



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PENSIONS AND BENEFITS
P. O. Box 295

TRENTON, NEW JERSEY 08625-0295
Telephone (609) 292-7524 / Facsimile (609) 777-1779
TRS 711 (609) 292-6683
www.nj.gov/treasury/pensions

ELIZABETH MAHER MUOIO
State Treasurer

JOHN D. MEGARIOTIS
Acting Director

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Lt. Governor

November 18, 2021

Sent via email to [REDACTED]

HELMER, CONLEY & KASSELMAN, P.A.
Kenneth W. Miller, Esq.

[REDACTED]

RE: Deloris Greene
PERS [REDACTED]
OAL DKT. NO. TYP 04072-19

Dear Mr. Miller:

At its meeting on October 20, 2021, the Board of Trustees (Board) of the Public Employees' Retirement System (PERS) considered the Initial Decision (ID) of the Honorable Kathleen M. Calemno, ALJ, all exhibits, exceptions filed by Deputy Attorney General (DAG) Porter Strickler, dated September 7, 2021 and exceptions filed by Kenneth W. Miller, Esq. dated September 22, 2021. After careful consideration, the Board voted to adopt the ALJ's factual findings, but to reject the finding that Ms. Greene is entitled to Ordinary Disability retirement benefits, thereby reaffirming its original decision denying Ms. Greene's application for Ordinary Disability retirement benefits. The Board directed the Secretary to draft findings of fact and conclusions of law consistent with its decision for presentation at its meeting of November 17, 2021.¹

CONCLUSIONS OF LAW

The Board noted that Ms. Greene worked as a Human Services Assistant prior to her resignation. ID at 3. Her duties consisted of helping residents of the group home with activities of daily living including toileting, changing diapers, dressing and bathing. She primarily worked in

¹ Due to health and safety concerns for the public regarding COVID-19, the October 20, 2021 and November 17, 2021 meetings were conducted via teleconference.

the dementia unit with elderly patients. ID at 4. Ms. Greene has [REDACTED]. ID at 3; 1T39:16-24. [REDACTED]. Following [REDACTED] Ms. Greene testified that she continues to [REDACTED]. Ms. Greene also attested to the fact that she has [REDACTED]. ID at 5; 1T46:2-8. Ms. Greene has [REDACTED]. ID at 5.

The Board rejected the ALJ's finding that Ms. Greene's expert, Dr. Eric David Strauss, (Dr. Strauss) was more credible than the Board's expert, Dr. Arnold T. Berman (Dr. Berman). The Board noted that Dr. Strauss's objective findings, although limited in scope, were similar to Dr. Berman's. One marked difference, however, was that Dr. Berman was the only expert to perform [REDACTED] by administering [REDACTED]. P-1; R-2. The test revealed [REDACTED]. Upon discerning that Ms. Greene may not [REDACTED], Dr. Berman [REDACTED]. To verify Ms. Greene's effort on the test, Dr. Berman administered [REDACTED] whereby Dr. Berman [REDACTED]. This follow up testing revealed that Ms. Greene's [REDACTED]. [REDACTED]. [REDACTED], Dr. Berman found that Ms. Greene [REDACTED] and concluded upon review of her job description that it would not disable her from performing her regular or assigned duties. 1T21:19-23:1; 1T25:5-13.

The Board also rejected the ALJ's finding that Dr. Strauss provided more persuasive testimony with respect to Ms. Greene's ability to perform her job duties, despite admitting that he did not view her specific job description, but rather based his opinion on his observations of CNA's while he worked in a hospital. In addition, Dr. Strauss did not ask Ms. Greene about her job duties during his examination. 1T24:30-25:3. Consequently, Dr. Strauss' conclusion that she was unable to perform her job duties was based on a job title in which Ms. Greene was not employed. In contrast, during Dr. Berman's testimony regarding Ms. Greene's job description, he concluded the only area that may involve [REDACTED], but he found that given [REDACTED] as evidenced through [REDACTED] that she could perform that function. Dr. Berman's review of Ms. Greene's job specification as a Human Service Assistant, coupled with [REDACTED] and Ms. Greene's own testimony bolstered his opinion that she could perform the duties of Human Service Assistant.

The Board next noted the medical testimony concerning the disability to Ms. Greene's [REDACTED] was not necessarily in conflict. Both Dr. Berman and Dr. Strauss found that Ms. Greene's [REDACTED] was normal apart from [REDACTED]. [REDACTED] was found in Ms. Greene's [REDACTED], which establishes that she was able to [REDACTED]. Dr. Berman explained that Ms. Greene could compensate for [REDACTED]. This evidence along with Ms. Greene's own testimony of relying on her [REDACTED]. "Unless contrary to common sense, common knowledge, or recognized physical laws, or based on primary facts absent from the proofs, the expert's statements are to be sifted by the jury like other testimony." Angel v. Rand Express Lines Inc., 66 N.J. Super 77, 86 (App. Div. 1961). "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself,"

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in that “[i]t must be such as the common experience and observation of mankind can approve as probable in the circumstances.” In re Perrone, 5 N.J. 514, 522 (1950).

Additionally, the Board rejected the substantial weight the ALJ gave to the fact that Ms. Greene worked in a dementia unit with patients requiring assistance “in all areas of personal care” and that were “sometimes resistant or non-cooperative.” Id at 12. However, an applicant “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 [s]he was hired.” Skulski v. Nolan, 68 N.J. 179, 205-06 (1975); Bueno v. Bd. of Trs., Teachers’ Pension & Annuity Fund, 404 N.J. Super. 119, 130-31 (App. Div. 2008), certif. denied, 199 N.J. 540 (2009). The Board therefore rejects the ALJ’s determination that Ms. Greene was eligible for Ordinary Disability retirement benefits.

For these reasons, the Board rejected the ALJ’s legal conclusion that Ms. Greene 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.

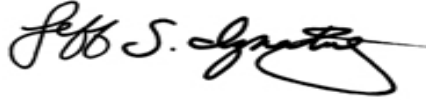
You have the right to appeal this final administrative action to the Superior Court of New Jersey, Appellate Division, within 45 days of the date of this letter in accordance with the Rules Governing the Courts of the State of New Jersey.

All appeals should be directed to:

Superior Court of New Jersey
Appellate Division
Attn: Court Clerk
PO Box 006
Trenton, NJ 08625

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Sincerely,

A handwritten signature in black ink, appearing to read "Jeff S. Ignatowitz". The signature is fluid and cursive, with a large loop at the end.

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

G-6 /SD

C: D. Lewis (ET); A. McCormick (ET); G. Sasileo (ET); K. Ozol (ET); P. Sarti (ET)
OAL, Attn: Library (ET)
DAG Porter R. Strickler (ET)
Deloris Greene