NEW JERSEY LAW REVISION COMMISSION

Tentative Report to Clarify the Term "Traumatic Event" in the Accidental Disability Retirement Benefits Statute, N.J.S. 43:16A-7

September 16, 2020

The New Jersey Law Revision Commission is required to "[c]onduct a continuous examination of the general and permanent statutory law of this State and the judicial decisions construing it" and to propose to the Legislature revisions to the statutes to "remedy defects, reconcile conflicting provisions, clarify confusing language and eliminate redundant provisions." *N.J.S.* 1:12A-8.

This Report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. Comments should be received by the Commission no later than **November 16, 2020**.

The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the Report, please inform the Commission so that your approval can be considered along with other comments. Please send comments concerning this Report, or direct any related inquiries, to:

Arshiya M. Fyazi and Jennifer D. Weitz, Counsels
New Jersey Law Revision Commission
153 Halsey Street, 7th Fl., Box 47016
Newark, New Jersey 07102
973-648-4575
(Fax) 973-648-3123
Email: amf@njlrc.org
jdw@njlrc.org
Web site: http://www.njlrc.org

Executive Summary

The New Jersey Judiciary is often called upon to review findings relating to the accidental disability retirement benefits. On occasion, the underlying case involves injuries that result from a traumatic event. In *Moran v. Board of Trustees., Police & Firemen's Ret. Sys.*, the Appellate Division addressed disabling physical injuries in the context of the scope and performance of one's occupation. [1] In *Mount v. Board. Of Trustees., Police and Firemen's Retirement System*, the New Jersey Supreme Court considered claims of mental incapacitation that arose exclusively from psychological trauma.[2]

N.J.S. 43:16A-7 does not define the term "traumatic event," which has left the determination of what constitutes a traumatic event to the courts.[3]

The Commission proposes modification to the current accidental disability retirement benefit statute to clarify the term "traumatic event" as it pertains to physical and mental disabilities sustained by first responders and public employees. [4]

Background

Members of the Police and Firemen's Retirement System ("PFRS"), the State Police Retirement System ("SPRS"), and the Public Employees' Retirement System ("PERS") are entitled to receive ordinary disability benefits if they become disabled for any reason, even an injury unrelated to their work.[5] In order to receive the increased benefits for an accidental disability, however, a member must meet a more exacting standard.[6]

N.J.S. 43:16A-7 governs eligibility for an accidental disability retirement allowance. The relevant portion of N.J.S. 43:16A-7(1) states:

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[1] *Moran v. Bd. of Trs., Police & Firemen's Ret. Sys.,* 438 N.J. Super. 346 (App. Div. 2014).
[2] *Mount v. Bd. of Trs., Police & Firemen's Ret. Sys.*, 233 N.J. 402 (2018).
[3] *Id.* at 407.
[4] In April 2017 and November 2019 NJLRC considered projects that recommended revisions to N.J.S. 43:16A-7. In April 2017, NJLRC focused on what constitutes an "undesigned and unexpected traumatic event" for a claimant to qualify for accidental disability benefits. *See* Memorandum from Brian Ashnault, on Meaning of Traumatic Event to the New Jersey Law Revision Commission (Apr. 10, 2017) (on file with the Commission).
At the April 20, 2017 Commission meeting the staff was directed to engage in research with specific attention to whether accidental disability retirement benefits should extend beyond the traumatic event because an individuals' exposure to toxins might not manifest themselves during the five-year statute of limitation for filing an application. *See Minutes of NJLRC meeting 20 Apr. 2017,* Newark, New Jersey. Available at www.njlrc.org.
In November 2019, Commission Staff examined a consolidated appeal where each appellant claimed mental incapacitation due to a "traumatic event". *See* Memorandum from Arshiya Fyazi, on Definition of Traumatic Event to the New Jersey Law Revision Commission (Nov. 8, 2019) (on file with the Commission).
At the November 21, 2019 Commission meeting, Staff was authorized to engage in the project to define what constitutes "traumatic event". *See Minutes of NJLRC meeting 21 Nov. 2019,* Newark, New Jersey. Available at www.njlrc.org.
[5] *See* N.J.S. 43:16A-6. *See also Russo v. Bd. of Trustees, Police and Firemen's Ret. Sys.*, 206 N.J. 14, 28 (2011).
[6] *Mount*, 233 N.J. at 419.

> … 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….[7]

The language of the accidental disability statute originally tracked that of the Worker's Compensation Act in that both required the applicant to have suffered "an accident arising out of and in the course of employment."[8] For almost a century, both statutes defined "accident" as "an unlooked for mishap or untoward event which is not expected or designed."[9]

The New Jersey Supreme Court began to expand the definition of "accident" for purposes of workers' compensation in *Ciuba v. Irvington Varnish & Insulator Co*.[10] The Court held that even though the decedent suffered from previously diagnosed heart disease, "if strain or exertion attending the rendition of the service aggravates or accelerates the progress of a pre-existing physical infirmity or condition due to either trauma or disease, and disability or death ensues, there is a compensable accident and injury."[11] Thus, the death was deemed an accident within the meaning of the Workmen's Compensation Act.[12]

The Court confirmed the expanded inquiry four years later in *Dwyer v. Ford Motor Co.*[13] Finding that the decedent's fatal heart attack was compensable, the Court held that

> "[W]hen an employee is suffering from an acute, or passively progressive or quiescent, heart condition, and the ordinary routine exertion of his regular work is too much for the heart, irrespective of whether the effort acts alone, or in conjunction or contribution with the weakness induced by the disease, to precipitate or accelerate or aggravate the attack, the resulting disability or death is within the statutory coverage."[14]

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[7] N.J.S. 43:16A-7(1) (emphasis added).
[8] *Richardson v. Bd. of Trs., Police & Firemen's Ret. Sys.*, 192 N.J. 189, 196 (2007) (internal quotes omitted).
[9] *Id.*
[10] *Ciuba v. Irvington Varnish & Insulator Co.*, 27 N.J. 127 (1958).
[11] *Id.* at 134.
[12] *Id.* at 140.
[13] *Dwyer v. Ford Motor Co.*, 36 N.J. 487 (1962).
[14] *Id*. at 491.

The Court summed up the newly broadened parameters for workers' compensation benefits by stating that "[c]ompensability arises whenever the required exertion is too great for the man undertaking the work, whatever the degree of exertion or condition of his heart."[15]

The following year, in 1963, the Appellate Division applied this reasoning to the accidental disability statute, holding that a firefighter who suffered a heart attack while at work was entitled to an accidental disability retirement allowance.[16] In *Fattore v. Police & Firemen's Ret. Sys.* the Appellate Court cited *Dwyer* in finding that "the heart attack is compensable if the actual work effort…did in fact materially contribute to the precipitation, aggravation or acceleration of the heart attack, or of any pre-existing heart or circulatory disease, thereby culminating in an attack."[17]

The Legislature responded by amending the accidental disability statutes to roll back the expansion.[18] The Legislature also amended the statutory definitions of N.J.S. 43:16A-7 and renamed qualifying incidents "traumatic events."[19] Thus, a traumatic event was akin to an accident, as it had been understood prior to the decisions mentioned above.[20]

Although the Legislature made clear the types of conditions that were excluded from accidental disability benefits, the lack of a statutory definition for "traumatic event" resulted in a struggle by courts to apply the requirement in a way that produced a coherent body of law.[21] In an effort to create consistency in this area, the New Jersey Supreme Court developed the *Richardson* and *Patterson* tests, named for their respective cases.

Richardson and Patterson

In *Richardson v. Board of Trustees, Police and Firemen's Retirement System*, the Supreme Court articulated a new test designed to alleviate the confusion surrounding the statutory requirements of N.J.S. 43:16A-7.[22]

Plaintiff Stewart Richardson was a corrections officer who suffered a complete tear of the ligament in his left hand while attempting to subdue a violent inmate.[23] After surgery to repair the injury was unsuccessful, Richardson filed an application for accidental disability retirement benefits.[24] The application was declined by PFRS, which found that Richardson did not suffer a

[15] *Id.* at 491-92.
[16] *Fattore v. Police & Firemen's Ret. Sys.*, 80 N.J. Super. 541 (App. Div. 1963).
[17] *Id.* at 550.
[18] *Richardson*, 192 N.J. at 199.
[19] *Id.* at 199-200.
[20] *Id.* at 204.
[21] *Id.* at 192.
[22] *Id.* at 212.
[23] *Id.* at 193.
[24] *Id.*

traumatic event.[25] Richardson appealed, and the matter was heard by an Administrative Law Judge ("ALJ").[26]

The ALJ found that the incident was not a traumatic event because Richardson responded in a way that was consistent with the ordinary duties of a corrections officer.[27] PFRS adopted the ALJ's opinion, Richardson again appealed, and the Appellate Division affirmed the ALJ decision.[28] The Supreme Court then granted certification and reversed the lower courts' decisions.[29]

