NEW YORK STATE AND LOCAL RETIREMENT SYSTEM

In the Matter of the Application of

Richard Jarvis
Reg. No.: 0B203736
EMPLID: R10428117
H.C. No.: 48213802

Pursuant to Section 74 or 374 of the Retirement and Social Security Law
for a Hearing and Redetermination

JURISDICTION:

A hearing having been held in Albany via WebEx videoconference on December 8, 2021, with Supervising Hearing Officer Patricia J. Patwell, presiding, and Richard Jarvis (the Applicant), having appeared represented by Thomas Jordan, Esq., and the New York State and Local Retirement System (the System) having appeared by Tanya C. Tersago, Esq., its counsel, by Scott Lukowski, Esq., of counsel.

A second hearing having been held in Albany via WebEx videoconference on August 16, 2022, with Supervising Hearing Officer Patricia J. Patwell, presiding and the Applicant having appeared represented by Thomas Jordan, Esq., and the New York State and Local Retirement System (the System) having appeared by Tanya C. Tersago, Esq., its counsel, by Scott Lukowski, Esq., of counsel.

On August 7, 2019, the Applicant submitted an Application for Police & Fire Retirement for Disability Incurred in Performance of Duty and ERS Members Covered Under Section 607-g and 89-v alleging that he was permanently disabled due to the condition of his left ankle. (System's Exhibit 1.)

On May 4, 2021, the System issued a Final Agency Determination in which it disapproved the Applicant's application on the basis the Applicant was not permanently incapacitated for the performance of duties. (System's Exhibit 2.)

Thereafter, the Applicant filed a timely request for a hearing and redetermination.

Based upon a review of the entire record as a whole consisting of all exhibits received in evidence, all testimony, and post-hearing legal arguments (*see*, *Corbin v. DiNapoli*, 182 A.D.3d 974 (3d Dept. 2020)), the following constitutes the decision of the Hearing Officer on the redetermination of the application.

ISSUE:

Whether the Applicant is permanently incapacitated for the performance of duties due to injuries to his left ankle.

EVIDENCE:

The System offered the following documentary exhibits, an Application for Police and Fire Retirement for Disability Incurred in Performance of Duty and ERS Members Covered Under Section 607-g and 89-v sent by Certified Mail on August 7, 2019 (System's Exhibit 1, 3 pages), the System's Determination on the Application dated May 4, 2021, and related cover letters (System's Exhibit 2, 4 pages), an Index of Records (System's Exhibit 3, 1 page), and medical records, a Duty Statement, Payroll Status Form, Accident Report, and other assorted documents (System's Exhibit 4, 309 pages).

The System offered the testimony of Dr. Patrick Connolly. Dr. Connolly was found to be credible.

The Applicant offered the following Exhibits, photographs of an orthopedic boot (Applicant's Exhibit A, 2 pages), and an email chain containing letters from Lieutenant Jonathan Davis (Retired), Lieutenant Justin Rhatigan, and Captain Patrick Landers (Retired) (Applicant's Exhibit B, 6 pages).

The Applicant testified on his own behalf and offered the testimony of Dr. Jordan Lisella. Both the Applicant and Dr. Lisella were found to be credible.

All references to the transcript dated December 8, 2021, will be noted with "T-1" and a cite to the relevant page number.

All references to the transcript dated August 16, 2022, will be noted with "T-2" and a cite to the relevant page number.

TESTIMONY:

Testimony of Dr. Jordan Lisella

At the hearing held on December 8, 2021, Dr. Jordan Lisella testified for the Applicant. After providing his educational background and work experience, Dr. Lisella was determined to be an expert in the field of orthopedic surgery. (T-1, pp. 31- 33.)

Dr. Lisella testified his partner operated on the Applicant on April 14, 2017, and Dr. Lisella examined the Applicant for the first time on September 5, 2017. (T-1, p. 34.)

When asked to provide the Applicant's past medical history, Dr. Lisella provided the following response,

> Well, he injured his left ankle. He had a trimalleolar ankle fracture, an unstable fracture pattern and requires [*sic*] surgery. (T-1, p. 34.)

During Dr. Lisella's testimony, the parties stipulated the date of the Applicant's injury was March 27, 2017. (T-1, pp. 34-35.) Dr. Lisella confirmed it was a work-related injury. Dr. Lisella

further testified he performed a physical examination of the Applicant which showed the Applicant had significant loss of dorsiflexion of his ankle. (T-1, p. 35.) When asked what significant loss of dorsiflexion means, the Applicant provided the following response,

> He had good pulses and sensation. That basically means that he lost range of motion and is having difficulty lifting up his ankle. If you're asked to lift your toes up toward your head, that's what dorsiflexion means. (T-1, p. 35.)

Dr. Lisella further testified the Applicant was still recovering from surgery, where he had a syndesmotic screw, which limits dorsiflexion. Dr. Lisella recommended removal of the screw. In Dr. Lisella's opinion, the Applicant was not capable of doing firefighter duties at that time. (T-1, p. 36.)

Dr. Lisella confirmed x-rays were performed on the Applicant. When asked if there was anything significant on the x-rays, Dr. Lisella provided the following response,

> Well, he had signs of a bad injury, and had this thing called a trimalleolar ankle fracture. There were signs that there was (indiscernible) [***sic***] involved, which means fragmentation of the joint service. It showed all the hardware that my partner put in, which all looked appropriate, but was a significant amount. And then it also showed this thing called syndesmotic screw, which abnormally -- you know, which is necessary after the surgery – well during the surgery, but can prevent dorsiflexion, which we just spoke about. (T-1, pp. 36-37.)

As result of his examination of the Applicant, Dr. Lisella recommended the hardware removal as a first step in the Applicant's treatment plan. (T-1, p. 37.) Applicant's attorney noted, in Dr. Lisella's report he mentioned a posterior malleolus and syndesmosis. When asked to describe those terms Dr. Lisella provided the following explanation,

> Yeah. So the ankle bone or the ankle joint is split into three areas called malleoli. If you reach down and you touch the inside of your ankle, there's a bump there or a prominence and there's a similar one on the outside. There's one anatomically and radiographically in the back also, but that's not readily palpable.
>
> So these three prominences are three bony areas that are involved in stability of the ankle and are also involved in the fractures. So when you have one fracture, sometimes it's stable; when we have two of these fractured, it's usually unstable;

> and when you have three fractured, then it's 100 percent unstable, and that's what Mr. Jarvis had. So we called it a trimalleolar ankle fracture. (T-1, pp. 37-38.)

When asked to explain why he was going to remove the screw from the Applicant's ankle, Dr. Lisella provided the following answer,

> Well, No. 1 [sic] it hurts because it restricts motion. The screw fixes the syndesmosis, which is the space between the tibia, the bigger bone at the ankle and the fibular, the outside smaller bone, and that space needs to be maintained. So when it's ruptured and injured, we put a screw across it. That screw allows the syndesmosis to heal, but it also does negative things, like causing pain and restricting motion. (T-1, p. 38.)

