COMMONWEALTH OF MASSACHUSETTS
Division of Administrative Law Appeals

JODY CARREIRO, *Petitioner*	:	Docket No. CR-21-0355
	:	Date: July 21, 2023
v.	:	
NEW BEDFORD RETIREMENT BOARD, *Respondent*	:	

Appearance for Petitioner:

Robert Deubel, Esq.
Law Offices of Deborah G. Kohl
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Appearance for Respondent:

Christopher Collins, Esq.
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Administrative Magistrate:

Eric Tennen

SUMMARY OF DECISION

The Petitioner, a school teacher, was injured while trying to break up a fight. The impact of the injury was apparent. Before the injury, she worked three jobs and was extremely physically active. After, she was unable to work or remain physically active. Although she had a pre-existing medical condition, that condition did not limit her in any way before her workplace injury. Accordingly, she proved by a preponderance of the evidence that her injury was the cause of her permanent disability.

DECISION

Pursuant to G.L. c. 32, § 16(4), the Petitioner, Jody Carreiro, filed an appeal after the New Bedford Retirement Board ("NBRB") voted to deny her application for accidental disability. The Petitioner was a high school biology teacher. She suffered an injury when she

attempted to break up a fight between two students. She eventually stopped working and applied for accidental disability. After a series of procedural hurdles, *see Carreiro v. New Bedford Ret. Bd.*, CR-16-448 and 18-0547, the Petitioner was evaluated by a medical panel that unanimously found in her favor. Nevertheless, the NBRB denied her application.

I held an in-person hearing on March 2, 2023 at the Division of Administrative Law Appeals (DALA). The Petitioner testified on her behalf; the Board offered no witnesses. I swore in the witness and was able to observe her demeanor throughout her testimony. I entered Exhibits 1-43 into evidence at the hearing without objection.

The parties submitted closing briefs on June 15, 2023, whereupon the administrative record was closed.

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:

Background

1. The Petitioner is 57 years old. (Stipulated Facts.)
2. She worked as a high school biology teacher from August 2006 until she was injured in September 2007. (Stipulated Facts.)
3. In addition to teaching, the Petitioner was an avid golfer. She played recreationally but also worked as a golf pro from 1993 to the present. Her work, and hobby, involved physical and non-physical tasks. She worked regularly on nights and weekends; in the summer she would work longer hours (because she was not teaching). (Petitioner Testimony.)
4. From 1993 until her injury in 2007, she was also an adjunct professor at Fisher College.

She taught multiple courses. (Petitioner Testimony.)

5. In addition to being an avid golfer, before her injury in 2007, the Petitioner was extremely active: she played multiple sports such as volleyball, biking, badminton and soccer. (Petitioner Testimony.)

Prior accidents and injuries

6. In 2002, she was involved in a motor vehicle accident. She was concussed, suffered a "whiplash type injury," and hurt her left shoulder. (Ex. 37, pg. 73; Petitioner Testimony.)

7. The accident also caused frequent headaches that eventually developed into migraines. She suffered from these for years after. (Petitioner testimony.)

8. Over time, she was successfully treated for these injuries. In any event, they never limited her from continuing to play sports or performing the basic duties of any of her jobs. (Ex. 37, pgs. 84; Petitioner Testimony.).

9. After that accident, she did not even miss a day of work, either as a teacher or golf pro. (Petitioner Testimony.)

10. Throughout her life she has had multiple surgeries mainly to her shoulders and elbows—at least six times between 1986 and 2006. (Petitioner Testimony.)

11. These surgeries did not cause her to miss work either. (Petitioner Testimony.)

The September 2007 incident

12. In August 2006, she began working as a biology teacher at New Bedford High School. Her duties required her to stand for 5-6 hours continuously. She also had to constantly bend her neck: while grading papers, making notes to prepare for class, looking through microscopes, and writing on a chalkboard. (Petitioner Testimony.)

13. In Spring 2007, she resumed her work as a golf pro (when the weather warmed up) and

taught classes at night at Fisher College. Thus, from early 2007 until the end of that school year, she worked three jobs. (Petitioner Testimony.)

14. In the Fall of 2007, she returned to New Bedford High School to resume teaching. (Petitioner Testimony.)

15. Unfortunately, on September 11, 2007, she was injured at work when she attempted to break up a fight between two students ("September 2007 incident"). In the process, she struck her head against a wall. (Stipulated Facts.)

16. She almost immediately began to feel her neck tighten. She could not turn or bend it without significant pain, which she described as an "electric" shock down the back of her neck. She had never experienced these symptoms before. (Petitioner Testimony.)

17. Within hours of the injury, she went to the emergency room. (Ex. 28, pg. 200.)

18. She thereafter began a course of physical therapy. (Stipulated Facts.)

19. She was immediately unable to work at the high school. She never again taught at Fisher College. (Petitioner Testimony.)

20. She continued to work as a golf pro, though not as many hours as before. However, now she could not perform any of the physical tasks she used to do. Instead, she can give only verbal instructions—which is enough for her to be an effective teacher. (Petitioner Testimony.)

21. Prior to the September 2007 incident, she had visited a chiropractor. Out of an abundance of caution, because of her motor vehicle accident in 2002, he ordered an MRI before he would treat her. (Petitioner Testimony.)

22. The MRI was coincidentally scheduled for a few days after she was injured at school. This was the first MRI she ever had; accordingly, there is no MRI from before the

September 2007 incident with which to compare. (Exhibit 34.)

23. The MRI showed that she had some general disc degeneration and spinal cord compression at three levels. (Exhibit 34.)

24. After seeing the results of the MRI, the chiropractor referred her to another doctor. Ultimately, she received three opinions: one doctor suggested she did not need to do anything unless symptoms worsened; on the other hand, two doctors opined she had a very serious condition that required immediate surgery. (Petitioner Testimony.)

25. She opted for the surgery. She had it in 2008. The surgery was not intended to alleviate her neck pain; it was intended simply to decompress her spinal cord. Some doctors referred to it as "prophylactic." It did, however, alleviate the "electric" shocks she felt after her injury. (Ex. 39; Petitioner Testimony.)

26. Despite the surgery, she continues experiencing multiple symptoms she developed after the September 2007 incident: sometimes she cannot walk more than 20 minutes without pain; she continues to have neck pain; she has a very limited range of motion; her grip strength is becoming weaker; she has tingling in her hands and decreased sensation. These symptoms are expected to persist and could possibly worsen. (Exs. 15, 36, & 39; Petitioner Testimony.)

27. She was unable to resume teaching because the range of motion in her neck was so limited. (Petitioner Testimony.)

Workers Compensation benefits

28. The Petitioner received workers compensation until it ran out around 2017. (Exs. 23-25; Petitioner Testimony.)

29. Within that process, she was evaluated by two doctors, including Dr. Michael DiTullio in

October 2008. (Ex. 39.)

30. He evaluated her after her surgery. He noted she continued to have symptoms, like a limited range of motion and inability to walk for a long time. He attributed her symptoms to the 2002 accident and a pre-existing condition of cervical spine abnormalities. In his opinion, "any ongoing symptomatology, future complaints, or requirement for additional surgical intervention for ongoing disability are not causally related to the traumatic episode of September 2007." (Ex. 39.)

Accidental Disability application

31. The Petitioner applied for accidental retirement disability in 2015. (Ex. 1.)

32. The Board originally declined to even convene a medical panel. That began a series of appeals at DALA which resulted in two remands. (Exs. 2-10.) [1]

33. This, in turn, produced evaluations by two medical panels.

34. The first evaluation was in October 2017. The Petitioner was evaluated by a joint panel consisting of Drs. Henry Drinker, John Golberg, and Judy Fine-Edelstein. (Ex. 6.)

35. That panel unanimously agreed that she was permanently disabled, but that her disability was not proximately caused by her workplace accident:

> The disability is not felt to be directly caused by the work-related incident as described. It was the opinion of the panel that the cervical degeneration and cervical spinal stenosis were pre-existing conditions, and potentially some of the disc disease could have been associated with an accidental injury in 2002. Records pertaining to her treatment at that time were not available. It is our opinion that the injury at work represented only a temporary exacerbation of her pre-existing condition.

(Ex. 6.)

[1] For a history of the various remands, *see Carreiro v. New Bedford Ret. Bd.*, CR-16-448 and 18-0547.

36. Following that report, the Board agreed to reconvene the panel to reevaluate the Petitioner because the panel did not have access to important medical records. (Exs. 11-13.)

37. The Board forwarded various records to the new panel. (Ex. 40.)

38. The Board also sent a detailed letter asking the doctors to explain various factual and legal conclusions. (Ex. 14.)

39. The medical panel consisted of two doctors who were on the Petitioner's prior medical panel (Drs. Drinker and Golberg) and one doctor who had not previously evaluated the Petitioner (Dr. Julian Fisher.) (Ex. 15.)

40. This time, the panelists met with the Petitioner individually. (Ex. 15.)

41. And this time, the Panel unanimously agreed that the Petitioner's injury could have been caused by her workplace accident (Ex. 15.)

42. The doctors reaffirmed the Petitioner was permanently disabled, listing a variety of ongoing symptoms: marked limitation of range of motion, decreased flexibility, neck stiffness and spasms, decreased strength grip, tingling and decrease in sensation over parts of her body. (Ex. 15.)

43. Each doctor agreed that the Petitioner may have had a pre-existing condition: some form of cervical spine degenerative disease which is, as Dr. Golberg put it, "a very common condition." (Ex. 15.)

44. In finding causation, each doctor therefore agreed that the Petitioner's workplace injury aggravated this pre-existing condition.

45. The doctors then focused on the change in the Petitioner's pain and restrictions before and after her injury:

> The work-related accident in 2007 caused a marked and dramatic change in the sense of sudden onset of neck pain that did not resolve, as opposed to in 2002. This pain from 2007 persisted despite all intervention. The medical tipping point was forced by the detection of the marked multilevel cervical instability. While one can argue that some degree of cervical spine degenerative disease was in process prior to 2007, the fact that the sudden onset of extreme pain with the finding of potentially life-threatening cervical instability required relatively urgent surgical intervention for stabilization.
>
> Clearly, the 2007 accident markedly aggravated any preexisting degenerative findings and served as a significant tipping point at greater than 51% in terms of placing her at risk for further compromise and potential paralysis. This was the necessary condition requiring urgent surgical intervention.

Exhibit 15 (Dr. Fisher report.)

> [T]here appears to have been substantial and evidently permanent aggravation of symptoms following the January 2008 surgery. I think the surgical procedure was intended to alleviate pressure on the spinal cord as a more urgent type of procedure. I find it difficult to believe that she would have had ongoing compression of the spinal cord from 2002 up until now without significant symptoms.
>
> …
>
> [I]n my mind, the symptoms following the accident of record fall within the category of an aggravation. There appears to be a fundamental worsening with some indication of a neurological status related to spinal cord compression. Therefore, I consider this to be more of a permanent aggravation in the sense that compression of the spinal cord may not resolve and can leave lingering symptoms. An exacerbation as you have defined would be anticipated to resolve, and there was no evidence that that was occurring nor would it be likely to occur in this context.
>
> . . .
>
> While I cannot specifically define that herniations of one or more of her intervertebral discs occurred specifically on that occasion, it seems unlikely to me that she could have sustained persistent spinal cord compression for over many years without having developed some significant symptoms.

Exhibit 15 (Dr. Golberg report.)

> We are left, therefore, with the subjective symptoms alone of the applicant as having significantly increased in the region of her cervical spine following the injury of September 11, 2007, rather than any clear

> confirmation that the subsequent need for treatment and incapacity are causally related.
>
> Notwithstanding the above logic and opinions, it must also be emphasized that prior to the fall in question on September 11, 2007, the applicant was able with few symptoms to carry on her work as a science teacher in the New Bedford Public School System and that her cervical spine pain significantly increased immediately following said incident. To this examiner, this is significant information. The presence of disc protrusions and/or herniations noted on the MRI three days after the injury in question does not prove that those findings were not present beforehand, but it also does not prove the opposite.
>
> Based on the fact that the applicant experienced subjectively a significant deterioration in cervical spine comfort following the accident and the presence of disc protrusions and herniations noted on MRI three days later, it makes it impossible for this examiner to say unequivocally that there could not be a cause and effect relationship.

Exhibit 15 (Dr. Drinker report.)

46. Despite these conclusions, on September 27, 2021, the Board denied the Petitioner's application because "causation had not been satisfied." (Exhibit 16.)

47. The Petitioner filed a timely notice of appeal on September 29, 2021. (Exhibit 17.)

CONCLUSION AND ORDER

The Petitioner has the burden of proving every element of her 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). Accidental disability requires three elements: 1) that the applicant was "mentally or physically incapacitated for further duty," 2) that her "incapacity is likely to be permanent," and 3) that her disability "is such as might be the natural and proximate result of the accident or hazard undergone." G.L. c. 32, § 6(3)(a). The only element the Board disputes here is causation.

Applicants must show they sustained their injuries from either a specific event or series of events. *Ibid*. The event, or events, must be "a significant contributing cause to [the]

employee's disability." *Robinson's Case*, 416 Mass. 454, 460 (1993). "If an applicant suffers from an underlying condition that was aggravated by a work-related injury to the point of disability, that injury is compensable." *B.G. v. State Bd. of Ret.*, CR-20-0207, 2021 WL 9583594, (DALA Oct. 8, 2021). In those cases, a Petitioner must still prove her disability was not caused merely "by [the] natural, cumulative, degenerative effects of her pre-existing condition." *Lisbon v. CRAB*, 42, Mass. App. Ct. 246, 255 (1996).

While a positive medical panel is "some evidence on the question of causation . . . it is not determinative." *Warren v. Boston Ret. Bd.*, CR-13-199, 2022 WL 16921473, *16-17 (DALA Sep. 30, 2022). Rather, "[t]he ultimate finding on causation is left to the retirement board to determine, considering all the evidence, both medical and non-medical." *Id.* at *17, *citing Wakefield Contributory Ret. Bd. v. CRAB*, 352 Mass. 499 (1967).

The Petitioner was a credible witness

The Board makes a broad argument that the Petitioner was not a credible witness. It characterizes her testimony as self-serving, exaggerated, and uncorroborated. I could not disagree more. I find the Petitioner was an extremely credible and reliable witness. She had a good memory and did not overstate matters. I observed her demeanor at all times and it was consistent regardless of who was asking her questions or what the questions were. Therefore, I reject the Board's argument that points to any part of the Petitioner's testimony as untrue. I cannot address every instance the Board raises this argument in its closing brief. However, it should be obvious when reading my factual findings, where I find many facts the Board disputes on this ground.

The September 2007 incident caused the Petitioner's disability.

The Board's next argument is that the evidence of causation is weak or non-existent. The common thread through this argument is the Board's failure to address the stark difference between the Petitioner's lifestyle and abilities before and after the September 2007 incident. Taking that into account, it is clear the September 2007 incident caused her disability by aggravating a pre-existing condition.

The Petitioner's preexisting condition, cervical spine degenerative disease, did not impact her before her injury at the high school. Despite her accident in 2002, lingering headaches, and various surgeries, she was able to work up to three jobs at a time without limitation. She was also extremely physically active. All of that stopped immediately after the September 2007 incident. There are not many cases where the line from injury to disability is more direct. When an employee is perfectly capable of doing their job, and then totally unable to following a workplace injury, this goes a long way toward meeting their burden of proving causation. *See e.g. Wood v. Lawrence Ret. Bd.*, CR-21-083 (DALA Aug. 19, 2022). This is so even if the employee has a pre-existing condition—as long as it is clear the pre-existing condition did not limit the applicant in the same way the new injury does. *See Smith v. Essex Regional Ret. Bd.*, CR-19-0533 (DALA Dec. 16, 2022); *Bettencourt v. Taunton Ret. Bd.*, CR-14-029 (DALA Dec. 30, 2015) *affirmed by* CRAB, (Oct. 18, 2017) ("Bettencourt was able to perform his demanding job with no restrictions prior to September 23, 2009 . . . his disability was proximately caused by this work incident, which aggravated his pre-existing degenerative back condition.").

The Board nitpicks the medical evidence to try and create a narrative I reject. The Board argues the Petitioner minimized her pain and injuries prior to the September 2007 incident to exaggerate the impact it had on her life. This implies her testimony was calculated to achieve a

result. It further argues that at some point after the incident, she was alleviated of her symptoms and capable of performing her duties. That she did not return to work was a conscious choice, not a medical necessity. I reject this premise.

Despite multiple injuries and surgeries before 2007, the Petitioner remained physically active and worked three jobs. She did so much because she enjoyed it. I do not believe she would have returned to her new job in the fall, unexpectedly be involved in an accident, and use it as an excuse to retire and collect benefits. The Petitioner had every chance to be sidelined by injuries, pain, and surgeries in the past and she never took it. That makes her claim that she is permanently impacted by her symptoms all the more credible. If she could work, she would; if she could be active, she would be. I believe she would gladly trade whatever money she may get from this disability claim to return to her old, physically active form.

The Board's argument brushes aside the Petitioner's credible testimony describing her pain and symptoms following the September 2007 incident. It also ignores every doctor's conclusion that she was permanently disabled. The doctors unanimously agreed that she has a very limited range of motion which will never get better and could get worse; they also agreed she still experiences pain, tingling sensations, and decreased sensations in her hand. These symptoms make it impossible for her to work as a teacher.

The Board next argues that if the Petitioner is disabled, she was on a path to incapacity well before 2007 and it is her pre-existing condition which caused her disability, not the September 2007 incident. This argument ignores the overwhelming evidence that the Petitioner was not limited in any way prior to the September 2007 incident—despite still experiencing pain from the 2002 accident and undergoing multiple surgeries. If the 2008 surgery resolved the effects of the September 2007 incident, then one would have expected the Petitioner to return to

her pre-incident form. But the surgery resolved only one of her many symptoms (the electric shocks) but did not fix the more permanent problems. The surgery was more prophylactic, to prevent further injury and disability.

Sometimes the simplest explanation is the most direct one. Imagine a marathoner approaching the end of a race, exhausted, but still running hard. Suddenly, she trips, falls, and breaks her ankle. She cannot finish the race. Before the injury, there was no reason to think she would not finish; after the injury, it was clear she did not finish because of it. But no one would seriously argue she failed to finish because she was too tired. That argument ignores her injury. Yet that is essentially the Board's approach here. It argues as if the September 2007 incident never happened and, instead, the Petitioner—a physically active athlete who worked three jobs (including two teaching jobs)—was destined for incapacity. Before the September 2007 incident, no one thought the Petitioner would be unable to work or be physically active because of her pre-existing condition—certainly not her or any of her doctors.

In short, the overwhelming evidence is that the Petitioner is permanently disabled. The demarcating line is clearly the September 2007 incident. She has proven by clear and convincing evidence the September 2007 incident caused her disability.

The Medical Panel opinions were persuasive, more so than an outdated opinion from the Petitioner's workers compensation case.

The Board's final argument is a direct attack on the logic and credibility of the medical panelists' opinions. It relies heavily, if not exclusively, on Dr. DiTullio's opinion. Dr. DiTullio evaluated the Petitioner for her worker's compensation claim in 2008. I find the medical panel opinions are more persuasive for a few reasons: they evaluated the Petitioner more recently; two of them evaluated her twice; and their evaluations are based on an interpretation of facts with which I agree.

I do not fault Dr. DiTullio for having a different opinion. "[D]ifferent experts can look at the same set of facts and reach different plausible conclusions." *Frakes*, at *15. But also, his evaluation is frozen in 2008, when he met with the Petitioner. The medical panelists met with the Petitioner almost ten years later, and had the benefit of more recent information, including more data about the Petitioner's long-term prognosis. Dr. DiTullio's opinion could not possibly have taken into account the symptoms the Petitioner would continue to suffer over the 10 years after he evaluated her.

The Board's singular reliance on one evaluation from the worker's compensation case is ironic since Boards often oppose the same arguments made by Petitioners. I rejected a similar argument by the Petitioner in *Frakes*, for example. And the language used to reject the argument there is equally applicable here:

> "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." Moreover, the contrary legal conclusions of the other evaluators arose in a different context—her claim for workers' compensation. Given the different legal schemes, the medical panel need not defer to those conclusions.

Frakes, *15-16 (citations omitted).

The two cases the Board cites are distinguishable. In *Francis v. Dukes Ctny. Ret. Sys.*, CR-18-0522 (DALA Mar. 18, 2022), the Petitioner there had a series of injuries that had limited his ability to work *before* the incident that formed the basis for his disability claim. In fact, he needed "external supports and a cane to ambulate." *Id*. at *3. Additionally, both the medical panelists and the DALA Magistrate found the Petitioner was not a reliable historian; he had a bad memory and appeared confused. *Id*. at *10. In *Brady v. Weymouth Ret. Bd.*, CR-20-0201 (DALA Jul. 15, 2022), the medical panelists were more equivocal on causation than in this case. Also,

the Petitioner did not want to retire and felt capable of working after his injury. He changed his mind only after his superior filed an involuntary retirement application on his behalf.

In any event, the combination of factors in this case, which include an extremely credible witness, compel me to side with the unanimous medical panel over an outdated workers' compensation evaluation.

Accordingly, the NBRB's decision denying the Petitioner's application for accidental disability is **reversed**.

SO ORDERED

DIVISION OF ADMINISTRATIVE LAW APPEALS

Eric Tennen

_____

Eric Tennen
Administrative Magistrate