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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1037-22**

MARGARETE HYER,

Petitioner-Appellant,

v.

**TEACHERS' PENSION AND
ANNUITY FUND,**

Respondent-Respondent.

Submitted April 9, 2024 – Decided May 24, 2024

Before Judges Gooden Brown and Puglisi.

On appeal from the Board of Trustees of the Teachers' Pension and Annuity Fund, Department of the Treasury, Agency Docket No. TPAF xx1815.

Phillips Nizer LLP, attorneys for appellant (Scott B. Piekarsky, of counsel and on the brief; Ernest W. Schoellkopf, on the brief).

Matthew J. Platkin, Attorney General, attorney for respondent (Sara M. Gregory, Assistant Attorney General, of counsel; Jakai T. Jackson, Deputy Attorney General, on the brief).

PER CURIAM

Petitioner Margarete Hyer appeals from the October 17, 2022 final administrative decision of the Board of Trustees (Board) of the Teachers' Pension and Annuity Fund (TPAF) denying her application for ordinary disability retirement (ODR) benefits. We affirm.

I.

On November 6, 2019, petitioner filed for ODR benefits. At its meeting on November 12, 2020, the Board denied her application, finding she was not totally and permanently disabled from performing her regular or assigned job duties.

Petitioner appealed the decision, and the Board transferred the case to the Office of Administrative Law (OAL) for a hearing, which was conducted by Administrative Law Judge (ALJ) Elissa Mizzone-Testa. The following testimony was adduced at the hearing.

Petitioner was fifty-one years old and not working at the time of the hearing. From 1998 to 2019, she had been employed as a visual arts teacher at Benjamin Franklin Middle School (Franklin) in Ridgewood, where she taught in the basement art studio. Prior to working at Franklin, she regularly exercised, did not smoke, and had no significant prior illnesses.

As a visual arts teacher, petitioner taught different grade levels every hour. In addition to her regular teaching duties, petitioner had "custodial responsibilities" which required her to clean surfaces and art supplies.

Petitioner testified "[t]here was dust and filth everywhere" in the classroom, and water and raw sewage flooded in from the bathrooms and ceilings. She further stated the classroom had faulty ventilation, heat and humidity issues, chipped lead paint and asbestos, book mites, rodents, wasps and mold.

Petitioner's classroom duties also exposed her to clay dust, kiln glaze emissions, and fumes from glue guns, markers, paints and acrylics. She complained to the principal and vice principal "repeatedly." She began to feel the "effects from the conditions . . . [in] 1998 yet did not seek medical attention until 2008."

Jeffrey Kim, M.D., petitioner's pulmonologist, diagnosed her with pulmonary fibrosis, but he did not testify at the OAL hearing. Isadora Guggenheim, M.D., with whom petitioner began treating in July 2020, testified at the hearing as an expert in environmental medicine and as a primary care physician. Dr. Guggenheim noted petitioner had mold toxicity, history of Lyme disease, chronic fatigue syndrome, cognitive issues, multiple musculoskeletal

complaints, muscle spasms, pulmonary fibrosis, and chronic inflammatory response syndrome.

After further diagnostic testing, petitioner was also diagnosed with acute and chronic Epstein Barr virus, chronic active and acute Lyme disease, and chronic inflammation. She was treated with oral pharmaceutical grade supplements, suggested changes to her diet, intravenous ozone therapy and prozalone injections. Dr. Guggenheim was unable to confirm the severe occupational asthma diagnosis made by Arthur Mark Lubitz, M.D. and the pulmonary fibrosis diagnosis by Dr. Kim because she did not have the requisite training or equipment. However, Dr. Guggenheim testified petitioner's exposure to conditions at work caused her problems, and opined petitioner was permanently and totally disabled because she was not able to achieve functional remission.

Dr. Lubitz, with whom petitioner began treating in May 2019, testified at the hearing as an expert in the field of allergy and immunology. Petitioner saw Dr. Lubitz approximately seven or eight times for "shortness of breath[] . . . a chronic cough and inability to breathe." After testing petitioner, Dr. Lubitz diagnosed her with severe occupational asthma, which he described as asthma "related to chemicals or fumes . . . in the immediate vicinity of the work," which

caused continuous lung irritation. Dr. Lubitz was unable to confirm petitioner's diagnosis of pulmonary fibrosis and lung scarring but noted she had lung restriction obstruction on pulmonary function tests. Although Dr. Lubitz opined petitioner was permanently and totally disabled, he acknowledged there were medications for asthma and mold exposure that may have alleviated petitioner's symptoms and therefore allowed her to resume working. However, he was unable to attempt these other methods of treatment because petitioner stopped seeing him a year prior to the hearing.

Samuel D. Kahnowitz, M.D. testified on behalf of the Board as an expert in pulmonary disease. He conducted an independent medical examination (IME) of petitioner, which lasted approximately fifteen to twenty minutes. After reviewing petitioner's prior diagnostic testing and medical records, Dr. Kahnowitz was not able to conclude that she was totally and permanently disabled because "[n]o specific data [was] present to sustain a diagnosis of disabling lung disease." Dr. Kahnowitz acknowledged petitioner "may have experienced episodes of . . . discomfort during her work as an art teacher in th[o]se environmental circumstances," but because he could not confirm a diagnosis of intrinsic pulmonary disease from her medical history or his

examination of her, he could not conclude she suffered from a full or partial permanent respiratory disability.

Dr. Kahnowitz could not substantiate the prior diagnosis of asthma because petitioner's symptoms commenced with muscle aches, not shortness of breath and chest pain, which would be consistent with asthma. He also noted that, although petitioner's first pulmonary function test showed decreased flow rates, subsequent testing revealed a dramatic increase in lung volume. He opined this test pattern ruled out an asthma diagnosis and was more consistent with emphysema. Dr. Kahnowitz further disputed petitioner had asthma because the pulmonary tests performed on petitioner were inadequate to confirm the diagnosis.

Dr. Kahnowitz also reviewed a computed tomography (CT) scan that showed one of petitioner's lungs had granulomas, which would not be present in pulmonary fibrosis. He opined the granulomas were more likely the result of an infection and noted petitioner had pneumonia prior to the scan. He also disagreed with the use of blood tests to confirm petitioner's lung condition, because the tests were not intended to be used for that purpose.

The ALJ issued her initial decision on October 17, 2022. She found petitioner to be "a forthright and credible witness." She further found Dr.

Lubitz's and Dr. Guggenheim's conclusions and reasoning were "overborne" by Dr. Kahnowitz's testimony:

Most of [Dr.] Kahnowitz's conclusions and opinions were based on attempting to discredit the testing and findings of [Dr.] Lubitz and [Dr.] Guggenheim; simply by reviewing their medical records and reports. He himself met with [petitioner] once for approximately [ten to fifteen] minutes and did not conduct any of his own objective tests to determine her diagnosis. Nor did he view the actual film of the [CT] scan. [Dr.] Kahnowitz only reviewed the [CT] scan report. In addition, [Dr.] Kahnowitz testified that he was unable to draw a conclusion as to [petitioner]'s medical conditions. He explained that he would have liked to have had more medical information and data in order to draw a conclusion.

However, the ALJ accepted the opinions of Dr. Kahnowitz as more credible:

Neither [Dr.] Lubitz or [Dr.] Guggenheim were able to give expert testimony in the field of pulmonology which [went] to the heart of [petitioner]'s medical conditions, i.e., her lungs and air flow. They merely rel[ied] on the medical records of Dr. Kim, a [p]ulmonologist, who did not testify at the hearing. [Dr.] Kahnowitz was admitted as an expert in the field of [p]ulmonology and gave testimony as to same.

Because the ALJ found Dr. Kahnowitz "presented a more persuasive argument," she gave his testimony greater weight and adopted and accepted his opinions as fact. Accordingly, the ALJ found petitioner failed to establish by

preponderance of the credible evidence that she was permanently and totally disabled from the performance of her duty as a teacher.

After considering the parties' exceptions and responses, the Board issued its final decision on December 2, 2022, adopting the ALJ's findings of fact and her determination that petitioner was not entitled to ODR benefits.

This appeal followed.

II.

A member of TPAF is entitled to ODR benefits when the member "is physically or mentally incapacitated for the performance of duty and should be retired." N.J.S.A. 18A:66-39(b). "The applicant for [ODR] 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).

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, "we 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.

On appeal, petitioner argues:


TPAF'S FINAL ADMINISTRATIVE
DETERMINATION DENYING [ODR] IS
UNREASONABLE AND UNSUPPORTED BY
SUBSTANTIAL CREDIBLE EVIDENCE IN THE
RECORD AND SHOULD BE REVERSED.

We disagree. The ALJ's decision turned on her finding that the Board's expert was more credible than petitioner's experts and his opinion was thus entitled to greater weight. This credibility determination was grounded in the

fact that Dr. Kahnowitz testified as an expert in pulmonology, which was the specialty directly related to petitioner's claim for ODR benefits, compared to petitioner's doctors, who were experts in other related areas. Because the ALJ's findings were sufficiently tethered to the record, the Board's adoption of her decision was not arbitrary, capricious or unreasonable.

Affirmed.

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



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