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ESTATE OF DURWIN PEARSON, Petitioner-Appellant, v. BOARD OF TRUSTEES OF THE POLICE AND FIREMEN'S RETIREMENT SYSTEM, Respondent.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-000417-23 (T4) On Appeal from the Final Administrative Determination of the Police And Firemen's Retirement System SAT BELOW: Police And Firemen's Retirement System PFRS # 3-10-54759 **BRIEF OF APPELLANT ESTATE OF DURWIN PEARSON**

On the Brief

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Date Submitted: April 5, 2024

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PRELIMINARY STATEMENT

In his Initial Decision ("ID") of June 29, 2023, the Honorable Jeffrey N. Rabin, A.L.J. ("Judge Rabin"), correctly recommended that Respondent should award Appellant Durwin Pearson, now deceased, ("Pearson"), a sergeant for the Camden Metro Police Department, an accidental disability retirement ("ADR") stemming from a severe motor vehicle accident that occurred on October 17, 2015.

Respondent, in its infinite wisdom, opted to reject Judge Rabin's ID. Unfortunately, the basis of that rejection lacks any discernable factual basis.

All witnesses called at the hearing before Judge Rabin agreed that Pearson had prior workers' compensation cases in 2000 and 2004. There were "reports of first injury" for both years. There were workers' compensation cases opened from both years. There were medical records, including diagnostic testing, from both years.

However, Respondent was, and continues to be, convinced that Pearson also had a third prior workers' compensation injury in the year 2009. In its Final Administrative Determination ("FAD") of September 19, 2023, Respondent opined:

> The **medical documents also contained references to a report of an injury in 2009**, made by Dr. Steven Kirshner, one of Mr. Pearson's treating physicians.

(Pa112). (Emphasis added).

The position of Respondent was fundamentally flawed. The FAD used the plural "medical documents" when describing a 2009 injury. However, when it came to 2009, the only document in evidence that referenced an accident or an incident occurring in that year was Pa161-Pa165, which was Dr. Kirshner's one narrative.

Respondent and its expert clung to, and continue to cling to, this lone record as evidence of a 2009 incident. And it was, and is, understandable why they would. In the absence of a 2009 accident or incident, the record showed Pearson as having 11+ years of being asymptomatic as it relates to his neck and having no treatment in those 11+ years. On the other hand, if there were a 2009 incident or accident, that timeframe of 11+ years would shrink to 6+ years. A purported 2009 incident might also justify the original grounds on which Respondent denied Pearson an ADR, namely:

> Pearson's claim was "the result of a pre-existing disease alone or a pre-existing disease that is aggravated or accelerated by the work effort."

(Pa2).

Pearson submitted at the hearing before Judge Rabin that he should not be denied an ADR based upon a typographical error in the report of Dr. Kirschner. Pearson's employers were required to turn over to Respondent all workers' compensation data each had for Pearson. Neither had an accident or an incident

from 2009. Additionally, no other medical records and no other exhibits moved into evidence referenced a 2009 incident or accident. Finally, Pearson denied any such 2009 incident or accident in his direct examination and cross-examination.

When viewed cumulatively, Pearson submitted, and Judge Rabin concurred, that it was more likely than not that Pearson was never involved in an incident or an accident in the calendar year of 2009. Pearson hopes this Court corrects the grievous misperception of Respondent.

PROCEDURAL HISTORY

On July 29, 2016, Pearson[1] applied for an ADR. (Pa1).

By letter dated October 17, 2017, Respondent ruled in Pearson's favor on all of the criteria enunciated in Richardson v. Board of Trustees Police & Firemen's Retirement System, 192 N.J. 189 (2007), with the exception of two. (Pa2-Pa4). Those two rejected criteria were:

1. Pearson's "reported disability [was] not the result of a traumatic event, as the event [was] not caused by a circumstance external to the member."
2. Pearson's claim was "the result of a pre-existing disease alone or a pre-existing disease that is aggravated or accelerated by the work effort."

(Exhibit Pa2-Pa4). Alternatively, Respondent awarded Pearson an ordinary disability retirement ("ODR"). (Pa2-Pa4).

Following an appeal filed by Pearson, a request for a hearing in the Office of Administrative Law ("OAL") was approved by Respondent with matter being transferred to the OAL with a hearing taking place on September 6, 2019 (1T), September 11, 2019 (2T), and September 21, 2020[2] (3T).

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[1] Pearson passed away suddenly following the filing of this appeal.

[2] The Covid-19 Pandemic was the reason for the inordinate delay between the second and third hearing dates.

Eight joint exhibits were admitted into evidence. (Pa1-Pa26; Pa119-Pa137). Pearson also moved into evidence four exhibits. (Pa138-Pa159). Respondent moved into evidence six exhibits. (Pa160-Pa186). Pearson testified. (1T). Pearson's expert, Dr. David Weiss ("Weiss"), testified. (2T). Respondent's expert, Dr. Jeffrey L. Lakin ("Lakin"), also testified. (3T).

Pearson submitted his written closing on February 8, 2021. (Pa27-Pa50). Respondent submitted its written closing on March 10, 2021[3]. (Pa51-Pa75).

Judge Rabin issued his ID on June 29, 2023. (Pa76-Pa94). Judge Rabin ruled in favor of Pearson by rejecting both reasons of Respondent for denying his ADR and recommending that Respondent award Pearson an ADR. (Pa76-Pa94).

Respondent filed exceptions to the ID on July 27, 2023. (Pa95-Pa101). On July 30, 2023, Pearson replied to those exceptions. (Pa102-Pa108).

Respondent issued its preliminary FAD on August 18, 2023 (Pa110). Respondent issued its final FAD on September 19, 2023. (Pa111-Pa113). It should be noted that in its final FAD Respondent only rejected Judge Rabin's conclusion that Pearson's ADR claim was "not the result of a pre-existing disease alone or a pre-existing disease that was aggravated or accelerated by the work effort." (Pa111-Pa113). Respondent did not disturb Judge Rabin's conclusion that

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[3] Respondent's written closing was misdated 2020.

Pearson's "reported disability was the result of a traumatic event, caused by a circumstance external to the member." (Compare Pa111-Pa113 with Pa76-Pa94).

Pearson filed a timely Notice of Appeal of the preliminary and final FAD. (Pa114-Pa118).

This appeal now follows.

STATEMENT OF FACTS

Pearson's Background in Law Enforcement

Pearson was a 50-year-old married father of three at the time he testified in this matter. (1T7-8). Pearson was a high school graduate and attended classes at both Camden County College and Farleigh Dickinson University. (1T8).

Pearson's first job in law enforcement was with the Camden County Sheriff's Department assigned to the Camden County Jail in 1989. (1T9-10). Pearson had to pass a physical fitness test to get that job. (1T9).

Pearson transferred from the Camden County Sheriff's Department to the Camden County Correctional Facility in approximately 1992 and for 7.5 years thereafter. (1T10).

In 1999, Pearson went to work for the Camden City Police Department. (1T11). Pearson had to pass a physical fitness test to get that job. (1T11). The Camden City Police Department eventually dissolved on April 30, 2013, and became the Camden County Police Department on May 1, 2013. (1T12-13). Pearson transitioned from one to the other. (1T12). Camden County, also known as Camden Metro, was a Civil Service Jurisdiction. (1T13).

Within a week of starting with Camden Metro, Pearson was promoted from police officer to police sergeant. (1T13). Following his promotion, Pearson was a

street sergeant as opposed to an administrative sergeant for his entire career. (1T13-14).

While with the Camden County Sheriff's Office, Pearson was periodically evaluated and none of those evaluations ever called into question his physical ability to do his job. (1T15-16). While with the Camden County Correctional Facility, Pearson was periodically evaluated and none of those evaluations ever called into question his physical ability to do his job. (1T16). While with the Camden City Police Department, Pearson was periodically evaluated and none of those evaluations ever called into question his physical ability to do his job. (1T16). While with the Camden County Metro Police Department, Pearson was periodically evaluated and none of those evaluations ever called into question his physical ability to do his job. (1T16-17).

While with the Camden County Sheriff's Office, Pearson was periodically counseled and none of that counseling ever called into question his physical ability to do his job. (1T17). While with the Camden County Correctional Facility, Pearson was periodically counseled and none of that counseling ever called into question his physical ability to do his job. (1T17). While with the Camden City Police Department, Pearson was periodically counseled and none of that counseling ever called into question his physical ability to do his job. (1T17). While with the Camden County Metro Police Department, Pearson was

periodically counseled and none of that counseling ever called into question his physical ability to do his job. (1T17-18).

In none of his four law enforcement jobs was Pearson ever disciplined for a physical inability to do his job. (1T18).

Pearson's Medical Background

From the day he was born through his first day in law enforcement in 1989, Pearson was never involved in a motor vehicle accident in which he was injured. (1T18-19). From the day he was born through his first day in law enforcement in 1989, Pearson was never involved in a falldown in which he was injured. (1T9). From the day he was born through his first day in law enforcement in 1989, Pearson was never involved in a fight, assault, or mugging in which he was injured. (1T19). From the day he was born through his first day in law enforcement in 1989, Pearson did break his arm playing high school football. (1T19-20). From the day he was born through his first day in law enforcement in 1989, Pearson was never involved in an on-the-job injury in which he was required to file a workers' compensation claim. (1T20).

From his start in law enforcement in April of 1989 but prior to October 17, 2015, Pearson was never involved in any off-duty motor vehicle accidents in which he was injured. (1T20-21). From his start in law enforcement in April of 1989 but prior to October 17, 2015, Pearson was never involved in any off-duty falldowns in

which he was injured. (1T21). From his start in law enforcement in April of 1989 but prior to October 17, 2015, Pearson was never involved in any off-duty fights, assaults, or muggings in which he was injured. (1T21). From his start in law enforcement in April of 1989 but prior to October 17, 2015, Pearson was never involved in any off-duty sporting events in which he was injured. (1T20-21).

Pearson filed no workers' compensation claims while employed with the Camden County Sheriff's Department. (1T21).

Pearson filed one workers' compensation claim while employed with the Camden County Correctional Facility. (1T22). Pearson injured the pinky finger on his right hand. (1T22-23). Pearson needed surgery and returned to full duty in about 30 days. (1T23).

Pearson filed two workers' compensation cases while employed with the Camden City Police Department. (1T23-24). Pearson believed the first one occurred in 2000. (1T24). Pearson believed the second one occurred in 2004. (1T24).

For the 2000 incident, Pearson injured his left knee and lower back for which he was out of work for 30 days and had no surgeries. (1T24-26). Pearson was returned Maximum Medical Improvement ("MMI") with no restrictions by his workers' compensation doctors from the 2000 incident. (1T26-28).

For the 2004 incident, Pearson injured his low back lifting a box and was out of work for 30-40 days. (1T28-29). Pearson was returned MMI with no restrictions by his workers' compensation doctors from the 2004 incident. (1T30).

After starting with Camden Metro, but prior to October 17, 2015, Pearson did not file any workers' compensation claims. (1T31).

From the date he returned to work following the 2004 incident, until October 16, 2015, Pearson never had to seek treatment for any part of his body injured in a previous workers' compensation matter. (1T31). From the day he returned to work following the 2004 incident, until October 16, 2015, the day prior to the critical incident in this matter, Pearson never had symptomatology in his neck. (1T51).

Pearson had never been treated by a chiropractor in his life. (1T32).

The Motor Vehicle Accident of October 17, 2015

On October 17, 2015, Pearson had 23 years and 8 months in the PFRS system and was literally 1 year and 4 months from reaching his 25th anniversary with a full pension with lifetime medical benefits. (1T52-53).

On October 17, 2015, Pearson was a street sergeant for the Camden Metro Police Department working 6AM to 6PM. (1T32-33). There were 7 shootings in Camden on October 17, 2015. (1T33). Camden Metro was also short staffed on October 17, 2015. (1T35).

For one of the shootings, Pearson heard the gun shots and assumed position in the middle of the intersection in his patrol vehicle. (1T36-38). As Pearson opened the door of this patrol vehicle to engage a shooting suspect, a car ran a stop sign and hit him. (1T37-38).

At the time of impact, Pearson had his left foot outside of his vehicle and the door of his vehicle halfway open. (1T39). At the time of impact, Pearson had removed his seatbelt. (1T39).

The front of the vehicle that ran the stop sign impacted the driver's side of Pearson's vehicle. (1T39-40). Pearson was propelled from the driver's side of his vehicle into the passenger side of his vehicle. (1T40). Pearson had already unholstered and taken out his weapon which fell to the floor of his vehicle upon

impact. (1T40-41). Pearson blacked out from the impact. (1T41). Upon gaining his senses, Pearson re-engaged the shooting suspect. (1T42).

There was nothing nefarious done by the individual who ran the stop sign. (1T43) This was simply a car accident, and they had no affiliation with the shooter. (1T43).

Pearson never finished his shift on October 17, 2015. (1T43).

Pearson's Injuries from October 17, 2015

Pearson only received authorized workers' compensation treatment because of the October 17, 2015, accident. (1T44).

Pearson was told he sustained a serious neck injury in the October 17, 2015, accident. (1T45). Pearson had neck surgery. (1T45). Pearson had two discs removed and replaced with two artificial discs. (1T45). Pearson had a 4–5-inch scar on his neck from the surgery. (1T45).

Following surgery, Pearson was told by his doctors he would never be a police officer again. (1T47). Pearson was never cleared MMI with no restrictions following his treatment from the October 17, 2015, accident. (1T48). Camden Metro did not offer permanent light duty assignments to officers. (1T48).

Pearson's Expert

Weiss was Board Certified in orthopedics. (2T5). Weiss was a Certified Independent Medical Examiner. (2T5).

Weiss was previously accepted by multiple Courts as an expert in orthopedics and disability impairment. (2T6). Judge Rabin only accepted him as an expert in orthopedics with an indication it would give his disability impairment testimony appropriate weight. (2T9). Weiss had been used an expert previously by PERS in offering the Pension Board an opinion on whether a given applicant was totally and permanently disabled. (2T5-6).

Weiss found Pearson to be totally and permanently disabled from being a police sergeant. (2T12). Weiss found Pearson's total and permanent disability to be causally related to his accident of October 17, 2015. (2T12).

Pearson had a total disc replacement at two levels. (2T12-16). Weiss' own diagnosis of Pearson included "aggravations," "pre-existing" injuries, "age-related degenerative disc disease," and "osteoarthritis." (2T17-19). Having an "aggravation," having "pre-existing" injuries to the same part of the body, having "age-related degenerative disc disease" and/or having "osteoarthritis" were not, and are not, automatic disqualifiers for getting an ADR. (2T19-22).

Per Weiss, Pearson's prior workers' compensation injuries of 2000 and 2004, even though they involved his neck and MRI studies showed both bulges and herniations, did not disqualify him from getting an ADR. (2T20-22).

