



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PENSIONS AND BENEFITS
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May 19, 2022

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Governor

SHEILA Y. OLIVER
Lt. Governor

ELIZABETH MAHER MUOIO
State Treasurer

JOHN D. MEGARIOTIS
Acting Director

Sent via email to: [REDACTED]

LAW OFFICE OF NANCY A. VALENTINO
Nancy A. Valentino, Esq.

[REDACTED]

RE: Milton Perkins
PERS [REDACTED]
OAL DKT. NO. TYP 00118-21

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Dear Ms. Valentino:

At its meeting of April 20, 2022,¹ the Board of Trustees (Board) of the Public Employees' Retirement System (PERS) considered the Initial Decision (ID) of the Honorable Tama B. Hughes, Administrative Law Judge (ALJ), dated March 23, 2022, the exceptions filed by Deputy Attorney General (DAG) Matthew Melton, dated April 5, 2022, and your reply to exceptions, dated April 11, 2022, as well as your personal statements and those of DAG Melton in regard to the appeal of your client, Milton Perkins. Thereafter, the Board voted to reject the ALJ's decision recommending Accidental Disability retirement benefits ("AD"), 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 May 18, 2022, meeting.² This will constitute the final administrative determination of the Board in this matter.

¹ Due to health and safety concerns for the public regarding COVID-19, the Board meetings referenced herein were conducted via teleconference.

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

By way of background, the Board considered and denied Mr. Perkins's application for AD at its meeting of September 16, 2020. The Board determined that Mr. Perkins is totally and permanently disabled from the performance of his regular or assigned work duties per N.J.S.A. 43:15A-43 and relevant case law. The Board noted Mr. Perkins filed his application on the basis of an incident described as occurring on [REDACTED] during [REDACTED], and determined that Mr. Perkins's disability is a direct result of that incident, which was identifiable as to time and place, occurred during and as a result of the performance of his regular or assigned duties and was not the result of his willful negligence. However, the Board noted Mr. Perkins's two differing descriptions of the incident in the record and could not establish the course of events that transpired on [REDACTED], that resulted in his disability. Nevertheless, the Board determined that under either scenario advanced by Mr. Perkins, the incident was not undesigned and unexpected and therefore does not qualify as a traumatic event that would entitle Mr. Perkins to AD. Mr. Perkins appealed, and the matter was transferred to the OAL for hearing. After a hearing, the ALJ found that Mr. Perkins is eligible for AD, based on her conclusion that the [REDACTED] incident qualified as undesigned and unexpected event under Richardson v. Bd. of Trs., Police and Firemen's Ret. Sys., 192 N.J. 189, 212-13 (2007).

FACTUAL FINDINGS

The Board modified the Initial Decision, adopting but expanding upon the ALJ's factual findings.

The Board noted that officers are required to take [REDACTED] on a yearly basis, and [REDACTED] is a normal and routine part of an officer's job duties. T25:6-13. Officer Jesus Nieves ("Nieves") testified that the [REDACTED] " was used [REDACTED] prior to the [REDACTED] incident. T26:21-23. Mr. Perkins had himself encountered [REDACTED] a few times during [REDACTED] in the past. 1T81:11-14. An instructor [REDACTED] pretends to [REDACTED]

[REDACTED]
[REDACTED]. T20:15-22. The
[REDACTED] duty is to [REDACTED]
[REDACTED]. T31:19-21.

During the [REDACTED] incident, Nieves was [REDACTED]
[REDACTED]. T82:6-12. Mr. Perkins testified that in his experience in this [REDACTED],
the [REDACTED], T41:8-13; T81:15-19. Mr. Perkins
could not say whether [REDACTED]
[REDACTED]. T81:20-82:5. Mr. Perkins [REDACTED] during the
[REDACTED] incident, but could not attribute [REDACTED] either to the [REDACTED]
[REDACTED]. T62:4-6; T64:2-6; T76:17-23. [REDACTED]
[REDACTED] records note that Mr. Perkins was [REDACTED] at [REDACTED] and
[REDACTED] at [REDACTED]. R-1. The records state:

Reports [REDACTED], started acutely yesterday while [REDACTED], No
[REDACTED] . . . Patient works for the sheriff department and was
doing [REDACTED] He [REDACTED]
[REDACTED] No
[REDACTED]"

[ibid.]

