COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. **Division of Administrative Law Appeals**

**Corinne Cobb,**

 Petitioner

v. Docket No. CR-14-367

 Dated: February 3, 2017

**State Board of Retirement,**

 Respondent

**Appearance for Petitioner:**

Brian R. Sullivan, Esq.

Keches Law Group

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Milton, MA 02186

**Appearance for Respondent:**

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State Board of Retirement

One Winter Street, 8th Floor

Boston, MA 02108

**Administrative Magistrate:**

**Edward B. McGrath, Esq.**

Chief Administrative Magistrate

# SUMMARY OF DECISION

 The Petitioner proved by a preponderance of the evidence that a back injury she suffered during the performance of her duties as a Nursing Assistant I caused her disability and, therefore, she is entitled to receive accidental disability retirement benefits.

# DECISION

# The Petitioner, Corinne Cobb, timely appealed Respondent, State Board of Retirement’s, denial, on June 30, 2014, of her application for accidental disability retirement. Each party submitted pre-hearing memoranda. The Petitioner’s was marked “A” and the Respondent’s “B.” I held a hearing on February 16, 2016, which I recorded digitally. The parties agreed that causation was the only contested issue. I accepted 16 exhibits into evidence. (Exs. 1-16) Following the hearing, I issued an Order confirming the Parties’ stipulation and identifying the exhibits. The parties were given until April 18, 2016 to submit post-hearing briefs. The Petitioner filed a post-hearing brief and it was marked “C”. On May 23, 2016, I closed the administrative record.

# Findings of Fact

 Based on the testimony and exhibits presented at the hearing and reasonable inferences from them, and my assessment of witness credibility, I make the following findings of fact:

1. Corrine Cobb (“Petitioner”) was born in 1943. She began working as a Nursing Assistant I for the Department of Public Health at the Massachusetts Hospital School on February 28, 1988. (Ex. 6, Test.)
2. Cobb’s work as a Nursing Assistant I at the Massachusetts Hospital School involved lifting and carrying heavy objects, including patients. Cobb was required to lift patients to dress and bathe them. She also had to lift the patients to transfer them to and from bed. She also had to make beds and respond to emergency situations. (Ex. 7, Test.)
3. On October 7, 2001, Cobb heard a pop in her back and felt excruciating pain in her low back while transferring a patient from a chair to bed at work. The pain went down the back of both her legs. (Test.)
4. She reported the incident to her employer that day. (Ex. 8, Test.)
5. The incident occurred at the end of her shift so she finished it, but she never returned to work because of low back pain. (Test.)
6. Cobb did not have any back problems prior to this incident. (Test.)
7. Cobb has had pain in her low back since the incident. The pain limits her activities. She is unable to stand more than 5 minutes before she needs to sit. She must stand after sitting 5 minutes. (Test.)
8. Cobb was last able to perform the essential duties of her job as a Nursing Assistant I on October 7, 2001. (Ex. 5, Ex.6, Test.)
9. On January 31, 2002, Cobb applied for early retirement, pursuant to the Early Retirement Incentive Program offered at the time, and stated on her application that she was on Industrial Accident Leave since November, 2001. (Ex. 3, Test.)
10. Cobb’s employment ended on March 16, 2002. (Ex. 6)
11. She took early retirement, because she could no longer work as a result of her low back injury. (Test.)
12. Cobb received Section 34 workers compensation benefits beginning on November 2, 2001 for the pay period ending October 27, 2001 and continued to collect weekly benefits. Cobb lump sum settled her workers compensation case on May 2, 2008. (Ex. 8, Test.)
13. Cobb tried to work for the Red Cross, The job required her to sit at a computer and book appointments, but she could not physically perform the job duties. She stopped after a week and half. (Test.)
14. On December 14, 2006, Richard Fraser, M.D. stated that “In March of 2002, Ms. Cobb sustained an injury to her lower back while working as a nursing assistant at the Massachusetts Hospital School.” He opined that his treatment of Cobb was “reasonable, medically necessary appropriate and directly related to the work injury that she sustained in March of 2002. (Ex. 12)
15. Dr. Fraser recorded the date of the incident incorrectly, as he reported the date as October 7, 2001 in some of his other notes and there is no evidence that Cobb returned to work at the Massachusetts Nursing School after October 7, 2001.
16. On July 19, 2007, Ronald E. Rosenthal, M.D. examined Cobb. He prepared a report addressed to the person handling Cobb’s workers’ compensation claim on the same day. (Ex. 8)
17. According to Dr. Rosenthal, he had a chiropractic note beginning October 9, 2001 through November 2, 2001 that showed Cobb had chiropractic treatment and physical therapy. (Ex. 8)
18. Dr. Rosenthal diagnosed chronic lumbosacral sprain and obesity. He opined that, “The accident that she describes which occurred on October 7, 2001, is the proximate cause of her current condition.” He stated that “the injury combines with her pre-existing condition of obesity, which is a major contributing factor to the chronicity of her symptoms and disability.” (Ex. 8)
19. On December 4, 2007, John F. McConville, M.D. opined that: “The present condition of the employee and the remote lifting injury at work six years ago does not appear to this examinee to have an established causal relationship.” He added that “Her inability to return to work as a Nursing Assistant is related to the exogenous obesity rather than from any residual of the reported work site incident of six years ago.” (Ex. 12)
20. On October 31, 2011, Cobb told Michael Freed, M.D. that “Recently it [back pain] has been worse with pain when she walks.” Cobb also told Dr. Freed that “since onset, the overall severity of the pain has moderately increased.” (Ex. 14)
21. A notation made by Dr. Freed reads: “Serious injuries: back injury lumbar injury of the back in 2001. Nov. 2010.” (Ex. 14).
22. On October 13, 2011, Dr. Freed wrote a report addressed to Richard Levrault, D.O., which read in part: “The patient reports years of back pain that started when lifting a patient 10 years ago. Recently it has been worse with pain when she walks.” (Ex.14)
23. An office note dated January 5, 2011 states that Cobb was complaining of “low back pain radiating down bilateral legs x3 months, states unable to move in morning.” Cobb reported that she was going to a chiropractor. (Ex. 14)
24. Cobb applied for Accidental Disability Retirement and her undated application was received by the Respondent on June 25, 2012. (Ex. 4)
25. On June 28, 2012, Richard Fraser, M.D. prepared the Treating Physician’s

