



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. TYP 04687-15

AGENCY DKT. NO. 1-510937

GUY WHITLOCK,

Petitioner,

v.

**BOARD OF TRUSTEES OF THE TEACHERS'
PENSION AND ANNUITY FUND,**

Respondent.

Stephen Roger Bosin, Esq., for petitioner

Robert S. Garrison, Jr., Deputy Attorney General, for respondent (Christopher
S. Porrino, Attorney General of New Jersey, attorney)

Record Closed: October 7, 2016

Decided: January 5, 2017

BEFORE **MARGARET M. MONACO**, ALJ:

STATEMENT OF THE CASE

Petitioner Guy Whitlock appeals from the determination of respondent Board of Trustees of the Teachers' Pension and Annuity Fund (the Board) denying his application for ordinary disability retirement benefits. The pivotal issue presented is

whether petitioner is physically incapacitated from the performance of his duties as an assistant superintendent for personnel.

PROCEDURAL HISTORY

The Board denied petitioner's application for ordinary disability retirement benefits at its meeting on January 8, 2015, based on its determination that petitioner was not totally and permanently disabled from the performance of his regular and assigned duties pursuant to N.J.S.A. 18A:66-39 and relevant case law. Petitioner filed an appeal, and the Board transmitted the matter to the Office of Administrative Law, where it was filed for determination as a contested case. The hearing was held on October 6, 2015, February 10, 2016 and May 17, 2016. Subsequently, the parties submitted transcripts of the hearing and briefs in support of their respective positions, and the record closed on October 7, 2016.

FACTUAL DISCUSSION

At the hearing, petitioner offered testimony by Dr. Richard Seldes, and testified on his own behalf. Dr. Arnold Berman testified on behalf of the Board. Certain facts surrounding this matter are largely undisputed. Based upon a review of the testimony and the documentary evidence presented, and having had the opportunity to observe the demeanor and assess the credibility of the witnesses who testified, I **FIND** the following preliminary **FACTS**.

In January 2013, petitioner commenced employment with the Hillsborough Township Board of Education (Hillsborough) as an assistant superintendent for personnel. He previously worked for the Montclair Board of Education as a director of special projects, principal, interim assistant to the superintendent and teacher. Petitioner was enrolled in the Teachers' Pension and Annuity Fund (TPAF) on October 22, 2001. (See J-1; J-8.) As Hillsborough's assistant superintendent for personnel, petitioner's job duties included, among others, the following:

- Serving as Chief School Administrator of the district in the absence of the Superintendent of Schools;
- Assisting the Superintendent of Schools in the analysis and development of the organization of schools so as to ensure the optimal instructional staff throughout the district;
- Assisting the Superintendent of Schools in the day-to-day administration of the negotiated agreements;
- Advising the Superintendent of Schools on personnel and supervisory needs;
- Supervising the hospitalization, major medical, and other types of employee benefit plans adopted by the Board of Education;
- Assisting the Superintendent of Schools in the selection and recommendation of certificated and non-certificated instructional personnel;
- Coordinating and administering the requirements of the New Jersey Thorough and Efficient Law in conjunction with other administrative and supervisory personnel;
- Evaluating procedures to be used in implementing educational goals established by the board;
- Coordinating, with the Assistant Superintendent for Curriculum and Instruction, the orientation program for new instructional staff and overseeing, with the Assistant Superintendent for Curriculum and Instruction, the professional development program for all staff;
- Evaluating, according to board policy and administrative procedures, all assigned personnel;
- Maintaining up-to-date certification records which will ensure compliance with local, state, and national laws;
- Serving as the district's administrative representative in negotiations with all recognized bargaining units;
- Assisting in the development and administrative budget; and
- Serving as the Affirmative Action Officers for the school district.

[J-4.]

Dr. Gregory Lutz, a physiatrist at the Hospital For Special Surgery, has been petitioner's treating physician for his spine since 2008. Petitioner suffered from back pain for approximately two and one half years prior to seeing this specialist for medical treatment. Based on petitioner's history, physical exam and imaging studies, Dr. Lutz performed a caudal epidural steroid injection procedure on May 8, 2008, and reported his post-operative diagnosis of "Symptomatic L5-S1 Disk Degeneration." (P-5.) On June 3, 2008, Dr. Lutz performed a left S1 transforaminal epidural steroid injection and again reported a post-operative diagnosis of "Symptomatic L5-S1 Disk Degeneration." (P-6.) Petitioner credibly testified that the first injection alleviated his pain for only two weeks and he experienced no relief from the second procedure.

In August 2013, petitioner again sought care from Dr. Lutz for his lumbar pain. Dr. Lutz started petitioner on a regimen of pain medication (Mobic) and prescribed physical therapy, which petitioner underwent in August and September 2013. Petitioner credibly described that he received no relief of the pain from either the medication or the physical therapy.