An incident report completed by Christopher Giacomelli on [REDACTED] states: "I
asked Officer Perkins what happened and he stated that [REDACTED]
[REDACTED] He also stated that he [REDACTED]
[REDACTED] during [REDACTED] R-3; T74:14-75:1.

CONCLUSIONS OF LAW

The Board rejected the ALJ's legal conclusion that the [REDACTED] occurrence
was an undesigned and unexpected event. A PERS member is entitled to AD only if he is

permanently and totally disabled as a direct result of a “traumatic event.” N.J.S.A. 43:15A-43. For an event to qualify a member for AD, it must be “undesigned and unexpected.” Richardson, supra, 192 N.J. at 212-13. The “polestar” of the undesigned and unexpected inquiry is whether an event is an “unexpected external happening,” that is, an “unanticipated mishap.” Ibid.

Our Supreme Court has held that an event is not undesigned and unexpected “when all that appears is that the employee was doing his usual work in the usual way.” Richardson, 192 N.J. at 201 (quotation omitted). 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. (quotation and emphases omitted). The applicant bears the burden of proof. See ID. at 212.

The Board noted that Mr. Perkins testified that he was unable to discern whether [REDACTED]
[REDACTED]
[REDACTED]. ID at 8; T62:4-6; T64:2-6; T76:17-23. The [REDACTED] records and [REDACTED] reflect these uncertainties. The [REDACTED] immediately following the incident indicate that Mr. Perkins attributed [REDACTED]
[REDACTED]. The records do not mention the [REDACTED], and specifically and unequivocally state there was no “direct trauma.” The Giacomelli report does mention the [REDACTED], but then goes on to say that Mr. Perkins [REDACTED]. However, Mr. Perkins testified with certainty that [REDACTED]. T63:8-12.

The Board voted to reject the ALJ’s legal finding that there were no inconsistencies in the reporting of the [REDACTED] incident. ID at 10. The ALJ improperly dismissed the [REDACTED] and the Giacomelli report because they were hearsay. ID at 12. Hearsay is admissible in administrative hearings, and the ALJ failed to articulate any reason for giving those

documents little to no weight. ID at 13; N.J.A.C. 1:1-15.5. These documents should have been given weight as corroborating Mr. Perkins's own testimony that he could not attribute the [REDACTED]. The inconsistencies in the records confirm that Mr. Perkins did not report the incident with certainty, just as he was unable to testify regarding the event with certainty. Because Mr. Perkins failed to present consistent evidence of the nature of the incident, he failed to prove the incident was undesigned and unexpected.

The Board also noted that in any of the scenarios proffered by Mr. Perkins, the incident was not undesigned and unexpected, and it voted to reject the ALJ's legal conclusion to the contrary. The Board found that the ALJ placed undue weight on the fact that the [REDACTED] was not used annually. ID at 16. However, both Nieves and Mr. Perkins were familiar with the [REDACTED] on the day of the [REDACTED] incident. Nieves was aware that it had been used during [REDACTED], and significantly, Mr. Perkins had actually participated [REDACTED] with [REDACTED] in previous years. Thus, use of [REDACTED] was not an "unusual circumstance." Ibid. Further, whether a circumstance is unusual is not determinative of whether it is undesigned and unexpected. See Clayton v Board of Trustees, PERS, App. Div. Dkt. No: A-1098-12T4 (decided March 28, 2014) (assigned duty of shoveling snow was not undesigned and unexpected even though it was an unusual assignment for him).

The Board also rejected the ALJ's finding that [REDACTED] was [REDACTED], [REDACTED], [REDACTED]. Ibid. Neither Nieves nor Mr. Perkins designed [REDACTED], and there was no expert testimony as to the intended design. Further, the Board also noted that the ALJ found the use of [REDACTED] to be an unusual circumstance with which Mr. Nieves and Mr. Perkins had little familiarity, only to then accept their "expertise" on its design. In fact, Mr. Perkins testified that the [REDACTED] would "normally" [REDACTED], while referring to his experience during his [REDACTED]. T42:8-12. In any case, Mr. Perkins could not opine as to whether [REDACTED] was "designed"

██████████ while the ██████████ were in motion, as was the case during the ██████████ incident.

