

To: New Jersey Law Revision Commission
From: Arshiya M. Fyazi and Jennifer D. Weitz, Counsels
Re: Definition of Traumatic Event (N.J.S. 43:16A-7(1))
Date: March 08, 2021

MEMORANDUM

Executive Summary

On September 16, 2020, Staff was asked by the Commission to clarify the accidental disability pension statute, N.J.S. 43:16A-7.¹ In addition to refining the requirements for physical and mental disabilities, the Commission suggested that any proposed modifications should aim to reestablish the concept of the suddenness of the traumatic event and address the aggravation of pre-existing conditions.²

The Commission directed the Staff to make clear that a traumatic event is caused by external circumstances.³ The Commission also noted that such an event should not be the result of a pre-existing condition known to the member that is aggravated or accelerated by the work.⁴ Finally, the Commission replaced the term “willful negligence” with the term “willful misconduct.”⁵

The accidental disability pension statute, N.J.S. 43:16A-7, requires that a member experience a traumatic event to qualify for enhanced disability benefits.⁶ Such an event must be: identifiable as to time and place; undesigned and unexpected; and caused by a circumstance external to the member.⁷ If a member claims a mental disability caused exclusively by a mental stressor, they must make a threshold showing that the event involved actual or threatened death or serious injury to themselves or another person, and that the event was objectively capable of causing a reasonable person in the member’s circumstance to suffer a disabling mental injury.⁸

Outreach

Outreach was conducted by Commission Staff to determine whether the proposed statutory modifications helped to clarify the accidental disability pension statute. Individuals and entities contacted include: the Attorney General of New Jersey; the New Jersey State Bar Association; the New Jersey State Association of Chiefs of Police; the New Jersey Police Traffic Officers Association; the New Jersey State Firemen Association; the New Jersey State Policemen’s Benevolent Association; the New Jersey Firefighters Mutual Benevolent Association; the

¹ See N.J. Law. Rev. Comm’n, Meeting Minutes (Sep. 16, 2020). (On file with the NJLRC.)

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ N.J. STAT. ANN. § 43:16A-7 (West 2020).

⁷ *Id.*

⁸ *Id.*

attorneys of record in *Mount v. Bd. of Trs. Police & Firemen's Ret. Sys.*, several private practitioners, and members of the public.

Stakeholder Responses

To summarize the responses received, there is consensus among the stakeholders that revisions should be made to N.J.S. 43:16A-7, but there is no consensus about the substance of those revisions or who should draft them.

Private practitioners who represent applicants support the project with additional clarification.⁹ Organizations including the NJFMBA and NJPBA, however, strongly object to the modifications proposed by the Commission.¹⁰ These organizations suggested that the Commission's Report neither refines the statutory language¹¹ nor provides additional guidance as suggested by the Court in *Mount v. Board of Trustees, PFRS*,¹² and they requested that the Commission's recommendation be "rejected"¹³ and "withdrawn".¹⁴

- *Support with Request for Further Clarification*

Scott M. Tashjy, counsel for appellant Mount in *Mount v. Board of Trustees, PFRS*,¹⁵ supported the proposed changes, but requested that the Commission further clarify the term "traumatic event."¹⁶

Mr. Tashjy suggested that the inclusion of the *Richardson* Court's definition of traumatic event in the proposed modification would be "helpful for all practitioners and the courts."¹⁷ A traumatic event as defined in *Richardson* is "an unexpected external happening that directly causes injury and is not the result of pre-existing disease alone or in combination with work effort."¹⁸ Mr. Tashjy felt that clarification of the term "traumatic event" can be achieved by incorporating the language used in *Richardson* into the current statute.¹⁹

- *Object to Modification*

The New Jersey Firefighters Mutual Benevolent Association (NJFMBA) and the New Jersey State Policemen's Benevolent Association (NJSPBA) each provided objections to the

⁹ See e-mails from Scott Tashjy and Tim Prol, *supra*.

¹⁰ See letters from Craig S. Gumpel and Paul L. Kleinbaum, *supra*.

¹¹ See letter from Craig S. Gumpel, *supra*.

¹² See letter from Paul L. Kleinbaum, *supra*.

¹³ See letter from Craig S Gumpel

¹⁴ See letter from Paul L. Kleinbaum, *supra*.