Dr. Lisella performed an operation to remove the screw from the Applicant's ankle on September 14, 2017. The surgery was uneventful. Dr. Lisella saw the Applicant for follow-up appointments on October 3, 2017, and November 3, 2017. (T-1, pp. 39-40.)

Dr. Lisella testified, when he examined the Applicant again on December 6, 2017, he noted the Applicant was slowing in terms of his progress, he was not getting back to 100% normalcy. He determined the Applicant should continue physical therapy and start work hardening strategies. At the time, the Applicant was on light duty. (T-1, p. 41.)

Dr. Lisella examined the Applicant on January 16, 2018. He testified he made the following observations at that visit,

> Well, I thought he may have plateaued, in that the healing from the injury had probably run its course, and since he was still – or noted that he was symptomatic and that he was probably transitioning over to more permanent type of problems, basically arthritis. (T-1, p. 41.)

When asked if on the physical exam of the Applicant if he made any significant findings, Dr. Lisella provided the following response,

> Well, I noted he has stiffness and decreased range of motion, and I didn't give a lot of details, but I said he was indicative of post-traumatic arthritis. (T-1, p. 42.)

Dr. Lisella confirmed he attributed the arthritis in the Applicant's left ankle to the Applicant's March 2017 on-the-job injury. (T-1, p. 42.)

Dr. Lisella confirmed, at the time of the January 16, 2018, examination, the Applicant was back to work full (duty). (T-1, p. 43.) Dr. Lisella further testified he examined the Applicant again on January 2, 2019, at which time the Applicant informed him he was having pain on the outside of his ankle. Dr. Lisella was concerned the pain to the Applicant's fibula could be peroneal tendinitis. Dr. Lisella performed a physical examination that day. He found the Applicant had tenderness over the peroneal tendons, which pain the resisted eversion of the foot. (T-1, pp. 43-44.)

Dr. Lisella's plan of treatment, at the time, was to remove the hardware from the Applicant's ankle to evaluate the tendons, because the concern was the tendons could be damaged permanently. (T-1, p. 44.) Dr. Lisella performed another operation on the Applicant on February 18, 2019, where he had to make a larger incision than the previous surgery in order to take out the entire fibular plate, and then evaluated the peroneal tendons and cleaned off the Applicant's tendons. (T-1, p. 45.)

Dr. Lisella saw the Applicant for a post-surgical visit on March 6, 2019, where he found the Applicant was doing normally. He recommended the Applicant wear a CAM boot, which was typical protocol. (T-1, p. 45.) Dr. Lisella described the CAM boot as follows,

> The best description or similarity is a ski boot, it goes from your toes to just under your knee and it restricts motion around the ankle. (T-1, p. 45, ***see also,*** Applicant's Exhibit A.)

Dr. Lisella testified, based on his own protocol, he would not have had the Applicant doing formal physical therapy at the time. He usually waited until the area was completely healed before starting the patient on physical therapy. (T-1, p. 46.)

Dr. Lisella confirmed he examined the Applicant again on March 26, 2019, at which time he recommended physical therapy, and recommended the Applicant stay out of firefighting. (T-1, p. 46.) Dr. Lisella testified he saw the Applicant again on April 16, 2019, who was attempting to get back to work. Dr. Lisella did not think it was safe for the Applicant to do full duty, so they agreed on light duty. (T-1, pp. 46-47.)

Dr. Lisella testified he saw the Applicant again on June 4, 2019, when he made the following assessment of the Applicant at that time,

> Well, I started talking to him about how he may have post-traumatic arthritis in his ankle, and that he shouldn't expect to—or he may need to temper his expectations about his future job and life. He remarked to me that he wanted to get back to full duty, and I thought it may not be a good idea at that time. (T-1, p. 47.)

Dr. Lisella confirmed the Applicant's arthritic condition is a permanent condition. (T-1, p. 47.) He recommended the Applicant do what he could in terms of life and work, however, he suggested the Applicant work light duty. He recommended a follow-up of eight to ten months. (T-1, p. 48.)

Dr. Lisella testified he saw the Applicant on May 18, 2021, at which time the Applicant's complaint was continued pain in the left ankle. (T-1, p. 48.) Dr. Lisella noted the Applicant needed to wear a brace every day, adding he thought it was unsafe for the Applicant to perform his duties as a fireman. He performed a physical examination of the Applicant where he observed the Applicant had good range of motion, but he also had pain with range of motion and with weight bearing. He also noted the Applicant had moderate swelling of his ankle. (T-1, p. 49.) Dr. Lisella's impression of the Applicant's condition was that he had post-traumatic arthritis. He thought, with the Applicant's amount of pain and disability, returning to duty as a fireman would be unsafe for him and the general public. (T-1, p. 50.)

Dr. Lisella confirmed he reviewed the independent medical report of Dr. Connelly who concluded obesity was the major contributing factor for the Applicant's inability to be a fireman. (T-1, p. 51.) Dr. Lisella testified he did not agree with that assessment because, in his opinion, the overriding cause of the Applicant's problems is his fracture. Dr. Lisella further testified he formed an opinion, with a reasonable degree of medical certainty, the Applicant is permanently disabled from firefighting. Furthermore, he opined, with a reasonable degree of certainty, the cause of the Applicant's disability and inability to be a firefighter was his ankle fracture which was attributable to the incident of March 27, 2017. (T-1, p. 51.)

Under cross-examination by the System, Dr. Lisella testified it is his assumption weight loss can sometimes improve discomfort, but it wasn't the main focus of his treatment strategy. When, asked if he ever specifically recommend the Applicant lose weight, to help improve the condition of his ankle, Dr Lisella testified may have mentioned it, but he does not specifically remember when and he didn't document it in his note. (T-1, p. 53.)

When asked if he thought the Applicant needed ankle fusion or ankle replacement surgery, Dr. Lisella provided the following response,

> Well, it's a subjective decision. We do these surgeries basically when patients can't take it anymore. That determination is made mostly by the patient. People have different pain thresholds, and people have different levels of activities that they feel they need to do. They have to compare that to the risks of the surgery itself. So, again, that's a subjective determination. (T-1, p. 54.)

Dr. Lisella confirmed both surgeries are reasonably safe medical procedures, but they would not be able to return the Applicant to full-duty work as a firefighter. (T-1, pp. 54-55.) Dr. Lisella provided the following explanation,

> If you do an ankle fusion, you remove a significant amount of motion in the ankle. So, I believe it would be unsafe for him to return as a full-duty fireman. In addition to that, when you do ankle fusion, you jeopardize the other joints for arthritis. So as a recommendation, I'd recommend that he become more sedentary and avoid

duties such as firefighting. If you do an ankle replacement, I would definitely restrict his duties as a fireman to try to protect the ankle replacement prosthesis. (T-1, p. 55.)

Dr. Lisella testified he does not believe there is any treatment available which may return the Applicant to a full-duty position as a firefighter. (T-1, p. 55.)

Applicant's Testimony

The Applicant testified at the hearing held on December 8, 2021. He testified he is employed as a professional firefighter and paramedic for the City of Albany, New York. At the time of his testimony, he had been a firefighter and paramedic for 12 years. (T-1, pp. 59-60.)

