COMMONWEALTH OF MASSACHUSETTS
Division of Administrative Law Appeals

ALAN BARNABY, *Petitioner*	:	Docket No. CR-21-0273
v.	:	Date: September 15, 2023
PITTSFIELD RETIREMENT SYSTEM, *Respondent*	:	

Appearance for Petitioner:

Cynthia Spinola, Esq.
Hashim & Spinola
Pittsfield, MA 01201

Appearance for Respondent:

Christopher Collins, Esq.
Law Office of Michael Sacco, P.C.
Southampton, MA 01073

Administrative Magistrate:

Eric Tennen

SUMMARY OF DECISION

The Pittsfield Retirement System denied the Petitioner's application for accidental disability following a negative medical panel. The Board's decision is upheld. The panel majority's decision was not plainly wrong, they did not use an incorrect legal standard, nor did they lack pertinent facts. Further, the Board's pre-assessment letter to the panel, while not encouraged, did not result in a procedural error and did not improperly influence the panel.

DECISION

Pursuant to G.L. c. 32, § 16(4), the Petitioner, Alan Barnaby, appealed the Pittsfield Retirement System ("PRS") denial of his application for accidental disability. The Petitioner was a long-time custodian for the Pittsfield schools. Over the course of his career, he experienced several injuries at work. After the last one in 2019, he stopped working and applied for accidental disability. On June 24, 2021, the PRS denied his application based on a negative medical panel. He timely appealed.

I held an in-person hearing on February 14, 2023 at the Division of Administrative Law Appeals (DALA) offices in Malden. Mr. Barnaby testified on his own behalf that day. I conducted a second day of hearings, virtually, on March 7, 2023. Karen Lancto, Executive Director of the Pittsfield Retirement System testified that day on behalf of the Petitioner. The PRS offered no witnesses.

In the pre-hearing memorandum, the parties jointly submitted agreed upon, or stipulated facts—which I incorporate below. They jointly submitted Exhibits (A-AA), Petitioner submitted additional exhibits PA-PH, and the PRS submitted additional exhibits RA-RD, all of which I entered into evidence at the hearing without objection. The parties submitted closing briefs on June 15, 2023, whereupon the administrative record was closed.[1]

FINDINGS OF FACT

Based on the stipulated facts, the Petitioner's testimony, and the exhibits submitted into evidence, I make the following findings of fact:

1. The Petitioner is 73 years old. He worked as a custodian for the City of Pittsfield for over

[1] After submitting their closing briefs, each party then filed a motion to submit a supplemental memorandum. I denied both motions because the parties had already, extensively briefed the points they wanted to supplement.

19 years. (Stipulated Facts.)

2. He worked at various schools over the years, but only one school at a time. (Petitioner Testimony.)
3. Over his career, he worked primarily the day shift (from noon-8:00p.m.). Towards the end, he sometimes worked the morning shift (6:00a.m-2:00p.m.) (Petitioner Testimony.)
4. Different shifts required different tasks. For example, the morning shift required snow removal (when necessary). (Petitioner Testimony.)
5. He was not the only custodian working at the schools. Over his career, he would work with 3-4 other custodians at a time. (Petitioner Testimony.)
6. Many of them would be required to perform the same duties, just in different areas of the school. (Petitioner Testimony.)
7. Regardless of shift, his job required many physical tasks such as snow blowing and salting sidewalks, stacking and unstacking chairs, trash removal, landscaping, sweeping and vacuuming, glass cleaning, delivering office supplies, and general cleaning. (Exhibit D; Petitioner Testimony.)
8. These tasks, in turn, required a significant number of activities that added strain to the Petitioner's back. For example, he had to carry a 35 lb. vacuum cleaner, four hours a day. He delivered office supplies which frequently including carrying boxes weighing more than 50 lbs. Trash bags could weigh up to 70 lbs.; he would carry them to, and then heave them in, the dumpsters. Once a week he lifted and washed cafeteria tables and chairs. (Ex. S; Petitioner Testimony.)
9. During his 19 years, he repeatedly performed these physical tasks that in turn required him to twist, bend, pivot, climb, and squat. (Stipulated Facts.)

