SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2642-21

CHERIE MITCHELL,

Petitioner-Appellant,

v.

BOARD OF TRUSTEES,
PUBLIC EMPLOYEES'
RETIREMENT SYSTEM,

Respondent-Respondent.

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Argued June 20, 2023 – Decided August 31, 2023

Before Judges Accurso and Messano.

On appeal from the Board of Trustees of the Public Employees' Retirement System, Department of the Treasury, PERS No. xx6372.

Herbert J. Stayton, Jr., argued the cause for appellant (Stayton Law, LLC, attorneys; Herbert J. Stayton, Jr., on the brief).

Payal Y. Ved, Deputy Attorney General, argued the cause for respondent (Matthew J. Platkin, Attorney General, attorney; Sookie Bae-Park, Assistant Attorney General, of counsel; Payal Y. Ved, on the brief).

PER CURIAM

Appellant Cherie R. Mitchell had been employed as a licensed practical nurse (LPN) at Ancora Psychiatric Hospital since 2005, when, on November 21, 2014, a combative patient she and others were attempting to restrain forcefully kicked her backwards against a "firebox." Mitchell injured her neck and right shoulder, which had been surgically repaired twice before in 2010 and 2013 due to work-related injuries. After each surgery, Mitchell had returned to her position at Ancora. Mitchell's physicians initially prescribed a conservative course of treatment, but, ultimately, she underwent a third shoulder surgery and received epidural injections in her cervical spine. For reasons we explain in greater detail, Mitchell never returned to her position.

Mitchell applied for accidental disability retirement (ADR) benefits, see N.J.S.A. 43:15A-43(a), but the Board of Trustees (Board) of the Public Employees' Retirement System (PERS) denied her application. The Board concluded that Mitchell was "not totally and permanently disabled from the performance of [her] regular and assigned job duties," nor "physically or mentally incapacitated from the performance of [her] usual or other duties that [her] employer [wa]s willing to offer," and "there [wa]s no evidence in the record of direct causation of a total and permanent disability."

Mitchell appealed, and the matter was transferred to the Office of Administrative Law as a contested case. An administrative law judge (ALJ) conducted the hearing over two days and considered the testimony of Mitchell, her orthopedic expert, Dr. David Weiss, and Robin McGuigan. McGuigan was the human resources assistant at the Department of Human Services (DHS), which employed Mitchell, who was familiar with her case. Dr. Jeffrey Lakin testified as the Board's orthopedic expert.

The ALJ rendered an initial decision affirming the Board's denial of ADR benefits. She determined Mitchell had failed to prove "an incapacity to perform duties in the general area of her ordinary employment as an LPN," and that she was not "disabled from working as an LPN for other employers." The ALJ also concluded that if the Board "determine[d] . . . [Mitchell was] in fact disabled," she had failed to prove "her alleged disability occurred as a direct result of the November 21, 2014 traumatic event." The ALJ determined "the work accident was not the essential significant or substantial contributing cause of [Mitchell]'s alleged disability."

Mitchell filed exceptions. On March 17, 2022, the Board "adopted the ALJ's decision affirming" its previous denial of ADR benefits to Mitchell. This appeal followed.

In several points and subpoints in her brief, Mitchell essentially argues that she satisfied the standards set out by the Court in Richardson v. Board of Trustees, Police & Firemen's Retirement System, 192 N.J. 189, 212–13 (2007), and the Board's denial of ADR benefits was arbitrary, capricious and unreasonable. Mitchell also contends Dr. Lakin's testimony was entitled to "little weight."

Mitchell additionally raises several points for the first time on appeal that focus on her interaction with DHS and Mitchell's request for workplace accommodation based on a restriction purportedly placed on her work duties by her medical providers. Mitchell first argues that DHS administratively determined it could not reasonably accommodate her medical restrictions, which conclusively demonstrates Mitchell was permanently disabled from performing the essential functions of an LPN. Mitchell also claims that based on DHS's determination, the doctrines of res judicata and collateral estoppel bar the Board from denying her ADR benefits. Mitchell additionally argues the Americans with Disabilities Act (ADA), 42 U.S.C.A. §§ 12101 to 12213, "preempts" the Board's decision that she is not totally and permanently disabled and unable to perform the essential duties of her position as an LPN. Lastly and alternatively,

Mitchell argues the record supports a finding that she is entitled to ordinary disability retirement (ODR) pension benefits. See N.J.S.A. 43:15A-42.

