



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PENSIONS AND BENEFITS
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November 16, 2023

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Lt. Governor

Sent via email to: [REDACTED]

LAW OFFICES OF KENNETH A. WALLACH, L.L.C.
Kenneth A. Wallach, Esq.

[REDACTED]

RE: C [REDACTED] P [REDACTED]
PERS 2- [REDACTED]
OAL DKT. NO. TYP 01021-14

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Dear Mr. Wallach:

At its meeting of September 20, 2023, the Board of Trustees (Board) of the Public Employees' Retirement System (PERS) considered the July 11, 2023 Initial Decision (ID) of the Honorable Margaret M. Monaco, ALJ, with its exhibits; your August 23, 2023 exceptions;¹ exceptions by Deputy Attorney General (DAG) Payal Y. Ved, dated August 25, 2023; your reply to DAG Ved's exceptions, and her reply to your exceptions, both dated September 12, 2023; and statements made at the meeting by you, your client, C [REDACTED] F [REDACTED], and DAG Ved regarding Ms. P [REDACTED] appeal of the Board's denial of her application for Accidental Disability retirement benefits ("AD"). After careful consideration, the Board **modified** the ID.² The Board adopted the ALJ's finding that Ms. P [REDACTED] is disabled (reversing the Board's previous determination) as well as her finding that Ms. P [REDACTED] did not show that her disability is the direct result of a traumatic

¹ The exceptions and replies were timely submitted under granted extensions.

² Additionally, the Board corrected a typographical error indicating that Ms. P [REDACTED] transferred to Kellogg Building on August 22, 2022. ID at 26. She in fact transferred there on August 22, 2011. 2T70:7-13.

event. It adopted the ALJ's determination that a claim of ongoing exposure between July and November 2011 does not describe an event that is identifiable to time and place, but the purported emissions of July 1, 2011 "technically specify an incident that is identifiable as to time and place." ID at 68. The Board found that Ms. P [REDACTED] did not show she was disabled by an identifiable as to time and place or undesigned and unexpected event occurring on that date, and that she did not show that she was disabled due to a traumatic event that occurred during and as a result of her performance of duty. Thus, Ms. P [REDACTED] is not eligible for AD. Further, although she is disabled, Ms. P [REDACTED] is not eligible for Ordinary Disability retirement benefits ("OD"), because she does not have the minimum ten years of service credit required for OD. The Board directed the undersigned to draft Findings of Fact and Conclusions of Law consistent with its determination. Findings of Fact and Conclusions of Law were presented to and approved by the Board at its November 15, 2023 meeting.³

By way of background, at its meeting on November 6, 2013, the Board determined that Ms. P [REDACTED] was not totally and permanently disabled from the performance of her regular and assigned duties. The Board also determined that several purported exposures in July, August and November, 2011 cited as causes of Ms. P [REDACTED] purported disability were not discrete incidents identifiable as to time and place; that they were not undesigned and unexpected; and that there was no showing that a total and permanent disability directly resulted from any or all of them. The Board did not find that any traumatic events occurred during and as a result of Ms. P [REDACTED] performance of her regular or assigned duties. Based on Ms. P [REDACTED] age and limited years of service credit, the Board determined that she did not qualify for any benefit other than the return of her accumulated pension contributions. On or about December 18, 2013, you

³ The Board requested and was granted extensions of time to issue its final administrative determination.

filed a timely appeal, and the matter was transmitted to the Office of Administrative Law (OAL) as a contested case. While the OAL matter was pending, at its meeting of April 19, 2017, the Board reconsidered the matter and affirmed its previous decision. The matter was the subject of nine days of OAL hearings in 2017 and 2018. The record closed on June 26, 2023.

FINDINGS OF FACT

The Board adopted the findings of fact as set forth by the ALJ in the Initial Decision, while correcting the ALJ's finding that Ms. P [REDACTED] transferred to Kellogg Building on August 22, 2022. ID at 26. Ms. P [REDACTED] transferred to Kellogg Building on August 22, 2011. 2T70:7-13. The facts, with the addition of this modification, are recounted here for convenience.:

In the summer of 2011, Ms. P [REDACTED], an employee of Union County since October 14, 2004, worked as a Clerk 2 for the Office of the Director of the Department of Human Services on the second floor of the County's Administration Building (Admin Building). Her job duties included processing contracts and delivering contracts and/or other paperwork to departments on various floors of the Admin Building for signatures and required approvals. On July 1, 2011, several employees on the fourth floor reported smelling a strong sweet odor and experiencing headaches, scratchy throats, coughing and eye irritation. Ms. P [REDACTED] also felt symptoms when she was on the fourth floor that day, and she then returned to her work station on the second floor. The fourth floor was evacuated. Investigation revealed neither the source of the odor nor any hazards. The employees in the building were released at 3:00 p.m. due to the holiday weekend. Ms. P [REDACTED] had the week of July 4 off.

A similar odor was detected on the fourth floor on July 5, with some employees complaining of symptoms including burning eyes, stuffy sinuses, sneezing and dizziness. Again, no source was discovered and the Elizabeth Fire Department found no toxins and no need to keep employees away from their work stations. The odor returned to the fourth floor on July 7

and 8, leading to the relocation of employees to the second floor. Ms. P [REDACTED] returned to work on the second floor on July 11. Reports of a sweet smell and complaints by employees of symptoms continued to occur during July and August 2011.

On August 11, 2011, Ms. P [REDACTED] e-mailed her supervisors that “by the time [she] left here yesterday [she] wasn’t feeling well”; her “eyes were/are burning, metal taste in mouth, tightness in chest, bad headache, upset stomach, very tired”; she was seen at Multi-Care, the county’s workers-compensation carrier, which attributed her symptoms to “fume exposure.” This was the first time Ms. P [REDACTED] had sought medical treatment for her symptoms.

Ms. P [REDACTED] was transferred to a the Kellogg Building on August 22, 2011 while the Admin Building continued to be tested, but was reassigned to the Admin Building on August 29 when her new building was closed due to damage from Hurricane Irene. However, after less than a day, she was returned to the Kellogg Building and worked there until December 2, 2011. She did not experience symptoms in the Kellogg Building.

She was then transferred to the Social Services Building, where she had “severe reactions” because it was “filthy, dusty, [had] water stains, ceiling stains, [and was] just a dirty building.” In July 2012, she had an incident involving another employee that eventually led to a one-week suspension, to which she agreed so that she could pursue the filing of a disability application, which she filed in May 2013 (her last day at work was August 1, 2012).

Ms. P [REDACTED] continued to experience symptoms after she left work, including three incidents of severe distress brought on by odors she encountered both indoors and out.

Testimony was taken in the OAL on October 11, 17 and 18, 2017; November 1 and 9, 2017; December 4, 2017; March 15, 2018; and May 22 and 24, 2018.

CONCLUSIONS OF LAW

The Board adopted the ALJ's conclusions of law, that Ms. P [REDACTED] is totally and permanently disabled from her duties, that while there technically is an identifiable incident on July 1, 2011, she failed to prove that the incident that caused her disability is identifiable as to time and place and does not qualify as a traumatic event, and that Ms. P [REDACTED] did not establish that the incident of July 1, 2011, directly resulted in the disability. Therefore, Ms. P [REDACTED] is not eligible for AD. However, the Board voted to modify the decision to clarify and expand on the ALJ's determination that Ms. P [REDACTED] did not meet the traumatic event standard and all of the requirements of Richardson v. Board of Trustees, Police & Firemen's Retirement System, 192 N.J. 189 (2007) . The Board makes the following conclusions of law.

Under N.J.S.A. 43:15A-43, PERS members are eligible for AD when they are "permanently and totally disabled as a direct result of a traumatic event occurring during and as a result of the performance of [their] regular or assigned duties." Ibid. In Richardson, the Supreme Court set forth a five-prong test that must be satisfied by an applicant for AD:

1. that he 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.

The applicant bears the burden of proof on each of these prongs. Id. at 212-3.

Here, the ALJ carefully and exhaustively weighed the expert testimony as to disability and causation, and clearly and persuasively explained her determination that Ms. P [REDACTED] carried her burden of demonstrating by a preponderance of the evidence that she is disabled from working in an office environment (not only at the Administration Building) due to her documented medical conditions. The ALJ was equally clear and persuasive in explaining her determination that the Board's expert witness established the probability that her disabling symptoms are not the direct result of anything that may have happened at the Administration Building on July 1, 2011 or thereafter. ID at 69. Ms. P [REDACTED] did not seek treatment for symptoms she attributes to one or more undetermined toxins allegedly released on July 1, 2011 until a full month later. Blood tests for a possible reaction to mold indicate, as Dr. Kashani explained, a reaction to mold that occurred significantly later than July 2011. Testing of the Administration Building at the time in question does not establish the existence of mold or other toxins.

The ALJ found that Ms. P [REDACTED] did not prove that the purported ongoing exposure between July and November 2011 were events identifiable to time and place, but she found that the purported exposure on July 1, 2011 was identifiable. However, "the evidence falls woefully short of establishing [Ms. P [REDACTED]] assertion that she was exposed to some type of toxin or contaminant on that day that directly resulted in her disability." ID at 68. The ALJ noted Ms. P [REDACTED] admission that she did not smell the reported odor on July 1 or report symptoms or seek treatment until August 11, 2011, and observed that the "record as a whole further casts substantial doubt on the accuracy and reliability of Ms. P [REDACTED] reports to her doctors, such as he description of the events and the asserted mold in the workplace." Ibid.

