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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0568-21

DENNIS COAXUM,

Petitioner-Appellant,

v.

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

Respondent-Respondent.

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Submitted November 1, 2022 – Decided December 16, 2022

Before Judges Sumners and Berdote Byrne.

On appeal from the Board of Trustees of the Police and Firemen's Retirement System, Department of the Treasury, PFRS No. x-2909.

Alterman & Associates, LLC, attorneys for appellant (Arthur J. Murray, on the brief.)

Robert S. Garrison, Jr., Director of Legal Affairs, PFRSNJ, attorney for respondent (Juliana C. DeAngelis, of counsel and on the letter brief).

PER CURIAM

In this appeal, we are asked to consider whether the Board of Trustees of the Police and Firemen's Retirement System of New Jersey (the Board) erred in denying accidental disability retirement benefits (ADRB) to Atlantic City firefighter Dennis Coaxum. The Board determined Dennis failed to prove 1) he is totally and permanently disabled, and 2) his injury was a direct result of a traumatic event that was undesigned and unexpected. Because we find the administrative decision was not arbitrary, capricious, or unreasonable, and is supported by substantial evidence in the record, we conclude the Board's decision was correct and affirm. Moreover, we reject Dennis' argument, raised for the first time on appeal, that the Board's decision leaves him without a financial remedy.

Dennis' injury occurred while employed as a firefighter on July 18, 2017, when he responded to a medical report of an elderly man having trouble breathing. Because of the old building's structure, a stair chair could not be used to navigate the man down a narrow flight of stairs with a u-shaped landing. Dennis and his partner used a Reeves Sleeve instead — a sheet-like device with handles, straps, and blankets. Dennis testified because of the man's age and significant height, moving the man was difficult. As Dennis and his partner proceeded down the steps, he lifted the man up high over his head and at an

angle to lift him past the awkward, narrow curvature of the stairwell and landing. Dennis further testified, upon being thrust up, the elderly man became scared, reached out from the sleeve, grabbed the railing, and shook it. When this happened, Dennis testified he felt a pop in his lower back. Dennis informed his supervisor, who advised him to see the workers' compensation doctor.

The workers' compensation doctor advised Dennis to return in a few weeks for reevaluation, prescribed medication, and returned him to full duty with no restrictions. When Dennis returned for reevaluation, the doctor sent him back to work full duty once again. Dennis informed his supervisor of his continuing pain, causing the supervisor to send him back to the workers' compensation doctor for a third visit. Dennis was then referred to undergo physical therapy and receive therapeutic injections, and he returned to work on light duty.[1] Throughout this period, Dennis claims he experienced constant pain in his lower back.

According to Dennis, light duty eventually became an issue as he was prohibited from taking the medication he was prescribed while employed as a firefighter. Because he could not perform his firefighter obligations at full duty,

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[1] According to Dennis, light duty at the firehouse meant he was "only allowed to answer the phones and do [other] little light work."

Dennis claims his supervisor advised him that he either needed to retire and apply for ADRB or he would be written up for failure to be medically cleared. Dennis states he cannot lift heavy objects or perform the tasks of a firefighter.

On February 24, 2018, Dennis applied for ADRB. On December 11, 2018, the Board denied his application pursuant to N.J.S.A. 43:16A-7. On March 25, 2019, the matter was transferred to the Office of Administrative Law (OAL) after Dennis filed an appeal. Hearings took place on November 10 and December 1, 2020. On August 13, 2021, the Administrative Law Judge (ALJ) issued an initial decision, finding Dennis did not prove he is totally and permanently disabled and did not prove his injury was "undesigned and unexpected," both necessary elements for ADRB. On September 14, 2021, the Board issued its final administrative determination adopting the ALJ's decision in full and affirming the Board's initial denial of ADRB.

When evaluating final administrative agency decisions, our review is limited. Stein v. Dep't of L. & Pub. Safety, 458 N.J. Super. 91, 99 (App. Div. 2019) (citing In re Stallworth, 208 N.J. 182, 194 (2011)). We uphold an agency's decision "unless there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record." J.B. v. N.J. State Parole Bd., 229 N.J. 21, 43 (2017) (quoting In re Herrmann, 192 N.J. 19, 27-28 (2007)).

"When an agency's decision meets those criteria, then a court owes substantial deference to the agency's expertise and superior knowledge of a particular field." In re Herrmann, 192 N.J. at 28. We afford "similar deference" to an agency's "[r]easonable credibility determinations." In re Pontoriero, 439 N.J. Super. 24, 35 (App. Div. 2015). We also apply a "'strong presumption of reasonableness' to an administrative agency's exercise of its statutorily delegated responsibilities." Lavezzi v. State, 219 N.J. 163, 171 (2014) (quoting City of Newark v. Nat. Res. Council, Dep't of Env't Prot., 82 N.J. 530, 539 (1980)). We do not, however, afford deference to an "agency's interpretation of a statute or its determination of a strictly legal issue." Thurber v. City of Burlington, 191 N.J. 487, 502 (2007) (quoting Mayflower Sec. Co. v. Bureau of Sec., 64 N.J. 85, 93 (1973)).

The Police and Firemen's Retirement System provides retirement benefits to its members for both accidental and ordinary disabilities. See N.J.S.A. 43:16A-6 - 7. N.J.S.A. 43:16A-7 governs accidental disability retirement and provides:

> Upon the written application by a member in service, by one acting in his behalf or by his employer any member may be retired on an accidental disability retirement allowance; provided, that the medical board, after a medical examination of such member, shall certify that the member is permanently and totally

> disabled as a direct result of a traumatic event occurring during and as a result of the performance of his regular or assigned duties and that such disability was not the result of the member's willful negligence and that such member is mentally or physically incapacitated for the performance of his usual duty and of any other available duty in the department which his employer is willing to assign to him.
>
> [N.J.S.A. 43:16A-7(a)(1).]

The ALJ concluded Dennis failed to prove, by a preponderance of the credible evidence, he is totally and permanently disabled. We agree.

Dr. Rahul Shah, who is an orthopedic surgeon and treated Dennis, testified on his behalf, and stated Dennis had no prior lumbar spine injuries, which was confirmed by reviewing Dennis' medical records. Dr. Shah completed an EMG nerve conduction study to determine whether Dennis had any "bilateral lower extremity radiculopathy."[2] Neither the EMG study nor the MRI revealed any radiculopathy, peripheral neuropathy, or pinched nerves. Shah testified however, an EMG does not detect issues involving back pain approximately thirty-five percent of the time and the fact that the test and MRI did not show nerve impairment does not signify Dennis is not experiencing a nerve problem.

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[2] "Radiculopathy is irritation on a nerve to cause pain or weakness that goes down either the arm or the leg. A radicular component is one of [the] nerves of the spinal area as . . . compared to a nerve in . . . the wrist or the arm, which would be . . . peripheral neuropathy."

Dr. Shah concluded Dennis "sustained a lumbar sprain and strain as well as L5-S1 facet mediated pain" and opined Dennis cannot perform the duties of a firefighter and is totally and permanently disabled. On cross-examination, Dr. Shah admitted he first examined Dennis on October 3, 2019, two years after his injury, and conceded nothing in the MRI could adequately explain Dennis' report of pain.

Dr. Arnold Berman testified as an expert in orthopedic surgery for the Board after conducting an evaluation of Dennis on October 19, 2018. Unlike Dr. Shah, Dr. Berman concluded Dennis is not totally and permanently disabled after reviewing his medical history, job description, ADRB application, medical records, including the EMG and MRI results, and conducting his own medical examination. Dr. Berman testified the MRI results of Dennis' back did not show any abnormalities and a patient's self-reported history of pain is subjective. Dr. Berman also testified Dennis stated he did not have a history of back pain but noted he had a prescription that previously excused him from work because of back pain.

Dr. Berman detailed the objective testing he conducted on Dennis to determine whether he was permanently disabled, including "tests that are out of Dennis' control such as reflex testing, motor strength testing, sensory testing,

circumference measurements to indicate the presence or absence of atrophy[,] which would indicate that he's using his arms and legs [with] regard to low back[,]" and a series of tests to determine whether or not there's any radiculopathy. After completing the objective tests, Dr. Berman found Dennis' reflex, sensory, and motor tests were normal, as was the evaluation of his cervical spine. Dr. Berman testified his only finding was "mild pain on range of motion of both the cervical spine and lumbar spine." He also performed grip strength testing and pinch testing and found all results were "way above the average." There was no evidence of atrophy based on circumference measurements of the upper extremity and no evidence of radiculopathy as the straight leg raising test was negative. Dr. Berman viewed the EMG and MRI in addition to the other physical tests and found they were also normal.

Dr. Berman stated a negative EMG result is dispositive of whether there is radiculopathy and inaccurate results are very rare. Dr. Berman diagnosed Dennis with "a lumbar strain/sprain, muscular soft tissue injury that was treated and resolved with no residuals" and opined Dennis was not permanently disabled from working as a firefighter.

The ALJ found both medical experts credible but gave greater weight to Dr. Berman because of the totality of his evaluation and the greater objective

testing he utilized. The ALJ noted both doctors testified consistently in finding the MRI and EMG studies showed "no evidence of radiculopathy or peripheral neuropathy." The divergence lay in Dr. Shah's testimony that thirty-five percent of the time, EMG studies failed to detect nerve issues in the back. She found Dr. Berman's testimony that EMG tests are dispositive in detecting nerve issues in the back more persuasive.

Dennis has failed to demonstrate the ALJ's findings, and specifically the ALJ's detailed credibility conclusions, are not supported by substantial evidence in the record. Both experts conducted evaluations and testified. The ALJ acted within its province as the factfinder to weigh the expert testimony and make findings accordingly. See State v. Frost, 242 N.J Super. 601, 615-16 (App. Div. 1990); Angel v. Rand Express Lines, Inc., 66 N.J. Super. 77, 85-86 (App. Div. 1961); see also Mandel v. UBS/PaineWebber, Inc., 373 N.J. Super 55, 71 (App. Div. 2004) ("Expert testimony should be weighed and judged as any other testimony and may be totally disregarded.").

The ALJ's rejection of Dr. Shah's conclusion that Dennis' alleged radiculopathy was "missed" by all objective testing was not arbitrary, capricious, or unreasonable, and we see no reason to disturb that finding on appeal.

Having found the Board did not err in its determination that Dennis failed to prove he is permanently and totally disabled, our review would generally end here as Dennis must prove both prongs of the statute to attain ADRB. However, because the greater portion of Dennis' brief is devoted to the second prong, whether his injury was "undesigned and unexpected," we review those findings of the Board for completeness and conclude they were also supported by sufficient, credible evidence in the record.

The Court in Richardson v. Board of Trustees, Police & Firemen's Retirement System, in interpreting N.J.S.A. 43:16A-7(a)(1), reasoned "[t]he polestar of the inquiry is whether, during the regular performance of his job, an unexpected happening, not the result of a pre-existing disease alone or in combination with the work, has occurred and directly resulted in the permanent and total disability of the member." 192 N.J. 189, 214 (2007).

Dennis cites to several cases in which this court held the Board applied Richardson too narrowly and argues the July 18, 2017 event and his ensuing injuries were unexpected because the elderly man grabbed the railing and the use of a Reeves Sleeve to transport is uncommon. Dennis argues Moran and Brooks, two decisions from this court where the event causing injury was found to be undesigned and unexpected, support his argument on appeal. See Moran

v. Bd. of Trs., Police and Firemen's Ret. Sys., 438 N.J. Super. 346 (App. Div. 2014); Brooks v. Bd. of Trs., Pub. Emps. Ret. Sys., 425 N.J. Super. 277 (App. Div. 2012). We disagree as Moran and Brooks are distinguishable. In Moran, the firefighter's duties prior to the date of injury did not include going inside of a burning building to rescue potential fire victims. Moran, 438 N.J. Super. at 349. Rather, he was part of the fire department's "engine company," which was responsible for transporting fire equipment and extinguishing fires, not rescuing potential fire victims. Ibid. The "truck company" was the unit "responsible for forcing entry into a burning structure and rescuing any occupants." Ibid. The firefighter in Moran was not trained to use his body as a battering ram to open the door and only did so after discovering, unexpectedly, people were inside a burning building and the truck company with special equipment for forcing entry and rescuing victims had not arrived. Id. at 354-55.

In Brooks, appellant was a school custodian who suffered a debilitating shoulder injury while he and group of students were moving a 300-pound weight bench. Brooks, 425 N.J. Super. at 279-80. Appellant was injured when the students dropped the bench. Ibid. We reversed the Board's determination the event was not undesigned and unexpected because the examples provided in

Richardson were "more common and mundane than appellant's attempt to move the weight bench into the school." Id. at 283.

Unlike Moran and Brooks, Dennis was performing his normal job duties on the date of the incident. He had been trained to transport people to medical facilities. While the utilization of a stair chair was more common and preferable, Dennis had been supplied with and trained to use a Reeves Sleeve and had utilized it to move patients on previous occasions. He conceded he was trained to move patients in different types of areas and under different circumstances. He testified he was trained to lift things over his head as a firefighter. The record is bereft of any indication Dennis' injury arose from anything other than ordinary strenuous work effort.

The ALJ found Dennis credible in his testimony but noted several inconsistencies. Specifically, his testimony was discrepant as it related to what he reported on the workers' compensation form, the ADRB application, and the circumstances of the injury. The ALJ noted Dennis did not mention the elderly man in the Reeves Sleeve grabbing the banister in any form, application, or to any doctor, raising it for the first time during his testimony. The ALJ, therefore, specifically rejected Dennis' contention that the man reached out and grabbed the railing.

The ALJ found Dennis failed to satisfy, by a preponderance of the evidence, the July 18, 2017 incident was "undesigned and unexpected." We agree with the ALJ that the act of carrying a tall elderly man down a narrow stairwell is not the type of unusual or unanticipated event that would entitle Dennis to ADRB. Additionally, the ALJ questioned Dennis' credibility given his lack of disclosure on any form or to any doctor prior to his testimony. Thus, there is nothing in the record to support Dennis' argument the Board's finding was arbitrary, capricious, or otherwise unsupported by substantial credible evidence in the record because the July 18, 2017 event which caused Dennis' injury was not undesigned and unexpected.

Finally, Dennis claims, for the first time on appeal, he is stuck in a "catch-22" because he was deemed totally and permanently disabled by Atlantic City's workers' compensation physician, rendering him unable to return to work, while the Board deemed him not totally and permanently disabled, which forecloses his opportunity to recover disability retirement benefits. Because Dennis failed to raise these issues before, their advancement is precluded on appeal as they do not "go to the jurisdiction of the [Board or the ALJ] or concern matters of great public interest." Zaman v. Felton, 219 N.J. 199, 226-27 (2014) (quoting Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973)); see also State v. Robinson,

200 N.J. 1, 19-20 (2009). Moreover, since nothing in the record allows us to determine whether other forms of disability benefits or light duty work are available to him, Dennis has failed to provide a basis for us to conclude an unjust result occurred. See Rule 2:10-2 ("Any error or omission shall be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result.").

We conclude the Board's finding Dennis is not totally and permanently disabled and the event which caused his back injury was not undesigned and unexpected was supported by credible evidence in the record and not arbitrary, capricious, or unreasonable.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION