COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. Division of Administrative Law Appeals

 One Congress Street, 11th Floor

 Boston, MA 02114

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**ROBERT CLARK**, Fax: (617) 626-7220

 *Petitioner* **www.mass.gov/dala**

 Docket No: CR-15-536

 *v.*

**NORWOOD RETIREMENT BOARD,** Dated: July 20, 2018

 *Respondent*

**Appearance for Petitioner**:

Michael C. Akashian, Esq.

225 Friend St., Suite 805

Boston, MA 0214

617-357-9400

**Appearance for Respondent**:

 Thomas F. Gibson, Esq.

 2400 Massachusetts Ave.

 Cambridge, MA 02140

 617-576-2400

**Administrative Magistrate**:

Angela McConney Scheepers, Esq.

**SUMMARY**

 The Petitioner has failed to prove by a preponderance of the evidence that there is a causal relationship between his incapacity and a workplace injury. The Respondent’s decision to deny accidental disability retirement benefits is affirmed.

**DECISION**

 Pursuant to G.L. c. 32, § 16(4), the Petitioner, Robert Clark, appealed the September 15, 2015 decision of the Norwood Retirement Board (Board) denying his application for accidental disability retirement benefits.

 I held a hearing at the Division of Administrative Law Appeal (DALA) on January 11, 2017. The hearing was digitally recorded. I marked Mr. Clark’s Pre-Hearing Memorandum “A” for identification. I marked the Board’s Pre-Hearing Memorandum “B” for identification. I admitted sixteen exhibits (Exhibits 1 – 16) into evidence. Mr. Clark testified on his own behalf.

 Mr. Clark submitted a Post-Hearing Brief on March 13, 2017. The Board submitted a Post-Hearing Brief on March 6, 2017 and a Supplemental Post-Hearing Brief on March 22, 2017, whereupon the administrative record closed.

**FINDINGS OF FACT**

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

1. The Petitioner, Robert Clark (born in1952), began working for the Town of Norwood (Town) as a cemetery worker in 1986. In June 1988, the Town’s Department of Public Works (DPW) hired him as a Truck Driver/Laborer. (Exhibit 3; Testimony.)
2. According to the DPW job description, the essential job duties for the truck driver/laborer position are the following:
* Operates light trucks and other equipment of little complexity for all public works projects; hauls gravel, dirt, sand, and other materials; loads and unloads materials; performs manual labor incidental to the work of operating assigned equipment; services and maintains trucks and equipment.
* May act as a leader of a small work crew on a particular project; provides direct supervision over the crew and performs the duties as the crewmembers.
* Mows grass; trims shrubs; rakes and seeds; performs minor maintenance on equipment used (greasing, changing oil, spark plugs, and filters).
* Removes leaves, brush and cuts grass on town property with the aid of such tools as rakes, pruning shears, hand mowers, and motorized grass cutters, leaf blowers, and shredders.
* Sweeps walks, driveways and work areas, and gathers debris for disposal; cleans and assists in maintaining town facilities including the cleaning of the bathrooms.
* Seeds, loams, fertilizes, rakes, rolls, weeds, mows and waters lawn areas: plants, trims, cuts and sprays hedges, shrubbery and flowers; rakes up and disposes of rubbish and leaves. Tasks may include shoveling, paving and granular materials such as gravel, sand, stone, and bituminous concrete asphalt.
* Assists all DPW divisions as necessary.
* Performs similar or related work as required.

(Exhibit 3.)

1. Prior to his employment with the DPW, Mr. Clark was diagnosed with post-traumatic stress disorder (PTSD) and shrapnel injuries after an explosion during his service in the United States Navy. Due to the injuries, Mr. Clark received seventy-five percent Veterans Affairs (VA) disability benefits of approximately $1,300.00 per month. (Exhibit 15; Testimony.)
2. On August 14, 2009 at 11:15 a.m., Mr. Clark was performing one of the essential duties of his position, raking asphalt. As he was raking, his left arm became numb and started twitching. He felt a pain begin in his heart and travel down his left leg. Mr. Clark was admitted to the emergency room at Norwood Hospital. He successfully recuperated, and returned to work on August 18, 2009. (Exhibits 5 and 6.)
3. After he returned to work, Mr. Clark filed a Town of Norwood Incident Report (Town Incident Report) on August 20, 2009. His supervisor filed an Employer’s First Report of Injury or Fatality (Employer’s Report) on the same day. (Exhibit 6.)
4. On February 24, 2010, Mr. Clark punched out for his lunch hour in the town yard locker room around 12:00 noon. He then engaged in a card game in the locker room with his co-workers, Doug Carver, Eugene Girard and David Matthews. During the game, Mr. Carver accused Mr. Clark of being a cheater, reached across the table and grabbed him by the neck, knocking off Mr. Clark’s glasses and tipping over the table. Mr. Girard and Mr. Matthews had to pull Mr. Carver off of Mr. Clark. (Exhibit 12; Testimony.)
5. Mark Ryan, the Department Head, sent home Mr. Carver for the rest of the day. (Exhibit 12; Testimony.)
6. At 12:55 p.m., Mr. Clark went to the Norwood Police station, and spoke with patrolman Gregory Gamel. Officer Gamel later interviewed both Mr. Girard and Mr. Matthews. Both men stated that things happened so quickly that they were uncertain whether Mr. Carver had grabbed or pushed Mr. Clark. However, they both agreed that they had separated the men quickly. (Exhibit 6; Testimony.)
7. Patrolman Gamel filed a narrative under incident report number 10-308-OF on February 24, 2010. (Exhibit 6.)
8. After the February 24, 2010 incident, Mr. Clark continued to work until June 7, 2010, when his physician medically excused him until August 19, 2010. (Exhibit 7.)
9. After complaining of headaches, Mr. Clark underwent a June 9, 2010 magnetic resonance imaging study (MRI). The MRI “showed extensive periventricular white matter disease as well as other anatomical findings ... .”[[1]](#footnote-1) (Exhibits 8 and 12; Testimony.)
10. Cathy Traietti, the DPW Business Manager, informed Mr. Clark in a July 30, 2010 letter that the Town had denied his workers’ compensation claim because he was not “at work” when the February 24, 2010 incident injury occurred. The letter noted Mr. Clark had continued working after the incident until June 7, 2010. (Exhibit 12.)
11. In accordance with the Collective Bargaining Agreement (CBA) between the parties, after Mr. Clark exhausted all of his sick time, the Town advanced him twenty sick days in order for him to continue his regular pay through August 13, 2010. (Exhibit 12.)
12. Mr. Clark returned to work on September 17, 2010, after successful treatment with epidural steroid injections and physical therapy. (Exhibits 7 and 15; Testimony.)
13. On his first day back at work, Mr. Clark was assigned to work with Mr. Carver. Mr. Clark “couldn’t even look at Mr. Carver,” and refused to work with him. Mr. Clark was then assigned to the leaf bag truck. On later days, the supervisor continued in his attempts to have them work together. (Testimony.)
14. Mr. Clark had to obtain the requisite DPW clearance examination from Quincy Medical for clearance to return to work. On September 22, 2010, Quincy Medical cleared Mr. Clark to work. The examiner wrote:

The physical findings and biological tests are within acceptable limits. The employee is capable of assuming activities as described in the job description without posing a substantial direct harm to the employee, fellow employees or others.

(Exhibit 15; Testimony.)

1. In a letter dated April 8, 2011, Mr. Ryan advised Mr. Clark that he had been placed on the Department’s sick leave restricted list, due his pattern of taking sick leave on weekends and/or holidays. Mr. Ryan wrote that Mr. Clark would remain on the restricted list for sixty days, and had to submit a physician’s note within twenty-four hours of taking any sick leave. (Exhibit 12.)
2. Based on the CBA, Mr. Clark had begun paying back the Town the sick days (for time off June 7 through August 13, 2010) it had advanced by deduction and loss of accrued sick days and vacation days in 2011 and 2012. By June 20, 2011, Mr. Clark had repaid thirteen days (ten vacation days and three sick days), and owed seven additional days (three sick days in 2011 and four vacation days in 2012) that were yet to be deducted. On June 20, 2011, the parties entered into a Section 19 Agreement whereby 1) Mr. Clark agreed to withdraw his Department of Industrial Accidents claim[[2]](#footnote-2) in consideration of the Town’s agreement to waive further deduction of the seven days owed; and 2) the parties agreed that the claim was withdrawn without liability for past or future medical or disability payments, attorneys’ fees or expenses. (Exhibit 12.)
3. On September 7, 2011, Mr. Clark was assigned to a work crew with Mr. Carver. While Mr. Clark picked up a bag of brush to throw onto the truck, he pinched a nerve in his neck. Mr. Clark asked his co-worker, Ken Jones, to assist him with further lifting. Mr. Clark continued working for an hour and a half, then left because he did not want to work with Mr. Carver any longer. (Exhibit 6; Testimony.)
4. Mr. Clark went to Norwood Hospital for care. He underwent an MRI of the cervical spine, which showed C5-6 disc herniation and left foraminal stenosis, right sided and central disc herniation at C-4 level, and small central C3-4 disc herniation.[[3]](#footnote-3) Mr. Clark was diagnosed with a possible near syncopal event,[[4]](#footnote-4) neck pain with headache. The hospital discharge summary stated, “Mr. Clark became dizzy following neck pain related to lifting a heavy object while working.” The hospital referred Mr. Clark for a neurological consultation with Marc H. Friedberg, M.D. (Exhibits 7 and 15.)
5. Mr. Clark returned to work two days later, after taking September 8 and 9, 2011 off as a holiday and a vacation day. (Labor Day fell on September 5, 2011.) (Exhibit 8.)
6. Mr. Clark submitted a Town Incident Report on September 12, 2011. Mr. Jones filed a Witness Report, also dated September 12, 2011. In his report, Mr. Jones said that the leaves in the bags were wet, and that they could not tell that the bags were heavy until they lifted them.[[5]](#footnote-5) (Exhibit 6; Testimony.)
7. The Town’s workmen’s compensation administrator filed an Employer’s Report on September 12, 2011. (Exhibit 6.)
8. Mr. Clark continued working until October 14, 2011, when he began using sick leave. (Exhibits 6 and 8; Testimony.)
9. On October 25, 2011, Mr. Clark treated with Dr. Friedberg. Dr. Friedberg diagnosed him with cervical stenosis, cervical sprain/strain, cervical spine pain and HNP cervical with radiculopathy, no myelopathy. Dr. Friedberg issued Mr. Clark a return to work letter, with the restriction of “no overhead lifting above chest.” (Exhibit 15; Testimony.)
10. On October 27, 2011, the Town advanced Mr. Clark one sick day, to be deducted from his earned sick time on January 1, 2012. (Exhibit 12.)
11. On November 4, 2011, Dr. Friedberg gave Mr. Clark his first cervical/thoracic epidural steroid injection (ESI) for neck pain.[[6]](#footnote-6) Mr. Clark experienced a 60% improvement in pain management after the administration of the injection. (Exhibits 6 and 15.)
12. On December 13, 2011, Mr. Clark saw Dr. Friedberg again, who once more cleared him for return to work, with the restriction of “no overhead lifting above chest.” Dr. Friedberg recommended another ESI because of the success of the November 4, 2011 injection. Dr. Friedberg administered Mr. Clark’s next ESI on December 23, 2011. (Exhibit 7.)
13. On January 20, 2012, Dr. Friedberg administered another ESI, and maintained the proscription of the modified work duty. Mr. Clark also received facet/pravert cervical/thoracic injections[[7]](#footnote-7) on February 29, 2012 and March 6, 2012. (Exhibit 15.)
14. On March 30, 2012, Dr. Freidberg cleared Mr. Clark to return to regular duty for April 2, 2012, after recommending modified duty for the last six months. (Exhibits 12 and 15.)
15. By this time, Mr. Clark had yet to return to work. He decided to return to work after his workers’ compensation ran out. When the Town received the IME[[8]](#footnote-8) which reportedly stated that Mr. Clark was at a medical end result, it terminated Mr. Clark’s workers’ compensation benefits. Mr. Clark had received workers’ compensation from January 1, 2012 through March 16, 2012. The Town scheduled a fit for duty/return to work exam for Mr. Clark for April 9, 2012. (Exhibits 12 and 14.)
16. Mr. Clark then used vacation time from March 19, 2012 through April 10, 2012. He had used administrative leave with pay from April 11, 2012 through April 25, 2012.