While the Board agrees with the ALJ, that there was an incident on July 1, 2011, in terms of a traumatic event that happened to Ms. P [REDACTED], the Board notes that Ms. P [REDACTED] did not seek treatment on July 1, 2011, and none of her experts could determine what may have been released into the air on that day. ID at 63-68. As such, the Board concludes that there is no identifiable as to time and place incident related to Ms. P [REDACTED] disability.

Additionally, and for clarity and completeness, the Board concludes that based on the facts as found by the ALJ, as modified by the Board, there is no undesigned and unexpected incident that occurred to Ms. P [REDACTED] on July 1, 2011. Ms. P [REDACTED] did not seek treatment on July 1, 2011, and none of her experts could determine what may have been released into the air on that day. ID at 63-68. Neither Ms. P [REDACTED] nor her experts were able, in fact, to establish that she was exposed to any type of toxin or contaminant at work on July 1, 2011, and so did not establish that any “unanticipated mishap” occurred. See Richardson, 192 N.J. at 212-13. Further, Dr. Kashani explained that a physical appearance of mold does not necessarily mean an exposure. ID at 50-51. Aspergillus is ubiquitous in nature, we are exposed to mold every day, and the molds that Ms. P [REDACTED] tested positive for in 2018 were common allergens, in her home and in the environment. ID at 49-53. Thus, even if there were mold present in the office on July 1, 2011, its mere presence would not constitute an unexpected external mishap. The burden was on Ms. P [REDACTED] to prove that an undesigned and unexpected incident occurred. All that was proved was that there was a strong, sweet odor; investigation revealed neither the source of the odor nor any hazards. Therefore, Ms. P [REDACTED] has not established that exposure to any toxin, let alone mold, occurred in the Administration Building on July 1, 2011, and without proof as to what occurred, there can be no undesigned and unexpected incident.

The Board also concludes that there is no evidence that a traumatic event occurred during and as a result of the performance of Ms. P [REDACTED] regular or assigned duties. As discussed

above, there is no objective evidence that Ms. P [REDACTED] was exposed to any toxin or mold on July 1, 2011. If Ms. P [REDACTED] was exposed to mold at some time, the evidence does not show that the exposure occurred at work or in July 2011. The accepted evidence in the record establishes that the mold levels in the Administration Building were “normal” and that an indoor air quality (“IAQ”) event did not occur in the Administration Building on July 1, 2011. P-19; P-29. The environmental testing could not correlate the reported odor with elevated levels of mold or other potentially dangerous substances. P-19; P-29, ID at 50-53.

Further, Dr. Kashani testified that mold is “common” and noted that Ms. P [REDACTED] blood reports indicated a mold exposure after she stopped working at the Administration Building. ID at 49-53. Dr. Kashani reviewed Ms. P [REDACTED] blood work from September 13, 2011 and February 28, 2018. The 2011 blood work showed that her Aspergillus Fumigatus (“AF”) immunoglobulin level was within normal limit[s] – therefore, she had no recent exposure to AF. ID at 49-51. The 2018 blood work showed that Ms. P [REDACTED] AF immunoglobulin level was no longer within normal limits and since immunoglobulin levels do not increase in the absence of exposure, the results showed Ms. P [REDACTED] was exposed to AF sometime after September 13, 2011 and before February 28, 2018. ID at 49-51. Because Ms. P [REDACTED] bloodwork was negative for AF antibodies in September 2011, when she was removed from the Administration Building and working in the Kellogg building, she did not prove that she was exposed to mold during and as a result of the performance of her regular or assigned duties on July 1, 2011.

The Board thus corrects the ALJ’s Findings of Fact and amplifies the Conclusions of Law, as set forth above, to conclude that there was no identifiable as to time and place or undesigned and unexpected incident as to Ms. P [REDACTED], and any alleged exposure to mold did not occur as a result of her regular or assigned duties. The Board adopts the ALJ’s other conclusions of law,

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including the ALJ's ultimate conclusion, that Ms. P [REDACTED] is not eligible for an Accidental Disability retirement benefit.

This correspondence shall constitute the Final Administrative Determination of the Board of Trustees of the Public Employees' Retirement System.

You have the right to appeal this final administrative action to the Superior Court of New Jersey, Appellate Division, within 45 days of the date of this letter in accordance with the Rules Governing the Courts of the State of New Jersey. All appeals should be directed to:

Superior Court of New Jersey
Appellate Division
Attn: Court Clerk
PO Box 006
Trenton, NJ 08625

Sincerely,



William Tedder, Acting Secretary
Board of Trustees
Public Employees' Retirement System

G-5

C: D. Lewis (ET); A. McCormick (ET); C. Law (ET)
OAL, Attn: Library (ET)
DAG Payal Y. Ved (ET)
C [REDACTED] P [REDACTED] (via regular mail)