SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0799-15T2

MARIA GRIECO-HICKS,

Petitioner-Appellant,

v.

BOARD OF TRUSTEES, TEACHERS' PENSION AND ANNUITY FUND,

Respondent-Respondent.

Argued December 6, 2016 – Decided May 11, 2017

Before Judges Fisher and Ostrer.

On appeal from the Teachers' Pension and Annuity Fund, Department of the Treasury, Docket No. 1-487853.

Samuel M. Gaylord argued the cause for appellant (Gaylord Popp, LLC, attorneys; Tanya L. Phillips, on the briefs).

Amy Chung, Deputy Attorney General, argued the cause for respondent (Christopher S. Porrino, Attorney General, attorney; Melissa H. Raksa, Assistant Attorney General, of counsel; Ms. Chung, on the brief).

PER CURIAM

Petitioner Maria Grieco-Hicks appeals from the September 10, 2015 final decision of the Teachers' Pension and Annuity Fund

Board of Trustees (the Board), denying her application for accidental disability retirement benefits. The Board adopted the initial decision of the Administrative Law Judge (ALJ). He found that petitioner failed to meet her burden to show she was permanently and totally disabled, and her alleged disability was directly caused by a traumatic event at work. Petitioner challenges both findings on appeal. Because we reject petitioner's argument on the former, we need not reach the latter, and, therefore, affirm.

I.

Petitioner's claim arises out of a workplace accident on September 3, 2010. Petitioner had been an art teacher for fourteen years at Trenton Central High School. She was fifty-seven years old. While standing on a step-stool to place art equipment on a shelf, she misstepped and fell. She struck an old printing press and her right foot was tucked under her buttocks as she hit the floor. The awkward fall injured her knee. Despite experiencing pain, she continued to work while under treatment until October 21, 2010. At that point, a physician reviewed an MRI performed on October 6, 2010, which had revealed bone bruises and multiple tears of meniscuses and ligaments including the anterior cruciate ligament (ACL). The physician immediately advised her not to return to school.

After leaving work, petitioner received treatment from a variety of specialists over a year and a half, which improved her knee condition – albeit not to full strength. She underwent knee surgery in March 2011 to remove the torn meniscuses and reconstruct her ACL by grafting a ligament from a cadaver. She followed up with physical therapy and received nerve blocks from a pain management specialist. MRIs in September 2011 and in April 2012 showed bowing and partial tearing of the ACL graft.

By late 2011, she continued to complain of pain. She began seeing a workers' compensation orthopedist, Steven R. Gecha, M.D. Dr. Gecha discharged her in March 2012, concluding she had reached her maximum level of medical improvement. His report acknowledged that petitioner declined to pursue a second surgery that Dr. Gecha explained had a fifty percent chance of improving her symptoms.

Dr. Gecha stated that, even though she was discharged, petitioner was restricted from standing and walking for extended periods of time. However, she had "[n]o limit to sitting . . . ."[1] In prior reports, he suggested "sedentary work only with only a

[1] The restrictions included: "[m]aximum 2 hours a day of standing and walking. Less than 1 hour a day of driving. . . . No twisting to transfer objects, squatting below chair levels, climbing ladders or cat walks, climbing more than 1 flight of stairs, lifting or carrying greater than 20 pounds, kneeling."

limited amount of total standing and walking . . . . No limit to sitting . . . ."

Petitioner applied for accidental disability retirement benefits in July 2012. After the Board initially denied her application, the matter was referred to the Office of Administrative Law for a contested hearing, which was held in April 2015. The witnesses included petitioner and two experts: Arthur Becan, M.D., who testified on petitioner's behalf, and Jeffrey F. Lakin, M.D., whom the Board retained.

Petitioner testified that she continued to experience daily pain, swelling, and instability in her knee. Her knee hurt when she walked, it was difficult to navigate steps, and she had trouble sleeping through the night. She testified that she could no longer work as an art teacher at Trenton Central High School. She contended that the job entailed a lot of walking, standing, stair-climbing, and carrying various supplies. She acknowledged, however, the building was handicap accessible and an elevator was available to persons provided a key to it. Moreover, petitioner's formal job description did not explicitly identify physical tasks of the position.[2]

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[2] Plaintiff's job description identified the following "performance responsibilities":

Based upon his August 2013 examination of petitioner and a review of her records, Dr. Becan opined that petitioner was totally and permanently disabled. He reviewed her various tears, operation and treatments, and concluded she was left with severe progressive arthropathy[3] of the right knee. He further opined that she had an "unstable arthritic knee" that caused buckling, which contributed

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> 1. Plans in written form and executes in practice a program of study that meets the individual needs, abilities, and interests of all students assigned.
>
> 2. Creates a classroom environment that is conducive to learning and appropriate to the . . . interest of the student.
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> 3. Guides the learning process toward the achievement of curriculum goals[,] . . . establishes clear objectives for all les[s]ons . . . [and] communicate[s] these objectives to students.
>
> 4. Strive[s] to implement by instruction and action the District's philosophy of education and instructional goals and objectives.
>
> 5. Assists in the selection of books . . . and other instructional materials.
>
> 6. Establishes and maintains cooperative relations with others.
>
> 7. Perform[s] such tasks and assumes such responsibilities as directed by the principal[.]

[3] "Arthropathy" is defined as, "[a]ny disease affecting a joint." Stedman's Medical Dictionary 161 (28th ed. 2006).

to the knee's continued atrophy. He testified that petitioner tore her ACL again after surgery, but did not identify the cause. He opined that she "no longer can perform prolonged walking, prolonged standing, prolonged sitting. She is unable to climb stairs, squat, kneel or crawl, and all of these are activities that were required as her occupation as an art teacher." Dr. Becan opined that petitioner would likely need a total knee replacement.

Dr. Lakin disagreed with Dr. Becan's conclusion. He conducted a December 2012 examination and records review. According to Dr. Lakin, petitioner complained her knee would give out once a month, but "her main complaints . . . were just sensitivity . . . along the incision." She told him she was able to navigate stairs and walk without a brace or other aids. He opined that petitioner's knee was stable and had excellent motion. He found no evidence of arthropathy. He minimized the significance of the tearing of the ACL graft, which he said was intact. He concluded that petitioner was not totally and permanently disabled from the normal activities of her job as a result of the accident.

The ALJ credited petitioner's complaints of instability, numbness, tingling, her daily pain and swelling, difficulty sleeping, going up and down steps, and her inability to stand for more than ten minutes. However, he rejected her claim that these

complaints rendered her unable to perform her essential job duties.

The ALJ reasoned:

> [P]etitioner's case comes down to her assertion that she is totally and permanently disabled because she is no longer able to perform prolonged walking, prolonged standing and prolonged sitting. She also maintains that she is unable to climb stairs, squat, kneel, or crawl, and that these are all activities necessary in the petitioner's occupation as an art teacher.
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> Several factors militate against petitioner's position. First, aside from petitioner's own testimony, nothing in the record tends to show that she was required to walk, stand or sit for prolonged periods of time. Nor is there any suggestion that petitioner was required to squat, kneel or crawl. The only activity that Dr. Becan suggests petitioner cannot do that is in the record as required is climbing steps. However, petitioner agreed that her school had an elevator, but that it required a key that she did not have. There is no evidence that petitioner could not get such a key, nor has petitioner produced any evidence that the Trenton school district would not move her to a classroom that did not require steps to access her classroom, such as a classroom on the first floor. Petitioner did not offer proof that she would be incapable of performing her job if using some form of assistance, such as a cane or wheelchair. Further, petitioner admitted that ramps had been installed at her school. Simply put, I find it unlikely that the administration of the Trenton school district would require a teacher to use stairs if she could not do so, and that the Trenton school district would terminate her from her employment if she could not do so. Petitioner offered no such proof

> that she would have been terminated for an inability to use stairs.
>
> The testimony of the experts evinces little dispute over petitioner's ability to return to work. Dr. Lakin testified that she was not totally and permanently disabled and could return to work. Dr. Becan is of the opinion that petitioner cannot do physical actions that are not even required in petitioner's job description.

The ALJ also found that petitioner was not totally disabled in her knee, noting that even Dr. Becan found that petitioner had 100 degrees of flexion, no atrophy in her right leg, and only a "mild loss" of strength.

Turning to the issue of causation, the ALJ found both experts credible, but Dr. Lakin's opinion more persuasive. "Dr. Lakin explained that if a traumatic injury were causing her arthritis," she would be experiencing symptoms that she had not described. Instead, "the MRIs only showed typical age-related arthritis. Further, there was no degeneration." The ALJ concluded that petitioner failed to prove that her fall "was the direct cause of her right-knee issues."

The Board subsequently adopted the ALJ's initial decision and denied petitioner's application for accidental disability retirement benefits.

II.

We exercise a narrow scope of review of the Board's decision. We will sustain the Board's decision "unless there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record." Russo v. Bd. of Trs., Police & Firemen's Ret. Sys., 206 N.J. 14, 27 (2011) (internal quotation marks and citation omitted). However, we are not bound by the agency's statutory interpretation or other legal determinations. Ibid.

In order to qualify for accidental disability retirement benefits, petitioner was required to demonstrate she was "permanently and totally disabled as a direct result of a traumatic event occurring during and as a result of the performance of [her] regular or assigned duties." N.J.S.A. 18A:66-39(c). See also Richardson v. Bd. of Trs., Police & Firemen's Ret. Sys., 192 N.J. 189, 194-95 (2007) (setting forth elements of a claim for accidental disability retirement benefits in a parallel statute). The principal issue is whether petitioner was "permanently and totally disabled" from performing her normal duties. Petitioner bears the burden of proof. Bueno v. Bd. of Trs., Teachers' Pension & Annuity Fund, 404 N.J. Super. 119, 126 (App. Div. 2008), certif. denied, 199 N.J. 540 (2009).

To determine whether a person is "permanently and totally disabled," the Supreme Court adopted the standard set forth in Getty v. Prison Officers' Pension Fund, 85 N.J. Super. 383 (App. Div. 1964), that is, "the criterion is whether or not [the petitioner] is employable in the general area of his ordinary employment . . . ." Skulski v. Nolan, 68 N.J. 179, 205-06 (1975) (quoting Getty, supra, 85 N.J. Super. at 390). The Getty court rejected tests at either of two extremes: one requiring that the petitioner be "generally unemployable" and the other requiring that the petitioner be "disabled from performing the specific functions for which he was hired."[4] Getty, supra, 85 N.J. Super. at 390 (emphasis added). In adopting the Getty standard, the Skulski Court emphasized that its standard "places no requirement upon the applicant to show physical inability to perform

[4] These two extremes relate to two prior cases described in Skulski, supra, 68 N.J. at 204-05. The Court of Errors and Appeals in Meehan v. Cnty. Employees' Pension Comm'n, 135 N.J.L. 17 (E. & A. 1946), affirmed the denial of a pension to a prison guard who lost his left eye as a result of a workplace injury, stating, "The sole question is whether the disability suffered permanently incapacitates him from reasonably performing the duties of his position." Id. at 18. By contrast, the old Supreme Court, in Simmons v. Policemen's Pension Comm'n, 111 N.J.L. 134, 135-36 (Sup. Ct. 1933), rejected the finding that a police officer was not permanently disabled because he was still fit for desk duty, stating "a fireman is a fireman, a policeman a policeman, and neither a desk clerk"; rather, the petitioner was permanently disabled if unable to perform "the ordinary everyday duties of a policeman."

substantially different duties or to produce evidence of general physical unemployability provided, however, that employer has work for him in the general area of his employment." Skulski, supra, 68 N.J. at 206.

We applied this test in Bueno, which involved a claim for ordinary disability retirement benefits. Bueno, supra, 404 N.J. Super. at 122. We did so notwithstanding that the petitioner was required to show she was "physically or mentally incapacitated for the performance of duty," N.J.S.A. 18A:66-39(b), as opposed to showing she was "permanently and totaled disabled", N.J.S.A. 18A:66-39(c), which is required for accidental disability retirement benefits. In Bueno, an experienced teacher suffered from adjustment and anxiety disorders as a result of the manner in which she was supervised and other conditions at a New Brunswick school where she had worked for the last few years. Bueno, supra, 404 N.J. Super. at 123-24. The Board concluded that Bueno was capable of teaching in a different school, in a more supportive environment. Id. at 124. Applying Skulski, we affirmed the denial of benefits to Bueno because she "failed to even prove that she was disabled from teaching for other employers." Id. at 131.

Applying Skulski and Bueno to this case, we discern no error in the Board's decision. The evidence demonstrates that petitioner was "employable in the general area of [her] ordinary employment,"

Skulski, supra, 68 N.J. at 205-06. She failed to show that she was unable to teach high school art, even if she could not teach it in precisely the same manner she had before her injury. As the ALJ noted, her school was handicap accessible and had an elevator. Accordingly, for example, she did not need to climb multiple flights of stairs.

Dr. Gecha, whose opinions petitioner cites on appeal, concluded that petitioner had no limitations on sitting, so long as she rose to stretch periodically.[5] Crediting petitioner's complaints of pain, she could still stand for brief periods of time. As the ALJ observed, petitioner "did not offer proof that she would be incapable of performing her job if using some form of assistance, as a cane or wheelchair." There was no evidence that even if she used a wheelchair, she would be unable to move about a classroom to guide and teach art students, particularly if reasonable accommodations to classroom layout were made.

Furthermore, the Trenton Board of Education, as well as any other public school employer, would have been obliged to make reasonable accommodations for petitioner's limitations to the

[5] We recognize that Dr. Becan stated that petitioner could not sit for prolonged periods of time. However, petitioner did not make that claim in her testimony, and Dr. Gecha stated she had no limitations on sitting. We presume that Dr. Becan meant only, consistent with Dr. Gecha, that petitioner would need periodically to rise to stretch.

extent they were not already provided. See 42 U.S.C. § 12112(b)(5)(A) (defining "discriminat[ion] against a qualified individual on the basis of disability" to include "not making reasonable accommodations to the known physical . . . limitations of an otherwise qualified individual with a disability who is an . . . employee" (internal quotation marks omitted)).

Inasmuch as we affirm the Board's decision that petitioner did not prove that she was totally and permanently disabled, we need not reach the Board's determination that petitioner failed to prove causation.

Affirmed.