When asked to describe his regular duties as a firefighter and paramedic for the Albany Fire Department, the Applicant provided the following response,

> It would generally be described, you'd have to be able to drag heavy hoses to spray fires. You'd have to be able to throw ladders, climb up on roofs, be able to operate stably on peaked roofs, various forms of roofs of that nature.
>
> We're also EMS, so I'd have to be able to carry patients downstairs, from potentially multiple floors up. I have to bring them to the ambulance, bring them to and [*sic*] hospital, things like that.
>
> I'd have to be able to travel around a building. I'd have to be able to operate inside and outside in unsteady footing and off-level footings, et cetera, et cetera. (T-1, pp. 60-61.)

The Applicant reviewed a job description for a firefighter which was submitted into evidence as pages 11 and 12 of System's Exhibit 4. He testified the description provided in the Exhibit is general which does not go into all of the duties he had to do. (T-1, pp. 61-62, ***see also***, System's Exhibit 4, pp. 11-12.)

The Applicant confirmed he filed for disability retirement. He testified he is claiming the following injuries as having permanently disabled him from firefighting, "(p)primarily my right

ankle and secondarily my left foot, due to the issues I've had in compensation for my left ankle, extreme pain, and things like that." (T-1, p. 62.)

When asked if there was a particular incident he is claiming disabled him, the Applicant provided the following response,

> On March 27, 2017, I was assigned to my home company, Engine Company 9. We were responding to an alarm of fire. We were the second-due engine company, which meant our job was to secure a water source, and my job on the rig that day, in my position, was to attach the large diameter hose to the hydrant, which would feed the engine from the hydrant.
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> I was – we arrived on scene. We were on the corner of the block of the fire building, and I got off the truck, went to the back to grab a large diameter hose, dragged it and the bag of tools we have with it over toward the hydrant, and as I went up to step on the hydrant to use the wrench to open up the hydrant to attach the hose, my foot landed on some ice covered by the snow. It appeared to be at a down angle. Both my legs went backward under me, and for some reason, my top half went backwards. All fell down on my leg, specifically my left ankle, and I heard and felt a crunch immediately. (T-1, pp. 62-63.)

The Applicant confirmed the crunch came from his left ankle. He was treated at the scene by coworkers who brought him to Albany Medical Center Emergency Room. After X-rays were taken, the Applicant was informed he had a trimalleolar fracture. His ankle was then casted after which he was referred to Albany Bone and Joint Center for an orthopedic surgical consult. (T-1, p. 64.) Two weeks and five days later, he had surgery where multiple pins, plates, screws, etc. were put in his ankle to try to stabilize it and begin the healing process. (T-1, pp. 64-65.)

The Applicant went home on bedrest beginning physical therapy in June of 2017. After a few weeks, physical therapy was not going well. Consequently, the Applicant went back to Bone and Joint where he met with Dr. Lisella. (T-1, pp. 65-66.) Subsequently, Dr. Lisella performed surgery on the Applicant in September of 2017. Then, the Applicant returned to work full duty beginning in mid-January of 2018. He testified he had gone through months of physical therapy, and a full month of a work-hardening program. He knew he was not 100 percent, but he had to

see if he could do the work. (T-1, pp. 66-67.) When he returned to full duty, he struggled to do what he could. He had multiple officers tell him they noticed significant inabilities as compared to prior to his injury. (T-1, p. 67.) He had to take pain medication all the time as well as ice his ankle as much as he could. (T-1, p. 68.)

The Applicant's last day of full duty for the fire department was December 23, 2018. (T-1, p. 68.) When asked the reason why he stopped working, the Applicant provided the following response,

> A combination of a few things. The pain has become unbearable, to the point it was not just affecting my duties, it was becoming unbearable, and I developed a situation where my leg would randomly give out multiple times during the day. I could be trying to stand up and have to catch myself on a wall or table, because when I went to put weight on it, there would be no strength, nothing would happen. Or I would be walking mid-stride, and when I put weight down on my left leg it would totally give out, and I would fall over multiple times, including multiple times in the firehouse. (T-1, pp. 68-69.)

The Applicant testified Dr. Lisella explained to him that his leg giving out could be caused by multiple things including arthritis or the effect of the hardware installed in his ankle which was rubbing against his nerves causing damage to tendons and nerves. (T-1, p. 69.) Applicant testified he had another surgery in February of 2019 after which he returned to work performing light duty. Light duty consisted of desk work, answering phones, and paperwork. He has not been able to return to full firefighting duty since 2018. (T-1, pp. 69-70.)

The Applicant testified he is now married with his daily activities include watching TV and light house chores. He is not able to do anything athletic or strenuous because it is too painful. (T-1, pp. 70-71.)

When asked what keeps him from returning to full firefighting, the Applicant provided the following response,

Oh it's a long list. For starters I have extreme difficulty on stairs, to the point where oftentimes I need a railing, or I'm going two feet on one stair.

In that regard, even on light duty in the fire department, in the headquarters in the fire department buildings the city doctor has restricted me that I cannot use stairs, even on light duty, before any talk of anything as far as a fire response. But other things that I would be required to do, many I listed earlier. I would be required to go and pick people up or drag them in and out of buildings, fire response or for EMS calls.

Q: You can't do that?

A: Absolutely not. Especially if stairs are involved. I would be required to be able to throw a ladder into a building and attempt to climb it, which for many reasons I cannot do. I do not have the power to push off my foot, and the proper way to work off a ladder, as a firefighter, is you have to be able to throw your boot and through the rungs of the ladder and lock into the rung below it. Essentially, your knee would be on one rung and your foot would be on the other. My foot doesn't move. I physically cannot get my foot around to do that.

I, obviously, would have no ability to work on any kind of peaked roof, or any roof in general, because they all generally have some slant to them, especially in any ice or snow condition.

I have no ability to move with any proficiency or any real urgency on any icy or snowy ground, because I have no stability. I'm afraid I'm going to fall with every step I take. I have no ability to move on any sort of unstable ground, which if anyone's been in a burning building, it's pretty much all it is. You're stepping over collapsed sections of walls, sections of ceilings, et cetera, like that, and that garbage throughout--not garbage, but things throughout the interior of the house has been thrown around or hit by hoses thrown all over the place.

Keeping in mind inside a burning building, for the most part, until the fire is out and the building is ventilated, you can knock on your face mask, and you can't see your hand. So I would be doing this entirely blind as well, and I would have no ability to do that. (T-1, pp. 72-73.)