Dr. Lutz ordered an MRI of petitioner's lumbar spine, which was performed on August 14, 2013. (P-9.) The stated impression with regard to that study was "disc degeneration" at L2-3, L4-5 and L5-S1, along with "a fissure in the posterior outer annulus" with "[m]oderate/severe right facet arthrosis associated with edema in the adjacent posterior elements" as to L4-5.

On September 19, 2013, Dr. Lutz performed a caudal epidural steroid injection at L5-S1. (P-4.) His report reflects preliminary and postoperative diagnoses of "L5-S1 diskogenic pain."

On February 27, 2014, Dr. Lutz performed a lumbar discogram to L3-4, L4-5 and L5-S1. (P-7.) Dr. Lutz's post-operative diagnosis was "Symptomatic L4-L5, L5-S1 Disc Disease with Severe Concordant Pain." The findings in the operative report reflect that, when the contrast was injected, petitioner had severe concordant pain with evidence of grade 5 annular disruption at the L4-L5 level, and petitioner had severe concordant lower back pain with evidence of grade 3-4 annular disruption at the L5-S1 level.

On February 27, 2014, a post discogram CT scan of petitioner's lumbar spine was performed. (P-8.) The stated impression indicates a "6 o'clock annular tear" at L4-5 and "Diffuse disc degeneration" at L5-S1. The findings as to L5-S1 state that "[t]here is severe disc space narrowing and marginal osteophyte formation"; "[t]here are Schmorl's nodes on the inferior endplate of L5 and to a lesser degree on the superior endplate of S1"; and "[t]here is mild to moderate bilateral foraminal stenosis due to endplate osteophytes at the inferior aspect of L5."

Subsequent to the lumbar discogram and CT scan, Dr. Lutz referred petitioner to Dr. Patrick O'Leary, who specializes in spine surgery. Dr. O'Leary ordered a thoracic spine x-ray of petitioner, which was conducted on March 12, 2014 and includes the stated impression of "[t]horacic spondylosis with kyphosis" and "[m]ultiple vertebral bodies mildly flattened." (P-10.) He also ordered a CT scan of petitioner's cervical spine and a bone scan. (See P-14 at 4.) In a report dated April 9, 2014, Dr. O'Leary concluded that petitioner has "diffuse cervical, thoracic and lumbar spondylosis and may over time require multiple spinal fusion operations." (P-14 at 4.) According to his report, Dr. O'Leary requested petitioner to see a rheumatologist and then "come back for reconsideration for a lumbar spinal fusion of the lower lumbar spine."

Petitioner's last day at work was in mid-April 2014. On July 22, 2014, petitioner applied for an ordinary disability pension with a retirement date of August 1, 2014. (J-5.) Petitioner used sick and vacation time from April until August 1, 2014. In his application, petitioner described that the basis for his application is "due to severe chronic debilitating pain in [his] spine resulting from degenerative processes which commenced over 5 years ago and have progressed aggressively to the point that [he is] no longer able to sustain the mental concentration necessary to perform the duties of an administrator/educator."

In connection with his application, Dr. Lutz completed a Medical Examination by Personal or Treating Physician form. (P-15.) In the form, Dr. Lutz reported his diagnosis of lumbosacral disc degeneration, cervical disc displacement, and hip sprain, and that he has treated petitioner with medication, physical therapy and epidural steroid

injection with “no relief.” Dr. Lutz further reported that petitioner is totally and permanently disabled and no longer able to perform his job duties and/or any other job, stating that petitioner has “constant severe low back pain”; an “inability to sit, stand or walk any length of time”; “cervical pain” with restricted range of motion; and “left hip pain” with “difficulty walking.” In his opinion, petitioner’s disability was likely to be progressive and no possibility existed that petitioner might improve to a degree to perform his job duties.

Dr. Robert Griffin also completed a Medical Examination by Personal or Treating Physician form dated August 18, 2014. (R-6.) According to the form, Dr. Griffin had been treating petitioner since April 2, 2014, and he addressed in the form matters regarding petitioner’s cervical spine. He reported that petitioner was not totally and permanently disabled and no longer able to perform his job duties and/or any other job.

Dr. Arnold Berman conducted an independent medical examination (IME) of petitioner. He conducted a physical examination of petitioner on November 6, 2014 and authored reports dated November 6, 2014, August 25, September 29 and December 15, 2015. (R-2 to R-5.) Based upon his evaluation, Dr. Berman opined that petitioner was “not totally and permanently disabled for the duties of his occupation of Assistant Superintendent of Personnel.” (R-2.)

On January 8, 2015, the Board considered and denied petitioner’s application for ordinary disability retirement benefits based upon its determination that petitioner is not totally and permanently disabled from the performance of his regular and assigned job duties pursuant to N.J.S.A. 18A:66-39 and relevant case law. (J-2.) The Board determined that with his years of service, petitioner qualified for a deferred retirement.¹

Subsequently, Dr. Richard Seldes conducted an IME of petitioner. He conducted a physical examination of petitioner in August/September 2015 and prepared reports dated September 15, 2015 and January 22, 2016. (P-3; P-12.)

