



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. TYP 12324-18

AGENCY DKT. NO. 2-1194491

RICHARD BINETTI,

Petitioner,

v.

PUBLIC EMPLOYEES'

RETIREMENT SYSTEM,

Respondent.

Stephen R. Bosin, Esq., for petitioner

Austin J. Edwards, Deputy Attorney General, for respondent (Gurbir S. Grewal,
Attorney General of New Jersey, attorney)

Record Closed: February 12, 2021

Decided: March 3, 2021

BEFORE **BARRY E. MOSCOWITZ, ALJ:**

STATEMENT OF THE CASE

On December 15, 2016, Richard Binetti, a security officer, and a member of the Public Employees' Retirement System, became disabled when he was involved in a motor-vehicle accident while in his patrol car at work. Can Binetti retire on an accidental disability retirement allowance? Yes. Under N.J.S.A. 43:15A-43, a member of the PERS

may retire on such an allowance if the employee is permanently and totally disabled as a direct result of an accident occurring during and as a result of the performance of his regular or assigned duties.

PROCEDURAL HISTORY

On December 15, 2016, Binetti, who worked as an unarmed security officer for the Bergen County Sheriff's Department, was involved in a motor-vehicle accident while in his patrol car at work. Binetti never returned to work. On July 13, 2017, he applied to the PERS for accidental disability retirement benefits.

In his application, Binetti wrote that he was struck broadside by another vehicle, in his driver's side, and had to be cut out of the car. Binetti further wrote that he was taken by ambulance to Hackensack University Medical Center, and that he injured his head, neck, back, and left side. Binetti claims that he suffers from chronic pain in his head, neck, back, and left side, and at times he suffers from migraine headaches, as well as double vision and tunnel vision. Binetti further claims that he is afraid and anxious about driving.

On April 18, 2018, the Board of Trustees of the PERS denied his application for accidental disability retirement benefits. In its letter to Binetti, the Board wrote that it had determined that the incident on December 15, 2016, was identifiable as to time and place, that it was undesigned and unexpected, and that it occurred during and as a result of his regular and assigned duties, but that no evidence existed that it caused a total and permanent orthopedic or psychological disability. Thus, the Board did not consider Binetti totally and permanently disabled from the performance of his regular and assigned duties under N.J.S.A. 43:15A-43. Nevertheless, the Board noted that Binetti had turned sixty and was eligible for service retirement benefits.

On June 5, 2018, Binetti appealed the determination and requested a hearing.

On August 15, 2018, the Board granted the request.

On August 24, 2018, the Board transmitted the case to the Office of Administrative Law (OAL) as a contested case under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the OAL, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6.

Before the hearing, the parties resolved that the legal issue in this case is whether Binetti is entitled to accidental disability retirement benefits on an orthopedic basis, that is, whether the incident caused a total and permanent orthopedic disability as a direct result of a traumatic event.

On February 7 and February 14, 2020, I held the hearing. On February 5, 2021, the parties submitted their closing briefs, and I closed the record. On February 12, 2021, Binetti submitted an additional closing brief, and I opened the record to accept it, having received no objection to its submission, and closed the record once more.

DISCUSSION AND FINDINGS OF FACT

Kubeck

Justin Kubeck, M.D., is an orthopedist who testified on behalf of Binetti and was offered and admitted as an expert in orthopedic medicine without objection. Kubeck first examined Binetti on August 13, 2019, and later wrote a report dated January 17, 2020. At the hearing, Kubeck read from his report dated January 17, 2020.

Initial Visit—August 13, 2019

Kubeck first examined Binetti at his office on August 13, 2019. Binetti complained of neck pain with limited range of motion and pain radiating down his left arm. Kubeck wrote that Binetti reported that he has been experiencing this pain since the accident on December 15, 2016. Kubeck continued that after the accident, Binetti underwent six months of physical therapy with no relief. Binetti reported that he later saw a Dr. Newman, who diagnosed him with left-sided arthropathy and left-sided radiculopathy, which was

severe and persistent. According to Binetti, he had not had any treatment since 2017, and he had no history of neck or shoulder problems before the accident.

