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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3334-21**

RAYMOND GRACE,

Petitioner-Appellant,

v.

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

Respondent-Respondent.

Argued August 15, 2023 – Decided August 21, 2023

Before Judges Mawla and Marczyk.

On appeal from the Board of Trustees of the Public Employees' Retirement System, PERS No. xx4361.

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

Jonathan W. Allen, Deputy Attorney General, argued the cause for respondent (Matthew J. Platkin, Attorney General, attorney; Donna Arons, Assistant Attorney General, of counsel; Jonathan W. Allen, on the brief).

PER CURIAM

Petitioner Raymond Grace appeals from the May 19, 2022 final agency decision of the Board of Trustees (Board) of the Public Employees' Retirement System (PERS) denying his application for ordinary disability retirement benefits pursuant to N.J.S.A. 43:15A-42. We affirm.

I.

Grace was employed at the New Jersey Institute of Technology (NJIT) for approximately twenty years in building services. He served as an assistant manager and was responsible for supervising various custodial employees and conducting inspections of campus buildings. Grace applied for ordinary disability retirement benefits on January 28, 2018, citing disc herniations, left hip swelling, lower back pain, knee pain, ankle pain, and numbness in his toes. On September 19, 2018, the Board denied Grace's application, finding he was not totally and permanently disabled from the performance of his regular and assigned duties. Thereafter, he challenged that ruling and the matter was transmitted to the Office of Administrative Law (OAL) for a hearing.

An Administrative Law Judge (ALJ) heard testimony from Grace, Grace's orthopedic expert—Dr. David Weiss—and the Board's orthopedic expert—Dr. Arnold Berman. Grace testified that while assisting his workers during special

events when they were shorthanded, he would at times lift objects weighing ten to fifteen pounds. Grace conceded this was work he was tasked to supervise and outside of his assigned duties. He also stated he found it difficult to conduct daily inspections of the campus buildings, which required him to be on his feet most of his shift, because of lower back pain and swelling in his ankle. He further explained he had to consult with contractors and vendors and escort them to project sites throughout campus, which required extensive walking. Grace testified he asked for a position involving less walking, but NJIT could not provide a sedentary administrative job. He also testified he felt a shooting pain from his lower back into both of his legs and into his heels along with pain in his groin area preventing him from getting out of bed on certain days. He managed his pain by using Motrin, but it was inadequate to stop the pain or his ankle swelling.

Dr. Weiss opined Grace was totally and permanently disabled. He testified Grace's disability stemmed from reduced tolerance for standing and walking as a result of the chronic pain produced by the herniated discs, along with the strain and damage to his knees and ankles. He stated the most significant factors in his analysis were Grace's two herniated discs in his lumbar spine, degenerative disc disease, and a positive electromyography (EMG) study

for bilateral radiculopathy. Dr. Weiss utilized a Patient Outcome Measurement System that followed an American Medical Association (AMA) Guide to Impairment and Disability.¹ Dr. Weiss acknowledged the results of this test are self-reported, subjective indicators. He testified Grace could not stand or walk for eight hours a day because of his lower back condition. He further indicated Grace had to be able to use buffers, mopping buckets, climb ladders, and lift up to fifty pounds on occasion based on the United States Department of Labor's Dictionary of Occupational Titles. Dr. Weiss further testified he used the AMA guide for the position of custodian to evaluate the physical demands of Grace's position, which he characterized as a "medium/heavy job rate."

Dr. Berman performed an independent medical examination and determined Grace was not totally and permanently disabled from the performance of his job. He noted the job description for assistant manager of custodial services did not require any major physical activity except walking. He found Grace had full range of motion of his thoracic and lumbar spine and had no radiculopathy when he conducted a straight leg raising test. His evaluation further revealed Grace's discs at L4/5 and L5/S1 were clinically

¹ The Board maintains New Jersey has not adopted the AMA Guidelines Dr. Weiss relied on.

normal, and no pain was elicited when he performed a full squat and deep knee bend. Dr. Berman further determined Grace had no atrophy in his lower extremities consistent with normal usage, and he had full range of motion of his previously injured ankle. He diagnosed Grace with degenerative arthritis and bulging discs with no clinical correlation and no disability. In short, Dr. Berman could not find a clinical correlation between Grace's subjective complaints and the objective findings of the magnetic resonance imagery (MRI). He further concluded the abnormalities in the EMG findings would occur in a normal population with Grace's MRI findings, and they are innocuous given the lack of clinical correlation.

The ALJ issued an initial decision on April 8, 2022, affirming the Board's denial of Grace's application for ordinary disability retirement benefits. The ALJ found Dr. Weiss erroneously characterized Grace's job duties as that of a custodian. Notably, there was no indication in Grace's job description he was required to use buffers, mopping buckets, climb a ladder, or lift up to fifty pounds. Rather, he was responsible for supervising custodians on his team, and his job did not involve manual labor. The ALJ further noted Dr. Weiss could not assign a pain level to Grace's herniated discs as his pain level is purely subjective. Accordingly, she concluded Dr. Berman was more persuasive given

Dr. Weiss relied largely on self-reported pain assessments rather than objective clinical findings. The ALJ further determined while the two experts disagreed in their conclusion as to whether Grace was totally and permanently disabled, both agreed they were unable to correlate Grace's subjective complaints of pain to his orthopedic diagnoses. In short, the ALJ found Dr. Weiss's conclusions were "overborne by those offered by [Dr.] Berman" and she therefore, adopted Dr. Berman's opinions and concluded Grace was not permanently and totally disabled. On May 19, 2022, the Board issued its decision adopting the ALJ's initial decision and affirming the denial of Grace's application for ordinary disability retirement benefits.

