
LOUIS POLLARA,
Petitioner,
v.
**BOARD OF TRUSTEES OF THE
POLICE AND FIREMEN'S
RETIREMENT SYSTEM OF
NEW JERSEY,**
Respondent.

Initial Decision: January 23, 1981 Final Agency Decision:
February 23, 1981

Superior Court, Appellate Division Decision Appears at: 183 *N.J.
Super.* 505 (App. Div. 1982)

SYNOPSIS

Petitioner, a former patrolman with the Newark Police Department, filed an application with the Police and Firemen's Retirement System for accidental disability retirement benefits, alleging that he had become totally disabled as a result of a job-related accident.

The administrative law judge assigned to the case determined that petitioner's total disability was the direct result of a traumatic event but that the event did not occur during the performance of the petitioner's duties as required by *N.J.S.A.* 43:16A-7(1). The judge found that petitioner's traumatic event took place in a 15-minute period before the start of petitioner's shift and that the functions performed in that 15-minute period were not part of petitioner's regular or assigned duties. Accordingly, the administrative law judge ordered that petitioner's application for accidental disability retirement benefits be denied.

Upon review, the Board of Trustees of the Police and Firemen's Retirement System accepted the initial decision.

Christopher A. Ferrara, Esq., for petitioner (Peter C. Vitanzo, attorney)

Robert K. Walsh, Deputy Attorney General, for respondent (John J. Degan, Attorney General of New Jersey, attorney)

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FOLEY, ALJ:

On November 21, 1980, a hearing was held on the appeal of petitioner, Louis Pollara, from a decision of the Board of Trustees of the Police and Firemen's Retirement System of New Jersey, which on January 23, 1979, denied petitioner's application for accidental disability retirement, *N.J.S.A.* 43:16A-7(1). The respondent Board recognized petitioner's disability and granted him an ordinary disability retirement. The matter was brought before me pursuant to a remand by the Superior Court, Appellate Division, dated May 20, 1980, under Docket No. A-325578, so that petitioner could be heard on his claim that he was performing an act of duty when the incident occurred. The matter was filed in the Office of Administrative Law on May 30, 1980.

At the outset of the hearing, the following facts were stipulated:

1. Petitioner was born on January 23, 1938.
2. Petitioner was employed by the Newark Police Department as a patrolman on January 4, 1964, which date was the date of his permanent appointment.
3. Petitioner was enrolled in the Police and Firemen's Retirement System on January 1, 1964.
4. A traumatic event occurred on May 24, 1976.
5. Petitioner's last day of active service was August 9, 1978.
6. Petitioner executed an application for accidental disability retirement on August 14, 1978, which was timely filed with the respondent on August 23, 1978.
7. The Board denied petitioner's application for accidental disability retirement on January 23, 1979. Petitioner was granted an ordinary disability pension on January 23, 1979.
8. On March 6, 1979, petitioner appealed to the Board for a hearing which was denied on April 12, 1979.
9. Petitioner appealed to the Superior Court, Appellate Division, on May 17, 1979 and, after oral argument in the Appellate Division on May 12, 1980, that court, on May 20, 1980, remanded to the Board so that petitioner could be heard on his claim that he was performing an act of duty when the incident occurred.
10. The matter was referred to the Office of Administrative Law by the Board of Trustees on May 27, 1980.
11. The petitioner is totally and permanently disabled.
12. The petitioner was a member in good standing at the time of the filing of his application with a creditable service of 14 years

13. The two issues for determination are direct causality and whether the traumatic event occurred during and as a result of the performance by the petitioner of his regular or assigned duties.

Louis Pollara testified that on May 24, 1976, he was working out of the precinct in the West District from 7:45 a.m. until 3:45 p.m. He stated that he reported to work within 15 minutes of 7:45 a.m. and that this was a requirement in order to go on duty. He stated there were preparations that he had to make in order to perform his police duties throughout the day. He testified that, from time to time, there were written reminders or memoranda to the department about being in the precinct preparing to go on duty within 15 minutes before the start of the actual shift in duty. During the 15 minute interval between 7:30 and 7:45 Pollara performed some personal and some departmental duties. The former consisted of his putting on his uniform in the locker room which was in the basement. The latter consisted of reviewing what happened the previous day concerning crime in the city, catching up on new teletypes of various types of police procedures, catching up on all the stolen cars prior to going to work and checking all his equipment to insure that it was in working order. The witness stated this is why the 15 minutes is part of the job and it was customary for him to do all of these functions in that 15 minute period of time.

Mr. Pollara stated that most of these functions are performed on the main floor in the main lobby, and that they were done after he put his uniform on.

Petitioner stated that after he had accomplished these prior functions, the bell rang and he went to roll call. He was talking in the locker room with three other officers and they proceeded to ascend the stairs to report to roll call. As he was going up the stairs with two fellow officers he reached to hold on and grasped the handrail. Roughly around the fifth step, the handrail broke off the stairs and he fell off the stairs sideways down into the stairwell. He stated he fell about five to seven feet but that he did not fall on a nice flat floor but rather on top of various parts of the broken railing and furniture which were stored on the floor. He struck his whole right side from his head to his foot. He remembered striking his shoulder and arm and scraping his face but his leg, particularly his knee and his shin, received the most serious injury and required treatment.

He was initially admitted to the hospital for treatment but continued to have problems with his knee from the time of the accident. Mr.

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Pollara stated that he had been in and out of the hospital several times and finally was told by the doctors that surgery would be necessary. A fracture was found and surgery was performed about eight months after the accident. During the time in between, the witness was out of work. At that time he could not walk on his leg or drive a car; he had severe pain and his leg became swollen. Subsequent to the surgery he continued to have problems with his right knee. He stated that his two legs are not the same size; there is tremendous swelling of the right knee to this day and he has numbness and pain on the right side. He cannot kneel on the floor at all and he cannot run. He gets tired and weak from prolonged walking; when he uses the stairs his leg buckles.

At the time of the accident the witness was assigned to patrol duty. He alternated with a partner in driving a vehicle for transporting and handling prisoners. Since the accident, he is no longer physically capable of doing this type of work, especially the handling of as many as 20 prisoners at one time which requires a great deal of footwork and lifting. He also found it difficult to climb stairs and to climb in and out of the truck he operated. Finally, he stated that to him 7:30 a.m. is his starting time according to the rules and regulations of the department.

On cross-examination, the witness was asked if the time that he took to perform the duties between 7:30 and 7:45 varied and he answered that it did not matter how long it took. He had to be there 15 minutes before roll call because the policy was set up that way. There had been some problems with individuals coming in late, not doing their proper chores, so the department established an official time. The witness stated he was paid for that time. He said the regulations and rules of the department were in writing. Somewhere there apparently was a copy of a master copy of regulations. He stated that he returned to duty on July 22, 1976, and worked until November 4, 1976, for roughly half-days, and sat at the desk answering the telephone. He stated that this was all he ever did. He was in and out and he always went back and sat at the desk until the day he retired. It was pointed out to the witness that the last day of active duty was stipulated to be August 9, 1978, and, when asked why the duty at the desk was no longer available to him after that date, Mr. Pollara stated he was having problems and that he was unable to do the physical things involved in using his leg.

The next witness for the petitioner was Thomas W. Hiltwein who stated that on May 24, 1976, he was employed by the Newark Police Department as a police officer. He said he was not sure if he was on

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the shift that began at 7:45 a.m. on the morning in question but that he had witnessed Mr. Pollara's accident. Officer Hiltwein stated that he does not know if he was going on duty or coming off duty at the time in question. He was asked what incidental duties he performed before the official time and he stated, "You take stolen cars, things like that" but that he generally got to work early.

Petitioner's final witness was Officer Peter Martakis of the Newark Police Department who stated that he was so employed on May 24, 1976, and that on that day he was serving the 7:45 a.m. to 3:45 p.m. tour of duty. He stated that the police are mandated by the city to respond 15 minutes before roll call. This time is used for preparation, getting dressed, reading teletypes, getting information of the previous offenses of the day, all things that are mandated by the city rules and regulations. He stated that the police get an occasional memorandum.

On cross-examination, the witness said that if he came in at 7:35 a.m. it would be up to the discretion of the lieutenant whether to subject him to departmental charges. The witness could not recall any incidents where fellow officers were subjected to departmental charges for coming in at 7:35 a.m. or 7:40 a.m.

The petitioner rested as did the respondent, the latter relying on the documentary evidence which had been submitted.

N.J.S.A. 43:16A-7(1), the applicable statute, states:

. . . 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 duties. . . .

The petitioner has the burden of proving his case by a preponderance of the believable evidence, *Atkinson v. Parsekian*, 37 *N.J.* 143, 149 (1962). Additionally, the choice of accepting or rejecting the testimony of witnesses rests with me, the trier and finder of the facts. I must make a reasonable choice, *Hornauer v. Division of Alcoholic Beverage Control*, 40 *N.J. Super.* 501, 506 (App. Div. 1956).

Initially, I **FIND** as facts those which were stipulated at the outset of the hearing. I further **FIND** as a fact that petitioner's permanent and total disability is a direct result of the traumatic event of May 24, 1976. I base this finding not only on Joseph O'Conner, M.D.'s report of his examination of the petitioner on August 3, 1978, but also on William Kruger, M.D.'s report of his examination of petitioner on October 24, 1978, notwithstanding a reference by Doctor Kuvin in the fourth paragraph on page one of his report of December 15, 1977, to a motorcycle accident and Doctor Kruger's reference to it in the

additional history he took on page three of his report. I can only assume that these references to a motorcycle accident are errors and that the two doctors were referring to the traumatic event of May 24, 1976. Doctor Kruger opined that he had no means of ascertaining whether petitioner had pathology in his knee prior to the accident of May 1976 or whether it occurred because of that accident. He stated that either could be true. However, he stated further that in the absence of any information that petitioner had difficulty with the right knee prior to May 24, 1976, he must assume that the pathology in the knee occurred following the accident mentioned. He stated additionally that there was no question on examination that petitioner has difficulty in his right knee with pain and restricted motion and atrophy of the thigh and calf from lack of normal use. Doctor Kruger indicated that petitioner was unable to perform the usual duties of a police officer. He has restricted flexion and extension in the knee and decrepitation and pain on motion. Doctor Kruger stated that the condition in the right knee by itself is enough to keep petitioner from being able to perform as a police officer.

I further **FIND** as a fact that from the time petitioner returned to duty following the traumatic event, that is, from July 22, 1976 until he retired, he was relegated to sitting at the desk answering the telephone. I further **FIND** as a fact that prior to the traumatic event, although petitioner was on sick leave on a number of occasions, the majority of those occasions were for short periods of time. A review of the personnel records reveals only four periods of absence which one might consider to be extended. These were from December 19, 1972 until January 4, 1973, April 14, 1973 until April 23, 1973, July 4, 1973 until July 16, 1973, and then not until immediately before the traumatic event when petitioner was absent from March 22, 1976 until March 28, 1976. I, therefore, **FIND** as a fact that the traumatic event on May 24, 1976, was the direct cause of petitioner's permanent and total disability, that is, the traumatic event was the essential significant or substantial contributing cause of the petitioner's disability, *Gerba v. Board of Trustees of the Public Employees' Retirement System*, 83 *N.J.* 174, 187 (1980).

Finally, I **FIND** as a fact that the traumatic event did not occur during and as a result of the performance by petitioner of his regular or assigned duties. The personal and departmental functions which petitioner performed between 7:30 a.m. and 7:45 a.m. were not his regular or assigned duties. His regular or assigned duties were patrolling, the driving of a truck which petitioner used in his handling and

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transporting of prisoners. Additionally, in his statement supporting his claim for disability retirement, in describing the traumatic event in detail, petitioner commenced by stating,

Reporting for duty. Going upstairs, grabbing handrail on my right which fell causing me to fall sideways down on top of the railing, which had landed below. I was dazed, uniform ripped and I could not get up because of the pain in my right leg. Knee badly damaged due to this fall.

Additionally, I question petitioner's consistency in his testimony when he stated that most of the functions were performed in the main floor, main lobby, as far as the police information was concerned and that he did these functions after he put his uniform on. He testified that he put his uniform on in the locker room which was in the basement. Thus, he then would have gone up the stairs to the main lobby to perform the departmental functions and yet he testified that when the bell rang for roll call, he was talking in the locker room with three other police officers and they proceeded to ascend the stairs to report to roll call. This is when the traumatic event occurred.

In my judgment this issue is controlled by the unreported decision of *Edward J. Reid v. Board of Trustees of the Police and Firemen's Retirement System in the State Department of the Treasury* (N.J. App. Div., Dec. 11, 1978, A-2751-77) (unreported). Reid appealed from a final determination by the Board of Trustees of the Police and Firemen's Retirement System which denied him accidental disability retirement benefits pursuant to *N.J.S.A. 43:16A-7*. Reid injured his left knee on January 1, 1970, when he slipped on ice and struck it against a police vehicle. He returned to work on or about February 17, 1970, and only days after his return to work, on February 22, 1970, but prior to the commencement of his actual duties on that day, he slipped and fell down the flight of stairs at police headquarters, again injuring his left knee. He applied for accidental disability retirement and the hearing examiner found that although he was totally and permanently disabled as a result of a traumatic event, specifically the fall of February 22, 1970, he failed to establish that the traumatic event he experienced occurred during and as a result of the performance of his regular or assigned duties as required by *N.J.S.A. 43:16A-7*. The Board affirmed the rejection of Reid's application, adopting the recommendations of the hearing officer.

The Appellate Division, in affirming the Board's denial of appellant's application, stated that the statute, *N.J.S.A. 43:16A-7*, required as a factual predicate to eligibility for an accidental disability pension: (1) permanent and total disability (2) as a direct result (3) of a traumatic event (4) "occurring during and as a result of the per-

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formance of the appellant's regular or assigned duties. . . ." The sole issue on appeal concerned the conclusion that the traumatic event which resulted in permanent and total disability did not occur during and as a result of appellant's performance of his regular or assigned duties. The Appellate Division stated that under the undisputed facts of this case, the traumatic event which was found to have caused appellant's total and permanent disability occurred five minutes before appellant's shift began. It further stated that although there was testimony that officers were required to report to work fifteen minutes before their tour of duty commenced, there can be no question but that appellant had not started actual performance of his regular or assigned duties when he fell down the stairs. The court stated that the problem presented was not susceptible of easy solution. Obviously, one of the employee's duties is to be present at the place of work. Nonetheless, in light of the declared legislative purpose to restrict eligibility for accidental disability retirement to the specific statutory conditions stated, the court was constrained to conclude that a traumatic event occurring before the employee actually commenced the work he was employed to do cannot be viewed as occurring during and as a result of the performance of his regular or assigned duties. In my judgment *Reid* is on all fours with the present case and I, therefore, **CONCLUDE** that although petitioner is permanently and totally disabled as a direct result of the traumatic event, the latter did not occur during and as a result of the performance by petitioner of his regular or assigned duties and I, therefore, **ORDER** that the Board's denial of petitioner's application for an accidental disability retirement allowance be **AFFIRMED**.

**FINAL DECISION BY THE BOARD OF TRUSTEES, POLICE
AND FIREMEN'S RETIREMENT SYSTEM:**

The Board of Trustees, Police and Firemen's Retirement System, at its meeting held February 23, 1981, reviewed the appeal of Louis Pollara and considered the following:

- (a) The transcript of the hearing conducted on November 21, 1980
- (b) All exhibits
- (c) The hearing officer's report of January 19, 1981
- (d) Exceptions to the report of the hearing officer, dated February 3, 1981

Thereafter, the Board of Trustees by unanimous vote approved the recommendations of the hearing officer and found that the decision of the Board should be affirmed.

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The Board of Trustees, Police and Firemen's Retirement System, hereby adopts the findings of fact and conclusions of law as contained in the hearing officer's report and incorporates the same herein by reference.