SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0758-20

EDWARD DINATALE,

Petitioner-Appellant,

v.

BOARD OF TRUSTEES,
PUBLIC EMPLOYEES'
RETIREMENT SYSTEM,

Respondent-Respondent.

Argued February 16, 2022 – Decided May 3, 2022

Before Judges Hoffman, Whipple and Susswein.

On appeal from the Board of Trustees of the Public Employees' Retirement System, Department of the Treasury, PERS No. xx-7706.

George T. Dougherty argued the cause for appellant (Katz & Dougherty, LLC, attorneys; George T. Dougherty, on the briefs).

Jeffrey D. Padgett, Deputy Attorney General, argued the cause for respondent (Matthew J. Platkin, Acting Attorney General, attorney; Donna Arons, Assistant

Attorney General, of counsel; Jakai T. Jackson, Deputy Attorney General, on the brief).

PER CURIAM

Petitioner Edward DiNatale appeals from a final agency decision of the Board of Trustees (Board), Public Employees' Retirement System (PERS), denying his application for accidental disability retirement (ADR) benefits. The key fact-sensitive issue is whether petitioner's disability was the "direct result" of a traumatic work-related event. Although the parties are generally in agreement with respect to many of the relevant facts, this case boils down to a battle of medical experts interpreting those facts. The Board accepted the initial decision of the Administrative Law Judge (ALJ) that credited the testimony of the Board's expert over the testimony of petitioner's expert. The Board's expert opined that petitioner's work-related injury "was an aggravating factor but it was not the primary etiology of his disability[,] which was preexisting degenerative arthritis." Relying on that expert opinion, the ALJ determined, and the Board agreed, that petitioner was ineligible to receive ADR benefits because his disability was not the direct result of a traumatic event. After carefully reviewing the record in light of the applicable legal principles, we affirm.

I.

We discern the following facts and procedural history from the record. Petitioner was employed as a Mercer County Sheriff's Investigator for approximately twelve years. On April 4, 2013, he was on duty at a local carnival when he "intervened in a melee trying to break up [a] fight and restore order." He was injured during the struggle. He received immediate medical care at a nearby hospital, where he was treated for a knee injury, a cardiac event, a concussion, and back pain.

Following the carnival incident, petitioner underwent physical therapy for the injuries to his neck, back, and both knees. Ibid. He returned to work in August 2013 but continued to receive treatment for his injuries through Worker's Compensation under the care of Dr. Steven R. Gecha. In April 2015, Dr. Gecha performed surgery on petitioner's left knee. Petitioner testified that his knee never fully healed, and in July 2015 he underwent a Functional Capacity Examination. As a result of that examination, he was assigned to "light duty" in the Sherriff's radio room. When he was informed by his employer that he "could not fully function in his position as a Sheriff's Investigator[,]" petitioner filed for retirement benefits.

On October 30, 2015, petitioner applied for ADR benefits. On March 6, 2016, the Board denied his application for ADR benefits, instead granting him

ordinary disability retirement benefits. The Board's notification letter explained that it had determined that petitioner is "totally and permanently disabled from the performance of [his] regular and assigned job duties;" he is "physically or mentally incapacitated from the performance of [his] . . . duties[;]" and that his injury was caused by an "undesigned and unexpected" event, not petitioner's "willful negligence." The letter explained that the Board had nonetheless denied his application for Accidental Disability retirement benefits because:

> [a]ccording to the medical documentation, your reported disability is not the direct result of a traumatic event, as the event is not caused by a circumstance external to the member.[1] [Petitioner's] disability claim is the result of a pre-existing disease alone or a pre-existing disease that is aggravated or accelerated by the work effort.

Petitioner appealed from the Board's decision, and on May 25, 2016, the matter was transmitted to the Office of Administrative Law (OAL) for adjudication and fact-finding as a contested case. ALJ Patricia M. Kerins heard testimony on the matter over the course of three non-consecutive days. The record closed on August 3, 2020.

[1] See infra note 3.

