

RECORD IMPOUNDED

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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1583-20**

W.H.,

Petitioner-Appellant,

v.

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

Respondent-Respondent.

Argued May 10, 2023 – Decided June 27, 2023

Before Judges Mayer and Enright.

On appeal from Board of Trustees of the Police and Firemen's Retirement System, Department of the Treasury, PFRS No. xx3518.

Robert A. Ebberup argued the cause for appellant (Law Offices of Robert A. Ebberup, LLC, attorneys; Robert A. Ebberup, on the brief).

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

PER CURIAM

Petitioner W.H.¹ appeals from the January 12, 2021 final agency decision of the Board of Trustees (Board), Police and Fireman's Retirement System (PFRS), adopting the initial decision of an Administrative Law Judge (ALJ) and affirming the Board's denial of petitioner's request for accidental disability retirement benefits (ADRBs). We affirm.

I.

Petitioner became employed with the Atlantic City Police Department (ACPD) beginning in 1992. In 1999, he was "loaned" to the Major Crimes Unit of the Atlantic County Prosecutor's Office (ACPO). While there, he "collected evidence from and photographed crime scenes, searched for DNA evidence, observed autopsies, completed lab work, wrote reports," and performed other duties. According to petitioner, he was constantly "on call" while in the Major Crimes Unit because his co-worker "suffered emotional issues and was obligated to attend to military obligations."

The hours and nature of the work began to wear on petitioner, and he sought to be transferred back to the ACPD. After his transfer request was denied, he underwent counseling with a psychiatrist, Dr. Edward Black, who

¹ We use initials to protect petitioner's privacy.

prescribed him Xanax.

By September 2001, petitioner took a "stress leave" from work, claiming his job impacted his wife and young children because "he was repeatedly called away from his family." He also reported he had "nightmares that his children were the victims of crimes" after he witnessed a particularly gruesome homicide scene involving a toddler. That same month, psychiatrist Dr. Gary Glass diagnosed petitioner with "adjustment disorder with anxiety and depression." The doctor opined petitioner should continue treatment with Dr. Black, and he would be able to return to full active duty within a month. However, petitioner did not return to work.

In January 2003, Dr. Black opined petitioner had post-traumatic stress disorder (PTSD) and was totally and permanently disabled. The following month, petitioner applied for ADRBs. In his application, he stated, "I am requesting [ADRBs] due to the fact that my [PTSD] is a direct result of my being on constant call for over two and one-half years . . . and working in a unit that was negligently understaffed."

In May 2003, petitioner's family practitioner also concluded petitioner had PTSD. Two months later, Dr. William H. Hankin, the Board's psychiatric expert, opined petitioner had PTSD and was totally and permanently disabled

from the performance of his work duties. Dr. Hankin found "even prolonged therapy shall not sufficiently resolve [petitioner's] symptoms to allow a return to his prior position." Further, Dr. Hankin concluded that while "[t]he disability was a direct result of the experiences that [petitioner] had on the job," "there was no one event that was an accident" that led to the disability.

In August 2003, the Board denied petitioner's application for ADRBs but awarded him ordinary disability retirement benefits (ODRBs) based on his PTSD diagnosis. Petitioner continued to receive ODRBs for nine years.

Petitioner resumed treatment with Dr. Black in 2011, hoping to return to work with the ACPD. In May 2011, Dr. Black determined petitioner was "emotionally and cognitively sound and completely able to return to full duty without restrictions at the" ACPD. In January 2012, Dr. Leon I. Rosenberg, a Board psychiatrist, also conducted a "return to work" evaluation and concluded petitioner "recovered from his PTSD" and was "no longer permanently and totally disabled from [his] occupation." However, Dr. Rosenberg further opined that although petitioner was "able to return to full duty without restrictions at the" ACPD, he was "at risk for a recurrence of his PTSD and should remain in treatment with Dr Edward Black to lessen the risks of a recurrence."

Based on these evaluations, petitioner enrolled in the police academy for

retraining, graduated first in his class, and returned to work with the ACPD in 2012. According to petitioner, he did well upon his return and enjoyed his assignments.

While on duty on July 7, 2015, petitioner responded to a disturbance at a local market. When he arrived at the scene, he saw a man with a bloody knife. A witness informed petitioner the man with the knife had killed someone inside the market. The suspect walked toward petitioner as petitioner issued repeated commands to drop the knife. When the suspect refused and continued to walk toward petitioner, petitioner fatally shot the suspect. Following an investigation of the incident, the shooting was deemed justified.

Soon after the incident, petitioner reported feeling anxious, hypervigilant, and aggressive, as if in "combat mode." He underwent mental health treatment for the next several months with Drs. Eugene Stefanelli and John R. McGowan.

Petitioner retired from the ACPD and applied for ADRBs in March 2016. In his application, he certified he had "PTSD due to [an] on-duty shooting resulting in [the] fatality of [the] suspect." During the next several months, Drs. Stefanelli and McGowan, as well as Dr. Michael Bizzarro, evaluated petitioner. Each doctor concluded petitioner suffered from PTSD.

Forensic psychologist Gianni Pirelli, Ph.D., also evaluated petitioner.

After two interviews and an interview of petitioner's brother-in-law, testing and a review of records, Dr. Pirelli concluded petitioner "may have been assigned the same diagnostic label in the early 2000s as he did subsequent to the 2015 shooting," but the symptoms he "experienced as a result of the unusual and disturbing 2015 shooting [were] not attributable to, nor [were] they an exacerbation of, those he experienced more than a decade earlier as a forensic detective."

In January 2017, the Board denied petitioner's application for ADRBs, concluding his "disability claim [was] the result of a pre-existing disease alone or a pre-existing disease that [was] aggravated or accelerated by the work effort" rather than "the direct result of a traumatic event." Petitioner appealed from the decision and the matter was transferred to the Office of Administrative Law for a hearing.

Over the course of three days in March 2019, the ALJ conducted an initial hearing and heard from several witnesses, including some of petitioner's former co-workers from the ACPD. Petitioner also called his expert, Dr. Pirelli, as a witness. Dr. Pirelli testified consistent with his report and opined "within a reasonable degree of psychological certainty that . . . [petitioner] developed PTSD as a result of the 2015 shooting. And that th[e] condition was not

connected with the potential . . . PTSD that he may have had, related to the 2003 incident."

During the doctor's testimony, the ALJ asked him whether he believed petitioner "was misdiagnosed" with PTSD in 2003. Dr. Pirelli answered, "I can't say that with . . . full confidence. . . . But I would say he very likely had probably an adjustment disorder with some . . . traumatic symptoms." The ALJ probed further and asked if what was "reflected in the[] reports" from doctors "back in 2003" "would . . . have qualified [as] PTSD." Dr. Pirelli testified it was "hard to say," given he "didn't see [petitioner] at that time," but he thought PTSD was "a fair diagnosis," even if he believed petitioner's condition was "probably more likely . . . a serious adjustment disorder related to the work, with some . . . traumatic symptoms." Considering the multiple diagnoses of PTSD that petitioner received in 2003, Dr. Pirelli added, "I'm not going to criticize those doctors. I think it's fair. I think it's within reason. I just . . . see it as very different than 2015."

The Board's only expert witness, Daniel B. LoPreto, Ph.D, a psychologist, also testified at the hearing. Petitioner's counsel previously marked Dr. LoPreto's report for identification and did not object to its subsequent admission into evidence.

Dr. LoPreto testified he interviewed and evaluated petitioner in October 2016 and also diagnosed him with PTSD. Additionally, he stated that during his "face-to-face examination" with petitioner, he "did not go back [thirteen] years" to discuss petitioner's prior symptoms from 2003 but "spent a lot of time talking about" the 2015 fatal shooting. The doctor opined petitioner had "a pre-existing condition, specifically a prior history of [PTSD]" and "[h]is current condition represent[ed] an exacerbation and acceleration of that well-documented and accepted pre-existing condition" from 2003.

Dr. LoPreto stated that during his evaluation, he reviewed petitioner's records, including reports from Drs. Hankins, Black, and Glass. Dr. LoPreto also performed the Personality Assessment Inventory but concluded the test "resulted in an invalid profile," "probably [due to] carelessness or idiosyncratic responding" on the part of petitioner.

Further, Dr. LoPreto testified he "was not in agreement with [Dr. Pirelli's] report" and "didn't find it compelling" because "[p]eople aren't cured of PTSD; it goes into remission, subject to re-exacerbation." Dr. LoPreto likened petitioner's PTSD to "an alcoholic . . . in recovery," explaining petitioner's symptoms could "go into remission and then . . . be exacerbated sometime later in life or accelerated later in life with another loss." He explained, "[t]he

symptoms are there under the surface and could easily be re-triggered or rekindled in various ways and that's what I believe happened in this . . . particular case." Dr. LoPreto reasoned petitioner's "symptoms went into remission" so that he could "perform the duties of a police officer" and those "symptoms remained in remission up until he had this critical incident where he was forced to use deadly force."