Injuries

10. In 1976, the Petitioner was in a motorcycle accident. It caused several injuries including some permanent paralysis in his left arm and damage to his vocal cords. (Exs. L and N.)
11. The accident did not cause any injuries to his back. (Petitioner Testimony.)
12. During his employment, he was involved in several accidents—though not every accident resulted in serious injuries or loss of work. He reported accidents, such as slipping and falling, and straining his back while moving furniture, in January 1999, June 1999, July 2002, and July 2003. (Exs. PB-PE.)
13. In August 2008, the Petitioner suffered a back injury when he fell breaking up furniture. This accident resulted in loss of work. (Ex. W.)
14. X-rays from that time revealed that the Petitioner has spondylolisthesis of L4 over L5 measuring 6.2 mm and scoliosis in his upper back causing him to position towards the left. (Ex. Y, pg. 139.)
15. He had never suffered from these problems before. (Ex. Y, pg. 182.)
16. He underwent physical therapy for several months but stopped because he was not making progress. (Petitioner Testimony.)
17. When he returned to work, he still experienced pain. (Stipulated Facts.)
18. His back continued to hurt, and he had to gradually reintegrate. But he eventually did. (Petitioner Testimony.)
19. In September 2018, he hurt his back again. (Petitioner Testimony.)
20. This time it happened while he was bringing in kitchen supplies from the loading dock. He had to lift six 45-lb cans onto a dolly. In doing that, he strained his back. (Petitioner Testimony.)

21. He was out of work for about a month. During that time, he underwent occupational therapy and received workers compensation benefits. (Stipulated Facts.)

22. He returned to work for about 10 weeks. Unfortunately, he suffered increasingly severe back pain performing his normal duties. (Stipulated Facts.)

23. On December 17, 2018, he suffered another acute back injury while snow blowing—during one of the few days he worked the morning shift. (Petitioner Testimony.)

24. While using the snow blower, he hit an uneven slab of concrete. It jolted his arm back and caused more back pain. (Petitioner Testimony.)

25. In response, he participated in physical therapy and occupational health rehabilitation. (Stipulated Facts.)

26. He was prescribed various medications, none of which provided any long-term relief. (Petitioner Testimony.)

27. He again suspended physical therapy because he was not making progress. (Petitioner Testimony.)

28. In March, 2019, the Petitioner attempted to return to work for three days. He did not want to retire because he was intent on maxing out his retirement benefits. (Petitioner Testimony.)

29. However, he continued to experience intolerable back pain that radiated to his leg and thorax. The pain was especially severe when he carried the heavy vacuum for four hours a day. (Stipulated Facts.)

30. After that, he was unable to work again at the school. (Petitioner Testimony.)

31. A May 21, 2019 x-ray revealed that he now had a "grade 1 anterolisthesis L4 over L5 similar to prior moderate disc space narrowing from L4/S1 and L2/3 progressed since

2008." (Ex. Y, page 296.)

32. He continues to suffer regular pain through today. He has involuntary spasms that radiate pain in his back.[2] He constantly experiences pain which he classifies as 7 out of 10. He can experience temporary relief—like when he takes pain medicine—but nothing alleviates his pain long term. (Petitioner Testimony.)

Home Depot Employment

33. In addition to his work as a custodian, since 2002, the Petitioner worked part-time for Home Depot. He worked in the paint department on weekends. (Petitioner Testimony.)

34. He worked primarily in the aisles, helping customers put together supplies for their projects. (Petitioner Testimony.)

35. His job did not require a lot of heavy lifting. Sometimes he would carry one-gallon cans of paint. He would use a dolly to move heavier items. (Petitioner Testimony.)

36. He continued to work there regularly until December 17, 2018—the day he hurt himself while working at school. Thereafter, he worked more sporadically. (Petitioner Testimony.)

37. He worked almost every weekend through April 28, 2019. However, some weekends he worked half-days; some weekends he only worked one day; and some weekends he did not work at all. (Ex. E.)

38. He did not work again at Home Depot after April 2019. (Petitioner Testimony.)

Workers Compensation Claim

39. For his injury, starting on December 17, 2018, the Petitioner received workers

[2] At the hearing, these spasms were visible. They would occur involuntarily and unpredictably.

compensation benefits. (Ex. W.)

40. As part of that case, the Petitioner was evaluated by Dr. Pier Boutin. (Ex. J.)

41. Dr. Boutin opined that the Petitioner "has a back injury that resulted from the chronic or the long-standing physical demands of his employment." (Ex. J.)

42. Dr. Boutin did not believe any further treatment would be beneficial. The Petitioner's limitations were therefore permanent. (Ex. J.)

Accidental Disability Application

43. The Petitioner took superannuation retirement on November 1, 2019. (Stipulated Facts.)

44. He applied for accidental disability benefits on November 27, 2019. (Ex. A.)

45. The reason for accidental disability was the "personal injury" he suffered based on his injuries from August 21, 2008 and on September 17, 2018 (which he reinjured in December, 2018, and then again in April, 2019).[3] (Ex. A.)

46. He ceased being able to perform his essential duties on April 29, 2019. (Ex. A.)

47. He included a Treating Physician's Statement from Dr. Mary Kilayko. (Ex. I.)

48. She diagnosed him with chronic back pain and deep vein thrombosis ("DVT"). As to his disability, she explained his chronic back pain "has not gotten better > 1 year despite pain medication and PT." (Ex. I.)