¹⁵ *Mount v. Board of Trustees, Police and Firemen's Retirement System*, 233 N.J. 402 (2018).

¹⁶ E-mail from Scott M. Tashjy, principal at the Tashjy Law Firm LLC., to Arshiya M. Fyazi, Counsel, N.J. Law Rev. Comm'n (Oct. 20, 2020). (On file with the NJLRC).

¹⁷ *Id.* See *Richardson*, 192 N.J. at 210.

¹⁸ *Id.* See *Richardson*, 192 N.J. at 212.

¹⁹ E-mail from Scott M. Tashjy, principal at the Tashjy Law Firm LLC., to Arshiya M. Fyazi, Counsel, N.J. Law Rev. Comm'n (Oct. 20, 2020). (On file with the NJLRC).

proposed statutory revisions.²⁰

The source of the objections raised by both entities was the separation of the criteria “caused by an external event” from the phrase “not the result of pre-existing disease that is aggravated or accelerated by the work.” Both organizations also said that the proposed changes do not define other aspects of a traumatic event, such as the “undesigned and unexpected” and “external circumstances” elements.

Similar concerns were raised by a private practitioner who represents appellants before pension boards.²¹ He stated that creating two statutory prongs by dividing the requirement that a traumatic event result from “circumstance external to the member” distorts the *Richardson* analysis and creates an extra, artificial hurdle for petitioners.²² He also focused on the idea of pre-existing conditions as separate and apart from a traumatic event, so that a member may have a pre-existing condition and still satisfy the necessary criteria provided that their disability is a direct result of the traumatic event.²³

The New Jersey Police Traffic Officers Association expressed interest in the project but has not commented thus far.²⁴

Staff prepared revised draft language in response to the comments received from commenters and seeks guidance from the Commission regarding the language shown below.

For ease of review, the first language shown below is taken from the Tentative Report released for comment. This is followed by language modified in response to the comments received. For reference, the final pages of this Memorandum are an Appendix that contains the full text of N.J.S. 43:16A-7 as included in the Tentative Report that was distributed for comment.

Language from the Commission’s Tentative Report²⁵

a. (4) Upon the written application by a member in service, by one acting in his behalf or by his employer, any member may be retired on an accidental disability retirement allowance; provided, that the medical board, after a medical examination of such member, shall certify that the member is permanently and totally disabled as a direct result of a traumatic event, ~~occurring during and as~~

²⁰ See letter from Craig S. Gumpel, Esq., New Jersey Firefighters Mutual Benevolent Association attorney at Law Offices of Craig S. Gumpel LLC., to Arshiya M. Fyazi and Jennifer D. Weitz, Counsels, N.J. Law Rev. Comm’n, *2 (Sep. 25, 2020) (on file with the NJLRC) and letter from Paul L. Kleinbaum, Esq., New Jersey Policemen’s Benevolent Association network attorney at Zazzali, Fagella, Nowak, Kleinbaum & Friedman to Arshiya M. Fyazi and Jennifer D. Weitz, Counsels, N.J. Law Rev. Comm’n, *2 (Nov. 4, 2020) (on file with the NJLRC).

²¹ E-mails from Tim Prol, Esq., Alterman & Associates, LLC to Jennifer D. Weitz, Counsel, N.J. Law Rev. Comm’n (Oct. 29, 2020 and Jan. 19, 2021). (On file with the NJLRC.)

²² *Id.*

²³ *Id.*

²⁴ E-mails from Rich Maxwell, Exec. Dir., N.J. Police Traffic Officers Assoc., to Jennifer D. Weitz, Counsel, N.J. Law Rev. Comm’n. (Oct. 14, 2020 and Dec. 3, 2020). (On file with the NJLRC.)

²⁵ The language that follows is excerpted from the Appendix. The full text of the Appendix appears at the end of this Memorandum on pg. 6.

