



# State of New Jersey

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DIVISION OF PENSIONS AND BENEFITS  
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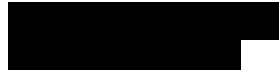
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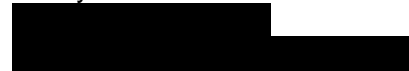
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August 16, 2017

Zazzali, Fagella, Nowak, Kleinbaum & Friedman  
Jason Sokolowski, Esquire



RE: Jenny Stankowski



Dear Mr. Sokolowski:

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The Board of Trustees of the Public Employees' Retirement System (PERS) has reviewed the Initial Decision ("ID") of the Administrative Law Judge ("ALJ") Susan Scarola, dated April 13, 2017,<sup>1</sup> in the above captioned matter, together with the joint stipulation of facts, the items submitted into evidence by the parties, exceptions filed by Deputy Attorney General Thomas R. Hower, dated May 22, 2017,<sup>2</sup> and reply to exceptions filed by you dated June 20, 2017<sup>3</sup>. At its meeting of July 19, 2017, the PERS Board voted to reject the ALJ's ID granting Accidental disability retirement benefits to Ms. Stankowski and has issued the following finding of facts and conclusions of law in support of its decision.

## **FINDINGS OF FACT**

In the ID, the ALJ reversed the Board's determination denying Ms. Stankowski's application for Accidental disability retirement benefits, finding that she is totally and permanently disabled as a direct result of a traumatic event, and the incident was undesigned

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<sup>1</sup> The Board requested and was granted an extension of time to issue its final decision.

<sup>2</sup> DAG Hower requested and was granted an extension of time to file exceptions.

<sup>3</sup> You requested and were granted an extension of time to file a reply to exceptions.

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and unexpected. The Board rejects the "Factual Discussion", "Findings" and "Legal Analysis and Discussion" in the ID that conclude that Ms. Stankowski is disabled, and that her disability was directly caused by a traumatic event. The Board modifies the ID based on expert testimony to conclude that Ms. Stankowski is not disabled as a direct result of a traumatic event, and denies her application for Accidental disability retirement benefits.

Ms. Stankowski was a custodian for the Winslow Township Board of Education (the "BOE") for over twenty years. ID at 2. On March 3, 2008, she was folding up two six-foot long table segments that were hinged together. Id. at 3. The two table segments jammed as she was folding them up and they unexpectedly unfolded back down. Ibid. She moved quickly to avoid the unfolding tables as they came down and ended up sitting on the floor feeling pain. Ibid. She went home later that night after her shift ended and took no medication. Ibid.; 1T90:25. She sought medical care the next day and was treated with pain injections, physical therapy and pain medication like oxycodone. 1T91:21; ID at 4. She had no surgery. Ibid. Ms. Stankowski was out of work for approximately six months and returned to work on September 8, 2008. 1T17:11. She worked until May 2010 on "light duty," which she arranged with her supervisor. ID at 4; 1T19:9-:16. She not have to perform heavy lifting and she did not use large machines. 1T21:14-22:10. She complained of pain in her lower back and legs. ID at 4. Ms. Stankowski denied being unable to perform her job duties. 1T32:4-:8; P-19.

The BOE privatized their entire custodial staff in May 2010, including Ms. Stankowski. ID at 4. The privatization is the reason that she stopped working; as the ALJ noted, Ms. Stankowski "did not stop working because of the pain, but because she was let go." Ibid. She applied for Accidental disability retirement benefits on October 27, 2011. ID at 2.

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The Board modifies the ALJ's factual findings that are not pertinent to lay-witness credibility by stating, "with particularity, the reasons for rejecting the findings and . . . the Board makes modified findings supported by sufficient, competent, and credible evidence in the record." N.J.S.A. 52:14B-10(c); see ZRB, LLC v. New Jersey, 403 N.J. Super. 531,561 (App. Div. 2008). Here, the ALJ incorrectly credited the testimony of Ms. Stankowski's medical witness Dr. David Weiss ("Dr. Weiss"), over the testimony of the Board's medical witness, Dr. Arnold T. Berman ("Dr. Berman"). For the reasons discussed below, the Board rejects the ALJ's finding that Dr. Weiss offered more credible testimony than Dr. Berman.

First, the Board rejects the ALJ's finding that "two highly qualified experts testified" in this case, ID at 13, and finds instead that Dr. Berman had superior orthopedic credentials to Dr. Weiss. Dr. Berman is a Board-certified orthopedic surgeon and was admitted as an expert in the field of orthopedics and orthopedic surgery. R-1. Dr. Berman performed many surgeries in his surgical career and he continues to have an active clinical practice. 2T49:25-50:1; 2T49:21-:23. Dr. Weiss, by contrast, is not an orthopedic surgeon and was only qualified as an expert in orthopedics.

