

**COMMONWEALTH OF MASSACHUSETTS
CONTRIBUTORY RETIREMENT APPEAL BOARD**

ANA BARBOSA,

Petitioner-Appellee

v.

MIDDLESEX COUNTY RETIREMENT BOARD,

Respondent-Appellant.

CR-15-501

DECISION

Respondent Middlesex County Retirement Board (MCRB) appeals from a decision of an administrative magistrate of the Division of Administrative Law Appeals (DALA), allowing petitioner Ana Barbosa's application for accidental disability retirement benefits. The DALA magistrate heard the matter on November 10, 2016 and admitted twenty-four exhibits. The magistrate's decision is dated April 28, 2017. MCRB filed a timely appeal to us.

Summary

After considering all the arguments presented by the parties and after a review of the record, we adopt the DALA magistrate's Findings of Fact 1- 46 as our own. We reverse. Ms. Barbosa failed to meet her burden of proof that as of her last day of work, she was totally and permanently unable to perform the essential duties of her job due to a personal injury sustained or hazard undergone, as a result of, and while in the performance of her duties. G.L. c. 32, § 7.

Background

On February 16, 2004, Ana Barbosa started working as a school custodian for the Town of Hudson public schools. Beginning in 2008, she was assigned to vacuum the stairs with a vacuum that she carried on her back. On September 27, 2011, Ms. Barbosa was vacuuming with the back pack while going up the stairs when she turned to the right, moved forward, and felt

pain in her right shoulder up into her neck.¹ She reported the injury to her supervisor at that time, and completed her shift. In an Employer Statement, Ms. Barbosa's supervisor, Bradley Parker, stated that "[she] was vacuuming stair treads with back and forth motion when injury to the right shoulder was noticed."² Despite Ms. Barbosa's neck and shoulder pain, she continued to work even after her supervisor could not provide an accommodation.³

Four months before Ms. Barbosa left work in June of 2013, she was referred by her primary care physician, Anupam Mathur, M.D., to Ludmila Fridman, M.D., a neurologist, for complaints of dizziness she experienced since the beginning of the year. Physical examination showed a mild limitation of movement of Ms. Barbosa's neck, and her neck muscles were observed as "very tight and stiff."⁴ Ms. Barbosa underwent a series of diagnostic tests, including ENT testing in March 2013 demonstrating right peripheral vestibulopathy and brain MRI in April 2013 showing no abnormalities.⁵ Based on these findings and her physical examinations, Dr. Fridman concluded that Ms. Barbosa had migraine headaches with vertigo in addition to vestibulopathy. Physical therapy was recommended.⁶

On May 31, 2013, Ms. Barbosa consulted with Paul Ponger, M.D., an orthopedist, for continuing problems with her neck and shoulder. Examination revealed right-sided paravertebral discomfort. However, x-rays of the cervical spine were negative.⁷ Dr. Ponger assessed Ms. Barbosa with neck pain and right paracervical spine discomfort and determined that her symptoms were not related to her cervical spine problem. He opined that physical therapy would be a reasonable treatment option and informed her that she could return for treatment as needed.⁸

At some point prior to ceasing work, Ms. Barbosa attempted to work on light duty, with no pushing, pulling or lifting.⁹ However, she was assigned to use the steam clean machine to wash the walls in the bathroom by her supervisor.¹⁰ After experiencing severe pain for an hour,

¹ See Testimony, Tr. at 13–14.

² Exhibit 16.

³ Testimony, Tr. at 18.

⁴ Exhibit 19.

⁵ An ENG deemed to be consistent with right peripheral vestibulopathy and an MRI deemed normal.

⁶ Exhibit 19.

⁷ Exhibit 7.

⁸ Exhibit 7.

⁹ Testimony, Tr. 29–30.

¹⁰ Testimony, Tr. 29–30.

Ms. Barbosa stopped using the machine.¹¹ She subsequently informed her supervisor about the issue, to which he said there was nothing he could do.¹² Thereafter, Ms. Barbosa went home.

On June 11, 2013, Ms. Barbosa received a letter from the Director of Facilities for Hudson Public Schools requesting that she provide him with a doctor's note verifying her ability to perform all the essential duties of a custodian. Such duties included using a back-pack mounted vacuum, folding and unfolding mechanical conference tables, stacking chairs, using a steam clean machine, emptying trash receptacles, moving boxes up to forty pounds, and shoveling snow.¹³ She ceased working on or about June 20, 2013.¹⁴ As requested, Ms. Barbosa obtained a note from Dr. Ponger, dated June 21, 2013, which stated that she should remain out of work until she finished physical therapy for her neck.¹⁵ Dr. Ponger provided another medical note dated July 25, 2013, for Ms. Barbosa to remain out of work until completion of physical therapy. Thereafter, he approved of Ms. Barbosa returning to light duty restricting her to lifting no greater than 10 pounds with limited overhead activities and use of machinery.¹⁶

When she returned for re-evaluation of shoulder pain on August 6, 2013, Ms. Barbosa reported to Dr. Ponger that she had initially injured her neck and back in September 2011, but recently reinjured it. She had not been able to do any aggressive work with her shoulder. Use of the vacuum cleaner was too heavy, and when assigned to perform powerwashing instead, that also proved to be painful. Physical examination demonstrated significant right sided paracervical spine discomfort from cervical spine up to the occiput with pain extending to the right of her neck towards her right shoulder. Dr. Ponger noted that she was being treated for migraines with significant improvement and determined this issue may be related to her shoulder problems. He recommended continuation of physical therapy and suggested more formal neurological evaluation due to the location of discomfort with involvement of the occiput. As of November 6, 2013, Dr. Ponger indicated that she should remain out of work until she had a neurological evaluation.¹⁷

¹¹ Testimony, Tr. 29–30.

¹² Testimony, Tr. 29–30.

¹³ Exhibit 6.

¹⁴ Exhibit 7.

¹⁵ Exhibit 7.

¹⁶ Exhibit 7.

¹⁷ Exhibit 7.

In September 2013, Ms. Barbosa initiated treatment with William Tosches, M.D., a neurologist. At that time, she reported waxing and waning neck pain, as well as low back pain. Dr. Tosches assessed her with right carpal tunnel syndrome, cervical syrinx, and cervical radiculopathy. He concluded that she was totally disabled from work injuries of September 27, 2011 and June 4, 2013.¹⁸

On October 8, 2013, Ms. Barbosa underwent a neurological evaluation with Dr. Tosches.¹⁹ The physical examination showed 75% restricted range of motion of the neck on lateral rotation to the right, and somewhat less restricted motion on lateral rotation to the left.²⁰ Additionally, there was a 30% reduction in flexion and extension of her neck.²¹ Further, examination showed moderate spasm in the cervical paraspinal muscles, tenderness across the right trapezius, and painful range of motion of the right shoulder.²² Dr. Tosches noted his impression of chronic cervical and right shoulder sprain and opined that Ms. Barbosa remained “totally disabled as a direct result of her work-related injury of 09/2011.”²³

In November of 2013 and January of 2014, Ms. Barbosa saw Dr. Tosches without any change in her condition.²⁴ After each of these appointments, Dr. Tosches opined that Ms. Barbosa remained “totally disabled as result of her work-related injuries of 09/27/11 and 06/04/2013.”²⁵ On February 11, 2014, an MRI of the cervical spine revealed a mild broad-based disc protrusion at C4-C5, greater to the right midline.²⁶ It further revealed that there was a “cavity/syrinx present in the spinal cord extending from the inferior aspect of C5 into the thoracic spinal cord.”²⁷ Again, Dr. Tosches opined that Ms. Barbosa was “totally disabled from all occupations as a direct result of her work-related injuries of 9/27/2011 and 06/04/2013.”²⁸

¹⁸ Exhibit 8. In FN 1 of the DALA decision, we note that the magistrate indicated the record does not contain contemporaneous mention of a second injury on June 4, 2013, and there was no second notice of injury pertaining to this date. DALA decision *6.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *See* Exhibit 8.

²⁵ The date of the second injury is unknown, but Dr. Tosches notes in his evaluation that the injury occurred around June 4, 2013 (*see* Exhibit 8).

²⁶ Exhibit 11.

²⁷ *Id.*

²⁸ Exhibit 8.

On April 1, 2014, Ms. Barbosa filed an application for accidental and ordinary disability benefits due to “neck, right shoulder, and back pain” that resulted from “vacuuming stairs wearing a 10-pound back pack vacuum, using a back and forth motion” on September 27, 2011.²⁹ MCRB denied her application on August 10, 2015.³⁰

A single or series of work-related events

In order to be eligible for accidental disability retirement benefits, Ms. Barbosa must prove that, as of her last day of employment, she was “unable to perform the essential duties of her job,” that “such inability is likely to be permanent,” and that the disability was the result of a personal injury or hazard sustained “as a result of, and while in the performance of, her duties.”³¹ In so doing, she must prove one of two hypotheses: that her disability was caused by a single or a series of work-related events or that her employment exposed her to an “identifiable condition not common or necessary to all or a great many occupations” resulting in a disability through gradual deterioration. *Blanchette v. CRAB*, 20 Mass. App. Ct. 479, 485 (quoting *Zerofski’s Case*, 385 Mass. 590, 595 (1982)). She bears the burden of proving each element of her benefit claim by a preponderance of the evidence. *Lisbon v. Contributory Retirement Appeal Bd.*, 41 Mass. App. Ct. 246, 255, 670 N.E.2d 392 (1996); *Daley v. Contributory Retirement Appeal Bd.*, 60 Mass. App. Ct. 1110, 801 N.E.2d 324 (2004).

The magistrate determined that Ms. Barbosa based her claim for accidental disability retirement on a single or series of work-related events. Specifically, she determined that Ms. Barbosa claimed that the specific act of turning and moving forward while vacuuming with a back pack vacuum, resulted in a personal injury to her neck and right shoulder. DALA decision at *16. The magistrate concluded that Ms. Barbosa met her burden to prove that the claimed injury caused her disabling condition and granted her application for accidental disability retirement.

An applicant seeking accidental disability retirement benefits must be examined by an independent medical panel. G.L. c. 32, § 6(3)(a); *Kelley v. Contributory Ret. App. Bd.*, 341 Mass. 611, 613 (1961). *See also Malden Ret. Bd v. Contributory Ret. App. Bd.*, 1 Mass. App. Ct. 420,

²⁹ Exhibit 14; FF 24.

³⁰ Exhibits 1,3; FF 46.

³¹ G.L. c. 32, § 7(1) (in pertinent part); *see generally Murphy v. Contributory Retirement Appeal Bd.*, 463 Mass. 333, 345 (1985).

423 (1973) (panel opines on medical questions “beyond the common knowledge and experience of [a] local retirement board”). A condition precedent to granting accidental disability retirement benefits is the panel’s issuance of an affirmative certification on questions of incapacity, permanence, and causation.³² *Kelley*, 341 Mass. at 613. While the majority medical panel answered all three questions of incapacity, permanence, and causation in the affirmative, its opinion on causality is “not conclusive of the ultimate fact,” but is “some evidence on the issue.” *Blanchette*, 20 Mass. App. Ct. at 483, 481 N.E.2d at 219. Its certification is only a statement of “medical possibility.” *Lisbon*, 41 Mass. App. Ct. at 254, 670 N.E.2d at 398, *quoting Noone v. Contributory Retirement Appeal Bd.*, 34 Mass. App. Ct. 756, 762, 616 N.E.2d 126 (1993). The final determination as to whether causation was proved is reserved to CRAB, “based on all the facts found and all the underlying evidence, including both the medical and non-medical facts.” *Blanchette*, *supra*.

Under G.L. c. 32, § 7(1), an applicant must prove that the work-related injury was the “natural and proximate cause” of the disability. *Campbell v. Contributory Ret. App. Bd.*, 17 Mass. App. Ct. 1018, 1018-19 (1984). Aggravation of a pre-existing condition to the point of disability satisfies the natural and proximate requirement. *Baruffaldi v. Contributory Retirement Appeal Bd.*, 337 Mass. 495, 150 N.E.2d 269, 271 (1958). In this instance, for an injury to be the “natural and proximate” cause of Ms. Barbosa’s disability, her injury must be more than a “contributing” or “aggravating” factor to her pre-existing condition. *Blanchette*, 20 Mass. App. Ct. at 485; *Campbell*, 17 Mass. App. Ct. at 1019. *See also Burke v. Contributory Retirement Appeal Bd.*, 34 Mass. App. Ct. 212, 213 (1993). The Supreme Judicial Court has determined that for an event of employment to be more than a “contributing cause,” it must be “a significant contributing cause to [the] employee’s disability.” *Ann Marie Robinson’s Case*, 416 Mass. 454, 460, 623 N.E.2d 478 (1993).

Here, there are several factors that weigh against granting Ms. Barbosa’s application for accidental disability retirement. While she claimed that she sustained a work injury on

³² The panel addresses three questions: (1) whether the applicant is mentally or physically incapacitated for further employment duties; (2) whether such incapacity is likely to be permanent; and (3) “whether or not the disability is such as might be the natural and proximate result of the accident or hazard undergone on account of which [an accidental disability] retirement is claimed.” G.L. c. 32, § 6(3).

September 27, 2011, she did not seek or receive any medical treatment within proximity to this injury. In fact, any medical treatment that she received for complaints of neck, right shoulder and back pain came more than twenty months later. Without any contemporaneous medical records, it is difficult to determine that the claimed injury of September 27, 2011 caused her disability. This is especially true when there is evidence of other possible causes of her disability as discussed in more detail below. Furthermore, although she testified that she received assistance from others and worked with a significant amount of pain following this injury, Ms. Barbosa did not miss any or much time from work as a result of this injury, and she did not cease working until June 20, 2013. Where there are no contemporaneous medical records for treatment of this injury and where she did not cease working until more than twenty months after the work injury, Ms. Barbosa has not proved by a preponderance of the evidence that the September 27, 2011 work injury caused her disability.

Further, Ms. Barbosa's application must be denied because she failed to prove that the September 27, 2011 injury was the natural and proximate cause of her disability. When there is evidence of other possible causes of the disability, to be the natural and proximate cause, Ms. Barbosa must prove that the claimed injury of September 27, 2011 be "a significant contributing cause" of her disability. *Ann Marie Robinson* at 460. The evidence in the record does not support this determination. First, Dr. Tosches, in his Treating Physician Statement, concluded that Ms. Barbosa was permanently disabled from performing the essential duties of her job as a result of injuries sustained on September 27, 2011 and June 4, 2013.³³ Although the record does not contain a second notice of injury for June 4, 2013, this opinion does not satisfy the criteria articulated by the SJC that the claimed injury be "a significant contributing cause" to her disability. Dr. Tosches' opinion merely indicates that it was a cause of her disability.³⁴

Similarly, other treating sources concluded the same. Dr. Ponger noted on August 6, 2013 that Ms. Barbosa presented for an evaluation for shoulder pain. He indicated that she first injured her neck and back in September 2011 but had reinjured them relatively recently.³⁵ After evaluating her for chronic neck pain, numbness and tingling of the right hand, and history of chronic low back pain, Dr. Ponger opined Ms. Barbosa to be disabled due to work related

³³ Ex. 15.

³⁴ *Id.*

³⁵ Ex. 7, 21.

injuries of September 27, 2011 and June 4, 2013.³⁶ Dr. Ponger continued to conclude the same after examining Ms. Barbosa on September 3, 2014.³⁷ His opinion does not reflect that the September 2011 injury was a “significant contributing cause,” and therefore, was not the natural and proximate cause of Ms. Barbosa’s disability.

Additionally, the timeline and sequence of events are at odds with Ms. Barbosa’s claim that she became disabled as a result of the September 2011 injury and that she ceased working as a result of this injury. Here, the record does not reflect that Ms. Barbosa sought or received any medical treatment after the September 27, 2011 injury, but continued working, albeit with subjective complaints of pain and limitations.³⁸ It was not until June 2013 that Ms. Barbosa sought treatment for complaints of neck and back pain. The medical records indicate that Ms. Barbosa reported to her doctor that she sustained an injury on June 4, 2013, that she was experiencing pain from this injury, and that she stopped working shortly thereafter on June 20, 2013.³⁹ Based on this, it would be difficult to conclude that Ms. Barbosa was disabled from the September 27, 2011 injury and that she ceased working in June 2013 as a result of this injury. Rather, this timeline and sequence of events calls into question as to whether Ms. Barbosa was disabled as of her last day of work as a result of the claimed injury of September 2011. *Vest v. Contributory Retirement Appeal Bd.*, 41 Mass. App. Ct. 191 (1996) (employee who has left government service without established disability may not, after termination of government service, claim accidental disability retirement status on basis of subsequently matured disability). We have consistently interpreted *Vest* to stand for the proposition that a member must establish permanent incapacity as of the date he or she last actively performed his or her essential duties based on the same disability for which the member is now seeking accidental disability retirement. See *Mathew Tinlin v. Weymouth Retirement Bd.*, CR-13-361 (CRAB Aug. 9, 2016); *Lauren Forrest v. Weymouth Retirement Bd.*, CR-12-690 (CRAB Apr. 13, 2015); *Myra Wolovick v. Teachers’ Retirement Bd.*, CR-02-1410 (CRAB Oct. 12, 2004); *Jose Chavez v. PERAC*, CR-04-427 (CRAB Dec. 23, 2004). Said differently, when an applicant seeks accidental disability retirement, he or she must establish that the same reason he or she stopped

³⁶ Ex. 8 (11/19/2013), (1/21/2014), (3/5/2014).

³⁷ Ex. 8.

³⁸ Respondent Memo at 10.

³⁹ Ex. 21.

working is the same reason for which he or she later seeks the benefit. Based on this timeline and reports to her doctor of a subsequent injury on June 4, 2013, Ms. Barbosa fails to meet her burden that she was disabled by her claimed injury as of her last day of work.

The medical panel's response to clarification questions dated June 25, 2015 addressing this chronology of events, further supports our determination that there were other causes of Ms. Barbosa's disability and that she was not disabled as of her last day of work based on the claimed injury of September 2011. On behalf of the medical panel, Dr. Lurie noted:

"I mentioned the June 2013 injury in a summary statement/question to her to the effect of, 'so you finally could no longer work due to the second injury just before you stopped?' She responded, indicating yes. This added to the plausibility of the chronology of injuries and work cessation. It also explains that it was not until July 25, 2013 that a physician first noted the applicant's complaints of 'right shoulder discomfort.' Of course, another reason is that she had been going to the doctor for dizziness and headaches, both of which were quite distressing for her. The visits to the PCP were for dizziness, as was the referral to the neurologist Dr. Fridman. It appeared that only when she reached an orthopedist did she and/or the doctor focused on orthopedic issues. Moreover, the date of July 25, 2013 was after the alleged second injury of June 2013. *Thus, it is plausible that the claimant had a relatively mild right shoulder discomfort that she was used to, and only complained when it was exacerbated [] the second injury.*"⁴⁰

Dr. Lurie's response reflects the June 2013 injury to be a cause of Ms. Barbosa's disability. It does not indicate the September 27, 2011 injury to be a "significant contributing cause" of her disability, nor does it establish that Ms. Barbosa was disabled as of her last day of work as a result of the September 2011 injury. Thus, when considering the totality of the evidence, we cannot conclude that the September 2011 injury to be the "natural and proximate" cause of Ms. Barbosa's disability, nor can we conclude that Ms. Barbosa was disabled as of her last day of work as a result of the claimed injury of September 2011.

Gradual Deterioration

MCRB argues that Ms. Barbosa based her claim for accidental disability retirement on the second theory addressed in *Blanchette* and *Zerofski* – that her injury was noncompensable because it was caused by a "common movement." *Adams v. CRAB*, 414 Mass. 360 (1993).

⁴⁰ Ex. 5.

Specifically, MCRB explained Ms. Barbosa noted in her application that “[o]n 9/27/2011, [she] was vacuuming stairs wearing a 10-pound back pack vacuum, using *a back and forth motion* when [she] developed neck and right shoulder and back pain.” Based solely on this description of a “back and forth motion,” MCRB asserts that Ms. Barbosa’s claim was based on a common movement. We do not find that there is enough evidence to establish in the record that Ms. Barbosa’s claim for accidental disability retirement was based on a common movement. There are no records that demonstrate Ms. Barbosa was injured while engaged in a repetitive motion. Regardless, Ms. Barbosa is unable to establish her entitlement to accidental disability retirement benefits because she failed to prove by a preponderance of the evidence that her claimed injury was the natural and proximate cause of her disability and that she was disabled as of her last day of work by the claimed injury.

Conclusion

The decision of the DALA magistrate is reversed. Ms. Barbosa failed to meet her burden of proof that her claimed injury of September 27, 2011 was the natural and proximate cause of her disability and that she was disabled as of her last day of work based on that claimed injury. Accordingly, she is not entitled to accidental disability retirement benefits pursuant to G.L. c. 32, § 7.

SO ORDERED.

CONTRIBUTORY RETIREMENT APPEAL BOARD



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Date: April 3, 2023