~~a result of the performance of his regular or assigned duties and that such disability was not the result of the member's willful negligence and that such member is mentally or physically incapacitated for the performance of his usual duty and of any other available duty in the department which his employer is willing to assign to him. The application to accomplish such retirement must be filed within five years of the original traumatic event, but the board of trustees may consider an application filed after the five year period if it can be factually demonstrated to the satisfaction of the board of trustees that the disability is due to the accident and the filing was not accomplished within the five-year period due to a delayed manifestation of the disability or to other circumstances beyond the control of the member.~~

b. For purposes of this section, the term “traumatic event” shall mean an event that is:

(1) identifiable as to time and place;

(2) undesigned and unexpected;

(3) caused by external circumstances, and;

(4) is not the result of a pre-existing disease or condition known to the member that is aggravated or accelerated by the work.

Proposed Modifications

(Drafted in response to stakeholder’s comments)

The majority of the comments received from stakeholders focused on subsection b. of the proposed modifications to N.J.S. 43:16A-7, As indicated above, some of the commenters strongly objected to the separation of subsections b.(3) and b.(4), noting that *Richardson* explicitly discussed these two elements as a single factor and that it should be reflected as such in the draft statute.²⁶

The NJFMBA and the NJSPBA remarked that the proposed modifications do not define the terms “undesigned and unexpected” and “external circumstances.” Additional research by Staff revealed that courts have refrained from defining these phrases since the legal analysis of cases brought pursuant to the statute centers on the specific facts of each applicant’s situation. Moreover, the Appellate Division, in two unpublished decisions in 2020, opined that the direct result standard that defines “traumatic event” and encompasses the factors “identifiable as to time and place,” “undesigned and unexpected,” and “external circumstances” requires a “fact sensitive assessment.”²⁷

²⁶ See *Richardson*, 192 N.J. at 213 (App. Div. 2007) (“caused by a circumstance external to the member (not the result of pre-existing disease that is aggravated or accelerated by the work).”)

²⁷ See *Slater v. Bd. of Trs., PFRS.*, 2020 WL 3442965 at *5 (App. Div. June 24, 2020) and *Reiger v. Bd. of Trs., PERS.*, 2020 WL 4873254 at *2 (App. Div. Aug. 20, 2020).

Finally, one commenter suggested that the “direct result” test discussed in *Gerba*²⁸ should be included in any proposed modifications, so that when assessing pre-existing conditions, “[a]s long as the traumatic event is the direct cause, i.e., the essential significant or substantial contributing cause of the disability, it is sufficient to satisfy the statutory standard of an accidental disability even though it acts in combination with an underlying physical disease.”²⁹

Revised Staff Draft

(Proposed revisions in response to comments are shown in *italics*)

b. For purposes of this section, the term “traumatic event” shall mean an event that is:

(1) identifiable as to time and place;

(2) undesigned and unexpected, and

(3) caused by external circumstances, *not the result of a pre-existing disease or condition known to the member, that is aggravated or accelerated by the work.*

²⁸ *Gerba v. Bd. of Trs., PERS*, 83 N.J. 174 (1980).

²⁹ *Id.* at 187.

Appendix

The proposed modifications to N.J.S. 43:16A-7, **Retirement for accidental disability; allowance; death benefits; definitions; participation in World Trade Center rescue, recovery, or cleanup operations**, (shown with ~~strike through~~, and underlining), follow:

a. ~~(1)~~ Upon the written application by a member in service, by one acting in his behalf or by his employer, any member may be retired on an accidental disability retirement allowance; provided, that the medical board, after a medical examination of such member, shall certify that the member 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 and that such disability was not the result of the member's willful negligence and that such member is mentally or physically incapacitated for the performance of his usual duty and of any other available duty in the department which his employer is willing to assign to him.~~ The application to accomplish such retirement must be filed within five years of the original traumatic event, but the board of trustees may consider an application filed after the five year period if it can be factually demonstrated to the satisfaction of the board of trustees that the disability is due to the accident and the filing was not accomplished within the five year period due to a delayed manifestation of the disability or to other circumstances beyond the control of the member.

b. For purposes of this section, the term "traumatic event" shall mean an event that is:

(1) identifiable as to time and place;

(2) undesigned and unexpected;

(3) caused by external circumstances, and;

(4) is not the result of a pre-existing disease or condition known to the member that is aggravated or accelerated by the work.

c. A member claiming either mental or physical disability as a result of a traumatic event must show:

(1) the traumatic event occurred ~~occurring~~ during and as a result of the performance of the member's regular or assigned duties;

(2) ~~and that such~~ the disability was not the result of the member's willful negligence misconduct, and;

