State of New Jersey

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*Governor*

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*Lt. Governor*

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ELIZABETH MAHER MUOIO
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JOHN D. MEGARIOTIS
*Acting Director*

July 22, 2021

Sent via email to: [redacted]

CHAMLIN, ULIANO & WALSH
James J. Uliano, Esq.
[redacted]

RE: Robert Suy Ho Go
PERS [redacted]
OAL DKT. NO. TYP 08042-16
(On remand TYP 13539-2012)

Dear Mr. Uliano:

At its meeting on June 16, 2021,[1] the Board of Trustees (Board) of the Public Employees' Retirement System (PERS) considered the Initial Decision (ID) of Administrative Law Judge (ALJ) the Hon. Joseph A. Ascione (the ALJ), dated May 3, 2021, as well as the exceptions filed by Deputy Attorney General (DAG) Porter Strickler, dated May 13, 2021, with respect to the appeal on behalf of your client, Robert Suy Ho Go. After careful consideration, the Board voted to reject the ALJ's legal conclusion that [redacted] directly resulted in Mr. Go's disability, thereby rejecting the ALJ's ultimate decision recommending Accidental Disability retirement benefits. The Board adopted the ALJ's legal conclusion concerning delayed manifestation, to the extent that he became permanently and totally disabled once his employer could no longer offer an accommodation. The Board directed the Secretary to draft findings of fact and conclusions of law consistent with its determination, which were presented to the Board at its meeting of July 21, 2021.[2]

[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.

## FACTUAL FINDINGS

In the ID, the ALJ recommended reversing the Board's determination denying Mr. Go's accidental disability retirement benefits ("AD"). Upon remand from the Appellate Division, the ALJ concluded that Mr. Go's [redacted] disability was the direct result of [redacted]. Mr. Go continued to work after [redacted], with an employer accommodation.

The Board noted the ALJ's factual findings in the ID. The ALJ found that Mr. Go's expert, Dr. Cary Skolnick, testified that [redacted] directly "resulted in [redacted]." ID at 10. The ALJ also noted that such a condition will usually develop over time, but that a significant injury" can accelerate the condition." Ibid. Importantly, the ALJ next found that

> [T]his testimony is inconsistent with the [redacted] done prior to the first [redacted], as no note is made of the [redacted]. Dr. Skolnick did not provide any testimony as to the absence of that finding on the [redacted]." Ibid.

The Board therefore finds that the ALJ's erred in finding that [redacted] directly result in the [redacted], as the medical evidence directly contradicts Dr. Skolnick's opinion. In fact, Dr. Skolnick's medical opinion is not supported by the competent medial evidence in the record, and the Board rejected the same. What is clear from the record in this case is that [redacted] done after [redacted], showed [redacted] Despite Dr. Arnold T. Berman and Dr. Skolnick's agreement as to the severity of Mr. Go's [redacted] revealed in [redacted]. The Board finds these conclusions

are without any support in the record, and is, in fact contradicted by the objective medical evidence in the record. 2T22:1-35:23; R-5; R-6; R-7; R-8; and R-9.[3]

The Board also finds that Dr. Skolnick's testimony that [redacted] "may have cause[d] [redacted]," 1T15:8-14, should be rejected, as it relies upon on proximate causation, rather than the definition the ALJ and Board are required below, to wit, that [redacted] was the substantial or significant cause of the disability. See N.J.S.A. 43:15A-43. The direct result standard outlined in the AD statutes is "far more exacting than [tort law's] 'proximate cause' standard and, as explained in Gerba, was purposely made to be so by the Legislature." In re Cordero, No. A-2803-10T4, 2012 N.J. Super. Unpub. LEXIS 1406, at *13 (App. Div. June 19, 2012) (per curiam); see also Torres v. Bd. of Trs., Police & Firemen's Ret. Sys., No. A-2388-15T3, 2018 N.J. Super. Unpub. LEXIS 1858, at **16-17 (App. Div. Aug. 3, 2018) ("The fact that total disability followed the muscle strain chronologically does not necessarily mean that it was 'as a result' thereof. To hold otherwise would be to adopt the false logic of 'Post hoc, ergo propter hoc'.") (quotation omitted).