The Applicant testified he wears the orthopedic boot pictured in Applicant's Exhibit B (the CAM boot) whenever he is out of the house and moving around or walking in general. (T-1, p. 73.) When asked if there was anything about the boot making it difficult for him to be a firefighter, the Applicant provided the following response,

> Well, the boot does two things: [*sic*] It entirely immobilizes my ankle further from the little motion it has, and it also provides structural support for my ankle, in the event if I'm walking and my leg gives out, I'm at least able to stumble and try to catch myself and not entirely fall.
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> But the obvious problem with that boot – which begins under my knee, wraps under my ankle, and goes just before my toes—is that it immobilizes my foot in that 90 degree angle, where I can't even get into my bunker gear. I can't even get to my turnout gear, as I would be trying to force that booted foot down pants and another fire boot, the entire length of my knee and into the boot. When, obviously, with no movement – I'm sure the image of fire pants and fire gear are common, you could see how I would not be able to make that bend – I couldn't even get into my gear is the long short of it. (T-1, p. 74.)

The Applicant confirmed he was examined by Dr. Patrick Connelly. He testified the examination lasted seven to ten minutes during which time they had a verbal exchange where the Applicant gave the doctor a brief synopsis of his injury and the surgeries he had. Dr. Connolly then used a protractor-like device to measure the range of motion in the Applicant's ankle, which took a minute or two. After the examination was over, the Applicant left Dr. Connolly's office. (T-1, p. 75.)

The Applicant testified he had never met Dr. Connolly before, yet before the examination began, the Applicant noted, on a sheet of paper on Dr. Connolly's desk, the Applicant noted the Applicant's name, demographic information, where, in large bold letters the words, were written, "Morbid obesity." (T-1, p. 76.)

The Applicant confirmed Dr. Connolly recommended the Applicant lose weight and go to physical therapy. He concluded the Applicant was not permanently disabled from firefighting. The Applicant testified he did not agree with Dr. Connolly for the following reasons,

> For starters – and what is every surgeon I've been to, every physical therapist has told me, the date or the year after your injury is generally accepted among the medical profession is when you reach maximum healing from your injury.
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> I first saw Dr. Connelly more than 4 years after that date, and he – I don't know if he wasn't aware. I don't know if he reviewed the files or not, but after both my

first two surgeries, I had multiple months of physical therapy. I had a whole entire month of work hardening before I went back to work the first time, so I've already done that...His entire claim is that I'm unable to return to work due to my weight – my size. The problem with that is during his interview at no point had he ever inquired as to what my size was prior to the injury. At no point in time had he ever inquired what my abilities were prior to the injury.

To that note, I can fill in the report now. I have always been – for most of my career I've always been over three hundred pounds. I have always been able to every part of my job without any issue, without any obstruction, without damaging anybody. I have been able to do it safely and proficiently. I don't want to comment on what his research was, but somehow, in his review, he didn't consider any of that.

Furthermore, especially with an injury like mine where I—it's very painful, I can't move it. I can't—putting weight on it in general hurts, let alone trying to do anything strenuous or athletic. I am perplexed how no consideration was ever given to the fact that there was very limited, if any, possibilities of real athletic exercises that would ever bring down – that I would be able to do in this condition that would be able to bring down my weight.

But, once again, I was able to do my job fine. I was a similar weight before and after the injury. The only difference was the injury. I was able to do my job 100 percent prior. You could find no notes or any reports of my job otherwise of ever needing to be spoken to on that. (T-1, pp. 77-79.)

Under cross-examination from the System's attorney, the Applicant testified he went out of full-duty work at the end of 2018 because his leg started giving out, when he started falling frequently multiple times a day due to the incident having occurred four years ago. He also confirmed, since 2017, he has not had any additional injuries to his ankle. (T-1, p. 82.)

In response to questions about the medical treatment he is currently receiving, the Applicant testified he sees the doctor once every few months or yearly for monitoring. At this point, there is no further treatment to pursue. Dr. Lisella, other physicians, including multiple other surgeons whom he had consulted for second opinions, have all said he had reached maximum healing. (T-1, pp. 82-83.)

The Applicant testified nobody had recommended weight loss as a possible treatment for his left ankle injury because it was never a factor. He provided the following clarification,

> I specifically asked the question to my—all the physicians I have seen and all the physical therapists I have seen. They've all said the same thing. They've seen multiple people with that type of injury, everyone from larger guys like myself, to 80-year-old senior citizens, to 19 year-old college cheerleaders. Size has nothing to do with the injury. It could happen to anybody. It's all about geometry of the injury. (T-1, p. 83.)

The Applicant confirmed that no one has recommended that he lose weight because no one has seen it as a problem. (T-1, p. 84.)

The Applicant testified that no other surgeries have been recommended for his left ankle. He spoke to Dr. Lisella about having ankle replacement surgery. Dr. Lisella and other doctors that he spoke to have said that a replacement ankle may work for someone with a desk job or a non-physical job. However, if someone is doing anything strenuous that requires lifting abilities, the replacement ankles break easily and causes more problems. It is not a good idea. (T-1, p. 84.)

The Applicant further testified that he discussed ankle fusion with Dr. Lisella, but the doctor concluded that the procedure would not do anything to help the Applicant get back on the job. Furthermore, the doctor felt that the Applicant was young so he wanted to preserve whatever motion the Applicant still had in his ankle, however little it was. Dr. Lisella will only perform that surgery if there was no other option. (T-1, p. 85.)

The Applicant further testified that when he stopped working and applied for the 207-a process, he was told by everyone, as far as working on his ankle, that he had reached his full potential for healing and recovery, and it was not getting better. Now, he had to learn to live with it, learn to adjust to the pain, and not aggravate it any more than it has to be. It has been years since any physician has recommended treatment to help his situation and get him back to his job. (T-1, p. 86.)

Under redirect examination the Applicant confirmed that he had surgery in 2019, after he stopped working full duty followed by a few months of physical therapy. (T-1, p. 87.)

Testimony of Dr. Patrick Connolly

At the hearing held on August 16, 2022, Dr. Patrick Connolly testified as an expert in the field of orthopedic surgery. Dr. Connolly testified that he performed an Independent Medical Examination of the Applicant on March 12, 2021. He knew that the Applicant had been employed as a firefighter and paramedic for the City of Albany which was considered a heavy labor position. (T-2, p. 12.)

Dr. Connolly testified about the Applicant's medical history and his physical examination of the Applicant. He provided the following description of the physical examination of the Applicant.

> The left ankle – the left ankle was the injured ankle. The patient's inspection indicated that he was 5 feet 10 inches tall, that he weighed 350 pounds, and that he did have an abnormal gait consequential to pain. That there was no findings of a complex regional pain syndrome. That both his left and right ankle had normal alignment. That the patient had full range of motion of both knees. That the patient's left ankle had diminished dorsiflexion of 5 degrees and the normal dorsiflexion is 20 degrees...So, the easiest way to explain dorsiflexion is opposite of plantar flexion. And dorsiflexion, if you were to try to stand on your heels alone, you would have to dorsiflex your foot. Plantar flexion is, if you're standing on your tippy toes, your foot is plantar flexed.
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> Dorsiflexion of 5 degrees is limited compared to normal which is 20 degrees. Plantar flexion, which is typically 40 degrees, is limited in this case to 30 degrees. Both dorsi and plantar flexion occur at the tibiotalar joint. The tibiotalar joint is essentially the ankle joint. (T-2, pp. 14-15.)

