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**COMMONWEALTH OF PENNSYLVANIA
PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD**

IN RE: ACCOUNT OF L [REDACTED] R [REDACTED]
DOCKET NO. 2016-26
CLAIM OF L [REDACTED] R [REDACTED]

OPINION AND ORDER OF THE BOARD

The Board has carefully and independently reviewed the entire record of this proceeding, including the proposed Opinion and Recommendation of the Hearing Examiner. We note that neither party filed Exceptions to the proposed Opinion and Recommendation. The Board finds appropriate the proposed Opinion and Recommendation and, accordingly, we hereby adopt it as our own.

IT IS HEREBY ORDERED that the appeal of Claimant, L [REDACTED] R [REDACTED], is DISMISSED WITH PREJUDICE.

PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD

Dated: August 10, 2018

By: Melva S. Vogler
Melva S. Vogler, Chairman

**COMMONWEALTH OF PENNSYLVANIA
PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD**

IN RE:

**Account of L [REDACTED] R [REDACTED]
Claim of L [REDACTED] R [REDACTED]**

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Docket No. 2016-26

OPINION AND RECOMMENDATION

**Hearing Examiner: David M. Green
For the Claimant: L [REDACTED] R [REDACTED], *pro se*
For PSERS: Cayla B. Jakubowitz, Esquire**

Procedural History

This matter is before the Public School Employees' Retirement Board (Board) on an appeal filed by L [REDACTED] R [REDACTED] (Claimant) from the May 26, 2016 denial of her April 18, 2016 *Application to Reapply for Renewal of Disability Benefits* (“*Application*”). Claimant supplemented her *Application* on May 9, 2016. By letter dated May 26, 2016, the Public School Employees’ Retirement System (PSERS) advised Claimant that her *Application* had been denied due to the opinion of her neurologist that she was functioning well with no exacerbations. On October 4, 2016, PSERS notified Claimant that, following review of her *Application*, the PSERS Executive Staff Review Committee denied Claimant’s request to have her disability annuity reinstated. On November 4, 2016, Claimant filed an *Appeal* of this denial. On December 5, 2016, PSERS filed its *Answer to Claimant’s Appeal* and her request for an administrative hearing.

On October 2, 2017, Glenn Grell, Secretary of the Board, appointed David M. Green, Esquire act the hearing examiner to conduct the administrative hearing relating of Claimant’s appeal. On the same date, the Board’s Appeal Docket Administrator issued a notice, scheduling the hearing for April 11, 2018, commencing at 10:00 a.m. at PSERS, 5 North 5th Street, Harrisburg, PA 17101.

On March 12, 2018, PSERS filed a request for a pre-hearing conference. On March 14, 2018, the hearing examiner issued an *Order Scheduling [the] Telephonic Pre-Hearing Conference* for March 29, 2018 at 9:30 a.m. A phone number and access code were provided to the parties for their access to the conference call. In preparation for the pre-hearing conference, each party was directed to file a pre-hearing statement containing, among other things, a list of documents and exhibits each party intended to offer at the hearing, the names and addresses of all persons to be called as witnesses, and a copy of the report and curriculum vitae of any expert witness whose

opinion would be offered into evidence. PSERS filed a pre-hearing statement; however, Claimant submitted only an email stating, "Please cancel my hearing on Wed. April 11, 2018, I have no witnesses I can bring at this time." As directed, PSERS counsel accessed, and participated in, the conference. Claimant did not access or participate in the pre-hearing conference.

Following the pre-hearing conference, the hearing examiner issued to both parties a *Pre-Hearing Order Following Telephone Conference* ("*Pre-Hearing Order*") reaffirming that the hearing would take place as scheduled. The *Pre-Hearing Order* directed that, if it was Claimant's intention to withdraw her appeal, she was to send written notification to the Appeal Docket Administrator "*specifically stating that she is withdrawing her appeal.*" (emphasis supplied). The *Pre-Hearing Order* directed Claimant the requested written notification by the close of business on April 9, 2018 or the hearing would proceed as scheduled. The *Pre-Hearing Order* also cautioned that Claimant's failure to attend the hearing could result in the dismissal of her appeal under the Board's regulations at Title 49 Pa. Code Section 201.8(a), and recited the text of the regulation itself.

On April 8, 2018, Claimant emailed the Appeal Docket Administrator stating, "I wish to cancel my Hearing on April 11, 2018, as I have no witnesses at this time. I do request, however, that if the MS symptoms return or get worse again at any time that the case be re-opened and I receive the benefits that I am entitled to from PSERS." This essentially was a motion for cancellation of the hearing, but not a withdrawal of her appeal. On April 9, 2018, PSERS filed a letter brief, essentially a reply to Claimant's motion, in which it argued that Claimant's email constituted a request to cancel the hearing *without prejudice*. (emphasis supplied). PSERS further requested that the hearing examiner recommend that the Board deny Claimant's request/motion as presented, and dismiss the claim *with prejudice*. (emphasis supplied).

On April 9, 2018, the hearing examiner entered an *Order Cancelling Hearing and Dismissing Appeal*, indicating that an Opinion and Recommendation would follow.

Discussion

As the moving party, Claimant bears the burden of establishing the relief that she seeks. Claimant must satisfy this burden by a preponderance of the evidence. *Lansberry v. Pennsylvania Public Utility Commission*, 578 A. 2d 600 (Pa. Cmwlth. 1990), *appeal denied*, 529 Pa. 654, 602 A. 2d 863 (1992). A preponderance of the evidence is “such proof as leads the fact-finder. . . to find that the existence of a contested fact is more probable than its nonexistence.” *Sigafoos v. Pennsylvania Bd. of Probation and Parole*, 503 A. 2d 1076 (Pa. Cmwlth. 1986). It has also been described as a ‘more likely than not standard’ or evidence which is sufficient to tip the mythical scales. *Agostino v. Township of Collier*, 968 A. 2d 258 (Pa. Cmwlth. 2009).

This matter dates back almost two years. Accordingly, Claimant was provided with ample notice of the hearing and was afforded almost six months to prepare her presentation in support of her appeal. In the instant case, Claimant’s admission that she had no witnesses to present, and her request for cancellation of the hearing, equate to a failure to appear at the hearing. The October 2, 2017 notice scheduling the hearing clearly stated:

If you do not appear at the hearing on the date and the time scheduled without good cause, the Hearing Examiner, upon motion, will recommend to the Board that your appeal be dismissed with prejudice. This means that the appeal will be terminated and that you will not be permitted to raise this issue to the Board in the future.

Letter of October 2, 2017 to Claimant from Appeal Docket Clerk. (Official Notice – Docket No. 2016-26).¹ (emphasis added).

¹ Official notice is taken of the filings in this matter, since it is clearly something of which the Board has specialized knowledge. This is permissible under the General Rules of Administrative Practice and Procedure, 1 Pa. Code § 31.1 *et seq.*, at § 35.173. *See also Gleeson v. State Bd. of Medicine*, 900 A.2d 430, 440 (Pa. Cmwlth. 2006), *appeal denied*, 917 A.2d 316 (Pa. 2007) (licensing board may take official notice of its own records).

Claimant was again placed on notice, by the March 29, 2018 *Pre-Hearing Order*, of the potential consequences under the Board's regulations in the event she failed to attend the hearing:

If Claimant intends to withdraw her appeal then, prior to the hearing date, she must send to the Docket Administrator written notification, **specifically stating that she is withdrawing** her appeal. Upon receipt of this withdrawal, the file will be closed.

If Claimant does not withdraw her appeal by the close of business on April 9, 2018, the hearing will proceed as scheduled. Claimant's failure to attend the hearing could result in the dismissal of her appeal under the Board's Regulations at Title 49 Pa. Code Section 201.8(a), which states:

§ 201.8. Dismissal for nonappearance.

- (a) Whenever a claimant **fails to appear**, either in person or through counsel, for a scheduled hearing without good cause, the hearing examiner will issue a recommendation to dismiss the case, without considering the merits of the claim;
- (b) This section **supplements** 1 Pa. Code §§ 35.125, 35.187 and 35.205 (relating to order of procedure; authority delegated to presiding officers; and contents of proposed reports).

(Official Notice – Docket No. 2016-26) (emphasis added).

Section 35.107 of General Rules of Administrative Practice and Procedure (GRAPP) states:

§ 35.187. Authority delegated to presiding officers.

Presiding officers designated by the agency head to preside at hearings shall have the authority, within the powers and subject to the regulations of the agency, as follows:

- (7) To dispose of procedural matters but not, before their proposed report, if any, to dispose of motions made during hearings to dismiss proceedings or other motions which involve final determination of proceedings. (emphasis added).

1 Pa. Code § 35.187(7). Section 201.8 of the Board's regulations specifically gives the hearing officer the authority beyond under GRAPP, to recommend dismissal of this appeal without considering its merits, due to Claimant's failure to appear at the hearing.

Claimant stated unequivocally that she would not attend the hearing. It would have been unavailing to convene the hearing in Claimant's absence, as she has the burden of going forward with evidence first. Therefore, Claimant has offered the Board no basis in law or fact to grant her the relief she seeks. It is therefore recommended that that the Board grant PSERS' request to dismiss Claimant's appeal, under the authority of 22 Pa. Code § 201.8, for Claimant's failure to appear for her scheduled hearing and carry her burden of proof.

**COMMONWEALTH OF PENNSYLVANIA
PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD**

IN RE:

Account of L [REDACTED] R [REDACTED]
Claim of L [REDACTED] R [REDACTED]

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Docket No. 2016-26

RECOMMENDATION

AND NOW, this 19th day of April 2018, it is recommended that the appeal filed by L [REDACTED] R [REDACTED] be **DISMISSED**, with prejudice, under the authority of 22 Pa. Code §201.8, due to Claimant's failure or refusal, without good cause, to appear for her scheduled hearing and meet her burden of proof.

BY ORDER:



**David M. Green
Hearing Officer**

For PSERS: Cayla Jakubowitz, Esquire
Assistant Counsel, PSERS
5 North Fifth Street
Harrisburg, PA 17101

For Claimant: L [REDACTED] R [REDACTED]
[REDACTED]

Appeal Docket Admin.: Laura Vitale

Date of Mailing: April 19, 2018