State of New Jersey

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June 16, 2022

Sent via email to: [redacted]

SZAFERMAN, LAKIND, BLUMSTEIN & BLADER, P.C.
Samuel M. Gaylord, Esq.
[redacted]

RE: Gregory Seel
PERS [redacted]
OAL DKT. NO. TYP 02335-19

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

Dear Mr. Gaylord:

At its meeting on May 18, 2022,[1] the Board of Trustees (Board) of the Public Employees' Retirement System (PERS) considered the following documents with regard to your client, Gregory Seel, and his appeal of the denial of his application for Accidental Disability retirement benefits: the Initial Decision (ID) of Administrative Law Judge (ALJ) Kimberly A. Moss, dated April 25, 2022, all exhibits, and the Exceptions filed by Deputy Attorney General (DAG) Jonathan Allen, dated May 5, 2022. After careful consideration, the Board adopted the ALJ's decision affirming the Board's denial of Accidental Disability retirement benefits, with modifications, but rejected the ALJ's recommendation of Ordinary Disability retirement benefits. Thereafter, the Board directed the undersigned to draft findings of fact and conclusions of law consistent with its determination, which were presented to and approved by the Boards at its meeting of June 15, 2022.

FINDINGS OF FACT

At its monthly meeting on November 7, 2018, the Board denied Mr. Seel's application for Accidental Disability retirement benefits. The Board found that Mr. Seel was not totally and permanently disabled from performing his regular and assigned duties, and that the incident of

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

[redacted] was identifiable as to time and place, occurred during Mr. Seel's regular and assigned job duties, and was not the result of his willful negligence. However, the Board also found that the [redacted] was not undesigned and unexpected. Finally, the Board determined there was no evidence in the record of direct causation of a total and permanent disability.

Briefly summarized, the ALJ found that Mr. Seel was employed by Rutgers University Mason Gross School of Fine Arts (Rutgers), and taught the Alexander Technique at Rutgers, a discipline in which he is trained and certified. ID at 3. The Alexander Technique is a hands-on method using cues to reframe physical movement and habits, commonly used in in acting, dance, and music. Ibid.

The ALJ found that on [redacted], Seel was [redacted] ID at 4. Seel testified that while he was [redacted] Ibid. The ALJ found that Seel continued working after his [redacted] but "weeks later he realized that his [redacted]." Ibid. Seel ultimately [redacted], and [redacted]" Ibid.

Seel returned to Rutgers in September 2015, but was hired only for the Fall 2015 semester. ID at 4-5. During that semester, Rutgers informed Seel that his contract would not be renewed. The ALJ noted that on July 30, 2016, Seel officially learned that his contract would not be renewed. ID at 5. After his contract was not renewed, Seel began teaching at New York University (NYU) for two years, until March 2017. ID at 5. There is no evidence in the record that Rutgers considered any alleged disability when it decided not to renew Mr. Seel's contract.

After summarizing the medical issues, which were not in serious dispute, the ALJ found that Seel is totally and permanently disabled from teaching the Alexander Technique but not from the general duties of a professor, and that the disability was the result of [redacted]

[redacted] rather than the result of [redacted]. ID at 16-17. Next, the ALJ found that the [redacted] while Mr. Seel was [redacted] qualified as "undesigned and unexpected" under N.J.S.A. 43:15A-43 and relevant case law. The ALJ ultimately concluded that Mr. Seel is eligible for Ordinary, but not Accidental, disability retirement benefits.

CONCLUSIONS OF LAW

The Board made the following conclusions of law.

The Board first voted to reject the ALJ's recommendation that Mr. Seel is eligible for Ordinary Disability retirement benefits. Although both experts testified that Mr. Seel is no longer able to perform his job duties, the Board found that Mr. Seel did not leave his position at Rutgers due to the disability. Mr. Seel neither resigned from his position at Rutgers nor was he forced to leave due to any disability. In fact, after Mr. Seel's contract was not renewed after the Fall 2015 semester, he accepted employment with NYU performing the same or very similar job duties, and continued working there for 2 years after his non-renewal at Rutgers. Because he continued working in a substantially similar position for those two years, it is clear that Mr. Seel is not eligible for Ordinary Disability retirement benefits because he did not separate from Rutgers due to any disability and was not disabled when he left PERS employment.

It is axiomatic that a PERS member must be disabled at the time he or she separates from employment. N.J.S.A. 43:15A-42, 43. PERS regulations require that:

> Each disability retirement applicant must prove that his or her retirement is due to a total and permanent disability that renders the applicant physically or mentally incapacitated from performing normal or assigned job duties at the time the member left employment; the disability must be the reason the member left employment.
>
> [N.J.A.C. 17:1-6.4 (emphasis added).]

Tellingly, Mr. Seel testified that he did not leave Rutgers because of a disability, but rather he left due to a combination of restructuring of the Rutgers program when a new administrator took over the department, and the fact that they "couldn't find any room in terms of time in the curriculum for me because they would want the Alexander [technique] to be in the second year." 1T56:1-8. Mr. Seel did not allege that his [redacted] was the impetus for Rutgers' decision not to renew his contract. Thus, his separation from employment had nothing to do with any alleged disability. Rather, his contract was not renewed and he went to teach at NYU instead due to several reasons, none of which had to do with his [redacted].

