COMMONWEALTH OF MASSACHUSETTS

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

**Charles Brace,**

 Petitioner

**Worcester Retirement Board,** Docket No.: CR-16-561

RespondentDate Issued: October 19, 2018

**Appearance for Petitioner:**

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**Appearance for Respondent:**

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**Administrative Magistrate:**

Judithann Burke

 **Case Summary**

 The Worcester Retirement Board was justified in refusing to convene a medical panel to evaluate the Petitioner, who was afflicted by episodes of hypertension and suffered from myocardial dysfunction, however, continued to work without medical restrictions until a finger injury in April 2015.

 **DECISION**

Pursuant to G.L. c. 32, § 16(4), the Petitioner, Charles Brace, is appealing the November 21, 2016 decision of the Respondent, the Worcester Retirement Board (WRRB), denying his application for Section 7 accidental disability retirement benefits. (Exhibit M.) The timely appeal was received on December 6, 2016. (Exhibit N.) I held a hearing on November 7, 2017 at the offices of the Worcester Registry of Deeds, 90 Front Street, Worcester, MA.

At the hearing, the Petitioner testified in his own behalf. The WRB called no witnesses. The parties filed pre-hearing and post-hearing memoranda of law. (Petitioner-Attachments A & C; Respondent-Attachments B & D.) The hearing was digitally recorded and a written transcript was subsequently generated by the parties. (Attachment D.) The Petitioner submitted Exhibits A-M. The Respondent submitted Exhibits N-V. The last of the submissions was received on May 2, 2018, thereby closing the record.

 **FINDINGS OF FACT**

1. The Petitioner, Charles Brace, born in 1963, began employment as a Police Officer in the City of Worcester in August 1988. The Petitioner underwent a pre-employment physical examination that did not reveal any evidence of hypertension or heart disease. (Petitioner Testimony and Exhibit A.)
2. The Petitioner suffered an on-duty episode of syncope on September 15, 1995 and he was placed on Injured on Duty (IOD) leave as a result thereof. He lost consciousness while driving his cruiser and was unaware of events that happened for several seconds. (Exhibit E, p. 6.)
3. On October 11, 1995, City Physician John E. Kelly, M.D. reported that the Petitioner’s blood pressure was slightly elevated at 140/90. Dr. Kelly indicated that he was unfit to return to duty until he underwent a full neurological evaluation. (Id.)
4. On December 8, 1995, Dr. Kelly reported that he had seen the Petitioner in late November and that he remained unfit for duty. The Petitioner was awaiting a neurological evaluation the University of Massachusetts Medical Center (UMMC). (Exhibit E, p. 5.)
5. On May 23, 1996, Dr. Kelly noted that he had seen the Petitioner and that the Petitioner was cleared to return to work without restriction effective May 22, 1996. Dr. Kelly noted that neurological and cardiac evaluations had been entirely unremarkable and that the Petitioner’s blood pressure was 140/90. (Exhibit E, p. 3.)
6. On December 2, 1997, Dr. Kelly examined the Petitioner to determine his eligibility to return to duty from another IOD leave. The doctor noted that the Petitioner had been under the care of Dr. John Ferullo, cardiologist, as well as his primary care physician, Dr. Roger Moore. The doctor reported that the Petitioner’s blood pressure at the time of the examination was 126/96. Dr. Kelly also noted that the Petitioner had suffered from hypertension and related symptomatology. The doctor determined that the Petitioner was unable to return to work because, “for back to work status, Police Officer Brace requires a blood pressure of 140 or less for systolic and 90 or less or diastolic. He is not at these parameters yet.” (Exhibit E, p. 2 and Exhibit L, p. 26.)
7. On October 30, 1998, the Petitioner suffered from headaches and chest pains while on duty. He was relieved from duty by Sergeant Dennis Tonner. (Exhibit E, p. 1 and Petitioner Testimony.)
8. The Petitioner was again placed on IOD pursuant to G.L. c. 41, §111F on October 30, 1998 due to hypertension. In a letter dated November 12, 1998, Dr. Kelly noted that the Petitioner had a long history of hypertension dating back to 1995 and that he had taken a significant number of sick days due to feeling ill. Dr. Kelly reported that the Petitioner’s blood pressure on that day was 170/104 and that he was presently taking Lopressor, Vasotec and Hydrochlorothiazide. The doctor found him unfit for duty and encouraged him to follow up with Dr. Moore in order to better control his hypertension. (Exhibit E, p. 1.)
9. On June 30, 2011, the Petitioner was admitted to the UMMC when he was struck by a car while he was riding his motorcycle. His blood pressure at the time of the admission was 207/133. (Exhibit F and Petitioner Testimony.)
10. On July 1, 2011, the Petitioner’s blood pressure 200/90. It was noted in the hospital record that he was restarted on the medications Tekturna and Exforge and that he was given labetalol and hydralazine without any significant effect. The Petitioner left the UMMC on July 2, 2011 against medical advice. He was discharged on the medications Exforge, Cardura and Lasix. (Exhibit F.)
11. On October 7, 2014, the Petitioner came under the care of P.G. Sadhujan, M.D. He told the doctor that his blood pressure was uncontrolled because of stress at work. He also told the doctor that he did not do any exercise or do any diet. The doctor noted that the Petitioner was 6’1” tall and that he weighed 260 pounds. Three blood pressure readings at the time of the examination were 230/160, 220/150 and 220/150. Dr. Sadhujan concluded that the Petitioner was in hypertensive emergency and that he should go the hospital. (Exhibit J.)
12. The Petitioner was admitted to the UMMC for a hypertensive emergency with complaints of blurry vision, headache and chest pains. He reported that he had been weak and lightheaded for the previous three months, and, that he had run out of his medication the previous month. On admission his blood pressure was 240/140. After extensive treatment, the Petitioner was discharged on October 14, 2014 with a blood pressure of 156/89. (Exhibit K.)
13. On October 21, 2014, Dr. Kelly reported that the Petitioner’s blood pressure was 140/88 and that he was cleared to return to work without restriction. (Exhibit E, p. 11-12.)
14. The Petitioner was seen by Allen Filiberti, M.D. on November 24, 2014. Dr. Filiberti reported that the Petitioner had a history of hypertension and that he was diagnosed with coronary artery disease, angina pectoris, prior myocardial infarction, hypertension and hypertensive heart disease. The doctor added hydrochlorothiazide to the Petitioner’s medication regimen. (Exhibit I.)
15. The Petitioner saw Dr. Sadhujan on January 16, 2015. At that time, he denied any chest pain, palpitation or shortness of breath. The Petitioner’s blood pressure was 170/100. Dr. Sadhujan noted that the Petitioner had hypertension and that he was on multiple medications including Diovan, nifedipine and metoprolol. The doctor concluded that the Petitioner had cardiomyopathy, coronary artery disease and hypertensive heart disease. He also added the diagnosis of chronic kidney disease, stage II. (Exhibit H.)
16. The Petitioner was seen on March 15, 2015. The doctor noted that he had multiple medical problems that included hypertension complicated by chronic kidney disease as well as a history of coronary artery disease, and, status post previous MI with cardiomyopathy. At that time, the Petitioner weighed 269 pounds. The Petitioner was taking multiple medications for his hypertension. His blood pressure was 160/100. (Exhibit G.)
17. On April 15, 2015 the Petitioner injured his right ring finger while he was assisting his partner with the fastening of handcuffs on an arrestee. He sustained a mallet injury to the finger and was placed in a volar extension splint. He wore the splint for several weeks. He was placed on leave pursuant to G.L. c. 41, § 111F. This was his last day of work. (Exhibit C and Petitioner Testimony.)
18. The Petitioner submitted an application for accidental disability retirement benefits on August 5, 2015. In the application, the Petitioner indicated that the last day he was able to perform his police duties was “May, 2015.” He indicated that the medical reasons for filing his application were “hypertension, myocardial dysfunction, kidney disease.” (Exhibit A.)
19. The record includes a treating physician’s statement from Dr. Sanhusjun dated April 15, 2015 that reflects that that the Petitioner was last able to perform his essential duties on April 15, 2015 due to high blood pressure and previous myocardial infarction. The rest of this document is illegible. (Exhibit B.)
20. In a second treating physician’s statement dated May 15, 2015, Dr. Sadhujan opined that the Petitioner was last able to perform his duties on that date due to hypertension and myocardial dysfunction. (Exhibit O.)
21. The WRB was scheduled to conduct an evidentiary hearing on the Petitioner’s Section 7 application at a board meeting set for Thursday April 14, 2016.
22. WRB counsel informed Petitioner’s counsel that the WRB would not likely schedule a medical panel due to the fact that the Petitioner stopped working due to a finger injury and not due to hypertension or heart disease. The WRB tabled the Petitioner’s case.
23. In a Treating Physician’s Statement dated July 13, 2016, Dr. Sadhujun indicated that the Petitioner was last able to perform his duties on March 15, 2015 due to hypertension, myocardial infarction and chronic kidney disease. (Exhibit D.)
24. On November 17, 2016, the WRB determined that the Petitioner was not eligible to receive an accidental disability retirement allowance, and, it refused to process his application. (Exhibit M.)
25. The Petitioner filed a timely appeal. (Exhibit N.)

**CONCLUSION**

 After a careful review of all of the testimony, documents, and arguments in this case, I have concluded that the Petitioner is not entitled to prevail in this appeal. He has not met his burden of proving that he was totally and permanently disabled from hypertension and heart disease on his last day of work, April 15, 2015. *See Vest v. Contributory Retirement Appeal Board,* 41 Mass. App. Ct. 191 (1996). The *Vest* case, *supra,* stands for the proposition that the member must establish total and permanent incapacity as of the date he or she last actively performed essential duties of the position.

 On April 15, 2015, the Petitioner was on duty without restrictions. He incurred a finger injury during the course of effectuating an arrest and went out on IOD.

 The Petitioner’s problems are further complicated by his filing an application for Section 7 benefits wherein he indicated that he was last able to perform his essential duties on May 15, 2015. It must be emphasized here that there are no contemporaneous medical records from shortly before or shortly after the April 15, 2015 finger injury that suggest that the Petitioner should not return to work due to any hypertension/heart condition. In fact, the fact, the record reflects that, although he suffered repeated episodes on and off duty that rendered him unable to perform his essential duties for discrete periods of time due to hypertension, there are also large block of time wherein he was able return to work without restrictions. The time period between his March 2015 visit with Dr. Sadhujan is one of these periods. Neither Dr. Sadhujan nor any other doctor declared him unfit to perform his duties due to hypertension and/or heart/kidney disease at the time of the April 15, 2015 injury. In fact, no doctor claimed that he was unfit to perform his essential duties due to hypertension and heart disease up to the time of his Section 7 application on August 5, 2015.

 The Petitioner may not now change his recitation of the facts to suit the law. Neither he, nor his treating physician can make one claim in his application and/or physicians’ statements, then proceed on another set of facts after the application is denied. See *Felisberto v. State Board of Retirement,* CR-11-84 (Division of Administrative Law Appeals 02/15/2013; no Contributory Retirement Appeal Board decision.) Even if I were to make a credibility finding in his favor based upon his testimony, I would necessarily need to find that he was untruthful in the application process. It is important that the written application and the employee’s testimony are consistent in order to meet one’s burden of proof. It is also re-emphasized that there are no medical records in support of the Petitioner’s recent version of the last day he was medically unable to perform his essential duties. *See Frank Soos, Jr. v. State Board of Retirement,* CR-12-210 (Division of Administrative Law Appeals 12/06/2013; no Contributory Retirement Appeal Board Decision.)

 Accordingly, the decision of the WRB denying the Petitioner’s request for Section 7 benefits without the convening of a medical panel is hereby affirmed.

 So ordered.

 BY:

 Division of Administrative Law Appeals,

 Judithann Burke

 Administrative Magistrate

DATED: October 19, 2018