The Court first discussed the test set forth in *Kane v. Bd. Of Trustees, Police & Firemen's Retirement System*.[30] There, the Supreme Court established the following three-part test to determine whether a PERS member's disability resulted from a traumatic event: (a) his injuries were not induced by the stress or strain of the normal work effort; (b) he met involuntarily with the object or matter that was the source of the harm; and (c) the source of the injury itself was "a great rush of force or uncontrollable power."[31] The *Richardson* Court acknowledged that this standard had proven unworkable, and sought a "paradigm shift" that would "provide decision-makers with a standard capable of consistent and uniform application."[32]

The Court then focused on whether Richardson experienced a traumatic event.[33] In applying N.J.S. 43:16A-7, the Court reiterated that its goal when interpreting a statute is to give effect to legislative intent.[34] Noting that the statutory language is ambiguous, the Court examined the legislative history of the statute, tracing the development of the term "traumatic event."[35] It noted that a traumatic event is akin to an accident, but that the aim and scope of the accidental disability statute is distinct from that of workers' compensation.[36] The Court reframed the analysis underlying *Kane* to reassert that "a traumatic event is essentially the same … as an accident … an unexpected external happening that directly causes injury and is not the result of pre-existing disease alone or in combination with work effort."[37] This restatement gave rise to the *Richardson* test, in which a member of PFRS must prove:

1. that he is permanently and totally disabled;
2. as a direct result of a traumatic event that is
    a. identifiable as to time and place,

[25] *Id.* at 194.
[26] *Id.*
[27] *Id*.
[28] *Id.*
[29] *Id*. at 189 and 215.
[30] *Kane v. Bd. of Trs., Police & Firemen's Ret. Sys.*, 100 N.J. 651 (1985).
[31] *Richardson*, 192 N.J. at 192, quoting *Kane*, 100 N.J. at 663.
[32] *Id*. at 192-93.
[33] *Id.* at 194.
[34] *Id.* at 195.
[35] *Id.* at 199.
[36] *Id.* at 210.
[37] *Id.* at 212.

b. undesigned and unexpected, and
c. caused by a circumstance external to the member (not the result of pre-existing disease that is aggravated or accelerated by the work);

3. that the traumatic event occurred during and as a result of the member's regular or assigned duties;
4. that the disability was not the result of the member's willful negligence; and
5. that the member is mentally or physically incapacitated from performing his usual or any other duty.[38]

The Court concluded that "a member who is injured as a direct result of an identifiable, unanticipated mishap has satisfied the traumatic event standard."[39]

PFRS had already conceded that Richardson's disability was the direct result of a work-related incident.[40] The only question was whether the incident qualified as a traumatic event.[41] The Court noted that Richardson's being thrown to the floor by an inmate he was trying to subdue was identifiable as to time and place, unexpected and undesigned, and not the result of a pre-existing condition.[42] Therefore, the incident satisfied the traumatic event standard.[43]

One year later, the Supreme Court heard a consolidated appeal that required it to revisit the "traumatic event" standard announced in *Richardson*. In *Patterson v. Board of Trustees, State Police Retirement System*, the Court weighed whether injuries sustained by three individuals, two police officers who appealed the denial of their applications by the SPRS and a corrections officer who appealed the decision of PFRS, satisfied the recently-established "traumatic event" standard.[44]

The Court held that an applicant who suffers a mental disability as a result of a mental stressor, absent any physical impact, can still have suffered a traumatic event and thus be eligible for accidental disability retirement.[45] In addition to the requirements of the *Richardson* test, the Court announced a new, sixth, requirement: the disability must result from direct personal experience of a terrifying or horror-inducing event that involves actual or threatened death or serious injury, or a similarly serious threat to the physical integrity of the member or another person.[46] In specifying this last requirement, the Court sought to effectuate the legislative intent of the statute as well as to ensure that the event in question is "objectively capable of causing a reasonable person in similar circumstances to suffer a disabling mental injury.[47]

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[38] *Id.* at 212-13.
[39] *Id.* at 213.
[40] *Id*.
[41] *Id.* at 214.
[42] *Id.* at 214-15.
[43] *Id.* at 215.
[44] *Patterson v. Bd. of Trs., State Police Ret. Sys.*, 194 N.J. 29 (2008).
[45] *Id*. at 33.
[46] *Id.* at 34.
[47] *Id.*