Petitioner, his expert, Dr. David Weiss, and the Board's expert, Dr. Andrew Hutter, all testified at the hearing. The following facts pertinent to this appeal were presented at the hearing:

When asked on cross-examination whether he had sustained any prior injuries or needed treatment for his knees, petitioner disclosed a 1991 skiing accident that required surgery on his right knee. "Although arthritis and swelling in his left knee was noted in 2003 while [petitioner] was in the Police Academy[,]" petitioner testified that before and after he was hired as a Sheriff's Investigator at the age of thirty-eight, he had been physically active both in his personal life and in the performance of his job duties. In 2010, he had arthroscopic surgery on his right knee. In March 2013—the month preceding the carnival incident—rheumatologist Dr. Qaisar H. Usmani treated swelling in petitioner's knees by draining fluid. A March 20, 2013, x-ray of the left knee showed "advanced severe" degenerative changes in the knee, along with soft tissue swelling."

After the April 2013 carnival incident, petitioner "received physical therapy for his injuries, including his neck, back and both knees." Following his August 2013 return to work, petitioner continued to receive care from Dr. Gecha through Worker's Compensation.

In April 2015, Dr. Gecha performed surgery on petitioner's knee to reconstruct a "large meniscus tear." Dr. Gecha's notes stated that as a result of the April incident he sustained the following: (1) Exacerbation of a pre-existing arthritis in the medial and the patellofemoral compartments of the knee; (2) Exacerbation of a pre-existing medical meniscal tear; and (3) Traumatic arthropathy and patellofemoral pain, with patellar tendinitis.

Petitioner testified that his knee never healed properly following the surgery. After a July 2015 Functional Capacity Examination (FCE), petitioner was placed on light duty in the radio room. Shortly thereafter, petitioner's employer told him he was unable to meet the physical demands required to function as a Sheriff's Investigator, and petitioner filed for retirement.

Petitioner's expert, Dr. Weiss, was qualified as an expert in orthopedics and "Impairment Disability." Dr. Weiss had reviewed petitioner's medical history and records and performed a clinical exam. Dr. Weiss issued a report following the September 2016 examination, then issued a supplemental report on November 7, 2016. Dr. Weiss testified that "he did not see evidence of the meniscus tear or a displaced patella in petitioner's left knee prior to the incident." Dr. Weiss made four diagnoses:

> (1) "[p]ost-traumatic internal derangement to the left knee with medial meniscus tear"; (2) "[p]ost-traumatic chondromalacia patella to the left knee"; (3)

> "[a]ggravation of the pre-existing age related degenerative joint disease of the left knee"; and (4) [s]tatus post-arthroscopic surgery with partial medial meniscectomy, lateral retinacular release and chondroplasty of the patellofemoral joint[.]"

Dr. Weiss opined that although petitioner had degenerative joint disease in the left knee even before the carnival incident, it did not rise to the level of disability because it was "asymptomatic." He noted that with simple treatment, petitioner had been able to meet the demands of his job duties until the carnival incident. Dr. Weiss acknowledged that petitioner had been treated for age-related osteoarthritic disability before the April 2013 injury—including treatment by draining fluid in March 2013, just one month before the carnival incident. However, he noted that it was only after the carnival incident that petitioner required physical therapy and surgery, and became unable to perform his job duties. Dr. Weiss cited the "traumatic internal derangement of the knee" as additional evidence that petitioner's disability was caused by the injury and not the pre-existing knee condition.

The Board's expert, Dr. Andrew Hutter, is a board-certified orthopedic surgeon. He was qualified by the ALJ as an expert in orthopedics and orthopedic surgery. Dr. Hutter testified that he "examined petitioner on January 14, 2016, on behalf of the Board and issued a report of his findings, followed by a supplemental report after a review of additional medical records." Dr. Hutter

agreed that petitioner "is totally and permanently disabled from the job." However, he reached a different conclusion from Dr. Weiss as to the cause for that disability.

Dr. Hutter testified in detail regarding petitioner's medical history. Dr. Hutter noted the documented history of arthritis in petitioner's left knee and explained the pathology of the degenerative arthritic condition. Dr. Hutter's review included Dr. Usmani's treatment of petitioner in March 2013, including the draining of fluid from both knees and the March 20, 2013, X-ray of petitioner's knees. Dr. Hutter also discussed petitioner's treatment by Dr. Gomez in May 2013, who had also noted "moderate tri-compartmental degenerative changes" in petitioner's knee. Dr. Hutter then testified as to the record of petitioner's treatment by Dr. Gecha, reviewing Dr. Gecha's findings of pre-existing arthritis, a pre-existing tear in petitioner's medial meniscus, and the "traumatic arthropathy and patellofemoral pain, with patellar tendinitis."

Based on all of the foregoing information, Dr. Hutter opined: "[t]he injury of April 2013 was an aggravating factor but . . . was not the primary etiology of his disability[,] which was preexisting degenerative arthritis. Therefore, the total and permanent disability is not a direct result of the incident of April 4, 2013."

On August 27, 2020, Judge Kerins issued an initial decision recommending denial of petitioner's application due to her finding "that the April incident was not the direct or primary cause of petitioner's disability related to his left knee." Judge Kerins found petitioner's testimony credible. However, after considering the testimony of both experts, Judge Kerins found that Dr. Hutter's testimony was more credible than Dr. Weiss' testimony. In her written opinion, Judge Kerins reasoned:

> The resolution of the issue in this matter[] . . . depends on the expert medical testimony presented by the parties. Both [Dr.] Hutter and [Dr.] Weiss agree that petitioner is disabled. They differ[,] however, on whether the disability was the direct result of the April incident, or the result of a pre-existing condition. . . .
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> While both experts presented cogent and articulate testimony, overall [Dr.] Hutter was the more credible. He discussed the effects of petitioner's unquestioned arthritic condition in the left knee in detail and related it to the issues with his patella and meniscus after the incident. His analysis that the longstanding degenerative changes in the knee were exacerbated by the April incident was corroborated by petitioner's difficulties with the knee, going back as far as 2003 during his police academy training and as recently as March 2013, when pain and swelling in the knee necessitated draining a large amount of fluid from the knee. As [Dr.] Hutter opined, the level of fluid drained from the knee was an indication that the knee was already compromised. He further referenced the records which noted a prior meniscus issue and under cross-examination he explained that the condition of [petitioner's] patella post-incident was not as severe as the degenerative changes caused by his arthritis. [Dr.

> Hutter] further stated that the arthritis likely affected [petitioner's] patella as well.

Judge Kerins adopted Dr. Hutter's opinion "that the April incident was not the direct or primary cause of petitioner's disability related to his left knee."

Judge Kerins then analyzed the facts of petitioner's application for ADR benefits under the "direct result" test prescribed by N.J.S.A. 43:15A-43. Under that law, "[a] [PERS] member who has not attained age [sixty-five] shall[] . . . be retired by the board of trustees [on an accidental disability allowance], if said employee is permanently and totally disabled as a direct result of a traumatic event occurring during and as a result of the performance of his regular or assigned duties[] . . . ." N.J.S.A. 43:15A-43. If the petitioner's disability is not "directly caused" by the traumatic event but is instead the result of an "underlying condition . . . only aggravated or ignited by the trauma," the disability is "ordinary" rather than "accidental" and petitioner is entitled to "ordinary," not "accidental" retirement disability benefits.

Because Judge Kerins found Dr. Hutter's opinion credible, she concluded that "in this matter, petitioner has failed to carry his burden of proof on the issue . . . and he has not proven by the preponderance of the evidence that his workplace injury . . . caused his disability."

On March 16, 2020, the Board adopted the ALJ's initial decision, affirming the denial of ADR benefits. This appeal followed.

Petitioner raises the following contentions for our consideration:

> POINT I:
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> STANDARD OF REVIEW OF AGENCY DECISION ON APPEAL.
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> POINT II[2]
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> PERS BOARD'S REASONS FOR DENYING PETITIONER'S ADR APPLICATION, AFFIRMED BY INITIAL DECISION OF OAL AND ADOPTED BY THE RESPONDENT PERS BOARD, DEVIATE [SUBSTANTIALLY] FROM SUPREME COURT'S CRITERIA FOR GRANTING ADR APPLICATIONS, REQUIRING REVERSAL OF RESPONDENT'S DECISION DENYING ADR BENEFITS AND MANDATING ADR AWARD RETROACTIVELY.
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> POINT III
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> RESPONDENT BOARD AND ALJ COMMITTED REVERSABLE ERROR BY FAILING TO FRAME THE DISPOSITIVE ACCIDENTAL DISABILITY ISSUE IN ACCORDANCE WITH PREVAILING SUPREME COURT INSTRUCTIONS FOR DISTINGUISHING ADR APPLICATIONS FROM ODR.
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> POINT IV
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> THE FINAL DECISION ERRONEOUSLY CITES GERBA V. BD. OF TRS. AS SUPPORTING ITS DENIAL OF [PETITIONER'S] ADR APPLICATION,

[2] This opinion begins with petitioner's first substantive point, which petitioner's brief identifies as Point II.

WHEREAS IT SUPPORTS GRANTING [PETITIONER'S] ADR APPLICATION.

POINT V

RESPONDENT BOARD'S ADOPTION AND RELIANCE ON RESPONDENT'S EXPERT'S OPINION THAT A PERMANENT DISABILITY CAUSED BY A TRAUMATIC OCCURRENCE PRODUCING BOTH A NEW STRUCTURAL ORTHOPEDIC INJURY AND ACCELERATING A PREEXISTING ASYMPTOMATIC ARTHRITIS CANNOT QUALITY FOR ADR [BENEFITS] IS REVERSABLE ERROR BECAUSE IT CONTRADICTS THE SUPREME COURT'S HOLDNG IN RICHARDSON v. PFRS, 192 N.J. 189, 193 (2007).

POINT VI

RESPONDENT'S DENIAL OF ADR BENEFITS WAS REVERSABLE ERROR BECAUSE IT WAS BASED, NOT ONLY ON IME'S FAILURE TO ACKNOWLEDGE RICHARDSON'S REVISED ADR CRITERIA FOR TRAUMATIC AGGRAVATION OF PRE-EXISTING [CONDITIONS], BUT ON HIS FAILURE TO ADDRESS AND DISPOSE OF TREATING SURGEON GECHA'S FINDING THAT STRUCTURAL DAMAGE TO PATELLA WAS UNRELATED TO PREEXISTING . . . ARTHRITIS, RENDERING HUTTER TESTIMONY INADMISSIBLE AS AN UNSUPPORTED NET OPINION.

II.

We begin our analysis by acknowledging the legal principles governing this appeal. The scope of our review is limited. We will not overturn an

administrative agency decision in the absence of a "clear showing that it is arbitrary, capricious or unreasonable, or that it lacks fair support in the record." Hemsey v. Bd. of Trs., Police & Firemen's Ret. Sys., 198 N.J. 215, 223–24 (2009) (quoting In re Herrmann, 192 N.J. 19, 27–28 (2007)). An agency's findings of fact, moreover, "are considered binding on appeal when supported by adequate, substantial and credible evidence[.]" In re Taylor, 158 N.J. 644, 656 (1999) (quoting Rova Farms Resort, Inc. v. Invs. Ins. Co., 65 N.J. 474, 484 (1974)). However, we owe no deference to an administrative agency's interpretation of legal precedent. Bowser v. Police & Firemen's Ret. Sys., 455 N.J. Super. 165, 171 (App. Div. 2018).

Turning to the substantive principles of law that apply to this matter, N.J.S.A. 43:15A-43 affords ADR benefits, in the form of an additional monthly allowance, to state workers who become "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 . . . ."

In Gerba, the Court noted that in 1966, the Legislature amended N.J.S.A. 43:15A-43 with purpose to "impose a more exacting standard of medical causation" and to "reject the concept . . . that an 'accident' can be found in the impact of ordinary work effort upon a progressive disease." 83 N.J. at 185. The Court explained that the ADR statute now

> expressly provides that disability resulting from a musculo-skeletal condition . . . which was not a direct result of a traumatic event "shall be deemed an ordinary disability." Where there exists an underlying condition such as osteoarthritis which itself has not been directly caused, but is only aggravated or ignited, by the trauma, then the resulting disability is . . . "ordinary" rather than "accidental" and gives rise to "ordinary" pension benefits. Hence, in terms of a traumatic event equating with a statutorily sufficient medical cause of an "accidental" disability, what is now required by N.J.S.A. 43:15A-43 is a traumatic event that constitutes the essential significant or the substantial contributing cause of the resultant disability
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> [83 N.J. at 185–86.]

In Richardson v. Bd. of Trs., Police & Firemen's Ret. Sys., our Supreme Court devised a five-part test to determine whether an injury is a direct result of a traumatic event. 192 N.J. 189, 212–13 (2007). The Court held that to qualify for accidental disability benefits, a member must prove all five of the following elements:

> 1. that he [or she] is permanently and totally disabled;
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> 2. as a direct result of a traumatic event that is
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> a. identifiable as to time and place,
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> 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;
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> 4. that the disability was not the result of the member's willful negligence; and
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> 5. that the member is mentally or physically incapacitated from performing his usual or any other duty.
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> [Ibid.]

The burden of establishing direct causation between total disability and a traumatic event rests with the petitioner, who must make the requisite causal showing by a preponderance of the evidence. Hayes v. Bd. of Trs. of Police & Firemen's Ret. Sys. 421 N.J. Super. 43, 51 (App. Div. 2011) (quoting In re Arenas, 385 N.J. Super. 440, 443–44 (App. Div. 2006)); see also Atkinson v. Parsekian, 37 N.J. 143, 149 (1962) (applying the preponderance standard in agency proceedings).

In Gerba, the Court explained that "what is now required by N.J.S.A. 43:15A-43 is a traumatic event that constitutes the essential significant or the substantial contributing cause of the resultant disability." 83 N.J. at 186. This fact-sensitive assessment becomes more complicated when the applicant has a preexisting disease or underlying medical condition. "Where there exists an underlying condition . . . which itself has not been directly caused, but is only aggravated or ignited, by the trauma, then the resulting disability is . . . 'ordinary'

rather than 'accidental' . . . ." Ibid.; see also N.J.S.A. 43:15A-43(a) ("Permanent and total disability resulting from a cardiovascular, pulmonary or musculo-skeletal condition which was not a direct result of a traumatic event occurring in the performance of duty shall be deemed an ordinary disability.").

This standard, however, is not so stringent as to require an applicant to establish that the traumatic event is the "sole or exclusive causative agent" of the applicant's disability. Korelnia v. Bd. of Trs. of Pub. Emps.' Ret. Sys., 83 N.J. 163, 170 (1980) (citing Gerba, 83 N.J. at 186). "[A]n accidental disability may under certain circumstances involve a combination of both traumatic and pathological origins." Ibid. (citing Cattani v. Bd. of Trs., Police & Firemen's Ret. Sys., 69 N.J. 578, 586 (1976)). We reiterate, however, that the burden of establishing direct causation between total disability and a traumatic event rests with the applicant. Hayes, 421 N.J. Super. at 51.

The Court in Richardson recognized that its prior articulation of the meaning of the term "traumatic event" had "taken on a life of its own, very likely creating a higher-than-designed hurdle for accidental disability applicants," necessitating "a course correction." Id. at 209–210. The Court clarified that "[t]he polestar of the inquiry is whether, during the regular performance of his job, an unexpected happening, not the result of a pre-existing disease alone or

in combination with the work, has occurred and directly resulted in the permanent and total disability of the member." Id. at 214.

III.

We next apply these principles to the facts of the present matter. We stress that the pivotal issue before us is not whether the injury suffered during the carnival incident was a traumatic event within the meaning of the statutory framework. We are satisfied that it was.[3] Rather, the critical issue is whether petitioner's disability is the "direct result" of that event. Our survey of the case law shows no categorical rule that a traumatic event that aggravates a pre-existing degenerative condition constitutes the direct cause of an ensuing disability for purposes of N.J.S.A. 43:15A-43. Because the ALJ and Board acted within their discretion in crediting Dr. Hutter's expert opinion that petitioner's disability is primarily the result of a pre-existing degenerative condition (emphasis added), we affirm the Board's conclusion that the disability was not

[3] All parties agree that the carnival incident occurred at an identifiable time and place, that it was unexpected and not the result of petitioner's willful negligence, and that it occurred in the course of the performance of his work duties. We note the Board's letter notifying petitioner of its denial might be read to suggest otherwise by stating "the event is not caused by a circumstance external to the member." (emphasis added) The record makes clear, however, that the basis for the Board's decision to deny ADR benefits is not that the April 4, 2015 incident was not a traumatic event, but rather that this event was not the direct cause of petitioner's disability.

a "direct result" of the traumatic event within the meaning of the statutory framework.

We add that we need only briefly address Petitioner's contention that Dr. Hutter's testimony was "inadmissible as an unsupported net opinion." As we have already explained, we accept the factual and credibility findings of the agency and defer to the agency's interpretation of subjects within its expertise, except for the most clearly erroneous of factual conclusions. See In re Carter, 191 N.J. 474, 483 (2007) (quoting Greenwood v. State Police Training Ctr., 127 N.J. 500, 513 (1992)) (reviewing courts "must defer to an agency's expertise and superior knowledge of a particular field."). Nevertheless, an expert's "bare opinion[,]" unsupported by "factual evidence or similar data" of the type for which the expert was qualified, is inadmissible; "a trial court may not rely on expert testimony that lacks an appropriate factual foundation and fails to establish the existence of any standard about which the expert testified." Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 372–73 (2011) (first citing Polzo v. Cnty. of Essex, 196 N.J. 569, 583 (2008), and then citing Dawson v. Bunker Hill Plaza Assocs., 289 N.J. Super. 309, 323–25, (App. Div. 1996)) (concluding that expert opinion lacked basis in facts sufficient to be more than guess or conjecture). Such an opinion must be excluded if the expert "cannot offer objective support for his or her opinions, but testifies only to a view about

a standard that is personal." Davis v. Brickman Landscaping, 219 N.J. 395, 410 (2014). In short, "the expert [must] 'give the why and wherefore' that supports the opinion, 'rather than a mere conclusion.'" Pomerantz, 207 N.J. at 372 (quoting Polzo, 196 N.J. at 583).

No such "mere conclusion" was offered here. Id. at 372–73 (citing Polzo, 196 N.J. at 583). The disputed fact at issue—whether petitioner's disability was the direct result of injury sustained at the carnival event—was "within the purview of medical opinion." Both Dr. Weiss and Dr. Hutter were qualified as experts, and both opined as to the cause(s) of petitioner's disability based on their review of petitioner's extensive and well-documented medical history. Each explained, in detail, the medical reasoning on which his conclusion was based. Neither opinion was an impermissible net opinion.

The experts, as it turns out, offered competing medical opinions as to the cause(s) of petitioner's disability. The ALJ was permitted, indeed required, to make a credibility finding. That finding, on which the Board's denial of ADR benefits relied, was supported by substantial evidence in the record. See McClain v. Bd. of Rev. 237 N.J. 445, 456 (2019). Accordingly, there is no basis for us to disturb the agency's determination. Carter, 191 N.J. at 483 ("if substantial evidence supports the agency's decision, 'a court must not substitute its own judgment for that of the agency's . . . .").

To the extent we have not specifically addressed them, any other arguments raised by petitioner lack sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E).

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION