

**Commonwealth of Massachusetts
Contributory Retirement Appeal Board**

Diana Back,

Petitioner-Appellant

v.

Barnstable County Retirement Board,

Respondent-Appellee

CR-18-0361

DECISION

Petitioner/Appellant Diana Back (“Ms. Back”) appeals from the decision of an administrative magistrate of the Division of Administrative Law Appeals (“DALA”), which affirmed the decision of the Respondent/Appellee Barnstable County Retirement Board (“Board”) to deny her application for accidental disability retirement pursuant to G.L. c. 32, § 7. Ms. Back was formerly employed as a police officer with the Town of Eastham.¹ By application received by the Board on October 20, 2016, she applied for accidental disability benefits, citing “right hip trochanteric bursitis” and “bilateral trapezial spasm” as the bases therefor.² The Board denied her application because a majority of the Regional Medical Panel (“Panel”) which examined her pursuant to G.L. c. 32, § 6 found that she was not physically incapable of performing the duties of a police officer.³

The DALA magistrate held an evidentiary hearing on March 3, 2020. By decision dated November 13, 2020, DALA affirmed the Board’s decision. Ms. Back filed a timely appeal to us.

¹ Exhibit 17.

²*Id.* Ms. Back retired for superannuation effective in May 2019, and her retirement allowance is in pay status. Exhibit 24; Transcript page 36. The accidental disability benefit that she seeks in this appeal would be a greater benefit than the one she is currently receiving. G.L. c. 32, § 7.

³Exhibit 26.

For the reasons that follow, we agree with the DALA magistrate that Ms. Back is ineligible for accidental disability retirement. Consequently, we affirm the DALA decisions, adopting DALA's findings of fact as our own. For the reasons stated in the discussion, we affirm. The negative certification as to the existence of disability by the majority of the members of the Panel bars the award of accidental disability benefits to Ms. Back. A majority negative certification is binding unless the Panel lacked significant information or applied an erroneous standard in reviewing the application.⁴ As is further discussed below, Ms. Back's claims of error by the majority Panel that examined her are unsupported.

By way of background, we briefly recount some of the facts found by the DALA magistrate. Ms. Back was employed by the Town of Eastham in the police department beginning in 2004.⁵ Starting in 2009 or 2010, she became a school resource officer and served in that position during the school year.⁶ During the summers, she returned to duty as a regular patrol officer.⁷ She worked an 8-hour shift as a school resource officer and a 9-hour shift as a patrol officer.⁸ While working, she wore a uniform and equipment belt weighing 15 pounds.⁹ The equipment included a gun and holster she wore on her right hip.¹⁰ Early in 2014, she began to experience right hip pain.¹¹ In January 2016, Ms. Back's physician diagnosed her with trochanteric bursitis in her right hip and recommended physical therapy.¹² From January 2016 to August 2016, Ms. Back sought treatment for her hip and neck pain and discussed various accommodations with her employer.¹³

⁴ *Malden v. Contributory Retirement Appeal Board*, 1 Mass. App. Ct. 420, 423-424 & n.6 (1973).

⁵ Finding of Fact #2.

⁶ Finding of Fact #4.

⁷ *Id.*

⁸ *Id.*

⁹ Finding of Fact #7.

¹⁰ *Id.*

¹¹ Finding of Fact #10.

¹² Findings of Fact # 14 and 15.

¹³ The DALA magistrate discussed Ms. Back's medical records and accommodations at length, making 27 separate factual findings related thereto. We have adopted DALA's factual findings and will not discuss them at great length in this decision.

In June 2017, Ms. Back was examined by the members of a Panel to evaluate her suitability for accidental disability retirement based on her claimed injuries.¹⁴ She was examined individually by Hwa-Hsin Hseih, M.D., Nabil Basta, M.D., and Thomas Goss, M.D., each of whom specializes in orthopedics.¹⁵ In their reports, each doctor noted the records that they had reviewed in reaching their conclusions and each reviewed information related to Ms. Back's position and the related equipment that she wore.¹⁶ Dr. Hseih supported her application, diagnosing her with "[a]symptomatic greater trochanteric bursitis, chronic in nature, right hip, with likely the same diagnosis on the left side."¹⁷

Drs Basta and Goss, on the other hand, found that Ms. Back was not physically incapable of performing the essential duties of her position. Specifically, Dr. Basta stated that on examination, "there was no evidence of any orthopedic findings" and that the examination was "benign."¹⁸ Dr. Basta found that there was full range of motion in Ms. Back's right hip, and there was "no tenderness in the greater trochanter."¹⁹ Dr. Goss stated, in pertinent part that Ms. Back

says that wearing a gun belt causes unacceptable discomfort over the lateral aspect of her right hip (which was diagnosed as a right trochanteric bursitis) and inability to wear a heavy duty vest....[h]owever, all of Ms. Back's cervical/right shoulder/right hip difficulties are subjective in nature—no hard objective evidence of significant musculoskeletal pathology involving any of these areas has been identified. I can find nothing in the medical records provided of associated neurologic dysfunction and Ms. Back is totally asymptomatic today with a normal examination in all areas....[d]espite her allegations that wearing a gun belt causes unacceptable right hip symptomatology and wearing her protective vest causes unacceptable cervical/ right shoulder symptomatology, I could find no objective basis for these claims.²⁰

¹⁴ Exhibits 18-22.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Exhibit 18.