49. The PRS sent the matter to a Medical Panel. It included a memorandum with an outline of the case and questions for the panel to consider. (Ex. K.)

50. PRS's executive director, Karen Lancto, was in charge of uploading documents to

[3] The April 2019 date was a mistake, and it should have read March 2019 (Ex. K).

PROSPER[4] to be shared with the medical panel. (Lancto Testimony.)

51. When preparing documents for a medical panel, Ms. Lancto sends what she receives. She will usually receive documents from an applicant, from the employer, and sometimes the Board. All that is forwarded. (Lancto Testimony.)

52. In this case, she received multiple documents from the Petitioner: his application, attachments to the application, and medical records. Via PROSPER, the PRS sent the medical panel several medical records. The medical records were mostly all recent, from 2018-2020. They also included a lumbar x-ray from 2008. (Ex. RA; Lancto Testimony.)

53. Ms. Lancto received a job description from the Pittsfield School Department. That too was uploaded. (Lancto Testimony.)

54. Ms. Lancto also explained that when a member files a report of a workplace accident, the employers normally forward those reports to the Retirement Board. When she receives a report like that, she opens a file for the member and places the report in the file. If another accident report is later submitted for that same member, she adds it to his file. (Lancto Testimony.)

55. In this case, the Petitioner had a file that contained several older accident reports that pre-dated the accidents listed on his application. (Lancto Testimony.)

56. Ms. Lancto could not remember if she made those reports available to the medical panel through PROSPER. The printout of the documents she uploaded to PROSPER does not include those. I therefore find they were not made available to the medical panel. (Lancto Testimony; Ex. RC.)

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[4] PROSPER stands for PERAC Real-time Online Self-Service Portal for Efficient Regulation. *See* PERAC Pension News, No. 45 (Feb 2017).

57. Ms. Lancto does not typically conduct an independent investigation, meaning, she does not go looking for documents to provide a panel. The only time she may do that is, for example, when she is missing a required document like a job description. (Lancto Testimony.)

58. Her tasks are purely administrative. She is not involved in framing questions to the panel or making any legal conclusions, such as what theory of disability the panel will review. To the extent she submits letters or memorandum that ask the panel to review certain facts and legal theories, those are drafted by the Board (typically its attorney). She simply signs her name and uploads it to PROSPER. (Lancto Testimony.)

59. In this case, Ms. Lancto submitted a memorandum, with exhibits, to the medical panel; she signed the memorandum. However, the Board's attorney prepared that memorandum. (Lancto Testimony; Ex. RC.)[5]

60. The memo summarized the Board's understanding of the Petitioner's injuries and medical records. (Ex. K.)[6]

61. The memo added issues for the panel to consider. For example, it noted that the Petitioner's doctor qualified his application based solely on his chronic back conditions and deep vein thrombosis ("DVT"). It instructed the panel to limit its "incapacity and permanency responses to his lumber and thoracic conditions and DVT." (Ex. K.)

62. It also instructed the panel to focus only on the four enumerated incidents in answering

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[5] To be clear, I am not suggesting Ms. Lancto did anything wrong in signing a memorandum drafted by someone else and uploading that to PROSPER. She is simply an administrative conduit between the Board and the Panel.

[6] Because the memorandum is too long to recount in full, I have included a copy of it as an Appendix for the reader's convenience.

the causation question (Aug 2008, Sept. 2018, Dec. 2019 and March 2019). It asked the panel to describe with as much detail as possible how the incidents may have caused his incapacity "without the benefit of any diagnostic studies in the form of MRIs and CT scans."[7] (Ex. K.)

63. The memo also had additional attachments, including surveillance reports of the Petitioner. These were prepared in his workers compensation case. (Ex. H.)

64. The Petitioner was evaluated by three doctors, each orthopedic specialists: Drs. Eugene Brady, Laurence Cohen, and John Golberg. (Exs. L, M and N.)

65. All three doctors agreed he was disabled and permanently incapacitated. However, Drs. Brady and Cohen did not opine that his incapacity was caused by his workplace injury; Dr. Golberg believed it was. (Exs. L, M and N.)

66. Dr. Brady summarized his findings:

> [R]egarding the history of a DVT, the claimant was not at strict bed rest and does not indicate any trauma to the left leg. I feel it is entirely speculative as to inactivity causing the DVT as he was never at full bed rest.
>
> Responding to the specific injuries as cited including August 21, 2008, when he fell breaking furniture, the injury of September 17, 2018, when he was lifting and moving heavy boxes, another episode where he indicates pain just lifting continuers [sic] of apples, also December 17 2018, doing snow blowing, and ultimately March 11, 2019, when he had returned to work for one day and was carrying a vacuum backpack and noted the onset of pain, all these episodes resulted in a period of increased back pain. There is no documented evidence that any caused any structural injury to his back.
>
> Based on his history, record review, and exam, the claimant is felt to be incapacitated from resuming the heavy work requirements of a custodian, but it is felt that these complaints are related to progressive degenerative changes, not to any specific injury at work. The claimant certainly seems to have been a hard worker, and his history shows he was actually working two jobs, one in a

[7] Presumably, the Board added this limitation because no MRI or CT scans were available and not to suggest the Panel should ignore such evidence if it existed—which it did not.

