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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2591-21**

GREGORY BAILEY,

Petitioner-Appellant,

v.

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

Respondent-Respondent.

Argued October 17, 2023 – Decided October 24, 2023

Before Judges Haas and Gooden Brown.

On appeal from the Board of Trustees of the Police and Firemen's Retirement System, Department of the Treasury, PFRS No. xx8978.

Edwin Henry Kerwin argued the cause for appellant (Law Offices of Daniel J. Zirrieth, LLC, attorneys; Daniel J. Zirrieth, of counsel and on the briefs; Edward Henry Kerwin, on the briefs).

Juliana C. DeAngelis, Legal Counsel, argued the cause for respondent (Robert S. Garrison, Jr. Director of

Legal Affairs, attorney; Juliana C. DeAngelis, on the brief).

PER CURIAM

Appellant Gregory Bailey appeals from the March 16, 2022 administrative decision of the Board of Trustees, Police and Firemen's Retirement System (Board) denying his application for accidental disability retirement benefits. We affirm.

Appellant worked for the City of East Orange as a police officer. On July 19, 2010, appellant and other officers responded to a domestic dispute call and encountered a man outside of an apartment building. The man was "screaming" and "irate." The officers attempted to get the man into a patrol car, but he broke free and began running away. Appellant pursued the man and "grabbed him from behind attempting to take him down to the ground to arrest him." Plaintiff sustained an injury in the incident.

In a written "employee report" appellant prepared on July 19, 2010, appellant stated that the injury occurred when he twisted his left knee "while wrestling with a simple assault suspect from a domestic incident." Appellant also wrote that "[i]t felt like my knee twisted and went back in place. Sustained injury to left knee." A contemporaneous "supervisor report" stated that appellant "sustained his injury while wrestling with a billigerent [sic] suspect

stemming from a DV incident" An incident report prepared by one of the other officers stated that appellant "sustained injury to his left knee" while "struggling" with the suspect.

However, in the application for accidental disability retirement benefits that appellant filed almost nine years after the incident, appellant asserted for the first time that after he grabbed the suspect, the man "was moving and twisting to free himself" and as appellant "turned his body to get the suspect on the ground[, the man] twisted and kicked back with his foot hitting and dislocating [his] left knee." Appellant repeated this new claim at the hearing in the Office of Administrative Law (OAL). When asked why he had not claimed the suspect kicked him in his contemporaneous written report on the day of the incident, appellant stated, "I may have overlooked it. At the time I was in a lot of pain. My adrenaline was pumping. I was in a hurry to get home. There wasn't much space. I may have overlooked it."

The Board denied appellant's application because the July 19, 2010 incident was not "undesigned or unexpected." Appellant asked for a hearing and the Board transmitted the matter to the OAL.

After hearing the testimony and reviewing the documentary evidence, the Administrative Law Judge (ALJ) agreed with the Board that appellant's

disability was not an undesigned and unexpected traumatic event. The ALJ found that appellant "twisted his knee during the apprehension" of the suspect. The ALJ noted that appellant claimed at the hearing that the injury was caused by the suspect kicking him, but found that appellant's "recollection immediately following the incident" as set forth in the written police reports was "more credible tha[n] a current recollection." Because appellant failed to demonstrate that the incident constituted a traumatic event, the ALJ affirmed the Board's initial denial of appellant's application for accidental disability retirement benefits.

After reviewing the record, the Board adopted the ALJ's decision. This appeal followed.

On appeal, appellant argues that "the Board's decision is arbitrary, capricious, and unreasonable based on the totality of the credible evidence supporting the finding that appellant . . . is eligible for accidental disability benefits." We disagree.

Our review of an administrative agency determination is limited. Russo v. Bd. of Trs. Police & Firemen's Ret. Sys., 206 N.J. 14, 27 (2011). Appellate courts will sustain an agency's final decision "unless there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the

record." Mount v. Bd. of Trs. Police & Firemen's Ret. Sys., 233 N.J. 402, 418 (2018) (quoting Russo, 206 N.J. at 27). In determining whether an agency's decision is arbitrary, capricious, or unreasonable, we examine: (1) whether the agency's decision conforms with relevant law; (2) whether the decision is supported by substantial credible evidence in the record; and (3) whether in applying the law to the facts, the "agency clearly erred in reaching [its] conclusion." In re Stallworth, 208 N.J. 182, 194 (2011) (quoting In re Carter, 191 N.J. 474, 482-83 (2007)).

We are required to affirm an agency's findings of fact if "supported by adequate, substantial and credible evidence." In re Taylor, 158 N.J. 644, 656-57 (1999) (quoting Rova Farms Resort, Inc. v. Inv's. Ins. Co., 65 N.J. 474, 484 (1974)). Moreover, if we are "satisfied after [our] review that the evidence and the inferences to be drawn therefrom support the agency head's decision, then [we] must affirm even if [we] feel[] that [we] would have reached a different result" Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 588 (1988). Additionally, we give "due regard to the opportunity of the one who heard the witnesses to judge . . . their credibility." Taylor, 158 N.J. at 656 (quoting Close v. Kordulak Bros., 44 N.J. 589, 599 (1965)).

An appellate court is not, however, bound by an agency's statutory interpretation or other legal determinations, which we review de novo. Mount, 233 N.J. at 418-19. Nevertheless, we generally accord "substantial deference to an agency's interpretation of a statute that the agency is charged with enforcing." Richardson v. Bd. of Trs., Police & Firemen's Ret. Sys., 192 N.J. 189, 196 (2007). "Such deference has been specifically extended to state agencies that administer pension statutes[,] because "a state agency brings experience and specialized knowledge to its task of administering and regulating a legislative enactment within its field of expertise." Piatt v. Police & Firemen's Ret. Sys., 443 N.J. Super. 80, 99 (App. Div. 2015) (quoting In re Election Law Enft Comm'n Advisory Op. No. 01-2008, 201 N.J. 254, 262 (2010)).

Appellant is a member of the PFRS. See N.J.S.A. 43:16A-1 to -68. That pension plan grants accidental disability retirement benefits if "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 [or her] regular or assigned duties." N.J.S.A. 43:16A-7(a)(1). A claimant seeking accidental disability retirement benefits must prove five elements:

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 [or her] usual or any other duty.

[Richardson, 192 N.J. at 212-13; see also N.J.S.A. 43:16A-7(a)(1).]

To be traumatic, an event must be "undesigned and unexpected." Richardson, 192 N.J. at 212. "The polestar of the inquiry is whether, during the regular performance of his [or her] job, an unexpected happening, not the result of pre-existing disease alone or in combination with the work, has occurred and directly resulted in the permanent and total disability of the member." Id. at 214.

Here, the ALJ found that there was no evidence of "an unexpected happening." Instead, appellant was injured when he twisted his knee while

wrestling with a suspect. The ALJ specifically found that appellant's more recent claim that the suspect kicked him in the knee and dislocated it was not as credible as the contemporaneous accounts of the incident made on the day it occurred. We defer to that credibility determination. Taylor, 158 N.J. at 656. Moreover, the ALJ correctly found that even if the injury was caused by the suspect kicking appellant's knee during the struggle, it would not have changed the result because there was no evidence that the injury appellant sustained resulted from an "unanticipated mishap." Richardson, 192 N.J. at 213. Given our limited standard of review, we discern no basis to disagree with the factual findings made by the ALJ, which were adopted by the Board, or the Board's legal conclusion that appellant had not established that he was entitled to accidental disability retirement benefits.

Appellant's main argument on appeal is based on his belief that this matter is factually similar to an unpublished Appellate Division decision unrelated to this case where the applicant received accidental disability benefits. However, the facts of that case are dissimilar to the circumstances presented here. More importantly, appellant's reliance on this unpublished case in this appeal is misplaced because pursuant to Rule 1:36-3, the case has no precedential value and is not binding on any court. As we stated in Badiali v. New Jersey Mfrs.

Ins. Grp., 429 N.J. Super. 121, 126 n. 4 (App. Div. 2012), aff'd, 220 N.J. 544 (2015), "as a general matter, unpublished opinions are not to be cited by any court absent certain specified circumstances." None of those circumstances apply to the unrelated, unpublished case on which defendant extensively relies.

Appellant also argues that his case is similar to Richardson, and makes passing reference to two other published cases, Moran v. Bd. of Trs., Police & Firemen's Ret. Sys., 438 N.J. Super. 346 (App. Div. 2014), and Brooks v. Bd. of Trs., Pub. Empls. Ret. Sys., 425 N.J. Super. 277 (App. Div. 2012). However, these cases are all readily distinguishable from the matter at hand.

In Richardson, a corrections officer was injured while attempting to subdue an inmate. 192 N.J. at 193. The officer had straddled the inmate to hold him down. Ibid. The inmate continued to kick, punch, and throw his body around, and eventually pulled himself loose. Ibid. The inmate then forcefully jerked up from the ground and knocked the officer backward, injuring him. Ibid. The Court concluded the officer's injury was caused by a traumatic event because the event "was (a) identifiable as to time and place; (b) unexpected and undesigned; and (c) not caused by a pre-existing condition . . . alone or in combination with work effort." Id. at 214-15.

In Moran, a firefighter was injured after kicking down a door to a burning building because he heard voices yelling from inside. 438 N.J. Super. at 349-50. The firefighter was part of the "engine company" that brought hoses to burning buildings and not part of the "truck company" that brought equipment used to forcibly enter those buildings. Id. at 349. The "truck company" was running late so the firefighter attempted to rescue the people inside the building despite not having the proper equipment. Id. at 354. We concluded the firefighter's injury was caused by an undesigned and unexpected event because the firefighter faced unusual circumstances, including the presence of victims inside the burning building, the "truck company's" delay, and the lack of equipment to break down the door. Ibid.

Finally, in Brooks, a school custodian suffered a shoulder injury while he and a group of students were moving a 300-pound bench. 425 N.J. Super. at 279-80. The custodian was injured when the students dropped the bench. Ibid. We reversed the Board's determination that the event was not undesigned and unexpected because moving the bench was not part of the custodian's regular job duties and the students who he was attempting to help suddenly dropped it. Id. at 283.

Here, and unlike in Richardson, Moran, and Brooks, appellant's injury did not result from an unexpected happening. He did not face unusual circumstances like in Moran and Brooks; nor did he suffer from an unintended mishap like in Richardson.

In sum, the Board's finding that appellant's injury was not the direct result of a traumatic event that was 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