¹ Petitioner has nineteen years and six months of pension service credit with the TPAF. (J-7.)

On October 21, 2015, an MRI of petitioner's lumbar spine was performed. (P-13.) The stated impression indicates that petitioner has disc degeneration at L2-3 and L5-S1, and petitioner has a "[s]mall/moderate sized broad-based posterior midline disc protrusion" at L4-5 that "causes mild/moderate thecal sac compression," along with "facet arthrosis" and "edema in the posterior elements adjacent to the right facet joint." The report further indicates that, when compared to the lumbar spine MRI on August 14, 2013, the L4-5 disc protrusion was "a new finding" and "the right facet arthrosis was slightly greater in the current exam."

Petitioner underwent a right hip replacement in or around 2003 and a left hip replacement in April 2014.

THE TESTIMONY

Apart from the evidence that forms the foundation of the above findings of fact, a summary of other pertinent testimony follows.

Guy Whitlock

Petitioner testified that his lumbar back condition was the basis for his disability application, and he was unable to perform the substantial and material duties of his occupation as a result of ongoing spine arthritic and disc conditions. He described his lumbar back pain as a debilitating, constant, chronic and sharp pain that has acute episodes of spiking. When the pain is at its worst, petitioner needs assistance getting out of bed or out of a chair, he can barely walk and he cannot properly stand. Although not a frequent occurrence, petitioner's pain at times radiates down his right leg to his foot. Petitioner has restricted movement and pain with regard to bending and reaching, and sitting compounds his pain. He described that his pain will become excruciating and unbearable after sitting for approximately twenty minutes to an hour and he will have to stand. However, his pain is also excruciating if he stands stationary for approximately five minutes, and it is extremely painful to get in an erect position and stand after sitting for a period of time.

Petitioner stopped working in mid-April 2014. When he left work, he was treated for his back and also had a total left hip replacement. Petitioner testified that before he stopped working he was experiencing pain the entire day at work, his colleagues were aware of his pain, and he had to leave work early at times to attend physical therapy. Petitioner stated that his pain “absolutely” affected his ability to do his work and described his job as a “high pressure,” “highly cerebral” and “intensive” position on a daily basis. He testified that having distracting pain that causes him to be thinking about the pain and reacting to the pain prevented him from being competent at his job. Petitioner’s pain prevented him from being able to think, function and act on a level of competency required by his position. Petitioner explained that the resulting pain from his condition does not allow him to sustain the concentration necessary to be competent in his position. He described that the quality of his work suffered, the distracting pain effected his concentration and he was not able to perform on a competent level the substantial and major duties of his occupation. Petitioner filed for disability based on his belief that he was unable to properly perform his duties because of the pain. Although there was no record of petitioner being incompetent, petitioner described that he was finding it harder and harder to concentrate to do his job on a competent level. While petitioner was aware of the intense effort he had to put forth in order to work through the pain, petitioner stated that he was not aware of any drop off in his performance. However, shortly before he left in mid-April, the superintendent of schools informed petitioner that he could tell that petitioner was in a lot of pain at a board of education meeting the prior night because petitioner had been off his game at the board meeting. Petitioner stated that this was the first time that he was made aware that his performance had suffered as a result of his condition.

Petitioner testified that Dr. O’Leary, along with another spine surgeon, advised petitioner against spinal fusion surgery of his lower lumbar spine due to the lack of integrity of his spine. According to petitioner, the surgeons informed him that, while a fusion would be indicated at L5, S1, the lack of integrity of his spine would cause a domino effect in that to fuse the two vertebrate would cause tension or pressure on the other levels and they would ultimately have to fuse his entire spine. Petitioner explained that Dr. Lutz was treating his back and Dr. Griffin was focusing on his neck which is not the basis of his disability. He also described that his hip replacement in April 2014 was

not successful; petitioner understood that his bone did not attach to the prosthesis; and his surgeon advised that petitioner needed revision surgery. Petitioner noted that his disability claim and the reason he could not return to work were based on his lower lumbar back condition and not his hip condition.

Dr. Richard Seldes

Seldes, who is board certified in orthopedic surgery and licensed to practice medicine in New Jersey and New York, was qualified as an expert in orthopedic medicine. Seldes performed an IME of petitioner and conducted a physical examination of petitioner's neck, back, and hips in August/September 2015. His examination revealed that petitioner had decreased range of motion of his lumbar spine. Petitioner had flexion to 45 degrees with normal being 90 degrees, and his extension was zero with normal being 30. Petitioner also had pain with bending and rotation. Seldes' examination of petitioner's cervical spine and hips also revealed decreased range of motion, and petitioner had pain at extreme range of motion on his left hip and pain with range of motion on his right hip.