> paint department at The Home Depot as well. That job also involved a certain amount of bending and lifting cans, etc. I feel the review of records indicates that his degenerative changes in the back are an accumulation of age primarily, and no one particular injury at work seems to have caused any structural damage or aggravation as noted on x-rays.

(Ex. L.)

67. Dr. Cohen's findings were similar:

> In my opinion his disability is not the result of any of the several reported work-related incidents, but rather a reflection of the exacerbation of his pre-existing condition, degenerative disc disease, by these episodes as described. Each of the episodes I believe caused an exacerbation. The few imaging studies which we have, do not identify an acute injury and there are no hard physical objective findings described on any of the several reports which I have reviewed following his reported injury. As is usually the case, the findings described actually reflect descriptions of pain on testing, and that is subjective.
>
> Mr. Barnaby's permanent impairment is the result of the natural progression of his pre-existing condition.
>
> Although several examiners have opined that "maybe" the venous thrombosis was the result of his relative inactivity which was forced upon him by his back injuries, I do not feel that this is the case. In my opinion, it is just as possible that he could have developed the DVT as a result of his longstanding paresis together with some unknown factor. Of course, there is often not a specific explanation for why one may develop a DVT. Often a specific cause can be not [sic] determined, except perhaps in the case of an occult malignancy. It is also helpful that the surveillance indicates that his existence during that period of time was not sedentary.
>
> Considering that he was able to return to his usual position at the school and hold a second job at the Home Depot, I am not considering the injury described in 2018 as a part of the collective injuries leading to his retirement. This was a self-limiting sprain of the spine.

(Ex. M.)

68. After receiving these two reports, the Petitioner filed several motions. (Exs. O-S.)

69. On January 27, 2021, he filed "Member's objection to Respondent's memorandum submitted to the panel examiners and motion for permission to submit supplemental

hypothetical questions and additional evidence to the panel examiners." This was accompanied by a memorandum of law and a list of hypothetical questions for the panel. (Exs. P and S.)

70. The parties then exchanged numerous e-mails about whether further questions would be submitted to the Panel. The Board ultimately objected to the Petitioner's proposed questions. (Ex R.)

71. In the meantime, on March 9, 2021, Dr. Golberg submitted his report. It was later than the others because he had to reschedule his examination. Ultimately, he disagreed with the other panelists. He considered "the injuries of records to be a proximate and predominant but not necessarily exclusive cause of his present incapacity." (Ex. N.)

72. Then on April 28, 2021, the Petitioner filed a "Motion to deem the panel examiners' Brady and Cohen reports inadequate pursuant to 840 C.M.R. 10.10 (4) and to conduct further examination pursuant to 840 C.M.R. 10.11 (3)." (Ex. O.)

73. These were filed with Ms. Lancto, with a copy to the Board's attorney.

74. Ms. Lancto testified that she received these. She indicated that objections and motions to medical panel reports were rare. When that happens, she consults with the Board's attorney about next steps. (Lancto Testimony.)

75. I understand this to mean that she does not decide whether to request a reevaluation or submit any further documents to the panel; instead, she takes her direction at that point from Board counsel.

76. Ultimately, after much back and forth between the Petitioner's counsel and Board counsel, on May 18, 2021, the PRS submitted a follow up letter to Drs. Cohen and Brady, but no additional documents. (Ex. V.)

77. The letter indicated that although the "Board was satisfied with the detail and quality" of their certificates, the Petitioner's "counsel raised a number of issues with the Board that the Board agreed to bring to" the doctors' attention. (Ex. V.)

78. The PRS then asked the doctors to address seven additional questions in as much detail as possible:

> 1. Is it medically ***possible*** that Mr. Barnaby's permanent incapacity is the natural and proximate result of cumulative trauma from performing his position's daily physical demands over the course of 18 years? The Board understands that Mr. Barnaby's custodial duties included *carrying a 35 lbs. vacuum backpack four hours a day five days a week while bending, pivoting, twisting climbing and twisting as well as throwing overhead bags of garbage weighing 50-100 lbs into a dumpster several times a day five days a week;*
>
> 2. Did Mr. Barnaby at some point in time develop anterolisthesis at L4 over L5 and disc space narrowing at L4/S1 and L2/3 and chronic back sprain?
>
> 3. Please identify Mr. Barnaby's lumbar spine conditions that ***possibly*** resulted from repeated, prolonged *axial loading on his spine due to* performing his position's daily physical demands.
>
> 4. Did Mr. Barnaby suffer from a preexisting condition in his lumbar spine on December 17, 2018?
>
> 5. What were the preexisting conditions?
>
> 6. Was the preexisting condition ***possibly*** caused from performing his position's daily physical demands?
>
> 7. Is Mr. Barnaby's total and permanent disability ***solely due to the natural progression of his preexisting conditions?*** Please elaborate on your response.

(Ex. V) (emphases in original.)

79. On May 21, 2021, Drs. Brady and Cohen responded with addendums to their reports. They did not change their conclusions. (Exs. L and M.)

80. Both emphasized that, in their opinions, the most likely cause of the Petitioner's

disability was the natural degenerative changes that come with age. (Exs. L and M.)

81. After the doctors had submitted their addendums, on June 23, 2021, the Petitioner forwarded more records to the PRS, all of which pre-dated the Board's supplemental letter: Dr. Boutin's report from the Petitioner's worker's compensation case (dated January 4, 2021), Dr. Kilayko's response to the medical panel's original reports (dated April 27, 2021), a job description, acupuncture records, report of thoracic spine CT scan, and occupational health records. (Stipulated facts.)[8]

82. The Board did not provide these documents to the panel. (Stipulated facts.)

83. Instead, on June 24, 2021, the Board denied the Petitioner's application and he timely appealed. (Exs. AA and 23.)

CONCLUSION AND ORDER

The Petitioner has the burden of proving every element of his disability claim. *Lisbon v. Contributory Ret. App. Bd*., 41 Mass. App. Ct. 246, 255 (1996); *Frakes v. State Bd. of Ret.*, CR-21-0261, 2022 WL 18398908 (DALA Dec 23, 2022). "G.L. c. 32, § 7(I) provides for accidental disability retirement benefits if a member (1) 'is unable to perform the essential duties of his job' and (2) 'such inability is likely to be permanent before attaining the maximum age for his group,' (3) 'by reason of a personal injury sustained or a hazard undergone as a result of, and while in the performance of, his duties,' (4) 'without serious and willful misconduct on his part.'" *Brady v. Weymouth Ret. Bd.*, CR-20-0201, *9 (DALA Jul. 15, 2022). "A condition precedent for

[8] The Petitioner's hearing memorandum and the joint statement of agreed facts state that the Petitioner filed Dr. Kilayko's report with the Board on June 23, 2021. The Petitioner then submitted a supplemental statement of disputed facts in which he wrote Dr. Kilayko's response was sent to the Board *before* it submitted the May 18, 2021 clarification letter. The record is therefore less than clear on this point. I find the Petitioner has not met its burden to prove this fact. Absent contrary evidence, I infer the Petitioner forwarded Dr. Kilayko's letter at the same time he forwarded Dr. Boutin's report and the additional medical evidence.

awarding accidental disability" is that "[a] majority of the panel must conclude the applicant is permanently unable to perform his essential job duties and that there is a medical possibility of a causal relationship between the disability and a personal injury or hazard undergone while performing his duties." *Id.* at *10, *citing Lisbon, supra*. When the medical panel issues a "negative" panel report, the Petitioner's burden is onerous:

> A negative panel report generally precludes an applicant from receiving accidental or involuntary disability retirement benefits.
>
> The general rule that a negative panel ends an application for accidental or involuntary disability retirement benefits has a few exceptions: if the medical panel did not "conform[] to the required procedure of physical examination"; it lacked "all the pertinent facts"; it used an erroneous legal standard; or the medical certificate was "plainly wrong."

Beauregard v. Fall River Ret. Bd., CR-18-0498, *2-3, 2022 WL 16921428, (DALA., Mar. 11, 2022), *citing Kelley v. Contributory Ret. App. Bd.*, 341 Mass. 611, 617 (1961).

1. There is no reason to overturn the Panel's conclusions on causation.

The Petitioner's first argument is that his injury was proximately caused by his workplace accident. Put in the context of a negative panel, I interpret his argument as suggesting the Panel's conclusions on causation were "plainly wrong." "The 'plainly wrong' exception does not entitle a petitioner to 'an opportunity for a retrial of the medical facts.' A medical panel's opinion is not plainly wrong simply because a petitioner disagrees with it." *Chiasson v. Worcester Ret. Bd.*, CR-17-0867, *10, 2021 WL 9697044, (DALA Dec. 10, 2021), *quoting Kelley v. CRAB*, 341 Mass. 611, 617 (1961).

First, he urges his injury was the product of gradual deterioration from an "identifiable condition . . . that is not common and necessary to all or a great many occupations." However, the facts do not support a finding that he was injured from an uncommon condition and the panel was right not to conduct its analysis under this theory. "Examples of 'identifiable conditions'

include exposure to hazardous materials, such as asbestos, or continuous exposure to traumatic events. Heavy lifting, pulling, and pushing activities, on the other hand, are common and necessary to many occupations, and therefore are usually deemed insufficient to support an award of accidental disability retirement." *Headd v. State Bd of Ret.*, CR-19-0197, *7 (DALA, Sep. 9, 2022) *and cases cited*. In evaluating the conditions, we should compare the Petitioner's duties with other similarly situated workers when possible. *See e.g. Morse v. CRAB*, 9 Mass. App. Ct. 114 (2019) (unpublished opinion), *affirming Morse v. State Bd. of Ret.*, CR-13-491 (CRAB Aug. 1, 201); *Fender v. CRAB,* 72 Mass. App. Ct. 755, 762 (2008) ("We discern no error in CRAB's comparative analysis of different professions, an undertaking that was, in the circumstances of this case, properly within the province of its expertise.").

The duties the Petitioner lists as uncommon conditions are in fact duties common to many occupations involving physical labor. CRAB recently affirmed that "heavy labor, in and of itself, is not a hazard uncommon to many occupations." *Sibley v. Franklin Reg. Ret. Bd.*, CR-15-054, *8 (CRAB May 26, 2023); *see Maccabee v. Worcester Reg. Ret. Bd.*, CR-08-757 (DALA 2012) (duties of a custodian, including pushing and pulling, heavy lifting, carrying, and moving, were not uncommon hazards).

Petitioner's reliance on *Williams v. Pittsfield Ret. Bd.*, CR-15-461 (DALA Nov. 24, 2017), *affirmed by* CRAB (Apr. 21, 2023) and *Bettencourt v. Taunton Ret. Bd.,* CR-14-029 (DALA Dec. 30, 2015), *affirmed by* CRAB (Oct. 18, 2017) is misplaced. Those cases each involved positive medical panels. Also, in each case, the theory of disability rested in part, if not entirely, on a specific event which aggravated a pre-existing condition.

The Petitioner's alternative causation argument is "that his disability stemmed from a single work-related event or series of events." G.L. c. 32, § 7. Causation can be difficult to

identify, especially in the medical context. Retirement Boards and factfinders therefore depend on medical experts. Factfinders typically defer to the medical panel, whether it opines the facts support, or do not support, a finding of causation. *See generally Malden v. CRAB*, 1 Mass. App. Ct. 420, 423 (1973). That is why it is extraordinarily difficult to overturn a negative panel decision absent some irregularity beyond mere disagreement with its medical conclusions. *See e.g. Marquise M. v. Worcester Ret. Bd.*, CR-18-0385, 2023 WL 2035318, (DALA Feb 10, 2023) (negative panel's rejection in case involving back injury upheld); *Frakes v. State Bd. of Ret.*, CR-21-0261, 2022 WL 18398908, (DALA Dec. 23. 2022) (same); *Beauregard, supra* (same); *Cavaretta v. Malden Ret. Bd.*, CR-17-0455 (DALA Oct. 22, 2021) (same).

Here, the record does not support overturning the medical panel majority's conclusion. The Petitioner had a pre-existing condition that assured his back problems would get progressively worse as he aged. The panel majority plausibly concluded that was the cause of his disability. The Petitioner rebuts this conclusion with the conclusions of different doctors, including his primary care physician and the doctor who evaluated him for his worker's compensation claim. That is not enough:

> As is often the case, different experts can look at the same set of facts and reach different plausible conclusions. "There is no requirement that the panel physicians agree with the opinions or findings of other clinicians." "[T]he fact that another physician offered a contrary opinion . . . is not evidence of the use of an erroneous standard by the medical panel."

Frakes, supra (citations omitted).

The Panel majority's analysis is sound and supported by the record. It is not "plainly wrong."

2. In analyzing causation, the panel used the correct legal standard. The panel properly did not rely on the "major cause" standard.

The Petitioner argues that the panel majority did not use the correct standard of causation because the Board did not instruct it to analyze whether his injury was "a major but not necessarily predominant cause" of his disability. This definition comes from the workers' compensation context. *See* G.L. c. 152, § 1(7)(A); *DeSantis v. MTRS*, CR-21-332, 2022 WL 17185576, (DALA Nov. 18, 2022). It is used in so-called "combination injury" cases under § 1(7)(A), fourth sentence.[9] I understand why the Petitioner would look to this standard since, generally, the term "personal injury" in retirement law should be given the same meaning it has in the workers' compensation context. *See Zavaglia v. CRAB*, 345 Mass. 483, 486 (1963); *Baruffaldi v. CRAB*, 337 Mass. 495, 500-501 (1958). That said, the retirement statute has been interpreted to rely on a different standard of causation:

> Under G.L. c. 32, § 7(1), [a member] must prove that the work-related injury was the "natural and proximate cause" of his disability. To be the natural and proximate cause of his disability, the work injury must be more than a "contributing" or "aggravating" factor to his pre-existing condition . . . 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."