¹⁸ Exhibit 19.

¹⁹ *Id.*

²⁰ Exhibit 30.

The Board asked that Drs. Basta and Goss clarify their opinions, but neither changed their conclusion that Ms. Back was not disabled.²¹ Based on the majority opinion of the Panel, by notice dated May 23, 2018, the Board informed Ms. Back that it had voted to deny Ms. Back's application and she timely appealed.²²

In September 2018, Ms. Back wrote to the Eastham Police Department that, “[f]ollowing the denial of my accidental disability application from the Barnstable County Retirement Board May 22, 2018, due to no objective evidence, I requested an MRI from my doctor...”²³ The enclosed MRI report stated that the MRI examination was conducted on July 17, 2018, more than one year after the Panel examined Ms. Back to determine her eligibility for benefits pursuant to G.L. c. 32, § 7.²⁴ At the DALA proceedings, Ms. Back also provided an Independent Medical Evaluation report from Dr. Errol Mortimer, which noted that he had both examined her and was drafting his report of the examination on February 20, 2020, nearly three years after the Panel examinations by Drs. Hseih, Basta and Goss.²⁵

Ms. Back makes two claims of error. The first relates to the post-Panel medical records described above that DALA did not order to be provided to the Panel, and the second relates to the conclusions that the majority Panel drew regarding the subjective nature of her complaints. For the reasons discussed below, both of Ms. Back's claims of error lack merit.

DALA properly denied the request to forward post-Panel medical records for review.

Both before DALA and now, Ms. Back bases one claim of error on the fact that two medical reports, the MRI report from 2018 and the IME report from 2020, were not provided to the Panel for their review. For the reasons discussed in the DALA decision, we agree with the DALA

²¹ Exhibits 30 and 33.

²² Exhibit 26.

²³ Exhibit 25 (emphasis added.)

²⁴ *Id.*

²⁵ Exhibit 37.

magistrate that these records should not be considered by the Panel.²⁶ In addition, we add the following comments.

In order to qualify for an award of accidental disability retirement benefits under G.L. c. 32, § 7(1), an applicant must prove that she is totally and permanently unable to perform the essential duties of her job as the natural and proximate result of a personal injury sustained or hazard undergone, as a result of, and while in the performance of her duties, at some definite place and at some definite time. The applicant bears the burden of proving that she is entitled to benefits by a preponderance of the evidence. *Lisbon v. Contributory Retirement Appeal Board*, 41 Mass. App. Ct. 246, 255 (1996); *Campbell v. Contributory Retirement Appeal Board*, 17 Mass. App. Ct. 1018, 1019 (1984). A three-physician regional medical panel, following an examination of the applicant, must issue a certificate addressing the applicant's mental or physical incapacity to perform the essential duties of her job. See G.L. c. 32, § 6(3)(a); *Malden Retirement Board v. Contributory Retirement Appeal Board*, 1 Mass. App. Ct. 420, 423 (1973).

The purpose of the medical panel examination and certificate is to "vest in the medical panel the responsibility for determining medical questions which are beyond the common knowledge and experience of the members of the local [retirement] board." *Id.* When the Panel does not support an application, the applicant does not have an opportunity for a retrial of the medical facts, where there has been a determination of them by the panel, applying proper procedures and correct principles of law. *Kelley v. Contributory Retirement Appeal Board*, 341 Mass. 611, 617 (1961). CRAB is bound by those findings unless the medical panel employed an erroneous medical standard in reaching its conclusions or lacked pertinent facts when it made its determination. *Malden Retirement Board*, 1 Mass. App. Ct. at 424. CRAB cannot substitute its opinion for that of the majority of the medical panel responding in the negative to any of the three parts of the medical certificate, and, absent Panel error, the Panel's decision must stand. *Id.*

²⁶ DALA discussed at length the fact that the Panel evaluated Ms. Back's application and reached its conclusions based on the medical records that Ms. Back provided and that the Panel was not required to ask that Ms. Back seek additional testing in order to prove her claim. DALA decision at *17-18. The burden of proof is on Ms. Back to prove her entitlement to benefits, not on the Panel. *Blanchette v. Contributory Retirement Appeal Board*, 20 Mass. App. Ct. 479, 483 (1985).

