**COMMONWEALTH OF MASSACHUSETTS**

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| Middlesex, ss. | **Division of Administrative Law Appeals** |
| **Richard Civetti,** Petitioner v.**Plymouth Retirement Board,** Respondent | Docket No. CR-16-411February 22, 2019 |

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| **Appearance for Petitioner**:Leigh A. Panettiere, Esq.Sandulli Grace, P.C.44 School Street, Suite 1100Boston, MA 02108 |
| **Appearance for Respondent** |

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**Administrative Magistrate**:

Bonney Cashin

**Summary of Decision**

The Petitioner is not entitled to accidental disability retirement. He has not shown by a preponderance of the evidence that he was permanently injured as a result of a work-related injury. The decision of the Retirement Board is affirmed.

**DECISION**

Richard Civetti timely appeals the decision of the Town of Plymouth Retirement Board issued on August 29, 2016 to deny him accidental disability retirement benefits. I held a hearing on November 2, 2017, which I recorded digitally, at the Division of Administrative Law Appeals at One Congress Street, Boston, Massachusetts. Mr. Civetti testified on his own behalf. The respondent Board called no witnesses. I admitted 34 exhibits into evidence. The record closed on March 5, 2018, when DALA received the parties’ closing briefs.

**FINDINGS OF FACT**

Based on the testimony provided and other evidence in the record, I find the following:

1. The Petitioner, Richard Civetti, began working as a police officer for the Town of Plymouth Police Department on March 20, 2006. (Exhibit 1 and 21).
2. Mr. Civetti sustained a right dominant shoulder injury on February 4, 2014 (2014 injury), after which he never returned to full, unrestricted duty. (Exhibits 4, 21 and Petitioner Testimony).
3. Mr. Civetti retired in 2016. He submitted a Member’s Application for Disability Retirement on October 15, 2015, indicating both Accidental and Ordinary Disability as the possible bases for his retirement. His application for Ordinary Disability was granted on August 26, 2016. His application for Accidental Disability was denied. (Exhibit 1, 14).
4. Mr. Civetti sustained a prior right shoulder injury in an on-duty accident on July 20, 2011 (2011 injury). Mr. Civetti fell from a bike while performing his duty in a police patrol mountain bike unit. Mr. Civetti underwent x-rays and was initially diagnosed with a possible mild separation of the acromioclavicular (AC) joint by his doctor, Walter G. Stanwood, M.D. (Exhibits 3, 5 and Petitioner Testimony).
5. Mr. Civetti had subsequent appointments with Dr. Stanwood on July 28, August 18, September 13, October 11, and November 8 of 2011. Dr. Stanwood’s notes from October 11, 2011 provide an updated diagnosis of AC separation and traumatic rotator cuff tendonitis, and state that the AC symptoms had resolved but that the rotator cuff symptoms persist. Dr. Stanwood opined that physical therapy was essential to treat the rotator cuff tendonitis. (Exhibit 6).
6. In his notes from October 11, 2011, Dr. Stanwood also wrote that Mr. Civetti was “apparently just getting started this week with the shoulder therapy. The shoulder continues to be bothersome. It still continues to have pain in it.” (Exhibit 6).
7. Between July and November, 2011, Mr. Civetti’s treatment consisted of medication for pain management, wearing a sling, and physical therapy. (Exhibit 6 and Petitioner Testimony).
8. Although Mr. Civetti testified that at the November 8, 2011 appointment he told Dr. Stanwood that he was still experiencing pain and cracking in his shoulder, Dr. Stanwood’s notes from the November 8, 2011 appointment state that Mr. Civetti felt 90 to 95 percent better and had little if any pain day to day. Dr. Stanwood noted that the shoulder traumatic rotator cuff tendonitis and AC arthrosis were resolved. Dr. Stanwood cleared Mr. Civetti to return to full duty without restriction. (Exhibit 6 and Petitioner Testimony).
9. Mr. Civetti did not undergo additional medical treatment for the shoulder injury between his return to duty in November 2011 and his fall on February 4, 2014. During that time period, Mr. Civetti did not have any formal medical restrictions or limitation with respect to his police duties. (Petitioner Testimony).
10. On February 4, 2014, Mr. Civetti arrived at the police station prepared to work the midnight shift, which begins at 11:30 p.m. and ends at 8:00 a.m. He arrived at 11:20 p.m. so that he could begin his shift exactly at 11:30 p.m., as was expected of officers. While exiting his vehicle in the parking lot at approximately 11:25 p.m., Mr. Civetti slipped on ice, injured his right shoulder, and was taken to the emergency room at Beth Israel Deaconess Hospital Plymouth. (Exhibit 4 and Petitioner Testimony).
11. Mr. Civetti admits that his shift had not yet started at the time of the fall. (Petitioner Testimony).
12. At the hospital, Mr. Civetti underwent x-rays that showed no acute fractures or abnormalities to his arm or shoulder. The emergency physician reported that the maximal tenderness around the AC joint was most consistent with an AC separation. Mr. Civetti was discharged on February 5, 2014 with a sling, pain management medication, and instructions to follow up with an orthopedic clinic as needed. (Exhibit 7 and Petitioner Testimony).
13. Mr. Civetti had to convince an unidentified doctor to perform an MRI, because at first the doctors assumed the injury could not be as bad as Mr. Civetti claimed. (Petitioner Testimony).
14. On March 26, 2014, Mr. Civetti underwent magnetic resonance imaging (MRI) on his right shoulder revealing: (1) a full-thickness and width tear of the supraspinatus rotator cuff, (2) infraspinatus musculotendinous junction edema, (3) severe subscapularis tendinosis with partial tear, (4) torn intra-articular biceps tendon with a split tear of extra-articular biceps tendon, (5) 7mm loose body posteriorly in the glenohumeral joint, (6) axillary recess synovitis containing 6mm of loose body, and (7) severe AC joint degenerative change. (Exhibit 8).
15. Mr. Civetti underwent an evaluation with Christopher Rynne, M.D. on April 4, 2014. Dr. Rynne noted that Mr. Civetti had been treated for the prior 2011 injury, but had recovered without residual symptoms. Regarding the 2014 injury, Dr. Rynne wrote that Mr. Civetti could not return to work, should obtain another medical opinion, and should consider surgery. (Exhibit 8).
16. On May 19, 2014 Mr. Civetti was seen for an initial consultation by orthopedic surgeon Jon J. P. Warner, M.D. Mr. Civetti did not bring the MRI imaging to that appointment. Dr. Warner noted that he would have to review the MRI to properly advise Mr. Civetti. Dr. Warner’s notes indicate that Mr. Civetti reported having continuing pain from the 2011 injury, which had not completely healed. (Exhibit 9).
17. On June 12, 2014, after Dr. Warner reviewed the MRI, he informed Mr. Civetti that the rotator cuff tear was the cause of Mr. Civetti’s right shoulder weakness and pain. Dr. Warner recommended surgical repair. (Exhibit 9).
18. Prior to the surgery, Police Captain John W. Rogers Jr. had assigned Mr. Civetti to light duty on June 25, 2014.[[1]](#footnote-1) Light duty consisted of being assigned to the station, working as a dispatcher, and tasks that conformed to his limitations. Light duty precluded operating police vehicles and interacting with prisoners. Following the surgery, Mr. Civetti was again assigned to light duty, consisting of the same responsibilities, with an effective date starting on November 17, 2014. (Exhibit 20).
19. Chief Michael E. Botieri indicated in an email to the Board that there was no possibility of a permanent light duty assignment for police officers, as they are expected to be able to perform all their duties. Thus, the police department could not continue to accommodate Mr. Civetti’s condition. (Exhibits 10 and 20).
