COMMONWEALTH OF MASSACHUSETTS
CONTRIBUTORY RETIREMENT APPEAL BOARD

ROBERT C. BENOIT,

Petitioner-Appellant

v.

EVERETT RETIREMENT BOARD,

Respondent-Appellee.

CR-14-821

DECISION

Petitioner Robert C. Benoit appeals from a decision of an administrative magistrate of the Division of Administrative Law Appeals (DALA), affirming a decision of the Everett Retirement Board (ERB) denying Benoit's application for accidental disability retirement benefits based on the heart law presumption, G.L. c. 32, § 94. The DALA magistrate heard the matter on May 18, 2016 and admitted seventeen exhibits, marking another for identification. Her decision is dated April 28, 2017. Benoit filed a timely appeal to us.[1]

Summary

We adopt the magistrate's Findings of Fact 1-24 as our own[2] and affirm the DALA decision. Benoit's application for accidental disability retirement benefits under the heart law, filed on October 21, 2013, was properly denied because no timely notice was filed of a heart-related impairment under G.L. c. 32, § 7(1) or § 7(3) and because he did not make a prima facie showing that he was disabled based on a heart condition as of his last day of work. Where

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[1] This is the second accidental disability application filed relating to Benoit. He was involuntarily retired due to knee injuries in 2003, *Benoit v. Public Employee Retirement Admin. Comm'n*, CR-04-5 (DALA Nov. 15, 2004, CRAB Feb. 3, 2005); *Benoit v. Everett Retirement Bd.*, CR-05-1311 (DALA Nov. 2, 2006), but later returned to active service.

[2] In Finding 2 we correct the year "1975" to read "1978." (Exs. A, O; Tr. 7.)

Benoit was ineligible for benefits as a matter of law, the Everett Retirement Board properly denied his application without referral to a regional medical panel.[3]

Background

Benoit began work as a firefighter for the City of Everett in 1978.[4] He was previously retired involuntarily on accidental disability on April 11, 2003, after sustaining two left knee injuries.[5] At some point before August of 2006, Benoit returned to active duty.[6]

On August 3, 2006, Benoit and other firefighters responded to a house fire in Everett.[7] Benoit testified at the DALA hearing that, while helping to pull a water line to the third floor, he felt palpitations and chest pains and was sent down to the ambulance company at the scene, where he was examined by EMTs.[8] No medical record or incident report was produced relating to this incident, and Benoit did not testify as to any further medical treatment or any resulting absence from work.

On May 15, 2007, Benoit was on duty at the fire station when he experienced left-sided chest discomfort on and off during the day.[9] He felt better when administered oxygen and when resting.[10] At approximately 10:30 pm there was an alarm, and while sliding down the pole Benoit again felt chest pain.[11] It is not clear whether he joined the firefighters in responding to the alarm,[12] but at approximately 11:30 pm, Benoit was transported in a fire engine to Whidden Hospital in Everett, where a resting electrocardiogram was administered at 11:37 pm.[13] The

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[3] We deny the ERB's various motions to strike Benoit's appeal, as the appeal has been perfected and both parties have filed memoranda.

[4] Finding 2; Tr. 7; Exs. A, O.

[5] *Benoit v. Public Employee Retirement Admin. Comm'n*, CR-04-5 (DALA Nov. 15, 2004, CRAB Feb. 3, 2005).

[6] The date of his return does not appear in our record.

[7] Benoit, testifying in 2016, recalled the date as July 2006; however, an incident report shows the date was August 3, 2006. (Tr. 9; Ex. E.)

[8] Finding 10, Tr. 9-10.

[9] Finding 12; Ex. F.

[10] Ex. F; Tr. 14.

[11] Exs. F, H.

[12] The call was to report to the Chelsea Central Fire Station, Ex. H, apparently not to respond directly to a fire scene or other location.

[13] Exs. F, H.

EKG showed Benoit's heart rate in normal, sinus rhythm, but also showed a possible "inferior infarct, age undetermined."[14] The hospital notes indicate that Benoit had a history of hypertension, and that he had been off his hypertension medication for the past three days.[15] Benoit remained at the hospital for about ninety minutes and was advised to remain overnight for a full workup and evaluation for coronary artery disease.[16] Benoit, however, was wary of an overnight stay at this particular hospital, and he called the fire station and arranged for his crew to pick him up in the fire engine.[17] The hospital record shows he left against medical advice.[18] No injury report was filed, and no report of the medical incident appears in the fire department's records.[19] Benoit's testimony makes no mention of seeking any further treatment or missing any work based on this incident, and he filed no records relating to such treatment or leave.[20]

On November 18, 2008, Benoit was on duty and crossing the street to retrieve a firefighting glove and other items from his car, when he was hit by a speeding car.[21] He sustained a cracked rib and knee and ankle sprains.[22] Although department records indicate Benoit was treated at the emergency department at Whidden Hospital, we do not have that hospital record, and there is no claim that any heart-related issue was noted at that visit. The incident report filed makes no mention of cardiac issues.[23] Benoit went out on injured-on-duty leave with pay under G.L. c. 41, § 111F, based on his orthopedic injuries.

