



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PENSIONS AND BENEFITS
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October 25, 2022

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Sent via email to: [REDACTED]

SPRINGSTEAD & MAURICE
Lauren E. McGovern, Esq.

[REDACTED]

RE: Jeanna Mack
PERS [REDACTED]
OAL DKT. NO. TYP [REDACTED]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Dear Ms. McGovern:

At its meeting of September 21, 2022, the Board of Trustees (Board) of the Public Employees' Retirement System (PERS) considered the Initial Decision (ID) of the Honorable Andrew M. Baron, dated August 19, 2022, the exceptions filed by Deputy Attorney General (DAG) Payal Ved, dated August 29, 2022, and your reply to exceptions, dated September 12, 2022, as well as your personal statements and those of DAG Ved in regard to the appeal of your client, Jeanna Mack. Thereafter, the Board voted to reject the ALJ's decision recommending Ordinary Disability retirement benefits ("OD"), thereby reaffirming its original denial. The Board directed the Secretary 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 October 25, 2022, meeting.¹

¹ Due to a scheduling conflict, this matter was moved from the agenda of the PERS Board's regularly scheduled meeting of October 19, 2022 to the agenda of a special meeting on October 24, 2022. Both meetings were conducted via teleconference. The Board was granted an extension of time to issue its final administrative determination.

FACTUAL FINDINGS

The Board voted to adopt the ALJ's factual findings, but voted to make the following additional findings of fact.

The Board's expert, Dr. John M. Boozan, M.D. ("Dr. Boozan") is Board-certified in [REDACTED] by the [REDACTED]. T152:21-22; R-1. Dr. Boozan graduated from Princeton University and Cincinnati College of Medicine. T152:18-19; R-1. Dr. Boozan did a three-year residency at the [REDACTED] [REDACTED] T152:19-20; R-1. Dr. Boozan is a [REDACTED] [REDACTED] [REDACTED] T153:17-20; T156:4-13.

As part of his daily practice, Dr. Boozan treats [REDACTED] [REDACTED] T155:10-156:1. [REDACTED] complete four years of medical school, three years of residency, and perform surgery. T159:6-12. [REDACTED] go to [REDACTED] school for four years, cannot perform surgeries, and mostly perform routine [REDACTED] [REDACTED]. T159:18-21. [REDACTED] lack the expertise in diagnosing [REDACTED] [REDACTED] and cannot offer surgical treatment. T159:22-24.

Testifying on behalf of Ms. Mack, Dr. William Goldsmith, O.D. ("Dr. Goldsmith), an [REDACTED] [REDACTED] do not go to medical school. T28:8-10. Dr. Goldsmith has not performed any corrective procedures or surgeries [REDACTED]. T28:24-29:3. Also testifying on behalf of Ms. Mack Dr. Steven Sorkin, O.D. (Dr. Sorkin) [REDACTED], who also did not go to medical school. T97:3-4. Dr. Sorkin has not performed any corrective procedures or surgeries [REDACTED] [REDACTED]. T98:7-10.

Dr. Boozan performed an [REDACTED] on Ms. Mack where he found that she has [REDACTED]

[REDACTED]. T165:21-23; T166:1-2. [REDACTED], Mack had less [REDACTED] but a little bit more [REDACTED] with better [REDACTED]. T165:23-25; R-2. [REDACTED], Mack had [REDACTED] [REDACTED] R-2. Dr. Boozan indicated that the [REDACTED] result for [REDACTED] does not make sense in light of the [REDACTED] T190:12-17. [REDACTED] [REDACTED]. T210:20-23. Dr. Boozan explained that when testing [REDACTED] at the same time in [REDACTED] patients, [REDACTED] should always be better because [REDACTED] [REDACTED]. T209:11-211:2.