In an April 25, 2012 Note to File, Cathy Traietti, the Town’s business manager wrote:

As of today, Quincy Medical has yet to clear Bob to return to work citing different issues. At this point, they appear to be waiting for information from Bob’s physician.

This case is slightly different from regular W/C cases in that Bob was terminated of his W/C benefits prior to his doctor’s clearance. In fact, he sought the clearance because he was no longer being paid. Once his W/C benefits were exhausted in this case, as far as W/C goes, is closed and can be treated as any other employee returning to work who has been out on his own time. No visit to Quincy Medical is required under these circumstances. We should allow him to return to work and if he has further issues he would need a ‘new incident’ in order to claim W/C again. His physician’s release covers the Town in this instance.

(Exhibit 13.)

1. Mr. Clark never underwent a fit for duty/return to work exam with Quincy Medical before returning to work. (Exhibits 12 and 14.)
2. Mr. Clark returned to work on April 27, 2012, after an absence of more than six months. He worked on the leaf bag truck subject to the restriction of no overhead lifting. He lifted leaf bags to a height of thirty-six to thirty-seven inches, or chest level. After working only a few hours, Mr. Clark reported that his “neck snapped” while picking up “heavy” trash bags. (Exhibit 14.)
3. Mr. Clark began receiving workers’ compensation benefits on April 28, 2012, in the amount of $559.12 per week. On September 20, 2012, the weekly amount was reduced to $419.39. (Exhibit 5.) (Exhibits 8 and 13.)
4. April 27, 2012 was his last day of work. (Exhibit 13; Testimony.)
5. Mr. Clark treated with Dr. Friedberg on April 30, 2012, who noted that he was “unable to work as of injury 4/27/12.” Dr. Friedberg administered another ESi on June 7, 2012. (Exhibit 15.)
6. Dr. Friedberg referred Mr. Clark for physical therapy on July 30, 2012. (Exhibit 15.)
7. The Town informed Mr. Clark that if he returned to work, he would not be required to work on the leaf bag truck. DPW modified the job description in order to reasonably accommodate Mr. Clark. The handwritten modifications provided that Mr. Clark would not be required to lift overhead or above the chest, and that he would not be required to lift leaf bags. (Exhibits 10 and 13.)