Additionally, Dr. LoPreto stated that when petitioner was cleared to go back to work in 2012, the doctor did not "think anybody said he's cured of this PTSD." Thus, Dr. LoPreto found once the shooting occurred, petitioner's "PTSD came back and he became disabled." He also confirmed his opinion was given with "a reasonable degree of psychological certainty."

Following Dr. LoPreto's cross-examination, petitioner's counsel asked to call petitioner "as a rebuttal witness with respect to the testimony . . . just heard from Dr. LoPreto." Counsel explained he wished to address "the scope of the work" the doctor performed. Counsel also asked that a "retired Atlantic City police officer" known to petitioner be permitted to testify "for that very same purpose," because petitioner had complained to the retired officer about Dr. LoPreto's evaluation shortly after his interview concluded.

When the ALJ questioned the necessity of having the retired officer

testify, petitioner's counsel argued for the first time that Dr. LoPreto's report was "a net opinion." However, counsel did not ask the ALJ to revisit the admissibility of Dr. LoPreto's report. Following additional argument, and over the objection of the Board's attorney, the ALJ permitted the retired officer to testify. The hearing concluded shortly thereafter.

On November 19, 2020, the ALJ affirmed the Board's denial of petitioner's application for ADRBs, concluding "the reported disability is not the direct result of the alleged event on July 7, 2015; rather, the disability is the result of a pre-existing disease alone or a pre-existing disease that is aggravated or accelerated by the work effort." In explaining his findings, the ALJ stated both of the experts who testified

offered clear, concise, detailed testimony and demonstrated impressive knowledge in their respective fields of expertise. On balance, I was better persuaded by and give greater weight to the testimony of Dr. LoPreto on the issue of a pre-existing condition alone or a pre-existing condition that is aggravated or accelerated by the work effort. This includes his in-depth analysis and consideration of the petitioner's treatment records and collateral materials.

The ALJ also found petitioner's work history, treatment records, and application history "compelling," and referred to the various doctors who examined petitioner in 2001 and 2003 before diagnosing petitioner with PTSD.

The ALJ further observed that even though Dr. Rosenberg concluded in 2012 that petitioner could return to employment, the doctor also opined petitioner was "at risk for a recurrence of his PTSD and should remain in treatment with Dr. Black to lessen the risks of recurrence." Accordingly, the ALJ found "petitioner failed to meet his burden by a preponderance of the credible evidence in the record . . . to qualify for" ADRBs.

On January 12, 2021, the Board adopted the ALJ's initial decision, affirming the denial of petitioner's request for ADRBs. However, the Board granted petitioner ODRBs, effective April 1, 2016.

II.

On appeal, petitioner contends the Board based its denial of his request for ADRBs "on insufficient competent and credible evidence." He also renews his argument that Dr. LoPreto's opinion is a "net opinion" that "cannot be relied upon as accurate." Additionally, petitioner contends for the first time on appeal that the test delineated under Richardson v. Board of Trustees, Police & Firemen's Retirement System, 192 N.J. 189, 212-13 (2007) "insidiously impacts mental-mental accidental disability claimants," thus denying him and similarly situated persons equal protection under the law.

"Our review of [an] administrative agency action is limited." Russo v. Bd. of Trs., Police & Firemen's Ret. Sys., 206 N.J. 14, 27 (2011) (citation omitted). "We recognize that agencies have 'expertise and superior knowledge . . . in their specialized fields.'" Hemsey v. Bd. of Trs., Police & Firemen's Ret. Sys., 198 N.J. 215, 223 (2009) (alteration in original) (quoting In re License Issued to Zahl, 186 N.J. 341, 353 (2006)). Therefore, we will not "substitute [our] own judgment for the agency's, even though [we] might have reached a different result." In re Stallworth, 208 N.J. 182, 194 (2011) (quoting In re Carter, 191 N.J. 474, 483 (2007)).

"[A]n 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 the record as a whole. 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 person challenging the administrative action." In re Arenas, 385 N.J. Super. 440, 443-44 (App. Div. 2006) (citations omitted).