Dr. Boozan also explained that the results of [REDACTED] testing did not make sense in terms of the rate of [REDACTED] because in his experience of treating [REDACTED] patients, [REDACTED] does not decompensate this quickly in patients who have had the [REDACTED] long term. T167-13-19; R-3. He also pointed out the inconsistent [REDACTED] readings between her treating physicians. T197:8-198:21. For example, on August 5, 2019, Dr. Theodore Perl, M.D. ("Dr. Perl"), [REDACTED] determined her [REDACTED] to be [REDACTED] and [REDACTED]. The next day, on August 6, 2019, Dr. Sorkin determined her [REDACTED] to be [REDACTED] and [REDACTED]. Dr. Boozan's testing did not reveal [REDACTED], all of which would be signs of a [REDACTED] T166:10-16. Dr. Boozan's findings were consistent with Dr. Shyam Patel, M.D.'s ("Dr. Patel"), [REDACTED] findings on August 26, 2021, which found [REDACTED] or any worsening of pre-existing [REDACTED]. T182:1-183:13; J-28.

The Board rejected the ALJ's finding that Ms. Mack's "entire testimony was credible." ID at 5. Pursuant to N.J.S.A. 52:14B-10(C):

The agency head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record. In rejecting or modifying any findings of fact, the agency head shall state with particularity the reasons for rejecting the findings and shall make new or modified findings supported by sufficient, competent, and credible evidence in the record.

[ibid. (emphasis added)]

Here, the ALJ's determination that Ms. Mack's testimony was credible is not "supported by sufficient, competent, and credible evidence in the record." ibid. Ms. Mack's testimony about her condition, her symptoms, her job description, the disability application process, and examination by Dr. Boozan was not credible or consistent. Ms. Mack has had [REDACTED] for approximately 20 years. She describes her [REDACTED], which causes her trouble performing her daily living activities. T271:20-273:3. When describing what she [REDACTED] during the hearing, Ms. Mack stated that she could [REDACTED]. T254:18-21; T274:15-17. At the same time, Ms. Mack stated that she was unable to [REDACTED] because [REDACTED]. T256:16-258:5. Ms. Mack inconsistently described [REDACTED].

Further, Ms. Mack was not able to identify or approximate when the symptoms she considers disabling, such as [REDACTED], actually began. T289:20-290:12. She was not even able to estimate whether or not it was ten years since her symptoms began. ibid. In the same way, Ms. Mack was not able to identify or approximate when she began having trouble performing her job duties. ibid.

Ms. Mack was also inconsistent about why she refused to do [REDACTED] with Dr. Sorkin. Dr. Sorkin testified that Ms. Mack did not want to do [REDACTED] as recommended by Dr. Perl because she had tried them before and did not like them. T127:3-7. Ms. Mack stated

that she had tried ██████████ in the past but had a tough time ██████████
██████████ T275:13-276:18. Records indicate that she tried ██████████. J-9. As
Dr. Sorkin explained, advancements have been made along with newer designs, however,
despite these advancements, Ms. Mack refused to even try ██████████ T108:20-24.

Subsequently, Ms. Mack testified that she actually did want to do ██████████ with
Dr. Sorkin, but could not afford it because of the cost. T295:22-296:9. Again, this testimony is
not supported by her treating physicians' reports, as Dr. Sorkin did not mention anything about
cost and his report refers to her refusal due to her prior bad experience ██████████ J-
10. Even Dr. Patel, who is an ██████████ in Dr. Sorkin's practice, noted in his August 26,
2021 report that Ms. Mack does not want to use ██████████ because she has used them
before. J-28.

When asked about ██████████ again, Ms. Mack said she was too afraid to try them ██████████
██████████ because ██████████. T320:10-21. As Dr. Boozan explained, ██████████
are a good option to explore for patients with ██████████ because they are removable and have
far fewer complications compared to other invasive procedures. T174:23-175:15. Ms. Mack
refused to try a viable option recommended by her treating physicians that could potentially
██████████; she changed her answer about whether or not she wanted ██████████;
and she changed her reasoning for why did not want to do ██████████.

