



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PENSIONS AND BENEFITS
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Governor

SHEILA Y. OLIVER
Lt. Governor

April 22, 2021

Sent via email to: [REDACTED]

CRIVELLI & BARBATI, LLC
Donald C. Barbati, Esq.

[REDACTED]

RE: Donna Blakemore
PERS [REDACTED]
OAL DKT. NO. TYP 14218-13

Dear Mr. Barbati:

At its meeting on March 17, 2021,¹ the Board of Trustees (Board) of the Public Employees' Retirement System (PERS) considered Initial Decision of Administrative Law Judge (ALJ) Elia A. Pelios, dated February 9, 2021, the Exceptions filed by Deputy Attorney General (DAG) Jakai T. Jackson, dated March 5, 2021 and your Reply to Exceptions dated March 10, 2021 in regard to the appeal of your client, Donna Blakemore. The Board noted the exceptions and the reply to exceptions. Thereafter, the Board rejected the ALJ's decision recommending Ordinary Disability retirement benefits. The Board directed the Secretary to draft findings of fact and conclusions of law consistent with its determination, which were presented to and approved by the Board at its meeting of April 21, 2021.²

FACTUAL FINDINGS

The Board made the following findings of fact.

¹ Due to health and safety concerns for the public regarding COVID-19, the meeting was conducted via teleconference.

² The Board requested and was granted an extension of time to issue its final administrative determination.

The Board noted that Ms. Blakemore originally filed her application for Accidental Disability retirement benefits, which Ms. Blakemore subsequently amended to one for Ordinary Disability (OD) retirement benefits. See J-5; ID at 2. While in the ID the ALJ summarized the hearing testimony of Ms. Blakemore, Ms. Blakemore's expert, Dr. David Weiss ("Weiss"), and the Board's expert, Dr. Jeffrey Lakin ("Lakin"), see ID at 3-10, the Board noted that the ALJ made no specific findings of fact as to what specific ailments Ms. Blakemore alleged were her [REDACTED] at the time of her application. The Board therefore makes the following additional findings of fact.

On Ms. Blakemore's October 9, 2012 application, she stated [REDACTED] during the May and [REDACTED] and had no further detail; it did not list [REDACTED]. J-5. In addition, the Board found that the "Workers Compensation First Report of Injury or Illness" form, which was completed the day after the [REDACTED], indicates that Ms. [REDACTED]. J-9 at 1. The "Employee And/Or Damage To /District Owned Property" form, which was completed and signed by Ms. Blakemore on the day after the May incident, does not describe any [REDACTED]. J-9 at 3.

The Board next noted that the "Employee Report" form, which Ms. Blakemore completed and signed [REDACTED] does not describe [REDACTED]. In addition, the undated "Supervisor's Report" form lists the nature of Ms. Blakemore's [REDACTED]. J-9 at 5. The "Workers Compensation First Report Of Injury Or Illness Form," which was completed the day after the December incident, indicates that Ms. Blakemore's [REDACTED]. J-9 at 6. The "Employee And/Or Damage To District Owned Property" form, which was completed and signed by Ms. Blakemore on the day after the incident, does not describe [REDACTED].

[REDACTED]. J-9 at 7.

With respect to the medical evidence presented at the hearing, the Board noted Ms. Blakemore's [REDACTED] was normal. ID at 5. Dr. Weiss also opined that Ms. Blakemore's [REDACTED] is not the reason that [she] cannot do the job." Ibid. Dr. Weiss also opined that the [REDACTED] was a major part of" Ms. Blakemore's disability. Ibid.

CONCLUSIONS OF LAW

The Board rejected the ALJ's legal conclusion that Ms. Blakemore is eligible for OD retirement benefits. The Board first noted that a member is eligible for OD retirement benefits if she can establish that she is permanently and totally disabled from performing their regular or assigned duties. N.J.S.A. 43:15A-42. Pursuant to N.J.A.C. 17:1-7.10(h), OD applications are "processed on the basis of the medical conditions described on the . . . application submitted." Moreover, N.J.A.C. 17:1-7.10(h) and (i) mandate that a member filing for disability retirement benefits is not permitted to file a separate application for any other type of retirement, including one based on any other allegedly-disabling condition, while the original disability retirement application remains pending in the Office of Administrative Law (the "OAL"). Ibid.; see also Luker v. Pub. Employees' Ret. Sys., OAL Dkt. No. TYP 13674-15, 2016 N.J. AGEN LEXIS 830, at *16 (Initial Decision Oct. 4, 2016) (disability retirement applicant not entitled to "add a new . . . medical condition that was not mentioned in her application that is currently before the OAL"), adopted, (Final Decision Nov. 15, 2016). Rather than adding a new medical condition to an already existing AD application, a member must file a separate application subsequent to the withdrawal of a member's previous application. Ibid. Moreover, pursuant to N.J.A.C. 17:2-6.1(f), "the medical condition described on the member's retirement application must correspond to the medical reports submitted in support of the member's disability retirement application." Ibid.

In this case, the Board noted that Ms. Blakemore failed to identify her [REDACTED] on the application for a disability retirement. J-5. Specifically, the application identified her [REDACTED]; thus, the Board was left to use the other documentation submitted by Ms. Blakemore to decipher what exactly were the allegedly [REDACTED]. Neither the “Workers Compensation First Report” form, the “Employee And/Or Damage to District Owned” form, nor the Employee Report, which were all submitted soon after the May and December incidents, [REDACTED].