Physical Examination

On physical examination, Binetti had cervical flexion and extension of only 20 degrees, and described pain and paresthesia down his left arm in a C5-6 pattern with decreased sensation to light touch in this distribution. Binetti had very limited shoulder forward flexion on the left side to only 90 degrees actively and 100 degrees passively with a possible impingement. Kubeck emphasized at the hearing that Binetti had “frozen shoulder” from his lack of movement and relative immobilization over time. Binetti had tenderness in his left subacromial space and was tender in the base of his occiput. Paraspinal muscle rotation was limited to 10 degrees in each direction, and Kubeck could not perform a Spurling test because of the limited neck rotation and range of motion. Forward elevation was limited on the left side as well. Without explanation, Kubeck noted no gross weakness in the biceps, triceps, wrist extensor, wrist flexor, or hand intrinsic.

Record Review

Radiographs showed minimal flexion-extension excursion and other age-appropriate changes, and MRI from January 2017 showed neuroforaminal stenosis, predominantly at C4-5 on the left.

Impression/Recommendation

Kubeck assessed this condition as cervical radiculopathy, mostly on the left at C4-5, and frozen shoulder on the left side, with persistent neck and shoulder pain with significantly limited range of motion, and as a result, recommended updated MRI of the cervical spine and a course of physical therapy.

Follow-up Visit—August 15, 2019

Kubeck examined Binetti in his office again on August 15, 2019. Binetti had undergone the MRI of the cervical spine, which revealed left-side neuroforaminal stenosis at C4-5, age-appropriate osteophytes at C3-4, C4-5, and C5-6, as well as right-sided neuroforaminal stenosis at C3-4. Binetti still had limited range of motion in his neck and shoulder, as well as upper-arm pain, which correlated to the objective findings. As such, his physical examination was essentially unchanged from his last office visit only days before, and Kubeck again assessed this condition as cervical radiculopathy with neck and shoulder pain and significantly limited range of motion. This time, Kubeck also recommended cervical interlaminar epidural steroid injection at C7-T1 to alleviate some of the pain and improve the range of motion.

Follow-up Visit—October 10, 2019

Kubeck examined Binetti in his office again on October 10, 2019. By this time, Binetti had undergone the interlaminar epidural steroid injection at C7-T1 and tolerated it well. Kubeck wrote that Binetti reported 50 percent improvement of his pain after the injection, which lasted a few weeks, but then returned to the previous pain level. Binetti had also undergone six weeks of physical therapy, including a home exercise routine, but he still complained of persistent neck, shoulder, and periscapular pain, together with multilevel cervical stenosis, which was predominantly foraminal stenosis.

On physical examination, Binetti was tender in the posterior aspect of the cervical spine. He had limited range of motion in flexion, extension, and rotation of the cervical spine, although he had no focal upper-extremity weakness again. Pain radiated to his shoulders and to the upper portion of his arms. Once again, Kubeck assessed multilevel cervical radiculopathy and recommended a second cervical interlaminar epidural steroid injection, together with physical therapy.

Follow-up Visit—November 14, 2019

Kubeck examined Binetti in his office again on November 14, 2019. By this time, Binetti had undergone the second interlaminar epidural steroid injection at C7-T1 and again tolerated it well. Kubeck wrote that Binetti, however, reported no improvement. Binetti had also undergone additional physical therapy, twelve sessions, but his pain and symptoms had worsened.

On physical examination, Binetti reported pain again mainly in the posterior aspect of the cervical spine, and more on the left side of his shoulder and periscapular area, with no weakness in the upper extremity, namely, in his deltoid, biceps, triceps, wrist extensors, wrist flexors, or hand intrinsic. Again, there was no atrophy. Accordingly, Kubeck assessed persistent cervical and periscapular pain and recommended facet joint injections and medial branch blocks.

Document Review

Kubeck did not treat Binetti again, but Binetti did undergo the epidural steroid injections, and Kubeck did review additional documents. In particular, Kubeck reviewed the independent medical examination by Andrew Hutter, M.D., an orthopedic surgeon, dated November 14, 2017, a letter from Steven Winer, M.D., an internist, dated June 29, 2017, and an office-visit note by Bernard Newman, M.D., an orthopedic surgeon, dated May 3, 2017. Kubeck also reviewed an MRI of the cervical spine from July 19, 2019, an MRI of the cervical spine from January 2, 2017, a CT of the cervical spine from December 19, 2016, and x-rays of the cervical spine from December 19, 2016. Finally, Kubeck reviewed the application for disability retirement, together with the job description.

After reviewing these documents, and noting that Binetti had been treating with Winer for a long time—with chronic pain, limited range of motion, and diminished rotation over the course of two years, despite extensive physical therapy and cervical epidural injections, not to mention diagnostic testing—Kubeck believed that Binetti was permanently disabled from the accident on December 15, 2016:

In my opinion, based upon a reasonable degree of medical probability and review of the additional records, Richard Binetti sustained a cervical radiculopathy with persistent neck and shoulder pain causally related to the motor vehicle accident he had while working as a security guard on 12/15/16. He had a cervical flexion and extension arc of only about 20 degrees. His range of motion was severely limited. He described pain and paresthesia down his left arm in more of a C5-6 pattern with decreased sensation to light hand touch in that distribution. Paraspinal muscle rotation again was quite limited to only about 10 degrees in each direction. This is permanent in nature in that his pain and symptoms had remained chronic for the past two years despite an extensive course of treatment including physical therapy and cervical epidural injections.

[P-2 at 4.]

Indeed, at the hearing, it was emphasized that Binetti's job description requires a physicality that Binetti no longer possesses. The job duties include: "patrols by car," "removes unwilling person from premises," "accompanies detainees," "aids law enforcement officer by accompanying prisoners," "restrains violent or disorderly persons," "drives government vehicle," "may apprehend law violators," "questions suspicious persons and may detain and arrest those persons," "seizes contraband or stolen property and detains suspects for questioning," and "escorts unruly persons."

Also emphasized at the hearing were Newman's notes from May 3, 2017, and June 23, 2017, as well as Winer's note from June 29, 2017. Regarding Newman's note from May 3, 2017, the doctor wrote that Binetti had reached maximum medical benefit and could not return to work. Regarding Newman's note from June 23, 2017, the doctor wrote that he had been treating Binetti, that Binetti had difficulty rotating and extending his neck, and that Binetti had severe left-sided C4-5 facet arthropathy and hypertrophy, which was unresponsive to treatment and caused daily pain. As a result, Newman concluded that Binetti could no longer perform his duties, as they involved driving, turning his neck, and grabbing others.

Regarding Winer's note from June 29, 2017, the doctor wrote that Binetti was a longstanding patient, and that Binetti had symptoms of persistent cervical radiculopathy,

which limited his strength and mobility in his left arm, shoulder, and neck, and rendered him unable to perform his duties.

Binetti

Binetti testified about how the accident occurred, how his treatment failed him, and how his pain persists. Throughout the hearing, Binetti sat still, nearly motionless, often with his eyes closed. Once on the stand, Binetti talked tentatively through visible discomfort. Indeed, his testimony was the manifestation of melancholy: It was flat, understated, and sad. It was of a person defeated and resigned to his condition.

Binetti explained that he became an unarmed security guard in the Bergen County Sheriff's Office after having had an auto-repair business, a food truck, and an Italian restaurant, and that he had been in that position as a security guard in that office for nearly fifteen years. He further explained that he worked the 3:00-p.m.–11:30-p.m. shift, and that he spent most of that time in his patrol car, driving around the county from county park to county park. It was during one of these shifts when he was struck by a truck on his driver's-side door. Binetti explained that he would have been hurt worse but for the fact that he was wearing his bulletproof vest and packed tightly in the car.

Binetti said that he is constant pain—at either an eight or nine, or sometimes ten, on a scale of one to ten—and that he cannot sit in a car for more than fifteen to twenty minutes. Binetti continued that the pain originates just below the back of his skull and radiates to his upper left shoulder, and sometimes down his arm to his hand. Binetti sighed that he cannot sleep, and that he must live with this pain and discomfort.

Binetti corroborated that he underwent the two epidural injections, including additional injections two weeks ago, none of which helped, and that he underwent physical therapy, which has not helped either. Binetti then demonstrated that he can barely move his head to the left, and that he can barely raise his left arm to chest height. Binetti resolved that he had to retire because he has difficulty driving and could not be physical with others if need be. For example, he cannot forcibly detain anyone because he no longer has the strength.

Binetti declared that sitting on the stand, at the moment, his pain was a nine out of ten, with ten, in his mind, requiring hospitalization.

Gherardi

Jayne Gherardi lives with Binetti. She testified that they started dating years ago, but that she had to sell her house after the accident on December 15, 2016, and move in with Binetti so she could care for him. Gherardi explained that she helps Binetti with nearly all his activities of daily living, including showering, dressing, shopping, cooking, and cleaning, among others, and that she loves Binetti, that he is her best friend, but that she is more of his caretaker now than anything else. Her testimony was heartfelt, emotional, and tearful, as she further explained what they used to do before the accident. For example, she testified that they used to go to New York City to the opera and to restaurants, and that they used to go to the mountains to vacation, but now Binetti merely looks on his iPad for recreation, walks around the house on occasion to exercise, if one could call it that, she said, or walks around the garage to admire the cars he once enjoyed restoring. Gherardi resigned that while Binetti is no longer fun or funny, they at least have each other. Her testimony was sad too and emotionally compelling.

Hutter

Andrew Hutter, M.D., was offered and admitted as an expert in orthopedic medicine without objection. On November 14, 2017, Hutter performed an independent medical examination of Binetti, in reference to his application for accidental disability retirement benefits, and on June 18, 2018, Hutter wrote an addendum to that report. At the hearing, Hutter testified from his reports.

Independent Medical Examination—November 14, 2017

To begin, Hutter took a history from Binetti and recorded his complaints. He recorded that Binetti had been in a car accident, that he had to be extricated from the car, and that he was taken to the emergency room. His initial treatment was through

occupational medicine at Hackensack University Medical Center, where he was treated by Newman. Hutter also recorded that Binetti underwent a course of physical therapy for several months but did not make progress.

Hutter recorded that Binetti complained of neck pain and left-shoulder pain and some low-back pain. Binetti also complained of headaches. More specifically, Hutter wrote that Binetti complained of daily pain in his neck, primarily at the base of the neck, with the pain radiating to his left shoulder blade and occasionally down his left arm to his left hand. This was just as Binetti testified at the hearing. Hutter also wrote that Binetti complained that he had limited range of motion in his neck, and that the main reason he cannot work is because he cannot turn his head to drive. He also had limited range of motion of his shoulder.

Upon physical examination, Hutter wrote that the neck was tender to touch at the base of the paraspinal musculature and left trapezius musculature. There was no palpable spasm, but range of motion was limited in all planes. Manual muscle testing was 5/5 in the right upper extremity but 5-/5 in the left upper extremity. Reflexes were symmetrical in both upper extremities, but there was a generalized decrease in light-touch sensation in the entire left upper extremity.

Left-shoulder examination revealed no warmth, swelling, or erythema, and there was no tenderness to touch of the AC joint, subdeltoid space, or bicipital groove. Flexion was limited to 90 degrees and abduction to 85 degrees. These findings are essentially the same findings Kubeck found and recorded more than three years later.

Hutter, however, wrote that Binetti actively resisted any attempts to passively increase range of motion. This was never explored, and could be explained by Binetti's documented pain and anxiety. Hutter also wrote that there was very limited internal and external rotation, with slight weakness and pain against resisted abduction.

The lower-back examination was normal—except for a 50 percent loss of range of motion when standing.

Hutter reviewed the application for disability, the job description, the accident report, the note from Newman, the emergency-room records, and diagnostic imaging, among other documents, but the documentation was admittedly limited. This lack of documentation was significant and was the reason why the expert opinion Kubeck rendered was more reliable. The examination Kubeck conducted was also more recent, and significantly so.

In summary, Hutter concluded that the subjective complaints were out of proportion to the objective findings. He wrote that the findings on MRI revealed only mild degenerative changes, and that he reviewed no documentation from physical therapy. In addition, he only had one office note from Newman. Therefore, based on the limited documentation, he opined that Binetti was not totally and permanently disabled from the performance of his job.

Still, Hutter was open-minded. He noted that should any additional records or diagnostic studies become available, he would be happy to review them and amend his report, and that it just what happened. Approximately seven months later, additional records became available and Hutter amended his report.

Addendum—June 18, 2018

In his addendum dated June 18, 2018, Hutter wrote that he reviewed additional records from Newman and Winer, but his conclusion remained unchanged because the records from Newman were few, and because he saw nothing that documented any treatment after the accident. This was the distinguishing difference between the two experts. At the hearing, Hutter reiterated that he would still be open to changing his opinion if he were provided that additional documentation. For example, Hutter stated that he was never provided with the documentation concerning the injections, and that he was never provided the recent report by Kubeck. So, without them, Hutter simply resolved that the car accident aggravated a preexisting, but quiescent, condition:

At this time, the conclusion in my previous report remains unchanged. There are still very minimal

records from Dr. Newman. There is nothing regarding the treatment that [Binetti] underwent from the time of the accident. As noted when I examined him, the subjective complaints were out of proportion to the objective findings.

The findings on the MRI are primarily degenerative changes. These would not be caused by the accident in question. While I understand he did not have any neck problems before this, I do believe he had soft tissue injuries to his neck as a result of the accident in question, which aggravated a preexisting condition. However, based upon the overall examination and review of the available medical records, the conclusion on my previous report remains unchanged at this time.

[R-5 at 2.]

Given his lack of documentation, I give greater weight to the expert opinion Kubeck rendered.

This greater weight notwithstanding, the two experts still share many of the same understandings. Both believe that Binetti had preexisting conditions, and both believe that these preexisting conditions were aggravated by the accident. In addition, both experts observed that Binetti was asymptomatic before the accident. Moreover, both experts acknowledge that Binetti never returned to work after the accident, despite efforts to relieve his symptoms, including physical therapy and epidural injections.

Thus, their only material departure is their conclusions, that is, whether Binetti is permanently disabled, and on this score, as I noted above, I give greater weight to the conclusion Kubeck reached. To underscore, Kubeck reasoned that Binetti had chronic pain, limited range of motion, and diminished rotation over the course of two years, despite extensive physical therapy and cervical epidural injections. Moreover, Kubeck delineated all the duties Binetti could no longer perform.

As a result, I **FIND** that a preponderance of the evidence exists that Binetti is permanently and totally disabled from the performance of his regular or assigned duties.

DISCUSSION AND CONCLUSIONS OF LAW

N.J.S.A. 43:15A-43

Under N.J.S.A. 43:15A-43(a), a member of the PERS may retire on an accidental disability allowance if the employee is disabled as a direct result of a traumatic event:

A member who has not attained age 65 shall, upon the application of the head of the department in which he is employed or upon his own application or the application of one acting in his behalf, be retired by the board of trustees, if said employee is permanently and totally disabled as a direct result of a traumatic event occurring during and as a result of the performance of his regular or assigned duties, on an accidental disability allowance.

Richardson

In 2007, the New Jersey Supreme Court revisited and reinterpreted the phrase “traumatic event” to mean what it had historically understood an accident to be—“an unexpected external happening that directly causes injury and is not the result of pre-existing disease alone or in combination with work effort.” Richardson v. Police & Firemen’s Ret. Sys. (PFRS), 192 N.J. 189, 211 (2007).

Under this paradigm shift, a member must now prove five things: First, the member must prove that he or she is permanently and totally disabled. Second, the member must prove that the disability is the direct result of a traumatic event. Toward this end, the traumatic event must be identifiable as to time and place, undesigned and unexpected, and caused by a circumstance external to the member. Stated otherwise, the disability cannot be the result of a preexisting disease that is aggravated or accelerated by the work. Third, the member must prove that the traumatic event occurred during and as a result of his or her regular or assigned duties. Fourth, the member must prove that the disability was not the result of his or her willful negligence. Finally, the member must prove that he or she is mentally or physically incapacitated from performing his or her usual or any other duty. Id. at 212–13.

Issue

Since I found that Binetti is permanently and totally disabled from the performance of his regular or assigned duties, I must determine whether this disability is the direct result of the accident on December 15, 2016. The Board argues that the disability is not a direct result of the accident whereas Binetti argues that it is. More pointedly, Binetti must prove by a preponderance of the evidence that the injuries he received from his accident are “the essential significant or the substantial contributing cause” of his disability as those terms or phrases are defined and explained in Gerba v. Board of Trustees, PERS, 83 N.J. 174 (1980).

Gerba

Although Gerba predates Richardson, Gerba is one of the cases in the strand under Cattani v. Board of Trustees, PFRS, 69 N.J. 578 (1976), to which the New Jersey Supreme Court returned in Richardson. In Gerba, the Court held that “direct result of a traumatic event” means “a traumatic event that constitutes the essential significant or the substantial contributing cause of the resultant disability.” Gerba, 83 N.J. at 186. In doing so, the Court rejected the notion that an accident could be found in the impact of ordinary work effort upon a progressive disease. But the Court also rejected the notion that the accident must be the sole or exclusive cause of the disability. Id. at 185–87. Stated differently, the Court accepted the notion that a traumatic event can act upon a progressive disease.

Rejection of Ordinary Work Effort upon a Progressive Disease

In Gerba, the New Jersey Supreme Court observed that judicial treatment of the statutory concept “direct result” and its relationship to its statutory companion “traumatic event” had been somewhat inconsistent and uncertain. Id. at 185. The Court continued that this was seen in cases where the disability had been causally related to an underlying condition as well as the traumatic event. Ibid. As such, the Court explained that the Legislature endeavored to impose a more exacting standard of medical causation, and in

doing so rejected the workers' compensation concept that an "accident" could be found in the impact of ordinary work effort upon a progressive disease. Id. 185–86.

By way of example, the Court noted that the statute expressly excepts disabilities resulting from musculoskeletal conditions, such as osteoarthritis, which were not the direct result of a traumatic event. Id. at 186. To paraphrase, when an underlying condition such as osteoarthritis exists, which itself has not been directly caused, but is only aggravated or ignited, by trauma, the resulting disability is only "ordinary," rather than "accidental," and gives rise to ordinary, and not accidental, disability retirement benefits. Ibid. Therefore, the Court asserted that the traumatic event must be "the essential significant or the substantial contributing cause" of the disability. Ibid.

Acceptance of a Traumatic Event upon a Progressive Disease

The New Jersey Supreme Court, however, emphasized that a basis for an accidental disability pension would still exist if it were shown that the disability directly resulted from the combined effect of a traumatic event and a preexisting disease. Id. at 186–87. "In such cases, the traumatic event need not be the *sole* or *exclusive* cause of the disability," the Court wrote. Id. at 187. Stated otherwise, it is sufficient to satisfy the statutory standard of an accidental disability if the traumatic event acts in combination with an underlying physical disease. Ibid.

Petrucci

For example, in Petrucci v. Board of Trustees, PERS, 211 N.J. Super. 280 (App. Div. 1986), the Appellate Division held that the member satisfied the direct-result test because he had been asymptomatic before the accident. In that case, Petrucci worked for the Department of Environmental Protection as an environmental-compliance investigator, which the court noted was a taxing job. Id. at 281. The court also noted that Petrucci was fifty-one, had previously worked for the Department of Transportation, owned a tavern for six years, worked as a brick layer and a stone mason, and served in the Army for three years. Id. at 282. Moreover, the court noted that he had never suffered any injury to his back or had any problem with his back before his accident. Ibid.

One day, however, Petrucelli fell nine steps at work. Id. at 282–83. He was taken to the hospital, received emergency treatment, and was released hours later. Id. at 283. The x-ray report revealed narrowing of disc space at C5-C6, hypertrophic changes seen anteriorly at C5-C6, degenerative changes of the thoracic spine, grade I spondylolisthesis at L5-S1, narrow disc space at L5-S1, and hypertrophic changes anteriorly at L4-L5. There were no fractures to the cervical or thoracic spine, and the chest, right hip, left ribs, and left clavicle were normal. Ibid. A CT scan later revealed spondylolisthesis at L5-S1, a vacuum disc, and bilateral spondylolysis about the pars interarticularis of L-5. Id. at 283–84.

The parties stipulated that Petrucelli was totally and permanently disabled and that the fall was a traumatic event; thus, the issue was whether Petrucelli’s disability was the direct result of the traumatic event. Id. at 284.

Petrucelli’s doctor took the position that Petrucelli could have remained asymptomatic for years, while the Board’s doctor took the position that Petrucelli’s preexisting condition presented a less stable structure more susceptible to injury. Id. at 285. Indeed, the Board’s doctor took the position that Petrucelli became symptomatic because of the contusions and sprains suffered in the fall superimposed on “pre-existing marked structural deficiencies, spondylolisthesis, and arthritis.” Ibid. More significantly, the Board’s doctor took the position that the chronic subsequent pain was related to these preexisting conditions rather than to the contusions and sprains suffered in the fall. Ibid. The disagreement then was based on the residuals. Ibid.

On appeal, the Board argued that the fall was not the “essential significant or substantial contributing cause” of the disability because Petrucelli would have eventually developed low-back problems even if the accident had not occurred, while Petrucelli argued that the fall was the “essential significant or substantial contributing cause” of the disability because he was pain free prior to the accident. Id. at 287–88.

In applying the law to the facts of the case, the Appellate Division revisited Gerba and its companion case, Korelnia v. Board of Trustees, PERS, 83 N.J. 163 (1980). In

particular, the Appellate Division noted that the Supreme Court in Gerba wrote that the traumatic event need not be the sole or exclusive cause of the disability, and that Gerba lost his case because he had *symptomatic* developmental arthritis for a decade and that the accident only contributed to the progression of the disease. Petrucci, 211 N.J. Super. at 288. Similarly, the Appellate Division noted that the Court in Korelnia wrote that an accidental disability may involve a combination of both traumatic and pathological origins. Id. at 288–89. As a result, the Appellate Division concluded that Petrucci satisfied the direct-result test. Id. at 289.

Binetti

In this case, the disability at issue involves a combination of both traumatic and pathological origins. In addition, Binetti was asymptomatic before the accident. Moreover, his preexisting conditions were aggravated or accelerated by the accident, not work effort. As a result, I **CONCLUDE** that Binetti satisfied the direct-result test that test is set forth in Petrucci.

Stated otherwise, I **CONCLUDE** that the accident is “the essential significant or the substantial contributing cause” of the disability as these terms or phrases are defined and explained in Gerba.

Accordingly, I **CONCLUDE** that Binetti is entitled to retire on accidental disability retirement benefits.

ORDER

Given my findings of fact and conclusions of law, I **ORDER** that Binetti is entitled to retire on accidental disability retirement benefits and that his application for accidental disability retirement is hereby **GRANTED**.

I hereby **FILE** my initial decision with the **BOARD OF TRUSTEES OF THE PUBLIC EMPLOYEES’ RETIREMENT SYSTEM** for consideration.

This recommended decision may be adopted, modified or rejected by the **BOARD OF TRUSTEES OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM**, which by law is authorized to make a final decision in this matter. If the Board of Trustees of the Public Employees' Retirement System 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 under 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.

March 3, 2021

DATE



BARRY E. MOSCOWITZ, ALJ

Date Received at Agency:

March 3, 2021

Date Mailed to Parties:
dr

March 3, 2021

APPENDIX

Witnesses

For Petitioner:

Justin Kubeck, MD
Richard Binetti
Jayne Gherardi

For Respondent:

Andrew Hutter, MD

Documents

Joint:

- J-1 Application for Disability submitted July 13, 2017
- J-2 Disability Evaluation undated
- J-3 Letter from Board to Binetti dated April 19, 2018
- J-4 Letter from Board to OAL dated August 16, 2018
- J-5 Accident Report dated December 16, 2016
- J-6 Job Description dated October 8, 1996

For Petitioner:

- P-1 CV of Kubeck
- P-2 Report of Kubeck
- P-3 Documents from Binetti:
 - Report by Hutter dated November 14, 2017
 - Application for Disability submitted July 13, 2017
 - Job Description dated October 8, 1996
 - Employee's Report of Injury dated December 16, 2016
 - Note from Newman dated May 3, 2017
 - Note from Newman dated June 23, 2017
 - Medical Examination by Personal or Treating Physician form dated May 24, 2017
 - Note from Winer dated June 29, 2017

CT Cervical Spine dated December 19, 2016

MRI Cervical Spine dated January 2, 2017

Review of Cervical Spine by Sylva Takvorian, MD, dated December 19, 2016

Functional Report by Binetti and Gherardi dated July 28, 2017

For Respondent:

R-1 Documents from Emergency Department at Hackensack University Medical Center dated December 19, 2016:

CT Head dated December 19, 2016

CT Cervical Spine dated December 19, 2016

R-2 Documents from Radiology Department at Hackensack University Medical Center dated December 19, 2016:

Medical Examination of Cervical Spine by Sylvia Takvorian, MD, dated December 19, 2016

MRI of Cervical Spine dated January 2, 2017

CT Cervical Spine dated December 19, 2016

R-3 Office Note by Bernard Newman, MD, dated May 3, 2017

R-4 CV of Hutter undated

R-5 Addendum by Hutter dated June 18, 2018

R-6 Notes from Emergency Department at Hackensack University Medical Center dated December 15, 2016