(3) such member is mentally or physically incapacitated for the performance of ~~his~~ their usual duty and of any other available duty in the department which ~~his~~ their employer is willing to assign to ~~him~~ them.

d. In addition to the requirements in subsection c., a member claiming mental disability as a result of a traumatic event must first show:

(1) they experienced an event that involved actual or threatened death or serious injury, or a similarly serious threat to the physical integrity of the member or another person, and;

(2) the event is objectively capable of causing a reasonable person in the member's circumstances, with similar background and training, to suffer a disabling mental injury.

e. Permanent and total disability resulting from a cardiovascular, pulmonary or musculoskeletal condition which was not a direct result of a traumatic event occurring in the performance of duty shall be deemed an ordinary disability.

f. The application to accomplish such retirement must be filed within five years of the original traumatic event, but the board of trustees may consider an application filed after the five-year period if it can be factually demonstrated to the satisfaction of the board of trustees that the disability is due to the accident and the filing was not accomplished within the five-year period due to a delayed manifestation of the disability or to other circumstances beyond the control of the member.

~~(2)~~ g. Upon retirement for accidental disability, a member shall receive an accidental disability retirement allowance which shall consist of:

~~(a)~~(1) An annuity which shall be the actuarial equivalent of his aggregate contributions and

~~(b)~~(2) A pension in the amount which, when added to the member's annuity, will provide a total retirement allowance of 2/3 of the member's actual annual compensation for which contributions were being made at the time of the occurrence of the accident or at the time of the member's retirement, whichever provides the largest possible benefit to the member.

~~(3)~~ h. Upon receipt of proper proofs of the death of a member who has retired on accidental disability retirement allowance, there shall be paid to such member's beneficiary, an amount equal to 3 1/2 times the compensation upon which contributions by the member to the annuity savings fund were based in the last year of creditable service; provided, however, that if such death shall occur after the member shall have attained 55 years of age the amount payable shall equal 1/2 of such compensation instead of 3 1/2 times such compensation.

~~(4) Permanent and total disability resulting from a cardiovascular, pulmonary or musculoskeletal condition which was not a direct result of a traumatic event occurring in the performance of duty shall be deemed an ordinary disability.~~

~~b.~~ i. ~~(4)~~ For purposes of this subsection,

(1) "Qualifying condition or impairment of health" includes:

A. diseases of the upper respiratory tract and mucosae, including conditions such as conjunctivitis, rhinitis, sinusitis, pharyngitis, laryngitis, vocal cord disease, upper airway hyper-reactivity and tracheo-bronchitis, or a combination of such conditions;

B. diseases of the lower respiratory tract, including but not limited to bronchitis, asthma, reactive airway dysfunction syndrome, and different types of pneumonitis, such as hypersensitivity, granulomatous, or eosinophilic;

C. diseases of the gastroesophageal tract, including esophagitis and reflux disease, either acute or chronic, caused by exposure or aggravated by exposure;

D. diseases of the psychological axis, including post-traumatic stress disorder, anxiety, depression, or any combination of such conditions;

E. diseases of the skin such as contact dermatitis or burns, either acute or chronic in nature, infectious, irritant, allergic, idiopathic or non-specific reactive in nature, caused by exposure or aggravated by exposure; and

F. new onset diseases resulting from exposure as such diseases occurring in the future including cancer, chronic obstructive pulmonary disease, asbestos-related disease, heavy metal poisoning, musculoskeletal disease, and chronic psychological disease.

(2) “World Trade Center rescue, recovery, or cleanup operations” means the rescue, recovery, or cleanup operations at the World Trade Center site between September 11, 2001 and October 11, 2001.

(3) “World Trade Center site” means any location below a line starting from the Hudson River and Canal Street, east on Canal Street to Pike Street, south on Pike Street to the East River, and extending to the lower tip of Manhattan.

j. ~~(2)~~ (1) Notwithstanding any provision of subsection a. through d. of this section or any other law to the contrary, for a member who participated, whether or not under orders or instruction by an employer to so participate, in World Trade Center rescue, recovery, or cleanup operations for a minimum of eight hours, permanent and total disability resulting from a qualifying condition or impairment of health shall be presumed to have occurred during and as a result of the performance of the member's regular or assigned duties and not the result of the member's willful negligence, unless the contrary can be proved by competent evidence.