Weiss found both 2000 and 2004 "remote" when dealing with the accident of October 17, 2015. (2T22). Weiss found Pearson being asymptomatic from his return to work after the 2004 incident until October 17, 2015, to be significant. (2T22-23).

Per Weiss, Pearson had a difference in disc pathology following the accident of October 17, 2015. (2T23-24). Weiss' own diagnosis of Pearson that included "aggravations," "pre-existing" injuries, "age-related degenerative disc disease," and "osteoarthritis" did nothing to change the opinion he gave Judge Rabin on causation. (2T25-26).

In the absence of continuing medical treatment for which there was none, the concepts of "aggravations," "pre-existing" injuries, "age-related degenerative disc disease," and "osteoarthritis" would make no difference to any of the responses Weiss provided in either his report or testimony to Judge Rabin. (2T26-28).

All opinions Weiss provided to Judge Rabin were to a reasonable degree of medical probability and certainty in his field of expertise, i.e., orthopedics. (2T28).

Respondent's Expert

Lakin was an orthopedic surgeon. (3T7). Lakin only did evaluations for the Pension Board and insurance companies. (3T9).

Lakin conceded that a pre-existing injury was not an automatic disqualifier from being eligible for an ADR. (3T23).

Lakin only saw Pearson once. (3T23-24). Lakin reviewed no films of Pearson; only the reports of the radiologists. (3T24).

No medical treatment notes for Pearson's neck or back covering the timeframe of January 1, 2006, through October 16, 2015, were ever provided to Lakin for review. (3T31).

Lakin claimed to have never heard the term Fitness for Duty Evaluation. (3T31-32). Lakin reviewed no records where Pearson was sent to a doctor because his superiors felt he could not physically do his job. (3T32).

The Purported Workers' Compensation Injury of 2009

Anytime Pearson got hurt on the job, he reported it, and a workers' compensation claim was opened. (1T56). In the absence of a Report of Injury from 2009, Weiss believed any reference to a 2009 accident or incident was simply a mistake. (2T37-38). Weiss believed any reference to 2009 was more likely a typographical error than a real injury date. (2T39).

Lakin conceded the only evidence of a 2009 injury involving Pearson stemmed from a report of Dr. Kirschner dated November 6, 2015. (3T24; Pa161-Pa165). No other medical reports or documentation mentioned a 2009 incident involving Pearson. (3T25). Lakin was never provided with any accident/injury report for any injury occurring in 2009 as to Pearson. (3T28).

LEGAL ARGUMENT

POINT I

COUNSEL FOR RESPONDENT LACKED A GOOD FAITH BASIS UPON WHICH TO ARGUE THAT PEARSON WAS INVOLVED IN AN INCIDENT OR ACCIDENT IN 2009 BASED ON THE TOTALITY OF THE CIRCUMSTANCES. (Pa103-Pa106).

One of the most important tenets of New Jersey Jurisprudence is that an attorney must have a good faith basis in order to ask questions of a witness at trial or make legal arguments to a tribunal. As described by the Appellate Division:

> [I]n putting questions to witnesses it is **improper** and unprofessional for an attorney to **allude to prejudicial irrelevancies** and matters which he has no reason to believe will be supported by admissible evidence.

Matter of Ungar, 160 N.J.Super. 322, 331 (App. Div. 1978). (Emphasis added).

In the case at bar, in his exceptions to Judge Rabin's ID, counsel for Respondent did not have a good faith basis to allege that Pearson was involved in an incident or an accident in 2009. (Pa95-Pa101). Respondent continues to cling to one lone entry in one lone record as evidence of a 2009 incident or accident.

Pearson's uncontradicted testimony at the hearing showed:

1. From his start in law enforcement in April of 1989 but prior to October 17, 2015, Pearson was never involved in any off-duty motor vehicle accidents in which he was injured. (1T20-21).

2. From his start in law enforcement in April of 1989 but prior to October 17, 2015, Pearson was never

involved in any off duty falldowns in which he was injured. (1T21).

3. From his start in law enforcement in April of 1989 but prior to October 17, 2015, Pearson was never involved in any off-duty fights, assaults, or muggings in which he was injured. (1T21).

4. From his start in law enforcement in April of 1989 but prior to October 17, 2015, Pearson was never involved in any off-duty sporting events in which he was injured. (1T20-21).

5. Pearson filed no workers' compensation claims while employed with the Camden County Sheriff's Department. (1T21).

6. Pearson filed one workers' compensation claim while employed with the Camden County Correctional Facility. (1T22).

7. Pearson injured the pinky finger on his right hand. (1T22-23).

8. Pearson needed surgery and returned to full duty in about 30 days. (1T23).

9. Pearson filed two workers' compensation cases while employed with the Camden City Police Department. (1T23-24).

10. Pearson believed the first one occurred in 2000. (1T24).

11. Pearson believed the second one occurred in 2004. (1T24).

12. For the 2000 incident, Pearson injured his left knee and lower back for which he was out of work for 30 days and had no surgeries. (1T24-26).

13. Pearson was returned MMI with no restrictions by his workers' compensation doctors from the 2000 incident. (1T26-28).

14. For the 2004 incident, Pearson injured his low back lifting a box and was out of work for 30-40 days. (1T28-29).

15. Pearson was returned MMI with no restrictions by his workers' compensation doctors from the 2004 incident. (1T30).

16. After starting with Camden Metro, but prior to October 17, 2015, Pearson did not file any workers' compensation claims. (1T31).

In other words, Pearson denied any 2009 incident or accident. No cross-examination by Respondent's attorney and no rebuttal evidence submitted by the Respondent's attorney undermined that testimony. (See 1T-3T; See Pa1-Pa26; Pa119-Pa186).

At the hearing, the following testimony was elicited from Respondent's own expert:

1. Lakin conceded the only evidence of a 2009 injury involving Pearson stemmed from a report of Dr. Kirschner dated November 6, 2015. (3T24).

2. No other medical reports or documentation mentioned a 2009 incident involving Pearson. (3T25).

3. Lakin was never provided with any accident/injury report for any injury occurring in 2009 as to Pearson. (3T28).

4. No medical treatment notes for Pearson's neck or back covering the timeframe of January 1, 2006, through October 16, 2015, were ever provided to Lakin for review. (3T31).

Respondent was represented by competent counsel at the OAL. Respondent had the ability to propound discovery upon Pearson. Respondent had the ability to ask for medical authorizations to be signed by Pearson. Respondent had the ability to subpoena medical records of Pearson. None of that pre-trial work uncovered any evidence of a 2009 incident or accident.

Before ever setting foot in the OAL, Pearson's employers were required to turn over to Respondent all workers' compensation data each had for Pearson. None had an accident or an incident from 2009.

When viewed cumulatively, Pearson submitted, and Judge Rabin concurred, that it was more likely than not that Pearson was never involved in an incident or an accident in the calendar year of 2009.

To allow Respondent to reverse Judge Rabin's ID in the absence of evidence that substantiates a 2009 incident or accident would be the quintessential example of letting a completely arbitrary and capricious decision stand.

POINT II

WHEN THE EVIDENCE WAS VIEWED CUMULATIVELY, JUDGE RABIN REACHED THE CONCLUSION THAT IT WAS MORE LIKELY THAN NOT THAT PEARSON WAS NEVER INVOLVED IN AN INCIDENT OR ACCIDENT IN 2009 THAT REQUIRED MEDICAL TREATMENT OR RESULTED IN INJURIES OF ANY KIND. (Pa41-Pa42).

All witnesses agreed that Pearson had prior workers' compensation cases in 2000 and 2004. There were "reports of first injury" from both. There were workers' compensation cases opened from both. There were medical records, including diagnostic testing, from both.

However, when it came to 2009, the only document in evidence that referenced an accident or an incident occurring in that year was Exhibit R1 (Pa161-Pa165), which was Dr. Kirshner's one narrative. The Board and its expert clung to, and continue to cling to this lone record as evidence of a 2009 incident.

Pearson submitted he should not be denied an ADR based upon a typographical error in the report of Dr. Kirschner. All past employers of Pearson were required to turn over to Respondent all workers' compensation data each had for Pearson. None had an accident or an incident from 2009. Additionally, no other medical records and no other exhibits moved into evidence referenced a 2009 incident or accident. Finally, Pearson denied any such 2009 incident or accident in his direct examination and cross-examination.

In the absence of a Report of Injury from 2009, Weiss believed any reference to a 2009 accident or incident was simply a mistake. (2T37-38). Weiss believed any reference to 2009 was more likely a typographical error than a real injury date. (2T39).

Lakin conceded the only evidence of a 2009 injury involving Pearson stemmed from a report of Dr. Kirschner dated November 6, 2015. (3T24). No other medical reports or documentation mentioned a 2009 incident involving Pearson. (3T25). Lakin was never provided with any accident/injury report for any injury occurring in 2009 as to Pearson. (3T28).

When viewed cumulatively, Pearson submitted that Judge Rabin should reach the conclusion that it was more likely than not that Pearson was never involved in an incident or an accident in the calendar year of 2009. Pearson asked Judge Rabin, through deductive reasoning, to reach the conclusion that, more than likely, Pearson was not involved in a 2009 incident/accident.

That is exacting the analysis Judge Rabin undertook on pages 9-10 of his ID. (Pa84-Pa85). Judge Rabin found:

Judge Rabin went on to hold:

> **Having found as fact that there was no injury report from an incident in 2009, I must agree with petitioner's argument that there was no incident from that year**. Unlike petitioner's injuries from 2000 and 2004, where there were workers' compensation cases opened for both, plus medical records and test results,

> any claim of injury from 2009 was not so documented. The only were the few mentions of a 2009 incident in Dr. Kirschner's report. Dr. Weiss suggested that Dr. Kirschner's reference to a 2009 injury was a typographical error, and that he meant to write "2000," which would correspond to petitioner's workers' compensation claim from 2000. While that point was not proven at the hearing, **petitioner was correct to argue that Camden City and Camden Metro were required to turn over all workers' compensation data that each had for petitioner; however, no workers' compensation files were turned over from 2009. Further, no other medical records or other evidence was produced at the hearing to confirm that there was any incident or accident in 2009, or any injuries resulting from any such incident or accident.** When questioned regarding this issue, petitioner denied that there was any 2009 incident or accident. Dr. Kirschner added no information on what might have happened in 2009 except to write that a worker's compensation claim was filed then, but again no such confirming claim documentation was provided. Dr. Kirschner also failed to mention the 2000 and 2004 workers' compensation claim, meaning he made errors in filling out this reporting form. Regarding 2009, he wrote that petitioner met with a therapist at that time but did not actually state that such visit was the result of a 2009 incident or accident. He wrote that petitioner suffered neck and back injuries in 2009 and a finger injury in 1995 but did not state when the injuries happened or whether they were the result of a single incident or series of incidences. He also again failed to mention incidences in 2000 and 2004. **As Dr. Lakin relied on this error-prone report, and as no other evidence was offered to confirm an injury in 2009, I CONCLUDE that there was no accident, incident or injury pertaining to petitioner from 2009.**

(Pa84-85). (Emphasis added).

Judge Rabin reached the conclusion that it was more likely than not that a 2009 incident/accident never occurred based upon a methodic, deductive reasoning analysis. Judge Rabin should be applauded for doing his job. Judge Rabin should not have been rebuked as counsel for Respondent did in his exceptions. (Pa95-Pa101).

POINT III

PRE-EXISTING PATHOLOGY IS NOT A *PER SE* BAR TO BEING AWARDED AN ADR. (Pa43-Pa49).

When a member has been injured in a workplace accident and is rendered totally and permanently disabled thereby, that member must be granted ADR benefits even where the member had pre-existing pathology. Cattani v. Board of Trustees, Police & Firemen's Retirement System, 69 N.J. 578 (1976).

In Cattani, a firefighter with a pre-existing cardiovascular condition was performing normal, albeit strenuous, work effort and thereafter experienced a heart attack. Id.

At a fire, Cattani was unloading several sections of hose from the back of the pumper. Id. at 589. Normally the task was performed by three (3) men, but Cattani carried the heavy load by himself. Id. Cattani performed several other strenuous work tasks over the course of several hours. Id. Upon returning to the fire station, Cattani was unable to move his arms or legs or speak and was rushed to the hospital. Id. Medical testing revealed Cattani had a pre-existing cardiovascular condition. Id. at 590.

The Board denied Cattani's application for accidental disability benefits. The Appellate Division reversed the PFRS Board, The Supreme Court held that where a member's disability is the end result of a pre-existing cardiovascular condition, **work effort alone** whether unusual or excessive, cannot be considered a traumatic

event, even though it may have aggravated or accelerated the pre-existing disease. Cattani at 586. (Emphasis added). However, the Cattani Court also held that a basis for an accidental disability pension **would exist if it were shown that the disability directly resulted from the combined effect of a traumatic event and a pre-existing disease**. Ibid. (Emphasis added). Moreover, an injury produced by **external force** qualifies for accidental disability retirement benefits under N.J.S.A. 43:16A-7(1). See Id. at 586. (Emphasis added).

Matter of Sigafoos, 143 N.J. Super. 469 (App. Div. 1976), overturned an erroneous determination of the PFRS Board similar to the error rendered by the PFRS Board in this matter. The Appellate Division, held that a police officer was entitled to accidental disability retirement benefits where he sustained a total and permanent disability resulting from the combined effect of a pre-existing musculo-skeletal condition which was aggravated by a traumatic event which occurred when he sustained a back injury requiring a lumbar hemilaminectomy while carrying a television set needed as a monitor during installation of a closed circuit TV system in a police station. Id. at 474.

In Sigafoos, Petitioner had suffered from a back condition over a period of years before the accident. Id. at 471. The Board found that Petitioner was totally and permanently disabled; that he was physically incapacitated for the performance of his usual duty, and that there were no other available duties in the department.

Ibid. However, the Board also found that 'Petitioner's permanent and total disability resulted from a musculo-skeletal condition which was not a direct result of a traumatic event occurring in the performance of duty.' Ibid. The Appellate Division reversed and found that, despite previous issues with a back condition, Petitioner injured his back when he was subjected to an unusual and unanticipated stress and was permanently and totally disabled as a result. Id. at 473-474. Citing Cattani, the Court held that petitioner's disability 'directly resulted from the combined effect of a traumatic event and a pre-existing disease' and as such, he was entitled to an Accidental Disability retirement allowance under N.J.S.A. 43:16A—7. Sigafoos at 474.