Next, in order to qualify for disability retirement benefits, a member "must establish incapacity to perform duties in the general area of his ordinary employment rather than merely showing inability to perform the specific job for which he was hired." Skulski v. Nolan, 68 N.J. 179, 205-06 (1975); Bueno, 404 N.J. Super. at 130-31; Getty v. Prison Officers' Pension Fund, 85 N.J. Super. 383, 390 (App. Div. 1964). Objective evidence that an applicant could perform his or her job with restrictions supports a conclusion that the applicant is not permanently and totally disabled. See O'Neill v. Bd. of Trs., Pub. Emps.' Ret. Sys., 2016 N.J. Super. Unpub. LEXIS 44, at *5-6 (App. Div. Jan. 11, 2016).

It is undisputed that Mr. Seel continued to work as a Part-Time Lecturer in the Alexander Technique at New York University after he left Rutgers. Thus, the Board found, that he was not incapacitated for the general duties of a lecturer. Skulski v. Nolan, 68 N.J. 179, 205-06 (1975); Bueno v. Bd. of Trs., 404 N.J. Super.119, 130-31.

The Board also notes that Seel failed to request any accommodation from Rutgers regarding his [redacted], which Rutgers may have been willing and able to accommodate. NYU hired Mr. Seel to teach this same technique despite his claim that he could only rarely [redacted]. The fact that he was able to perform the general duties of his job as lecturer, and specifically as a lecturer in the ALexamder Technique, is demonstrated by his

employment in that role for two years with NYU. Thus, the Board also found that Mr. Seel is not eligible for Ordinary Disability retirement benefits because he was not disabled in the general area of his employment. Therefore, the Board rejected the ALJ's legal conclusion that Mr. Seel was entitled to Ordinary Disability retirement benefits pursuant to N.J.S.A. 43:15A-42, 43, and relevant case law.

The Board next rejected the ALJ's decision that the alleged incident was "undesigned and unexpected." For an event to be "traumatic" under the statute it must be "undesigned and unexpected." Richardson, 192 N.J. at 212-13. The "polestar" of the undesigned and unexpected inquiry is whether an event is an "unexpected external happening" or "unanticipated mishap." Ibid. The event cannot be viewed "solely by the result" and "must be examined within the context of what petitioner was doing at the time." Estok v. Bd. of Trs., Police & Firemen's Ret. Sys., 2011 N.J. Super. Unpub. LEXIS 1009, at *18 (App. Div. Apr. 26, 2011).

An incident does meet the "undesigned and unexpected" standard "when all that appears is that the employee was doing his usual work in the usual way." Richardson, 192 N.J. at 201 Thus, under Richardson, an event is undesigned and unexpected if there is: 1) "an unintended external event;" or 2) "an unanticipated consequence of an intended external event if that consequence is extraordinary or unusual in common experience." Ibid. Further, "[t]o properly apply the Richardson standard. . . a reviewing court must carefully consider not only the member's job responsibilities and training, but all aspects of the event itself. No single factor governs the analysis." Mount v. Bd. Of Trs., Police & Firemen's Ret. Sys., 233 N.J. 402, 427 (2018).

The incident here involved [redacted]. It was not until weeks after [redacted] that Seel discovered [redacted], which he then attributed to [redacted]. Seel was performing his usual [redacted] which falls within the bounds of his job duties and ordinary work effort. It is neither undesigned nor unexpected that [redacted]

[redacted] and Seel candidly admitted that [redacted]. However, the fact that [redacted] was [redacted] this time does not change the fact that [redacted] was anticipated and expected. See Buendia v. Board of Trs., 2016 N.J. Super. Unpub. LEXIS 38, (App. Div. Dec. 9, 2015) (Using a machine that is known to be difficult to manage and produces a jerking motion does not become undesigned and unexpected when the degree is greater than normally anticipated). The ALJ also seemed to rely upon Seel's statement that he did not "know of anyone who [redacted] that was [redacted]." ID at 17. The Board rejects any such reliance on this anecdotal statement to make this determination.

Moreover, even assuming the [redacted] than Mr. Seel [redacted] does not therefore make the task undertaken not undesigned and unexpected. Chrzanowski v. Bd. of Trs., Pub. Emps.' Ret. Sys., 2016 N.J. Super. Unpub. LEXIS 214, at **7-8 (App. Div. Jan. 11, 2016) (injury caused by exerting additional physical effort to lift fire hydrant embedded two feet deeper than normal would not constitute external event as physical exertion itself was expected and "exactly a situation in which he expected to find himself").

For these reasons, the Board made additional findings of fact and rejected the ALJ's legal conclusion that Mr. Perkins is eligible for AD 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

Sincerely,

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

G-7/JSI

C: D. Lewis (ET); K. Ozol (ET); A. McCormick (ET); T. Fleischmann (ET)
OAL, Attn: Library (ET)
DAG Jonathan Allen (ET)
Gregory Seel (via regular mail)