Dr. Connolly provided the following additional testimony,

> The other motion that was assessed was inversion and eversion. Inversion and eversion takes place at the joint below the tibiotalar joint. That's called the subtalar joint.

> Normal inversion is 30 degrees. Normal eversion is 20 degrees. In this particular case, the patient's inversion was limited to 10 degrees and the eversion was limited to 15 degrees.
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> The patient had normal pulses of his foot, and he had a healed incision without any evidence of what we would call complex regional pain syndrome, which would be associated with differences in temperature, trophic changes in the toes, vascular abnormalities in or skin discoloration and hypersensitivity to touch. (T-2, p. 16.)

When asked if he formed a diagnosis of the Applicant's condition within a reasonable degree of medical certainty, Dr. Connolly provided the following response,

> So, under Clinical Impression, the patient is status post left ankle fracture, trimalleolar variant, status post open reduction internal fixation, removal of syndesmosis screw and removal of lateral plate with peroneal tendon debridement. (T-2, pp. 16-17.)

After Dr. Connolly reviewed the Applicant's surgical history, he testified the surgical treatment given to the Applicant for his particular injury was fairly routine. (T-2, p. 18.) Dr. Connolly further confirmed the incident of March 27, 2017, caused the Applicant's injury to his left ankle. (T-2, p. 19.) Dr. Connolly further testified when he examined the Applicant, his opinion was he would not offer an opinion of a permanent disability from the Applicant's employment, but, at the time of the evaluation, he was disabled from that employment, however, he had not reached maximum medical improvement. (T-2, p. 19.)

Dr. Connolly concluded, at the time of his examination of the Applicant, his ankle fracture had healed, but he was not fully rehabilitated enough to allow him to go back to work without restrictions. It is his belief with further rehabilitation of the left ankle, the Applicant would be able to return to full duties as a firefighter for the City of Albany. (T-2, p. 20.)

Dr. Connolly provided the following testimony,

> Well, the patient's height/weight ratio was significantly inhibiting for this patient to maximize his physical abilities to perform tasks required as a firefighter. And I felt that the patient should be best treated by an overall aerobic fitness program to

> improve his height/weight ratio. That the patient, besides a program of weight reduction and improved aerobic fitness, should have an additional 18 sessions of physical therapy to improve his strength and range of motion, as well as proprioception of his injured ankle. And that a program such as this in a highly motivated individual would allow someone to return back to work without restrictions as firefighter.
>
> I also indicated that I didn't think additional surgery was required, but that the patient had not been seen by Dr. Lisella in two years, and that a reassessment of his tibiotalar joint space would be appropriate – again, that's the ankle joint—to see if there was any accelerated tibiotalar arthritis which had not been noted previously. (T-2, pp. 20-21.)

Under cross-examination, Dr. Connolly confirmed the development of arthritis is fairly common with the type of ankle injury the Applicant had. He further confirmed the arthritis can cause pain, loss of range of motion, and in most cases is a permanent condition. (T-2, p. 31.)

Dr. Connolly testified the Applicant's morbid obesity is the predominant factor in his conclusion the Applicant is not permanently disabled. (T-2, p. 32.) He further testified the Applicant did not indicate he was working with any restrictions or limitations prior to his injury, and as of April 3, 2017, the Applicant weighed over 300 pounds. (T-2, p. 32.)

Under questioning by counsel for the City of Albany, Dr. Connolly testified "maximum medical improvement has a definition, when it's unlikely the patient's condition would improve with any reasonable treatment." (T-2, p. 48.)

He further testified,

> In terms of time, it depends. And in this particular case, what matters most is not the fracture but what else can be done. And aerobic fitness and losing weight, in my opinion via experience, if this guy lost 100 pounds, he would be able to work as a firefighter. And the fact that he can't, that doesn't mean that the ankle fracture is severe, that every time someone has an ankle fracture, the City of Albany now is going to say they can't go back to their job because most of them can. Some people can't, but they should have at least the opportunity, or I should at least express what else could be done to improve the condition. Because some people might lose 100 pounds, and then they might be able to go back as a firefighter." (T-2, pp. 49-50.)

Dr. Connolly also offered the following assessment,

There's no indication that this patient's problem is consequential to healing. The problem that he has is that he has stiffness and lack of motion because it hadn't been properly rehabilitated. And that he also had problems with aerobic fitness because of his difficulties with stiffness and pain. (T-2, p. 53.)

MEDICAL PROOF:

Independent Orthopedic Evaluation of the Applicant performed by Dr. Shanker Krishnamurthy on December 28, 2017:

Impression and Opinion: It is my professional opinion, based upon a comprehensive physical examination, case history, and review of the claimant's file and the history as provided by the claimant, that the following are true:

Degree of Disability: Based on the NYS WCB Guidelines, the claimant has a moderate temporary, partial disability

End result MMI: MMI has not been reached.

Appropriate Treatment and Frequency: It is my opinion that he requires further physical therapy three times a week for six weeks. It is my opinion that the request for work hardening should also be approved. The C-4 authorization request for work hardening and physical therapy should be approved.

Prognosis: The prognosis for this claimant is fair. (System's Exhibit 4. p. 126.)

New York State Workers' Compensation Examination of the Applicant by Dr. David Dixon of OrthoNY, on May 28, 2019:

Dr. Dixon examined the Applicant in which his report includes the following,

There is no erythema, cellulitis, or infection. Pulses are palpable. He is neurovascularly intact. I appreciate decreased range of motion in dorsiflexion and plantarflexion compared to the opposite side, as well as inversion and eversion, mild in all planes except for dorsiflexion which is more moderately to markedly decreased. He has otherwise noted to have some chronic slight swelling around the ankle, some mild tenderness medially, laterally as well as anteriorly. No evidence of obvious subluxation or dislocation of the tendons. I appreciate no obvious tendon abnormality. Skin exam is otherwise normal,

Radiographs: X-rays bilaterally standing for comparison of the ankle three views reveal the patient does have trimalleolar ankle fracture, which is healed with some mild degeneration at the ankle joint.

Impression: The patient has left trimalleolar ankle fracture two years out, continued pain and disability and inability to do the activities he wants to such as, firefighting.

C. Plan of Care

At this point, I think any further surgical treatment will be a good option for him. He seems to be having good care in regards to this. I think he is not going to be able to participate as a firefighter because of his ankle injury, so he is likely going to require a disability from that where he is disabled from firefighting work. I will see him back as needed. He continues to be disabled as per Dr. Lisella. (System's Exhibit 4, pp. 299-300.)

Workers' Compensation Board Form EC-4NARR, dated June 4, 2019, Assessment and Plan written by Dr. Jordan Lisella regarding the Applicant

On June 4, 2019, Dr. Lisella wrote the following Assessment and Plan regarding the Applicant,

He is still on light duty and I think he needs to remain on light duty. I do not think it is safe for him to go back full duty as a fireman. We had a long discussion with him and based on his physical findings and my expertise, I do not think he is going to significantly improve here on out. I think he probably will always be limited to light duty and I do not think he will ever be able to regain his full capacity to be a firefighter again. He is considering an early disability retirement and I would support this decision. Otherwise, we will release him or to have him continue to do light duty at work. He can follow-up with me in 8-10 months for follow-up and permanency exam. If he has any worsening problem in the meantime, he can contact me sooner.

