

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

William J. Casey,

Petitioner,

v.

Docket No. CR-20-0319

Lynn Retirement Board,

Date: September 15, 2023

Respondent.

Appearance for Petitioner:

Jayne M. Bogart, Esq.
100 Haverhill Road
Topsfield, MA 01983

Appearance for Respondent:

Diane J. Bonafede, Esq.
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Administrative Magistrate:

John G. Wheatley

SUMMARY OF DECISION

The petitioner is not eligible for disability retirement under the Cancer Law, G. L. c. 32, § 94B, because his condition of cancer was not discovered within five years of the last date he actively served.

DECISION

The petitioner, William Casey, appeals the decision of the Lynn Retirement Board (“Board”) denying his application for disability retirement. The petitioner and the respondent

each filed a pre-hearing memorandum, which I have marked as briefs “A” and “B” respectively. I held an evidentiary hearing on July 11, 2022, which was recorded. I admitted twelve documents into evidence at the hearing. Mr. Casey testified on his own behalf. There were no other testifying witnesses. On September 29, 2022, I received post-hearing briefs from both parties, which I have marked as brief “C” for petitioner and “D” for respondent. The record closed upon receipt of the briefs.

FINDINGS OF FACT

Based on the testimony and documentary evidence presented at the hearing, I make the following findings of fact:

1. William Casey worked for the City of Lynn Fire Department for thirty years, from November 1971 until his retirement on March 31, 2002. (Testimony.)
2. Mr. Casey responded to approximately 100 fires during his employment with the Lynn Fire Department, which included arsons, the Great Lynn Fire of 1981, and a fire at a plastics factory, among others. (Testimony.)
3. Following his retirement, Mr. Casey saw his primary care physician and had lab work done on an annual basis. (Testimony.)
4. In January 2010, Mr. Casey’s primary care physician referred him to an oncologist, Dr. Angus McIntyre, due to an elevated white blood cell count. (Testimony.)
5. Dr. McIntyre saw Mr. Casey on February 8, 2010, for an initial evaluation. Dr. McIntyre diagnosed early-stage chronic lymphocytic leukemia, which was confirmed by flow cytometric analysis. (Exs. 4, 12.)
6. On November 11, 2016, Mr. Casey submitted an application for disability retirement to the Lynn Retirement Board. (Ex. 1.)

7. Dr. McIntyre completed the treating physician's statement in support of Mr. Casey's application, opining that Mr. Casey was permanently disabled as a result of his leukemia diagnosis. (Ex. 3.)
8. In a letter attached to the physician's statement, Dr. McIntyre commented on "when his disease first began or might have been identified." He noted that Mr. Casey did not have any symptoms when he first presented for treatment in 2010, and that the findings at that time were "consistent with early stage chronic lymphocytic leukemia." He further noted:

"[A] total lymphocyte count of 5000 with confirmatory flow cytometry demonstrating a monoclonal B-cell population were considered adequate to make the diagnosis of CLL. The 4th line on [Mr. Casey's] chart is absolute lymphocyte count and it can be seen that this slowly increased from 1.3-2.7 (1300 – 2700) from January 1998 to November 2004. It was not determined because of the absence of a differential over the ensuing years until January 2010 when it clearly was elevated at 22.7. It therefore would have crossed the threshold of 5000 some time during the intervening years although it is hard to say when that might have been. . . . If one accepts that the neutrophils and other cells made up between 4.0 and 4.7 during those intervening years and subtracts that from the total white count, that would give an estimate of the total lymphocyte count. It therefore would have crossed the 5000 threshold somewhere in the middle of 2007 perhaps around July when the total white count was 10.2."
- (Ex. 4.)
9. In a treatment note dated December 20, 2016, Dr. McIntyre commented that "the 1st evidence of disease was either 2007 or 2008," based on white blood cell counts on January 9, 2007, July 10, 2007, and December 23, 2008. (Ex. 12.)
10. On June 26, 2020, the Lynn Retirement Board denied Mr. Casey's application on the ground that it did not receive any medical documentation that he was diagnosed with cancer within five years of retirement. (Ex. 14.)
11. On July 10, 2020, Mr. Casey timely appealed the Board's decision. (Ex. 14.)

DISCUSSION

General Laws c. 32, § 94B(1) creates a rebuttable presumption that certain cancer conditions are causally related to a firefighter's job. The statute provides, in pertinent part:

“[A]ny condition of cancer affecting the skin, breasts or the central nervous, lymphatic, digestive, hematological, urinary, skeletal, oral, reproductive or prostate systems, lung or respiratory tract, resulting in total disability or death to a uniformed member of a paid fire department . . . shall, if he successfully passed a physical examination on entry into such service or subsequent to such entry, which examination failed to reveal any evidence of such condition, be presumed to have been suffered in the line of duty, unless it is shown by a preponderance of the evidence that non-service connected risk factors or non-service connected accidents or hazards undergone, or any combination thereof, caused such incapacity.”

Section 94B(2) further provides that “[a]ny person first discovering any such condition within five years of the last date on which such person actively so served shall be eligible to apply for benefits hereunder.”

Mr. Casey is not eligible for disability benefits under § 94B because his leukemia was not discovered or diagnosed within five years of his retirement on March 31, 2002.¹ Rather, the chronic lymphocytic leukemia diagnosis was not made until February 2010, nearly eight years after he retired. Dr. McIntyre's opinion that the cancer was likely present in 2007 does not satisfy the statute's eligibility requirements. The statute requires that the condition be *discovered* within five years of active service, not that the condition be present within such time. *DelGizzi v. Newton Retirement Bd.*, CR-00-1147 (DALA Jan. 19, 2001), *aff'd* (CRAB May 25, 2001) (“The statute refers specifically to the date of discovery of the condition, not to the speculative date of onset of the condition.”). See also *Kimble v. Boston Retirement Sys.*, CR-16-566, at *8

¹ Section 94B does not preclude a member from applying for accidental disability retirement under G. L. c. 32, § 7. G. L. c. 32, § 94B(4). Mr. Casey, however, did not submit his application within the two-year period required by § 7(1). See *Oteri v. Weymouth Retirement Bd.*, CR-09-0255, at *4 (CRAB Oct. 13, 2011) (“Not having worked as a firefighter during the two years before the application for accidental disability retirement was filed, [the petitioner] cannot meet the requirement of G. L. c. 32, § 7(1).”).

(DALA Feb. 14, 2020) (cancer, rather than condition that subsequently caused cancer, must be discovered within five years); *Logan v. Public Employee Retirement Admin. Comm'n*, CR-00-1002, at *4 (DALA July 2, 2001) (cancer must be actually discovered within five years). Moreover, Dr. McIntyre suggested an onset of the cancer around mid-2007 (possibly July), which is more than five years after Mr. Casey's retirement in any event.

The petitioner argues that § 94B places an undue burden on firefighters to rely on their physicians to reach a cancer diagnosis within five years of their active service.² Although I am sympathetic to the petitioner's circumstances, and commend his many years of service as a firefighter, DALA does not have the authority to grant an equitable remedy that is contrary to the statute's explicit requirements. See *Petrillo v. Public Employee Retirement Admin.*, CR-92-731 (CRAB Oct. 22, 1993) (CRAB does not have "the authority to employ an equitable remedy in the face of specific statutory language [to the] contrary").

CONCLUSION AND ORDER

The petitioner is not eligible for disability benefits under the Cancer Law, G. L. c. 32, § 94B. The decision of the Lynn Retirement Board is therefore affirmed.

Division of Administrative Law Appeals

/s/ John G. Wheatley

John G. Wheatley
Administrative Magistrate

² I note that the petitioner had annual physicals with blood work each year after he retired, so his doctor had adequate opportunity to discover cancer within the five-year period following his retirement.