Second, the ALJ emphasized that Dr. "Weiss's testimony related more to the actual physical condition of the petitioner as shown in MRI's and other objective diagnostic tests than did Dr. Berman's." ID at 13-14. The Board rejects the ALJ's findings, because Dr. Berman relied upon objective medical records and testing, whereas Dr. Weiss relied upon Ms. Stankowski's subjective complaints. Accordingly, the Board finds, based on sufficient competent, credible evidence summarized below, that Dr. Berman's medical testimony and conclusions that Ms. Stankowski is not disabled and that the 2008 incident did not cause a disability for her, is better supported by the objective evidence and therefore more persuasive than Dr. Weiss's contrary conclusions.

On physical examination, Dr. Berman found that Ms. Stankowski had full motion, though she had slight pain at the end of ranges of motion. 2154:12. Dr. Berman noted no

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spasm or tenderness. 2T54:16-:17. Ms. Stankowski's neurological examination was normal, including her Achilles and patellar reflexes. Her muscle testing and sensation were normal, as was her heel and toe walking. 2T54:18-:22; 2T55:11. Her straight leg raising test was negative and her Lasegue test, which accentuates the straight leg raising test, was also normal. 2T55:3-:4, 2T58:25-59:1. Dr. Berman measured Ms. Stankowski's strength and the circumference of her arms, which were both normal. 2T55:24-:25. She had "excellent" strength measured by the collateral pinch test. 2T56:7-:11. Her hip exam was normal. 2T56:10. Her thigh and calf circumferences were symmetrical, indicating no atrophy. 2T56:12-:14. The absence of atrophy correlates with Dr. Berman's conclusion that there is no pinched nerve and no herniated disc in her lumbar spine. 2T56:15-:16. He concluded that she had no pressure on the nerve roots. 2T64:9. He found that Ms. Stankowski's extensor hallucis longus muscles were normal. 2T106:17. She had no sensory loss on the top of her foot. 2T106:19. All objective clinical tests were normal. 2T58:10.

Ms. Stankowski had hurt her back in the mid-1990's at work and was out of work for two months and had physical therapy for five weeks and pain injections. 2T24:14-:25. Dr. Berman noted this fact and stated that typically that type of pain never goes away completely. 2T65:20-:23.

Dr. Berman reviewed medical records of Ms. Stankowski including the March 14, 2008, MRI of her lumbar spine (the "2008 MRI"), which was taken eleven days after the 2008 incident. P- 3; R-2. Based on this MRI report Dr. Berman noted that the discs in her lumbar spine were desiccated (i.e., they had loss of fluid) and that desiccation is a degenerative change that takes place over years. 2T63:4. He identified no evidence of acute injury. 2T62:1-:2; 2T64:2-:5. The 2008 MRI indicated (1) small left paracentral disc herniations at L4-L5 and L5-S1 compressing the ventral aspect of the thecal sac and (2) facet arthropathy at these levels. P-3; 2T66:8-:10. Dr. Berman noted that facet arthropathy takes ten to fifteen years to develop. 2T67:2-:5. Dr. Berman noted that at Ms. Stankowski's age, weight

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and height, there are usually degenerative changes in MRI results in that age group. 2T64:17-:22. He noted that the positive findings noted on this MRI report were small and were not pressing on a nerve root, and therefore did not cause pain. 2T64:9. He was unable to correlate the MRI findings with the results of his own physical examination. 2T65:6-:7. Dr. Berman also reviewed the January 17, 2011("2011 MRI"), lumbar MRI report, which noted only degenerative changes at L4-L5 and L5-S1. P-7; R-3. The 2011 MRI most significantly noted that the small L4-L5 and L5-S1 left paracentral disc herniations noted on the 2008 MRI "are not appreciated on the present study." Ibid.

Dr. Berman reviewed two EMG tests. P-4; P-7. Regarding the April 10, 2008, EMG report, he disagreed with the conclusion in the report of "electro-diagnostic evidence of recent bilateral L5 radiculopathy." 2T71:21. He noted that the EMG result stated "plus one fibrillations" - "which are very minor abnormalities that do not indicate anything of an acute nature." 2T72:4-:6. He also noted that, while EMG tests are accurate for peripheral entrapped nerve injuries, they are inaccurate for spinal disorders because of the frequency of "false positives." 2T97:18-98:2. He agreed that the results of the EMG tests showed L5 radiculopathy, which is the false positive result that he would expect because of Ms. Stankowski's degenerative changes in her lumbar spine. 2T100:12-:15. The EMG report from January 20, 2011, noted the findings supported a chronic L5 radiculopathy and that the 2008 EMG result was "more suggestive of a recent process." P-7. Dr. Berman also testified that it takes a long time for changes in an EMG to appear in an EMG result. 2T101: 4-:14. The 2008 EMG test was performed only eleven days after the 2008 incident. P-3.

Dr. Berman reviewed the August 10, 2011, discogram that showed a no pain response at L3-4 and pain responses at both L4-5 and L5-S1. P-11. Dr. Berman also reviewed the post-discogram CT scan of her lumbar spine from August 10, 2011, that showed grade 3 nucleogram at L4-L5 and grade 5 nucleogram at L5-S1. P-11. Dr. Berman explained that the higher nucleogram value indicates greater degeneration at these two levels and that these are significant radiological

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findings only. 2T118:1-:8. Dr. Berman stated that these tests results provide no more information than that the two discs are degenerated, which was already known, and that a discogram is a "marginal" test only and not a "core" test. 2T115:17-116:3. In addition, he could not correlate these radiological findings to Ms. Stankowski's clinical presentation. 2T118:10-:12.

Dr. Berman agreed that there are radiological indications of abnormalities in Ms. Stankowski's lumbar spine, but he could not clinically correlate the radiological indications with her clinical presentation. 2T121:14-:23. She had minor pain complaints that are not disabling and are not a direct result of the 2008 incident. 2T122:13-:14; 2T127:10-:16. He concluded that she had "these small disc abnormalities that are associated with desiccation degenerative changes and no evidence of acute injury. So she had long-standing degenerative changes." 2T73:6-:9.

Third, the ALJ's statement that "Dr. Berman also appeared to believe that Ms. Stankowski had returned to work on a full-time basis after her injury and was performing her job without restrictions," ID at 15, misses the point. Ms. Stankowski did not complain to Dr. Berman that she could not perform some of her job duties; she neither volunteered that anyone assisted her nor told him that she performed her job full duty. 2T88:7-:18; 2T89:17-:21; 2T90:12-:15; 2T93:19-:24. Moreover, the fact that Ms. Stankowski worked light duty under an accommodation by her employer after the 2008 incident contradicts the ALJ's conclusion that "[t]here are no accommodations that could be made to permit Ms. Stankowski to continue working in that position." ID at 17. The Board rejects this conclusion because it is not supported by the record. Ms. Stankowski's ability to work under an accommodation means that she is not permanently and totally disabled from performing her job duties.

Regarding the ALJ's finding that Ms. Stankowski "was advised of the need for surgery," ID at 12, the Board notes that only one doctor (Dr. James Lowe) discussed surgery with Ms. Stankowski in 2011, three years after the 2008 incident. 2T30:11-31:13. None of the doctors who treated her previously recommended surgery. See R-4 (Dr. Tariq S. Siddiqi's July 3, 2008, report

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concluded that Ms. Stankowski "can return to her usual employment in an unrestricted capacity" and did not recommend surgery); P-11 (Dr. Peter Corda's February 22, 2011 report concluded "she is capable of working full time since she has been working for two years up until the point that she got laid off."); 2T120:7-:10. This fact supports a finding that the 2008 incident did not directly result in a permanent and total disability.

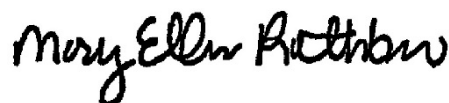
Finally, the Board rejects: the sentence on page 4 of the ID that states "[s]he now receives Social Security benefits[]", and the footnote 5 on page 17 of the ID. An award of federal social security benefits is not evidence that supports granting Ordinary disability retirement benefits. See Miller v. Bd. of Trs., Pub. Employees' Ret. Sys., No. A- 1518-12, 2014 N.J. Super. Unpub. LEXIS 1917, at "11-12

### **CONCLUSION**

Based on the foregoing, the Board adopts the finding that the injury of March 3, 2008 was undesigned and unexpected. However, the Board rejects the ALJ's two legal conclusion that "petitioner is permanently and totally disabled from performing the duties of custodian[]", and that "the injury of March 3, 2008, was the direct cause of the petitioner's permanent and total disability." ID at 17, 21.

You have the right, if you wish 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.

Sincerely,



Mary Ellen Rathbun, Secretary  
Board of Trustees  
Public Employees' Retirement System

G-11/MER

C: V. McManus (ET); DAG Hower (ET); Jenny Stankowski