## CONCLUSIONS OF LAW

The Board made the following conclusions of law.

The Board noted that a member is eligible for AD benefits if he or she is permanently and totally disabled "as a direct result of a traumatic event." N.J.S.A. 43:15A-43. The issue of direct result was addressed by the New Jersey Supreme Court in Gerba v. Board of Trustees, Public Employees' Retirement System, 83 N.J. 174 (1980), and Korelnia v. Board of Trustees, Public Employees' Retirement System, 83 N.J. 163 (1980). The Supreme Court noted the legislative purpose of the amendment of previous pension statutes that introduced the "direct result"

[3] "1T" refers to the hearing transcript from January 23, 2014. "2T" refers to the hearing transcript from April 1, 2014.

requirement was to apply a more exacting standard of medical causation than that used in workers' compensation law, and to reject, for purposes of awarding AD, the workers' compensation concept that an "accident" can be found in the impact of ordinary work effort upon a progressive disease. Gerba, 83 N.J. at 185-86. The Court stated that:

> Where there exists an underlying condition such as osteoarthritis which itself has not been directly caused, but is only aggravated or ignited, by the trauma, then the resulting disability is, in statutory parlance, "ordinary" rather than "accidental" and gives rise to "ordinary" pension benefits.
>
> [Gerba, 83 N.J. at 186.]

The Court concluded that what is now required is a "traumatic event" that constitutes the essential significant or substantial contributing cause of the applicant's disability. Ibid.

In the remand decision, the court directed the Board to "[s]ynthesiz[e] these precedents," "make detailed findings concerning the conflicting expert testimony presented by the parties," and "determine whether [redacted]." Go v. Pub. Emps.' Ret. Sys., 2016 N.J. Super. Unpub. LEXIS 876, at *6 (App. Div. Apr. 18, 2016).

It is clear that if an employee is able to perform their job duties with a reasonable accommodation allowed by their employer, then they are not considered totally and permanently disabled from that employment. Grieco-Hicks v. Bd. of Trs., 2017 N.J. Super. Unpub. LEXIS 1159, *12 (App. Div. May 11, 2017)(Discussing the interplay between reasonable accommodations and the disability statutes.) Therefore, the Board rejects the ALJ's legal conclusion that [redacted] was the substantial and significant cause of Mr. Go's disability, as he was able to return to work [redacted] until he left work almost ten years later. As the court held in Ensellin, "in applying for an ordinary disability retirement, petitioner would have been required to establish … i.e., that he was disabled and could not

function in his position even with reasonable accommodation." Ensslin v. Board of Trustees, PFRS, 311 N.J. Super. 333, 336 (App. Div. 1998). Thus, the Board finds that as Mr. Go was able to perform his job with the reasonable accommodation of a helper after [redacted] that incident cannot be the substantial and significant cause of his disability. Further, the Board finds that his employer deciding later on to no longer provide a helper to Mr. Go has no effect on the causation of his disability.

The record before the Board clearly establishes that the ALJ's legal conclusion is contradicted by objective medical evidence in the record, and the Board therefore rejects that conclusion. Rather, the Board concludes that Mr. Go's [redacted] was the substantial significant cause of his disability and [redacted]. This conclusion is supported by sufficient credible evidence in the record, and upon which Dr. Berman relied to conclusively form his opinion as detailed in [redacted] to have had no causative effect on Mr. Go's disability.

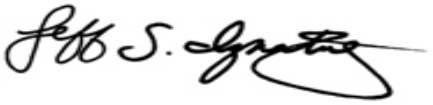
For these reasons, the Board rejected the ALJ's legal conclusion that Mr. Go is eligible for AD retirement benefits. This correspondence shall constitute the Final Administrative Determination of the Board of Trustees of the Public Employees' Retirement System.

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-9 /JSI

C: D. Lewis (ET); (ET); A. McCormick (ET); G. Sasileo (ET); K. Ozol (ET); L. Hart (ET); P. Sarti (ET)
DAG, Porter Strickler (ET)
OAL, Attn: Library (ET)
Robert Suy Ho Go (sent via email to: [redacted])