THE COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. **Division of Administrative Law Appeals**

Jean Bernier,

 **Petitioner**

v. Docket No. CR-15-555

 DATED: January 13, 2017

Hampden County Regional

Retirement System,

 **Respondent**

**Appearance for Petitioner:**

Charles R. Casartello, Esquire

Pellegrini, Seeley, Ryan & Blakesley, P.C.

P.O. Box 20009

Springfield, MA 01103-0009

**Appearance for Respondent:**

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**Administrative Magistrate:**

Judithann Burke

 **Case Summary**

The parties agree that the Petitioner is entitled to be evaluated by an all-new medical panel due to the application of an erroneous standard by a majority of the September 2014 medical panel doctors as related to the question of aggravation of a pre-existing condition.

 **DECISION**

The Petitioner, Jean Bernier, is appealing from the September 29, 2015 decision of the Respondent, Hampden County Regional Retirement Board (HCRRB) denying her application for Section 7 accidental disability retirement benefits. (Exhibit 13.) The appeal was timely filed on October 8, 2015. (Exhibit 14.) A hearing was scheduled to be held on November 14, 2016 in Room 305 at 436 Dwight Street, Springfield, MA. No testimony was taken. At that time, I marked the Petitioner’s pre-hearing memorandum and joint exhibit list as Attachment A. I marked the Respondent’s pre-hearing memorandum as Attachment B. Exhibits 1-14 were made part of the record. The Respondent stipulated to Petitioner’s proposed findings of fact A-E, G-I and K, all set forth on pages 5 & 6 of Attachment A. There is no digital recording.

 **FINDINGS OF FACT**

 Based upon the documents submitted on the day of the hearing in the above-entitled matter, I hereby render the following findings of fact:

1. The Petitioner, Jean Bernier, was born in 1952. She began working as a paraprofessional at the Birchland Park Middle School in East Longmeadow on or about September 4, 2001. Her duties included assisting in educating students with autism, i.e. helping them communicate and interact with others, assisting with personal hygiene, ensuring their safety and the safety of others, applying restraint when necessary, and, participating in their educational learning activities. (Stipulations A-C.)
2. Prior to March 13, 2013, the Petitioner’s medical history included low back injuries and related treatment, including three (3) surgeries in 1985, 1989 and 2006. Following each surgery, she made substantial improvement and was able to return to work. (Exhibits 1 -3 and 6-8 & Stipulation G.)
3. The Petitioner fell at work in 2007 and reinjured her back. She underwent conservative treatment and returned to work. From 2007 through March 13, 2013, she was asymptomatic in regards to her low back and had non-medical treatment for same. (*Id.* & Stipulation H.)
4. While she was attempting to restrain an out-of-control special needs student during her shift on March 13, 2013, the Petitioner was assaulted, twisted and shaken severely in different directions. When the eleven (11) year old male was finally subdued, the Petitioner immediately experienced back pain. (Exhibits 1-4.)
5. The Petitioner reported to the school nurse who provided her with an ice pack and the anti-inflammatory medication Aleve. The pain increased in scope and severity and the Petitioner had to leave the school that day. She went home for bed rest. (*Id.*)
6. When the Petitioner’s back pain persisted, she sought treatment from her primary care physician, James Hession, M.D. His diagnosis was “low back pain with weakness and radiculopathy of the left lower extremity.” He treated the Petitioner conservatively with heat, muscle relaxants and rest. (Exhibit 1.)
7. When her low back pain did not abate, the Petitioner underwent an MRI on April 8, 2013. This revealed spondylotic, degenerative disc disease, and post-operative changes of the lumbar spine with no nerve root impingement. (*Id.*)
8. The Petitioner followed up with a neurosurgeon, Thomas Kaye, M.D. in late April 2013. He opined that she was suffering from facet arthropathy and he ordered physical therapy. (Exhibit 2.)
9. The Petitioner was evaluated by orthopedic surgeon Marc A. Linson, M.D. on September 16, 2013. He diagnosed her with low back pain and left leg sciatica and recommended an epidural injection. Dr. Linson concluded that the Petitioner was disabled from any type of work at that time. (Exhibit 3.)
10. The Petitioner underwent a series of epidural injections. These failed to provide her any relief. (*Id.*)
11. The Petitioner applied for accidental disability retirement benefits on March 7, 2014.

On page 5 of her application, the Petitioner indicated that she had been injured on March 13, 2013 while “assisting another paraprofessional with a student in the hallway trying to put on his pants while she restrained him. Student freed one hand and grabbed the front of my sweater and bra. I tried to free myself and student pulled me with great force toward him trying to bite me. While I was trying to pull away, the student then turned his head toward the other para with mouth open and teeth showing. I shouted for help and said watch out, he is going for your shoulder. She let go of the student and he came at me with both hands.” (Exhibit 4.)

1. Dr. Linson completed the Statement of Applicant’s Physician. He indicated that the Petitioner was unable to perform her essential duties, the disability was permanent, and that the incapacity was caused by the work injury on March 13, 2013. (Exhibit 5.)
2. Single physician medical panel doctor Pier Bouton, M.D., an orthopedist, evaluated the Petitioner on September 4, 2014. He answered the three certificate questions in the affirmative and diagnosed the Petitioner with “chronic law back pain and status post discectomy.” (Exhibit 6.)
3. Single physician medical panel doctor Hwa-Hsin Hsieh, M.D. evaluated the Petitioner on September 11, 2014. Dr. Hsieh’s diagnosis was “lumbosacral sprain/strain on the left with pre-existing sciatic radiculopathy.” Dr. Hsieh concluded that the Petitioner was totally and permanently disabled from performing her essential duties, but that said incapacity was not such as might be the natural and proximate result of the personal injury sustained on account of which retirement was claimed. Dr. Hsieh opined that the Petitioner’s ongoing symptoms were from her pre-existing multiple degenerative disc disease, degenerative arthritis and facet arthropathy rather than the result of the injury sustained on March 13, 2013. (Exhibit 7.)
4. Single physical medical panel doctor Isadore G. Yablon, M.D. evaluated the Petitioner on September 17, 2014. He opined that the Petitioner was totally and permanently incapacitated due to back pain secondary to degenerative arthritis noted on X-rays and the MRI.

Regarding causation, Dr. Yablon stated, “based on the information available at this time, her inability to do the physical demands of her job description is because of the underlying degenerative changes of her lumbosacral spine.” He added, “for this to be related, she would have to have had a fracture, a fracture dislocation, a dislocation, a ligamentous injury or an acute disc protrusion none of which was described in the MRI studies which she had.” (Exhibit 8.)

1. During a hearing before the HCRRB on December 30, 2014, the Petitioner’s attorney filed a Motion to Remand the Case to the medical panel and questioned how Drs. Hsieh and Yablon had interpreted the aggravation of a pre-existing condition standard. (Exhibit 9.)
2. The HCRRB remanded the matter to the panel with a request for clarification and reconsideration of the issue of causation. (Exhibit 10.)
3. Dr. Yablon submitted his clarification on July 2, 2015. He reported:

There was an MRI study of the lumbosacral spine dated May 16, 2007. Under Impression, it is listed that this was a technically limited open MRI examination of the lumbar spine with partial transitional lumbosacral anatomy and evidence of previous lumbar spine surgery and lumbar spine degenerative disease resulting in mild L2-3 central spinal canal stenosis and neural foraminal narrowing most pronounced at the L3-4 and L4-5 levels similar to the prior imaging studies.

There is no reason identified to alter the opinion, namely that said incapacity is likely to be permanent, because of the progressive nature of the degenerative arthritis.

Said incapacity remains not such as might be the natural and proximate result of the personal injury sustained or hazard undergone on account of which retirement is claimed. As stated, for this to be related, she would have to have had a fracture, a fracture dislocation, a dislocation, a ligamentous injury, or an acute disc protrusion, none of which was described in the MRI studies which she had.

She may have had previous back disease but the problem of March 13, 2013 did not contribute to her present complaints or aggravate or speed up the progression of the underlying condition. Her complaints at the time of her evaluation were due to a progression of the underlying degenerative changes of her lumbosacral spine.

(Exhibit 12.)

1. Dr. Hsieh’s clarification was received on July 8, 2015. He stated the following:

It should be noted that following any back surgery, the natural history is for gradually developing facet arthritis, spinal stenosis and degenerative disc disease. If the member was doing well for a period of time, as described above, through to the time of the March 2013 injury which was a lumbosacral sprain/strain, the continued complaints after the expected recovery time for the injury would be due to pre-existing gradual development of the above noted conditions which would be the natural course of events after multiple operations caused by the natural progression of degenerative disease.

It continues to be my opinion that the member’s strain/sprain as sustained on March 13, 2013 resolved and the reason for the persistent complaints of pain have been due to the continuation of the pre-existing degenerative condition. The injury of March 13, 2013 did not aggravate the underlying condition. There may have been an exacerbation of symptoms due to the sprain/strain syndrome for up to six months, however, at that point she would have returned to baseline and, as noted the continued complaints would be more reasonably related to the natural progression of the underlying degenerative disease.

(Exhibit 11.)

1. The HCRRB denied the Petitioner’s application on September 29, 2015. (Exhibit 13.
2. The Petitioner filed a timely appeal on October 6, 2015. (Exhibit 14.)

**CONCLUSION**

 The parties are in agreement that this case must be remanded to an all-new medical panel. I order that this be carried out.

 The medical panel majority did not evaluate the impact and consequences of the March 13, 2013 incident on the Petitioner’s overall well-being and ability to function. While she may have had prior back injuries and surgeries (at least one work-related) she was still fully functional until the traumatic incident on March 13, 2013. From that point on, she experienced daily lower back pain and undertook many treatment modalities for relief.

 The panel majority failed to explain how she could be fully functional until a work related injury, then become totally and permanently disabled by virtue of a pre-existing degenerative condition which was up to that point asymptomatic. The panel majority doctors also fail to support their conclusions that, in order for the incident on March 13, 2013 to have aggravated the Petitioner’s pre-existing condition, she would have had to have experienced a fracture or dislocation. Finally, the conclusions of the two majority panel doctors, that the Petitioner suffered a lumbar sprain/strain on March 13, 2013 from which she should have healed in six months, are not supported by the treating medical evaluations.

 The aggravation of a pre-existing injury, be it a non-documented work injury or underlying condition, is compensable under the current retirement law scheme. *Barrufaldi v. CRAB,* 150 N.E. 2nd 269 (1958).

In conclusion, the Petitioner is entitled to have the question of aggravation addressed directly and lucidly by an all new medical panel. This case is remanded to the HCRRB for the purpose of convening an all-new regional medical panel which will conduct a thorough evaluation of the Petitioner and her medical records, review all of the pertinent medical evidence, address the question of aggravation of a pre-existing condition, render a lucid certificate, and apply the correct standards of law.

So ordered.

BY:

Division of Administrative Law Appeals,

Judithann Burke

Administrative Magistrate

DATED: January 13, 2017