The crux of the issue here is that Mr. Perkins was doing exactly what he intended to do during the ██████████ incident: hitting Nieves with ██████████ during ██████████. The incident must be evaluated in the context of what Mr. Perkins was doing at the time and his job duties in general. See Shappell v. Bd. of Trs., Pub. Emps.' Ret. Sys., 2012 N.J. Super. Unpub. LEXIS 1724, at *6 (App. Div. July 18, 2012) (“Whether an event is ‘undesigned and unexpected’ cannot be judged solely by the result because employees do not expect to be injured doing the routine tasks of their job. Rather, whether a traumatic event is ‘undesigned and unexpected’ must be determined in the context of what Shappell was doing at the time and the nature of his job duties in general.”).

Ultimately, Mr. Perkins was engaged in a ██████████ ██████████ ██████████ ██████████. Mr. Perkins was practicing the proper way ██████████ ██████████, while Mr. Perkins was trained to ██████████. ██████████ is when he claims ██████████. Although the consequence might have been unanticipated, it is not “extraordinary or unusual in common experience” that ██████████ might ██████████ ██████████. See also Salgado v. Bd. of Trs., Police & Firemen’s Ret. Sys., 2019 N.J. AGEN LEXIS 1023, *12-13 (“Injuries during full-force combat training are to be expected . . . it cannot be said that an injury during full-force combat training is considered ‘extraordinary or unusual’; it is a known consequence of any physical altercation.”).

Here Mr. Perkins’s ██████████ of ██████████ at Nieves, while ██████████ ██████████, at a time when ██████████ Mr. Perkins ██████████ ██████████ which led to the incident. The incident involved the normal protocol of ██████████

██████████ and Mr. Perkins's ██████████. Mr. Perkins was doing his "usual work in the usual way," which does not constitute a traumatic event. Therefore, the Board found that the ██████████ incident was not undesigned and unexpected.

Finally, the Board rejected the ALJ's legal analysis finding that the factual circumstances present here are akin to those in Moran v. Board of Trustees, Police & Firemen's Retirement System, 438 N.J. Super. 346, 348 (App. Div. 2014) and support finding that the incident giving rise to Mr. Perkins's disability was the direct result of an undesigned and unexpected event. ID at 16.

Initially, the facts in Moran are inapposite to those presented here. Moran involved a firefighter who "heroically saved two victims from a burning building by kicking in the building's front door." Moran, supra, 438 N.J. Super. at 347. The court noted that Moran responded to the fire as part of an 'engine company.'" The "truck company," which had not yet arrived was the unit responsible to force "entry into a burning structure and rescu[e] any occupants." Ibid. It was equipped with special equipment to carry out its duties, which included breaking down the door or otherwise gaining entry. Id. At 349-50.

When Moran arrived on the scene at 2:00 a.m., he noted the structure was boarded up which led the firefighters to believe the house was vacant. Ibid. Therefore, the firefighters focused on putting out the fire to prevent its spread. Id. at 350. Suddenly, Moran "heard screams from people trapped inside the structure." Ibid. Without the necessary tools carried by the truck company, Moran was forced to use his "shoulder, leg and back" to attempt to gain entry. Ibid. The court found that Moran "encountered an unexpected life-and-death emergency for which he was carrying no tools." Id. At 351. Thus, though he was disabled as a result of his intended action, the life-and-death exigency of the situation, without the proper equipment, made it an undesigned and unexpected event. Ibid.

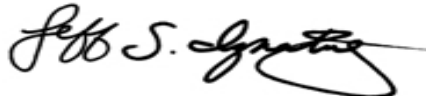
Moran is readily distinguishable. First, Mr. Perkins was involved in a “hostile,” but controlled, [REDACTED] [REDACTED]. This is not comparable to the life-and-death exigency of Moran. Put simply, left without any tools, Moran was forced to use his body to break into a building to rescue its occupants. The entire circumstance was undesigned and unexpected. Mr. Perkins, however, [REDACTED]. There was no life-and-death exigency, only a [REDACTED]. Thus, Moran provides no support for the ALJ’s decision.

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-17/JSI

C: D. Lewis (ET); K. Ozol (ET); A. McCormick (ET); T. Fleischmann (ET)
Retired Health Benefits Section (ET)
OAL, Attn: Library (ET)
DAG Matthew Melton (ET)
Milton Perkins (via regular mail)