Seldes reviewed medical records as part of his evaluation. Based upon the documentation he reviewed, Seldes testified that petitioner's conditions are getting worse over time. He testified that Dr. Lutz's report dated September 19, 2013 confirmed that petitioner had low back pain and Dr. Lutz performed an epidural injection at L-5/S-1. Seldes explained that this procedure is used to help treat back pain, and L-5/S-1 is one of the levels where petitioner has degenerative changes. He noted that "oftentimes patients who have persistent pain in their back need to undergo repeated injections," and the records reflect that petitioner had earlier epidural steroid injections at L5-S1 on May 8, 2008 and June 3, 2008. Seldes explained that an objective test was performed during each of those procedures where there was a reproduction of back pain with the injection of the steroid followed by pain relief during the anesthesia phase, which he stated indicates a positive test result that the affected level is pathologic or objective evidence of pathology. Seldes testified that the MRI of petitioner's lumbar spine on August 14, 2013 reveals that petitioner has disc degeneration at multiple levels (L2-L3, L4-5, L5-S1), and the findings in Dr. Lutz's operative record of petitioner's

lumbar discogram in February 2014 confirm petitioner's degenerative disc disease in his lower lumbar spine. Seldes stated that the CT scan in February 2014 showed that petitioner has diffuse degenerative disc disease at L5-S1 with annular tears at L4-L5. He added that the findings that there is severe disc space narrowing and marginal osteophyte formation, along with the mild to moderate bilateral foraminal stenosis due to endplate osteophytes at inferior aspect of L5, are "all consistent with severe disk disease at L5-S1." Seldes testified that the report and films of petitioner's MRI on October 21, 2015 showed that petitioner has degenerative disc disease and arthritis of his lumbar and thoracic spine and reflects that petitioner's condition was deteriorating. He reviewed the report of Dr. O'Leary, a spine surgeon, dated April 9, 2014, which states his impression that petitioner has diffuse cervical, thoracic and lumbar disc changes and disc disease with arthritis and that petitioner may need multiple spinal surgeries in the future. He testified that the x-ray of petitioner's thoracic spine on March 12, 2014 reveals that petitioner also has degenerative disc disease at his thoracic spine. The records further reflect that petitioner was suffering from spondylosis, a condition where there is a breakdown of joints and the bones around the spine.

Based upon his evaluation, Seldes opined that petitioner suffers from "cervical, thoracic, and lumbar degenerative disease, severe." He opined that petitioner has a "permanent aggressive condition of his spine which continues to worsen as time goes on." Seldes testified that there was objective evidence of petitioner's degenerative disc disease, explaining that petitioner had MRIs, CAT scans, x-rays, and a discogram, which all show that he had degenerative disc disease. Seldes opined that petitioner's condition was advanced and severe based on the appearance of the images on the studies. He testified that the presence of severe lumbar degenerative disc disease would be a cause of distracting pain and it would also affect an individual's ability to sit and stand and to do sedentary work. Seldes explained that it would affect an individual's ability to do sedentary work because the lower spine area has increased stress in a sitting position, and sitting would actually cause an increase in pain for an individual with degenerative disc disease. He indicated that sitting puts a lot more stress on the spine than standing "so patients that have this condition just have difficulty sitting for long periods of time, they just can't take the pain." Seldes testified that petitioner also has degenerative arthritis, which would affect his ability to do sedentary

work and cause distracting pain. He further described that spondylosis causes spinal pain and would be another cause of distracting pain.

Based upon his evaluation, Seldes determined that petitioner also suffers from “status post right hip replacement with early osteolysis” and “status post left hip replacement with hip pain with incomplete osseous integration.” He explained that osteolysis is a condition where the bone gets eaten away by an inflammatory response, this condition was evidenced on an MRI of petitioner’s hips on August 21, 2015, and it would be a further cause of distracting pain. Osseous integration is when the bone grows into the metal implant that is put for a total hip replacement, and the MRI of petitioner’s hips shows that petitioner’s left hip component is not completely integrated and had “incomplete bone growing into it,” which Seldes stated can be a cause of distracting pain.

Seldes reviewed petitioner’s job description as an assistant superintendent for personnel. He opined to a reasonable degree of medical certainty that petitioner was unable to perform the duties of assistant superintendent for personnel or any sedentary duty work. He opined that petitioner cannot perform any duties that require sedentary work because of petitioner’s “inability to sit for long periods of time, [and] inability to concentrate secondary to pain.” Seldes opined that petitioner has a chronic, progressive degenerate spine condition that limits his ability to work. He explained that petitioner has arthritis and degenerative disc disease, which is a permanent, progressive condition that continues to worsen as time goes on. Seldes opined that “in its current state . . . it is severe and it does cause distracting pain which limits [petitioner’s] ability to work and it will progress as time goes on which would even further limit his ability to work.” Based on petitioner’s level of degenerative disc disease, Seldes opined that petitioner “is unable to sit for greater than one hour secondary to his neck and back pain and this also alters his ability to concentrate and be able to perform mental tasks.” (P-3.)

