

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY**

<b>CHRISTIANNE M. HAGGERTY,</b>	)	
	)	
	)	
<b>Appellant,</b>	)	
	)	
<b>v.</b>	)	<b>C.A. No. N14A-01-007 MJB</b>
	)	
<b>BOARD OF PENSION TRUSTEES OF THE STATE OF DELAWARE, DELAWARE OFFICE OF PENSIONS</b>	)	
	)	
	)	
<b>Appellees.</b>	)	

**Submitted:** April 27, 2015  
**Decided:** July 20, 2015

*Upon Appellant’s Appeal from the Board of Pension Trustees, **REVERSED.***

**OPINION**

Christianne M. Haggerty, 239 Manor Circle, Elkton, Maryland 21921, *pro se*, Appellant.

Stacey Cohee, Esq., Deputy Attorney General, 655 S. Bay Road, Suite 1A, Dover, Delaware 19901, Attorney for Appellee Delaware Office of Pensions.

**BRADY, J.**

## I. INTRODUCTION

This is appellant Christianne M. Haggerty's ("Haggerty") *pro se* appeal from a decision of the Delaware Board of Pension Trustees (the "Board"). Haggerty was awarded a partial disability pension but maintains that she is entitled to a total disability pension. Haggerty argues that the Board erred in its consideration of the medical evidence before it.

The Court reviews the decision of the Board to determine whether it supported by substantial evidence and free from legal error.<sup>1</sup> For the reasons detailed below, the Court finds that the Board misapplied the law in deciding Haggerty's claim and accordingly **REVERSES** and **REMANDS** the decision of the Board.

## II. FACTUAL & PROCEDURAL BACKGROUND

### A. Haggerty's Injury

Haggerty was employed as a police officer with the New Castle County Police Department ("NCCPD") when she suffered an injury in the line of duty on March 9, 2009.<sup>2</sup> Haggerty reported the incident the next day, sought treatment, and was immediately placed on "light duty."<sup>3</sup> After the injury, Haggerty was diagnosed with a left shoulder strain/sprain, cervical whiplash, and potential bursitis.<sup>4</sup> On January 6, 2010, after treatment for her injuries, therapy, and a job placement assessment, Haggerty was placed back on full duty.<sup>5</sup> Three weeks later, Haggerty was put back on light duty due to aggravated neck pain and headaches.<sup>6</sup> Dr. Ann Kim and Dr. Pierre LeRoy concluded that the pain was caused by the weight of Haggerty's

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<sup>1</sup> *King v. Board of Pension Trustees*, 1997 WL 718682, \*7 (Del. Super. Ct. Aug. 29, 1997).

<sup>2</sup> Answering Brief, Item 12, at 2.

<sup>3</sup> *Haggerty*, 2012 WL 3029580, at \*1.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

uniform and gun.<sup>7</sup> Haggerty was subsequently evaluated by Dr. Stephen Rogers, who concluded that Haggerty was totally disabled from all law enforcement work.<sup>8</sup>

### **B. Haggerty's Termination and Application for Disability Pension**

On August 20, 2010, NCCPD sent Haggerty a letter notifying Haggerty that she was being terminated.<sup>9</sup> Haggerty was terminated because she was on light duty and the County maintained that there were no other light duty positions available in which Haggerty could continue.<sup>10</sup> Haggerty's termination was effective as of October 7, 2010.<sup>11</sup> Haggerty applied for a disability pension from the Delaware State Office of Pensions ("SPO") on September 2, 2010.<sup>12</sup> On November 23, 2010, the SPO informed Haggerty that she had been granted a partial disability pension.<sup>13</sup> Haggerty appealed the decision, seeking a total disability pension.<sup>14</sup> At the time of the appeal, the SPO requested that Haggerty submit to an expert vocational assessment by Malcolm & Associates, LLC ("Malcolm"), which Haggerty did.<sup>15</sup> On April 4, 2011, Malcolm submitted its report (the "Malcolm Report") finding that Haggerty was not totally disabled but could do medium physical demand work for 8-10 hours per day.<sup>16</sup> After considering the Malcolm Report, the SPO issued a decision confirming that Haggerty would receive only a duty-connected partial disability pension.<sup>17</sup> Haggerty appealed the decision of the SPO, and, on September 14, 2011, a hearing was held before the hearing officers for the Board in

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Haggerty*, 2012 WL 3029580, at \*1.

<sup>10</sup> Remand Hearing Transcript at 48.

<sup>11</sup> *Haggerty*, 2012 WL 3029580, at \*1.

<sup>12</sup> Answering Brief, Item 12, at 2.

<sup>13</sup> Answering Brief, Item 12, at 3.

<sup>14</sup> Answering Brief, Item 12, at 3.

<sup>15</sup> Answering Brief, Item 12, at 3.

<sup>16</sup> Answering Brief, Item 12, at 3.

<sup>17</sup> Answering Brief, Item 12, at 3-4.

accordance with 29 *Del. C.* §8308(c)(8). On November 18, 2011, the Board voted to adopt the recommendation of the hearing officers and denied Haggerty's appeal.<sup>18</sup>

### **C. Haggerty's Initial Appeal to Superior Court**

On December 15, 2011, Haggerty appealed to Superior Court. Haggerty argued that the Board erred in not finding her totally disabled. Specifically, Haggerty suggested that because there is no job with New Castle County for which the County presently finds her suited, she is totally disabled.<sup>19</sup>

On July 20, 2012, Judge Slights reversed and remanded the decision to the Board.<sup>20</sup> The Court found the Board had correctly interpreted and applied 11 *Del. C.* §8801, the statute defining "partial disability" and "total disability" for the purposes of the county and municipal police/firefighter pension plan.<sup>21</sup> 11 *Del. C.* §8801(16) defines "total disability" as "a medically determined physical or mental impairment which renders the member totally unable to work in any occupation for which the member is reasonably suited by training or experience, which is reasonably expected to last at least 12 months."

The Court explained that the definition of "total disability," as previously determined by Superior Court, focuses on the employee's ability to engage in "any occupation, whether police-related or *otherwise*."<sup>22</sup> An individual is not totally disabled if she can work in some job, even if that job is with an organization other than New Castle County.<sup>23</sup> In other words, "any occupation" in 11 *Del. C.* §8801(16) is not, contrary to Haggerty's suggestion, limited to "any

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<sup>18</sup> Answering Brief, Item 12, at 4.

<sup>19</sup> *Haggerty*, 2012 WL 3029580, at \*3

<sup>20</sup> *Id.* at \*4.

<sup>21</sup> *Id.* at \*3.

<sup>22</sup> *Id.* (quoting *Jordan v. Board of Pension Trustees*, 2004 WL 2240598, \*3 (Del. Super. Ct. Sept. 21, 2004)) (emphasis in original).

<sup>23</sup> *Id.*

occupation with New Castle County.”<sup>24</sup> The Court concluded that “the Malcolm Report’s conclusion that Haggerty can work in positions aside from those provided by the County” was consistent with the Board’s finding that Haggerty is not totally disabled.<sup>25</sup>

Despite the Board’s proper interpretation of the statute, the Court found that the Board’s decision was not supported by substantial evidence because the Board had completely ignored evidence that contradicted the Board’s findings—specifically three medical opinions presented by Haggerty at the hearing, each of which opined that Haggerty was totally disabled, i.e., unable to work in any capacity.<sup>26</sup> The Court explained, “[t]he Board failed to provide any indication that it actually considered the treating physician’s opinion and apparently never considered or even reviewed the two separate medical opinions offered by Haggerty.”<sup>27</sup>

The Court directed that, upon remand, the Board should hold a new hearing, which effectively afforded the parties the opportunity to present new evidence.<sup>28</sup> However, the Court made clear that evidence of Haggerty’s condition having worsened subsequent to her original filing for benefits should not be considered: “There is nothing in the [disability pension] statute... to suggest that the Board is obligated to increase a partial disability pension to a full disability pension where a pensioner’s physical state worsens. As unfair as this may seem to Haggerty and any other service-member faced with a degenerative condition caused by a work-related injury, this Court is not the proper forum for relief.”<sup>29</sup>

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<sup>24</sup> *Id.*

<sup>25</sup> *Haggerty*, 2012 WL 3029580, at \*3.

<sup>26</sup> *Id.* at \*4.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at \*5.

<sup>29</sup> *Id.* at \*4.

#### **D. Evidence before the Board on Remand**

In accordance with the Court's direction, the Board allowed the record to be supplemented by additional submissions<sup>30</sup> and held a remand hearing before the hearing officers on November 13, 2013.<sup>31</sup> In their Report and Recommendation, the hearing officers summarized the evidence before them as of the remand hearing. At the hearing, Haggerty testified that she had been working light duty as a dispatcher prior to her termination.<sup>32</sup> Haggerty's initial treatment was with Dr. Kambhamettu, whom Haggerty consulted at the behest of the County.<sup>33</sup> Dr. Kambhamettu placed Haggerty on light duty.<sup>34</sup> In April 2009, Haggerty had her first MRI of her shoulder, which indicated that she had bursitis. Dr. Kambhamettu referred Haggerty to a surgeon, Dr. Sowa, who gave Haggerty a cortisone shot for pain, ordered an MRI of Haggerty's spine, and referred Haggerty to a colleague who specialized in spines.<sup>35</sup> The spine specialist did not think that Haggerty's injuries required surgery, and he referred Haggerty to Dr. Kim, a pain specialist.<sup>36</sup> Haggerty began treatment with Dr. Kim in June 2010.<sup>37</sup>

In March 2011, Haggerty switched doctors and began treating with Dr. Falco, also a pain specialist.<sup>38</sup> In April 2011, Dr. Falco suggested Haggerty see Dr. Xing, who had treated Haggerty for a back injury that she "had years ago," for a second surgical consultation.<sup>39</sup> Dr. Xing referred Haggerty to Dr. Katz, who ordered another MRI.<sup>40</sup> According to Haggerty, the MRI showed degenerative disc disease, but Dr. Katz still did not think that surgery was

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<sup>30</sup> Report on Remand at 3.

<sup>31</sup> Answering Brief, Item 12, at 4.

<sup>32</sup> Report on Remand at 3.

<sup>33</sup> Report on Remand at 3.

<sup>34</sup> Report on Remand at 3.

<sup>35</sup> Report on Remand at 3.

<sup>36</sup> Report on Remand at 4.

<sup>37</sup> Report on Remand at 4.

<sup>38</sup> Report on Remand at 4.

<sup>39</sup> Report on Remand at 4.

<sup>40</sup> Report on Remand at 4.

necessary at that time.<sup>41</sup> Haggerty testified that Dr. Katz referred her back to Dr. Sowa, who, in turn referred her to Dr. Eppley, a neurosurgeon.<sup>42</sup> Haggerty testified that it was now January 2013, and Dr. Eppley recommended surgery.<sup>43</sup>

Haggerty underwent spinal fusion surgery in July 2013.<sup>44</sup> Haggerty testified that the surgery revealed “fragments of bone embedded into the disc” and that Dr. Eppley “said that that was consistent with having some type of trauma to the area.”<sup>45</sup> Haggerty indicated that her worker’s compensation case was reopened as a result of the surgery, and that she is now on total disability until cleared to work by her doctors.<sup>46</sup>

On cross-examination, Haggerty was asked why she had withdrawn her original June 2011 petition for worker’s compensation for total disability.<sup>47</sup> Counsel for the SPO asked Haggerty to read into the record a letter from her attorney at the time indicating that Dr. Falco was unable to testify that Haggerty was totally disabled at that time.<sup>48</sup> Upon further questioning, Haggerty confirmed that prior to September 14, 2011, the date of the first Board hearing concerning Haggerty’s appeal of the SPO’s granting her only partial disability benefits, the only doctors who had opined that Haggerty was totally disabled were Dr. Kim, Dr. Falco, Dr. Coubarous, and Dr. DeJoseph.<sup>49</sup> When asked whether any of the physicians had opined that Haggerty’s disability would last more than 12 months, Haggerty indicated that Dr. Falco had written the word “never” in response to the question as to whether she could return to work.<sup>50</sup>

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<sup>41</sup> Report on Remand at 4.

<sup>42</sup> Report on Remand at 4.

<sup>43</sup> Report on Remand at 4.

<sup>44</sup> Report on Remand at 4.

<sup>45</sup> Report on Remand at 4-5.

<sup>46</sup> Report on Remand at 5.

<sup>47</sup> Report on Remand at 5.

<sup>48</sup> Report on Remand at 5.

<sup>49</sup> Report on Remand at 5-6.

<sup>50</sup> Report on Remand at 6.

The record contained several vocational assessments. First, there was the Malcolm report on which the SPO relied in making its original determination that Haggerty was only eligible for partial disability. The report concluded that at that time, given Haggerty's experience and education, a labor market survey indicated several jobs that she could work with her injury.<sup>51</sup> Two other experts for the County, Dr. Meyers and Barbara Stevenson of Coventry Worker's Comp Services, similarly opined that there were jobs that Haggerty could do. In his August 3, 2011 Expert Medical Examination Report, Dr. Meyers opined that Haggerty "was safe to return to work at light duty capacity as per Dr. Kim's recommendation of January 4, 2011" and was "not totally disabled."<sup>52</sup> Barbara Stevenson identified ten jobs that Haggerty could perform.<sup>53</sup>

Haggerty submitted numerous physician reports that had been prepared in connection with her worker's compensation claim, including reports by Dr. Kim, Dr. DeJoseph, Dr. Falco, and Dr. Coubarous. There are multiple reports, sometimes from the same doctor, tracking Haggerty's progress over time. These reports were made on a standard "Delaware Workers' Compensation: Physician's Report of Worker's Compensation Injury" form.<sup>54</sup> The form does not explicitly ask whether the applicant is totally disabled from any kind of work (and not just prevented from performing her current job), a fact that the Board made much of in its decision on remand. Nonetheless, several of these reports indicated "total disability," by checking the box corresponding to "0" hours per day that the patient can work and writing some variation of "total disability/no work" in the "comments" section of the form.<sup>55</sup>

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<sup>51</sup> Malcolm Report, Item 13, Exhibit to Answering Brief.

<sup>52</sup> Meyers Report at SR299-307.

<sup>53</sup> Stevenson Report at SR311-15.

<sup>54</sup> See, e.g., Report of Dr. Kim, Exam Date Sept. 9, 2010, at SR216.

<sup>55</sup> See, e.g., Report of Dr. Kim, Exam Date Sept. 9, 2010, at SR216; Report of Dr. DeJoseph, Exam Date Sept. 10, 2010, at SR217; Report of Dr. Falco, Exam Date Mar. 1, 2011, at SR223.



Haggerty submitted two Pension Plan Medical Reports to the SPO. Both reports were discussed at the hearing.<sup>56</sup> The Pension Plan Medical Report form asks directly after the officer's ability to work in any position for which she is suited. Question 11 asks, "Does the impairment render the officer totally unable to work in any occupation for which he/she is reasonably suited by training or experience...?" Question 12 asks, "If not, what occupation is the officer able to perform?" The first report by Dr. Kim was dated October 8, 2010.<sup>57</sup> In response to Question 11, Dr. Kim answered "no."<sup>58</sup> In response to Question 12, Dr. Kim stated that Haggerty was capable of "light duty... [and] administrative work, desk work."<sup>59</sup> The second report by Dr. Rogers, submitted on October 29, 2010, answered "Yes" in response to Question 11 and "Not applicable" to Question 12.<sup>60</sup> Haggerty was questioned about an apparent handwriting discrepancy in Dr. Rogers' report, but Haggerty was unable to explain the handwriting discrepancy at the hearing.<sup>61</sup>

### **E. The Board's Findings**

The hearing officers issued a Report and Recommendation, denying Haggerty's appeal, which was approved and adopted by the Board on December 20, 2013.<sup>62</sup> The question before the Board was whether Haggerty had met the standard for "total disability" under 11 *Del C.* §8801(16). As a threshold issue, the Board considered whether it needed to take into account evidence that Haggerty's condition has worsened since she first applied for a disability

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<sup>56</sup> Report on Remand at 11.

<sup>57</sup> Report on Remand at 10-11.

<sup>58</sup> Pension Plan Report of Dr. Kim at SR271-74.

<sup>59</sup> Pension Plan Report of Dr. Kim at SR271-74.

<sup>60</sup> Pension Plan Report of Dr. Rogers at SR328-32.

<sup>61</sup> Report on Remand at 6.

<sup>62</sup> Answering Brief, Item 12, at 4. Because the Report and Recommendation of the hearing officers was adopted by the Board, the Court will refer to the findings in the Report as the Board's findings.

pension.<sup>63</sup> Citing the Court’s decision on appeal, the Board determined that the County Plan was not intended to take into account worsening of an applicant’s medical condition after she has filed for benefits.<sup>64</sup>

The Board found that it was beyond dispute that Haggerty “had a medically determined physical impairment [that] rendered her unable to function as a police officer [and] which was reasonably expected to last at least 12 months, at the time of her initial application in September 2010, and through the time of her initial Pension Board hearing on September 14, 2011.”<sup>65</sup> The Board identified numerous medical opinions in the record, which had been submitted for the purpose of Haggerty’s worker’s compensation claim.<sup>66</sup> These opinions included reports by Dr. Kim, Dr. DeJoseph, Dr. Falco, and Dr. Coubarous.<sup>67</sup> The Board found that

[w]hile each of the WC [worker’s compensation] Medical Reports are responsive to the question of whether Ms. Haggerty could perform the duties of a police officer, thereby meeting the standard required by 8801(13) of the County Plan for partial disability, they do not address whether Ms. Haggerty is able to perform any other work for which she may be qualified, as required for a finding of total disability pursuant to sec. 8801(16).<sup>68</sup>

The Board pointed out that, in contrast to the worker’s compensation form, the form for the Pension Plan Medical Report asks the physician completing it to directly address whether the claimant may do *any* work for which she is suited by training or experience.<sup>69</sup>

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<sup>63</sup> Report on Remand at 8.

<sup>64</sup> Report on Remand at 8 (*citing Haggerty*, 2012 WL 3029580, at \*4).

<sup>65</sup> Report on Remand at 8.

<sup>66</sup> Report on Remand at 8.

<sup>67</sup> Report on Remand at 8-9.

<sup>68</sup> Report on Remand at 10.

<sup>69</sup> Report on Remand at 10.

Of the two Pension Plan Reports, the Board stated that it gave the Rogers report less weight than that of Dr. Kim.<sup>70</sup> The Board pointed to the fact that Dr. Kim was the regular treating physician for Haggerty and “has the benefit of several months of evaluation and treatment on which to form her opinion.”<sup>71</sup> In contrast, said the Board, Dr. Rogers was a medical expert engaged by the County who has a much more limited role in Haggerty’s care.<sup>72</sup> The Board also noted that Dr. Rogers had written an earlier medical review, dated July 6, 2010, in which he acknowledged that Haggerty was currently working light duty, that “Dr. Kim would be her physician of first resort,” and that the permanent impairment to the cervical spine that was causally related to the work injury was “10%.”<sup>73</sup> The Board also says that both Haggerty and her husband testified that Rogers was not privy to the proper disability definitions under 11 *Del C.* §8801(16) and was instead making his evaluations premised on the worker’s compensation standards.<sup>74</sup> Finally, the Board expressed concern over the fact that Rogers’ Pension Plan Medical Report appeared to contain two different handwritings.<sup>75</sup>

The Board found that the vocational evaluations in the record provided “overwhelming support for a partial disability determination” as they indicated multiple jobs for which Haggerty would be qualified given her physical limitations.<sup>76</sup>

Finally, the Board found that there was ample medical evidence in the record to suggest that Haggerty’s disc condition was degenerative and had deteriorated since the September 14, 2011 hearing.<sup>77</sup> However, the Board found no evidence to indicate that Haggerty’s degenerative

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<sup>70</sup> Report on Remand at 11.

<sup>71</sup> Report on Remand at 11.

<sup>72</sup> Report on Remand at 11.

<sup>73</sup> Rogers Report, July 6, 2010, at SR320-25.

<sup>74</sup> Report on Remand at 12.

<sup>75</sup> Report on Remand at 11.

<sup>76</sup> Report on Remand at 12.

<sup>77</sup> Report on Remand at 12.

condition was caused by her work injury.<sup>78</sup> The Board said that the only evidence of a causal connection between the work injury was the postoperative note and Haggerty's associated testimony concerning the "fragments of bone embedded into the disc" that Dr. Eppley said was "consistent with having some type of trauma to the area."<sup>79</sup> The Board concluded that Haggerty's injuries could have been caused by a multitude of other factors including a back issue that predated the injury and subsequent injuries from sneezing and in the shower.<sup>80</sup>

### **III. THE INSTANT APPEAL**

#### **A. Haggerty's Appeal**

On July 31, 2014, Haggerty filed the Opening Brief in the instant appeal.<sup>81</sup> Haggerty challenges the Board's finding that there was a lack of evidence of causation. She cites Dr. Kim's October 8, 2010 Pension Plan Medical Report, which states that Haggerty's impairment resulted from the work-related incident, as well as Dr. Rogers' October 26, 2010 Pension Plan Medical Report, which says that the injury happened during the March 2009 altercation with a suspect, and the post-surgical notes of Dr. Eppley, which say that Haggerty's injuries are consistent with trauma.<sup>82</sup> Regarding the Board's contention that the injuries could have been caused by something else, like sneezing hard, Haggerty cites research that shows that sneezing is a symptom of cervical radiculopathy, not a cause.<sup>83</sup> Haggerty provides supporting documents attached to the Opening Brief, including a printout from an online medical information site concerning the causes of cervical radiculopathy and a letter from Dr. Rogers addressing the

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<sup>78</sup> Report on Remand at 13.

<sup>79</sup> Report on Remand at 4-5.

<sup>80</sup> Report on Remand at 13.

<sup>81</sup> Opening Brief, Item 9.

<sup>82</sup> Opening Brief, Item 9, at \*1.

<sup>83</sup> Opening Brief, Item 9, at \*6.

apparent handwriting discrepancy, both of which the Court cannot consider as they were not before the Board.<sup>84</sup> Haggerty also addresses the duration of the injury and cites many documents, including Dr. Rogers' and Dr. Xing's reports, which all state that the injury is likely to last more than 12 months.<sup>85</sup> Further, Haggerty argues that the fact that there are disability reports spanning more than a year is evidence that the disability in fact existed for at least 12 months.<sup>86</sup>

Haggerty challenges the Board's decision to weigh Dr. Kim's Pension Plan Medical Report more heavily than that of Dr. Rogers.<sup>87</sup> Haggerty says that Dr. Rogers, unlike Dr. Kim, reviewed Haggerty's education and training, and hence was better positioned to opine regarding what alternative occupations Haggerty could or could not perform.<sup>88</sup> Haggerty says that the Board misinterpreted her testimony about whether or not Rogers was working with the proper "total disability" and "partial disability" definitions.<sup>89</sup> Haggerty cites to the transcript of the Remand Hearing at which she testified that while Rogers had only the worker's compensation definitions when he wrote his July 2010 worker's compensation report, Rogers had the proper disability pension definitions for his October 2010 Pension Plan Medical Report.<sup>90</sup> Regarding the apparent handwriting discrepancy, Haggerty says that it is common practice to have doctor's notes transcribed by more than one person in a doctor's office and points to a letter from Dr. Rogers (attached as an Exhibit to the Opening Brief), which explains this.<sup>91</sup>

The Board concluded that the worker's compensation determination of "total disability" does not mean that the individual cannot work in any position. Haggerty disputes this conclusion

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<sup>84</sup> Opening Brief, Item 9, at \*6.

<sup>85</sup> Opening Brief, Item 9, at \*2.

<sup>86</sup> Opening Brief, Item 9, at \*5.

<sup>87</sup> Opening Brief, Item 9, at \*2.

<sup>88</sup> Opening Brief, Item 9, at \*2.

<sup>89</sup> Opening Brief, Item 9, at \*3.

<sup>90</sup> Opening Brief, Item 9, at \*3 (*citing* Remand Hearing Transcript at 48).

<sup>91</sup> Opening Brief, Item 9, at \*3.

and argues that “total disability,” whether in the worker’s compensation context or elsewhere, means just that—total inability to work.<sup>92</sup> Haggerty disputes the findings of the Malcolm Report, which provides a list of different jobs, including private detective, probation officer, and protective services worker, that Haggerty could allegedly perform. Haggerty says that this is not correct given her doctors’ assessments of her abilities.<sup>93</sup> Haggerty also says that the Malcolm Report’s conclusion that she could do the mentioned jobs is inconsistent with the County’s assessment that, as of the time of her termination, there were no suitable jobs open for Haggerty.<sup>94</sup> Haggerty’s argument is that since the County does in fact employ people in these positions, the County’s determination that there were no suitable jobs indicates that Haggerty could not, in the County’s estimation, perform these jobs.<sup>95</sup>

Haggerty further points to opinions by doctors contrary to Dr. Myers’ opinion that she required no continuing medical treatment, arguing that the fact that she had surgery proves that continuing treatment was necessary.<sup>96</sup> Regarding Barbara Stevenson’s report, Haggerty argues that it should be discounted because Stevenson relied heavily on Dr. Myers’ report and did not personally interview Haggerty.<sup>97</sup>

## **B. The Board’s Answer**

The Board begins by addressing two preliminary matters. First, the Board argues that the Court should exercise its discretion to exclude Haggerty’s Opening Brief because it was filed late.<sup>98</sup> According to the briefing schedule established by the Court, Haggerty was required to file

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<sup>92</sup> Opening Brief, Item 9, at \*4

<sup>93</sup> Opening Brief, Item 9, at \*4.

<sup>94</sup> Opening Brief, Item 9, at \*4.

<sup>95</sup> Opening Brief, Item 9, at \*4-5.

<sup>96</sup> Opening Brief, Item 9, at \*5.

<sup>97</sup> Opening Brief, Item 9, at \*5.

<sup>98</sup> Answering Brief, Item 12, at 6.

her Opening Brief by March 20, 2014.<sup>99</sup> On March 12, 2014, Haggerty requested a continuance/extension of the deadline to file her Opening Brief because she had been unable to get a copy of the record.<sup>100</sup> On July 17, 2014, the Court issued a Final Delinquent Brief Notice, directing Haggerty that the matter would be dismissed unless action was taken in 10 days.<sup>101</sup> Haggerty filed her Opening Brief on July 31, 2014, which, the Board contends, was 4 days late.<sup>102</sup> The Board also says that while the Board received a copy of the Opening Brief on July 31, 2014, the Office of Pensions was not served until August 8, 2014.<sup>103</sup> The Board says that Haggerty has provided no explanation or justification for her untimely filing.<sup>104</sup> Second, the Board argues that the Court should not consider the exhibits that Haggerty submitted with her Opening Brief because they were not before the Board, and the Court is limited to the record before the Board upon review.<sup>105</sup>

Preliminaries aside, the Board argues that the decision is supported by substantial evidence and should be affirmed. The Board argues that the scope of the issues is narrowed by the previous Superior Court decision in the instant case. In Haggerty's initial appeal, she argued that the Board erred as a matter of law in interpreting the definitions of "total disability" and "partial disability."<sup>106</sup> The Court found that the Board correctly interpreted and applied the statutory definitions. The Court also found no error in the Board's decision not to consider any evidence that Haggerty's condition deteriorated since she filed her original application in deciding the disability pension.<sup>107</sup> The Court reversed and remanded only because the Court

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<sup>99</sup> Answering Brief, Item 12, at 7.

<sup>100</sup> Order, Item 7.

<sup>101</sup> Notice, Item 8.

<sup>102</sup> Answering Brief, Item 12, at 7.

<sup>103</sup> Answering Brief, Item 12, at 7.

<sup>104</sup> Answering Brief, Item 12, at 7.

<sup>105</sup> Answering Brief, Item 12, at 8.

<sup>106</sup> *Haggerty*, 2012 WL 3029580, at \*3.

<sup>107</sup> *Id.* at \*4.

found that the Board had failed to address the contrary medical evidence, specifically the opinions of the three doctors, including Haggerty's current treating physician, who opined that Haggerty was in fact totally disabled.<sup>108</sup>

The Board argues that, upon remand, it properly considered all of the medical evidence before it. The Board argues that it considered the reports prepared in connection with Haggerty's worker's compensation claim as general evidence of Haggerty's physical condition.<sup>109</sup> What the Board says it rejects is Haggerty's argument that that a finding of "total disability" for worker's compensation purposes is conclusive that an individual is totally disabled under the disability pension standard.<sup>110</sup> The Board disputes Haggerty's assertion that the worker's compensation experts' finding her totally disabled contradicted the findings of the Malcolm Report, Dr. Meyers' report, and Barbara Stevenson's report, which all found that there were jobs that Haggerty could do.<sup>111</sup>

The Board notes that it does not dispute that Haggerty was injured on the job, that the injury rendered Haggerty unable to function as a police officer, and that the injury was reasonably expected to last at least 12 months.<sup>112</sup> The Board did conclude that the need for the spinal fusion surgery was more likely due to a degenerative condition separate from the injury.<sup>113</sup>

The Board defended its decision to give the Kim Report more weight than the Rogers Report.<sup>114</sup> The Board refers to the fact that it questioned the Rogers Report in part because part of it appeared to be in different handwriting.<sup>115</sup> The Board acknowledged that Haggerty submitted an explanation for the handwriting discrepancy in her Opening Brief as well as a

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<sup>108</sup> *Id.*

<sup>109</sup> Answering Brief, Item 12, at 9-10.

<sup>110</sup> Answering Brief, Item 12, at 9-10.

<sup>111</sup> Answering Brief, Item 12, at 10.

<sup>112</sup> Answering Brief, Item 12, at 11.

<sup>113</sup> Answering Brief, Item 12, at 11.

<sup>114</sup> Answering Brief, Item 12, at 11.

<sup>115</sup> Answering Brief, Item 12, at 11.



supporting exhibit, a letter from Dr. Rogers.<sup>116</sup> However, the Board correctly argues that these materials are outside the record considered by the Board at the time of the hearing and hence cannot be considered by the Court.<sup>117</sup> The Board argues that, putting aside the handwriting issue, it had multiple reasons for weighing Dr. Kim's report more heavily, including the fact that Dr. Kim was Haggerty's regular treating physician.<sup>118</sup>

### **C. Haggerty's Reply**

Haggerty submitted a Reply Brief on September 23, 2014 in which she addresses the Board's arguments. Haggerty argues that her Opening Brief was timely filed as it was filed on July 31, 2014, which was within 9 business days after the notice from the Court, giving her 10 days to file.<sup>119</sup> Haggerty assumed that the 10 days given by the Court's notice should be interpreted as business days. Haggerty argues that her additional exhibits should be considered even though they were not before the Board because all of the documents concern issues that were before the Board.<sup>120</sup>

Haggerty disputes that the Board's decision was supported by substantial evidence.<sup>121</sup> Haggerty argues it is not reasonable for the Board to conclude that the worker's compensation determinations finding her totally disabled refer only to law enforcement.<sup>122</sup> Haggerty argues that the Board also erred by relying heavily on the Malcolm Report and the report by Barbara

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<sup>116</sup> Answering Brief, Item 12, at 11.

<sup>117</sup> Answering Brief, Item 12, at 11.

<sup>118</sup> Answering Brief, Item 12, at 11.

<sup>119</sup> Reply Brief, Item 15, at \*2.

<sup>120</sup> Reply Brief, Item 15, at \*2-3. Haggerty argues that she "is not attempting to expand the record[;] she is presenting evidence that is either[] already on record, publically available[,] or directly addresses why the [Board] erred... Since none of the documents presented new arguments, Ms. Haggerty requests that the court consider all of the documents contained in her opening appeal."

<sup>121</sup> Reply Brief, Item 15, at \*3.

<sup>122</sup> Reply Brief, Item 15, at \*3.

Stevenson because the preparers were vocational experts, but not medical experts.<sup>123</sup> Haggerty says that the Board offers no evidence to support its finding that the cervical surgery was more likely due to a preexisting degenerative condition rather than to the work injury.<sup>124</sup> Haggerty concludes that the prevailing opinion among the doctors who examined her was that she was totally disabled and that the injury caused the total disability.<sup>125</sup> Haggerty again cites documentation from Dr. Kim, Dr. De Joseph, Dr. Falco, and Dr. Coubarous, all of whom, says Haggerty, support her claim of total disability under the disability pension standard.

#### **IV. ADDITIONAL BRIEFING**

After a review of the record and the parties' submissions, the Court asked the parties to submit simultaneous additional briefing on two crucial issues: (1) whether the standard for "total disability" for worker's compensation is different from the standard for "total disability" for a disability pension; and (2) whether the Board applied a different standard in determining Haggerty's eligibility for a disability pension.<sup>126</sup> The parties submitted additional briefing within the time provided.

In her Supplemental Brief, Haggerty says that the Board's Answering Brief indicates that they still did not consider her worker's compensation status in making the determination of her eligibility for a disability pension.<sup>127</sup> Haggerty argues that it was "arbitrary and capricious" and "contrary to established case law" for the Board not to do so.<sup>128</sup> Haggerty goes on to argue that the standards for "total disability" for worker's compensation and for a disability pension are in

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<sup>123</sup> Reply Brief, Item 15, at \*4

<sup>124</sup> Reply Brief, Item 15, at \*4.

<sup>125</sup> Reply Brief, Item 15, at \*5

<sup>126</sup> Letter, Item 17.

<sup>127</sup> Appellant's Supplemental Brief, Item 20, at \*1.

<sup>128</sup> Appellant's Supplemental Brief, Item 20, at \*1.

fact very similar. Haggerty says that since “total disability” is not defined in the worker’s compensation statute, it is necessary to look to case law.<sup>129</sup> Haggerty cites *Federal Bake Shops v. Maczynski* for the worker’s compensation total disability standard:

“[T]otal disability” or similar language in worker’s compensation statutes refers to a disability [that] prevents claimant from obtaining any other employment commensurate with the claimant’s qualifications and training, rather than inability to continue in the same employment or the same line of work.<sup>130</sup>

Haggerty argues that this is substantively similar to the disability pension statute, 11 *Del. C.* §8801(16), which defines total disability as “totally unable to work in any occupation for which the [applicant] is reasonably suited by training or experience.” Thus, Haggerty argues, the Board acted unreasonably in not adopting the worker’s compensation determination.

In its Supplemental Brief, the Board renewed its argument that there is a different standard for worker’s compensation versus for a disability pension.<sup>131</sup> The Board argues that total disability for pension purposes is focused on “any job, whether police related or *otherwise*,” whereas worker’s compensation focuses on the specific job the employee was employed to do.<sup>132</sup> The Board says that it did follow the Court’s instructions on remand and did review all of the evidence, including the worker’s compensation reports.<sup>133</sup> However, the Board argues, that while it considered the worker’s compensation reports as evidence of Haggerty’s condition, this does not change the fact that the Board needed to apply the separate disability pension standard to the facts.<sup>134</sup> The Board says that while it did in fact consider all of the evidence, the Board is

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<sup>129</sup> Appellant’s Supplemental Brief, Item 20, at \*1.

<sup>130</sup> Appellant’s Supplemental Brief, Item 20, at \*2 (*quoting Federal Bake Shops v. Maczynski*, 180 A.2d 615, 616 (Del. Super. Ct. 1964)).

<sup>131</sup> Appellee’s Supplemental Brief, Item 18, at 3.

<sup>132</sup> Appellee’s Supplemental Brief, Item 18, at 3 (*quoting Haggerty*, 2012 WL 3029580 at \*3) (emphasis in original).

<sup>133</sup> Appellee’s Supplemental Brief, Item 18, at 4.

<sup>134</sup> Appellee’s Supplemental Brief, Item 18, at 4.

not required to comment on every piece of evidence.<sup>135</sup> The Board argues that it is “free to choose between conflicting medical opinions.”<sup>136</sup>

The Board also argues that the doctrine of *stare decisis* operates to preclude the Court from presently addressing the question of whether the Board applied the correct legal standard concerning the definition of total disability.<sup>137</sup> The Board argues that “the issue of the appropriate standard to be applied has already been determined in this case”; the Court determined that the definition of “total disability” for a disability pension focuses on the employee’s ability to engage in “any occupation, police related or *otherwise*.”<sup>138</sup>

#### **V. STANDARD OF REVIEW**

In reviewing a decision of the Board of Pension Trustees, the Court’s role is not to act as trier of fact, but rather to determine whether the Board’s decision is supported by substantial evidence and free from legal error.<sup>139</sup> Substantial evidence means “such relevant evidence as reasonable mind might accept as adequate to support a conclusion.”<sup>140</sup> The Court considers the record in the light most favorable to the prevailing party.<sup>141</sup> However, “legal determinations, including statutory construction and application of the law to undisputed facts, require plenary review” on appeal.<sup>142</sup>

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<sup>135</sup> Appellee’s Supplemental Brief, Item 18, at 5 (*citing Haggerty*, 2012 WL 3029580 at \*4; *College v. Unemployment Ins. Appeal Bd.*, 2009 WL 5191831, \*9 (Del. Super. Ct. Dec. 31, 2009)).

<sup>136</sup> Appellee’s Supplemental Brief, Item 18, at 5 (*quoting Lindewirth v. Board of Pension Trustees*, 1996 WL 111134, \*3 (Del. Super. Ct. Feb. 29, 1996)).

<sup>137</sup> Appellee’s Supplemental Brief, Item 18, at 4.

<sup>138</sup> Appellee’s Supplemental Brief, Item 18, at 5 (*citing Haggerty*, 2012 WL 3029580 at \*3) (emphasis in original).

<sup>139</sup> *King v. Board of Pension Trustees*, 1997 WL 718682, \*3 (Del. Super. Ct. Aug. 29, 1997).

<sup>140</sup> *Haggerty*, 2012 WL 3029580, at \*3.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* (internal quotation, citation omitted).

## VI. DISCUSSION

### A. Preliminaries

The Board contends that Haggerty's Opening Brief should be excluded because it did not comply with the timeliness requirements under Rule 107(f).<sup>143</sup> The Board recognizes that it is within the Court's discretion to consider or decline to consider submissions based on a minor delay.<sup>144</sup> The Court's July 17, 2014 Delinquency Notice to Haggerty directed her to submit her brief within 10 days.<sup>145</sup> The Notice did not specify 10 calendar days or 10 business days. If the requirement were interpreted as 10 business days, then Haggerty's July 31 filing would have been timely. However, when a rule, statute, or document does not specify calendar days or business days, courts presume calendar days.<sup>146</sup> Presuming calendar days, Haggerty's filing was four days late. Nonetheless, because the Court finds no prejudice to Appellee based on this minor delay, the Court will exercise its discretion and consider Haggerty's Opening Brief.

The Court will not consider the additional materials presented as exhibits and attached to Haggerty's Opening Brief. It is well-established that this Court is limited to a review of the record that was available at the time of the administrative hearing.<sup>147</sup> Haggerty was afforded the opportunity at the hearing on remand to introduce any additional evidence not presented in the original hearing. The Court may only review the evidence that was available to the Board at the

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<sup>143</sup> Answering Brief, Item 12, at 6.

<sup>144</sup> Answering Brief, Item 12, at 6. Rule 107(f) provides, "If any brief, memorandum, deposition, affidavit, or any other paper which is or should be a part of a case pending in this Court, is not served and filed within the time and in the manner required by these Rules or in accordance with any order of the Court or stipulation of counsel, the Court may, in its discretion, dismiss the proceeding if the plaintiff is in default, consider the motion as abandoned, or summarily deny or grant the motion, such as the situation may present itself, or take such other action as it deems necessary to expedite the disposition of the case."

<sup>145</sup> Notice, Item 8.

<sup>146</sup> See, e.g., *Safford v. None Involved*, 2013 WL 6039334, \*2 (Del. Super. Ct. Oct. 21, 2013); *Tarapchak v. Town of South Bethany Bd. of Adjustment*, 1998 WL 109829,\*4 (Del. Super. Ct. Feb. 24, 1998).