With respect to her job duties, obligations, and responsibilities, Ms. Mack inconsistently
described what they were. At first, Ms. Mack stated that she was responsible for following around
one student and making sure that she assisted in any way the student required. T261:1-262:16.
When asked for specifics, Ms. Mack was unable to describe ways she helped the students.
T306:7-309:19. Later in her testimony, Ms. Mack stated that every day was different and that she
would often be called to substitute for other classes or help with other special education students.

T312:20-314:25. Ms. Mack's varying descriptions were both contradictory and wholly inconsistent— on one hand she claimed she is assigned to one specific student who requires consistent hands on attention, on the other hand she claimed she had to manage entire classes.

With respect to her online application for OD, Ms. Mack claims that [REDACTED], a secretary from Paterson School District, filled out the application for her through MBOS (the member benefits online portal). T281:13-18. At first, Ms. Mack testified that she could not [REDACTED] or [REDACTED] to fill out the online application herself, so [REDACTED] helped her by filling it out for her. T286:19-288:16. [REDACTED] apparently knew what to fill out because [REDACTED] had Ms. Mack's medical documents. T281:13-282:19.

After filling out the OD application online, [REDACTED] then sent the application back to Ms. Mack to review [REDACTED]." T286:19-288:16. Ms. Mack stated that she was able to review the application because [REDACTED] that she was able to submit the application. Ibid. However, the application has to be completed "through a member's secure account established through the member benefit online system (MBOS)", and it requires the member to select an Option, designate beneficiaries, acknowledge terms and conditions, and authorize the release of medical information. N.J.A.C. 17:2-6.1. Even if [REDACTED] did actually log onto Ms. Mack's secure MBOS account and fill out the application for her, [REDACTED] would not know what to put for the Option or beneficiary designation since they did not discuss the contents of the application. Further, [REDACTED] could not have acknowledged the terms and conditions on Ms. Mack's behalf or sign Ms. Mack's name on the release of medical information portion, as there is no evidence that Ms. Mack gave [REDACTED] such authority, such as through a Power of Attorney.

Furthermore, Ms. Mack's claim that [REDACTED] sent back the OD application [REDACTED] so that Ms. Mack was able to review it does not comport with the MBOS system. The disability

application must be completed and submitted within MBOS.² Thus, there was no way for ██████ to complete the application and send it to Ms. Mack to review. And, even if ██████ could send Ms. Mack the application to review and file, Ms. Mack would still need to be able to ██████ ██████ maneuver through her secure MBOS account and click “submit” as she claims she did.

Finally, the Board also finds that Ms. Mack’s testimony describing her independent medical examination with Dr. Boozan was not credible. She stated that Dr. Boozan, a Board-certified ██████ who has performed many ██████ on patients with ██████ had “no clue” what ██████ was. T269:9-270:18. She also stated that Dr. Boozan did not perform all of the tests he claimed to have done and that Dr. Boozan made her sit with him for three hours without offering any explanation for ██████ with Dr. Boozan. Ibid.

Based on the above inconsistent testimony, the Board finds sufficient, competent, and credible evidence in the record to reject the ALJ’s conclusion that Ms. Mack’s testimony was credible.

The Board next rejected the ALJ’s legal conclusions that (1) “Ms. Mack is fully disabled, unable to return to work, unable to complete activities of daily living without assistance, and is entitled to an award of ordinary disability”; (2) the testimony of Dr. Boozan is not credible; and (3) the testimony of Doctors Goldsmith and Sorkin was credible. ID at 10.

To establish eligibility for OD, a PERS member must prove that she “is physically or mentally incapacitated for the performance of duty.” N.J.S.A. 43:15A-42. First, an “applicant for [OD] has the burden to prove that [s]he . . . has a disabling condition and must produce expert

² See <https://www.nj.gov/treasury/pensions/mbos-kit.shtml#retapp> (last visited February 23, 2022).

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evidence to sustain this burden.” Bueno v. Bd. of Trs., Teachers’ Pension & Annuity Fund, 404 N.J. Super. 119, 126 (App. Div. 2008), certif. denied, 199 N.J. 540 (2009). Second, the applicant must show that her disabling condition is total and permanent. Patterson v. Bd. of Trs., State Police Ret. Sys., 194 N.J. 29, 42 (2008); Bueno, 404 N.J. Super. at 122, 124. Finally, the applicant “must establish incapacity to perform duties in the general area of h[er] ordinary employment rather than merely showing inability to perform the specific job for which [s]he was hired.” Skulski v. Nolan, 68 N.J. 179, 205-06 (1975); Bueno, 404 N.J. Super. at 130-31.

One of the critical functions of the court is to make “findings of fact as to issues of credibility of lay witness testimony.” N.J.S.A. 52:14B-10(c). Credibility determinations require an overall assessment of the witness’s story considering its rationality, internal consistency, and the manner in which it “hangs together” with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). “Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself,” in that “[i]t must be such as the common experience and observation of mankind can approve as probable in the circumstances.” In re Perrone, 5 N.J. 514, 522 (1950). A trier of fact may reject testimony as “inherently incredible”, and may also reject the testimony when “it is inconsistent with other testimony or with common experience” or is “overborne” by the testimony of other witnesses.” Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

In determining the credibility of a witness, the interests, motives, or bias of the witness are relevant, and a fact finder is expected to base decisions of credibility on his or her own common sense, intuition, or experience. Barnes v. United States, 412 U.S. 837, 845 (1973); State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952).

With respect to expert testimony, “[t]o aid such determinations, our courts have developed a guidepost—where the medical testimony is in conflict, greater weight should be accorded to the

testimony of the treating physician.” Bialko v. H. Baker Milk Co., 38 N.J. Super. 169, 171 (App. Div. 1955). However, this guidepost is not conclusive, and the factfinder is not obligated to accept an expert’s opinion. State v. Carpenter, 268 N.J. Super. 378, 383 (App. Div. 1993). Indeed, the factfinder may accept some of the expert’s testimony and reject the rest, Todd v. Sheridan, 268 N.J. Super. 387, 401 (App. Div. 1993), even if that testimony is unrebutted by any other evidence. Johnson v. Am. Homestead Mortg. Corp., 306 N.J. Super. 429, 438 (App. Div. 1997). That a physician has been selected and is paid by the Board is hardly a basis to discount his testimony in favor of the treating physician, who is presumably paid by the patient. Torres v. Schripps, Inc., 342 N.J. Super. 419, 430 (App. Div. 2001) (citing In re Yaccarino, 117 N.J. 175, 196 (1989)); Reizis v. Bd. of Trs., Teachers Pension and Annuity Fund, 91 N.J.A.R.2d (TYP) 16, 21. It is further well settled that “the weight to which an expert opinion is entitled can rise no higher than the facts and reasoning upon which that opinion is predicated.” Johnson v. Salem Corp., 97 N.J. 78, 91 (1984) (internal citation omitted).

In this regard it is within the province of the finder of facts to determine the credibility, weight, and probative value of the expert testimony. State v. Frost, 242 N.J. Super. 601, 615 (App. Div.), certif. denied, 127 N.J. 321 (1990). “The testimony and experiential weaknesses of the witness, such as (1) his status as a general practitioner, testifying as to a specialty, or (2) the fact that his conclusions are based largely on the subjective complaints of the patient or on a cursory examination, may be exposed by the usual methods of cross-examination.” Angel v. Rand Express Lines Inc., 66 N.J. Super 77, 86 (App. Div. 1961). Other factors to consider include whether the expert’s opinion finds support in the records from the other physicians, and the information upon which the expert has based his conclusions. The premises upon which the expert’s observations are based, coupled with the expert’s ultimate conclusions, may be contradicted by rebuttal experts and other evidence of the opposing party. Ibid.