Here, the Appellant argues that she was “denied...the opportunity to prove her case” when DALA rejected her argument that the post-Panel 2018 MRI results should be reviewed by the Panel.²⁷ Her argument is misplaced. Although Ms. Back is correct that it is her burden to prove her case, any argument that post-Panel medical records need to be supplied to the Panel fails. As noted above, a negative certification by a majority Panel may be overcome if an applicant can show that the Panel members lacked pertinent facts in reaching its conclusions. *Malden, supra*. However, medical records that did not exist at the time of a Panel examination are not “pertinent facts” that a Panel may have overlooked in examining an applicant. *Goodgion v. Contributory Retirement Appeal Board*, Civil Action No. 08-1622, slip op. at 2 (Mass. Super. Ct. May 1, 2009); *Cannata v. State Board of Retirement*, CR-18-0096 (Contributory Retirement Appeal Board, February 19, 2025); *Grannam v. State Board of Retirement*, CR-12-501 (Contributory Retirement Appeal Board, May 27, 2016) (Panel cannot be said to have lacked information that did not exist at the time of its determination); *Hanover v. State Board of Retirement*, CR-12-575 at *8 (Division of Administrative Law Appeals, October 21, 2016) (post-panel medical record excluded from record as irrelevant).

Similarly, DALA properly determined that the 2020 report of Dr. Mortimer should not be sent to the Panel. Dr. Mortimer examined Ms. Back as part of an Independent Medical Evaluation that her counsel sought to review both her medical records and the reports issued by the Panel. The request was made and the review conducted less than one month prior to the evidentiary hearing at DALA.²⁸ Evaluation reports of this type have been afforded no evidentiary weight.

O'Connor v. State Board of Retirement, CR-14-268 at *12 (Division of Administrative Law Appeals February 9, 2018) (stating that a physician “cannot parse the panel report and attempt to have his opinions [at the Petitioner’s behest] outweigh those of the properly comprised and otherwise legitimate medical panel members.”) Here, Ms. Back admits that she did not even seek or obtain the MRI until after she received the unfavorable Panel results²⁹, and Dr.

²⁷ Specific Objections at

²⁸ Exhibit 37.

²⁹ She stated, in relevant part that she “underwent an MRI of her hips to provide objective evidence to the panel....” Petitioner/Appellant’s Specific Objections at page 6.

Mortimer's report was obtained even later, shortly before the evidentiary hearing at DALA. Ms. Back is not entitled to a retrial of the medical facts of her case. *Kelley, supra*. DALA properly denied her request to submit post-Panel medical records to the Panel which examined her.

The majority Panel applied the appropriate standard in evaluating Ms. Back.

Ms. Back's second claim of error is that the majority Panel based its findings on an erroneous standard when it determined that she was not disabled because the majority determined, in part, there were no objective findings to substantiate her complaints of pain. DALA determined that, "the weight that the panel physicians assigned to Ms. Back's subjective complaints was a matter for the panel's judgment. The physicians were free to exercise their expertise in determining that Ms. Back's subjective symptoms, within the context of the rest of her medical record, did not support a finding of permanent disability." DALA decision at *18. The record demonstrates that Drs. Basta and Goss (the Panel majority) reviewed all of Ms. Back's medical records, conducted a physical examination, and that they understood her claim and the physical requirements of her job. The Panel members examined Ms. Back, and reviewed all the medical information provided to them, even after requests for clarification. As such, the Panel properly carried out its obligation. See G.L. c. 32, §6(3)(a); *Noone v. Contributory Retirement Appeal Board*, 34 Mass. App. Ct. 756, 764. (1993).

Dr. Basta noted that on examination, Ms. Back had full range of motion in her right hip and cervical spine, and no tenderness in her greater trochanter, and she had no symptoms in her upper extremities.³⁰ His report indicated that he understood her physical complaints and he examined the vest that she wore while working.³¹ Similarly, Dr. Goss devoted six paragraphs to discussing Ms. Back's medical records, he outlined her complaints about the gun belt and her vest, and he reviewed her job description.³² The record shows that the majority Panel members properly evaluated her. *Noone, supra*. Moreover, the majority Panel properly evaluated her claim of subjective complaints. They were not required to credit them or afford them particular weight.

³⁰ Exhibit 19.

³¹ *Id.*

³² Exhibit 30.

Back v. Barnstable County Retirement Board, CR-18-0361

Ballentine v. State Board of Retirement, CR-06-503 (Division of Administrative Law Appeals decision on remand August 20, 2010); *Burke v. State Board of Retirement*, CR-17-677 (Division of Administrative Law Appeals, July 31, 2020) (weight that medical panel assigned to subjective complaints is left to the panel's judgment, because it is beyond the common knowledge of the parties and DALA.) The fact that the majority of the Panel did not agree with the assessment of Ms. Back's treatment providers is not indicative of Panel error. *Queenan v. Contributory Retirement Appeal Board*, 2001 WL 292410 (Mass. Super. Ct., February 21, 2010). Ms. Back's claim that the majority Panel applied an erroneous standard in reviewing her application is without merit.

For all of the foregoing reasons, we affirm the DALA decision. DALA properly denied Ms. Back's application for accidental disability retirement pursuant to G.L. c. 32, § 7.

SO ORDERED.

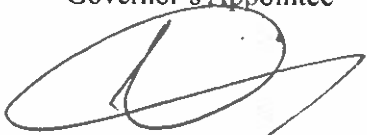
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