<sup>147</sup> *Thompson v. Unemployment Ins. Appeal Bd.*, 25 A.3d 778, 782 (Del. 2011).

remand hearing and determine whether the Board's decision was based on substantial evidence and free from legal error.<sup>148</sup>

### **B. The Board Erred as a Matter of Law**

The Board argues that *stare decisis* precludes the Court from presently addressing whether the Board applied the correct legal standard concerning the definition of total disability for a disability pension.<sup>149</sup> The Board argues that the proper standard was determined by the Court during the course of Haggerty's first appeal and that "total disability" for a disability pension requires that the claimant is unable to engage in "any occupation, police related or otherwise" as opposed to whether the claimant is able to return to her previous occupation.<sup>150</sup> The Board is correct that, as the Court pointed out in the previous Haggerty decision, the disability pension standard requires more than just that the claimant not be able to return to her former job. However, the Court need not apply *stare decisis* to reach this result. The total disability standard for a disability pension is plain from the statute itself: 11 *Del. C.* §8801(16) defines total disability as "totally unable to work in any occupation for which the [applicant] is reasonably suited by training or experience." The question raised by Haggerty in the instant appeal is one of the relationship between the total disability standard for a disability pension and the total disability standard for worker's compensation. This question was not addressed by the Court in connection with Haggerty's first appeal.

A side-by-side comparison of the two standards reveals, as Haggerty contends, that they are almost identical. The worker's compensation total disability standard is not defined in the worker's compensation statute but instead comes from case law. The classic statement of the

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<sup>148</sup> *King*, 1997 WL 718682, at \*3.

<sup>149</sup> Appellee's Supplemental Brief, Item 18, at 4.

<sup>150</sup> Appellee's Supplemental Brief, Item 18, at 5 (*citing Haggerty*, 2012 WL 3029580 at \*3) (emphasis in original)).

worker's compensation standard appears in *Federal Bake Shops*, where "total disability" is defined as a disability that "prevents claimant from obtaining any other employment commensurate with the claimant's *qualifications and training*, rather than inability to continue in the same employment or the same line of work."<sup>151</sup> The disability pension standard, which is provided by statute, defines "total disability" as "totally unable to work in any occupation for which the [applicant] is reasonably suited by *training or experience*."<sup>152</sup> Both standards make clear that total disability is not limited to an inability to return to the applicant's current position, but rather refers to the applicant's inability to obtain employment for which she is suited by her training and qualifications, including experience. The Court finds, as a matter of law, that the worker's compensation total disability standard and the disability pension total disability standard are substantially identical.

The Court finds that the Board has consistently over the course of the instant matter misinterpreted the relationship between the worker's compensation and disability pension standards, adopting the erroneous legal conclusion that a total disability determination for worker's compensation means only that the applicant is unable to return to the specific position that she previously held. In its decision on remand, the Board justified discounting the worker's compensation medical reports on the basis that they are only responsive to whether Haggerty could return to work as a police officer and "do not address whether Ms. Haggerty is able to perform any other work for which she may be qualified."<sup>153</sup> In its subsequent briefing, the Board has reasserted its position that the standards are different and that a worker's compensation

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<sup>151</sup> *Federal Bake Shops v. Maczynski*, 180 A.2d 615, 616 (Del. Super. Ct. 1964) (emphasis added). The *Federal Bake Shops* standard has been adopted in subsequent case law and remains the current standard for total disability for worker's compensation. See, e.g., *Pinnacle Foods v. Chandler*, 2010 WL 6419563, \*4 (Del. Super. Ct. Mar. 28, 2011); *Williams v. Beachside Restaurant*, 1998 WL 960711, \*4 (Del. Super. Ct. Nov. 17, 1998); *Powell v. Air Products and Chemicals*, 1993 WL 603372, \*3 (Del. Super. Ct. Nov. 17, 1993).

<sup>152</sup> 11 Del. C. §8801(16) (emphasis added).

<sup>153</sup> Report on Remand at 10.

determination of total disability only “focuses on the specific job that the employee was employed to do and whether that individual can return to work in this same position.”<sup>154</sup> The Court finds that the Board’s interpretation directly conflicts with well-established case law holding that the worker’s compensation total disability standard addresses whether the disability “prevents claimant from obtaining any other employment commensurate with the claimant’s qualifications and training.”<sup>155</sup>

The Court accepts that the Board made a good faith effort to properly decide this matter on remand. The Board did, in fact, follow the Court’s instruction to consider all of the medical evidence presented by Haggerty, including the worker’s compensation reports finding “total disability.” The Court also finds that the Board acted reasonably in choosing to weigh Dr. Kim’s Pension Plan Medical Report more heavily than that of Dr. Rogers. Even if not for the handwriting discrepancy issue, the Board reasonably relied on Dr. Kim as she was the treating physician.<sup>156</sup> Similarly, the Board acted reasonably in assigning significant weight to the opinions of the vocational experts even though they are not medical doctors.<sup>157</sup>

However, the Court finds that the Board committed legal error in erroneously concluding that the worker’s compensation and disability pension total disability standards are distinct and that the former only relates to the applicant’s ability to return to the same occupation. This legal error was clearly the basis of the Board’s decision to discount the worker’s compensation decision finding “total disability” and the expert reports written for the purpose of the worker’s compensation application. While the Court recognizes that the worker’s compensation decision is not binding on the Board in determining eligibility for a disability pension, it would be

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<sup>154</sup> Appellee’s Supplemental Brief, Item 18, at 3-4.

<sup>155</sup> *Federal Bake Shops*, 180 A.2d at 616.

<sup>156</sup> Report on Remand at 11.

<sup>157</sup> Report on Remand at 12.



unreasonable for the Board not to properly weigh the worker's compensation determination and the associated medical reports. The Court finds that in the instant case the Board did not properly weigh this evidence because it was operating under an incorrect understanding of the applicable legal standards.

## **VII. CONCLUSION**

The Court finds that the Board committed legal error in concluding that the legal standards for total disability under worker's compensation and for a disability pension are distinct. This legal error resulted in the Board improperly discounting the worker's compensation determination of "total disability" and the associated medical expert reports finding "total disability." For this reason, the decision of the Board is **REVERSED** and **REMANDED** to the Board for decision consistent with the Court's ruling.

**IT IS SO ORDERED.**

\_\_\_\_\_/s/\_\_\_\_\_  
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**M. JANE BRADY**  
Superior Court Judge