Addendum: He is also inquiring about any special programs that his insurance or work might offer for disability. If this program exists, I certainly would prescribe it and agree with him participating in gym or workout type class.
(System's Exhibit 4, p. 88.)

March 12, 2021, Independent Orthopedic Evaluation by Dr. Patrick Connolly:

On March 12, 2021, Dr. Patrick Connolly performed an Independent Orthopedic Surgery Medical Evaluation on the Applicant. His report includes the following,

> Impression: Status post left ankle fracture trimalleolar, status post open reduction internal fixation, removal of syndesmosis screw as operation #2, and removal of lateral plate with peroneal tendon debridement as operation #3.
>
> There are some mild signs of symptom magnification with testing, but overall, (the Applicant) is cooperative and certainly has had an injury to the left ankle that is significant. It is not clear, however, why (the Applicant) is not able to rehabilitate and allow him to return back to work as a Firefighter.
>
> Recommendations would be a program to improve his overall aerobic fitness and his height/weight ratio to get him out of the classification of morbid obesity, which independent of an ankle fracture would place (the Applicant) at risk as being employed as a Firefighter. In addition to weight reduction and improvement of aerobic fitness, (the Applicant) should work with an additional 18 sessions of physical therapy to improve strength and range of motion as well as proprioception as (the Applicant) has complaints of giving out and giving way. In my opinion, in a highly motivated claimant, (the Applicant) should clearly be able to return back to work following an injury of this nature as a Firefighter. At this time, I would not offer an opinion that (the Applicant) is permanently disabled from that employment, but currently he is disabled. He has not reached maximum medical improvement. That a major factor contributing to his current inability to work as a Firefighter would be his morbid obesity, which is unrelated to employment, and if this is addressed as well as improvement of his proprioception and strength, he should be able to return back to work as a Firefighter. I do not believe that additional surgical intervention is required at this time. (The Applicant), however, has not seen Dr. Lisella in 2 years, and a reassessment of his tibiotalar joint space would be appropriate to see if, indeed, there has been an unexpected development of significant arthritis. (System's Exhibit 4, pp. 4-5.)

Dr. Lisella's Notes from appointment with the Applicant on May 18, 2021:

> Impression: Degenerative joint disease of the ankle. Due to clinical pain and lack of range of motion as well as dependency on a brace, I believe that it is impossible that (the Applicant) returned to his full unprotected duties as a fireman. Working as a fireman would [*sic*] only be detrimental to (the Applicant) but also dangerous considering his responsibilities.

An independent medical examination noted that obesity may have been a major contributing factor, I disagree with this. The type of injury that (the Applicant) experienced is responsible for the vast majority of his pain and current condition.

Treatment Plan: Continue conservative treatment including bracing, activity modification, anti-inflammatories. We may have to consider an ankle fusion sometime in the future. (System's Exhibit 4, pp. 92-93.)

Return to Duty Evaluation of the Applicant performed by Dr. Warren Silverman on September 17, 2021:

Assessment: Based on his physical examination at this point, this gentleman appears to be developing posttraumatic arthritis in the ankle with diminishing range of motion. His ankle is almost fused at this point. This would make it impossible to do all the activities of a firefighter safely. He would be putting the public at risk. Attempting to carry somebody down a flight of stairs with his ankle would be hazardous to both parties. Being able to run and jump would not seem possible. I think we can put him back on light duty. He can do sedentary tasks or tasks that involve limited ambulation and avoiding stair climbing. In the meantime, he is reapplying for disability retirement on appeal. He absolutely would be justified in giving [*sic*] disability retirement in that a firefighter without any movement in his ankle cannot do the job. I am in full support of his achieving this status. (System's Exhibit 4, p. 95.)

FINDINGS OF FACT:

The Applicant has been employed as a professional firefighter and paramedic for the City of Albany for 12 years. (T-1, pp. 59-60.)

The Applicant's regular duties required him to be able to drag and/or throw heavy equipment including hoses and ladder, hold a fire hose and direct its stream, put up and climb ladders, enter burning buildings, climb up on and be able to operate with stability on various types of roofs, be able to walk inside and outside a building in steady and unsteady conditions, to be able to remove people from buildings, and carry patients down stairs, from potentially multiple floors up, and bring them to the ambulance. He was required to have a "physical condition commensurate with the demands of the position." (T-1, pp. 60-61 and System's Exhibit 4, pp. 11-12.)

On March 27, 2017, the Applicant was working when responding to an alarm of fire. The Applicant was responsible for attaching a large diameter firehose to a hydrant. When the Applicant arrived at the scene, he dragged the hose and a bag of tools towards a hydrant. He went to step up on the hydrant, however, his foot landed on some ice covered by the snow. Both of his legs and top half of his body went backwards. He fell on his left ankle, immediately, he heard and felt a crunch from that ankle. (T-1, pp. 62-63.)

The Applicant was brought to the Albany Medical Center Emergency Room where he was diagnosed with a trimalleolar fracture of his left ankle. After his ankle was casted, he was referred to Albany Bone and Joint Center for an orthopedic surgical consult. (T-1, p. 64, System's Exhibit 4, pp. 25-27.) He went for a surgical consultation with a surgeon at Albany Bone and Joint Center. Two weeks and five days later, he had surgery wherein multiple pins, plates, screws, etc. were put in his ankle to try to stabilize it to begin the healing process. (T-1, pp. 64-65.)

The Applicant went home on bedrest, then he began physical therapy in June of 2017. After a few weeks, physical therapy was not going well. Accordingly, the Applicant went back to the Bone and Joint center to meet with Dr. Lisella. (T-1, pp. 65-66.) Dr. Lisella performed another surgery on the Applicant in September of 2017. The Applicant went through months of physical therapy and a full month work hardening program. He returned to work full duty beginning in mid-January of 2018. Although he knew he was not 100 percent, he had to see if he could do the work. (T-1, pp. 66-67.)

When the Applicant returned to full duty, he struggled to do what he could. He had multiple officers tell him they noticed significant inabilities as compared to prior to his injury. (T-1, p. 67.) He had to take pain medication all the time and ice his ankle as much as he could. (T-1, p. 68.)

Retired Lieutenant Jonathan Davis (Lieutenant Davis) wrote in an undated letter he had worked with the Applicant in the Albany Fire Department since 2010. Lieutenant Davis wrote, prior to his injury, the Applicant had no difficulty performing his duties, yet when he returned to full duty, the Applicant's gait appeared "off," he even had difficulty using stairs. Furthermore, Lieutenant Davis did not observe a change in the Applicant's size. (Applicant's Exhibit B, p. 3.)

Similarly, Lieutenant Justin Rhatigan (Lieutenant Rhatigan) wrote in an undated letter, prior to the Applicant's injury, he had no problem performing any physical function of a firefighter including completing all assigned tasks. Lieutenant Rhatigan further wrote it wasn't until the Applicant returned to the firehouse after his injury where he had any difficulty, if not an inability, to perform tasks safely and properly. Lieutenant Rhatigan further noted the Applicant's size had not changed significantly since before his injury, whereas the injury was the only major change in his physical condition. (Applicant's Exhibit B, p. 4.)

Retired Captain Patrick Landers (Captain Landers) expressed similar sentiments in an undated typewritten letter and a handwritten letter dated August 30, 2021. (Applicant's Exhibit B, pp. 5-6.)

The Applicant's last day of full duty for the fire department was December 23, 2018. (T-1, p. 68.) He was unable to continue working because the pain had become unbearable, and his left leg would give out multiple times during the day. Also, when he put weight on his left leg there would be no strength, nothing would happen; or he would fall over when his left leg totally gave way as he put his weight down while walking mid-stride. (T-1, pp. 68-69.)

Once he had another surgery in February of 2019, he returned to work performing light duty. Light duty consisted of desk work, answering phones, and paperwork. He has not been able

to return to full firefighting duty since 2018. (T-1, pp. 69-70.) The Applicant is not able to do anything athletic or strenuous because it is too painful. (T-1, pp. 70-71.)

The condition of the Applicant's left ankle prevents him from returning to work full duty as firefighter. He stopped doing full duty work at the end of 2018 because his leg started giving out, and he started falling frequently multiple times a day. He has extreme difficulty walking on stairs where he often needs to use a railing. He cannot pick a person up and carry them out of a building, especially if stairs are involved. He cannot climb a ladder because as a firefighter he has to be able to throw his boot through the rungs of the ladder and lock into the rung below it, with his knee on one rung and his foot on the other. He cannot maneuver his foot around to do that. He cannot work on a roof and walk with stability. He is not able to move quickly on any icy or snowy ground, or any unstable ground, or in a burning building containing debris. The Applicant wears the CAM orthopedic boot when he leaves the house while moving around or walking in general. The bulky boot immobilizes his ankle making it impossible to put on his firefighter gear while wearing the CAM boot. (T-1, pp. 72-74, 82, ***see also***, Applicant's Exhibit A.)

Even though the Applicant has always weighed about 300 pounds, he was able to perform all of his job duties without issue prior to his injury. (T-1, pp. 77-79, ***see also***, Applicant's Exhibit B, pp. 3-6.)

In response to questions about the medical treatment he is currently receiving, the Applicant testified he sees the doctor once every few months or yearly for monitoring. At this point, there is no further treatment that he can pursue. Dr. Lisella, other physicians and including his surgeons he consulted for second opinions, have all said he had reached maximum healing. (T-1, pp. 82-83.) None of the providers the Applicant has consulted has recommended weight loss

as a possible treatment for his left ankle injury. He has been told his size has nothing to do with the injury, rather is the geometry of the injury which is the issue. (T-1, pp. 83, 86.)

The Applicant has been examined and treated by several different doctors and providers since fracturing his ankle on March 27, 2017. He went to numerous physical therapy appointments between June of 2017 and July of 2019. (System's Exhibit 4, pp. 141-297.) Dr. Lisella performed surgery on the Applicant's ankle who has followed his condition closely. In notes from an appointment with the Applicant on May 18, 2021, Dr. Lisella found the Applicant to have degenerative joint disease of the ankle. He further determined, due to clinical pain and lack of range of motion and dependency on a brace, it is impossible for the Applicant to return to his full unprotected duties as a fireman. In addition, Dr. Lisella opined the Applicant has post-traumatic arthritis. He attributes the arthritis in the Applicant's left ankle to the Applicant's March 2017 on-the-job injury. He believes with the Applicant's amount of pain and disability, returning to duty as a fireman would be unsafe for him and the general public. (T-1, p. 50.)

Dr. Lisella does not believe an ankle replacement surgery or ankle fusion surgery would return the Applicant to full-duty work as a firefighter. Ankle fusion surgery removes a significant amount of motion in the ankle, thusly, making it difficult for the Applicant to perform the expected duties of a full-duty firefighter. Ankle fusion surgery also jeopardizes the other joints for arthritis. An ankle replacement surgery would restrict the Applicant from fulfilling his firefighter duties because he would need to protect the ankle replacement prosthesis from breakage. (T-1, pp. 53-55, ***see also***, Applicant's testimony T-1 pp. 84-85.)

Dr. Lisella does not believe there is any treatment available which may return the Applicant to a full-duty position as a firefighter. (T-1, p. 55.)

In a New York State Workers' Compensation Examination of the Applicant by Dr. David Dixon of OrthoNY, on May 28, 2019, Dr. Dixon determined the Applicant has left trimalleolar ankle fracture two years out, continued pain and disability with an inability to do the activities he wants to, such as, firefighting. Dr. Dixon thought the Applicant was not going to be able to work as a firefighter because of his ankle injury and who was likely going to need to go on disability. (System's Exhibit 4, pp. 299-300.)

In a Return to Duty Evaluation of the Applicant competed by Dr. Warren Silverman on September 17, 2021, Dr. Silverman noted the Applicant appeared to be developing posttraumatic arthritis in the ankle with diminishing range of motion. He noted the Applicant's ankle was almost fused, which would make it impossible to do all the activities of a firefighter safely, as well as it would be putting the public at risk. Specifically, Dr. Silverman commented for him to attempt to carry somebody down a flight of stairs with his ankle would be hazardous to both parties. Additionally, he would not be able to run and jump. Dr. Silverman felt the Applicant could be put on light duty to perform sedentary tasks or tasks involving limited ambulation while avoiding stair climbing. Dr. Silverman opined the Applicant would be justified in receiving disability retirement because a firefighter without any movement in his ankle cannot do the job. (System's Exhibit 4, p. 95.)

Dr. Connolly, who performed an Independent Medical Examination at the request of the System. He testified for the System at the hearing held on August 16. 2022, indicating he did not find the Applicant to be permanently disabled. Dr. Connolly focused on the need to improve the Applicant's overall aerobic fitness as well as his height/weight ratio to get him out of the classification of morbid obesity. In addition to weight reduction and improvement of aerobic fitness, Dr. Connolly recommended the Applicant complete an additional 18 sessions of physical

therapy to improve strength and range of motion as well as proprioception. In Dr. Connolly's opinion, the Applicant should clearly be able to return back to work as a firefighter following an injury of this nature. He concluded the Applicant had not yet reached maximum medical improvement. (System's Exhibit 4, pp. 4-5, and T-2, pp. 10-54.)

DISCUSSION and CONCLUSIONS OF LAW:

The Comptroller has exclusive authority to determine applications for all forms of retirement benefits provided for in the Retirement and Social Security Law. RSSL §§374(b). *Matter of Mancuso v. Regan*, 190 A.D.2d 948, 593 N.Y.S.2d 590 (3d Dept. 1993). The undersigned, as Hearing Officer, is appointed to perform the duties of the Comptroller as specified in RSSL §374. Questions as to the weight and credibility of testimony and other evidence rest with the hearing officer. *Matter of Bodenmiller v. DiNapoli*, 157 A.D.3d 1120, 1122, 69 N.Y.S.3d 723, 725 (3d Dept. 2018), *Matter of Kastner v. Regan*, 75 A.D.2d 977, 428 N.Y.S.2d 370 (3d Dept. 1980), *lv denied*, 51 N.Y.2d 703 (1980).