The Court stated that a mental-mental injury (a psychological trauma causing mental incapacity) is neither explicitly included nor excluded in N.J.S. 43:16A-7(a)(1).[48] Finding the language of the statute unclear, the Court looked to the Workers' Compensation Act, which, when originally drafted, used language similar to that of the accidental disability benefits statute.[49] The Court noted that workers' compensation cases had recognized mental-mental injuries as valid bases for a worker's compensation claim.[50] As well, N.J.S. 40A:14-195, a statute creating law enforcement crisis intervention centers, uses the phrase "post trauma stress disorders" (and gives a non-exhaustive list of examples), thus indicating that the Legislature recognized that a traumatic event can result in a mental disability without any physical impact.[51] The Court then concluded that a permanent mental injury resulting from an exclusively mental event can satisfy the "traumatic event" standard under *Richardson*.[52]

The Court acknowledged that mental disability claims may have more diffuse proofs related to the incident and its effect on the claimant.[53] To allay concerns expressed by the pension boards about litigation "over idiosyncratic responses by members to inconsequential mental stressors" the Court, as noted above, added a requirement to the *Richardson* test.[54] In addition to satisfying the five prongs noted above, the traumatic event in question must be objectively capable of causing a permanent, disabling mental injury.[55] By applying the *Patterson* test, the Court sought to "assure objectivity in the analysis."[56]

Cases Underlying NJLRC Project Regarding Traumatic Event

- *Moran v. Bd. of Trs., Police & Firemen's Ret. Sys.*[57]

James Moran, a firefighter, sustained disabling injuries when he used his body to break down a door and rescue two victims from a burning house that was thought to be vacant.[58] Moran served in a fire department whose members belonged to one of two units.[59] The first was the engine company, that focused on extinguishing fires by leading hoses into buildings.[60] The other unit, the truck company, used special equipment to force entry into buildings and rescue anyone inside.[61] Both units were expected to respond to a fire scene at the same time.[62]

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[48] *Id.* at 45.
[49] *Id.* at 46.
[50] *Id.* at 47.
[51] *Id.* at 45.
[52] *Id.* at 48.
[53] *Id.*
[54] *Id.* at 48-49.
[55] *Id.* at 49-50.
[56] *Id.* at 50.
[57] *Moran v. Bd. of Trs., Police & Firemen's Ret. Sys.,* 438 N.J. Super. 346 (App. Div. 2014).
[58] *Id.* at 349.
[59] *Id.*
[60] *Id*.
[61] *Id.*
[62] *Id.* at 350.

At the fire scene in question, Moran's engine company arrived before the truck company.[63] Moran was unfurling the hose when he heard screams coming from inside the house, which was ablaze.[64] Although the truck company would have had the equipment necessary to break into the house, it inexplicably had not yet arrived, so Moran used his shoulder, leg, and back to break down the door.[65] At the administrative hearing, Moran testified that both the presence of people in the burning building and the absent truck company were unexpected events.[66] If not for both of those things, Moran would not have tried to break open the door.[67]

PFRS did not rebut Moran's testimony.[68] The ALJ found that the event involved an unexpected situation, and that consequently Moran was forced to respond in a way that was unanticipated by his training and experience.[69] The ALJ explained that "Moran was responding to a 'sudden and emergent circumstance' that required him to respond with unanticipated extreme physical exertion, causing his injury."[70]

PFRS adopted the ALJ's factual findings but rejected the legal conclusion.[71] It found that "kicking in a door or … using one's back to force entry does not constitute an unexpected happening."[72] It also found that since a firefighter's job includes rescuing people, Moran's actions were within the scope and performance of his job.[73] Thus, the cause of Moran's disability was not undesigned and unexpected.[74] Moran appealed the decision of PFRS.[75]

- *Mount v. Bd. Of Trustees, PFRS.*[76]

Officer Christopher Mount ("Mount") served as a police officer for 11 years before witnessing a severe vehicle accident on January 10, 2007. Soon after the accident, he experienced psychological problems.[77] In 2010, he was diagnosed with post-traumatic stress disorder ("PTSD").[78] Subsequently, he left his employment as a police officer and applied for accidental disability benefits.[79]