Here, the ALJ solely relied on Ms. Mack's subjective complaints about disability and failed to explain how Doctors Goldsmith and Sorkin's testimony supported the conclusion that Ms. Mack as totally and permanently disabled from her job duties and therefore the Board rejects the ALJ's conclusions.

After carefully considering all relevant evidence in the record, the Board finds that Ms. Mack failed to satisfy her burden that she was totally and permanently disabled at the time she left employment in September 2020. The Board also finds that Dr. Boozan testified more reliably and credibly than Doctors Goldsmith and Sorkin, as Dr. Boozan's conclusion was more in accordance with Ms. Mack's medical history, the results of her [REDACTED] [REDACTED] examinations, and the opinions of her treating [REDACTED]. As such, the Board finds Dr. Boozan's opinion to be more credible than those of Ms. Mack's physicians.

Dr. Boozan's opinion also deserves greater weight because his education and experience as an [REDACTED] is far superior to the education and experience of Dr. Goldsmith and Dr. Sorkin. As an [REDACTED], Dr. Boozan went to medical school, did a residency, and has performed many surgeries, including [REDACTED] for [REDACTED] patients. T152:18-19; T152:19-20; T153:17-20; T156:4-13; T155:10-156:1; T159:6-12; R-1. As [REDACTED] Doctors Goldsmith and Sorkin did not go to medical school, did not do residencies, and cannot perform surgeries. T97:3-4; T98:7-10; T28:8-10; T28:24-29:3; T159:18-21; T159:22-24.

Dr. Boozan's complete and thorough [REDACTED] exam on January 14, 2021 did not reveal any objective findings sufficient to establish a total and permanent disability at the time Mack left employment in September 2020. R-2. Objective testing revealed that Mack did not have [REDACTED] [REDACTED] T166:10-16; T208:20-24. These findings were consistent with Dr. Perl and Dr. Patel's findings. T182:1-

183:13; J-9; J-28. Dr. Perl and Dr. Patel are also both [REDACTED] and Ms. Mack's treating physicians.

Furthermore, Dr. Boozan did not base his conclusion solely on [REDACTED] like Dr. Goldsmith and Dr. Sorkin did because [REDACTED] has a subjective component that requires the patient to give answers. T160:16-161:17. In Ms. Mack's case, Dr. Boozan found that she was not being truthful in what she could and could not [REDACTED] during the [REDACTED] exam because her results indicated that she [REDACTED] T190:18-192:5. Dr. Boozan explained that this was not possible in [REDACTED] patients because [REDACTED] should always be better as the target is closer and larger, [REDACTED]. T209:11-211:2.

In contrast, Doctors Goldsmith and Sorkin only focused their conclusion on [REDACTED]. As Dr. Boozan pointed out, and as the records confirm, Ms. Mack's [REDACTED] readings by her treating physicians have been inconsistent. For example, on August 5, 2019, Dr. Perl determined Ms. Mack's [REDACTED] J-9. The next day, on August 6, 2019, Dr. Sorkin determined her [REDACTED] [REDACTED] J-10. Due to the inconsistent [REDACTED] readings throughout the record, Dr. Boozan's objective testing is a more reliable indicator of whether Ms. Mack is actually totally and permanently disabled from her job duties. The Board therefore finds that Dr. Boozan's objective testing revealed that Ms. Mack was not totally and permanently disabled from her job duties, and is far more reliable than her other physicians who relied on Ms. Mack's subjective complaints.

The Board rejects the ALJ's conclusion that Dr. Goldsmith's opinion was more credible than Dr. Boozan. As noted above, the interests, motives, or bias of a witness are relevant in determining credibility. Dr. Goldsmith is a [REDACTED] who has a long-standing

relationship with Ms. Mack and appears to support her when she requests it. T20:9-16. In September 2019, Dr. Goldsmith filled out a questionnaire for Ms. Mack's medical leave request indicating that she cannot perform her job duties and [REDACTED]. T25:3-26:1; J-11. However, as of their August 2019 examinations, Dr. Perl and Dr. Sorkin found that Mack's [REDACTED] was stable and there were no changes from 2017.³ J-9; J-10. Even based on their [REDACTED] testing, neither Dr. Perl or Dr. Sorkin consider Ms. Mack disabled in 2019. Ibid. Thus, Dr. Goldsmith's opinion that she could not perform her job duties and [REDACTED] [REDACTED] is inconsistent with her other treating physician's opinions.