Strong v. Worcester Reg. Ret. Sys., CR-15-597, (CRAB Apr. 13, 2023) (citations omitted).

The Petitioner argues that CRAB implicitly adopted the "major cause" formulation in the recent case of *Williams, supra*, when it incorporated by reference the magistrate's decision at pages 24-28. The magistrate's decision included the following language:

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[9] The fourth sentence of § 1(7A) reads: "If a compensable injury or disease combines with a pre-existing condition, which resulted from an injury or disease not compensable under this chapter, to cause or prolong disability or a need for treatment, the resultant condition shall be compensable only to the extent such compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment."

> Finally, the Petitioner has duly noted that the courts have long held that aggravation of multiple sclerosis as well as orthopedic injuries, where both are deemed to be "major causes" of injury and disability, is a sufficient basis for a finding of causation. *See* [Lamonica] v. Boston Water and Sewer Commission, 17 Mass. Workers' Comp. Rep. (2003). The employee in [Lamonica] suffered aggravation of his multiple sclerosis as a result of a back injury and the back injury was aggravated by the multiple sclerosis. *See also* Patient v. Aetna Casualty and Surety Company, 9 Mass. Workers' Comp. Rep. 679 (1995) which reiterated the long-established legal premise that "Consideration of the combined effects is appropriate where a work injury aggravates a previously existing health condition, and an employee under those circumstances may properly recover for his entire impairment without apportionment."

Williams v. Pittsfield Ret. Bd., CR-15-017, *26-27 (DALA Nov 24. 2017).

However, "the retirement law's demand for 'direct and proximate' causation is meaningfully stricter than the workers' compensation law's 'major but not necessarily predominant' rule."[10] *DeSantis,* at *4, n.1, *citing Buchanan v. CRAB*, 62 Mass. App. Ct. 1105 (2004) (unpublished memorandum opinion). I do not believe the magistrate in *Williams* was proposing a different standard, as opposed to just citing a case. Nor do I believe CRAB would upend decades of practice and impose a new causation standard by simply incorporating a reference to it from a magistrate's decision. *See DeSantis*, *supra*. Unless CRAB explicitly

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[10] As noted, direct and proximate causation requires a "significant contributing cause." That standard derives from *Ann Marie Robinson's Case*, 416 Mass. 454, 460 (1993), a workers' compensation case which in turn interpreted a prior version of G.L. c.152, § 1(7)(A). A subsequent amendment in 1991 substituted the word "predominant" for "significant." That same amendment added the fourth sentence that includes the "major cause" standard the Petitioner now cites. *Id*. at 458. Thus, workers' compensation cases have different causation standards depending on what type of injury is at issue. Personal injuries require the regular burden of proof, so-called "as is" causation. *MacDonald's Case,* 73 Mass. App. Ct. 657, 62 (2009); *Gray v. Sunshine Haven*, 22 Mass. Workers' Comp. Rep. 175, 2008 WL 2787791, (IAB Jul. 15, 2008). *C*ombination cases use the "major but not predominant" standard. *Id.* And cases seeking recovery for "pure emotional injuries" have the most exacting standard, "predominant cause." *See Cornetta's Case*, 68 Mass. App. Ct. 107, 117 (2007) (explaining the history and significance of the statutory amendments). Retirement cases have never used these tiered causation standards.

indicates the "major cause" standard is now the new (and different) standard to be applied in these cases, I cannot adopt it. Accordingly, the doctors used the correct and prevailing standard of causation in this case.

3. The panel did not lack pertinent facts

The Petitioner next suggests that the panel lacked pertinent facts. He argues the panel did not have information about other prior injuries he suffered at work (from 1999 through 2008) or the fact that he had been awarded workers compensation benefits; also, the Board did not submit a series of documents he provided them including his physician's rebuttal, Dr. Boutin's report from his workers compensation case, a job description, and some additional medical records. Putting aside whether the Board should have forwarded these documents to the medical panel, their absence from the record is irrelevant.[11]

The panel was aware of the Petitioner's job duties; indeed, his application included a list of "custodian duties." The panel was not under any misunderstanding as to what he did. The Petitioner does not point to anything in the additional medical documents or prior injury reports that contradicts any of the panel majority's findings. Lastly, the doctors' reports did not add any facts not already available. His physician's "rebuttal" essentially explained she disagreed with the panelists' ultimate finding on causation; and Dr. Boutin's report did not offer any new facts. They were simply reports from different doctors who arrived at different conclusions. As I already noted, different experts can evaluate the same facts and draw different conclusions. A

[11] In the Board's defense, the Petitioner submitted the doctors' reports and medical documents after he had filed his objections and the Board had already sent a clarification letter to the panelists; indeed, he submitted them a month after the doctors issued their addendums in response to the clarification letter.

On the other hand, the Board was in possession of his prior injury reports and should have forwarded those to the panel.

report with a contrary medial opinion is not a "pertinent fact" if the only difference is the opinion and not, for example, an analysis of facts not available to the medical panel.

4. The Board's pre-assessment memorandum to the medical panel was not a procedural error and does not warrant convening a new medical panel.

Lastly, the Petitioner complains that the Board's pre-assessment letter was improper for a variety of reasons: because it characterized the Petitioner's pain as "pain magnification,"[12] suggested the "wear and tear" theory of causation, suggested that without an MRI or CT the petitioner did not suffer a permanent injury, and interpreted the surveillance videos rather than supplying them to the panel.

When a medical panel is formed, PERAC regulations specify how they receive information and who may contact them. A retirement board is obligated to transmit certain documents and prohibited from transmitting others. *See* 804 Code of Mass. Regs. § 10.10(6)-(7). In fact, the retirement board is the only entity authorized to communicate with the panel. All other communications, even by the member, go through PERAC. *Id*. at § 10.10(8). The process is tightly controlled, probably to make sure the panel complies with its statutory obligation "that their findings were arrived at independently of each other and free of undue influence of any kind." G.L. c. 32, § 6(3)(c).

There is, however, a growing practice among retirement boards of drafting a memorandum for the medical panel *prior* to its assessment. The memorandum often includes very specific questions for the panel to answer and the Board's summary of the relevant facts from the medical records. These questions, *prior* to a panel's evaluation, are "unusual," *Peters v. Worcester Ret. Bd.*, CR-19-0260, *14 n.3, (DALA Dec 16, 2022), because "[n]either the statute

[12] The letter did not use the term "pain magnification."

nor the PERAC's instructions direct the panel members to pay particular attention to any specific diagnosis or other information contained in the medical records or other materials transmitted to them for review." *See Chaves v. Taunton Ret. Bd.*, CR-18-0204 (DALA Dec. 3, 2021).[13]

Sometimes the Petitioner does not complain about the process. *See Peters*, *supra*. But in at least one case they did, and DALA found the Board crossed a line and prejudged the case because the memorandum was an attempt to steer the medical panel down a certain path. *See Chaves, supra*;[14] *see also Rowley v. Everett Ret. Bd.*, CR-19-0579, 2022 WL 16921467, (DALA May 6, 2022), n. 6 ("But here the assertions and premises of the board's question [post assessment] betrayed premature adverseness to Mr. Rowley's still-pending application.").

The Board, as the entity that transmitted the pre-evaluation memorandum, finds nothing wrong with this practice. In fact, it argues DALA has approved of it in prior decisions. *See Beauregard, supra*; *Smith, supra*; *Ronayne v. Worcester Ret. Bd.*, CR-18-0331 (DALA Feb. 12, 2021). The Board overstates the force of these decisions. It does not appear that the Petitioners there objected to the practice and the decisions provide no analysis of its propriety. That said, while the better practice might be for Boards to refrain from submitting these memoranda, I do not believe it violates any policy or regulation.[15] Nevertheless, even if allowed, it has the potential to improperly influence the panel and DALA is empowered to review whether the panel was impartial.

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[13] The only statutory authority I can find for a pre-assessment summary is when the head of the department files for involuntary retirement. In that case, his application "shall include a fair summary of the facts upon which such opinion is premised." G.L. c. 32, § 16(1).

[14] I acknowledge *Chaves* is presently under appeal.

[15] Post-assessment requests for clarification are supposed to go through PERAC. *See* 840 Code Mass. Regs. § 10.11(2). Pre-assessment communications have no similar requirement. PERAC may want to consider creating a policy to deal with this growing practice and assure any communications with the panel do not improperly interfere with its impartiality.

Here, although the memorandum in this case was selective in the records it cited and the language it quoted, it did not suggest an incorrect legal standard, misrepresent any facts, nor use diminishing language. Moreover, the doctors each received PERAC's standard form that lays out the legal elements of incapacity, permanence, and causation. Nothing in the doctors' reports suggest they were improperly influenced, misled, or confused about the legal elements or medical documents.

CONCLUSION

I sympathize with the Petitioner because he is clearly unable to work and still experiences constant pain. Unfortunately for him, the burdens in this case regarding a negative panel are simply too onerous to overcome. The Board's decision denying his application for accidental disability is **affirmed.**

SO ORDERED

DIVISION OF ADMINISTRATIVE LAW APPEALS

Eric Tennen

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Eric Tennen
Administrative Magistrate