Commonwealth of Massachusetts Contributory Retirement Appeal Board

PHILIP BUTLER,
Petitioner-Appellant

v.

STATE BOARD OF RETIREMENT,
Respondent-Appellee.

CR-19-0054

DECISION

Petitioner Philip Butler appeals from a decision of an administrative magistrate of the Division of Administrative Law Appeals (DALA) upholding the respondent State Board of Retirement's (SBR) decision to deny his application for accidental disability retirement without convening a regional medical panel. The magistrate held an evidentiary hearing on December 16, 2021, and admitted ten exhibits into evidence. The magistrate's decision is dated May 27, 2022. Mr. Butler filed a timely appeal to us.

After giving careful consideration to all the evidence in the record and the arguments presented by the parties, we adopt the magistrate's Findings of Fact 1 – 36 as our own and incorporate the DALA decision by reference. For the reasons discussed in the Conclusion and Order, we affirm, adding the following comments.

Background. Mr. Butler worked for Upper Blackstone Water Pollution Abatement District ("Upper Blackstone") from 1985 to 2016. He initially began as a landscaper and later became a repairman.[1] Prior to Upper Blackstone, he worked for County Heat Treat from 1982 – 1984. During that period, he injured his low back when a piece of steel fell from a crane and hit his low back. He was hospitalized, underwent surgery and had extensive rehabilitation.[2] He remained out of work for a considerable period, but later was hired at Upper Blackstone. Prior to

[1] Finding of Fact 3, 7; Exhibit 3, 9.
[2] FF 4 – 6; Ex. 3.

his employment, he passed a physical examination and reported having recovered about 80% from the injury at County Heat Treat. He was experiencing neck and back pain and difficulty with lifting and bending.[3]

On March 2, 1994, Mr. Butler was injured at Upper Blackstone when a heavy ball of frozen grit fell from a large machine above him and onto his head and shoulders. He was treated at UMass Memorial Hospital and was subsequently followed for his injuries by his treating providers. He was later cleared to return to work on June 27, 1994. He received workers' compensation benefits for this injury. When he returned to work, he reported experiencing chronic back pain. While he did not make a formal request for accommodations, Upper Blackstone provided informal accommodations for Mr. Butler to continue working. Mr. Butler was no longer required to perform heavy lifting. His equipment was outfitted with good seats, and Mr. Butler was allowed to take regular days off to take pain medications without operating heavy machinery. Mr. Butler reported that even with his pain symptoms, his employer was satisfied with his job performance.[4]

In August 2015, Mr. Butler filed for long term disability benefits with Unum, his insurance carrier, based on the 1982 injury at County Heat Treat and the 1994 injury at Upper Blackstone. Because he was still working at the time of application, Unum informed him that he did not qualify for benefits based on his working status.[5]

In September 2015, Mr. Butler was diagnosed with a hernia after injuring himself attempting to lift a jersey barrier. He was scheduled for surgery on January 5, 2016. He last worked on December 31, 2015. He took a vacation day on January 4, 2016. He had planned hernia surgery on January 5, 2016. Thereafter, Mr. Butler informed his primary care doctor that he decided to take "early retirement" because of his back pain. The doctor did not advise him to stop working but expressed that she could help improve his back pain with more treatment. Mr. Butler decided to stop working because he wanted Unum to pay his long term disability benefits since benefits could not be paid while he was working.[6]

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[3] FF 8.
[4] FF9 – 15; Ex. 3, 7, 8A, 8B.
[5] FF17 – 18; Ex. 6.
[6] FF 19 – 24, 26 - 27; Ex. 6, 8H, 10

On February 22, 2016, Mr. Butler filed for superannuation retirement.[7] He moved to Maine in May 2016.[8] When his Unum disability benefits began, he noticed that the benefits were offset by his Chapter 32 superannuation retirement benefits. Subsequently, on December 1, 2017, Mr. Butler applied for accidental disability retirement. SBR denied his application without convening a medical panel.[9]

Discussion. To be eligible for accidental disability retirement benefits under G. L. c. 32, § 7, an applicant must establish that he is "unable to perform the essential duties of his job and that such inability is likely to be permanent . . . by reason of a personal injury sustained or hazard undergone as a result of, and while in the performance of, his duties." G.L. c. 32, § 7(1). An applicant must prove that his disability stemmed from either (1) a single work-related event or series of events, or (2) if the disability was the result of gradual deterioration, that his employment exposed him to an "identifiable condition . . . that is not common or necessary to all or a great many occupations." *Blanchette v. Contributory Ret. App. Bd.*, 20 Mass. App. Ct. 479, 485 (1985). The applicant bears the burden of proof by a preponderance of the evidence. *Murphy v. Contributory Ret. App. Bd.*, 463 Mass. 333, 345 (2012); *Lisbon v. Contributory Ret. App. Bd.*, 41 Mass. App. Ct. 246, 255 (1996).

In his application for accidental disability retirement dated December 1, 2017, Mr. Butler claimed that he ceased being able to perform the essential duties of his job as of January 4, 2016 as a result of a personal injury sustained on March 2, 1994 and that his condition gradually deteriorated as a result of his work exposing him to a hazard from April 15, 1994 to January 4, 2016. He reported suffering from chronic low back pain, lumbar spondylosis, lumbar disc herniation, cervical foraminal stenosis, right glenohumeral osteoarthritis, subscapularis tendinosis, and partial thickness tear of the right subscapularis.[10]

Katie M. Adams, M.D., completed the Treating Physician Statement, dated October 4, 2017 in support of Mr. Butler's application. She confirmed that he ceased being able to perform the essential duties of his job on January 4, 2016. She listed his diagnoses to consist of lumbar spondylosis, lumbar disc herniation, cervical foraminal stenosis, glenohumeral osteoarthritis, and

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[7] FF 25; Ex. 9.
[8] FF 30.
[9] FF 30 – 31, 35; Ex. 1, 3.
[10] FF 31 -32; Ex. 3.

subscapularis tendinosis with partial thickness tear of the right subscapularis. Dr. Adams concluded that the injuries in the 1980s and in March 1994 combined with recurrent sprains/strains sustained from work to be the natural and proximate cause of Mr. Butler's disability.[11]

After reviewing the record, we conclude that the magistrate correctly determined that Mr. Butler's application for accidental disability retirement benefits should be denied as a matter of law. 840 C.M.R. 10.09(2). We agree with the magistrate's analysis beginning with the paragraph at the bottom of page 8 to the first paragraph on page 11 and incorporate that by reference. Mr. Butler must prove by a preponderance of the evidence that he was disabled as a result of the March 1994 back injury as of his last day of work, rather than a subsequently matured disability. *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 seeking accidental disability retirement, the applicant must establish that the same reason he stopped working is the same reason for which he later seeks the benefit. Here, Mr. Butler left work to undergo a scheduled hernia surgery on January 5, 2016, not because he could no longer perform the essential duties of his job as a result of the claimed back injury. Thus, on his last day of work – December 31, 2015 – the record demonstrates that Mr. Butler stopped working for reasons unrelated to the back injury of March 1994.

Additionally, the record reflects that after recovering from hernia surgery in January 2016, Mr. Butler stopped working in order to receive long term disability benefits through his insurer Unum, which was promised to him the prior year.[12] He was informed that he was not

[11] FF 33; Ex. 4.
[12] FF 16 – 17.

eligible to receive long term disability benefits while working, so he made a decision not to return to work after recovering from hernia surgery. Around the same time as his application for long term disability benefits, Mr. Butler also filed for superannuation retirement benefits. He was later surprised to learn that his long term disability benefits were reduced by the amount of his retirement benefits. He, therefore, applied for accidental disability retirement. Overall, the evidence reflects that Mr. Butler chose not to return to work after recovering from hernia surgery to maximize his non-Chapter 32 benefits (as determined by the magistrate). Accordingly, the substantial evidence in the record supports the magistrate's decision to deny Mr. Butler's application as a matter of law and without convening a regional medical panel. In so deciding, we defer to the magistrate's substantive findings. *Vinal v. Contributory Retirement Appeal Bd*., 13 Mass. App. Ct., 85 (1982).

Lastly, Mr. Butler also claimed that he sustained a repetitive injury from April 15, 1994 to December 31, 2015. Specifically, he claims that the repetitive work he performed through the years gradually caused his disability. In this instance, we agree with the magistrate that the strain/sprain/hazard Mr. Butler relied on in his application does not constitute a hazard for entitlement to accidental disability retirement and incorporate that discussion on pages 11 – 12. For claims based on the hazard theory, Mr. Butler must establish that his work "exposed him to an identifiable condition not common and necessary to all or a great many occupations." *See Blanchette v. Contributory Retirement Appeal Bd.,* 20 Mass. App. Ct. 479, 487 n.7 (listing as examples of work hazards not common to many occupations diseases arising from asbestos exposure or "continual exposure to traumatic or depressing events") and *Kelly's Case*, 394 Mass. 684, 688 (1985). The evidence does not support this. CRAB has held that performing strenuous or repetitive work alone is "not common or necessary to all or a great many occupations" to qualify for accidental disability retirement benefits.[13] The strain/sprain/hazard that Mr. Butler

[13] *Parent v. Worcester Regional Retirement Board*, CR-11-659 (DALA 2012, aff'd by CRAB 2013) (holding that "physically exertional but routine" conditions of firefighter were common to many that involve heavy work activities); *Curley v. Cambridge Board of Retirement*, CR-12-214 (CRAB 2015) (holding that heavy lifting as mechanic in Fire Department, changing heavy tires, and inspecting and maintaining vehicles did not constitute an unusual condition); *Duggan v. Boston Retirement Board*, CR-98-225 (CRAB 2000) (holding the same in a position requiring frequent stair climbing); *Loura v. Taunton Retirement Bd*., CR-13- 186 (CRAB July 2021, aff'd Bristol Superior Ct. CA No. 2021-00576, Nov. 15, 2022)(regularly lifting and moving heavy pipes and machinery, kneeling and lifting in confined spaces and performing water maintenance

claims caused his disability are just the types of repetitive work that CRAB has determined do not qualify for accidental disability retirement but are more align with normal wear and tear injuries. Moreover, Mr. Butler did not file any reports of injury throughout the 22 years he was performing his work after the March 1994 injury that would support a claim under the hazard theory. In fact, for twenty-two (22) years, Mr. Butler worked and performed his duties satisfactorily, and there is no evidence in the record to conclude otherwise. Accordingly, he has failed to meet the requirements for an award of accidental disability retirement benefits under the hazard theory.

Conclusion. The DALA decision is affirmed. Mr. Butler failed to meet his burden to be entitled to an evaluation by a regional medical panel and 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: May 28, 2025

work were heavy labor work and did not constitute an identifiable condition); and *Pereira v. New Bedford Ret. Bd.,* CR-16-450 (CRAB Aug. 2024); (repetitive movements of welder were not uncommon for accidental disability retirement).