We have considered these arguments in light of the record and applicable legal standards. We affirm.

I.

Dr. Weiss was not one of Mitchell's treating doctors, but at the hearing before the ALJ, he reviewed the course of Mitchell's treatment following the November 2014 incident. The treatment began conservatively but ultimately led to the surgical repair of a complete tear of the rotator cuff in her right shoulder by Dr. Luke Austin in May 2015. Dr. Weiss also reviewed the treatment for pain in Mitchell's cervical spine by Dr. Theodore D. Conliffe, including two epidural injections. Dr. Weiss, who personally reviewed the MRI of Mitchell's cervical spine, opined that she had suffered a herniated disc at C-3-C-4.

Dr. Weiss testified that "given the injuries to both [Mitchell's] right shoulder and cervical spine[,] she would be unable to engage in either the functional or postural requirements" of her job as an LPN. The doctor opined that Mitchell could still "perform sedentary work . . . which would render her below the functional requirements of a [LPN]." He further concluded the November 2014 incident was the cause of Mitchell's injuries and limitations.

On cross-examination, Dr. Weiss acknowledged that restrictions on Mitchell's ability to lift more than ten to fifteen pounds were "self-reported" and not the result of any tests he had administered. He also acknowledged that Mitchell would be able to perform "a significant portion of her job duties," and Dr. Austin's November 2016 post-operative note indicated Mitchell could return "to normal activities" with "no restrictions" on the use of her shoulder. On redirect, Dr. Weiss acknowledged that Dr. Conliffe and Dr. Barrett Woods, a spinal surgeon with whom Mitchell had consulted, cleared her to return to work and released her from their care in May 2016 with a ten-pound weightlifting limit.

Robin McGuigan was the ADA coordinator for DHS, and she engaged in the required interactive process with Mitchell upon her clearance to return to work in May 2016. See, e.g., Tynan v. Vicinage 13 of the Superior Ct., 351 N.J. Super. 385, 400–01 (App. Div. 2002) (explaining employer's obligation to engage in informal interactive process to determine possible reasonable accommodation for employee's disability). Mitchell requested an accommodation for the ten-pound weightlifting limit.

McGuigan sent DHS's "Jobs Demands and Medical Capabilities Form," that listed various functions performed by LPNs to Dr. Woods to complete. Dr.

Woods indicated that Mitchell had a ten-pound weightlifting restriction and could not do "pushing-pulling," but she was otherwise unrestricted in her ability to perform her job duties.

McGuigan agreed that the job duties of an LPN as described by the Civil Service Commission did not include some duties performed by an LPN at Ancora, for example the need to lift or move adult patients weighing at least 100 pounds. McGuigan contacted eight other facilities to determine if they could accommodate an LPN with Mitchell's medical restriction; none could.

On August 22, 2016, McGuigan advised Mitchell in writing that her request for an accommodation was denied and offered Mitchell the option to resign in good standing or retire. If Mitchell chose neither option, McGuigan stated Ancora would "be forced to take the necessary action to separate [Mitchell] from State Service in accordance with N.J.A.C. 4A:2-2.3(a)(3), Inability to Perform Duties."

Mitchel testified before the ALJ about her current medical condition and restrictions on her activities of daily living. She also said that Dr. Woods had agreed to increase her weightlifting restriction to twenty-five pounds and provided a note to that affect, but McGuigan informed her that her request for

an accommodation was denied.[1] On cross-examination, Mitchell reviewed the essential job functions for an LPN at Ancora and acknowledged her ability to perform most of them, albeit some with limitations, and an inability to perform a few. For example, Mitchell said she was unable to push wheelchairs or re-position patients in bed.

