



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PENSIONS AND BENEFITS
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Acting Director

January 16, 2020

[Redacted]

Law Offices of Daniel J. Zirrieth, LLC
Daniel J. Zirrieth, Esquire

[Redacted]

RE: Dianne Merwin

[Redacted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Dear Mr. Zirrieth:

At its meeting on December 11, 2019, the Board of Trustees of the Public Employees' Retirement System (PERS) considered the October 7, 2019, Initial Decision of the Hon. Elissa Mizzone Testa, ALJ, regarding your client, Dianne Merwin's appeal of the Board's denial of her application for Accidental Disability retirement benefits. The Board also considered the exceptions filed by Deputy Attorney General Christopher Meyer, and your reply thereto, dated November 15, 2019. After careful consideration, the Board adopted the ALJ's Findings of Fact and legal conclusion denying Ms. Merwin's application for Accidental Disability retirement benefits but rejected the ALJ's conclusion that she is eligible for Ordinary Disability retirement benefits. Thereafter, the Board directed the Secretary to draft Findings of Fact and Conclusions of Law consistent with its determinations, to be presented to the Board for discussion and review.

At its meeting of January 15, 2020, the Board approved the following Findings of Fact and Conclusions of Law.

### **FINDINGS OF FACT**

The Board adopted the ALJ's Findings of Fact and the same are incorporated herein. Briefly summarized, Merwin testified that on November 4, 2015, she was injured when she fell and struck her head. ID at 3. After her fall, Merwin sought treatment at the Jersey City Medical Center Emergency Room. Ibid. Merwin was diagnosed with a head contusion, lumbar strain and was referred for an orthopedic and neurological evaluation. Ibid.; P-5. Ms. Merwin applied for Accidental Disability retirement benefits on or about January 31, 2017. ID at 1-2. On January 18, 2018, the Board considered and denied her application, and determined that she was only eligible for a Deferred retirement benefit. ID at 2. The Board also determined that the November 4, 2015, incident was identifiable as to place and time, undesigned and unexpected, occurred during and as a result of her regular or assigned duties, and was not a result of Ms. Merwin's willful negligence. Ibid. Finally, the Board found that Ms. Merwin was not totally and permanently disabled from the performance of her usual or other duties that her employer was willing to offer. Ibid.

### **CONCLUSIONS OF LAW**

The Board adopted the ALJ's conclusion that Merwin is not eligible for Accidental Disability retirement benefits, finding that the alleged incident did not directly result in a disability. ID at 14. However, the Board rejected the ALJ's legal conclusion that Merwin is eligible for Ordinary Disability retirement benefits because of the totality of all of her medical conditions. ID at 19-20.

The case law provides that a PERS member is entitled to a liberal interpretation of a pension statute, ID at 19, however, "eligibility [itself] should not to be liberally permitted." In re Adoption of N.J.A.C. 17:1-6.4, 454 N.J. Super. 386, 399 (App. Div. 2018). The Board finds that Merwin failed to satisfy her burden of proof that she is eligible for Ordinary Disability retirement

benefits because she failed to establish sufficient credible medical testimony and evidence to support the ALJ's findings.

The ALJ found that Merwin suffered from a number of medical conditions, including post-concussive syndrome, with residual mild cognitive deficits, and cephalgia as a result of the November 4, 2015 incident. ID at 19. However, the Board's expert witness and Independent Medical Examiner (IME), Dr. Steven Lomazow, whom the ALJ found provided more credible testimony, ID at 15, is Board-certified by the American Board of Neurology and Psychiatry, with a specialty certification in the field of neurology, and sub-certified by the United Council of Neurological Specialties in the field of Headache Medicine, was admitted as an expert in neurology only and concluded that the evidence does not demonstrate a credible pattern of cognitive dysfunction or objective evidence of a total and permanent neurologic disability. 2T5:21-6:7; 2T8:13-9:15; P-16. Dr. Lomazow also concluded that there was no evidence the mild concussion syndrome was disabling, as the detailed cognitive evaluations of Dr. George Carnevale and Dr. Angela Adams were unable to state that there were significant cognitive deficiencies. 2T24:19-25:5. Dr. Lomazow was clear, there is no evidence of a neurologic disability.

However, Dr. Lomazow testified on cross-examination that he believes Merwin "is psychiatrically disabled." 2T35:17-36:4. In contrast, on direct examination, when asked if he reached an opinion regarding Merwin's psychiatric issues, he stated: "No. I was asked to opine on the neurologic issues. I did note the neuropsychological findings [of Dr. Emanuel Hirso and Dr. Carnevale]." 2T25:24-26:8. The ALJ found that "[T]his opinion that Merwin is psychologically disabled cannot be ignored simply because Lomazow only rendered a neurological opinion and did not conduct neuropsychological evaluations." ID at 10. Thus, the Board finds that such an opinion is outside of the IME's expertise as a neurologist, and accordingly rejects the ALJ's reliance on it as it lacks reliability. Put simply, the record lacks any medical testimony concerning

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a psychiatric disability, as neither expert medical witness testified in that area. Moreover, Dr. Lomazow did not conduct a psychiatric evaluation, performed no psychiatric testing, and therefore the Board rejects the ALJ's conclusion that Merwin established eligibility for Ordinary Disability retirement benefits.

While the Board recognizes a relationship between the medical fields of neurology and psychology, Dr. Lomazow only performed a neurologic evaluation and was only admitted as an expert in neurology and not psychology. Likewise, Dr. Anca Bereanu, who testified on behalf of Merwin, was only admitted as an expert in neurology and not psychology. To accept the testimony of a psychiatric disability would be to ignore the distinction between the two specialties.

Further, Dr. Lomazow did not state this opinion based on a reasonable degree of psychological certainty and did not perform any neurophysiological testing of his own. Instead, he relied on the testing performed by Dr. Carnevale, which found a mild post-concussion syndrome and post-traumatic depression, but no "significant or consistent evidence of traumatic brain injury including concussion." 2T21:21-23:23; P-10. Dr. Carnevale did not make a disability determination and, crucially, Dr. Lomazow did not opine that Merwin is permanently psychiatrically disabled.

As the ALJ acknowledged, there was no expert testimony offered to address Merwin's psychological injuries. ID at 11. It is well-settled that without expert medical testimony Merwin cannot carry her burden of proof that she is psychiatrically disabled. See Patterson v. Bd. of Trs., State Police Ret. Sys., 194 N.J. 29, 50-51 (2008) (member seeking disability retirement benefits must produce expert evidence to sustain burden of proof). Put simply, as there were no psychiatric experts presented at the hearing, the testimony regarding the nature of Merwin's psychological conditions, treatment, and prognosis was limited. Without a fully developed record regarding Merwin's psychological conditions, the conclusion that Merwin is psychiatrically

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disabled is not reliable and the Board rejects the ALJ's legal conclusion that she sustained her burden to establish eligibility for Ordinary Disability retirement benefits.

Based on the above, the Board adopted the ALJ's Findings of Fact, as well as the legal conclusion that Merwin is not eligible for Accidental Disability retirement benefits. However, the Board rejected the ALJ's legal conclusion that she is eligible for Ordinary Disability 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 S. Ignatowitz, Secretary  
Board of Trustees  
Public Employees' Retirement System

G-7/JSI

C: D. Lewis (ET); L. Milton (ET); L. Hart (ET); P. Sarti (ET)  
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Dianne Merwin