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[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *Id.* at 351.
[69] *Id.*
[70] *Id*.
[71] *Id.*
[72] *Id*.
[73] *Id*. at 352.
[74] *Id*.
[75] *Id.* at 346.
[76] *Mount v. Bd. of Trs., Police & Firemen's Ret. Sys.*, 233 N.J. 402 (2018). In this consolidated appeal, the New Jersey Supreme Court examined whether each police officer's claim of mental incapacitation due to a "traumatic event" warranted an award for accidental disability retirement benefits.
[77] *Id.* at 410.
[78] *Id.* at 411.
[79] *Id.*

PFRS determined that Mount's mental disability was a direct result of the accident.[80] He did not, however, meet the standards set forth by the case law and was deemed unqualified to collect the enhanced benefits under N.J.S. 43:16A-7(1).[81] Mount appealed the matter to the ALJ.[82]

The ALJ determined that Mount met some, but not all, of the requirements to qualify for accidental disability benefits as set forth in the case law.[83] PFRS subsequently adopted the ALJ's finding as its final agency decision.[84] On appeal, the Appellate Division affirmed PFRS's determination.[85] Mount sought certification from the New Jersey Supreme Court.[86]

Officer Gerardo Martinez ("Martinez") was a trained hostage negotiator for almost ten years.[87] Prior to the incident that gave rise to his disability claim, he had never dealt with a hostage negotiation.[88] On April 25, 2010, he was involved in a hostage negotiations that lasted more than 14 hours, and ended with the death of the hostage taker.[89]

As a result of the incident, Martinez was diagnosed with both PTSD and depression.[90] In 2011, he resigned from his position and applied for accidental disability benefits.[91] PFRS denied his application because it found that Martinez did not meet the standards set forth by the case law.[92]

On appeal, the ALJ ruled in favor of Martinez, stating that he met the qualifying standards to receive accidental disability benefits.[93] PFRS adopted ALJ's findings of fact, but disagreed with the ALJ's conclusions of law.[94] On appeal, the Appellate Division reversed PFRS's determination and ruled that Martinez was entitled to accidental disability pension benefits.[95] PFRS petitioned for certification.[96]

Analysis

In *Moran v. Bd. of Trs., Police & Firemen's Ret. Sys.,* the Appellate Division rejected PFRS's assertion that the injury did not qualify for accidental disability benefits because it occurred during work-related duties.[97] Citing *Richardson*, the Court noted that "the statute

[80] *Id.* at 412.
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.* at 413.
[85] *Id.*
[86] *Id.*
[87] *Id.* at 414.
[88] *Id.*
[89] *Id.* at 415-416.
[90] *Id.* at 416.
[91] *Id.*
[92] *Id.* at 417.
[93] *Id.* at 417.
[94] *Id.* at 418.
[95] *Id.*
[96] *Id.*
[97] *Moran*, 438 N.J. Super. at 353.

requires that the traumatic event occur 'during and as a result of the performance of [the member's] *regular* or *assigned* duties.'"[98] While acknowledging that in this case the traumatic event "was not a classic 'accident'" the Court found that the missing truck unit and the presence of people in the burning building together equaled an undesigned and unexpected event.[99] The Court then reiterated the *Richardson* Court's directive that "[t]he polestar of the inquiry is whether, during the regular performance of his job, an unexpected happening, not the result of pre-existing disease alone or in combination with the work, has occurred and directly resulted in the permanent and total disability of the member."[100] The Court remanded with direction to grant Moran's application for accidental disability retirement benefits.[101]

In *Mount v. Bd. of Trs., Police & Firemen's Ret. Sys.*, the New Jersey Supreme Court applied the *Patterson* and the *Richardson* tests to determine whether Mount and Martinez each suffered a disabling injury due to a traumatic event.[102] These two tests are applied sequentially on a case-by-case basis.[103] If the PFRS member meets the standard set forth in *Patterson,* then the Court would apply the *Richardson's* five prong test to ascertain a claimant's eligibility under N.J.S. 43:16A-7(1).[104] If, however, the claimant fails to meet the *Patterson* threshold, the Court will deny accidental disability benefits without applying the *Richardson* test.[105]

The Supreme Court determined that both Mount and Martinez demonstrated that they met the standards proscribed by *Patterson*.[106] According to the Court, both occurrences were "terrifying" and "horror inducing" events because each was objectively capable of causing a reasonable person in similar circumstances to suffer a disabling mental injury.[107]

The Court then distinguished between the plaintiffs when it applied the *Richardson* test.[108] One of the prongs requires the member to prove that the traumatic event was "undesigned and unexpected."[109] The Court noted that in determining whether an event was undesigned and unexpected, all aspects of the event, and not just the job responsibility and training of the officers, are to be considered.[110]