A year later, on August 19, 2020, Dr. Goldsmith wrote a letter indicating that Ms. Mack could return to work on modified duty. T62:18-63:6; J-12. He admitted that as of August 19, 2020, Ms. Mack was not totally and permanently disabled. T63:7-11. A month later, on September 16, 2020, Dr. Goldsmith filled out a form saying that Ms. Mack was totally and permanently disabled from her job duties. T63:12-64:8; J-15. Dr. Goldsmith did not provide any reason or justification for why his opinion changed from August 2020 - that Ms. Mack could work - to a month later in September 2020 - that Ms. Mack was totally and permanently disabled. Thus, Dr. Goldsmith's testimony that Ms. Mack is totally and permanently disabled is not credible due to him changing his opinion without providing any reason for the change.

Additionally, Dr. Goldsmith wrote a letter on July 24, 2021 indicating that Ms. Mack had [REDACTED] but that detail was not in his report from his examination of Mack from the same day. T52:19-53:12; J-25; J-26. Further, he conceded that Dr. Patel found [REDACTED] during his examination in August 2021. T54:7-55:18; J-28. Notably, no other physician, including Dr. Boozan, found [REDACTED], let alone [REDACTED].

³ Dr. Perl determined her [REDACTED] Dr. Sorkin determined her [REDACTED] J-9; J-10.

These facts are crucial to the outcome of this case, and the Board finds that Dr. Goldsmith's biased and inconsistent opinions regarding Ms. Mack's condition are not reliable or credible.

Similarly, the Board found that Dr. Sorkin's testimony was also not reliable or credible. He examined Mack twice, once in 2019 and once in 2020, and both times determined that her [REDACTED] was "stable." T124:2-19; J-10; T122:21-123:15; J-17. However, in 2020 he determined that Mack was totally and permanently disabled. Notably, during his 2020 examination, he was unable to perform a [REDACTED] test to measure [REDACTED] Ms. Mack's [REDACTED] T143:25-144:13. [REDACTED] T100:13-18. As Dr. Sorkin himself explained, the greater [REDACTED] [REDACTED] T101:10-14. Thus, without any objective evidence - [REDACTED] - Dr. Sorkin concluded that Mack was totally and permanently disabled from her job duties in September 2020. Further, Dr. Sorkin admitted that his conclusion that she was totally and permanently disabled was based, in part, on her subjective complaints of [REDACTED] T129:19-130:3.

Thus, without performing the [REDACTED] test to determine the [REDACTED] of Ms. Mack's [REDACTED] the Board rejected the ALJ's reliance on his testimony and the finding that it was more credible than Dr. Boozan, who performed and relied upon objective testing.

The Board also rejected the ALJ's finding that Ms. Mack is permanently and totally disabled. The Skulski case requires that Ms. Mack establish that she is incapable of performing duties in the general area of her employment as a paraprofessional. 68 N.J. at 205-06. The Board finds that Ms. Mack has not met this burden. Ms. Mack explained that she had trouble performing her duties in the science and technology school due to everything being computerized. While she has had trouble in the science and technology school specifically, she has not established how she is unable to perform the duties of a paraprofessional generally. Further,

despite the difficulties in the science and technology school, Ms. Mack never requested a different assignment in a different school. In fact, Ms. Mack testified that her assignment changes every year, so she may not have even been assigned to the science and technology school the following school year. T259:20-23. Most importantly, the ALJ did not identify which duties Ms. Mack could not perform. The ALJ also failed to explain in the ID how Doctors Goldsmith and Sorkin determined Ms. Mack was not able to perform her duties.