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[14] Finding 12; Ex. F.

[15] Ex. F.

[16] Exs. F, H.

[17] Tr. 15; Exs. F, H.

[18] Ex. F; Finding 13.

[19] Four years later, and a year after Benoit filed the present application for accidental disability retirement, a fellow firefighter wrote a "To Whom It May Concern" letter concerning Benoit's chest pain and transport to and from the hospital. Ex. H. (We note that this letter, dated August 10, 2014, twice misstates the year in question, which was 2007.) The letter was admitted into evidence at the DALA hearing and provides some details about the incident, but, as we conclude below, it did not serve as an official record of the department for notice purposes. The magistrate excluded an affidavit from a fire captain relating to procedures for entry and exit of fire apparatus, as it also did not report any injury. (Tr. 21.)

[20] Tr. 14-16.

[21] Finding 3, Ex. P.

[22] Ex. P.

[23] Ex. P.

On January 7, 2009, while out on leave, Benoit underwent a colonoscopy and afterwards was noted to be in atrial fibrillation. He was given Digitek and Atenolol and was referred to a cardiologist.[24]

On January 9, 2009, Benoit saw cardiologist Jeffrey Clayman, M.D.[25] He was again found to be in atrial fibrillation. Dr. Clayman prescribed Coumadin, an anticoagulant, and scheduled a follow-up visit in three weeks. He told Benoit that his atrial fibrillation "may not be permanent," but that if it persisted Dr. Clayman would perform a cardioversion after the Coumadin had resulted in sufficient anticoagulation, as measured by Benoit's INR level.[26]

Three weeks later, on January 29, 2009, Benoit returned for a follow-up EKG with Dr. Clayman. The EKG showed his heart was in normal sinus rhythm, with no atrial fibrillation. He also "felt better," with no chest pain,[27] and an exercise treadmill test showed that, even with exercise, the atrial fibrillation did not return.[28] Dr. Clayman discontinued the Coumadin, recommended daily aspirin, and opined that Benoit "should be able to return to work when his orthopedic issues are resolved."[29]

Although Dr. Clayman had also advised Benoit to return for follow-up visits after one and two months, he never did so, and for the following fifteen months, he did not seek or receive any treatment for atrial fibrillation, other than taking his daily aspirin.[30] He testified that during this time he was out of state, apparently having traveled to Florida.[31]

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[24] Tr. 25; Ex. I (Lahey Health record dated January 9, 2009.) We do not have the record for January 7, 2009.

[25] Finding 15; Ex. I.

[26] Ex. I; Tr. 28. INR refers to international normalized ratio.

[27] Finding 16; Ex. J.

[28] Ex. D.

[29] Finding 16; Ex. J; *see* Ex. D (noting Benoit passed stress test on January 29, 2009).

[30] Finding 18; Tr. 33, 36, 38.

[31] Tr. 36; Ex. K. Dr. Clayman's report of May 3, 2010 notes that Benoit had a physician in Florida (Ex. K), but Benoit testified that he did not seek any treatment for atrial fibrillation during the fifteen months from January 29, 2009 to May 3, 2010 (Tr. 36), and that he never saw "any doctor besides Dr. Clayman at any time" (Tr. 33), presumably meaning for treatment of atrial fibrillation.

Meanwhile, on April 17, 2009,[32] about two and one-half months after his last visit with Dr. Clayman and while still out on leave for his orthopedic injuries, Benoit decided to take advantage of an early retirement incentive program and retired on superannuation.[33]

On May 3, 2010, more than a year after his retirement, Benoit returned to Dr. Clayman with exertional shortness of breath and increased heart rate. Dr. Clayman gave Benoit a Holter heart-rate monitor and ordered an INR coagulation test and a stress test.[34] Although his note does not provide the results of these tests, in a later narrative to supplement his physician statement, Dr. Clayman described Benoit as being in atrial fibrillation on that date, with shortness of breath on exertion and palpitations.[35]

The medical treatment records provided to us end with Dr. Clayman's note of May 3, 2010. Our record contains no documentation of whether Benoit received any treatment during the three years beginning on May 3, 2010.

In 2013, Benoit again experienced atrial fibrillation. Dr. Clayman, as reported in the physician's statement filed in connection with Benoit's disability application, performed at least two cardioversion procedures, the first on May 3, 2013 and the second on August 28, 2013, describing both as "failed."[36] Dr. Clayman also wrote that Benoit failed a sotalol load on August 26, 2013.[37]

On October 21, 2013, four and one-half years after his retirement on superannuation, Benoit filed his application for accidental disability retirement, based on the heart law presumption. He listed atrial fibrillation as the reason for his disability, but listed no dates of injury or notices provided.[38] Dr. Clayman filed a physician's statement on November 21, 2013, stating that Benoit's diagnosis was atrial fibrillation, that as a result Benoit was unable to perform the essential duties of his job as a firefighter, and that the condition was likely to be

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[32] References to the date April 24, 2009 appear to be incorrect (Tr. 27; Ex. D).

[33] Finding 2, Tr. 29, 32. Benoit did not clarify if he was still out of state in Florida at this time.

[34] Ex. K; Findings 17, 21.

[35] Ex. D.

[36] Ex. B; Finding 19. Benoit testified that he underwent three cardioversions, resulting in normal sinus rhythm that lasted only a week or a couple of days. Tr. 24, 28.

[37] Ex. B.

[38] Exs. A, O. Benoit also failed to answer the question, "When did you cease to be able to perform the essential duties of your position?" (Exs. A, O at 2.)

permanent because it was resistant to cardioversion and that he had "recurrent afib." Dr. Clayman listed the date of injury as January 7, 2009. In response to the question, "when was the applicant last able to perform his essential duties," Dr. Clayman stated that he was "unaware prior to 1/7/2009."[39]

On August 9, 2014, Dr. Clayman supplemented his physician's statement with a letter. He acknowledged that, as of January 29, 2009, Benoit's atrial fibrillation had resolved, he had passed a stress test, and that Dr. Clayman had cleared Benoit to return to work. Nevertheless, Dr. Clayman opined that it was "likely" that the arrhythmia "could have recurred again" due to its "paroxysmal and recurrent nature." Dr. Clayman stated that "a consideration of disability should be considered" relative to the timeframe of April 2009, since arrhythmia "could have easily been induced" by the heavy duties of firefighting.[40]

Discussion

1. Lack of notice. We agree with the DALA magistrate that Benoit is not entitled to accidental disability retirement benefits. Most importantly, he failed to provide the required written notice of a heart-related injury and does not fall within any of the exceptions to that requirement.

G.L. c. 32, § 7(1) provides that:

> no [accidental disability] retirement shall be allowed unless such injury was sustained or such hazard was undergone within two years prior to the filing of such application or, if occurring earlier, unless written notice thereof was filed with the board by such member or in his behalf within ninety days after its occurrence.

An exception to this notice requirement is provided under G.L. c. 32, § 7(3), which, as applicable to firefighters classified in Group 4 for retirement purposes, provides that lapse of time or failure to file notice "shall not be a bar" to proceedings seeking accidental disability retirement "if a record of such injury sustained or hazard undergone is on file in the official records of [the member's] department."

Applications filed under the heart law presumption are not exempted from these notice requirements. The heart law, G.L. c. 32, § 94, provides that:

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[39] Ex. B.

[40] Ex. D; Findings 20-22.

> any condition of impairment of health caused by hypertension or heart disease resulting in total or partial disability or death to a uniformed member of a paid fire department [or certain others] shall, if he successfully passed a physical examination on entry into such service, or subsequently successfully passed a physical examination, which examination failed to reveal any evidence of such condition, be presumed to have been suffered in the line of duty, unless the contrary be shown by competent evidence.

Thus, when a firefighter seeks accidental disability retirement benefits under G.L. c. 32, § 7, the heart law provides a presumption that the injury was sustained in the "line of duty," and relieves the applicant from proving causation. Nothing in the heart law, however, excuses the applicant from either filing a timely application, or providing written notice of injury within ninety days, or in the case of a firefighter, of having a record of the injury on file in the department's official records. This was clarified by the Superior Court in the case of *Vest v. Contributory Retirement Appeal Bd.*, Suffolk Super. Ct. No. 93-5480C, 1994 WL 879940 (Aug. 1, 1994) (Grasso, J.), *affirmed*, 41 Mass. App. Ct. 191 (1996):

> Vest filed his application four years after his termination. Thus he could not have sustained the injury within two years prior to the filing of the application. Nor did he file any notice of injury or receive benefits under G.L. c. 41, § 111F prior to his 1985 termination. . . . *Nothing in the "Heart Law," G.L. c. 32, § 94 relieves an applicant like Vest from the notice requirement.* The presumption of disability under § 94 goes only to the issue of causation, once disability is proved.

Id. at *2-3 (emphasis added).

Here, Benoit did experience some non-disabling heart incidents while he was actively working as a firefighter, but none resulted in the filing of a report of injury and, like Vest, Benoit never went out on § 111F leave based on a heart condition, which would have resulted in a report of a cardiac injury being filed in the department's official records. His coworker's "To Whom It May Concern" letter written more than four years after his superannuation retirement cannot retroactively fulfill this requirement.[41] That department heads are directed by G.L. c. 32,

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[41] Ex. H. As we have noted, Benoit also offered an affidavit relating to the procedures for taking out and returning fire apparatus, which was excluded by the magistrate where it contained no notice of injury. Tr. 21.

§ 7(3)(b) to file reports of injuries sustained in the performance of member's duties also cannot excuse the member's failure to file notice of his injury.[42]

The existence of a contemporaneous, written record of an injury or heart condition occurring while the member is still actively working is an important protection against claims of injury that arise, or that become disabling, after the member stops work, as addressed by the Appeals Court in *Vest*, 41 Mass. App. Ct. at 194 (discussed below). While of course there may be unfortunate exceptions, in general the absence of any written report suggests that the injury or incident was not considered significant enough to warrant documentation. Additionally, a contemporaneous record of an injury or incident provides valuable information in evaluating a later claim of accidental disability retirement. Thus, it makes sense that the Legislature did not exempt accidental disability claims filed under the heart law from the requirement of filing within two years of an injury or from the various alternate notice requirements.

2. Prima facie case of disability as of last day of work. Benoit correctly points out that, without evaluation by a regional medical panel, it can in most cases be difficult to conclude whether a member was disabled as of his last day of work, as required by *Vest v. Contributory Retirement Appeal Bd.*, 41 Mass. App. Ct. 191, 194 (1996). Here, however, Benoit was actively working on the last day when he performed his duties, November 18, 2008, when he was involved in a motor vehicle accident sustaining orthopedic injuries. However, he makes no argument that he was disabled on that date from a cardiac condition despite his two earlier heart-related incidents. We consider the requirement under *Vest* that disability arise while a member is on "active service" to mean that the member must have been regularly and actively employed in the performance of his duties. We reach this conclusion because that was the case for Vest, who was discharged while actively working and who developed a disabling heart condition several years later. *Vest*, 41 Mass. App. Ct. at 192-193; *see Vest*, Suffolk Super. Ct. No. 93-5480C at *1. Here, Benoit had no impairment based on a heart condition when he last performed his duties. Thus, he has not established a prima facie case of disability as of his last day of work.

Even if one accepted Benoit's argument that the operative date was the day of his superannuation retirement, April 17, 2009, the facts still do not make out a prima facie case that

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[42] A department head's knowledge of an injury, where no written report or record exists, is also insufficient to fulfill the retirement law's notice requirements, which require written notice or a written record on file in the department's official records. G.L. c. 32, § 7(1),(3).

he was disabled from work due to a heart condition on that date. In late January 2009, Benoit was cleared to return to work. His Coumadin was discontinued and he was given a stress test that showed he was able to exercise with no return of arrhythmia. Moreover, for the next fifteen months Benoit sought and received no treatment for atrial fibrillation. His treating physician's opinion that disability should be "considered" as of April 2009 because firefighting duties could lead to a return of arrhythmia contrasts with the facts in the record: the same physician having cleared Benoit for work, his passing the stress test, his absence of cardiac problems for more than a year, and the lack of any record of treatment for another three years. In the face of these facts, Benoit also did not demonstrate a prima facie case of disability as of April 17, 2009.

For all these reasons, the Everett Retirement Board properly denied Benoit's application for accidental disability benefits without referring him for evaluation by a regional medical panel. Where Benoit failed to provide notice, accidental disability retirement was unavailable as a matter of law.[43] Additionally, Benoit did not establish a prima facie case of disability due to a heart condition on his last day of work.[44]

Conclusion

The decision of the DALA magistrate is affirmed. Benoit is not entitled to accidental disability benefits and is not entitled to examination by a regional medical panel.

SO ORDERED.

CONTRIBUTORY RETIREMENT APPEAL BOARD

Uyen M. Tran

Uyen M. Tran
Assistant Attorney General
Chair
Attorney General's Appointee

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[43] *See* 840 C.M.R. 10.09(2):

> At any stage of a proceeding on an ordinary or accidental disability retirement application the retirement board may terminate the proceeding and deny the application if it determines that the member cannot be retired as a matter of law.

[44] *See Lowell v. Worcester Regional Retirement Bd.*, CR-06-296 (DALA 2009) (to be entitled to examination by a medical panel, applicant must present prima facie case of each element required for accidental disability retirement).

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