on the evidence adduced during the hearings. The ALJ further explained the MRI lacked any objective evidence of a neuroma in Dona's foot. She also noted evidence in the record indicating Dona's low effort during the grip strength test. The ALJ ultimately found Dona "ha[d] not carried his burden of proving that he is totally and permanently disabled." Thus, the ALJ determined Dona did not qualify for accidental disability retirement benefits.

On December 15, 2020, the Board adopted the ALJ's decision and denied Dona's application for accidental disability retirement benefits. Dona appealed.

On appeal, Dona argues the ALJ overlooked the FCE results and Dr. Zell's medical opinion. Dona also asserts the ALJ misapplied the law because he only needed to prove he was disabled and could not continue his work as a corrections

officer. Additionally, Dona contends the ALJ erred in crediting the testimony of Dr. Lakin over the testimony of Dr. Weiss. We reject Dona's arguments.

Our review of an agency decision is limited. In re Herrmann, 192 N.J. 19, 27 (2007). An administrative agency's final quasi-judicial decision "'will be sustained unless there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record.'" Saccone v. Bd. of Trs., Police & Firemen's Ret. Sys., 219 N.J. 369, 380 (2014) (quoting Russo v. Bd. of Trs., Police & Firemen's Ret. Sys., 206 N.J. 14, 27 (2011)). The burden of proving a decision was arbitrary, capricious, or unreasonable is on the party challenging the agency's action. Lavezzi v. State, 219 N.J. 163, 171 (2014).

When reviewing whether an agency decision is arbitrary, capricious, or unreasonable, we consider: (1) whether the agency action violated "express or implied legislative policies"; (2) whether there was substantial evidence in the record to support the agency's decision; and (3) whether in applying the law to the facts, the agency reached a conclusion "that could not reasonably have been made on a showing of the relevant factors." Allstars Auto. Grp., Inc. v. N.J. Motor Vehicle Comm'n, 234 N.J. 150, 157 (2018) (quoting In Re Stallworth, 208 N.J. 182, 194 (2011)). If the agency satisfies these requirements, we "owe[]

substantial deference to the agency's expertise and superior knowledge of a particular field." Herrmann, 192 N.J. at 28.

A PFRS member may seek accidental disability benefits under N.J.S.A. 43:16A-7(a)(1). The statute provides:

Upon the written application by a member in service, by one acting in his behalf or by his employer any member may be retired on an accidental disability retirement allowance; provided, that the medical board, after a medical examination of such member, shall certify that 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 and that such disability was not the result of the member's willful negligence and that such member is mentally or physically incapacitated for the performance of his usual duty and of any other available duty in the department which his employer is willing to assign to him.

First and foremost, the member must prove permanent and total disability to qualify for accidental disability retirement benefits. Thus, the ALJ focused her decision on whether Dona was totally and permanently disabled from his job as a corrections officer at the CCDOC.

"The 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)).

As the factfinder, the ALJ has "the prerogative to evaluate the credibility of the testimony of the competing experts" and to find one expert's testimony more credible than another expert's testimony. N.J. Div. of Child Prot. & Permanency v. M.M., 459 N.J. Super. 246, 258 (App. Div. 2019). See also City of Long Branch v. Liu, 203 N.J. 464, 491 (2010). Here, the testimony of the medical experts was particularly relevant.

While the workers' compensation doctors who treated Dona did not testify, Drs. Lakin and Weiss summarized the findings by those doctors. Thus, the ALJ had an opportunity to review the medical opinions of Dona's treating doctors as part of her findings and conclusions. The ALJ determined Dr. Lakin's testimony best aligned with the medical opinions of Dona's treating workers' compensation doctors.

Dona argues Dr. Lakin's testimony was not as credible and, therefore, the ALJ should not have given greater weight to his testimony as compared to Dr. Weiss's testimony. The ALJ detailed the medical testimony proffered by Drs.

Lakin and Weiss. After considering all of the medical testimony and medical evidence, the ALJ deemed Dr. Lakin to be more credible because she found his testimony more consistent with the objective medical evidence in the record.

Moreover, the ALJ provided ample support for her credibility determinations. Regarding the neuroma in Dona's left foot, the ALJ cited the lack of a neuroma finding in the MRI of Dona's left foot and the absence of any doctor, other than Dr. Weiss, diagnosing a neuroma in Dona's foot. Regarding Dona's left hand, the ALJ credited Dr. Lakin's testimony because he found Dona had full grip strength upon the physical examination. The ALJ also noted that none of Dona's other treating doctors found any issues concerning Dona's grip strength or unresolved ankle problems. Additionally, the ALJ explained that both Drs. Lakin and Zell found inconsistencies in Dona's performance of various tests during the FCE.

Contrary to Dona's assertion, the ALJ did not ignore the FCE results or the opinions of Dr. Zell. The ALJ extensively discussed the FCE results, and found they were not reliable due to Dona's low effort during the evaluation. While Dr. Zell did not testify during the hearings, both Drs. Lakin and Weiss discussed Dr. Zell's FCE findings as part of their testimony. Thus, the ALJ considered Dr. Zell's medical opinion and FCE results, but found Dr. Lakin to

be more credible and his medical conclusions more plausible based upon the objective medical evidence in the record rather than Dona's proffered subjective complaints.

Dona further argues he need only prove that he is "disabled from the performance of his job as a Camden County Corrections Officer," and not "totally disabled from performing any job." He contends the ALJ failed to consider the CCDOC was unable to provide any accommodation and thus her decision was flawed. We reject these arguments.

After considering the evidence, including the differing medical opinions, and rendering credibility determinations, the ALJ concluded Dona failed to prove he is "disabled from the performance of his job as a Camden County Corrections Officer" to satisfy the first element to be entitled to receipt of accidental disability retirement benefits under N.J.S.A. 43:16A-7(a)(1). Because the ALJ found Dona was not disabled from performing his job at the CCDOC, the ALJ was not required to evaluate whether the CCDOC had the ability to accommodate Dona through a different work assignment.

Having reviewed the record, we are satisfied the ALJ's decision that Dona failed to meet his burden to be entitled to accidental disability retirement benefits and the Board's adoption of the ALJ's decision was based on substantial

credible evidence in the record and 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