II.

Grace raises the following point on appeal:

THE BOARD'S DECISION IS NOT BASED UPON SUFFICIENT CREDIBLE EVIDENCE AS [] GRACE SUSTAINED HIS BURDEN OF PROOF DEMONSTRATING HE IS PERMANENTLY AND TOTALLY DISABLED.

More particularly, Grace asserts Dr. Berman relied solely on his evaluation and disregarded objective medical evidence in the record because he could not elicit clinical correlation of Grace's complaints. Grace asserts the Board, in turn,

failed to rely on credible evidence in the record. We are unpersuaded by Grace's arguments.

Our review of decisions by administrative agencies is limited, with petitioners carrying a substantial burden of persuasion. In re Stallworth, 208 N.J. 182, 194 (2011). An agency's determination must 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)). "[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)).

While we are not bound by an agency's interpretation of legal issues, which we review de novo, Russo, 206 N.J. at 27, "[w]e must give great deference to an agency's interpretation and implementation of its rules enforcing the statutes for which it is responsible." Piatt v. Bd. of Trs., Police & Firemen's Ret. Sys., 443 N.J. Super. 80, 99 (App. Div. 2015) (quoting St. Peter's Univ. Hosp. v. Lacy, 185 N.J. 1, 13 (2005)). "Such deference has been specifically extended to state agencies that administer pension statutes." Ibid.

A member of PERS is entitled to ordinary disability retirement benefits when the member "is physically or mentally incapacitated for the performance of duty and should be retired." N.J.S.A. 43:15A-42. "The applicant for ordinary disability retirement benefits has the burden to prove that he or she has a disabling condition and must produce expert evidence to sustain this burden." Bueno v. Bd. of Trs., Teachers' Pension & Annuity Fund, 404 N.J. Super. 119, 126 (App. Div. 2008); see also Patterson v. Bd. of Trs., State Police Ret. Sys., 194 N.J. 29, 50-51 (2008). The applicant must also show the disabling condition is total and permanent. See Patterson, 194 N.J. at 43; Bueno, 404 N.J. Super. at 124. In addition, "[t]o qualify for disability retirement, a member must be unable to perform his or her regular and assigned duties due to a permanently disabling medical condition present at the time the member separates from service, as a result of which disabling condition the member should be retired." N.J.A.C. 17:2-6.1(g)(3).

The Board, in adopting the ALJ's decision, did not ignore the objective findings in Grace's medical records. Rather, the ALJ found Dr. Berman's testimony compelling that despite Grace's herniated discs, there was a lack of clinical correlation as evidenced by the negative orthopedic testing coupled with the absence of atrophy and signs of reflex, motor, and sensory deficits.

Moreover, Dr. Berman analyzed Grace's objective and clinical findings in the context of the job description for an assistant manager of custodial services, consistent with his actual job duties and responsibilities. The ALJ rejected Dr. Weiss's opinion, which utilized the more rigorous custodial job description in reaching his conclusions. Although Grace contends the medical evidence was "overwhelming[,]" the record reflects it was strongly disputed.

We discern no basis in the record on which to reject the Board's decision adopting the ALJ's determination Grace did not prove he is totally and permanently disabled from the performance of his regular and assigned duties. The ALJ based her determination primarily on her finding that Dr. Berman's opinion was more credible than Dr. Weiss's. The trier of fact determines an expert's credibility and the weight to be accorded to their testimony. Angel v. Rand Express Lines, Inc., 66 N.J. Super. 77, 85-86 (App. Div. 1961). "Deference to a trial court's fact-findings is especially appropriate when the evidence is largely testimonial and involves questions of credibility." In re Return of Weapons to J.W.D., 149 N.J. 108, 117 (1997). Since the tribunal "'hears the case, sees and observes the witnesses, [and] hears them testify,' it has a better perspective than a reviewing court in evaluating the veracity of witnesses." Pascale v. Pascale, 113 N.J. 20, 33 (1988) (alteration in original)

(quoting Gallo v. Gallo, 66 N.J. Super. 1, 5 (App. Div. 1961)). Grace failed to satisfy his burden in proving the Board's final decision was arbitrary, capricious, or unreasonable.

We have carefully reviewed the record in light of the relevant legal precedents and, in applying our highly deferential standard of review, we determine there was substantial credible evidence to support the Board's denial of Grace's application for ordinary disability retirement benefits. We have held, "although a person eligible for benefits is entitled to a liberal interpretation of a pension statute, 'eligibility [itself] is not to be liberally permitted.'" In re Adoption of N.J.A.C. 17:1-6.4, 454 N.J. Super. 386, 399 (App. Div. 2018) (quoting Smith v. Dep't of Treasury, Div. of Pensions & Benefits, 390 N.J. Super. 209, 213 (App. Div. 2007)). The Board's decision here falls well within the discretion accorded to it by statute when interpreting eligibility for ordinary disability retirement benefits.

To the extent we have not specifically addressed any of Grace's remaining arguments, we conclude 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