Dr. Lakin evaluated Mitchell in March 2018. He testified about the various tests he performed during the examination, stating most were objective in nature. Dr. Lakin opined that Mitchell had had an excellent recovery from shoulder surgery. The doctor, who had reviewed only the radiological reports and not the MRI imaging of Mitchell's cervical spine, concluded the MRI demonstrated "multi-level changes of degeneration." Dr. Lakin testified that Mitchell had no "physical restrictions or limitations" because of her cervical spine and was fully capable of performing her job duties as an LPN. Mitchell's counsel vigorously cross-examined Dr. Lakin, particularly regarding the weightlifting limitations imposed by Mitchell's treating physicians.

The ALJ's initial decision thoroughly reviewed the testimony and documentary evidence admitted during the hearing. The judge fully credited

[1] This note was not produced during the hearing, and it is not in the appellate record.

Mitchell's version of the November 2014 incident as fact. She also found credible Mitchell's testimony that she was capable of performing many of the duties contained within the Civil Service LPN job description despite her injuries.

While she found Mitchell still had "some pain and stiffness," the ALJ did not credit Mitchell's testimony about her inability to perform some activities of daily living, nor did the judge find credible Mitchell's testimony "that she could not perform the essential functions of an LPN such as standing, walking, or squatting." The ALJ noted Mitchell never reported such limitations to her treating physicians, and, instead, demonstrated an ability to "perform more physically demanding duties and personal activities when she requested a change in the lifting restriction . . . in order to return to work." The ALJ specifically found "the lifting restriction [wa]s based on subjective evidence which [she] did not find compelling."

Turning to the dueling expert testimony, the ALJ found Dr. Lakin to be more credible than Dr. Weiss and explained why. She concluded Dr. Weiss's "credible and succinct testimony . . . largely relied upon [Mitchell's] self-reporting and . . . subjective complaints." The ALJ noted Dr. Weiss acknowledged that the ten-pound weight restriction placed upon Mitchell's

return to work was "due to Mitchell's self-reported complaints of pain to her neck and cervical spine," yet Dr. Weiss "relie[d] on the lifting restriction" to conclude Mitchell was disabled. The judge observed that Dr. Weiss's opinion that Mitchell's limitation was the result of three shoulder surgeries was "inconsistent with the treating medical doctors."

The ALJ found Dr. Lakin "conducted objective testing . . . to make objective findings." She noted that his findings were "consistent" with objective tests administered to Mitchell "shortly after the incident," and the opinions of "her treating physicians," particularly Dr. Austin, who found Mitchell "to be fully recovered with no restrictions" after shoulder surgery.

The ALJ found that Drs. Woods, Weiss and Lakin all acknowledged the ten-pound weightlifting limitation was based on Mitchell's "subjective reports of pain, not physical testing." She focused on Dr. Woods' August 2016 report, noting the doctor "documented that the lifting restriction was in place 'to avoid future muscle flares and eliminate the need to miss work due to neck pain.'" In that report, Dr. Woods stated that Mitchell's "pain was mostly muscular in nature," and he also sought to clear up "some confusion regarding the permanency of" the ten-pound weight restriction. Noting that Mitchell asked if he could modify the restriction so she could return to work, Dr. Woods modified

it "as per the patient's request[,] as there was no medical contraindication to being able to lift more if [Mitchell] could tolerate it physically." (Emphasis added).[2] The ALJ concluded:

> [T]here [wa]s no evidence that Mitchell engaged in a new formal re-evaluation offered by Dr. Woods that would have established her ability to lift and would have likely afforded her . . . more opportunities for employment as an LPN. Instead, . . . McGuigan sought an LPN position that could accommodate a "permanent restriction of no lifting, pushing, or pulling more than [ten] pounds."

The ALJ expressly determined "the ten-pound lifting restriction was not a permanent disabling restriction to Mitchell's ability to perform the duties of an LPN, and the request for an accommodation was inconsistent with the medical records and expert testimony."