A. A member who did not participate in such operations for a minimum of eight hours shall be eligible for the presumption provided that:

(i) the member participated in the rescue, recovery, or cleanup operations at the World Trade Center site between September 11, 2001 and September 12, 2001;

(ii) the member sustained a documented physical injury at the World Trade Center site between September 11, 2001 and September 12, 2001 that is a qualifying condition or impairment of health resulting in a disability to the member

that prevented the member from continuing to participate in World Trade Center rescue, recovery, or cleanup operations for a minimum of eight hours; and

(iii) the documented physical injury that resulted in a disability to the member that prevented the member from continuing to participate in World Trade Center rescue, recovery, or cleanup operations for a minimum of eight hours is the qualifying condition or impairment of health for which the member seeks a presumption under this subsection.

B. In order to be eligible for the presumption provided under this subsection, a member shall have successfully passed a physical examination for entry into public service which failed to disclose evidence of the qualifying condition or impairment of health that formed the basis for the permanent and total disability.

~~(3)~~ (2) A member who participated in the World Trade Center rescue, recovery, or cleanup operations for a minimum of eight hours and subsequently retired on a service retirement or an ordinary disability retirement and thereafter incurred a disability caused by a qualifying condition or impairment of health which the medical board determines to be caused by participation in World Trade Center rescue, recovery, or cleanup operations shall be eligible to apply to the board of trustees to have the retiree's retirement allowance recalculated as an accidental disability retirement allowance for benefit payments on or after the date of the application, provided the retiree filed an application for such recalculation within 30 days of the date that the retiree knew or should have known of the existence of such disability and its relation to the rescue, recovery, or cleanup operations. In order to be eligible for such recalculation, the retiree shall have successfully passed a physical examination for entry into public service which failed to disclose evidence of the qualifying condition or impairment of health that formed the basis for the disability.

~~(4)~~ (3) The board of trustees shall promulgate rules and regulations necessary to implement the provisions of this subsection and shall notify members and retirants in the retirement system of the enactment of this act, P.L.2019, c. 157, within 30 days of enactment.

(4) A member or retiree shall not be eligible for the presumption or recalculation under this subsection unless within two years of the effective date of this act, P.L.2019, c. 157, the member or retiree files a written and sworn statement with the retirement system on a form provided by the board of trustees thereof indicating the dates and locations of service.

(5) This subsection shall apply regardless of whether the member or retiree, who is otherwise eligible, was enrolled in the retirement system at the time of participation in World Trade Center rescue, recovery, or cleanup operations as specified herein.

Comments

The language contained in subsection a. consisted of one large block paragraph. The paragraph has been subdivided into subsections a. through f. to improve accessibility and for ease of reference.

The definition of traumatic event contained in newly created subsection b. is based on the language provided by the Supreme Court in *Richardson v. Bd. of Trs., Police & Firemen's Ret. Sys.*, 192 N.J. 189 (2007). The definition follows the term “traumatic event” as stated in section a. to aid the reader.

The language contained in newly created subsection d. is based on the language provided by the Supreme Court in *Patterson v. Bd. of Trs., State Police Ret. Sys.*, 194 N.J. 29 (2008). This provision was recommended by the Supreme Court in *Mount v. Bd. of Trs., Police & Firemen's Ret. Sys.*, 233 N.J. 402 (2018). This newly created subsection addresses cases arising from mental disabilities attributed exclusively to mental stressors, and as suggested by the Commission, clarifies the reasonable person standard to be applied.

Newly created subsection c. consists of language originally provided for in section a. (shown in strikethrough above its new location) that was subdivided into two different sections for ease of reference. As per the Commission's request the term “willful negligence” has been stricken from the statute as the provision relates to a member's actions, and “willful misconduct” has been substituted.

The language contained in newly created subsection e. consists of an existing paragraph (shown in strikethrough below its new location) that was moved to make it more cohesive with section a. of the statute as it relates to specific disabilities not directly arising from the “traumatic event.”

Reference in subsection j.(1) has been amended to reflect newly created applicable subsections.

The remaining provisions of the statute have not been altered; the existing language has been divided into sections and subsections to make the statute more accessible.