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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2685-20**

STEPHEN PACE,

Petitioner-Appellant,

v.

**BOARD OF TRUSTEES,
PUBLIC EMPLOYEES'
RETIREMENT SYSTEM,**

Respondent-Respondent.

Argued October 17, 2022 – Decided November 4, 2022

Before Judges Currier, Mayer, and Enright.

On appeal from the Board of Trustees of the Public Employees' Retirement System, Department of the Treasury, PERS No. xx7276.

Samuel M. Gaylord argued the cause for appellant (Szaferman, Lakind, Blumstein & Blader, PC, attorneys; Samuel M. Gaylord, on the brief).

Matthew Melton, Deputy Attorney General, argued the cause for respondent (Matthew J. Platkin, Attorney General, attorney; Melissa H. Raksa, Assistant

Attorney General, of counsel; Matthew Melton, on the brief).

PER CURIAM

Petitioner Stephen Pace appeals from an April 22, 2021 final agency determination by the Board of Trustees (Board) of the Public Employees' Retirement System denying his request for accidental disability retirement benefits. The Board reversed a determination by an administrative law judge (ALJ) that Pace was entitled to such benefits. Since the Board's decision was unsupported by the record – specifically, the lack of evidence that Pace had any neck complaints or neck treatment prior to the work-related accident on August 21, 2017 – we reverse.

We recite the facts from the hearing before the ALJ. For ten years, Pace worked as a maintenance janitor for the Lower Township Board of Education. Pace's job responsibilities included hard physical labor. Prior to August 21, 2017, Pace never had any complaints or treatment related to his neck.

Pace received treatment to his back in March 2014 after lifting fifty-pound bags of salt. Diagnostic imaging taken in 2014 revealed degenerative disc disease in Pace's lumbar spine. The record on appeal lacks any diagnostic images or medical records regarding Pace's cervical spine until 2017.

On August 21, 2017, Pace fell into an uncovered manhole while trimming weeds on school property. After the fall, Pace reported neck and back pain. Thereafter, Pace treated with his worker's compensation assigned physician, Dr. Andrew Glass, for his neck and back complaints. Dr. Glass initially focused on treating Pace's back. Pace received non-invasive therapies over the course of several months, including physical therapy and pain management. Because the non-invasive therapies failed to provide any long-term relief, Dr. Glass recommended lumbar surgery. The doctor ordered magnetic resonance imaging (MRI) of Pace's lumbar and cervical spine. The MRI of Pace's cervical spine revealed herniated discs at four levels, requiring immediate surgery to Pace's neck rather than the lumbar surgery as originally proposed by Dr. Glass.

On August 1, 2018, Dr. Glass performed a three-level cervical fusion to alleviate significant spinal cord compression at the C3-C4, C4-C5, and C5-C6 levels in Pace's spine. In his post-operative report, Dr. Glass explained Pace's cervical spine revealed the thecal sac "at each level appeared well decompressed." After the fusion surgery, Pace was instructed not lift anything above ten pounds and was unable to return to work as a result.

On October 10, 2018, Pace applied to the Board for accidental disability retirement benefits. At its meeting on May 15, 2019, the Board denied Pace's

application, finding that his disability was not a direct result of the August 2017 incident. Rather, the Board found the disability was "the result of pre-existing disease alone or pre-existing disease that [was] aggravated or accelerated by the work effort."

Pace appealed the Board's denial and the matter was transferred to the Office of Administrative Law. An ALJ heard testimony from Pace and two expert witnesses. Dr. David Weiss, an orthopedic expert, testified on behalf of Pace. Dr. Arnold Berman, an expert in orthopedic surgery, testified on behalf the Board. The experts' testimony focused solely on whether Pace's disability was the direct result of the August 2017 incident.¹

Based on his physical examination of Pace and review of Pace's medical records, Dr. Berman testified that Pace's disability was not the direct result of the accident because he had significant pre-existing degenerative disc disease, coupled with prior neck complaints in 2014. Dr. Berman further testified that the MRI of Pace's lumbar spine in 2014 revealed significant degenerative disc disease in his lower back. Although there was no diagnostic imaging of Pace's cervical spine prior to 2018, Dr. Berman opined that a finding of degenerative

¹ The Board conceded that Pace met the other requirements for accidental disability retirement benefits under Richardson v. Board of Trustees, Police and Firemen's Retirement System, 192 N.J. 189 (2007).

disc disease in the lumbar spine almost always correlates to the existence of degenerative disc disease in the cervical spine.

On the other hand, Dr. Weiss testified Pace was asymptomatic for any neck-related complaints prior to August 21, 2017. Subsequent to the August 2017 work-related fall, Dr. Weiss opined that Pace required a three-level cervical fusion surgery to repair compressed discs in his neck. According to Dr. Weiss, the cervical surgery was the substantial cause of Pace's disability.

On February 8, 2021, the ALJ determined Pace was entitled to accidental disability retirement benefits. She concluded Dr. Berman's findings were not substantially supported by the record. The ALJ found Dr. Weiss to be more credible in his finding Pace's disability was "the direct result of the described traumatic event occurring on August 21, 2017."

On March 17, 2021, the Board rejected the ALJ's determination that Pace was entitled to accidental disability retirement benefits. In its April 22, 2021 written findings of fact and conclusions of law, the Board explained Dr. Berman relied on a prior injury to Pace's neck in 2014 to support his opinion that the August 2017 incident was not the direct result of Pace's disability. The Board found that Pace failed to meet his burden of proof because:

- (1) he had a neck issue prior to the incident;
- (2) both experts agreed that Mr. Pace had aggravated pre-

existing conditions and a cervical surgery that combined to cause his disability; (3) the ALJ applied a "but for" standard, which Dr. Weiss disagreed with, that is not applicable and relied on a hearsay document created by a physician not subject to direct or cross examination, which should be given zero weight in rendering a decision; and (4) Dr. Berman, the better credentialed medical expert, should be given more weight because he reliably explained how the mechanism of injury could not have caused the seen herniations.

Pace appealed the Board's denial of his request for accidental disability retirement benefits. On appeal, Pace contends his August 21, 2017 fall into an open manhole while working on school property was the substantial cause of his three-level cervical fusion surgery, entitling him to accidental disability retirement benefits. We agree.

We review agency decisions under an arbitrary and capricious standard. Zimmerman v. Sussex Cnty. Educ. Servs. Comm'n, 237 N.J. 465, 475 (2019). An administrative agency's determination "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." Saccone v. Bd. of Trs., Police & Firemen's Ret. Sys., 219 N.J. 369, 380 (2014) (quoting Russo v. Bd. of Trs., Police & Firemen's Ret. Sys., 206 N.J. 14, 27 (2011)).

In reviewing an agency's decision, the court "must be mindful of, and deferential to, the agency's 'expertise and superior knowledge of a particular field,'" Circus Liquors, Inc. v. Governing Body of Middletown Twp., 199 N.J. 1, 10 (2009) (quoting Greenwood v. State Police Training Ctr., 127 N.J. 500, 513 (1992)), and "may not substitute its own judgment for the agency's." In re Stallworth, 208 N.J. 182, 194 (2011) (quoting In re Carter, 191 N.J. 474, 483 (2007)). When an administrative body rejects the findings of an ALJ, it must state its reasons for doing so, and its own findings must be supported by "sufficient, competent, and credible evidence in the record." Div. of Youth & Fam. Servs. v. C.H., 414 N.J. Super. 472, 480 (App. Div. 2010).

Accidental disability retirement benefits require an employee demonstrate that he or she "is permanently and totally disabled as a direct result of a traumatic event occurring during and as a result of the performance of his [or her] regular or assigned duties." N.J.S.A. 43:16A-7(a)(1). In Richardson, our Supreme Court held a claimant seeking accidental disability retirement benefits must prove the following:

1. that he [or she] 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, 192 N.J. at 212-13.]

In Gerba v. Board of Trustees, Public Employees' Retirement System, 83 N.J. 174, 185 (1980), our Supreme Court reviewed the "direct result" language "in cases where . . . the disability may be causally related in some measure to an antecedent or underlying physical condition as well as to the traumatic event." The Gerba Court held an applicant for accidental disability retirement benefits need only show "a traumatic event that constitutes the essential significant or the substantial contributing cause of the resultant disability . . . even though it acts in combination with an underlying physical disease." Id. at 186-87 (emphasis added).

Here, the only issue is whether Pace's disability is the "direct result" of the work-related fall on August 21, 2017, which we review de novo. See

Saccone, 219 N.J. at 380. Based on our review of the record, we are satisfied the Board's decision was arbitrary, capricious, and untethered to the credible evidence in the record before the ALJ. We agree with the ALJ's determination that Pace's three-level cervical fusion was substantially caused by the work-related incident in August 2017 to satisfy the direct result prong under Richardson and Gerba for entitlement to accidental disability retirement benefits.

This case is factually similar to Petrucelli v. Board of Trustees, Public Employees' Retirement System, 211 N.J. Super. 280 (App. Div. 1986). In Petrucelli, the petitioner's pre-existing spinal condition was asymptomatic prior to the petitioner's fall. Id. at 281, 284. We held the petitioner's fall satisfied the "direct result" prong despite his pre-existing condition because the fall "triggered a symptom complex resulting in total disability." Id. at 289. We explained that the petitioner may have worked until retirement without incident and thus it was "entirely speculative" whether "he would have developed low-back symptoms independently of the . . . fall." Ibid.

Here, there is no evidence in the record that Pace had any injury to his neck or any treatment to his neck prior to August 2017. Pace testified he never treated for any neck complaints prior to the work-related fall on August 21,

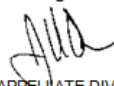
2017. Pace worked full-time as a maintenance janitor for the school system until the August 2017 fall rendered him unable to lift or to perform the hard physical labor associated with his job duties.

While Dr. Berman's expert report stated Pace "was seen at Cape Regional Medical Center [on August 14, 2015] with complaints of neck, lower back and left leg pain," the doctor's list of "medical records reviewed" omitted any such record. On cross-examination, Dr. Berman conceded that he reviewed no record "of any active medical care and treatment [to] Mr. Pace's cervical spine in the three to four years prior to the accident of August 21, 2017."

There is nothing in the record to support the conclusion that Pace received medical attention or treatment for his neck prior to the August 21, 2017 work-related accident. The lack of evidence of any complaints to Pace's neck prior to August 2017 supports the conclusion that the August 21, 2017 work-related accident and subsequent three-level cervical fusion was "the essential significant or substantial cause" of Pace's disability, entitling him to an award of accidental disability retirement benefits.

Reversed.

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


CLERK OF THE APPELLATE DIVISION