The Court found that Mount experienced a traumatic event for the purposes of the *Richardson* test.[111] In its analysis the Court considered that Officer Mount observed the horrific

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[98] *Id.* (emphasis in the original).
[99] *Id.* at 354.
[100] *Id.*
[101] *Id.*
[102] *Mount*, 233 N.J. at 426.
[103] *Id.*
[104] *Id.*
[105] *Moran*, 438 N.J. Super. at 407, quoting *Patterson*, 194 N.J. 29 (2008).
[106] *Mount*, 233 N.J. at 408.
[107] *Id*.
[108] *Id*.
[109] Id. at 421.
[110] *Id.* at 427.
[111] *Id.* at 428.

traffic accident at close range, and was not trained or equipped with firefighting equipment or protective gear to help the teenage victims involved in the accident.[112] Additionally, Mount viewed the victim's arm hanging from the vehicle window, faced imminent threat of explosion and learned that as a result of the explosion the young victims' bodies melted into the interior of the vehicle.[113] The totality of the circumstances indicated that Mount faced an undesigned and unexpected traumatic event. The Court therefore remanded the matter to the Appellate Division to determine whether Mount's disability was a direct result of the January 10, 2007 incident.[114]

Regarding Martinez, the Court applied a similar analysis but reached a contrary decision. The Court found that Martinez had been trained as a hostage negotiator and held that position for almost ten years.[115] He was aware that hostage negotiations sometimes fail and end with the use of lethal force.[116] The events of a failed hostage negotiation are neither "undesigned nor unexpected" under a *Richardson* analysis."[117] The Court therefore reversed the Appellate Division's decision and held that Martinez was not eligible for accidental disability benefits under N.J.S. 43:16A-7(1).[118]

The Court ended its opinion by noting that the Legislature may choose to enact separate provisions for physical disabilities and for mental disabilities due exclusively to mental stressors.[119] It also stated that legislative guidance would help all parties involved in applications for accidental disability benefits.[120]

Recent Legislation

During the 2018-2019 legislative session, the bill that was enacted as P.L. 2019, c.157, §2 passed the Legislature and took effect on July 8, 2019. The amendment allows an eligible member or retiree of the Police and Firemen's Retirement System, the State Police Retirement System, and the Public Employees' Retirement System to receive an accidental disability retirement allowance for a disability resulting from participation in 9/11 World Trade Center rescue, recovery, or cleanup operations.[121] The amendment recognizes the new onset of diseases such as cancer, chronic obstructive pulmonary disease, asbestos-related disease, heavy metal poisoning, musculoskeletal disease, and chronic psychological disease resulting from exposure to toxins released when the World Trade Center destroyed.[122] Nevertheless, the adopted legislation does not clarify the term "traumatic event" as discussed in this project.

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[112] *Id.* at 427.
[113] *Id.*
[114] *Id.*at 428.
[115] *Id.* at 414.
[116] *Id.*
[117] *Id.* at 431.
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] A.B. 4882, 2018th Leg., 2nd Sess. (N.J. 2019) (codified as P.L. 2019, c.157, §2, eff. July 8, 2019).
[122] *Id.*

Pending Legislation

Assembly Bill 3204 was introduced on February 25, 2020. The legislation seeks to provide certain health care benefits to surviving dependents of an accidental disability retiree who participated in 9/11 World Trade Center rescue, recovery, or cleanup operations. It also clarifies eligibility criteria for recalculation of retirement allowance for participation in rescue, recovery, or cleanup operations.[123] This legislation, however, does not address the ambiguity of the term "traumatic event."

Conclusion

N.J.S. 43:16A-7(1) does not define what qualifies as a "traumatic event." The New Jersey Supreme Court in *Mount* invited the "Legislature to refine the statutory language to clarify its intent regarding the term 'traumatic event.'"[124]

The Commission recommends the addition of language to N.J.S. 43:16A-7 to provide consistency, thus aiding members, retirement boards, practitioners, and courts. The Appendix on the pages that follow proposes the addition of a definition of the term "traumatic event" consistent with the intent of the Legislature and the mandate of the New Jersey Supreme Court.

[123] A.B. 3204, 2019th Leg., 1st Sess. (N.J. 2020).
[124] *Mount*, 233 N.J. at 431.

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 ~~strikethrough~~, 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. ~~(1)~~ For purposes of this ~~sub~~section,

(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 ~~sub~~section, 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. 157,1 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 ~~sub~~section 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.