In the case at bar, Weiss meticulously addressed each issue in Pearson's life and methodically explained why none impacted his opinion that Pearson was totally and permanently disabled causally related to the critical incident of October 17, 2015. Specifically:

a. Weiss' own diagnosis of Pearson included "aggravations," "pre-existing" injuries, "age-related degenerative disc disease," and "osteoarthritis." (2T17-19). In other words, Weiss did not try to hide from and did not try to ignore the workers' compensation injuries of 2000 and 2004.

b. Weiss found both 2000 and 2004 "remote" when dealing with the accident of October 17, 2015. (2T22).

c. Weiss found Pearson being asymptomatic from his return to work after the 2004 incident until October 17, 2015, to be significant. (2T22-23).

d. Weiss found that Pearson had a difference in disc pathology following the accident of October 17, 2015. (2T23-24).

e. In the absence of continuing medical treatment for which there was none, the concepts of "aggravations," "pre-existing" injuries, "age-related degenerative disc disease," and "osteoarthritis" would make no difference to any of the responses Weiss provided in Exhibit P3. (2T26-28; Pa152-Pa153)

f. In the absence of a Report of Injury from 2009, Weiss believed any reference to a 2009 accident or incident was simply a mistake. (2T37-38).

g. Weiss believed any reference to 2009 was more likely a typographical error than a real injury date. (2T39).

Conversely, Lakin had one singular focus, i.e., 2009. Despite that singular focus, Lakin conceded the only evidence of a 2009 injury involving Pearson stemmed from a report of Dr. Kirschner dated November 6, 2015. (3T24). No other medical reports or documentation mentioned a 2009 incident involving Pearson. (3T25). Lakin was never provided with any accident/injury report for any injury occurring in 2009 as to Pearson. (3T28).

In short, Weiss was consistent from beginning to end with reasonable, rational explanations on causation. On the other hand, Lakin's opinion could not and cannot stand unless, more likely than not, there was a 2009 incident/accident.

Judge Rabin opined:

> While petitioner had some degenerative and osteoarthritic changes which predated the Incident, these were age-related degenerative disc disease, being normal changes that people all go through in life; **petitioner's prior workers' compensation injuries of 2000 and 2004**, even though they involved his neck and MRI studies showed both bulges and herniations, **were remote factors**; despite these pre-existing changes, it was the Incident that directly caused Petitioner's disability and made him totally and permanently disabled from being a police officer in the state of New Jersey; petitioner was asymptomatic from his return to work after the 2004 incident through the date of the Incident; there was no injury report from any incident in 2009.

(Pa82). (Emphasis added).

Even if the Court were to use January 1, 2005, as the operative date that Pearson returned to work following the 2004 incident (although Pearson testified it was some time in the calendar year 2004), January 1, 2005, through October 16, 2015 (the day prior to the critical incident) represents 3,939 days, not including leap years. That is 3939 days Pearson had no neck pain. That is 3,939 days Pearson had no manifestation of symptoms in the neck. That is 3,939 days Pearson sought no medical treatment for his neck. That is 3,939 days Pearson played sports, went to the gym, continued being a police sergeant on the street, ran the Junior Police Academy, and lived his life without neck pain. In other words, neither the 2000 nor 2004 workers' compensation accidents should have been, or should be, impediments to this Court reversing Respondent and, like Judge Rabin, recommending that Pearson receive an ADR. Both 2000 and 2004 were remote enough to have no significant role in Pearson's total disability.

Here, to the extent that Pearson had pre-existing pathology in his neck, the external forces generated on Pearson's neck on October 17, 2015, resulted in injury to his neck. This injury was disabling. Even the Board's expert, Lakin, conceded that the accident of October 17, 2015, resulted in an injury to Pearson. (1T99:16). Lakin also conceded that Pearson was working full duty up until the date of the accident. Plus, it must be remembered that Respondent did not disturb Judge Rabin's conclusion that Pearson's "reported disability was the result of a traumatic

event, caused by a circumstance external to the member." (Compare Pa111-Pa113 with Pa76-Pa94).

Since Pearson experienced an accidental injury on October 17, 2015, even if he had pre-existing pathology, under Cattani and Sigafoos, it was sufficient as a matter of law that Pearson was injured in an accident on October 17, 2015. Like in Sigafoos, where the officer had pre-existing back pain but was injured and rendered totally and permanently disabled moving a television set, so too was Pearson rendered totally and permanently disabled as a result of a motor vehicle accident which subjected Pearson's neck to external forces which did not originate in his neck. The accidental workplace injury of October 17, 2015, generated external forces on Pearson's neck which rendered him disabled. That "combined effect of a traumatic event and a pre-existing disease" satisfies the traumatic event standard and requires a grant of ADR benefits irregardless of pre-existing pathology.

CONCLUSION

This Court should reverse the decision of Respondent which arbitrarily and with no basis in the record rejected the well-reasoned ID of Judge Rabin

Respectfully submitted,

ALTERMAN & ASSOCIATES, LLC

By: ____________________________

Arthur J. Murray

Dated: April 5, 2024

ESTATE OF DURWIN PEARSON, v. Petitioner-Appellant, BOARD OF TRUSTEES, POLICE AND FIREMAN'S RETIREMENT SYSTEM OF NEW JERSEY, Respondent.	SUPERIOR COURT OF NEW JERSEY: APPELLATE DIVISION APPEAL OF FINAL ADMINISTRATIVE DETERMINATION DOCKET NO. A-000417-23

BRIEF OF RESPONDENT - BOARD OF TRUSTEES, POLICE AND FIREMAN'S RETIREMENT SYSTEM OF NEW JERSEY

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INTRODUCTION

Respondent, Board of Trustees of the Police and Firemen's Retirement System of New Jersey ("Board"), submits this brief in response to the Appeal of its Final Administrative Determination denying Appellant Durwin Pearson's ("Petitioner") application for Accidental Disability retirement benefits. The Board determined Petitioner, a former Camden County Regional Police Department Sergeant, failed to demonstrate that his disability was the direct result of the 2015 accident he complains of and, instead, was the result of a pre-existing disease alone or pre-existing disease that is aggravated or accelerated by the work effort; specifically, his long and well-documented history of cervical spine injuries and degenerative conditions. The Board's decision, including its rejection of the ALJ's Initial Decision, is supported by sufficient credible evidence and must be affirmed.

PROCEDURAL HISTORY

Petitioner appeals the Final Administrative Determination ("FAD") of the Respondent Board denying Petitioner's Application for Accidental Disability retirement benefits (Pa 114).[1]

Petitioner, a former Police Officer with the Camden County Regional Police Department (formerly the Camden City Police Department), filed for Accidental Disability ("AD") on June 29, 2016 with an effective date of July 1, 2016. (Pa1).

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[1] "Pa" refers to the Petitioner's Appendix.

Petitioner's application states it was filed as a result of a motor vehicle accident that occurred on October 17, 2015. (Pa1). By letter dated October 17, 2017, the Board denied Petitioner's application for AD, finding his disability was not the direct result of the 2015 incident, and was instead the result of a pre-existing disease alone or pre-existing disease that is aggravated or accelerated by the work effort. (Pa2). The Board granted Petitioner Ordinary Disability. (Pa2 - Pa3).

Petitioner appealed the Board's decision, and the matter was transmitted to the Office of Administrative Law ("OAL") as a contested case on January 18, 2018. (Pa77). Hearings were held on September 6, 2019, September 11, 2019 and, after a significant delay due to Covid 19, on September 21, 2020. (Pa77). The OAL record was closed on May 31, 2023, and on June 29, 2023, the Administrative Law Judge ("ALJ") issued an Initial Decision reversing the Board's decision and determining that Petitioner is entitled to AD retirement benefits (Pa76, Pa77, Pa91).

The Board filed Exceptions to the ID on July 27, 2023, and Petitioner filed a Reply to Exceptions on July 30, 2023 (Pa95, Pa102). At its August 14, 2023 meeting the Board voted to reject the ID. (Pa110). The Board Secretary prepared findings of fact and conclusions of law supporting its decision which were presented to the Board at its September 18, 2023 meeting. (Pa110). At that same meeting, the Board approved the findings of fact and conclusions of law and issued a FAD rejecting the recommendation of the ID and denying Petitioner's application for AD. (Pa111-

Pa113). The Board also determined that Petitioner would continue to receive Ordinary Disability benefits. (Pa113).

Petitioner filed a Notice of Appeal of the Board's FAD on October 11, 2023, and filed its Appellate Brief on the Merits and related Appendices on April 5, 2024. The Board files the within Brief on the Merits in opposition to the Petitioner's appeal.

COUNTER STATEMENT OF FACTS

Petitioner began his career as a Police Officer with the City of Camden in April 1999 and was enrolled in the Police and Firemen's Retirement System ("PFRS") on May 1, 1999. (Pa111). He later transferred to the Camden County Regional Police Department, which replaced the Camden City Police Department in 2013, where Petitioner remained until his retirement. (Pa111).

A. The October 17, 2015 Motor Vehicle Accident and AD Application

Petitioner filed for Accidental Disability retirement benefits on June 29, 2016, requesting an effective date of July 1, 2016. (Pa1). On his application, Petitioner identified an accident date of October 17, 2015 and stated he sustained "herniated cervical discs 5 and 6 with spinal cord displacement as a result of a motor vehicle accident." (Pa1). Reports related to the accident state that Petitioner was responding in his police vehicle to a "shots fired" call at the Camden intersection of 8th and Pine street. (Pa16). As he was traveling through the intersection, a civilian ran a stop sign

and struck Petitioner's vehicle on the rear driver's side, causing damage to the left rear wheel. (Pa11; Pa16). Petitioner was thrown to the passenger side of his vehicle and reported injury to his neck, upper and lower back and left knee. (1T[2]40; Pa7).

B. Petitioner's Treatment and Surgery

Petitioner was taken to Cooper Hospital by a fellow officer, where he was evaluated in the emergency room and imaging studies, including CT scans and MRIs, of his cervical spine were performed. (Pa165, 168). Petitioner was released that same day. (Pa168). After following up with a workers' compensation doctor, Petitioner was evaluated by orthopedic surgeon, Dr. Steven Kirshner, on November 6, 2015. (Pa168, 162). Dr. Kirshner reviewed Petitioner's CT scan, which demonstrated degenerative disc disease of the cervical spine. (Pa164). Petitioner's MRI of the cervical spine also showed degenerative disc disease, specifically at C5-C6 and C6-C7, and a central disc herniation at C5-C6 with moderate to severe spinal stenosis, and at C6-C7 with moderate stenosis. (Pa164).

Dr. Kirshner diagnosed Petitioner with "herniated nucleus pulposus, cervical" at "C5-6 and C6-7 with moderate to severe spinal stenosis with compression of the spinal cord." (Pa165). On November 23, 2015, Petitioner underwent an anterior

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[2] "IT" refers to the Transcript of the September 6, 2019 OAL hearing during which the Petitioner testified. "2T" refers to the Transcript of the September 11, 2019 OAL hearing during which Petitioner's expert, Dr. Weiss, testified. "3T" refers to the Transcript of the September 21, 2020 OAL hearing during which the Board's expert, Dr. Lakin, testified.

cervical discectomy and decompression with the insertion of artificial discs at C5-C6 and C6-C7, performed by Dr. Kirshner. (Pa165, 168).

C. Petitioner's Prior Injuries and Treatment

Petitioner's records demonstrate that he was involved in three prior incidents in 2000, 2004 and 2009 during which he sustained injuries to his neck and back.

1. The 2000 Incident and Injuries

On or about August 25, 2000 while working on bike patrol, Petitioner injured his left knee, lower back and neck after tackling a suspect attempting to steal a police bicycle. (Pa119, 129). An MRI taken on September 12, 2000 demonstrated a small herniated disc at C6-C7 and an annular bulge at C5-C6. (Pa122, 124, 134). Petitioner continued to experience neck and upper back pain and was out of work for two ½ months. (Pa 119, 124). Petitioner was evaluated by Dr. Gregory McClure, a Certified Independent Medical Examiner, and Dr. Anton Kemps, an Occupational Medical Specialists, in furtherance of Petitioner's application for workers' compensation. (Pa129, 135). Petitioner's workers' compensation application was granted. (3T38:9-23).

2. The 2004 Incident and Injuries

On March 25, 2004 while at work, Petitioner was lifting some heavy boxes when he experienced pain in his neck and into his upper arms with weakness in his low back radiating down his legs. (Pa124, 130). Petitioner was taken by ambulance

to the Virtua Hospital Emergency Room in Camden, where x-rays of the cervical and lumbar spine were taken, he was prescribed muscle relaxants and pain medication, and released. (Pa130).

Petitioner's symptoms continued and on April 9, 2004, Petitioner visited Dr. Stuart Dubowitch, an orthopedist. Petitioner reported "pain about his neck with radiation into the upper extremities, some weakness in his arms and pain about the low back area with some radiation to the lower legs." (Pa 119). Dr. Dubowitch recommended physical therapy and subsequently ordered MRIs of Petitioner's cervical and lumbar spine. (Pa121). In comparing the 2004 cervical MRIs to those from 2000, Dr. Dubowitch determined that Petitioner's herniated disc at C6-C7 had increased in size, and that the annular bulge at C5-C6 remained unchanged. (Pa122). The lumbar MRI demonstrated a small central herniation at L5-S1. (Pa122). Petitioner continued his physical therapy through April 30, 2004, on which date Dr. Dubowitch advised he could return to work. (Pa122). Petitioner was out of work for approximately 45 days after this incident. (Pa130).

Petitioner's symptoms from the box-lifting incident continued, and on April 4, 2006, Petitioner visited Dr. Henry S. David, D.O., an orthopedic surgeon (Pa125). Petitioner complained of pain "referable to his neck onto his arms and legs" which, "prior to this accident…were mainly on the left side" but now are "on the right side as well". (Pa126). Petitioner stated that no matter what activities he engaged in, he

had discomfort. (Pa126). Dr. David conducted a physical examination and compared the MRIs of petitioner's cervical and lumbar spine taken in 2000 and 2004. (Pa125-126).

Dr. David's physical examination revealed tenderness in the paraspinous cervical muscles to the trapezius portion of both shoulders and loss of motion in rotation of Petitioner's neck of approximately 50%. (Pa126). Dr. David diagnosed petitioner with (i) acute and chronic cervical sprain and strain; (ii) aggravation of pre-existing cervical degenerative arthritis and cervical disc herniation of C6-C7 with increase in the disc herniation C6-C7; (iii) acute and chronic lumbrosacral sprain and strain; and (iv) post injury disc herniation L5-S1. (Pa127).

On July 17, 2006, Petitioner again visited Dr. Gregory McClure and Dr. Anton Kemps, the Certified Independent Medical Examiner and Occupational Medical Specialist he saw in connection with his 2000 workers' compensation claim. (Pa129, 135). Petitioner again complained of constant pain and stiffness in his neck. (Pa131). When Petitioner had "flare ups", the pain radiated from his neck through his back to his knees bilaterally. (Pa131). Petitioner also experienced pain in his lower back that occurred with prolonged sitting and driving that at times radiated to both legs. (Pa131).