The judge conducted a review of applicable case law before concluding Mitchell "ha[d] not proven an incapacity to perform duties in the general area of her ordinary employment as an LPN. . . . Mitchell [wa]s not relieved from seeking other work as an LPN because it has not been proven that she was disabled from working as an LPN for other employers." Finding the medical

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[2] Dr. Woods' report noted that Mitchell's request to increase the weight limitation "was unauthorized by Workers' Comp and thus should not be recognized. . . . [T]here is no change in her work restrictions . . . provided during the last official visit in May 2016."

experts all acknowledged the "pre-existing age-related degenerative disc disease" in Mitchell's cervical spine, as well as the "exacerbation of her pre-existing [shoulder] condition" resulting from two prior surgeries, the ALJ also determined that the November 2014 incident "was not the essential significant or substantial contributing cause of [Mitchell]'s alleged disability." The ALJ affirmed the Board's prior denial of Mitchell's ADR benefits.

II.

We set some well-known guideposts for our review, which is limited. See, e.g., Russo v. Bd. of Trs., Police & Firemen's Ret. Sys., 206 N.J. 14, 27 (2011) (noting, "[o]ur review of administrative agency action is limited" (citing In re Herrmann, 192 N.J. 19, 27 (2007)). "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.'" Saccone v. Bd. of Trs., Police & Firemen's Ret. Sys., 219 N.J. 369, 380 (2014) (quoting Russo, 206 N.J. at 27). "[I]f substantial evidence supports the agency's decision, 'a court may not substitute its own judgment for the agency's even though the court might have reached a different result.'" In re Carter, 191 N.J. 474, 483 (2007) (quoting Greenwood v. State Police Training Ctr., 127 N.J. 500, 513 (1992)).

"The burden of demonstrating that the agency's action was arbitrary, capricious[,] or unreasonable rests upon the p[arty] challenging the administrative action." In re Arenas, 385 N.J. Super. 440, 443–44 (App. Div. 2006) (citing McGowan v. N.J. State Parole Bd., 347 N.J. Super. 544, 563 (App. Div. 2002)). "[W]e review de novo the Board's interpretation of N.J.S.A. [43:15A-43(a)] and our caselaw." Mount v. Bd. of Trs., Police & Firemen's Ret. Sys., 233 N.J. 402, 419 (2018) (citing Russo, 206 N.J. at 27).

Like other public retirement systems, PERS provides for both ODR benefits, N.J.S.A. 43:15A-42, and ADR benefits, N.J.S.A. 43:15A-43. See Rooth v. Bd. of Trs., Pub. Emps. Ret. Sys., 472 N.J. Super. 357, 365 (App. Div. 2022). "The principal difference between ordinary and accidental disability retirement 'is that ordinary disability retirement need not have a work connection.'" Ibid. (quoting Patterson v. Bd. of Trs., State Police Ret. Sys., 194 N.J. 29, 42 (2008)). ADR benefits, which provide the disabled employee with a higher percentage of their final annual compensation, require that the employee demonstrate they are "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." N.J.S.A. 43:15A-43(a). Our courts have concluded that the words "traumatic event" and "direct result" in the statute

reflected the Legislature's intent "to make the granting of an accidental disability pension more difficult." Gerba v. Bd. of Trs., Pub. Emps.' Ret. Sys., 83 N.J. 174, 183 (1980) (quoting Cattani v. Bd. of Trs., Police & Firemen's Ret. Sys., 69 N.J. 578, 584 (1976)).

In Richardson, the Court determined that an individual seeking ADR benefits under N.J.S.A. 43:16A-7(1), the analogous provision of the Police and Firemen's Retirement System, must prove:

> 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.

[192 N.J. at 212–13 (emphasis added).][3]

Mitchell premises most of her argument on the Board's affirmation of the ALJ's determination that Dr. Lakin's opinions were more persuasive than Dr. Weiss's; Mitchell's shoulder was fully healed; and her complaints of cervical pain were subjective. Mitchel contends that her treating doctors, particularly Drs. Conliffe and Woods, were inherently more credible than the Board's hired expert.

Neither Dr. Conliffe nor Dr. Woods testified. But, more importantly, this argument ignores the "general rule, [that] the reviewing court should give 'due regard to the opportunity of the one who heard the witnesses to judge of their credibility . . . and . . . [give] due regard also to the agency's expertise where such expertise is a pertinent factor.'" Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 587 (1988) (second alteration in original) (quoting Close v. Kordulak Bros., 44 N.J. 589, 599 (1965)). As factfinder, the ALJ was free "to accept or reject,

[3] PERS, like other public employee pension systems, "conditions the grant of [ADR] benefits on satisfying identical standards to those in N.J.S.A. 43:16A-7." Richardson, 192 N.J. at 192 n.1; see also Brooks v. Bd. of Trs., 425 N.J. Super. 277, 281 n.1 (App. Div. 2012) (noting statutes governing many of the public employee pension systems in New Jersey contain similar provisions to those in PERS regarding the award of ADR benefits).

in whole or in part, the testimony of one expert over that of another." Maudsley v. State, 357 N.J. Super. 560, 586 (App. Div. 2003).

Mitchell's argument also ignores the import of Dr. Woods' August 2016 report, which the ALJ cited, and the May 2016 "Workers' Compensation Quick Note," in which the doctor cleared Mitchell to return to work with the lifting restriction. That form was part of DHS's file assembled by McGuigan. The ALJ observed that in the report, Dr. Woods explained that he "documented . . . the lifting restriction was in place 'to avoid future muscle flares and eliminate the need [for Mitchell] to miss work due to neck pain.'" In the report, the doctor also stated that Mitchell's "pain was mostly muscular in nature"; he did not attribute the pain to the cervical herniation observed on the MRI. In the "Quick Note," Dr. Woods diagnosed Mitchell with a "cervical strain."

In the report, Dr. Woods also tried to clarify "some confusion regarding the permanency of" the ten-pound weight restriction. (Emphasis added). He noted that Mitchell asked to modify the restriction and "there was no medical contraindication to being able to lift more if [Mitchell] could tolerate it physically." (Emphasis added).

In short, the treating doctor, upon whom Mitchell relied to establish the workplace restriction that played so prominent a role in this case, lent little

support to Dr. Weiss's opinions about the severity and permanency of any cervical injuries Mitchell suffered as a result of the November 2014 incident.

Mitchell also assails the Board's determination that she was not permanently disabled from performing the essential functions of her job as an LPN. A fair reading of the record, however, does not support Mitchell's point.

Mitchell admitted that despite her ailments, she was able to perform a majority of the duties on the Civil Service Commission's job description for an LPN. Indeed, when asked to complete DHS's "Job Demands and Medical Capabilities Form," Dr. Woods indicated Mitchell could perform a vast majority of the functions without significant limitation.

It is also undisputed that the existence of the ten-pound weightlifting restriction realistically foreclosed Mitchell from performing some LPN functions at Ancora. The ALJ cited our decision in Bueno v. Board of Trustees, Teachers' Pension & Annuity Fund, 404 N.J. Super. 119 (App. Div. 2008), however, as support for her conclusion that Mitchell was not "physically incapacitated from performing h[er] usual or any other duty." Richardson, 192 N.J. at 213 (emphasis added). In Bueno, which dealt with a teacher's application for ODR benefits under N.J.S.A. 18A:66-39(b), we said,

> where a public employer has no other work for a public employee disabled from performing his or her assigned

> job duties, such an employee must at a minimum prove [(1)] an "incapacity to perform duties in the general area of his ordinary employment" for other employers and [(2)] may even be required to prove "inability to perform substantially different duties or . . . produce evidence of general physical [or mental] unemployability."
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> [404 N.J. Super. at 131 (third alteration in original) (quoting Skulski v. Nolan, 68 N.J. 179, 206 (1975)).]

Although not entirely clear, we discern from Mitchell's brief that she contends the Board's initial denial only found she was not permanently disabled from performing "her regular and assigned duties" or "other duties [that] her employer was willing to offer her." The Board did not apply Bueno's broader standard that the employee must prove an inability "'to perform duties in the general area of h[er] ordinary employment' for other employers." Ibid. (quoting Skulski, 68 N.J. at 206)). She also argues that Bueno relied upon Skulski, a case decided prior to the Court's seminal decision in Richardson, and the ALJ therefore improperly broadened Richardson's requirements.

This appeal is from the Board's final determination which adopted the ALJ's decision. The Board's initial denial is not what we review.

Bueno was decided in 2008, one year after Richardson, and, because it dealt with ODR benefits, the decision never mentioned Richardson's analytic paradigm. Nevertheless, we have since recognized the continued vitality of

Skulski's formulation regarding the meaning of disability under the various public pension statutes. See In re Adoption of N.J.A.C. 17:1-6.4, 17:1-7.5 & 17:1-7.10, 454 N.J. Super. 386, 415 (App. Div. 2018) ("[T]he appropriate standard for permanent disability under PFRS is whether the applicant is 'employable in the general area of his [or her] ordinary employment'" (second alteration in original) (quoting Skulski, 68 N.J. at 205–06)). More importantly, accepting arguendo Mitchell's argument that our colleagues' formulation of the standard in Bueno is overly broad, the ALJ determined that Mitchell, if incapacitated from performing her usual duty, was not incapacitated from performing "any other duty" as an LPN, because she was capable of doing most of the routine duties in the job's description. We agree that Mitchell failed to establish eligibility under the Richardson standard.

Based on our reasoning, we need not address the Board's adoption of the ALJ's conclusion that the November 2014 incident "was not the essential significant or substantial contributing cause of [Mitchell's] alleged disability." See, e.g., Kasper v. Bd. of Trs. of the Tchrs.' Pension & Annuity Fund, 164 N.J. 564, 577 (2000) (recognizing that by requiring the disability to be the direct result of a traumatic event, the Legislature "intended to impose a stringent test of medical causation and . . . that the trauma . . . must at the very least be the

essential significant or the substantial contributing cause of the disability." (quoting Korelnia v. Bd. of Trs., PERS, 83 N.J. 163, 170 (1980))).

Mitchell argues alternatively that she is entitled to ODR benefits based on Dr. Weiss's testimony and Dr. Austin's conclusion that the 2014 incident exacerbated her pre-existing shoulder condition. A PERS member may apply for ODR benefits upon the certification of "[t]he physician or physicians designated by the board . . . that the member is physically or mentally incapacitated for the performance of duty and should be retired." N.J.S.A. 43:15A-42. The ADR statute uses similar language. See N.J.S.A. 43:15A-43(a) (requiring certification that the member "is physically or mentally incapacitated for the performance of duty").

Because Mitchell's application was for ADR benefits, neither the Board's initial decision nor the ALJ's initial decision addressed her eligibility for ODR benefits, and the Board failed to address the issue at all in its brief. However, we see no need to remand the issue back to the Board for consideration. The Board essentially rejected Dr. Weiss's opinion that Mitchell was disabled, and Dr. Austin's final report cleared Mitchell without restrictions. Under the standard in Bueno, Mitchell failed to prove she was eligible for ODR benefits.

Lastly, Mitchell never made any of the arguments before the ALJ or the Board that she makes now regarding the interplay between DHS's failed attempt to reasonably accommodate the weightlifting restriction and Mitchell's entitlement to ADR benefits. We generally refuse to consider issues not presented to administrative agencies when the opportunity to do so was available to an appellant. See, e.g., J.K. v. N.J. State Parole Bd., 247 N.J. 120, 138 n.6 (2021).

It suffices to say, however, that an employer's obligations to reasonably accommodate an employee's disability have little to do with our review of the determination made by an agency charged with evaluating a pension member's application for disability benefits. An employer's obligation to accommodate an employee's disability is not without limits, and our Law Against Discrimination, for example, "provides that an employer may lawfully terminate a disabled employee if the disability precludes job performance." Grande v. Saint Clare's Health Sys., 230 N.J. 1, 23 (2017) (citing N.J.S.A. 10:5-4.1). That employee may nevertheless qualify for disability benefits. Mitchell does not provide any persuasive support for the proposition that an employer's decision has some preclusive effect upon the agency's determination under the doctrines of res judicata or collateral estoppel.

To the extent we have not otherwise addressed appellant's arguments, they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

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

CLERK OF THE APPELLATE DIVISION