Additionally, the Board’s expert, Dr. Lakin, testified that Ms. Blakemore only informed him of [REDACTED] and failed to mention [REDACTED] 3T37:7-19, 3T54:3-7; 3T56:8-12; 3T42:8-43:11. This was corroborated by Ms. Blakemore’s testimony as she testified that she did not tell Dr. Lakin [REDACTED]. 4T15:15-17. Specifically, Ms. Blakemore testified, “the appointment was made for me so, I assume[d] he knew. He didn’t ask me anything; I didn’t tell him anything.” Ibid. Ms. Blakemore clearly failed, even when face to face with the Board’s expert, to identify [REDACTED] [REDACTED] as potential disabling [REDACTED]. Due to Ms. Blakemore’s failure to identify [REDACTED] Dr. Lakin, the Medical Review Board (the “MRB”), and the Board had no reason to consider [REDACTED] in their review of her application. This is particularly important because [REDACTED]. The “Employee And/Or Damage To District Owned Property Form,” which was completed by Ms. Blakemore for the December incident, does not identify [REDACTED]. Put simply, the Board cannot grant an OD retirement benefit on the basis alleged [REDACTED] which she did not openly disclose and which were not considered by the Board.

The Board finds its consideration of the ID is governed by N.J.A.C. 17:1-7.10(h) and (i) in that neither Ms. Blakemore nor ALJ are not permitted to modify the basis for her application to include

conditions that were not considered by the Board. Granting an OD retirement benefit upon such a basis undermines the Board's authority to decide a disability retirement application in the first place, as the member could indefinitely pivot from one disability claim to another in the OAL. Moreover, for the ALJ to base a disability finding on claims that were not considered by the MRB, the Board's expert, or the Board usurps authority away from the Board and provides an avenue to circumvent the statutory criteria the Board must apply to grant a disability benefit to weigh the testimony of the petitioner's expert more heavily than that of the Board's expert. In order to prevail, a disability claimant would only need to:

- 1) fail to fully identify the potential disabling ailments on the application and to the Board's expert;
- 2) disclose the previously undisclosed ailments only to the petitioner's testifying expert; and
- 3) claim that the Board's expert is less reliable than the petitioner's expert because he failed to evaluate ailments that were not identified on the application for disability or disclosed to him during his examination.

Had Ms. Blakemore wanted the Board to consider alleged injuries [REDACTED] she should have submitted a new application based on the different or additional medical conditions as described in N.J.A.C. 17:1-7.10(i). Instead, she simply withheld this information from the Board and the Board's expert and used that omission as a trial strategy.

This is particularly important here, because the ALJ granted an OD based on these claims which were never alleged to the Board. In fact, Dr. Lakin did not discuss [REDACTED] as they were not part of Ms. Blakemore's initial application or complained of [REDACTED]. The ALJ determined that Dr. Weiss's testimony about Ms. Blakemore's [REDACTED] was unrebutted as Dr. Larkin did not "take into account [REDACTED] [Ms. Blakemore]" and [REDACTED]. ID at 12. For these reasons, the ALJ gave more weight to Dr. Weiss's testimony. However, by making such findings, the ALJ expanded the scope of the hearing from [REDACTED] which were the only ones attributable to

the [REDACTED]) to include injuries that were not evaluated by the Board, such as [REDACTED]. Thus, the failure to disclose these other alleged conditions provided the basis for the ALJ's decision.

The Board finds that the ALJ impermissibly expanded the scope of this case beyond those [REDACTED] that Ms. Blakemore included on her application - [REDACTED]. By doing so, and by giving more weight to Dr. Weiss's testimony, the ALJ effectively penalized Dr. Lakin for doing the task he was assigned to do - evaluating Ms. Blakemore for disability based on those [REDACTED] that she disclosed to the Board. More importantly, the ALJ's decision undercuts the Board's authority to determine disability based on what was disclosed on Ms. Blakemore's application. Finally, the ALJ's actions are contrary to N.J.A.C. 17:1-7.10(h), which requires any appeal to be "based on the medical conditions described on the original application."

Ibid.

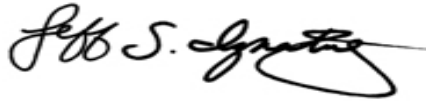
For these reasons, the Board rejected the ALJ's legal conclusion that Ms. Blakemore is eligible for OD retirement benefits. This correspondence shall constitute the Final Administrative Determination of the Board of Trustees of the Public Employees' Retirement System.

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

CRIVELLI & BARBATI, LLC
Donald C. Barbati, Esq.
Re: Donna Blakemore
April 22, 2021
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Sincerely,

A handwritten signature in black ink, appearing to read "Jeff S. Ignatowitz". The signature is fluid and cursive, with a large loop at the end.

Jeff Ignatowitz, Secretary
Board of Trustees
Public Employees' Retirement System

G-10/JSI

C: D. Lewis (ET); A. Ginsburg (ET); G. Sasileo (ET); K. Ozol (ET); L. Hart (ET); P. Sarti
DAG Jakai Jackson (ET)
OAL, Attn: Library (ET)
Donna Blakemore (sent via email to: [REDACTED])