The doctors described Petitioner's herniated disc at C6-C7 and central herniation at L5-S1 as shown on the MRIs ordered by Dr. Dubowitch and added, "it

should be noted that he did have a previous of the cervical spine on September 12, 2000 from another work related injury showing again a C6-7 paracentral disc herniation as well as some bulging at other discs in the area." (Pa134). Drs. Kemp and McClure determined Petitioner had a partial total disability of the cervical spine and noted "consistent changes with loss or range in the cervical spine" and sensory change in the left hand. (Pa135). On November 1, 2006, Petitioner received a workers' compensation award related to the March 25, 2004 incident. (Pa136-137).

3. The 2009 Incident and Injuries

This incident is mentioned repeatedly in the records of Petitioner's orthopedic surgeon, Dr. Kirshner, who evaluated Petitioner in connection with the subject October 17, 2015 car accident. (Pa160-165). In documenting his November 6, 2015 evaluation of Petitioner, Dr. Kirshner states that Petitioner had a previous history of neck and back pain from a 2009 work incident and refers to the 2009 incident five times in his four-page report. (Pa163). Dr. Kirshner describes the 2009 incident as follows:

> He was in a fight as a police officer. He tackled a man to the ground. He hit the back of his head on a car as he fell. He lost consciousness for 10 to 15 seconds. He reports neck injury and back injury. He had PT. He was out or work for 3 months. He denies and injections or surgeries.

(Pa163).

D. Testimony of Petitioner Durwin Pearson

Petitioner testified that he began working in law enforcement in the Camden County Sherriff's Office in April 1989. (1T18:20-24). He started working at the Department of Corrections in Camden County in 1992 and joined the Camden City Police Department in 1999. (1T10:11; 1T11:1). Petitioner continued working for the Camden City Police Department until April 30, 2013. (1T12:25). His final law enforcement position was with Camden Metro, which began operations on May 1, 2013, and for which his last day of work was October 17, 2015, the date of the accident. (1T15:20-23;1T47:25).

Petitioner testified that he recalled filing two prior workers' compensation claims while he was employed by the Camden City Police Department, in 2000 and 2004. (1T24:1-13). The 2000 claim was due to injuries he suffered while he was on bike patrol during a "take down" of a perpetrator who stole a fellow officers police bike. (1T24:16-25:9). Petitioner injured his knee, his neck and his lower back and was out of work for approximately 30 days. (1T26:6-14). Petitioner thinks that x-rays and MRIs were taken, but does not recall what they showed. (1T26:17-23). Upon returning to work he resumed his normal duties. (1T28:4-6).

The 2004 claim was due to injuries Petitioner suffered while lifting a heavy box at the Board of Education building. (1T28:7-17). He felt immediate pain, sought treatment right away and was out of work for "between 30 and 40 days." (1T29:9-

19). Petitioner recalls that x-rays and MRIs were taken, but testified that he does not know the results. (1T30:1-7). When asked what parts of his body were injured, Petitioner stated, that it "really felt like my back, but …I'm not really sure, to be honest with you." (1T30:20-24).

With regard to the 2009 incident, Petitioner testified that there could have been incidents in 2009 when he had to tackle suspects and, in fact, "[t]hat could have been anybody." (1T54:22-24). When asked if he recalled any incident in 2009 when he fell and hit his head, he responded "[n]ot off the top of my head, no." (1T55:25-56:3). He could not recall whether he got in any fights in 2009 while working as a police officer, adding "I was active", and when asked if he had any neck or back injuries, any time off from work or any physical therapy in 2009, he responded each time, "Not that I can recall." (1T55:4-20). At no time did Petitioner deny that such an incident occurred in 2009. (1T1-57).

With regard to the October 17, 2015 accident, Plaintiff testified that he did not finish his shift after the accident, and as soon as the scene was cleared, his fellow police officers put him in a vehicle and drove him to the hospital. (1T43:20-22; 1T44:3-6). Other than the neck injury and neck surgery, Petitioner did not injure any other parts of his body. (46:5-9). When asked how long he was in physical therapy after the accident, he stated "Not for long…between 60 and 90 days." (1T47:9-12). Petitioner's last day of work was October 17, 2015. (1T48:23-25).

E. Testimony and Report of Petitioner's Expert, Dr. David Weiss

Petitioner's medical expert, Dr. David Weiss, is Board Certified in orthopedics and a certified independent medical examiner. (2T5:12-18). He served as a PFRS examiner in orthopedics for approximately 3 ½ years, a role that ended more than ten years ago. (2T5:19-62). Dr. Weiss has no longer performs surgery and has not done in more than a decade. Miller v. Public Employee's Retirement System, 2014 N.J. Super. Unpub. Lexis 1917, 10 (App. Div. 2014) [RA-4 Exhibit A]. Dr. Weiss has previously been recognized as an expert in orthopedics by the courts of New Jersey, including the OAL, and was qualified by the ALJ as an expert in orthopedics in this matter. (2T6:2-6; 9:2-6).

Dr. Weiss examined Petitioner on September 20, 2016 and provided no medical treatment to him. (2T9:7-8; 25). He prepared an expert narrative report dated September 20, 2016 in which he makes no mention of Petitioner's 2000, 2004 or 2009 accidents. (Pa1440170). The list of documents he reviewed in connection with his evaluation of demonstrates he did not review the medical records, including the CT and MRIs, from the 2000, 2004 and 2009 incidents. (Pa147). Instead, Dr. Weiss reviewed only medical records associated with Petitioner's 2015 motor vehicle accident. (Pa147).

During the hearing before the ALJ, Dr. Weiss admitted he did not have all the medical records from Petitioner's treating physicians that had been entered into

evidence when he prepared his report. (2T31:11-17). Such records included the 2004 records from orthopedist Dr. Stuart Dubowitch, a 2006 narrative report from orthopedic surgeon Dr. Henry David, and the 2006 narrative reports from Dr. Anton Kemps and Dr. Gregory McClure. (2T36:8-21).

Dr. Weiss testified he reviewed Petitioner's prior medical records after he issued his narrative report, but did not author an addendum report to address them. (2T36:8-23). He was nevertheless questioned by Petitioner's counsel about Petitioner's prior incidents and injuries during the hearing as if they were "hypothetical" events. (2T19:24-21:20). In this context, Dr. Weiss testified that both incidents were "remote" and that Petitioner appeared to be asymptomatic until 2015. (2T22:3-23:6).

Dr. Weiss did review the report of Dr. Kirshner describing Petitioner's 2009 accident before he prepared his narrative report, but acknowledged his failure to mention it in his report. (2T32:22-33:3; 34:12-35-3). However, he testified that the 2009 incident could affect his conclusion in this case if it "rose to the level that he needed epidural blocks", or if "they suggested surgery at that time", but the information provided was "not really specific." (2T35:8-23). Dr. Weiss added, "[b]ut I'll agree, there is an issue - - that there is an issue in 2009", but never requested nor was he provided additional records to regarding this incident. (2T35:25-36:4).

During the hearing, ***and solely at the at the suggestion of Petitioner's counsel***, the theory was presented that all of Dr. Kirshner's references to Petitioner's 2009 accident were typographical errors, and that that Dr. Kirshner was instead referring to the 2000 incident. (2T38:9-39:17). Petitioner's counsel advised Dr. Weiss during the hearing that a PFRS investigation into Petitioner's prior accidents, including a request for workers' compensation records from the City of Camden's insurance carrier, turned up no records for either the 2009 incident or another 2002 incident. (2T38:9-22). Petitioner's counsel then asked Dr. Weiss "to assume that Sergeant Pearson has testified that the [description of the 2009 incident] is actually the factual predicate of the 2000 workers' compensation injury" adding, "this wouldn't be the first time that a doctor has made a mistake in terms of the date on a report, would it?" (2T37:18-22). Dr. Weiss agreed with counsel's statements. (2T37:23). Notably, Petitioner presented no such testimony and the typographical error theory was not raised during Petitioner's appearance before the ALJ. (1T1:1-57:19).

Petitioner's counsel then asked Dr. Weiss, "You would agree with me also that on a keyboard, a nine is next to a zero, is it not? (2T38:2-3). Dr. Weiss again agreed with counsel's statement. (2T38:4). Ultimately, Petitioner's counsel asked, "so would you agree with me that, it's more likely than not that this is a typographical error and this actual 2009 reference is really for the year 2009 incident?" (2T39:11-

14). Dr. Weiss again agreed, but clarified his agreement was "based upon that there was no formal worker's comp issue on the court's online." (2T39:15-17).

Dr. Weiss determined that Petitioner was permanently and totally disabled, but noted he "had some degenerative changes, he had some arthritic changes" that "were not caused by the accident" but "[p]redated the accident." (2T17-23-25). Dr. Weiss explained that age related degenerative disc disease means "normal architectural changes we are all going through in life." (2T18:20). He nevertheless opined that Petitioner's disability "was directly due to the traumatic work-related injury of October 17, 2015." (2T12:18-24). Dr. Weiss explained his conclusion as follows:

> "And so the puzzle tells me, had it not been for the day of that injury, we wouldn't be here today and that - - and that, to me, is what the essence is of this particular case as an IME examiner."
>
> (2T26:2-5).

Dr. Weiss dismissed Petitioner's pre-existing spinal conditions, including his age-related degenerative disc disease. (2T26:4). He also noted that Petitioner was working full duty at the time of the 2105 accident and there were no medical records for spinal treatment between 2004 and 2015, stating "I see this 11 year remote history with no ongoing issues". (2T27:8-11; 26:1-2).

F. <u>**Testimony and Reports of the Board's Medical Expert, Dr. Jeffrey Lakin**</u>

The Board's medical expert, Dr. Jeffrey Lakin, is a practicing orthopedic surgeon and is Board Certified as an Orthopedic Surgeon by the American Board of Orthopedic Surgery. He was qualified by the ALJ in this matter as an expert in both Orthopedics and Orthopedic Surgery. (T3:18-19).[3]

Dr. Lakin examined Petitioner on January 13, 2017 and provided no medical treatment to him. (3T11:17). He produced a narrative expert report dated January 13, 2017 stating:

> [Petitioner] had a preexisting history of a prior neck injury in 2009 followed by treatment with physical therapy. X-ray reports [from 2015 and 2016] revealed degenerative changes. The [2015] operative report revealed findings of spinal stenosis at C5-C6 and C6-C7, ***which was a significant previous condition***.
>
> * * * *
>
> The total and permanent disability was not a direct result of the accident of 10/17/15, but was an aggravation of a preexisting condition.
>
> (Pa170) (Emphasis added).

After obtaining and reviewing Petitioner's prior 2002 – 2006 medical records from Drs. Dubowitch, David, Kemp and McClure, including the prior CT and MRI

[3] During a conference call on March 4, 2021, it was stipulated by and between the parties and accepted by the ALJ that Dr. Lakin is recognized as an expert in both the medical fields of orthopedics and orthopedic surgery.

reports, Dr. Lakin produced an addendum report dated September 13, 2017. (Pa166, Pa172; T313:20-14:9). The addendum report stated:

> MRI Reports of the cervical spine are dated 10/27/00 and 4/27/04. The MRI report of 4/27/04 revealed that the small disc herniation on the right at C6-C7 had increased in size compared to the previous study of 10/27/00. This now caused impression of the anterior aspect of the thecal sac and implanting the cervical spinal cord in sagittal diameter. The disc herniation extends slightly to the right neural foramin which has narrowed. There is a mild annular bulge at C5-C6 that was unchanged.
>
> Clearly, there were significant pretexting conditions with a prior accident causing an injury to the neck on 3/25/04 as well as an accident documented in 2002. Therefore, the pathology noted on the previous MRI studies of the cervical spine in 2000 and 2004 clearly were preexisting conditions with prior treatment of the cervical spine.
>
> (Pa174).

Dr. Lakin testified that, although Petitioner was totally and permanently disabled from his ability to perform his duties as a police officer, his disability was not the result of the October 17, 2015 accident. (3T12:24-13:3). Instead, Dr. Lakin concluded that Petitioner's disability was an aggravation of pre-existing cervical conditions caused by prior accidents and aging. (3T21:2-18; 22:2-14).

Regarding Petitioner's pre-existing conditions, Dr. Lakin testified that, during his evaluation of Petitioner, "when I asked of prior injuries there was no mention of the injury in 2002" and "no mention of the injury in 2004 with lifting a box." (3T14:6-11). However, as demonstrated by Petitioner's medical records, he testified:

> Again…in this case [Petitioner] had a pre-existing disc herniation and disc bulging at C5-C6 and C6-C7. He also had stenosis at C5 - - at C5-C6 and C6-C7.
>
> And that's - -and - - and it's - - it's the pre-existing pathology that was aggravated by this accident that caused him to be disabled. It wasn't anything new that happened from this accident that caused him to be disabled.
>
> Stenosis takes a long time to develop. The pathology was already there at C5-C6, C7. His surgery was done for problems that pre-dated the accident and wasn't caused by this accident.

(3T22:2-14).

Dr. Lakin explained, [t]here's clearly pre-existing pathology, there was clearly pre-existing treatments" and the "operative surgeons saw a spinal stenosis that goes back eleven years." (3T35:20-24). When pushed to "agree" with Petitioner's counsel that there was no active treatment for any neck issues between 2006 and 2015, Dr. Lakin disagreed, pointing to the records of prior trauma from 2009. (3T36:3-8). He testified that Dr. Kirshner's records show that, in the 2009 incident, Petitioner "injured his neck and lower back" and attended physical therapy. (3T13:15-17). Dr. Lakin also testified that, as set forth in his addendum report, Petitioner's prior MRI reports show a disc herniation at C5-C6 and disc bulge at C6-C7, the same discs that were operated on in Petitioner's 2015 surgery. (3T38:15-17).

G. The ALJ's Initial Decision

The June 29, 2023 ID states that the ALJ accepted as fact certain testimony of Petitioner's medical expert, Dr. Weiss, which testimony was summarized in the ID as follows:

> In the absence of a Report of Injury, Weiss believed any reference to a 2009 accident or incident was simply a typographical error and was most likely meant to say "2000." Weiss did not have all the medical records in evidence when he prepared his report, including medical records by Dr. Stuart Dubowitch from 2004, narrative report from Dr. Henry David from 2006 and narrative reports from Drs. Anton Kemps and Gregory McClure dated 2006.

(Pa79). Despite not having Petitioner's prior medical records when he prepared his report, the ALJ also accepted as fact that "Weiss found both 2000 and 2004 'remote' when dealing with the [2015] Incident." (Pa79).

With regard to the testimony of the Board's medical expert. Dr. Lakin, the ALJ stated that "Petitioner never told Lakin about a 2009 incident during the physical examination." (Pa80). However, the ALJ failed to include Dr. Lakin's testimony that Petitioner failed to tell Dr. Lakin about *any* prior incidents and injuries, including his testimony that "when I asked of prior injuries there was no mention of the injury in 2002" and "no mention of the injury in 2004 with lifting a box." (3T14:6-11) (Pa76-92).

In the Legal Analysis and Conclusions section of the ID, the ALJ stated:

> Dr. Weiss suggested that Dr. Kirshner's reference to a 2009 injury was a typographical error, and that he meant to write '2000', which would

> correspond to Petitioner's workers' compensation claim from 2000. While that point was not proven at the hearing, petitioner was correct to argue that Camden City and Camden Metro were required to turn over all workers' compensation files that each had for petitioner; however, no workers' compensation files were turned over from 2009.

(Pa84).

The ALJ also concluded that Dr. Kirshner "failed to mention the 2000 and 2004 workers' compensation claim[s], meaning he made errors in filling out this reporting form", but the ID gives no explanation as to the "reporting form" the ALJ refers to. (Pa85). The ALJ also gives no consideration to the probability that, as with Dr. Lakin and Dr. Weiss, Petitioner failed to tell Dr. Kirshner about the 2000 and 2004 incidents or his prior cervical herniations, nor does the ALJ acknowledge that Dr. Weiss failed to mention the 2000 or 2004 incidents in his narrative expert report or his Certification of Medical Examination by Personal or Treating Physician he submitted to the Division of Pension of Benefits. (Pa85; Pa144-150; Pa151-152). Nevertheless, the ALJ thereafter referred to Dr. Kirshner's treatment report as "this error-prone report." (Pa85).

The ALJ also found, that "[w]hen questioned regarding the issue, Petitioner denied that there was any 2009 incident or accident", but cites to no such testimony and Respondent's find none in the transcript. (Pa85).

The ALJ determined that both Dr. Weiss and Dr. Lakin "provided believable and seemingly credible testimony", he found Dr. Weiss's testimony "to be more reliable in the within matter" for the following reasons:

> Dr. Lakin relied on information in Dr. Kirshner's report as to a 2009 injury, but there was no independent report indicating back or neck injuries in 2009 and Dr. Kirshner did not testify. Neither doctor had full documentation to review for the years 2004 through 2015, and thus Dr. Lakin's conclusions as to the pre-existing spinal issues were not fully supported."

(Pa81).

On these findings of fact and law, including Dr. Weiss's dismissal of the findings regarding the 2000 and 20004 incidents and that "Dr. Weiss specifically found that petitioner was asymptomatic from his return to work after the 2004 incident through the date of the incident on October 17, 2015", the ALJ recommended that the Board's determination should be reversed and Petitioner's application for AD should be granted. (Pa91).

H. <u>The Board's Final Administrative Determination</u>

After considering the testimony of the Petitioner, the testimony of the parties' medical experts and the ALJ's ID, the Board issued a FAD rejecting the ALJ's ID and recommending denial of Petitioner's application for AD. (Pa111, 116). The Board found that, "because Dr. Weiss made no mention of the alleged typographical errors in his expert report, his response to leading questions by [Petitioner's] counsel

does not support the conclusion that [Dr. Weiss] is more credible than Dr. Lakin." (Pa112-113).

As further explained in the FAD, "[t]he Board was not persuaded by the ID", and noted that the year 2009 was set forth in Dr. Kirshner's report five separate times, and the ID presumes there was only once incident in 2000 and that Dr. Kirshner mistakenly typed "2009" all five time. (Pa113). In addition to the fact that this theory was created by Petitioner's counsel at the hearing and not Dr. Weiss, the Board found that the description of the 2000 incident "is substantially different than the incident described as occurring in 2009." As such, the "Board does not find credible that the difference between these two incidents can be reconciled as a 'typo'. (Pa113). Instead, it "determined that the details are too dissimilar to come to the conclusion that they are actually the same incident, differentiated only by typographical error." (Pa113).

The Board also rejected the lack of workers' compensation records as the basis for the ID's conclusion that the 2009 incident did not occur, stating "it is also feasible that [Petitioner] sustained injury in 2009, but there is no worker's compensation or other employer report because it is possible he injured himself outside of work." The Board found that "this theory is at least as plausible as an orthopedic surgeon making a typographical error five times in the same report and describing the same incident with discernable differences in detail." (Pa113). The Board ultimately:

- Found no credible evidence to support the ALJ's acceptance of the theory introduced ***by the Petitioner's counsel*** that that the reports detailing Petitioner's 2009 injury was the result of a typographical error and that such injury did not occur;
- Rejected the ALJ's legal conclusion that Petitioner's expert, Dr. Weiss, provided more reliable testimony than the Board's expert, Dr. Lakin;
- Rejected the ALJ's legal conclusion that Petitioner's disability was directly caused by the 2015 accident and its recommendation that Petitioner be awarded AD; and
- Denied Petitioner's application for AD.

(Pa 111-113).

ARGUMENT

I. THE BOARD'S DETERMINATION THAT PETITIONER IS NOT ENTITLED TO ACCIDENTAL DISABILITY RETIREMENT BENEFITS IS SUPPORTED BY SUFFICIENT CREDIBLE EVIDENCE IN THE RECORD AND MUST BE AFFIRMED.

PFRS member eligibility for AD retirement benefits is governed by N.J.S.A. 43:16A-7, which requires 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 him.

N.J.S.A. 43:16A-7. To demonstrate compliance with this statute, and as established by the New Jersey Supreme Court, an applicant for AD must demonstrate each of the following five elements:

1. That he is permanently and totally disabled;
2. As a direct result of a traumatic event that is
   a. identifiable as to time and place,
   b. undesigned and unexpected, and
   c. caused by a circumstance external to the member (not the result of preexisting 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 usual or any other duty.

Richardson v. Board of Trustees, 192 N.J. 189, 212-13 (2007) (emphasis added). The applicant bears the burden of proof on each of these elements. Id. at 212.

Here, the Board determined that Petitioner met all of the Richardson elements except element 2-c above, because he failed to demonstrate his disability was the

direct result of a traumatic event caused by a circumstance external to the member. (Pa2; Pa111). Instead, the Board determined that Petitioner's medical records demonstrate his disability was the result of a pre-existing disease that was aggravated or accelerated by the work effort. (Pa2; Pa111). Subsequent to the OAL contested case proceeding, the Board considered the testimony of the Petitioner and the parties' medical experts, and the ALJ's initial decision recommending reversal of the Board's denial of Petitioner's application for AD. As stated in its Final Administrative Determination ("FAD"), the Board:

- Found no credible evidence to support the ALJ's acceptance of the theory introduced ***by the Petitioner's counsel*** that that the reports detailing Petitioner's 2009 injury was the result of a typographical error and that such injury did not occur;
- Rejected the ALJ's conclusion that Petitioner's expert, Dr. Weiss, provided more reliable testimony than the Board's expert, Dr. Lakin;
- Rejected the finding that Petitioner's disability was not caused by a pre-existing condition or a pre-existing condition accelerated or exacerbated by the work effort;
- Rejected the ALJ's conclusion that Petitioner's disability was directly caused by the 2015 accident and its recommendation that Petitioner be awarded AD; and

- Denied Petitioner's application for AD.

(Pa 111-113).

It is these findings set forth in the Board's FAD that are the subject of Petitioner's appeal. (Pa114).

A. STANDARD OF REVIEW

1. The Appellate Division's Review of the Board's Determination

An administrative agency's determination is presumptively correct and, on review of the facts, this Court will not substitute its own judgment for the agency's where the agency's findings are supported by sufficient credible evidence. Gerba v Board of Trustees of the Public Employees' Retirement System, 83 N.J. 174, 189 (1980). See, also Campbell v New Jersey Racing Commission, 169 N.J. 579, 597 (2001); Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). Thus, on judicial review of an agency determination, courts have a limited role to perform. Gerba v. Board of Trustees, *supra*., 83 N.J. at 189. If the Appellate Division is satisfied after its review that the evidence and inferences to be drawn therefrom support the agency's decision, then it must affirm even if the Court feels it would have reached a different result. Campbell v. New Jersey Racing Commission, *supra*., 169 N.J. at 587

Thus, the Board's "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." Russo v. Board of Trustees, Police & Firemen's Retirement System, 206

N.J. 14, 27 (2011). Moreover, the party challenging the validity of the administrative decision bears the burden of proving it was "arbitrary, unreasonable or capricious." Boyle v Riti, 175 N.J. Super. 158, 166 (App. Div. 1980). "The precise issue is whether the findings of the agency could have been reached on substantial credible evidence in the record, considering the proof as a whole." Bueno v. Board of Trustees, supra., 404 N.J. Super. at 119.

Further, although a person eligible for benefits is entitled to a liberal interpretation of a pension statute, "eligibility [itself] is not to be liberally permitted." Smith v. Department of Treasury, Division of Pension and Benefits, 390 N.J. Super. 209, 213 (App. Div. 2007). Our courts have long been cognizant that the pension boards "are fiduciaries and therefore have a duty to protect the [pension] fund[s] and the interests of all beneficiaries thereof' and not just the individual member seeking a retirement allowance." Mount v Board of Public Employees' Retirement System, 133 N.J. Super. 72, 86 (App. Div. 1975).

2. The Board's Review of the ALJ's Initial Decision

The Board's review of an ALJ's Interim Decision is governed by N.J.S.A. 52:14B-10(c), which states that, '[i]n reviewing the decision of an administrative law judge, the agency head may reject or modify findings of fact, conclusions of law or interpretations of agency policy in the decision, but shall state clearly the reasons for doing so." Id. It is pursuant to this authority that the Board rejected the ALJ's

decision and related findings in its FAD. As explained by the Appellate Division, in such a circumstance:

> Although we are considering the ALJ's report as part of the record, we emphasize that the Board is the primary factfinder in this case and that is the Board's order and decision we are reviewing. The Board has ultimate authority upon a review of the record submitted by the ALJ to adopt or modify the recommended report and decision of the ALJ, N.J.S.A. 52:14B-10(c), and an appellate court is only entitled to review those findings and recommendations in its review of the record for the purpose of determining whether nor not the Board's findings are supported by substantial credible evidence.

New Jersey Department of Public Advocate, v N.J. Board of Public Utilities, 189 N.J. Super. 491, 507 (App. Div. 1983).

B. THE BOARD'S ACCEPTANCE OF DR. LAKIN'S TESTIMONY AS MORE RELIABLE THAN DR. WEISS'S IS SUPPORTED BY CREDIBLE EVIDENCE IN THE RECORD AND THE LAW

In rejecting the ALJ's ID, the Board accepted the testimony of the its medical expert, Dr. Lakin, over that of Petitioner's expert, Dr. Weiss. The Board's determination was in direct response to the ALJ's contrary finding that Dr. Weiss's testimony "was more reliable in the within matter" which the ALJ explained as follows:

> Dr. Lakin relied on information in Dr. Kirshner's report as to a 2009 injury, but there was no independent report indicating back or neck injuries in 2009 and Dr. Kirshner did not testify. Neither doctor had full documentation to review for the years 2004 through 2015, and ***thus Dr. Lakin's conclusions as to the pre-existing spinal issues were not fully supported***."

(Pa81) (Emphasis added). The Board disagreed, a determination that is supported by credible evidence in the record and the applicable law. (Pa113).

The weight granted to expert testimony depends on factors such as whether the expert testified in his specialty, whether the expert's conclusions are based only upon the subjective conclusions of the patient, and whether the expert has superior credentials in a specific medical field, such as an active orthopedic surgeon versus an orthopedist who does not perform surgery. Angel v Rand Express Lines, Inc., 77 N.J. Super. 77, 86 (App. Div. 1961); Miller v Public Employees Retirement System, *supra*., 2014 N.J. Super. at 10. [RA- 4 Exhibit A].

Other relevant factors include when the rejected expert's testimony was based on a flawed assumption; when the rejected expert failed to review all of the petitioner's medical records; and when the expert's premises and conclusions are contradicted by rebuttal experts and other evidence of the opposing party. Brown v. Board of Trustees, 2023 N.J. Super. Unpub. Lexis 442, 12 (App. Div. 2023) [RA-8 Exhibit B]; Riley v Board of Trustees, 2021 N.J. Super. Unpub. Lexis 2739 at 13 (App. Div. 2021) [RA-12 Exhibit C]; Marter v Board of Trustees, 2024 N.J. Super. Unpub. Lexis 1766, 11 (App. Div. 2024) [RA-17 Exhibit D].

Nearly all of these factors are present in this matter. As a result, the reasons the Board found Dr. Lakin's testimony more reliable than Dr. Weiss's are numerous, and, despite the ALJ's focus on only the 2009 incident, include all of the following:

(1) Prior to preparing his report, Dr. Weiss failed to review the medical records regarding Petitioner's pre-existing injuries to his cervical spine, including records from an orthopedist and orthopedic surgeon, and CTs and MRIs demonstrating a worsening herniation at C6-C7 and bulges at C5-C6, the very discs alleged to be injured and operated upon as a result of the 2015 accident. (Pa147) (2T31:11-17; 36:8-23).

(2) Upon learning of the existence of the pre-existing conditions and records, Dr. Weiss failed to prepare an amended report to address them. (2T36:8-23). Dr. Lakin prepared an addendum to his narrative report specifically addressing Petitioner's prior records and the incidents, injuries, treatment and MRI results they contain. (Pa173-174).

(3) At the OAL hearing, Dr. Weiss admitted his failure to address Petitioner's pre-existing injuries in his report, and was nevertheless questioned about them as if they were "hypothetical" events. (2T19:24-21:20). In this context, Dr. Weiss dismissed Petitioner's prior incidents and cervical injuries as "remote" noting that Petitioner appeared to be asymptomatic until 2015 (2T22:3-23:6). Dr. Lakin testified in detail at the hearing about Petitioner's well documented pre-existing cervical injuries, including that:

- Petitioner "had a pre-existing disc herniation and disc bulging at C5-C6 and C6-C7" and "had stenosis at…C5-C6 and C6-C7." (3T22:2-14).

- Petitioner "had pre-existing pathology that was aggravated by this accident that caused him to be disabled" and "it wasn't anything new that happened from this accident that caused him to be disabled." (3T22:2-14).
- "Stenosis takes a long time to develop" and "the pathology was already there at C5-C6, C7." (3T22:2-14).
- Petitioner's surgery was done for problems that pre-dated the accident and wasn't caused by this accident." (3T22:2-14).
- "There's clearly pre-existing pathology, there was clearly pre-existing treatments" and the "operative surgeons saw a spinal stenosis that goes back eleven years." (3T35:20-24).
- Petitioner's prior MRI reports show a disc herniation at C5-C6 and disc bulge at C6-C7, the same discs that were operated on in Petitioner's 2015 surgery. (3T38:15-17).

(4) Dr. Weiss testified that Petitioner was asymptomatic from 2004 through 2015. (2T22:20-22). The ALJ cited to this testimony, stating "Dr. Weiss specifically found that petitioner was asymptomatic from his return to work after the 2004 incident through the date of the incident on October 17, 2015." (Pa91). However, Dr. Weiss's testimony is contradicted by Petitioner's own medical records, which demonstrate Petitioner continued to seek treatment for his neck pain from orthopedist Henry David in 2006, who diagnosed Petitioner with "aggravation of

pre-existing cervical degenerative arthritis and cervical disc herniation of C6-C7 with increase in the disc herniation C6-C7" at that time. (Pa126-127). Also in 2006, Petitioner visited Drs. McClure and Kemps, complaining of constant pain and stiffness in his neck and "flare ups" during which the pain radiated from his back is neck through his back to his knees bilaterally. (Pa131).

(5) Although these contradictions between Dr. Weiss and Dr. Lakin do not even include Petitioner's 2009 incident, neck pain and treatment, discussed in detail in Point C, *infra*, the Board found that, "because Dr. Weiss made no mention of the alleged typographical errors in his expert report, his response to leading questions by [Petitioner's] counsel does not support the conclusion that he is more credible than Dr. Lakin." (Pa112).

(6) Dr. Lakin's credentials are more substantial than Dr. Weiss's. Dr. Lakin is Board Certified in Orthopedic Surgery, and is currently a practicing orthopedic surgeon, and was qualified by the ALJ as an expert in both Orthopedics and Orthopedic Surgery. (3T7:8-9; 7:23-8:6). (See note 1, *supra*). Although Dr. Weiss is a Board Certified Orthopedist and was qualified by the ALJ as such, he is no longer a practicing surgeon and has not been for more than ten years. (2T5:12-18; 6:2-6; 9:206). <u>Miller v Public Employees Retirement System</u>, 2014 N.J. Super. Unpub Lexis 1917,10 (App. Div. 2014) [RA-4 Exhibit A]. (Affirming reliance on Dr. Lakin over Dr. Weiss, because the agency "considered Lakin the more qualified

expert because he was an active orthopedic surgeon" and "Weiss… explained he does not do surgery.").

"Ultimately, 'the 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.'" Marter v Board of Trustees, *supra*, 2024 N.J. Super. at 11 [RA-17 Exhibit D], *quoting* Renan Realty Corp. v. State Department of Community Affairs, 182 N.J. Super 415, 421 (App. Div. 1981). Here, any one of the differences between Dr. Weiss and Dr. Lakin demonstrate that the Board's choice of Dr. Lakin was "reasonably made." Id. All of them together leave no doubt that the Board's decision to rely on Dr. Lakin's testimony is supported by credible evidence in the record and must be affirmed. Gerba v Board of Trustees of the Public Employees' Retirement System, *supra.*, 83 N.J. at 189; New Jersey Department of Public Advocate, v N.J. Board of Public Utilities, *supra.*, 189 N.J. Super. at 507.

C. THE BOARD'S DETERMINATION THAT THE 2009 INCIDENT DESCRIBED BY PETITIONER'S TREATING PHYSICIAN WAS NOT A TYPOGRAPHICAL ERROR IS SUPPORTED BY CREDIBLE EVIDENCE IN THE RECORD.

Petitioner's treating physician, Dr. Kirshner, evaluated Petitioner in connection with the subject October 17, 2015 car accident and performed Petitioner's surgery. (Pa160-165). The 2009 incident is mentioned five times in Dr.

Kirshner's treatment report, including that Petitioner had a previous history of neck and back pain from a 2009 incident, which Dr. Kirshner describes as follows:

> He was in a fight as a police officer. He tackled a man to the ground. He hit the back of his head on a car as he fell. He lost consciousness for 10 to 15 seconds. He reports neck injury and back injury. He had PT. He was out or work for 3 months. He denies and injections or surgeries.

(Pa163).

It has been alleged by Petitioner's counsel that this incident did not occur, that Dr. Kirshner's five references to the incident were typographical errors and that Dr. Kirshner was instead referring to Petitioner's 2000 incident. (2T38:9-39:17). For comparative purposes, Petitioner described the 2000 incident as follows:

> In 2000 I was working a concert, 30,000 people at the concert….But we were just patrolling on bikes. I had a partner. He got off the bike to check on someone…and an individual jumped on the bike and took off…I catch up to him. I do a take-down with the bike - - take him down.

(1T24:16-25:13). Petitioner testified that he was wearing a helmet and that he injured his knee, his lower back and his neck (1T24:21; 26:6-9).

As with Petitioner's 2000 and 2004 incidents and injuries, Dr. Weiss did not mention the 2009 incident in his report, but testified he read about it in Dr. Kirshner's report. (2T32:22-33:3; 34:12-35-3). He also testified that the 2009 incident could affect his conclusion in this case if it "rose to the level that he needed epidural blocks", or if "they suggested surgery at that time", but the information provided was "not really specific." (2T35:8-23). Dr. Weiss added, "[b]ut I'll agree, there is

an issue - - that there is an issue in 2009", but never requested nor was he provided additional records to review in connection with this accident. (2T35:25-36:4).

During the hearing, ***and solely at the at the suggestion of Petitioner's counsel***, the theory was presented that all of Dr. Kirshner's references to Petitioner's 2009 accident were typographical errors, and that that Dr. Kirshner was instead referring to the 2000 incident. (2T38:9-39:17). Petitioner's counsel advised Dr. Weiss during the hearing that a PFRS investigation into Petitioner's prior accidents, including a request for workers' compensation records from the City of Camden's insurance carrier, turned up no records for either the 2009 incident or another 2002 incident. (2T38:9-22). Petitioner's counsel then asked Dr. Weiss "to assume that Sergeant Pearson has testified that the [description of the 2009 incident] is actually the factual predicate of the 2000 workers' compensation injury" adding, "this wouldn't be the first time that a doctor has made a mistake in terms of the date on a report, would it?" (2T37:18-22). Dr. Weiss agreed with counsel's statements. (2T37:23). Notably, ***Petitioner presented no such testimony*** and the typographical error theory was not raised during Petitioner's appearance before the ALJ. (1T1:1-57:19).

Petitioner's counsel followed up with Dr. Weiss asking, "You would agree with me also that on a keyboard, a nine is next to a zero, is it not? (2T38:2-3). Dr. Weiss again agreed with counsel's statement. (2T38:4). Ultimately, Petitioner's

counsel asked, "so would you agree with me that, it's more likely than not that this is a typographical error and this actual 2009 reference is really for the year 2009 incident?" (2T39:11-14). Dr. Weiss again agreed, but clarified his agreement was "based upon that there was no formal worker's comp issue on the court's online." (2T39:15-17).

During Petitioner's testimony he was asked about the 2009 incident ***and never denied that it occurred.*** To the contrary, he testified that there could have been incidents in 2009 when he had to tackle suspects and, in fact, "[t]hat could have been anybody." (1T54:22-24). When asked if he recalled any incident in 2009 when he fell and hit his head, he responded "[n]ot off the top of my head, no." (1T55:25-56:3). He could not recall whether he got in any fights in 2009 while working as a police officer, adding "I was active", indicating it was possible, and when asked if he had any neck or back injuries, any time off from work or any physical therapy in 2009, he responded each time, "Not that I can recall." (1T55:4-20). In contrast, when Petitioner was asked if he recalled what his previous X-Rays and MRIs showed, he definitively testified, "Absolutely not." (1T26:21-23).

The testimony of Dr. Weiss and Petitioner demonstrate that critical findings of the ALJ were based on incorrect assumptions. For example, the ALJ found as fact that, "In the absence of a Report of Injury from 2009, ***Weiss believed*** any reference to a 2009 accident or incident was simply a typographical error and was most likely

meant to say '2000.'" (Pa79). In support of his legal conclusions, the ALJ again stated, "***Dr. Weiss suggested*** that Dr. Kirshner's reference to a 2009 injury was a typographical error, and that he meant to write '2000', which would correspond to petitioner's workers' compensation claim from 2000." (Pa85). Further, his findings were based on his belief that "[w]hen questioned regarding the issue, petitioner denied that there was any 2009 incident or accident." (Pa85) ***None of these findings are accurate***. Nevertheless, in reliance upon them, the ALJ determined, "**I CONLUDE** that there was no accident, incident or injury pertaining to petitioner from 2009." (Pa85) (Emphasis in original).

The ALJ also found it significant that Dr. Kirshner "failed to mention the 2000 and 2004 workers' compensation claim[s], meaning he made errors in filling out this reporting form", but gives no explanation as to the "reporting form" the ALJ refers to. (Pa85). The ALJ also gives no consideration to the probability that, as with Dr. Lakin and Dr. Weiss, Petitioner failed to tell Dr. Kirshner about the 2000 and 2004 incidents or his prior cervical herniations. Most significant, the ALJ does not acknowledge that Dr. Weiss, Petitioner's own expert, failed to mention the 2000 or 2004 incidents in ***his*** report or in his Certification of Medical Examination by Personal or Treating Physician he submitted to the Division of Pension of Benefits. (Pa85; Pa144-150; Pa151-152). Nevertheless, the ALJ thereafter referred to Dr. Kirshner's treatment records as "this error-prone report." (Pa85).

Based on the credible evidence in the record, and in addition to the fact that the 2009 incident is noted in Dr. Kirshner's report five times, the Board rejected the ALJ's findings that the 2009 incident did not occur. It based this conclusion on three additional solid reasons set forth in its FAD: (1) "The Board found that, because Dr. Weiss made no mention of the alleged typographical errors in his expert report, his response to leading questions by [Petitioner's] counsel does not support the conclusion that he is more credible than Dr. Lakin" (Pa112); (2) "The Board found that the description in testimony of the 2000 incident…is substantially different than the incident described as occurring in 2009" and "does not find it credible that the difference between these two incidents can be reconciled as a 'typo'" (Pa113); and (3) "The Board believed it is also feasible…that there is no workers' compensation or other employer report because it is possible he injured himself outside of work." (Pa113). With regard to its third reason, the Board stated, "this theory is at least as plausible as an orthopedic surgeon making a typographical error in the same report and describing the same incident with discernable differences in detail." (Pa 113).

Here, the Board's findings and conclusions, including its rejection of the ALJ's findings, are supported by substantial credible evidence in the record, are stated clearly in its FAD and must be affirmed. Gerba v Board of Trustees of the Public Employees' Retirement System, *supra.*, 83 N.J. at 189; New Jersey Department of Public Advocate, v N.J. Board of Public Utilities, *supra*., 189 N.J.

Super. at 507. See, also Riley v Board of Trustees, *supra*., 2021 N.J. Super. at 12 [RA-12 Exhibit C], *citing* N.J.S.A. 52:14B-10(c) (Affirming the Board's rejection of the ALJ's findings and denial of Petitioner's application).

D. THE BOARD'S DETERMINATION THAT THE PETITIONER'S DISABILITY WAS CAUSED BY PREEXISTING CONDITIONS WAS BASED ON SUBSTANTIAL CREDIBLE EVIDENCE AND ITS CONSIDERATION OF THE PROOFS AS A WHOLE.

Petitioner argues that the Board "lacked a good faith basis" to argue or ask questions of a witness regarding the 2009 incident and "continues to cling to one lone entry in one lone record as evidence of a 2009 incident." Petitioner's Brief, p. 26. He further argues that, to "allow" the Board to reverse the ID "in the absence of evidence that substantiates a 2009 incident or accident would be the quintessential example of letting a completely arbitrary and capricious decision stand." Id. at 21. These arguments are without merit. First, it was Petitioner who fixated on this issue prompting the ALJ to address it at length in his opinion, which in turn required the Board to address it in its FAD. The 2009 incident was just one factor in the entirety of the proofs considered by the Board in its determination that Petitioner's disability is due to pre-existing cervical conditions, and a minor one at that. Second, Petitioner has the burden of proof to demonstrate that the Board's decision was "arbitrary, unreasonable or capricious." Boyle v Riti, *supra*., 175 N.J. Super. at 166. As such, given there is evidence in the record of a 2009 incident presented by Petitioner's

own treating physician, it is not the Board's burden to dispel that evidence. "The precise issue is whether the findings of the agency could have been reached on substantial credible evidence in the record, considering the proof as a whole." Bueno v. Board of Trustees, 404 N.J. Super. 119, 125 (App. Div. 2008).

1. The Board's Findings Were Based on Credible Evidence and Consideration of the Proofs as a Whole

Dr. Lakin's initial report demonstrates that his review of records consisted of those associated with Petitioner's treatment for the subject 2015 accident, including Dr. Kirshner's treatment report. (Pa167). Dr. Lakin states therein:

> [Petitioner] had a preexisting history of a prior neck injury in 2009 followed by treatment with physical therapy. X-ray reports [from 2015 and 2016] revealed degenerative changes. The [2015] operative report revealed findings of spinal stenosis at C5-C6 and C6-C7, ***which was a significant previous condition***.
>
> * * * *
>
> The total and permanent disability was not a direct result of the accident of 10/17/15, but was an aggravation of a preexisting condition.

(Pa170) (Emphasis added). Dr. Lakin's addendum report identifies the additional records he reviewed after the preparation of his initial report. (Pa173). These records include Petitioner's medical records related to his 20000 and 20004 incidents, injuries and treatment, about which Dr. Lakin states:

> MRI Reports of the cervical spine are dated 10/27/00 and 4/27/04. The MRI report of 4/27/04 revealed that the small disc herniation on the right at C6-C7 had increased in size compared to the previous study of 10/27/00. This now caused impression of the anterior aspect of the

> thecal sac and implanting the cervical spinal cord in sagittal diameter. The disc herniation extends slightly to the right neural foramin which has narrowed. There is a mild annular bulge at C5-C6 that was unchanged.
>
> Clearly, there were significant pretexting conditions with a prior accident causing an injury to the neck on 3/25/04 as well as an accident documented in 2002. Therefore, the pathology noted on the previous MRI studies of the cervical spine in 2000 and 2004 clearly were preexisting conditions with prior treatment of the cervical spine.

(Pa174). Dr. Lakin's initial opinions "remain unchanged" and he affirmed his determination that "the total and permanent disability was not a direct result of the accident of 10/17/14 but was an aggravation of a preexisting condition." (Pa174).

As his reports demonstrate, the 2009 incident played a minor role in Dr. Lakin's findings and opinions, and as set forth in detail in previous sections of this brief, he focused at length during the hearing on the implications of the pre-existing damage to Petitioner's cervical spine demonstrated by the 2000 and 2004 MRIs, including a worsening disc herniation at C6-C7 and disc bulge at C5-C6, the same discs that were operated on in Petitioner's 2015 surgery. (3T35:20-24). Dr. Lakin also found it compelling that the "operative surgeons saw a spinal stenosis that goes back eleven years (3T38:15-17). In fact, during Dr. Lakin's direct examination, there is only one mention of the 2009 incident. (3T13:11-15). However, during his cross examination, Petitioner's counsel questioned Dr. Lakin at length about the 2009 incident in an unsuccessful effort to support counsel's "typo" theory, covering eight pages of the 47-page hearing transcript. (3T24:17- 31:13).

During Dr. Weiss's testimony, the Board questioned Dr. Weiss about Dr. Kirshner's repeated reference to the 2009 incident and Dr. Weiss's failure to mention it in his narrative report, ***and would have been remiss had it not done so***. (2T33:16-36:4). However, the Board spent equal time questioning Dr. Weiss about the 2000 and 2004 incidents, Petitioner's prior medical records and MRI reports, and Dr. Weiss's similar failure to opine regarding those incidents in a narrative report. (2T30:10-31:19; 36:8-23). Significantly, Dr. Weiss did testify that he believed the 2009 incident did not occur and, instead, admitted that "there was an issue in 2009" that could have affected his conclusion. (2T35:8-23). It was not until Dr. Weiss's redirect examination that Petitioner's counsel presented the theory that the 2009 incident was a typo and did not actually occur. (2T37:1-39:17).

In its closing brief, the Board again addressed all of the available evidence, including Petitioner's 2002 and 2004 incidents, injuries and cervical issues, Dr. Kirshner's references to the 2009 incident and Petitioner's pre-existing spinal stenosis and degenerative conditions. (Pa67-68). Conversely, in its closing brief, Petitioner devoted its entire first argument to the theory that there was no 2009 incident, and ironically argued in subsequent points that "Lakin had one singular focus, i.e., 2009." (Pa41-42; 48).

Petitioner's focus on the 2009 incident is a red herring to draw attention away from his other accidents and injuries, his prior MRIs demonstrating a worsening

herniated disc at C6-C7 and bulging disc at C5-C6, his eleven-year pre-existing history of spinal stenosis at C5-C7 and Dr. Weiss's failure to address these significant pre-existing conditions. Contrary to Petitioner's arguments, the Board based its decision on all of the evidence available. That evidence demonstrate that, in 2004, Petitioner was diagnosed with "aggravation of pre-existing cervical degenerative arthritis" ,"cervical disc herniation of C6-C7 with increase in the disc herniation C6-C7" and an "annular bulge at C5-C6." (Pa122, 125). That evidence also demonstrates that, in 2015, Petitioner's orthopedic surgeon, Dr. Kirshner, likewise diagnosed Petitioner with degenerative disc disease "specifically at C5-6 and C6-7" and disc herniation at C6-C7. As Dr. Lakin testified, "the pathology was already there at C5-C6, C7" and [Petitioner's] surgery was done for problems that pre-dated the [2015] accident…" (3T22:2-14). Petitioner's focus on the 2009 incident and his false statements that the 2009 incident was the sole basis for the Board's decision cannot change the credible evidence in the record and the "proofs as a whole" that support the Board's decision.

2. **Petitioner, Not the Board, Bears the Burden of Proof of Demonstrating the Board's Decision was Arbitrary, Capricious and Unreasonable**.

In arguing that the Board should substantiate the information in the records of Petitioner's own treating physician Petitioner conflates the burdens of proof and attempts to transfer its burden to the Board. The Board's decision will be sustained

unless there is a clear showing ***by the Petitioner*** that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record. Russo v. Board of Trustees, Police & Firemen's Retirement System, *supra.*, 206 N.J. at 27 (2011); Boyle v Riti, *supra*., 175 N.J. Super. at 166. Conversely, the Board "may reject or modify" the ALJ's findings of fact and conclusions of law, N.J.S.A. 52:14B-10(c), and the Court's review of the Board's determination is only "for the purpose of determining whether nor not the Board's findings are supported by substantial credible evidence." New Jersey Department of Public Advocate, v N.J. Board of Public Utilities, 189 N.J. Super. 491, 507 (App. Div. 1983).

The difference between these burdens was at issue in Riley v Board of Trustees, *supra*., 2021 N.J. Super. at 12. [RA-12 Exhibit C]. There, the petitioner argued the Board could not reject the ALJ's findings "without first concluding those findings were arbitrary, capricious, unreasonable or unsupported by the evidence." The Court rejected this argument, stating the Court would defer to the Board's findings as long as they "were supported by substantial credible evidence." Id., *citing* N.J.S.A. 52:14B-10(c). The inability of a petitioner to transfer its burden to the Board was at issue in Hawkins v. Board of Trustees, 2020 N.J. Super. Unpub. Lexis 727 (App. Div. 2020). [RA-18 Exhibit E]. There, as in this matter, the Board rejected the ALJ's reliance upon an expert and its decision to grant the petitioner accidental disability benefits. Id. at 1-2. [RA-18-19 Exhibit E]. The petitioner argued that,

because the Board failed to present evidence 'to contradict' certain assertions he raised, "the Board's denial is not supported by the record, is arbitrary, capricious, plainly unreasonable and should be reversed." Id. at 9. [RA-21 Exhibit E]. The Court disagreed, stating that "[petitioner's] argument essentially places the burden of proof on the Board" and "as…established in Richardson, the petitioner seeking benefits bears the burden of proof." Id. at 10, *citing* Richardson v. Board of Trustees, 192 N.J. at 212. [RA-21 Exhibit E].

Here, as set forth above the Board's decision is supported by substantial credible evidence. Further, it is not the Board's burden to prove or disprove the statements in Dr. Kirshner's records. Plaintiff bears the burden of proof to demonstrate he is eligible for AD and could have requested that Dr. Kirshner – his own treating physician and surgeon - testify at the OAL hearings, or that he submit a certification expanding or clarifying the statements in his medical records. Plaintiff's failure to do so, and his claim that there is a lack of evidence to disprove Dr. Kirshner's five references to the 2009 incident is not in itself "evidence" that the 2009 incident did not happen.

E. <u>ALTHOUGH PREEXISTING CONDITIONS ARE NOT A *PER SE* BAR TO ACCIDENTAL DISABILITY, THAT DOES NOT CHANGE THE OUTCOME THAT PETITIONER'S DISBILITY IS NOT THE DIRECT RESULT OF THE 2015 ACCIDENT</u>.

Under the AD statute, the burden of proving "direct result" by competent medical testimony rests with solely upon the Petitioner. <u>Gerba v Board of Trustees</u>, 83 N.J. 174, 185 (1980); <u>Atkinson v Parsekian</u>, 37 N.J. 43, 49 (1962). A traumatic event can be said to "directly cause" a total and permanent disability within the meaning of the statute only when the event constitutes the "essential, significant or substantial contributing cause" of the disability. <u>Gerba v. Board of Trustees</u>, *supra*., 83 N.J. at 188; <u>Korelnia v. Board of Trustees, Public Employees Retirement System</u>, 83 N.J. 162, 170 (1980); <u>Petrucelli v. Board of Trustees</u>, 211 N.J. Super. 280, 287 (App. Div. 1986).

As noted by the Supreme Court, the legislative purpose of the "direct result" requirement is to apply a more exacting standard of medical causation, thereby rejecting the workers' compensation concept that an "accident" can be found in the "impact of ordinary work effort upon a progressive disease." <u>Id.</u> at 185-186, *quoting* <u>Russo v. Teacher's Pension & Annuity Fund</u>, 62 N.J. 142, 150-51 (1973). Thus, while a petitioner with pre-existing conditions is not foreclosed from accidental disability benefits in all circumstances, if the disability results only from the aggravation, acceleration or ignition of the disease, the disability is "ordinary" rather

than "accidental." Gerba v. Board of Trustees, *supra.*, 83 N.J. at 186. Further, while a traumatic event need not constitute the sole or exclusive cause of a petitioner's disability, the statutory language requires the traumatic event to be the direct cause "even though it is in combination with an underlying physical disease." Id. at 187.

Whether a claimant's alleged disability is the direct result of a traumatic event is one necessarily within the ambit of expert medical opinion. Korelnia v. Board of Trustees, Public Employees Retirement System, *supra.*, 83 N.J. at 171. This brings to the forefront the opinions and testimony of Petitioner's expert, Dr. Weiss, versus those of the Board's expert, Dr. Lakin. As set forth in detail in point I-B, *supra.*, the Board chose Dr. Lakin and that choice was based on substantial credible evidence in the record, including Dr. Weiss's failure to review the medical records documenting Petitioner's pre-existing conditions before issuing his narrative report or to address them in an addendum; Dr. Weiss's resultant testimony about Petitioner's prior incidents, injuries and treatment in the indirect context of "hypothetical" scenarios instead of testifying about the actual events and records; the direct contradiction in the record of Dr. Weiss's testimony that the Petitioner was asymptomatic from 2004 through 2015; and Dr. Weiss's lesser credentials in that he not been a practicing surgeon for more than a decade.

For these substantial and credible reasons, the Board relied upon Dr. Lakin's opinions and testimony concluding that Petitioner's disability was an aggravation of

pre-existing cervical conditions caused by prior accidents and aging. (3T21:2-18; 22:2-14). Specifically, Dr. Lakin testified that Petitioner had a pre-existing disc herniation at C6-C7, disc bulging at C5-C6 and stenosis at both C5-C6 and C6-C7, the same discs that were operated on in Petitioner's 2015 surgery. (3T22:2-14; 38:15-17). Thus, he determined that Petitioner's 2015 "surgery was done for problems that pre-dated the accident and wasn't caused by this accident." (3T22:2-14). As a result of his review of ***all*** Petitioner's medical records, Dr. Lakin determined that "the total and permanent disability was not a direct result of the accident of 10/17/14 but was an aggravation of a preexisting condition." (Pa174).

In addition, Dr. Weiss ***applied the wrong standard in forming his opinions about the cause of Petitioner's disability.*** Dr. Weiss testified:

> "And so the puzzle tells me, had it not been for the day of that injury, we wouldn't be here today and that - - and that, to me, is what the essence is of this particular case as an IME examiner."

(2T26:2-5). Thus, Dr. Weiss relied upon a "but for" test to reach his opinion rather than the required "direct result" standard. The "but for" test is not appropriate to determine whether an injury was the direct cause of a petitioner's disability. In re Cordero, 2012 N.J. Super. Unpub. Lexis 1406. 9, 14 (App. Div. 2012). In Cordero, the Public Employee Retirement System's Board rejected an ALJ's ID that relied upon an expert's application of the "but for" test rather than the "direct result" test. Id. at 8-9. The Court, likening the "but for" test to the proximate cause standard,

explained that proximate cause is a "cause which naturally and probably led to and might have been expect to produce" the result complained of. Id. at 13-14, *citing* Cruz-Mendez v ISU Insurance Services of San Francisco, 156 N.J. 556, 575 (1999). It further explained:

> In contrast, the essential significant or substantial cause of a disability ***requires a far more demanding proof*** than a standard which requires a cause that "probably led to and might have been expected to produce the accident complained of" Rather, appellant must establish by expert medical opinion that the incident [at issue] directly resulted in his total and permanent disability.

Id. at 14-15 (Emphasis added), *citing* Gerba, *supra*., 83 N.J. at 185-86 and Korelnia, *supra*., 83 N.J. at 170. The Court held, "[b]ecause the ALJ used the incorrect legal standard, the Board properly rejected her decision" and "correctly rejected the ALJ's finding regarding the element of direct causation. Id. at 15.

These principles are directly applicable to this case. As demonstrated by his testimony, Dr. Weiss applied the incorrect "but for" proximate cause standard to reach his conclusion that the 2015 accident was the direct cause of Petitioner's disability. The direct cause standard requires "far more demanding proof" and thus, the Board in this matter correctly rejected Dr. Weiss's and the ALJ's findings regarding the element of direct causation.

CONCLUSION

For the reasons set forth above, and based on the substantial credible evidence in the record and presented herein, the Respondent, Board of Trustees of the Police and Firemen's Retirement System of New Jersey, respectfully requests that its Final Administrative Determination of September 19, 2023 is affirmed.

Respectfully submitted,

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ESTATE OF DURWIN PEARSON,	: Superior Court of New Jersey : Appellate Division
	: Docket No: A-000417-23
Petitioner-Appellant,	: Civil Action
v.	: On Appeal from a Final Administrative : Determination of the Police and : Fireman's Retirement System
BOARD OF TRUSTEES, POLICE AND FIREMAN'S RETIREMENT SYSTEM OF NEW JERSEY,	: Sat Below: PFRS
	: PFRS Docket No: 3-10-54759
Respondent.	:

REPLY BRIEF ON BEHALF OF APPELLANT ESTATE OF DURWIN PEARSON

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LEGAL ARGUMENT

POINT I: RESPONDENT FAILS TO RECOGNIZE SEVERAL IMPORTANT ASPECTS OF THE STANDARD OF REVIEW

In relation to agency fact finding, "the role of the appellate court is that of determining 'whether the findings made could reasonably have been reached on sufficient credible evidence present in the record.'" Mayflower Sec. Co. v. Bureau of Sec., 64 N.J. 85, 92 (1973) (quoting Close v. Kordulak Bros., 44 N.J. 589, 599 (1965)). "The appellate application of this standard requires far more than a perfunctory review; it calls for careful and principled consideration of the agency record and findings in the manner." Id. at 93. "An appellate tribunal is . . . in no way bound by [an] agency's interpretation of a statute or its determination of a strictly legal issue." Ibid. Moreover, "where technical or specialized expertise is not implicated . . . [appellate courts] owe no deference to [an] agency." A.Z. ex rel. B.Z. v. Higher Educ. Student Assistance Auth., 427 N.J. Super. 389, 394 (App. Div. 2012).

POINT II: AT THE VERY LEAST, PEARSON'S DISABILTY RESULTED FROM THE "COMBINED EFFECT" OF A TRAUMATIC EVENT AND PRE-EXISTING CONDITION. MOREOVER, THE TRAUMTIC EVENT WAS THE "ESSENTIAL SIGNIFICANT OR SUBSTANTIAL CONTRIBUTING CAUSE" OF PEARSON'S DISABILITY.

Under Richardson, a PFRS member seeking Accidental Disability Benefits must prove:

1. that he is permanently and totally disabled;

> 2. as a direct result of a traumatic event that is
>
>   a. identifiable as to time and place,
>
>   b. undesigned and unexpected, and
>
>   c. caused by a circumstance external to the member (not the result of pre-existing disease that is aggravated or accelerated by the work);
>
> 3. that the traumatic event occurred during and as a result of the member's regular or assigned duties;
>
> 4. that the disability was not the result of the member's willful negligence; and
>
> 5. that the member is mentally or physically incapacitated from performing his usual or any other duty.
>
> [Richardson v. Bd. of Trs., PFRS, 192 N.J. 189, 212-13 (2007).]

The traumatic event standard is satisfied when a "work-connected event" 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). Id. at 192. As such, disabilities that result from "pre-existing disease alone" or "work effort that aggravate[s] or accelerate[s] pre-existing disease" are not caused by a traumatic event. Richardson, 192 N.J. at 193, 204; see also In re Adoption, 454 N.J. Super. 386, 411 (App. Div. 2018) (stating that a "traumatic event has not occurred" when a disability "arises out of a combination of pre-existing disease and work effort"). However,

"[n]othing in the amendments or the legislative history, by way of substance or temporality, suggests any broader motivation." Richardson, 192 N.J. at 210.

Indeed, "a basis for an accidental disability pension" exists when "the disability directly result[s] from the combined effect of a traumatic event and a preexisting disease." Cattani v. Bd. of Trs., PFRS, 69 N.J. 578, 586 (1976); see also In re Sigafoos, 143 N.J. Super. 469, 474 (App. Div. 1976) ("The proofs here clearly show that petitioner's disability directly resulted from the combined effect of a traumatic event and a preexisting disease [and therefore] he is entitled to an accidental disability retirement allowance.") (citation omitted) (internal quotations omitted); Korelnia v. Bd. of Trs., PERS, 83 N.J. 163, 170 (1980) ("[A]n accidental disability may under certain circumstances involve a combination of both traumatic and pathological origins.").

"[When] an employee is afflicted with an underlying physical disease bearing causally upon [a] resulting disability . . . the traumatic event need not be the sole or exclusive cause of the disability." Gerba v. Bd. of Trs., PERS, 83 N.J. 174, 187 (1980). In such cases, "[a]s long as the traumatic event is the direct cause, i.e., the essential significant or substantial contributing cause of the disability, it is sufficient to satisfy the statutory standard of an accidental disability even though it acts in combination with an underlying physical disease." Ibid.; see also Kasper v. Bd. of Trs., TPAF, 164 N.J. 564, 577 (2000) (stating that the "direct result"

standard requires traumatic events to be "the essential significant or the substantial contributing cause" of a disability); Slater v. Bd. of Trs., PFRS, No. A-0755-18T3 (App. Div. June 24, 2020) (slip op. at 5). ("[I]n a case involving the combined effect of a preexisting condition and a traumatic event, the lodestar of the direct result inquiry is simply whether the traumatic event is 'the essential significant or the substantial contributing cause of the resultant disability.'" (quoting Gerba, 83 N.J. at 187)).

In this case, Pearson's disability was clearly caused by the 2015 traumatic event. The record is clear that Pearson experienced two work-related injuries to his back and neck. The injuries occurred in 2000 and 2004, and workers' compensation cases were opened both times. (Pa84). He was out of work for 2-3 months for the first injury, and 1-2 months for the second injury. (1T17-19; Pa119, 163). He received treatment both times, but never had surgery. (1T24:1-30:24). He also returned to his full duties each time, without any restrictions. (1T27:5-24; 1T30:8-14). In 2006, Pearson saw two doctors due to discomfort in his back and neck. (Pa124-35). Thereafter, Pearson did not have any problems with his back or neck. (1T31:13-32:5; 1T51:12-52:2). He described being "active" in his work, and was fully capable of performing his duties as a "street sergeant." (1T55:4-15; 1T13:10-14:23). In this capacity, Pearson was "in charge of . . . all the operations on the street," which included "assisting the other officers in arrests and [] criminal

investigations," and being "the first responder[] to any type of crime that [was] called into the operators." (1T14:1-5).

On October 17, 2015, Pearson was located "right around the corner from [a] school" in order to "provide a safe environment for [] kids to walk home." (1T36:25-37:1). School was "letting out" when Pearson heard "numerous gunshots." (1T36:12-15). Pearson drove in the direction of the gunfire, and saw civilians fleeing the area. (1T37:15-24). He continued driving toward the scene, where he saw a man "standing over top" and "constantly shooting" another man. (1T37:15-24). Pearson proceeded to pull into an intersection, and get out of his car in order to "engage the suspect." (1T38:2-6). However, as Pearson was stepping out of his car, another vehicle ran a stop sign, and struck him. (1T38:5-8). Pearson was thrown from the driver side of his vehicle to the passenger side, and immediately "blacked out." (1T38:8-11). As a result, Pearson sustained serious neck injuries, and was forced to have surgery so that doctors could "remove two discs out of [his] neck and put two artificial discs in [his] neck." (1T45:3-18).

It is undisputed that Pearson became permanently and totally disabled as a result of the 2015 incident. (Pa112). However, Respondent claims that Pearson's disability was not "directly caused by the 2015 incident," but instead, was "caused by a pre-existing condition or a pre-existing condition accelerated or exacerbated by the work effort." (Pa113).

Respondent's position is completely meritless. Prior to the incident, Pearson had not experienced back or neck symptomology for nine years,[1] and was performing the duties of a street sergeant without issue. Moreover, prior to the incident, Pearson never had back or neck surgery. Pearson then got hit by a car, sustained serious injuries, and was forced to have surgery. In the aftermath, it was determined that Pearson was permanently and totally disabled, and could not work as a police officer.

"[A] traumatic event is essentially the same as what we historically understood an accident to be." Richardson, 192 N.J. at 212. A "great rush of force or uncontrollable power" is "one example of the kind of happening that will satisfy the traumatic event standard." Ibid.; see also Russo v. Bd. of Trs., PPFRS, 206 N.J. 14, 30 (2011) (same). It is difficult to imagine how getting hit by a car, and knocked unconscious does not constitute a "great rush of force." Richardson, 192 N.J. at 212. Indeed, Richardson itself identifies getting hit by a vehicle as an event that is traumatic in nature. Ibid. As such, Pearson was subject to a traumatic event.

Moreover, as stated above, when a "disability directly result[s] from the **combined effect** of a traumatic event and a preexisting disease," an accidental disability pension should be granted. Cattani, 69 N.J. at 586 (1976) (emphasis

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[1] As stated above, between 2006 and 2015, Pearson did not experience back or neck pain. (1T31:13-32:5; 1T51:12-52:2).

added); see also Sigafoos, 143 N.J. Super. at 474 ("The proofs here clearly show that petitioner's disability directly resulted from the **combined effect** of a traumatic event and a preexisting disease [and therefore] he is entitled to an accidental disability retirement allowance.") (emphasis added) (citation omitted) (internal quotations omitted).

Here, Pearson was performing his duties as a law enforcement officer without issue until he was struck by a car. Thereafter, Pearson needed surgery, and could no longer work as a law enforcement officer. These facts demonstrate that the traumatic event of being struck by a vehicle caused—either on its own or in combination with a pre-existing condition—Pearson's disability. That is to say, the traumatic event of being struck by a vehicle was the "essential significant or substantial contributing cause" of Pearson's disability. Gerba, 83 N.J. at 187. As already stated, Pearson was working as a "street sergeant" without issue before the 2015 incident. (1T55:4-15; 1T13:10-14:23). In this capacity, Pearson was "in charge of . . . all the operations on the street," which included "assisting the other officers in arrests and [] criminal investigations," and being "the first responder[] to any type of crime that [was] called into the operators." (1T14:1-5). The **only** thing that changed between Pearson being **fully capable** of performing his duties, and becoming totally and permanently disabled, was the traumatic event of getting

struck by a car. It is therefore clear that the 2015 incident was "essential" and "substantial" in relation to Pearson's disability.

Finally, Respondent asserts that Pearson experienced an additional injury in 2009, and that the additional injury provides further support that Pearson's disability was caused by a pre-existing condition. As will be shown infra, Pearson did not experience a 2009 injury. Moreover, even if Pearson did experience such an injury, the above analysis would not change. Pearson would still have been working as a law enforcement officer for several years without issue, and the 2015 incident would still be an "essential" and "substantial" cause of the disability.

POINT III: THE BOARD'S DETERMINATION THAT PEARSON SUFFERRED AN INJURY IN 2009 IS COMPLETELY UNSUPPORTED BY THE RECORD. MOREOVER, EVEN IF PEARSON SUFFERRED AN INJURY IN 2009, ACCIDENTAL DISABILITY BENEFITS ARE STILL WARRANTED.

In its final administrative decision, the Board stated:

> In the [initial decision], it was found as fact that there was no injury report from an incident in 2009. The [initial decision] concluded that Dr. Krishner's report claiming an injury in 2009 was likely based on typographical errors. Dr. Weiss assented to the suggestion during examination that Dr. Kirshner "more likely than not" meant to type "2000" instead of "2009" because the numbers "9" and "0" are close together on a keyboard. The Board [finds] that, because Dr. Weiss made no mention of the alleged typographical errors in his expert report, his response to leading questions by [] Pearson's counsel does not support the conclusion that he is more credible than Dr. Lakin. . . .

> It [is] noted that the year 2009 [was] in Dr. Kirshner's report five times. It [was] presumed that . . . Dr. Kirshner mistakenly typed 2009 by accident. The Board [finds] that the description in testimony of the 2000 incident . . . is substantially different than the incident described as occurring in 2009 . . . . The Board does not find credible that the difference between these incidents can be reconciled as a "typo." It [finds] that the details are too dissimilar to come to the conclusion that they are actually the same incident, differentiated only by [a] typographical error. The Board believe[s] that it is also feasible that [] Pearson sustained an injury in 2009, but there is no workers' compensation or other employer report because it is possible that he injured himself outside of work. It finds that this theory is at least as plausible as an orthopedic surgeon making a typographical error five times in the same report and describing the same incident with discernible differences in detail.
>
> [(Pa112-13).]

The Board's findings regarding the 2009 injury are completely unsupported by the record. First, Dr. Kirshner's description of the 2009 injury is almost identical to previous descriptions of the 2000 injury.

Dr. Kirshner, who evaluated Pearson in 2015, described the incident as follows:

> [Pearson] was in a fight as a police officer. **He tackled a man to the ground.** He hit the back of his head on a car as he fell. He lost consciousness for 10-15 seconds. He reports **neck injury and back injury.** He had PT. **He was out of work for 3 months.** He denies any injections or surgeries.

> [(Pa163) (emphasis added).]

Dr. Dubowitch, who evaluated Pearson in 2004, described the incident as follows:

> [Pearson] had a previous back injury sustained when he **tackled an individual** who was steeling a police bicycle. He had **neck and upper back symptomatology** necessitating treatment and **he was out of work at that time for two and one-half months.**
>
> [(Pa119) (emphasis added).

Pearson, who testified in 2019, described the incident as follows:

> Mr. Murray: Let's go back to the [incident] that happened in 2000. What do you recall the incident being?
>
> . . .
>
> Mr. Pearson: [I] do one of the take-downs that we learned from being on the bike patrol. He falls down.
>
> . . .
>
> Mr. Pearson: I jump off my bike, I go up to him, he tries to run, **I tackle him.** By tackling, you know, other police officers [] come to assist me. We lock him up. When tackling, you know, I thought I had a helmet on, so I go and tackle him, hit first, get a nice little tackle in and, you know, cuffed him up, everything.
>
> . . .
>
> Mr. Pearson: [I injured] my knee, **my lower back, and my neck was bothering me a little bit.**
>
> . . .

Mr. Murray: Did you have to have any surgeries?

Mr. Pearson: No, sir.

[(1T25:11-26:9).]

All three descriptions state that Pearson tackled someone, and sustained injuries to his back and neck. In addition, the doctor reports are consistent in relation to the amount of work that Pearson missed. One report says 3 months, while the other report says 2.5 months. Finally, each statement agrees that treatment was obtained, but that surgery was not needed.

Moreover, apart from Dr. Kirshner's report, the record contains no reference to a 2009 injury. If such an incident took place, and Pearson was forced to miss 3 months of work, there would be evidence of it. Pearson's employers were required to produce all workers' compensation documentation. (Pa84-85). Nothing was provided in relation to a 2009 injury. (Pa84-85). The Board posited it was "feasible that [] Pearson sustained an injury in 2009, but there [was] no workers' compensation or other employer report because [Pearson] injured himself outside of work." (Pa113). This argument is completely contradicted by the record. In relation to the supposed 2009 injury, Dr. Kirshner's report states that Pearson "was in a fight **as a police officer** [and] tackled a man to the ground." (Pa163). The report also states that Pearson filed a workers' compensation claim in relation to

the incident.[2] (Pa163). However, if the injury occurred at work, and a workers' compensation claim was filed, then why did Pearson's employers not produce documentation in relation to a 2009 injury? The employers produced documentation in relation to Pearson's other work-related injuries. (Pa84). Moreover, in addition to the absence of workers' compensation records, there are no medical records at all in relation to a 2009 injury. (Pa84). As summarized in the ALJ's initial decision, "[u]nlike [Pearson's] injuries from 2000 and 2004, where there were workers' compensation cases opened for both, plus medical records and test results, any claim of injury from 2009 was not so documented." (Pa84). Finally, Pearson himself testified that a 2009 injury did not occur.[3] (1T54:18-55:20).

It is clear that a 2009 injury did not occur. The only reference to such an injury is contained in Dr. Kirshner's report. However, it appears probable, even presumable, that Dr. Kirshner made a typographical error when interviewing Pearson, and then transferred that error when completing his report.

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[2] Dr. Kirshner's report specifically stated that Pearson had a "previous history" of workers' compensation in 2009. (Pa163).

[3] Pearson specifically testified that he could "not . . . recall" a 2009 injury. (1T54:18-55:20). In its brief, Respondent asserts that the above statement does not constitute a formal denial of the injury. (Respondent's Brief at 10, 35). It is difficult to understand what kind of semantical argument Respondent is trying to make. Pearson stated that he did not remember a 2009 injury. Pearson made this statement because a 2009 injury did not occur. The record supports this conclusion.

It is also interesting that Respondent finds it so improbable for a typographical error to occur. Indeed, Respondent's own brief makes several typographical errors. Respondent wrote "20004" instead of "2004" on two occasions. (Respondent's Brief at 20, 39). It wrote "20000" instead of "2000" on one occasion. (Respondent's Brief at 39). It also wrote "2002" instead of "2000" on one occasion. (Respondent's Brief at 41). Moreover, Dr. Dubowitch stated in a report that Pearson's bike accident occurred in 2002, when in reality, it occurred in 2000. (Pa119). The record is filled with such errors. What the record does not contain, however, is reference to a 2009 injury. That is because such an injury did not occur. Moreover, as explained supra, even if a 2009 injury occurred, Pearson is still entitled to accidental disability benefits.

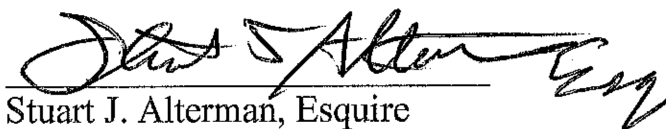
As a final matter, it should be noted that the ALJ's findings in this matter were detailed and thorough. As a result, the Court should take such findings into account when making its decision. See In re Hendrickson, 235 N.J. 145, 160 (2018). ("[M]erely because the factual findings and rulings made by ALJs are oftentimes contingent on whether an agency accepts, rejects, or modifies an ALJ's decision does not mean that ALJs are second-tier players or hold an inferior status as factfinders.").

FILED, Clerk of the Appellate Division, August 30, 2024, **A-000417-23**, **AMENDED**

Conclusion

Based on the foregoing, the Board's rejection of the ALJ's initial decision must be overturned.

Respectfully Submitted,
ALTERMAN & ASSOCIATES, LLC



Dated: August 29, 2024

Stuart J. Alterman, Esquire