

**COMMONWEALTH OF MASSACHUSETTS
CONTRIBUTORY RETIREMENT APPEAL BOARD**

ROBERT CESAITIS,

Petitioner-Appellant

v.

WORCESTER RETIREMENT BOARD,

Respondent-Appellee.

CR-15-74

DECISION

Petitioner Robert Cesaitis appeals from a decision of an administrative magistrate of the Division of Administrative Law Appeals (DALA), affirming the decision of the respondent Worcester Retirement Board (WRB) denying his application for accidental disability retirement benefits because WRB determined he was capable of performing the essential duties of his modified job. The magistrate held a hearing on June 16, 2016 and admitted twenty-nine exhibits. The DALA decision is dated June 2, 2017. Mr. Cesaitis filed a timely appeal to us.

After considering the arguments put forth by the parties and after reviewing the record, we incorporate the DALA decision by reference and adopt its findings of fact 1 – 34 as our own. We affirm the DALA decision for the reasons set forth in the Conclusion, adding the following comments.

Discussion

Under G.L. c. 32, § 7, a public employee is eligible for accidental disability retirement benefits if the employee demonstrates 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 a hazard undergone as a result of, and while in the performance of, his duties at some definite place and at some definite time.”

To establish entitlement to accidental disability retirement benefits, Mr. Cesaitis has the burden of proving each element of his claim by a preponderance of the evidence. *Bagley v. Contributory Retirement Appeal Bd.*, 397 Mass. 255, 258 (1986)(petitioner has burden of proving his case by the preponderance of evidence); *Lisbon v. Contributory Retirement Appeal Board*, 670 N.E. 2d 392, 41 Mass. App. Ct. 246 (1996); *Daley v. Contributory Retirement Appeal Bd.*, 60 Mass. App. Ct. 1110, 801 N.E. 2d 324 (2004); *Hough v. Contributory Retirement Appeal Bd.*, 309 Mass. 534, 36 N.E. 2d 415 (1941); *Wakefield Contributory Retirement Bd. v. Contributory Retirement Appeal Bd.*, 352 Mass. 499, 226 N.E.2d 245 (1967).

An applicant seeking accidental disability retirement benefits must be examined by an independent medical panel. G.L. c. 32, § 6(3)(a); *Kelley v. Contributory Ret. App. Bd.*, 341 Mass. 611, 613 (1961). *See also Malden Ret. Bd v. Contributory Ret. App. Bd.*, 1 Mass. App. Ct. 420, 423 (1973) (panel opines on medical questions “beyond the common knowledge and experience of [a] local retirement board”). A condition precedent to granting accidental disability benefits is the panel’s issuance of an affirmative certification on questions of incapacity, permanence, and causation.¹ *Kelley*, 341 Mass. at 613. A medical panel’s certification is given deference unless it is based on an erroneous standard, fails to follow proper procedures, is improperly compromised, or unless the certificate is “plainly wrong.” *Malden v. Contributory Ret. Appeal Bd.*, 1 Mass. App. Ct. 420, 423 (1973); *Kelley*, 341 Mass. 611 (1961).

Following an amendment to G.L. c. 32 § 7 in 1996, a public employee may be eligible for accidental disability retirement only if he or she cannot perform the “essential duties” of his or her job. This statutory language effectively requires “an injured public employee who is physically capable of performing some of the important duties of his position to do so.” *Foresta v. Contributory Ret. Appeal Bd.*, 904 N.E.2d 755, 762 (Mass. 2009). The Supreme Judicial Court (SJC) explained in *Foresta* that § 7 permits an employer to modify an

¹ The panel addresses three questions: (1) whether the applicant is mentally or physically incapacitated for further employment duties; (2) whether such incapacity is likely to be permanent; and (3) “whether or not the disability is such as might be the natural and proximate result of the accident or hazard undergone on account of which [an accidental disability] retirement is claimed.” G.L. c. 32, § 6(3).

employee's essential duties in order to accommodate physical limitations, thereby revising the "essential duties" of his job, and as a result, limit the retirement system's liability for accidental disability retirement. The SJC prefaced that the modified job description must be "similar in responsibility and purpose to those performed by the employee at the time of injury, and must result in no loss of pay or other benefits." *Id.* at 670 (holding that an MTA Safety Inspector who was injured on the job could be assigned to "light duty" administrative tasks because the modified tasks were similar in responsibility to his role prior to the accident).

Mr. Cesaitis contends that the actual circumstances of his work conditions would preclude him from performing his essential job duties as modified in the job description provided by the WRB. Therefore, he argues that because the magistrate failed to consider the actual circumstances of his work conditions that her decision to uphold the denial of his application for accidental disability retirement is erroneous and should be reversed.² By extension, he asserts that the medical panel issued an improper certification and that its certification should not be relied upon.³ Consequently, Mr. Cesaitis believes he should be entitled to a new medical panel evaluation.

Notwithstanding Mr. Cesaitis' argument that he could not have been reasonably expected to perform the modified essential job duties given the actual daily operations of the high school cafeteria, we agree with and defer to the magistrate's conclusion that the WRB acted properly according to § 7(1) when it offered Mr. Cesaitis a modified job description. *Vinal v. Contributory Retirement Appeal Bd.*, 13 Mass. App. Ct. 85, 430 N.E.2d 440 (1982). The modified job duties addressed the limitations and restrictions resulting from his back injury as determined by Dr. Devine.⁴ However, Mr. Cesaitis testified that there were times where he was short-staffed and requested assistance from management, but his requests were ignored. Therefore, he was left with having to perform work beyond what was described in the modified job duties.⁵ He also testified that there were multiple occasions that despite his requests to employees and the suppliers to assist with the heavy lifting requirements and

² Petitioner Memo at 10-11.

³ *Id.*

⁴ Ex. 4; Trans. at 27.

⁵ Trans. at 29-33.

meeting their contractual obligations, the employees and suppliers failed to comply.⁶ Nevertheless, he did not notify the proper officials of these transgressions and lack of cooperation from the employees and the suppliers. Instead, he performed the work that was not required of him (which he was excused from doing in the modified job duties).⁷ Without proper notice, the WRB was unable to address those issues. Nevertheless, Mr. Cesaitis felt he could not continue to work in the modified position and ceased work in April 2013. While we commend Mr. Cesaitis' commitment to promoting efficient operations of the cafeteria and the seriousness to which he approaches his duties, he was provided with the accommodations noted in the letters of February 28, 2013 and March 28, 2013 for the purpose of addressing the symptoms and limitations resulting from his injury.

Further, we do not believe the accommodations provided by the WRB in its letters of February 28, 2013 and March 28, 2013 were illusory or untimely. While Mr. Cesaitis indicated and testified that he requested a reasonable accommodation for his limitations prior to filing his application for accidental disability retirement and was advised there were no light duty jobs, WRB contends that no request was ever made. When facts are in dispute, we look to the record to resolve the issue. A review of the Employer Statement indicates that Mr. Cesaitis did not request an accommodation, and as a result, the employer indicated that it did not offer an accommodation at the time the form was completed. Regardless, the Employer Statement indicated that there were no accommodations that were available for Mr. Cesaitis.⁸ The Physician Statement does not indicate that an accommodation was requested.⁹ Mr. Brophy testified that he first learned of Mr. Cesaitis' injury and limitations when he presented for a meeting in February 2013.¹⁰ Although the Employer Statement indicated that no accommodations were available for Mr. Cesaitis, the WRB subsequently provided accommodations to address those limitations in the February and March 2013 letters so that he could continue to work. Mr. Brophy testified that he donated a reclining chair for Mr. Cesaitis to assist in him performing his essential duties.¹¹ Based on our review of the

⁶ Trans. at 35-37, 55-56.

⁷ Trans. at 55-56, 79-80.

⁸ Ex. 2.

⁹ Ex. 1.

¹⁰ Trans. at 75.

¹¹ Trans. at 80-81.

evidence in the record, we can only conclude, as did the magistrate, that there is no evidence of a request for a reasonable accommodation by Mr. Cesaitis to address his injury.

Lastly, Mr. Cesaitis argues that he should be evaluated by a new medical panel because the medical panel applied an erroneous standard and lacked pertinent facts when it issued its certification. We conclude that the magistrate correctly determined that the medical panel did not apply an improper standard or failed to consider pertinent information. In this case, it would be improper for CRAB to disturb the medical opinions provided by the majority of the medical panel. Although the medical panel initially answered the three certificate questions affirmatively based on Mr. Cesaitis' original job description, the WRB acted pursuant to 840 CMR 10.11(2) in seeking clarification from the panel members as to whether Mr. Cesaitis could perform the modified duties provided by WRB in its letters of February 28, 2013 and March 28, 2013. Both Drs. Kasparyan and Yablon agreed that as long as Mr. Cesaitis' job duties did not include "repetitive bending" or "heavy lifting" that he would be able to perform the essential duties outlined under the modified job description.¹² Notwithstanding Mr. Cesaitis' sense of duty and commitment to his job, we agree with the magistrate that the medical panel did not apply an improper standard or failed to consider pertinent information in its responses to clarification questions. Deferring to the magistrate's findings, we conclude that Mr. Cesaitis is not entitled to an evaluation by a new medical panel. *Vinal v. Contributory Retirement Appeal Bd.*, 13 Mass. App. Ct. 85, 430 N.E.2d 440 (1982).

Conclusion

Mr. Cesaitis failed to meet his burden of proof that he is entitled to an evaluation by a new medical panel. He also failed to prove that he is entitled to accidental disability retirement benefits pursuant to G.L. c. 32, § 7. The DALA decision is affirmed.

SO ORDERED.

CONTRIBUTORY RETIREMENT APPEAL BOARD



Uyen M. Tran
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Chair

¹² Ex. 3.

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