The factual "findings of an ALJ 'are considered binding on appeal, when supported by adequate, substantial and credible evidence.'" Oceanside Charter Sch. v. N.J. State Dep't of Educ., 418 N.J. Super. 1, 9 (App. Div. 2011) (quoting In re Taylor, 158 N.J. 644, 656 (1999)). "[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. Affs., Bureau of Hous. Inspection, 182 N.J. Super. 415, 421 (App. Div. 1981); see also City of Long Branch v. Jui Yung 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).

A reviewing court does not substitute its judgment for that of the agency by "engag[ing] in an independent assessment of the evidence as if it were the court of first instance." State v. Locurto, 157 N.J. 463, 471 (1999). However, we review an agency's interpretation of the law de novo. Russo, 206 N.J. at 27.

We also review evidentiary rulings, such as the admissibility of any expert's report, for abuse of discretion. BOE v. Zoning Bd., 409 N.J. Super. 389, 430 (App. Div. 2009). Indeed, rulings as to the admissibility of expert evidence are subject to the same abuse-of-discretion standard as other evidentiary rulings. Hisenaj v. Kuehner, 194 N.J. 6, 16 (2008).

Further, N.J.A.C. 1:1-15.9(b) provides:

If a witness is testifying as an expert, testimony of that witness in the form of opinions or inferences is admissible if such testimony will assist the judge to understand the evidence or determine a fact in issue and the judge finds the opinions or inferences are:

1. Based on facts and data perceived by or made known to the witness at or before the hearing; and
2. Within the scope of the special knowledge, skill, experience or training possessed by the witness.

Additionally, N.J.A.C. 1:1-15.9(f) states: "If facts and data are of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, those facts and data upon which an expert witness bases opinion testimony need not be admissible in evidence."

It also is well settled that a member of the PFRS is entitled to ADRBs under N.J.S.A. 43:15A-43 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 [their] regular or assigned duties." Pursuant to our Supreme Court's decision in Richardson, a claimant seeking ADRBs must prove:

1. [the member] 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 [their] usual or any other duty.

[192 N.J. at 212-13 (emphasis added).]

The Court also found the Legislature "intended to make clear that a pre-existing condition that, in connection with work effort, caused injury would not qualify as an accident" under the statute. Id. at 199. In that regard, the Court explained "a traumatic event is . . . an unexpected external happening that directly causes injury and is not the result of pre-existing disease alone or in combination with work effort." Id. at 212.

In Patterson v. Board of Trustees, State Police Retirement System, 194 N.J. 29, 33-34 (2008), the Court refined the test to be applied when the claimant's injury is a mental disability precipitated by an exclusively mental stressor. The Court concluded in such "mental-mental" cases, the nature of the

traumatic event requires more particularized proof before further inquiry under Richardson is warranted. Russo, 206 N.J. at 32. Thus, the Court held "[t]he disability must result 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." Patterson, 194 N.J. at 34. The Patterson Court also concluded, "generally, . . . permanent mental injury caused by a mental stressor without any physical impact can satisfy the Richardson standard." Id. at 48.

Governed by these standards, we are satisfied the Board's conclusion that petitioner failed to meet his burden as to causality was based on the substantial, credible evidence in the record, including the ALJ's finding that Dr. LoPreto's testimony was more persuasive than that of Dr. Pirelli. Likewise, considering our deferential standard of review regarding evidentiary rulings, the evidentiary regulations we have referenced, and Dr. LoPreto's detailed testimony and report, we decline to conclude the Board should have disregarded Dr. LoPreto's opinion as a "net opinion." Our conclusion in this regard is bolstered by the fact petitioner's counsel submitted Dr. LoPreto's report and did not object to its admission into evidence at the conclusion of that hearing. Petitioner's counsel also accepted Dr. LoPreto "as an expert in clinical psychology" before the doctor

was permitted to testify.

Finally, we need not discuss petitioner's equal protection argument as it was not raised before the agency, even though "an opportunity for such a presentation [was] available." Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973); see also J.K. v. N.J. State Parole Bd., 247 N.J. 120, 138 n.6 (2021). But even if we addressed this argument, we are satisfied petitioner and similarly situated claimants with mental-mental disabilities are adequately protected under Patterson and Richardson.

In sum, we conclude the Board's adoption of the ALJ's decision denying petitioner's application for ADRBs was based on the substantial credible evidence in the record and a correct interpretation of the controlling statute and principles of law.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION