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

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3129-14T2

ALLAN BARLETT,

Petitioner-Appellant,

v.

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

Respondent-Respondent.

Argued November 30, 2016 – Decided April 19, 2017

Before Judges Alvarez and Accurso.

On appeal from the Board of Trustees of the
Police and Firemen's Retirement System, PFRS
No. 3-87114.

Christopher A. Gray argued the cause for
appellant (Sciarra & Catrambone, LLC,
attorneys; Mr. Gray, on the briefs).

Thomas R. Hower, Deputy Attorney General,
argued the cause for respondent (Christopher
S. Porrino, Attorney General, attorney;
Melissa H. Raksa, Assistant Attorney General,
of counsel; Mr. Hower, on the brief).

PER CURIAM

Allan Barlett appeals the February 10, 2015 final
administrative decision by the Board of Trustees of the Police and

Firemen's Retirement System (Board). That final decision adopted the administrative law judge's (ALJ) initial decision that although Barlett was totally and permanently disabled, and therefore eligible for a disability pension, he was not eligible for an accidental disability pension. We affirm.

After the Board first denied Barlett's claim for accidental disability benefits, the matter was transferred to the Office of Administrative Law (OAL) for a hearing under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6. Barlett served as a corrections officer at the Albert C. Wagner Youth Correctional Facility when the relevant incidents occurred.

At the administrative hearing, Barlett testified, as did two medical experts. It is undisputed that Barlett was injured twice on March 1, 2011. In the course of the initial incident, he was injured while removing an inmate from a cell and separating two inmates who were fighting. A short time later, he was involved in another altercation while attempting to place an inmate in a cell. During the course of the second event, he was pinned between the tracking for a motorized steel door and the door itself.

It is also undisputed that Barlett suffered work-related injuries to his lower back and right thumb in 2005 and 2006. Barlett received workers' compensation benefits for the 2006

incident, and his treatment continued intermittently, although he was returned to full duty without restrictions after both events.

After the 2011 incidents, however, the Department of Corrections (Corrections) ordered Barlett to undergo a complete functional capacity exam, which determined he was no longer able to work at full capacity. The Division of Risk Management informed him he could not return to work before applying for a disability pension. His application for accidental disability followed.

In rendering his decision, the ALJ cogently and thoroughly discussed the record and canvassed the medical testimony. Barlett's main witness was Martin Riss, M.D., who was qualified as an expert in orthopedics, internal medicine, and disability. He opined that Barlett had clear objective pathology to his neck, back, and hand that made it unsafe for him to perform his job. Dr. Riss disagreed with the Board's medical expert, Arnold Berman, M.D., that Barlett had a resolved soft tissue injury and could return to work.

Dr. Berman, who was qualified as an expert in orthopedic medicine and surgery, is board certified in orthopedic surgery and as an independent medical examiner. He testified not only about Barlett's present condition, but discrepancies in the record regarding changes to his spine. Dr. Berman concluded that the magnetic resonance imaging (MRIs) and electromyography (EMGs) of

Barlett's spine established nothing more than degenerative changes caused by aging. He also concluded that Barlett had a resolved cervical lumbar sprain with "symptom magnification," meaning Barlett was exaggerating his symptoms.

Dr. Berman did not consider Barlett's condition to be a disability, and further opined that the 2011 incidents simply could not have caused a disabling injury because of the biomechanics of the way in which Barlett was pinned by the door. He attributed Barlett's symptoms to his "baseline degenerative condition that was evident between 2006 and 2011."

In addition to the testimony of the medical witnesses, a number of medical reports were admitted into evidence, including reports from Barlett's workers' compensation treatment. Those physicians authored reports to the effect that Barlett "was totally and permanently disabled from his duties as a corrections officer."

The ALJ found Dr. Riss and Dr. Berman to be credible witnesses. He accepted Dr. Berman's opinion that the 2011 incidents did not constitute a basis for an accidental disability award because they could not have caused the injuries Barlett claimed. Based on Dr. Berman's testimony, he concluded that at the time of the application, the soft tissue injury of cervical strain had resolved and Barlett's then-current complaints were the result of preexisting degenerative disease. The condition might

have been aggravated by the 2011 incidents but they were not the "essential significant or substantial contributing cause of the ultimate disability[.]" Gerba v. Bd. of Trs., 83 N.J. 174, 187 (1980); see also Richardson v. Bd. of Trs., Police & Firemen's Ret. Sys., 192 N.J. 189 (2007).

Nonetheless, the ALJ also found the reports from Barlett's treating physicians, introduced through Dr. Riss, to be the most persuasive evidence as to Barlett's disability. Barlett suffered from "severe degenerative issues with his cervical area[,]" and "works in a profession in which there is no light duty." Thus Barlett was permanently and totally disabled from employment as a senior corrections officer and was entitled to ordinary disability retirement.

On appeal, Barlett contends as follows:

THE DECISION OF THE DIVISION OF PENSIONS IS ARBITRARY, C[AP]RICIOUS AND NOT SUPPORTED BY THE CREDIBLE EVIDENCE AND MUST BE REVERSED. BARLETT'S INJURIES WERE DIRECTLY CAUSED BY THE MARCH 1, 2011 INCIDENTS.

Established precedents inform our decision. Our scope of review of an agency's final determination is limited. In re Stallworth, 208 N.J. 182, 194 (2011). Indeed, we presume the validity of the "administrative agency's exercise of its statutorily delegated responsibilities." Lavezzi v. State, 219 N.J. 163, 171 (2014). An agency's determination on the merits

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. Bd. of Trs., Police & Firemen's Ret. Sys., 206 N.J. 14, 27 (2011) (quoting In re Herrmann, 192 N.J. 19, 27-28 (2007)).

As Stallworth explains, in determining whether agency action is arbitrary, capricious, or unreasonable, we examine:

- (1) [W]hether the agency's action violates express[ed] or implied legislative policies, that is, did the agency follow the law;
- (2) [W]hether the record contains substantial evidence to support the findings on which the agency based its action; and
- (3) [W]hether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.

[Stallworth, supra, 208 N.J. at 194 (quoting In re Carter, 191 N.J. 474, 482-83 (2007))].

We are not bound by the agency's interpretation of legal issues. In re Taylor, 158 N.J. 644, 658 (1999) (citing Mayflower Sec. Co. v. Bureau of Sec., 64 N.J. 85, 93 (1973)). We do not substitute our judgment for that of the agency, however, even when we may have reached a different conclusion. Stallworth, supra, 208 N.J. at 194. The party challenging the determination bears the burden

of proof. Boyle v. Riti, 175 N.J. Super. 158, 166 (App. Div. 1980).

Barlett contends that the ALJ should have discounted Dr. Berman's testimony in its entirety and accepted all of Dr. Riss's. Since the ALJ accepted only parts of the testifying witnesses' testimony, and only some of the medical reports, he argues that the initial decision was arbitrary, capricious, unreasonable, or lacked fair support in the record.

To the contrary, it is well-settled that a trier of fact is free to accept or reject the testimony of any party's expert, or accept some testimony from the expert and reject the rest. Brown v. Brown, 348 N.J. Super. 466, 478 (App. Div.), certif. denied, 174 N.J. 193 (2002); Todd v. Sheridan, 268 N.J. Super. 387, 401 (App. Div. 1993).

The basis for the ALJ's assessment of the expert testimony is quite clear from our review of the record. Barlett's treating physicians all agreed with Dr. Riss that Barlett's condition made him unable to perform his work responsibilities in a safe manner. The ALJ's decision to accept those opinions is well-founded. They included the opinions of physicians who had treated Barlett over years, not just those who conducted examinations for purposes of the litigation. The ALJ's acceptance of part of Dr. Berman's

testimony that the 2011 incident did not cause Barlett's current condition is also logical.

Dr. Berman was board certified. He testified in detail about the incident with the steel door and opined the event could not have caused Barlett a disabling injury. Additionally, like the other medical experts, Dr. Berman acknowledged that Barlett suffers from a degenerative condition. That the ALJ credited only part of each expert's testimony and part of the reports was not error—it was a reasonable exercise of discretion regarding the weight to accord the evidence based on a number of factors supported by the record.

Barlett did not prove causation as required to receive accidental disability benefits, only that he had unresolved back troubles that made his continuing employment dangerous. See Richardson, supra, 192 N.J. at 212-13 (holding that to receive accidental disability benefits, a worker must prove that his disability is the "direct result of a traumatic event" that "occurred during and as a result of [his] regular or assigned duties."). He met his burden of proof as to the disability. Therefore, the decision denying accidental disability benefits was not arbitrary, capricious, unreasonable, or lacking in fair support in the record.

Affirmed.

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