In an administrative proceeding, the Applicant bears the burden of proof. State Administrative Procedure Act, Section 306 (1); *Matter of Wilson v. DiNapoli*, 52 A.D.3d 931, 933, 859 N.Y.S.2d 314, 315 (3d Dept. 2008); *Matter of Zolzer v. New York State Comptroller*, 196 A.D.2d 934, 935, 601 N.Y.S.2d 979 (3d Dept. 1993). In this matter, it is the Applicant's burden to establish he is not only disabled due to the injuries to his left ankle sustained in the performance of his duties, but that his disability is permanent. *Matter of Fragetti v. New York State Policemen's & Firemen's Retirement System*, 139 A.D.2d 867, 868, 527 N.Y.S.2d 594 (3d Dept. 1988).

It is clear from the evidence presented the Applicant was employed as a firefighter and paramedic for the City of Albany. His job duties required him to be completely mobile in order to

be able to carry and manipulate heavy equipment, carry people, and climb on ladders, stairs, roofs, and uneven surfaces. It is not a sedentary job.

On March 27. 2017, the Applicant significantly injured his left ankle while working. He was diagnosed with a trimalleolar fracture of the left ankle. Over the course of the following years, he had several surgeries, many appointments with his orthopedic surgeon, and numerous physical therapy appointments. He also participated in a work hardening program. He attempted to return to work full duty, however, he eventually realized the pain in his ankle was too great, with his ankle too unstable for him to continue working full duty as a firefighter and paramedic. As noted above, the issue is whether or not his injury has made him permanently disabled from his employment.

The Applicant provided credible and compelling evidence in this case in the form of his hearing testimony. The evidence provided by the Applicant is fully supported by Dr. Jordan Lisella's testimony and medical records. Dr. Lisella is the Applicant's surgeon. It is well settled the opinions of the Applicant's treating physicians are not automatically entitled to greater weight than those of another expert who examined him (*Matter of English v. McCall*, 6 A.D.3d 923, 925, 774 N.Y.S.2d 879, 882 (3d Dept. 2004), *Matter of Irish v. McCall*, 297 A.D.2d 895, 896, 747 N.Y.S.2d 610 (3d Dept. 2002)). The evidence provided by Dr. Lisella is supported by other medical evidence in the record.

Dr. Lisella maintained, despite all of the treatments and surgeries the Applicant has received, it is not safe for him to return to work as a full-duty firefighter. Furthermore, he concluded, due to clinical pain and lack of range of motion, post-traumatic arthritis, and dependency on a brace, it was impossible for the Applicant to return to his full unprotected duties as a fireman. He believed, with the Applicant's amount of pain and disability, returning to duty

as a fireman would be unsafe for him as well as the general public. While he acknowledged certain additional ankle surgeries exist (e.g., ankle fusion or ankle replacement), he determined neither surgery will help the Applicant get back to full duty.

Dr. Lisella's assessment of the Applicant's condition is supported by Dr. David Dixon of OrthoNY, who examined the Applicant on May 28, 2019, noting two years after the initial injury, the Applicant had continued complaints of pain and disability who was not going to be able to work as a firefighter because of his ankle injury. Dr. Dixon wrote the Applicant was likely going to need to go on disability. Dr. Warren Silverman provided even more details of the Applicant's condition in a report after an examination on September 17, 2021. Dr. Silverman observed the Applicant appeared to be developing posttraumatic arthritis in the ankle with diminishing range of motion. He noted the Applicant's ankle was almost fused making it impossible to do all the activities of a firefighter safely, which would put the public at risk in any attempt to carry somebody down a flight of stairs on the Applicant's ankle would be hazardous to both parties. Dr. Silverman unequivocally determined the Applicant would be justified in receiving disability retirement because a firefighter, without any movement in his ankle, cannot do the job. (System's Exhibit 4, p. 95.)

In contrast to the assessments of Drs. Lisella, Dixon, and Silverman, Dr. Connolly's determination the Applicant should lose weight and go to eighteen more sessions of physical therapy is not persuasive. During the hearing, Dr. Lisella testified he did not agree with that opinion because, in his opinion, the overriding cause of the Applicant's problems is his fracture. As the Applicant testified, and letters from his coworkers corroborate, he has always weighed about 300 pounds, as such, his weight never affected his ability to do his job. Indeed, Dr. Connolly did not just suggest weight loss, he suggested a weight loss of 100 pounds, without giving any

specific recommendation for the Applicant to successfully complete such a daunting loss of weight considering the pain and instability he experiences in his left ankle.

The State Comptroller possesses the authority to resolve conflicts in medical evidence and to credit the opinion of one expert over that of another, as long as the credited expert has provided an articulated, "rational and fact-based opinion, based upon a physical examination, and a review of pertinent medical records." *Matter of Kossifos v. DiNapoli*, 92 A.D.3d 1073, 1074, 938 N.Y.S.2d 372, 374 (3d Dept. 2012); *Matter of Bladykas v. NYSLERS*, 75 A.D.3d 749, 751, 903 N.Y.S.2d 810, 812 (3d Dept. 2010).

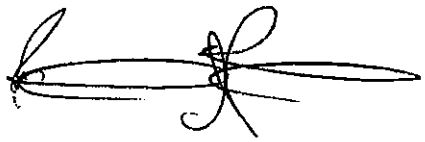
In this matter, the undersigned, as the agent of the Comptroller must credit the opinion of Dr. Lisella over that of Dr. Connolly. Dr. Lisella's testimony and medical records were very thorough and reflective of the years he spent treating the Applicant's ankle injury. It is his unequivocal opinion the Applicant cannot return to full-duty work as a firefighter and paramedic due to his injury, besides there is no surgery available which would make the Applicant able to return to his previous full employment. His opinion is supported by the opinions of two other doctors and the credible testimony of the Applicant himself. In contrast, the opinion of Dr. Connolly is not supported by the record of this case which cannot be given more weight than the extensive testimony and documentary evidence presented by the Applicant, Dr. Lisella, and other medical providers.

It is determined the Applicant has proven he is permanently incapacitated from the performance of his duties due to the injury to his left ankle.

DECISION:

My review of the hearing testimony, the documentary evidence in the record, the post hearing submissions, and the applicable statutes and case law, has led me to the conclusion the Applicant has provided the necessary evidence to meet his burden of proving he is permanently incapacitated for the performance of his job duties as a firefighter and paramedic due to the injury to his left ankle occurring during the performance of his duties on March 27, 2017. Accordingly, I recommend his application for Police and Fire Retirement for Disability Incurred in the Performance of Duty be approved.

By:



Patricia J. Patwell
Supervising Hearing Officer

Dated: February 3, 2023
Albany, New York