*Mr. Clark’s Application for Accidental Disability Retirement*

1. Mr. Clark filed an application for accidental disability retirement on October 5, 2012. In the application, he listed three slipped discs in the neck as the reason for his disability. He noted two dates for the date of injury: September 7, 2011 as the date of the original injury, and April 27, 2012. (Exhibit 3.)
2. Mr. Clark listed the essential duties of his position as, “truck driver, laborer, asphalt.” He stated that he had to perform those essential duties daily, and that he could no longer perform heavy lifting. (Exhibit 3.)
3. Under the heading “Reason for Accidental Disability,” Mr. Clark checked the “personal injury” box on his application, and stated under the subheading of “Description of incident(s) or hazard/exposure, “Lifting heavy brush and pinched neck and nerve.” (Exhibit 3.)
4. On the application, Mr. Clark wrote that he was performing his job duty of “lifting and removing brush + leaf bags pulled + pinched nerves in neck ... slipped discs in neck ...” immediately prior to and during the time of the personal injury he sustained. (Exhibit 3.)
5. In the application, Mr. Clark stated that he was undergoing physical therapy. (Exhibit 3.)
6. Dr. Friedberg submitted a Treating Physician’s Statement Pertaining to a Member’s Application for Disability Retirement on Mr. Clark’s behalf, diagnosing him with cervical stenosis, cervical sprain/strain, cervical spine pain and HNP cervical with radiculopathy, no myelopathy. In the Physician’s Statement, Dr. Friedberg stated that Mr. Clark was injured on September 7, 2011. He noted that Mr. Clark was unable to perform the essential duties of his position and was last able to do so on April 27, 2012. Dr. Friedberg noted that Mr. Clark could not perform any heavy lifting. (Exhibits 4 and 15.)
7. Dr. Freidberg noted that Mr. Clark’s condition had been continuing for seven years, was likely to regress, and was not yet at maximum medical improvement (MMI). In response to the question, “What other life event/circumstance/condition in the applicant’s medical history may have contributed to or resulted in the disability claimed?” Dr. Friedberg responded, “None I am aware of.” (Exhibit 4.)
8. The Town of Norwood (Town) submitted the Employer’s Statement Pertaining to a Member’s Application for Disability Retirement (Employer’s Statement), dated February 28, 2013. The Town described Mr. Clark’s daily essential duties as the following:

Operate light trucks and other equipment of little complexity. Performs manual labor such as cutting grass, raking and picking up leaves, sweeping, shoveling snow, asphalt, sand, dirt, etc.

(Exhibit 5.)

1. The Town described the physical requirements of the position in the following manner: “Daily tasks require frequent lifting and bending. Position requires ability to lift or move objects weighing up to 100 pounds. (Exhibit 5.)
2. In regard to whether Mr. Clark could perform the essential duties of his position if reasonably accommodated, the Town submitted, “Yes. The applicant was offered reasonable accommodations but decided against returning even after we agreed to his requests.” The Town noted that there were no other positions that Mr. Clark could hold based on his experience and qualifications. (Exhibit 5.)
3. In the Employer’s Statement, the Town responded to the relevant questions that Mr. Clark had missed work complaining of pain, and decided to retire after the Town agreed that he would not have to participate in leaf bag pickup. (Exhibit 5.)
4. In response to the question of whether Mr. Clark had filed grievances, the Town submitted that none was filed, but that Mr. Clark had limited ability to work “after sustaining an injury from another employee while they were not on town time.” (Exhibit 5.)
5. The Town listed two injuries in the Employer’s Statement: the August 14, 2009 injury which took place while Mr. Clark was raking asphalt; and the February 24, 2010 incident which took place in the locker room. (Exhibit 5.)
6. Pursuant to G.L. c. 32, § 6(3), PERAC convened a regional medical panel comprised of a psychiatrist Melvyn Lurie, M.D. and two neurologists Thomas R. Sciascia, M.D. and Lee D. Cranberg. (Exhibit 7.)
7. The panel physicians reviewed Mr. Clark’s job description and medical records. At the April 5, 2013 examination, Mr. Clark informed the panel of neck complaints after February 24, 2010 and that on September 7, 2011 he felt a sudden snap associated with neck and arm pain. (Exhibit 7.)
8. Dr. Sciascia wrote the report on behalf of the panel. The panel found that Mr. Clark was a poor historian. The panel diagnosed him with multi-level disc herniation of the cervical spine, degenerative cervical spine disease as evident in the x-rays, and chronic neck pain syndrome. (Exhibit 7.)
9. The panel answered in the affirmative on questions 1 and 2:
10. The Panel concluded that the patient is physically incapable of performing the essential duties of a laborer/truck driver. The Panel bases its conclusion on the job description, which outlines essential functions of being capable of loading and unloading materials and performing manual labor. The Panel concluded that based on the underlying anatomical cervical spine disease and his clinical complaints of neck pain, he would be unable to carry out these mechanical duties.
11. The Panel concluded that the said incapacity is likely to be permanent and unlikely to respond to further rehabilitative efforts.

(Exhibit 7.)

1. The panel certified causation by answering in the affirmative on question 3:

The Panel concluded that the said incapacity is such as might be the natural and proximate result of the personal injury sustained or hazard undergone on account of which retirement is claimed. The Panel based this opinion that the patient aggravated a pre-existing condition of degenerative cervical spine disease as a result of the September 7, 2011 work-related incident on the following reasons. Following the work-related incident the patient had clinically significant neck pain related complaints that impaired his ability to conduct his work activities. In addition, the patient underwent epidural steroid injection treatment in an effort to manage his neck related pain complaints.

(Exhibit 7.)

1. On September 9, 2013, the Board sought a clarification from the panel and posited the following questions: was the panel aware that 1) Mr. Clark’s June 7, 2010 to September 17, 2010 absence was due to the February 24, 2010 choking incident; 2) Mr. Clark worked for one month following the September 7, 2011 incident, then began using sick leave until he was cleared to return to work six months later, when he reported another injury hours into his first day back on the job; 3) Mr. Clark never recovered from the February 24, 2010 choking incident; and 4) Mr. Clark did not return to work after the employer acceded to his request for reasonable accommodation. The Board enclosed Mr. Clark’s 2011 and 2012 attendance records, the Employer’s April 27, 2012 First Report of Injury and the Employer’s Statement. (Exhibit 8.)
2. On December 31, 2013, Dr. Sciascia responded on behalf of the panel: 1) the panel was aware that Mr. Clark had lost work time following the February 2010 incident; 2) the panel was unaware that the patient was cleared to return to work on April 27, 2012, but this did not affect the Panel’s opinion that the patient was permanently disabled as of September 7, 2011; 3) the panel concluded that the patient never fully recovered from the choking incident, although based on his ability to return to work following that incident, the level of neck pain appears to have been manageable and the patient was capable of conducting work duties; and 4) the panel was unawarethat the employer had offered reasonable accommodations, and had only considered whether Mr. Clark was medically capable of carrying out the job description as given to the panel at the time of the patient evaluation. (Exhibits 8 and 9.)
3. On October 28, 2014, the Board inquired of the Town whether the essential duties of the position as modified would have been similar in responsibility and purpose as those performed by Mr. Clark on April 27, 2012; and to confirm that Mr. Clark was out on sick leave, vacation time, administrative leave or workmen’s compensation until he returned to work on April 27, 2012, and then never returned to work. (Exhibit 14.)
4. In a letter dated December 17, 2014, Town responded:

The essential duties of the position, as modified, would be similar in responsibility and purpose to those performed by Mr. Clark at the time of his April 27, 2012 injury. If necessary, the accommodations and salary would have been permanent.

Mr. Clark did use vacation leave, administrative leave with pay and was out on workmen’s compensation from January 1, 2012 through April 25, 2012, returning to work on April 26, 2012.

(Exhibit 14.)

1. In a letter dated February 20, 2015, the Board asked the panel for a second clarification. The Board posited first whether the panel was aware that after the September 7, 2011 incident, Mr. Clark took September 8 and 9, 2011 as a vacation and sick day, and then worked for over a month. Would this knowledge affect its earlier conclusion that Mr. Clark was permanently disabled as of September 7, 2011? Secondly, the Board noted that in its response to the first request of clarification, the panel stated that it was unaware of any offer of reasonable accommodation. The Board enclosed the modified job description, dated December 17, 2014, with the hand-written accommodations as provided by the DPW Director and Town Engineer: “1. Mr. Clark would not be required to lift overhead or above the chest. 2. Mr. Clark would not be required to lift leaf bags.” (Exhibit 10.)
2. On May 8, 2015, the panel physicians met again with Mr. Clark after reviewing a packet, including the modified job description which had not been supplied for the April 5, 2013 examination.[[9]](#footnote-9) The panel evaluated whether he could perform the essential duties of the position as revised with the hand-written accommodation to the job description. (Exhibit 11.)
3. Mr. Clark informed the panel that he was unable to work because he could not lift more than a milk bottle. This affected his life at home because he could not lift laundry or groceries. He recounted the February 24, 2010 incident, and described how the subsequent neck pain had worsened after September 7, 2011 incident. He stated that he could not perform the essential duties of his position such as asphalt work, using a whacker, snow-plowing, mowing, digging, using a roller, cutting up a tree, climbing a ladder or trimming shrubbery.
4. Dr. Lurie responded on behalf of the panel, issuing a report dated May 8, 2015. Dr. Lurie wrote:

It was the unanimous opinion of the panel that the examinee was incapable of performing his job as described in the revised job description of 12/17/14. Not only would he be unable to lift heavy things such as leaf bags, but also he would not be able to lift other heavy things, nor do asphalt work, snow plowing or leaf raking. He also would not be able to do paving, raking, and trimming shrubs and a variety of other job functions due to the neck pain. There were required functions that were essential as described in the job description.

(Exhibit 11.)

1. The panel answered again in the affirmative for incapacity, permanence and causation. The panel offered two theories for causation:

There does appear to be a question of whether the injury in the tussle at work in February of 2010 was considered to be not part of his work-related injury. To the extent it was considered to be part of his work-related injury, which occurred at the card game and also when lifting a leaf bag on 9/7/11, there would be no other events or conditions that might have contributed to or resulted in the disability claimed. However, if the allowable disability claim only relates to the incident on 9/7/11 of lifting the leaf bag, then the tussle would be another event other than the event of the lifting of the leaf bag.

It was the unanimous opinion of the panel that it was more likely than not that the disability was caused by the condition or events described in the previous paragraph. That is, the panel’s opinion is that the disability was caused by two injuries, namely the tussle in February 2010 and the lifting of the leaf bag in September of 2011. On the other hand, if the injury from the tussle was considered not to be work related and a separate condition, then it certainly contributes to the disability. The lifting of the leaf bag on 9/7/11 would be an aggravation or exacerbation of a pre-existing condition, namely the neck injury of 2/2010.

It was the unanimous opinion of the panel that the incapacity is such as might be the natural and proximal result of the personal injury sustained or hazard undergone on account of which retirement is claimed. That is, the claimant claims that the injury sustained was twofold, namely in February of 2010 and September 2011. However, if there is an argument about where the first injury was the only contributor, it was not. It was a contributor, but the lifting of the leaf bag in September 2011 was an exacerbation and aggravation of the pre-existing condition.

With respect to the issue of aggravation of a pre-existing condition and the standard of that, the question is whether there was an acceleration of a pre-existing condition or injury as the result of an accident or hazard in the performance of the applicant’s duties that causation would be established. As noted above in the discussion, prior to the February 2010 injury there was no pre-existing condition. However, it is possible that February 2010 injury in the tussle is not considered to be work related. If it is considered to be work related, then it and the lifting of the leaf bag would be the injuries leading to the disability. If on the other hand the tussle is not considered a work-related injury, then it did result a pre-existing condition, which was then exacerbated at work when he lifted a leaf bag on 9/7/11.

(Exhibit 11.)

1. At its September 10, 2015 meeting, the Board voted to deny Mr. Clark’s application for accidental disability retirement. The Board informed Mr. Clark of its decision in a notice dated September 15, 2014, which included a statement of his his appeal rights, and gave the following reason for the denial:

Mr. Clark did not meet his burden of proving by a preponderance of the evidence that he is totally and permanently unable to perform the essential duties of his job by reason of personal injury sustained as the result of, and while in the performance of, his duties at some definite time and place.

(Exhibit 1.)

1. On September 23, 2015, Mr. Clark filed a timely appeal. (Exhibit 2.)

*Workers’ Compensation Claim*

1. On January 4, 2016, Mr. Clark entered into a lump sum settlement for his workers’ compensation claim, with the injuries reported as occurring on September 7, 2011 and April 27, 2012. The settlement stated:

On or about 9/7/2011 Mr. Clark was lifting heavy bags of leaves and felt a snap in his neck. He treated conservatively, was paid section 34 benefits until 3/17/2012 and was released to return to work without restrictions. On or about 4/27/2012 he re-injured his neck while throwing heavy leaf bags into a truck. He was returned to a neurosurgeon, Marc Friedberg, M.D. who treated Mr. Clark with physical therapy, injections, and medication. The insurer commenced paying section 34 benefits, but then reduced Mr. Clark’s benefits to a maximum partial rate on 9/20/2012. The claim for section 34 benefits was filed and came to concurrence in 4/11/2013. An order denying the claim was issued. The employee filed an appeal, but withdrew the appeal.[[10]](#footnote-10) He continued to receive partial benefits. The employee is also receiving retirement benefits at a 52% rate. … Mr. Clark has only 21 months of section 35 benefits available to him. The settlement represents approximately 62% of the remaining benefits upfront. The parties request that this settlement be approved as in the employee’s best interest.

…No determination has been made out with respect to the employee’s suitability for Vocational Rehabilitation pursuant to G.L. c. 152, § 30G.

(Exhibit 16.)

**CONCLUSION AND ORDER**

The decision of the Norwood Retirement Board to deny Mr. Clark’s accidental retirement application is affirmed. Mr. Clark injured his neck due to a non-work related incident and has failed by a preponderance of the evidence to establish a causal nexus between his disability and his employment.

Under G.L. c. 32 § 7, accidental disability retirement is granted to a member when he is unable to perform 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, their duties. G.L. c. 32 § 7(1). The applicant bears the burden of proof by a preponderance of the evidence for both the issue of disability, and under section seven disability, the causal nexus between the disability and a job-related personal injury. *Wakefield Contributory Retirement Bd. v. Contributory Retirement Appeal Bd.,* 352 Mass. 499, 502 (1967); *Hough v. Contributory Retirement Appeal Bd.*, 309 Mass. 534, 540 (1941); *Daley v. Contributory Retirement Appeal Bd.*, 60 Mass. App. Ct. 1110 (2004); *Lisbon v. Contributory Retirement Appeal Bd.,* 41 Mass. App. Ct. 246, 255 (1996). *See also Boston Retirement Bd. v. Contributory Retirement Appeal Bd.,* 340 Mass. 109, 110-11 (.

In order to meet the burden of proof with regards to causation, a member must prove one of two hypotheses: that the disability was caused by a single or series of work-related events, or that the applicant’s employment exposed her to an “identifiable condition … that is not common and necessary to all or a great many occupations.” *See Blanchette v. Contributory Ret. App. Bd.*, [20 Mass. App. Ct. 479](http://sll.gvpi.net/document.php?id=sjcapp:20_mass_app_ct_479), 482 (1985), *quoting* *Zerofski’s Case*, [385 Mass. 590](http://sll.gvpi.net/document.php?id=sjcapp:385_mass_590), 595 (1982). It is the applicant’s burden to prove that he has a permanent and total disability that is the natural and proximate result of a personal injury sustained as a result of the performance of his duties. *Fairbairn v. Contributory Retirement Appeal Bd*., [54 Mass. App. Ct. 353](http://sll.gvpi.net/document.php?id=sjcapp:54_mass_app_ct_353), 357 (2002), *citing* *Blanchette*, 20 Mass. App. Ct. at 483.

Aggravation of a pre-existing condition to the point of total and permanent disability satisfies the “natural and proximate” cause requirement. *Baruffaldi v. Contributory Retirement Appeal Bd*., [337 Mass. 495](http://sll.gvpi.net/document.php?id=sjcapp:337_mass_495), 499 (1958). Massachusetts courts have held that in order to meet the “natural and proximate cause” standard, the applicant’s work-related incident must be more than a “contributing” or “aggravating” factor to a pre-existing condition. *Blanchette*, 20 Mass. App. Ct. at 485; *Campbell v. Contributory Retirement Appeal Bd*., [17 Mass. App. Ct. 1018](http://sll.gvpi.net/document.php?id=sjcapp:17_mass_app_ct_1018), 1019, *rev. denied* 391 Mass. 1105 (1984). The Supreme Judicial Court has noted that in order for an event of employment to be more than a “contributing cause,” it must be found to be “a significant contributing cause to [the] employee’s disability.” *Robinson’s Case*, [416 Mass. 454](http://sll.gvpi.net/document.php?id=sjcapp:416_mass_454), 460 (1993). Furthermore in *Zerofski*, the court noted that “in some cases work may be a contributing cause of injury, but only to the extent that a great many activities pursued in its place would have contributed. When this is so, causation in fact is an inadequate test.” *Zerofski’s Case*, 385 Mass. 590, 594 (1982); *See also* *Campbell v. Contributory Retirement Appeal Bd*., 17 Mass. App. Ct. at 1018.

 A medical panel’s certificate as to disability, its permanence and work-related causation is merely “medical possibility.” *Moore v. Contributory Retirement Appeal Bd.*, 341 Mass. 611, 616 (1961). It is not conclusive of the ultimate fact of causation. *Wakefield Contributory Retirement Bd. v. Contributory Retirement Appeal Bd*., 352 Mass. at 502 (1967); *Noone v. Contributory Appeal Bd.*, 20 Mass. App. Ct. 634, 641 (1985); *Blanchette*, 20 Mass. App. Ct. at 485 (1985). CRAB makes the final determination of whether causation is proved based on the facts and evidence, both medical and non-medical. *Blanchette, supra*; *see also Kelley v. Contributory Retirement Appeals Bd*., 341 Mass. 611, 616 (1961).

Mr. Clark listed two dates of injury on his application for disability retirement, September 7, 2011 and April 27, 2012. Mr. Clark’s earlier February 24, 2010 neck injury was ineligible because it “did not occur while in the performance of [his] duties.” *See, e.g.* *Damiano v. Contributory Retirement Appeal Bd.,* 72 Mass. App. Ct. 260 (2008). After the February 24, 2010 neck injury, Mr. Clark worked for approximately three and a half months, then was medically excused for three and a half months. During his medical absence, Mr. Clark received epidural steroid injections and underwent physical therapy. He was medically cleared for work on September 22, 2010. Mr. Clark then began using sick time on weekends and holidays, to the extent that on April 8, 2011 Mr. Ryan placed him on the restricted list for sixty days, requiring him to submit a physician’s note within twenty-four hours of taking sick leave.

On September 7, 2011, Mr. Clark pinched a nerve while throwing a bag of brush onto the bag leaf truck. After the incident, he continued working for an hour and a half before going to Norwood Hospital for care. Mr. Clark was diagnosed with a possible near syncopal event and neck pain with headache. The emergency physician referred Mr. Clark for a neurological consultation after an MRI confirmed C5-6, C3-4 and C-4 cervical disc herniation and left foraminal stenosis.

After the September 7, 2011 incident, Mr. Clark took two days off in vacation and holiday leave, then worked for approximately five weeks before using sick leave. Although Mr. Clark was medically cleared by neurologist Dr. Friedberg to return to work with overhead lifting restrictions as early as October 25, 2011, (no lifting of bags more than thirty-six or thirty-seven inches in height, or chest level) he did not return to work until April 27, 2012. In the meantime, he continued treating with Dr. Friedberg and received ESI injections for pain management.

On April 2, 2012, Dr. Friedberg recommended that Mr. Clark return to regular duty. On April 27, 2012, Mr. Clark returned to work subject to the restriction of no overhead lifting and no lifting of leaf bags. Mr. Clark was working on the leaf bag truck, when he reported that his neck “snapped” from lifting “heavy” trash bags. Mr. Clark never returned to work afterward.

In the meantime, the Town acceded to Mr. Clark’s request for accommodation of his essential job duties if he were to return to work. The Town agreed that 1) he would not have to perform any overhead lifting, and 2) he would not be required to work on the leaf bag truck.

Mr. Clark then applied for accidental disability retirement benefits. Dr. Friedberg submitted a Physician’s Statement on Mr. Clark’s behalf. Although he had cleared him to return to work without restriction on April 2, 2012, in his Physician’s Statement the neurologist concluded that Mr. Clark was permanently disabled as of September 7, 2011.

On April 5, 2013, the regional medical panel unanimously concluded that Mr. Clark was permanently disabled, unable to perform essential duties as a truck driver/laborer and that he had become incapacitated in the performance of his work by aggravating a pre-existing condition of degenerative cervical spine disease on September 7, 2011.

The panel acknowledged upon the Board’s first request for clarification that it was unaware that Mr. Clark had been cleared to return to work on April 27, 2012 and that he had been offered reasonable accommodations. But the panel further concluded that Mr. Clark never recovered from the non-work-related February 2010 injury, although Dr. Friedberg had cleared him to return to regular duty starting April 2, 2012 after recommending modified duty for six months.

After the Board confirmed that that Town had offered Mr. Clark reasonable accommodations before his return to work on April 27, 2012, it requested a second clarification from the panel. The Board asked the panel whether knowing that Mr. Clark had taken two days off for holiday and vacation (not as sick time), then worked for a month after the September 7, 2011 injury would affect its opinion that he was disabled as of September 7, 2011, and whether the panel was aware that the Town had offered Mr. Clark reasonable accommodations.

The penal re-examined Mr. Clark on May 8, 2015. In a report issued on the same date, the panel unanimously opined that Mr. Clark was incapable of performing his essential duties as described in the amended job description.

The panel offered two theories based on whether or not the February 24, 2010 event was a work-related injury. If the February 24, 2010 event were work-related, then the disability was caused by the February 24, 2010 event, and aggravated by the September 7, 2011 incident. If the February 24, 2010 event were not work-related, it served as a pre-existing condition, which was exacerbated by the September 7, 2011 incident. Because it is not for the panel to decide the issue of causation, its two theories based on whether the 2010 incident were work-related is not conclusive. *Noone v. Contributory Appeal Bd.*, 20 Mass. App. Ct. 634, 641 (1985).

The medical evidence in the administrative record was sparse. I have no contemporaneous medical records of Mr. Clark’s February 24, 2010 injury. The only medical records submitted to DALA are Dr. Friedberg’s neurological notes.

Mr. Clark was not a credible witness. He testified that he was never offered reasonable accommodation. This is contradicted by the administrative record. Contrary to the sworn statement in his application, Mr. Clark testified he did not want to return to work after September 7, 2011 because he was forced to work with Mr. Carver.

Mr. Clark already suffered from a degenerative cervical condition when he was injured in the non-work-related incident on February 24, 2010. After the September 7, 2011 incident, the Town never removed Mr. Clark from restricted duty. While Mr. Clark may have suffered injuries on September 7, 2011 and April 27, 2012 as he listed in the application, these incidents were merely contributing causes to the personal injury Mr. Clark suffered. They did not amount to the significant contributing cause required to satisfy accidental disability retirement. *Robinson’s Case*, 416 Mass. at 460 (1993); *Campbell*, 17 Mass. App. Ct. 1018, *rev. denied* 391 Mass. 1105 (1984).

I find that the combination of Mr. Clark’s progressive cervical disease and his discomfort of working with Mr. Carver are the reasons for his failure to return to work.

 Causation is a strict standard for accidental disability retirement, and Mr. Clark has failed by a preponderance of the evidence to establish a casual nexus between the disability and his employment. At best, the lifting-related injuries beginning on September 7, 2011 (after the card game fight in February 2010 that required ESI treatment) contributed to the effects of the non-work-related 2010 injury, but the medical evidence is too sparse to rule out the 2010 fight as causative. *Damiano v. Contributory Retirement Appeal Bd.,* 72 Mass. App. Ct. 259 (2008); *See Richard v. Retirement Bd. of Worcester*, 431 Mass. 163, 167, 726 N.E.2d 405 (2000).

 Accordingly, the Norwood Retirement Board’s denial of Robert Clark’s application for accidental disability retirement is affirmed.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

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Angela McConney Scheepers

Administrative Magistrate

DATED: July 20, 2018

1. Migraines or small strokes might cause periventricular white matter disease. Among the symptoms of PWM are reduced walking speed and difficulty with balance. And while walking more slowly is a symptom, it is not necessarily indicative of a lesion as people tend to walk more slowly and carefully as they age. Another symptom may be confusion or reduced mental ability. Depending on the location of lesion, the capability to think clearly or perform a certain task may be impaired. *See* [*https://healthfully.com/definition-periventricular-white-matter-disease-5042429.html*](https://healthfully.com/definition-periventricular-white-matter-disease-5042429.html) [↑](#footnote-ref-1)
2. *See* Finding of Fact 70. [↑](#footnote-ref-2)
3. A C4-C5 herniation can cause shoulder pain and weakness in the deltoid muscle at the top of the upper arm, and does not usually cause numbness or tingling. A C5-C6 herniation can cause weakness in the biceps (muscles in front of the upper arms) and wrist extensor muscles. Numbness and tingling along with pain can radiate to the thumb side of the hand. This is one of the most common levels for a cervical disc herniation to occur. *See* [*https://www.spine-health.com/conditions/herniated-disc/cervical-herniated-disc-symptoms-and-treatment-options*](https://www.spine-health.com/conditions/herniated-disc/cervical-herniated-disc-symptoms-and-treatment-options) [↑](#footnote-ref-3)
4. A loss of consciousness and postural tone caused by diminished cerebral blood flow, *Stedman’s Medical Dictionary*, (28th ed. 2006.) [↑](#footnote-ref-4)
5. A notation on the bottom of the page written in a different handwriting states:

10/14/11 – Per Ken –He is reporting only what was said to him and did not actually “see” anything.

(Exhibit 6.) [↑](#footnote-ref-5)
6. Cervical or thoracic epidural steroid injections are minimally invasive procedures that deliver steroids via a needle directly into the epidural space to help reduce inflammation. *See* [*https://www.spine-health.com/glossary/epidural-steroid-injection*](https://www.spine-health.com/glossary/epidural-steroid-injection) [↑](#footnote-ref-6)
7. Facet/pravert cervical/thoracic injections: involves injecting a small amount of local anesthetic (numbing agent) and/or steroid medication, which can anesthetize the facet joints and block the pain. *See* [*https://www.spine-health.com/treatment/injections/cervical-thoracic-and-lumbar-facet-joint-injections*](https://www.spine-health.com/treatment/injections/cervical-thoracic-and-lumbar-facet-joint-injections) [↑](#footnote-ref-7)
8. This IME is not in the administrative record. [↑](#footnote-ref-8)
9. The Town enclosed the modified job description in its December 17, 2014 response to the Board. (Exhibit 14.) [↑](#footnote-ref-9)
10. See Finding of Fact 18. [↑](#footnote-ref-10)