20. On August 5, 2014, Mr. Civetti underwent a surgical procedure that involved arthroscopic massive rotator cuff reconstruction, biceps tendon tenodesis, arthroscopic subacromial decompression, and arthroscopic debridement. (Exhibit 9).
21. Following the surgery, Mr. Civetti underwent physical therapy beginning on September 29, 2014. At the initial evaluation, Mr. Civetti reported the 2011 injury as the cause of his current condition. He reported completing physical therapy following the 2011 injury. He also stated that it did not help. The initial evaluation included details of Mr. Civetti’s 2014 shoulder surgery, but did not mention the 2014 injury. Mr. Civetti completed his physical therapy, and was discharged with a home exercise program on March 28, 2015. The final report from that date stated that Mr. Civetti continued to have mild to moderate shoulder pain when reaching overhead and carrying out activities of daily living. (Exhibit 31).
22. On June 5, 2015, Mr. Civetti underwent an evaluation by Dr. Warner. Dr. Warner noted his belief that Mr. Civetti would be unable to return to full duty activity due to weakness in the shoulder, and that the department could begin finalizing disability paperwork. (Exhibit 9).
23. Mr. Civetti received a second medical opinion from Kenneth Polivy, M.D. on August 31, 2015. Dr. Polivy noted that Mr. Civetti reported no shoulder complaints prior to the February 4, 2014 slip and fall. Dr. Polivy also opined that Mr. Civetti had taken his treatment as far as was medically possible, and that Mr. Civetti would be unable to perform full-time unrestricted police work on a permanent basis. (Exhibit 32).
24. On his application for Disability Retirement on October 15, 2015, Mr. Civetti stated the medical reason for the application as pain and weakness due to massive rotator cuff reconstruction surgery. He listed the dates of both the 2011 injury and the 2014 injury as the Reason for Accidental Disability, and characterized the 2014 injury as a re-aggravation. (Exhibit 1).
25. Plymouth Police Department Chief Michael Botieri also filed an Involuntary Retirement Application for Ordinary Disability on November 15, 2015. (Exhibit 17).
26. Dr. Warner completed the Treating Physician’s Statement Pertaining to a Member’s Application for Disability Retirement on January 19, 2016. The statement indicated that the date of injury was July 11, 2011 and that the medical diagnosis leading to the disability was a massive right shoulder tear. It states that the applicant’s disability will continue indefinitely due to right shoulder weakness due to the weak rotator cuff. In detailing the events that led to the disability, Dr. Warner wrote “injury from mountain bike – fell at work.” I take this to be in reference to both the 2011 injury and the 2014 injury, as Dr. Warner’s notes attribute the rotator cuff tear to the 2014 injury. (Exhibits 2, 9).
27. Physician medical panel doctor Ronald Marvin, M.D. evaluated Mr. Civetti on June 15, 2016. Dr. Marvin answered all three certificate questions in the affirmative. Dr. Marvin declared with a reasonable degree of medical certainty that the cause of the permanent disability was a work-related injury on February 4, 2014. His diagnosis was a rotator cuff tear, with supraspinatus and subscapularis with biceps disease with medial subluxation and impingement. His report also stated that although Mr. Civetti had a previous injury, he was able to return to work, and thus causation is established by a re-aggravation theory. Dr. Marvin opined that there is a significant risk of re-injury due to the fact that Mr. Civetti had a massive rotator cuff tear, and that his shoulder is still extremely weak with crepitus and significant limitation. (Exhibit 11).
28. Physician medical panel doctor Steven G. McCloy, M.D. evaluated Mr. Civetti on June 28, 2016. Dr. McCloy answered all three certificate questions in the affirmative. In his review of Mr. Civetti’s medical documentation, Dr. McCloy wrote that Mr. Civetti said he has pain and weakness in his right arm and shoulder due to massive rotator cuff reconstruction surgery. Dr. McCloy also reported that Mr. Civetti’s treating physician stated that Mr. Civetti cannot return to work due to the rotator cuff tear and residual right shoulder weakness. In his diagnoses, Dr. McCloy listed (1) right shoulder injury with AC joint separation, (2) right shoulder injury with AC joint separation and rotator cuff tear, (3) status post rotator cuff operation, and (4) chronic right shoulder pain and weakness. In answering whether incapacity is permanent, Dr. McCloy commented that Mr. Civetti had successful surgery and physical therapy, but that Mr. Civetti was left with residual pain and weakness. In answering the question of causation, Dr. McCloy wrote in his report that Mr. Civetti had two injuries to his right shoulder, with the first resulting in shoulder separation, and the second resulting in a separation and tearing of the rotator cuff. The doctor opined that both injuries were work-related. (Exhibit 12).
29. Physician medical panel doctor Henry Drinker, M.D. evaluated Mr. Civetti on June 29, 2016. Dr. Drinker answered all three certificate question in the affirmative. Dr. Drinker diagnosed the injury as a full thickness tear of the right dominant rotator cuff and a tear to the biceps with postoperative pain and weakness. He wrote that Mr. Civetti had two separate work-related injuries to his shoulder. He wrote that Mr. Civetti fully recovered from the 2011 injury with no residual disability. Dr. Drinker’s report makes no mention of continuing pain arising from the 2011 injury. Dr. Drinker wrote that while a pre-existing condition in the form of chronic rotator cuff tendinosis was present, the injury on February 4, 2014 was the major cause of the subsequent incapacity. (Exhibit 13).
30. When the Board denied the application for Accidental Disability retirement on August 29, 2016, it stated that the decision was based upon a finding that the February 4, 2014 injury, which the medical panel opined was the cause of the permanent disability, was not sustained in performance of Mr. Civetti’s duties.[[2]](#footnote-2) (Exhibit 14).
31. On August 30, 2016, Mr. Civetti filed a timely appeal of the Board’s decision denying accidental disability retirement. (Exhibits 16 and 17).

**DISCUSSION AND CONCLUSION**

 Accidental disability retirement is granted to a retirement system member who is unable to perform his essential job duties, when such inability is likely to remain permanent until retirement age, and when the disability is by reason of an injury or series of injuries or of a hazard undergone as a result of, and while in the performance of, his job duties. G.L. c. 32, §7(1). An applicant must demonstrate either that a disability “stemmed from a single work related event or series of events” or, “if the disability was the product of gradual deterioration, that the employment [had] exposed [the employee] 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). Mr. Civetti has not met his burden of proving that he sustained a compensable personal injury stemming from a work-related event because he has not met the threshold requirement of demonstrating that the injury occurred “while in the performance of his duties” as a police officer. *See* *Lisbon v. Contributory Ret. App. Bd.*, 41 Mass. App. Ct. 246 (1996), *Boston Ret. Bd. v. Contributory Ret. App. Bd.*, 340 Mass. 109 (1959).

 The evidence in this appeal reflects that, when Mr. Civetti stepped out of his car, slipped, and fell on the ice in the Plymouth Police Department parking lot, he had not yet reported for duty. An injury on the way into work does not make the employee eligible for accidental disability retirement. *Medford v. Medford Ret. Bd.*, CR-05-1320 (Contributory Ret. App. Bd., Aug. 3, 2016) (holding that an officer who re-injured his back while pulling open a heavy, metal door to enter the police station at the beginning of his work shift was not in performance of his duties, and thus not entitled to an accidental disability retirement benefit). [[3]](#footnote-3) Additionally, Mr. Civetti was not traveling from one place where he had a workplace obligation to another place where he had a workplace obligation. *Namvar v. Contributory Ret. App. Bd.*, 422 Mass. 1004 (1996). Because Mr. Civetti was not in performance of police officer duties at the time he injured his shoulder, he is not eligible for accidental disability retirement benefits as a result of the 2014 injury in the parking lot. *See* *Namvar*, 422 Mass. 1004, *Boston Ret. Bd.*, 340 Mass. at 112.

 Mr. Civetti argues alternatively that his permanent disability has a causal relationship to the 2011 work-related injury when he fell from a bike while working in a police patrol mountain bike unit. Indeed, on his Application for Disability Retirement, Mr. Civetti identified both the 2011 mountain bike injury and the 2014 slip and fall as his reason for applying for accidental disability. Counsel for Mr. Civetti argues that the two injuries should be viewed as a single injury.

Mr. Civetti relies on *Donovan v. Contributory Ret. App. Bd.*, 83 Mass. App. Ct. 1009, (Memorandum and Order under Rule 1:28) (2013), in which the court awarded accidental disability retirement to an employee who injured himself on duty and suffered a re-aggravation of the injury while off duty. *Donovan*, however, is substantially different from this case. In *Donovan*, the Appeals Court overturned the decision of a DALA magistrate whose reasoning for denying accidental disability retirement was contradicted by the findings of the medical panel. The petitioner had sustained a work-related injury performing his duties as a maintenance worker. The symptoms of his injury temporarily subsided, but were later re-aggravated when the petitioner was engaged in non-work activities such as golfing or reaching up to a shelf. By a majority, the medical panel had found that the petitioner’s disability arose from his initial injury. Crucially, the panel also found that the ordinary life activities that led to the reemergence of the symptoms were not new injuries. Unlike *Donovan*, Mr. Civetti has not met his burden of establishing that the 2011 injury was the cause of his permanent disability, and that the 2014 injury was not a new injury. Experiencing pain from everyday activities, like reaching for an item on a shelf is far different from a second fall that tore a rotator cuff and did additional damage.

 Mr. Civetti, in part, relies upon the findings of the medical panel to support his position. G.L. c. 32, § 6(3)(a) requires that a three-physician regional medical panel, after examining an accidental disability retirement applicant, issue a certificate as to (1) the applicant's physical or mental incapacity for duty, (2) the likelihood that the incapacity is 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 retirement is claimed." G.L. c. 32, § 6(3)(a). Unless the panel applies an erroneous standard or fails to follow proper procedures, or unless the certificate is "plainly wrong," the local board may not ignore the panel's medical findings. *Kelley v. Contributory Ret. App. Bd.*, 341 Mass. 611 (1961).

However, the medical panel's certification as to the plaintiff's condition (that his disability "might be the natural and proximate result" of a personal injury which the plaintiff sustained as a result of his employment) is not conclusive of the ultimate fact of causal connection, but stands only as some evidence on the issue. *Blanchette*, 20 Mass. App. Ct. at 485, *Wakefield Contributory Ret. Bd. v. Contributory Ret. App. Bd.*, 352 Mass. 499, 502 (1967). The determination whether causation was proved was reserved to the Board, based on the facts found and all the underlying evidence, including both the medical and nonmedical facts. *Blanchette*, 20 Mass. App. Ct. at 485.

In this case, the medical panel was unanimous in answering the three questions positively. While the panel was clear that the 2014 injury had a causal relationship to the disability, it was less clear on whether the 2011 injury also had a causal relationship to the permanent disability. Additionally, the panel members all articulate a mistaken belief that the 2014 injury was work-related, which I have already addressed.

Dr. Marvin stated that the cause of the permanent disability was a work-related injury on February 4, 2014. He asserted that although Mr. Civetti had a previous injury, he was able to return to work after it. He also concluded that causation is established by a re-aggravation theory. That conclusion however, depends on the 2014 injury being work-related, which it was not.

Dr. McCloy wrote in his report that Mr. Civetti had two injuries to his right shoulder, with the first resulting in shoulder separation, and the second resulting in a separation and tearing of the rotator cuff. In his application, Mr. Civetti state that his reason for retiring was weakness and pain related to surgery undergone to repair a torn rotator cuff. This supports the Board’s conclusion that Dr. McCloy’s report stands for the position that the 2014 injury was the natural and proximate cause of Mr. Civetti’s injury. Regardless, the report does not assert a causal relationship between the 2011 injury and the disability.

In his report, Dr. Drinker wrote that Mr. Civetti fully recovered from the 2011 injury. He concluded that the injury on February 4, 2014 was the major cause of the subsequent incapacity. Although he acknowledged a pre-existing condition in the form of chronic rotator cuff tendinosis, Dr. Drinker did not state that that the 2011 injury was the proximate and natural cause of the permanent disability.

None of the medical panel’s evaluations offer precise support to Mr. Civetti’s contention that the 2011 injury was the cause of his permanent disability. While all three members of the medical panel acknowledge the 2011 injury, none unequivocally and clearly state that but for the 2011 injury, Mr. Civetti’s permanent disability would not have occurred. Given what the panelists wrote, the Board was justified in concluding that the panel held the 2014 injury to be the cause of the permanent disability.

Additional evidence supports this conclusion. At the resolution of Mr. Civetti’s rehabilitation for the 2011 injury, his physician, Dr. Stanwood, wrote that the shoulder traumatic rotator cuff tendonitis and AC arthrosis were resolved. Dr. Stanwood also noted that Mr. Civetti reported feeling up to ninety-five percent better by then and experienced little to no pain on a daily basis. The note stated that Dr. Stanwood cleared Mr. Civetti to return to full duty without restriction. At that time Mr. Civetti did in fact return to full active duty. He did not undergo additional treatment on his shoulder during the years between the 2011 and 2014 injuries.

Mr. Civetti has presented some evidence supporting the position that his 2011 injury persisted and thus played a role in his ultimate disability. When being evaluated by Dr. Warner following the 2014 injury, the doctor’s notes reflect that Mr. Civetti reported having residual pain from the 2011 injury. The notes opine that the first injury never got completely better. When Dr. Warner submitted the Treating Physician’s Statement Pertaining to a Member’s Application for Disability Retirement, he listed the date of the 2011 injury as the date of injury, and listed a fall from a mountain bike, in addition to the fall at work, as the event that led to the disability. However, as was the case with the medical panel, Dr. Warner acknowledged that the massive right shoulder tear from the 2014 injury was the cause of Mr. Civetti’s disability.

Mr. Civetti also reported to all three doctors on the medical panel that he had experienced continued symptoms of pain and cracking in his shoulder after returning to work in 2011, and the panelists had these statements before them when they considered the extent to which the 2011 injury contributed to his disability. However, there is some reason to doubt how much Mr. Civetti was really impacted by the 2011 injury after he returned to work. There were two instances where Mr. Civetti was evaluated by a medical professional in which he did not report continuing symptoms after 2011. Dr. Rynne’s notes from April 4, 2014 state that Mr. Civetti recovered without residual symptoms. Dr. Polivy’s notes from August 31, 2015 also report that Mr. Civetti had no shoulder complaints after 2011, prior to the 2014 injury. Notably, Mr. Civetti testified that he stopped complaining of his pain because he was led to believe it was normal by Dr. Stanwood. The doctor’s medical notes do not reflect such a conversation. Ultimately, no contemporaneous medical evidence supports Mr. Civetti’s self-reported claim of residual pain after the 2011 injury.

Consequently, I conclude that the Board correctly determined that Mr. Civetti’s application for accidental disability retirement should be denied. Mr. Civetti’s 2014 injury did not occur while he was performing his job duties, nor was that injury a compensable re-aggravation of his 2011 injury. I affirm the Board’s decision.

 DIVISION OF ADMINISTRATIVE LAW APPEALS

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 Bonney Cashin

 Administrative Magistrate

DATED: February 22, 2019

1. The record is unclear as to the exact date Mr. Civetti returned to work following the 2014 injury. [↑](#footnote-ref-1)
2. The Board allowed the application for ordinary disability in the same letter. [↑](#footnote-ref-2)
3. An on-duty police officer may also be deemed to be not in performance of his duties at the time of injury. *See* *Coggins v. Hull Ret. Bd.*, CR-10-314 (*Contributory Ret. App. Bd.*, Jan. 16, 2014) (on-duty police officer was not in performance of his work duties when he injured himself after exiting his personal vehicle in police parking lot). [↑](#footnote-ref-3)