Seldes disagreed with Dr. Berman’s opinion that petitioner has no objective residual signs and that he is able to do sedentary work. He testified that petitioner has “multiple objective studies that have shown that he has degenerative disc disease”;

petitioner had multiple injections in his lower spine and had seen a spine surgeon who recommended spine surgery; and “[t]hese are all clear indicators that he has a real condition which is chronic, progressive and severe.” Seldes further stated in his report that, during his physical examination, petitioner “really had muscle spasm which is an objective sign”; he “had pain to palpation”; and he “had significant limited range of motion with passive range of motion with goniometer, which is also more objective testing.” (P-12.) He further reported that petitioner “had a clear pain with motion”; “he has significantly restricted range of motion” and he “had difficulty sitting as well as standing.”

Seldes acknowledged that a straight leg raising test is done to determine if there is radiculopathy; petitioner’s test was negative; petitioner had 4+ out of 5 strength as to his lower extremities; and Seldes did not observe any atrophy in petitioner’s upper and lower extremities. He was unaware of the medical examination form completed by Dr. Griffin, but noted that petitioner’s cervical spine is not as severe as his lumbar spine. He agreed that it is more difficult to review an MRI scan of a person who had a hip replacement because of the metal in the replaced hip. Although Seldes acknowledged that a person can function with disc degeneration in the lumbar and cervical spines, he explained that there are varying degrees of disc disease. He testified that patients who have mild disc disease can do their everyday activities without much difficulty, but it becomes extremely difficult to do certain activities once the condition is more moderate to severe. In Seldes’ opinion, petitioner has severe degenerative disc disease.

Dr. Arnold Berman

Berman, who is board certified in orthopedics and licensed to practice medicine in New Jersey, New York, and Pennsylvania, was admitted as an expert in orthopedics and orthopedic surgery. Berman performed an IME of petitioner and conducted a physical examination on November 6, 2014. Petitioner’s complaints at that time consisted of chronic and severe neck and back pain. Berman described that petitioner’s history revealed that he had a gradual onset of this pain and a variety of conservative treatments, including physical therapy along with cervical and lumbar spinal blocks.

According to Berman, petitioner had an “excellent” examination with “virtually no objective findings” except his two hip replacements. With regard to petitioner’s back and neck complaints, Berman’s examination found “no evidence of any acute injury” and “no evidence of any progressive loss of function.” He described that there also was no change in petitioner’s MRIs or x-rays other than what would be expected normally in anyone with degenerative change. Berman testified that “there will always be some progression [b]ut that progression does not correspond to a clinical manifestation,” and the degenerative changes in the cervical and lumbar spine are found normally in the population, as individuals get to be in their mid-fifties. He explained that there are two parts to his examination in order for him to make a final conclusion as to whether or not degenerative changes cause symptoms. The first part is subjective and consists of the patient’s complaints of symptoms, which are under the patient’s total control. The second is objective and consists of matters that are not within the patient’s control, such as the patient’s reflex and circumference. Berman testified that all of petitioner’s objective findings as to his cervical spine, lumbar spine, and hips were completely normal. According to Berman, petitioner had normal range of motion of his cervical and lumbar spine; petitioner’s reflex, motor, sensory, straight leg and strength testing were normal; and petitioner had no atrophy. Berman noted that petitioner had a lot of potential reasons for having atrophy because of his two hip replacements and petitioner had none. Petitioner had a normal hip exam with full range of motion and no complaints of pain.

Berman reviewed petitioner’s radiological studies. He described the need for a clinical correlation during the examination, meaning that there must be a match of abnormal radiologic findings with abnormal objective findings on examination of the patient, and that all of petitioner’s objective findings on examination were normal. Berman testified that Dr. Griffin, who was petitioner’s treating physician, did not find petitioner to be totally and permanently disabled, and a treating physician’s opinion “counts a lot” with him because the physician “knows the patient” and from his experience a treating physician “tends to tilt in the direction of the claimant.” He further described that hip surgery has been his principal sub-specialty in orthopedic surgery throughout his career, along with his research regarding total joint replacement loosening. Berman testified that petitioner had “a superb technical, surgical result”

regarding his left hip, he had “two good hips” and there was no evidence of loosening in the prosthesis of his hips radiologically or clinically. He explained that one cannot use an MRI to make this determination because any kind of metal, such as petitioner’s hip replacements, will “totally distort” an MRI to the point that it cannot be interpreted.

Berman diagnosed petitioner with “lumbar sprain/strain, resolved with no residuals and no aggravation of degenerative joint disease and no progressive functional loss over the last several years.” He also concluded that petitioner had “cervical spine strains, chronic, of nontraumatic onset, resolved with no residuals with no progressive loss of function” and “bilateral total hip replacement postop with no pain and no loss of function.” Berman testified that petitioner had “degenerative changes without any aggravation of them.” He stated that petitioner’s “degenerative disease is of a minor nature and it has not shown any significant progression [and] there’s been no evidence of any progressive loss of function.” Berman reviewed petitioner’s job duties as an assistant superintendent, which he described as basically a sedentary position. He opined that petitioner “could continue without difficulty the full active duty [of] his current job as an assistant superintendent.” Berman testified that it would be “very healthy” for petitioner to do sedentary work because “activity at that level is the best thing you could have for the spine and for the hips too.”

Berman admitted that the matters addressed in Dr. Griffin’s form involve petitioner’s neck, Dr. Lutz was the doctor who was treating petitioner’s back, and Dr. Lutz found petitioner to be totally and permanently disabled. He admitted that Dr. Lutz concluded that petitioner had symptomatic L4-5 and L5-1 degenerative disc disease, but characterized it as a subjective finding. Berman agreed that degenerative disc disease is apparent on an x-ray, which is objective, but stated that an “x-ray has no relevance unless there’s a clinical correlation with a patient.” He acknowledged that petitioner complained of chronic and severe back pain at the time of his examination, which petitioner rated as an eight to ten on a scale up to ten, and Berman’s August 2015 report states that petitioner has “minor subjective complaints.” Berman testified that he “take[s] subjective complaints very seriously,” but added that subjective complaints must be verified by objective findings and they are “taken less seriously if the objective findings are normal.” In Berman’s view, long standing degenerative

disease was the cause of petitioner's back pain and, if petitioner had pain at all, it was "minor" in nature and not disabling. He testified that the most important question is whether there is radiculopathy, stating that "[s]pinal pain, typically, is not disabling unless it is radicular," and petitioner had no complaints of leg pain and there was no evidence of radiculopathy clinically or radiologically. Although Berman agreed that cervical or lumbar degenerative disc disease can possibly become significant enough to be impairing, he testified that it "almost never occurs without radiculopathy." Berman agreed that the medical records demonstrated radiologic signs of cervical and lumbar degenerative disease. Although he testified that he did not consider this condition to be advanced, he acknowledged writing in his report that the medical records "demonstrated well-documented, advanced cervical and lumbar degenerative disc disease." Berman admitted that a case of well-documented advanced cervical and lumbar degenerative disc disease could "sometimes" cause pain, but stated that "it occurs very, very commonly with no pain" and reiterated the need for exam findings that substantiate subjective pain. In his view, because petitioner had a normal clinical exam, his pain is mild and non-disabling notwithstanding the radiologic findings. Berman opined that petitioner does not have a "significant spinal problem" and it would not be possible for petitioner to experience distracting pain from his physical conditions. He testified that all types of degenerative processes cause pain but they are typically not disabling pain and, "[u]nless you have radiculopathy, it's not disabling." He further opined that petitioner will never have a spinal fusion operation stating, "[h]e has too many levels involved and you can't address all those levels at one time."

DISCUSSION AND CONCLUSIONS

N.J.S.A. 18A:66-39(b) sets forth the criteria governing eligibility for ordinary disability retirement benefits for members in the TPAF, and directs in pertinent part that the member must be "physically or mentally incapacitated for the performance of duty." To be eligible for such benefits, the member "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 he was hired." Skulski v. Nolan, 68 N.J. 179, 205–06 (1975); see Getty v. Prison Officers' Pension Fund, 85 N.J. Super. 383, 390 (App. Div. 1964). The standard does not, however, require "the applicant to show physical inability

to perform substantially different duties or to produce evidence of general physical unemployability.” Skulski, supra, 68 N.J. at 206.

The pivotal issue presented is whether petitioner is incapacitated for the performance of his duty as an assistant superintendent of personnel due to a physical disability. Petitioner has the burden of demonstrating, by a preponderance of the credible, competent evidence, that he meets the requirements for ordinary disability retirement benefits. See In re Revocation of the License of Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962). In this regard, the burden is on petitioner to prove that he “has a disabling condition and must produce expert evidence to sustain this burden.” Bueno v. Bd. of Trs., Teachers’ Pension and Annuity Fund, 404 N.J. Super. 119, 126 (App. Div. 2008), certif. denied, 199 N.J. 540 (2009); see Patterson v. Bd. of Trs., State Police Ret. Sys., 194 N.J. 29, 50–51 (2008). This forum has the duty to decide in favor of the party on whose side the weight of the evidence preponderates, and according to a reasonable probability of truth. Jackson v. Del., Lackawanna and W. R.R. Co., 111 N.J.L. 487, 490 (E. & A. 1933). Evidence is said to preponderate “if it establishes ‘the reasonable probability of the fact.’” Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). The evidence must “be such as to lead a reasonably cautious mind to the given conclusion.” Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958). Precisely what is needed to satisfy this burden necessarily must be judged on a case-by-case basis.

In undertaking this evaluation, it is necessary for me to assess the credibility of the witnesses for purposes of making factual findings as to the disputed facts. Credibility is the value that a finder of the facts gives to a witness’s testimony. It requires an overall assessment of the witness’s story in light of its rationality or internal consistency and the manner in which it “hangs together” with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). “Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself,” 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). A fact finder “is free to weigh the evidence and to reject the testimony of a witness . . . when it is contrary to circumstances given in evidence or contains inherent improbabilities or

contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth.” Id. at 521–22; see D’Amato by McPherson v. D’Amato, 305 N.J. Super. 109, 115 (App. Div. 1997). A trier of fact may also reject testimony as “inherently incredible” and when “it is inconsistent with other testimony or with common experience” or “overborne” by the testimony of other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958). Further, “[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.” State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted). The choice of rejecting the testimony of a witness, in whole or in part, rests with the trier and finder of the facts and must simply be a reasonable one. Renan Realty Corp. v. Dep’t of Cmty. Affairs, 182 N.J. Super. 415, 421 (App. Div. 1981).

It is also necessary for me to assess and weigh the competing expert testimony offered at the hearing. It is well settled that “[t]he weight to which an expert opinion is entitled can rise no higher than the facts and reasoning upon which that opinion is predicated.” Johnson v. Salem Corp., 97 N.J. 78, 91 (1984) (citation omitted). It is within the province of the finder of facts to determine the credibility, weight and probative value of the expert testimony. State v. Frost, 242 N.J. Super. 601, 615 (App. Div.), certif. denied, 127 N.J. 321 (1990); Rubanick v. Witco Chem. Corp., 242 N.J. Super. 36, 48 (App. Div. 1990), modified on other grounds and remanded, 125 N.J. 421 (1991). “The testimonial and experiential weaknesses of the witness, such as (1) his status as a general practitioner, testifying as to a specialty, or (2) the fact that his conclusions are based largely on the subjective complaints of the patient or on a cursory examination, may be exposed by the usual methods of cross-examination.” Angel v. Rand Express Lines, Inc., 66 N.J. Super. 77, 86 (App. Div. 1961). Other factors to consider include whether the expert’s opinion finds support in the records from other physicians, and the information upon which the expert has based his conclusions.

Against this backdrop, Seldes and Berman appear to agree that petitioner suffers from degenerative disc disease. Further undisputed is that petitioner’s disability

application was predicated upon his spine condition and not his neck or hip conditions. The experts' paths diverge as to whether petitioner is totally and permanently disabled from performing his duties as assistant superintendent for personnel due to his medical condition.

In judging the strength of the competing expert testimony, I find that the scales tip in favor of Seldes. Simply put, I found Berman's conclusions and the reasoning underlying those conclusions to be overborne by those offered by Seldes and, on balance, I afford greater weight to Seldes' testimony and opinions regarding the extent and permanency of petitioner's conditions. I found Seldes' testimony to be credible, persuasive and consistent with other offered evidence, and the conclusions reached by him were not significantly impaired by counsel's thorough cross-examination. The credible evidence demonstrates that Seldes performed a detailed evaluation of petitioner and based his opinions not only on petitioner's subjective complaints, but on Seldes' own experience, expertise, observations, examination and testing of petitioner, coupled with his review of petitioner's medical records. During his examination, petitioner had muscle spasm, pain to palpation, significant limited and restricted range of motion and clear pain with motion. (See P-12.) Seldes credibly explained the results of various objective studies and procedures that petitioner underwent, and credibly described that petitioner had severe degenerative disc disease in his lumbar and thoracic spine, along with degenerative arthritis and spondylosis, and that petitioner's condition is permanent, deteriorating and will worsen over time. And, Seldes credibly testified that the presence of severe lumbar degenerative disc disease would be a cause of distracting pain and it would impact an individual's ability to sit, stand and to do sedentary work, and petitioner's degenerative arthritis and spondylosis would be a further cause of distracting pain.

Seldes offered compelling and persuasive testimony that, based upon his evaluation, petitioner is unable to perform the duties of his position as an assistant superintendent or any type of sedentary duty work. His opinion stemmed from the fact that because of petitioner's condition he cannot sit for long periods of time and petitioner's inability to concentrate and perform mental tasks due to pain. Petitioner's inability to perform his job duties is also supported by petitioner's testimony. In short, I

found petitioner to be a forthright and credible witness. He offered sincere and candid testimony detailing his limitations and his severe distracting and disabling pain resulting from his back condition, which I found to be probable, be persuasive, have a “ring of truth,” and be consistent with the testimony and opinions offered by Seldes as well as the objective medical testing. This evidence discloses significant symptoms that support Seldes’ opinion as to petitioner’s incapacity to perform his job duties, including petitioner’s limitations as to sitting, standing and concentrating due to his pain.

Succinctly stated, the totality of the credible evidence demonstrates that petitioner is unable to do the activities that are necessary to perform his job duties. The credible testimony supports that petitioner is unable to sit for long periods of time, and petitioner’s pain adversely affects his concentration and ability to effectively engage in the complex and demanding duties required by his position. I embrace petitioner’s stance that his regular and assigned duties, while not of a physically demanding nature, were intellectually, academically and administratively demanding, and require a high level mental acuity and efficiency. Indeed, Seldes’ opinion as to petitioner’s total and permanent disability is not only supported by objective medical evidence, but is corroborated by the Medical Examination by Personal or Treating Physician form completed by Dr. Lutz, who treated petitioner’s back condition for several years and reported that petitioner has “constant severe low back pain” and an “inability to sit, stand or walk any length of time,” and who plainly is in the best position to know the extent and permanency of petitioner’s conditions.

For his part, Berman opined that petitioner was not disabled from performing his job functions, and found that petitioner had a lumbar sprain/strain, which was resolved, and degenerative disease in his lumbar spine, which Berman characterized as minor. I found Berman’s opinions to be overborne by those offered by Seldes and the medical evidence presented. For example, Berman’s testimony that petitioner did not have well-documented advanced lumbar degenerative disc disease was inconsistent with other evidence, including his own report. Similarly, his conclusions that petitioner did not have a “significant” spinal problem and suffers at most from minor pain are overborne by the testimony of Seldes and petitioner, along with the objective medical documentation. And, although Berman articulated that a treating physician’s opinion

“counts a lot” with him, his opinion is at odds with Dr. Lutz, who treated petitioner’s back, and Berman’s apparent reliance on the form completed by Dr. Griffin, who treated petitioner’s neck, was misplaced.

Based upon a consideration of the totality of the evidence, I **CONCLUDE** that petitioner has established, by a preponderance of the credible evidence, that he is incapacitated from the performance of duty as an assistant superintendent for personnel. I **CONCLUDE** that petitioner has established, by a preponderance of the credible evidence, that he is physically incapable of performing the material and general duties of an assistant superintendent for personnel, and that he is permanently and totally incapacitated and disabled from the performance of his regular and assigned job duties as the result of his medical conditions. I **CONCLUDE** that petitioner has met the requirements necessary to qualify for and obtain an ordinary disability retirement pursuant to N.J.S.A. 18A:66-39(b) and his application for such benefits should be granted.

ORDER


I **ORDER** that the determination of the Board of Trustees of the Teachers’ Pension and Annuity Fund denying petitioner’s application for ordinary disability benefits be and hereby is **REVERSED**, and that petitioner’s appeal requesting such benefits be and hereby is **GRANTED**.

I hereby **FILE** my initial decision with the **BOARD OF TRUSTEES OF THE TEACHERS’ PENSION AND ANNUITY FUND** for consideration.

This recommended decision may be adopted, modified or rejected by the **BOARD OF TRUSTEES OF THE TEACHERS’ PENSION AND ANNUITY FUND**, which by law is authorized to make a final decision in this matter. If the Board of Trustees of the Teachers’ Pension and Annuity Fund does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF PENSIONS, One State Street Square, 50 West State Street, PO Box 295, Trenton, New Jersey 08625-0295**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 5, 2017
DATE


MARGARET M. MONACO, ALJ

Date Received at Agency: January 5, 2017

Date Mailed to Parties: January 5, 2017

jb

APPENDIX

List of Witnesses

For Petitioner:

Dr. Richard Seldes
Guy Whitlock

For Respondent:

Dr. Arnold Berman
Guy Whitlock

List of Exhibits in Evidence

Joint:

- J-1 Joint Stipulations
- J-2 Letter from Mary Ellen Rathbun to Guy Whitlock dated January 9, 2015
- J-3 Letter from Mary Ellen Rathbun to Kurt Schwartz dated April 6, 2015
- J-4 Job Description
- J-5 Application for Disability Retirement
- J-6 Employer Certification for Disability Retirement
- J-7 Estimates of Retirement Benefits dated June 16 and September 11, 2014
- J-8 Enrollment Application

For Petitioner:

- P-1 Resume of Guy Whitlock
- P-2 Curriculum Vitae of Dr. Richard Seldes
- P-3 Report by Dr. Richard Seldes dated September 15, 2015
- P-4 Operative Record dated September 19, 2013
- P-5 Operative Record dated May 8, 2008
- P-6 Operative Record dated June 3, 2008
- P-7 Operative Record dated February 27, 2014
- P-8 CT of lumbar spine on February 27, 2014

- P-9 MRI of lumbar spine on August 14, 2013
- P-10 X-ray of thoracic spine on March 12, 2014
- P-11 MRI on August 21, 2015
- P-12 Addendum Report by Dr. Richard Seldes dated January 22, 2016
- P-13 MRI of lumbar spine on October 21, 2015
- P-14 Report by Patrick F. O'Leary, M.D., F.A.C.S., P.C. to Dr. Gregory Lutz dated April 9, 2014
- P-15 Medical Examination by Personal or Treating Physician form

For Respondent:

- R-1 Curriculum Vitae of Dr. Arnold Berman
- R-2 Report by Dr. Arnold Berman dated November 6, 2014
- R-3 Addendum Report by Dr. Arnold Berman dated August 25, 2015
- R-4 Addendum Report by Dr. Arnold Berman dated September 29, 2015
- R-5 Addendum Report by Dr. Arnold Berman dated December 15, 2015
- R-6 Medical Examination by Personal or Treating Physician form dated August 18, 2014