Accordingly, the Board rejected the ALJ's conclusion that Ms. Mack is totally and permanently disabled because both the Initial Decision and the expert opinions offered by Ms. Mack's physicians is based almost entirely on Ms. Mack's subjective complaints; (2) the ALJ found Doctors Goldsmith and Sorkin more credible without citing to any specific reasons and without citing to any of their medical testimony or expertise; and (3) the ALJ erroneously found Dr. Boozan biased and not credible despite his superior expertise as [REDACTED] experienced in treating [REDACTED] patients.

The Board also rejected the ALJ finding that Mack's employer could not reasonably accommodate her as a contributing factor in determining that Mack was totally and permanently disabled. ID at 6.

Under the Americans with Disabilities Act ("ADA"), an employer's duty to accommodate a disabled employee extends only so far as necessary to allow the disabled employee to perform the essential functions of his or her job; it does not require acquiescence to the employee's every demand. Tynan v. Vicinage 13 of Superior Court, 351 N.J. Super. 385 (App. Div. 2002). If the employer reasonably determines that the employee, because of his or her disability, cannot presently perform the job even with accommodations, then the employer need not attempt reasonable accommodation. Ibid.

In order for Ms. Mack to be eligible for OD, she must establish that she is totally and permanently disabled from the performance of her job duties. In the employment context, the ADA places the burden on an employer to engage in an informal interactive process to identify potential reasonable accommodations that would allow the disabled employee to perform the job. Tynan, 351 N.J. Super. at 400. If the employer determines that an employee is disabled and is entitled to the reasonable accommodation requested, then the employee would not be considered totally and permanently disabled from performing their job. In contrast, if the employer denies the request for a reasonable accommodation, that does not serve as a dispositive finding that the employee is totally and permanently disabled from their job duties because the employer may deny a request for a variety of reasons, such as the request being unreasonable, the employer does not believe the employee needs such accommodation, or the employer simply cannot provide the accommodation.

Here, Ms. Mack's employer determined that they could not accommodate her and that she could not perform her essential duties based on Dr. Goldsmith's responses in the Interactive Process Certification and Questionnaire (J-14). The determination that she could not perform her duties is only relevant in the context of the employer's duties and responsibilities under the ADA. By saying that they cannot accommodate her and that she cannot perform her duties, they are legally justifying their decision to deny Ms. Mack's request for reasonable accommodations. The employer's denial of an accommodation under the ADA is not relevant to the determination of whether Ms. Mack is totally and permanently disabled from her job duties as a paraprofessional. Notably, Ms. Mack's request for an accommodation did not include a request for reassignment outside the science and technology school. Without such a request, there is no way to know whether or not the school district could have accommodated a reassignment.

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Further, the employer's refusal to provide Ms. Mack an accommodation does not mean that she has proven that she actually has a disability that required an accommodation, or that she could not do her job without an accommodation. Ms. Mack should have challenged the employer's denial before she left employment. Regardless, the denial has no relevance to the pension appeal other than indirectly, in that Mack must show that she is disabled and additionally and that she would still be disabled even with an accommodation. Accordingly, the employer's inability to accommodate Ms. Mack cannot be a contributing factor in determining that she is totally and permanently disabled.

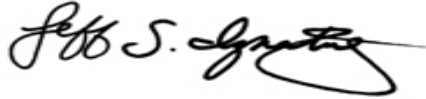
For the reasons stated above, the Board made the aforementioned factual findings; rejected the ALJ's conclusion that Ms. Mack was credible; rejected the ALJ's conclusion that Ms. Mack is totally and permanently disabled from her job duties as a paraprofessional; and rejected the ALJ's finding that the school's failure to accommodate Ms. Mack is a contributing factor in the determination that she is totally and permanently disabled. 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

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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-6/JSI

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