Statement. Noting the date of injury as “10-7-01”, Dr. Fraser stated that Cobb was last able to perform the essential duties of her job on "10-7-01” and that the injury of “10-7- 11(sic)” led to Cobb’s disability. (Ex. 5)

1. On November 26, 2012, The Board forwarded background information including

medical records to members of the Regional Medical Panel. (Ex. 10)

1. The panel was made up of the following three orthopedists: William C. Donahue,

M.D., Louis A. Bley, M.D., and Robert J. Nicoletta, M.D. (Ex. 11)

1. Dr. Donahue opined that, based upon his review of the available records, Cobb’s

history and his physical examination of her, that “there was a causal relationship between the injury on October 7, 2011(sic) and her continuing problems.” (Ex. 11)

1. Dr. Bley wrote that Cobb’s disability “appears to be causally related to the

accident of record as there is no indication of symptomology prior to the work incident.” (Ex. 11)

1. Dr. Nicoletta wrote in his report that “her initial injury has developed to the chronic

lower back pain that she has now, with obesity.” Dr. Nicoletta also said “She was never able to return to her job as described…” (Ex. 11)

1. After reviewing some additional medical records, the panel members prepared

supplemental reports, but their opinions remained the same. (Ex.16)

1. On June 30, 2014, the Respondent denied the application for accidental disability.

(Ex. 1)

1. On July 14, 2014, DALA received Cobb’s timely appeal of that decision. (Ex. 2)

# Discussion

In order to qualify for an award of accidental disability retirement benefits under M.G.L. c. 32, § 7(1), an applicant must prove that she is totally and permanently unable to perform the essential duties of her job as the natural and proximate result of a personal injury sustained or hazard undergone, as a result of, and while in the performance of her duties, at some definite place and at some definite time. The Petitioner must prove her case by a preponderance of the evidence. “The weight or ponderance of evidence is its power to convince the tribunal which has the determination of the fact, of the actual truth of the proposition to be proved. After the evidence has been weighed, that proposition is proved by a preponderance of the evidence if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there.” *Sargent v. Massachusetts Accident Co.*, 307 Mass. 246, 250 (1940). Pursuant to the agreement of the parties, the only issue that I need to address in this matter is causation.[[1]](#footnote-1)

I begin with the general rule that an "employee who has left government service without an established disability may not after termination of government service, claim accidental disability retirement status on the basis of a subsequently matured disability." *Vest v. Contributory Retirement App. Bd*., [41 Mass. App. Ct. 191](http://sll.gvpi.net/document.php?id=sjcapp:41_mass_app_ct_191), 194, 668 N.E.2d 1356, 1358 (1996). *see also Horick v. Quincy Retirement Bd*, CR-08-397 \* 6 (DALA 12/3/2010; no CRAB Dec.) (firefighter with heart condition not disabled at the time he was placed on administrative leave). In the instant case, Cobb’s credible testimony, her treating physician’s statement and the employer’s note contained on page 2 of the Employer’s Statement, Ex. 6, convinces me that Cobb was disabled on the last day she worked, October 7, 2001.

The Petitioner bears the burden of proving a causal nexus between an injury and her disability. *Lisbon v. CRAB*, 41 Mass. App. Ct. 246, 255, 670 N.E.2d 392, 399 (1996); *Campbell v. Contributory Retirement Appeal Bd.*, 17 Mass. App. Ct. 1018, 1019, 460 N.E.2d 213, 214 (1984). In order to meet her burden of proof, the applicant must prove one of two hypotheses: that her injury was caused by a single or series or work-related events, or that her employment exposed her to an “identifiable condition ... that is not common and necessary to all or a great many occupations,” that resulted in disability through gradual deterioration.” *Blanchette v. Contributory Retirement Appeal Bd.*, 20 Mass. App. Ct. 479, 485, 481 N.E.2d 216, 220 (1985) quoting *Zerofski’s Case*, 385 Mass. 590, 595, 433 N.E.2d 869 (1982). In this case, Cobb is alleging that her disability was caused when she lifted the patient at work on October 7, 2001.

The final determination on the issue of causation is for the Contributory Retirement Appeal Board (CRAB), "based on the facts found and all the underlying evidence, including both the medical and non-medical facts." *Blanchette*, 20 Mass. App. Ct. at 483. The evidence in this case convinces me that Cobb's disabling back injury was the natural and proximate result of the personal injury she sustained on October 7, 2001. A majority of the medical panel supported the Petitioner on the issue of causation and, while the medical panel’s opinion on causality is “not conclusive of the ultimate fact,” it is “some evidence on the issue.” *Id.*; *see* *Mathewson v. CRAB,* [335 Mass. 610](http://sll.gvpi.net/document.php?id=sjcapp:335_mass_610), 614, 141 N.E.2d 522, 525 (1957).

 Two of the panel doctors causally related Cobb’s disability to the incident at issue and I find those reports persuasive. Dr. Rosenthal, who performed an independent medical examination on Cobb for the workers’ compensation insurer, found there was a causal relationship. Cobb’s treating physician, Dr. Fraser, also supported Cobb on the issue of causation. While some of his reports refer to an incident of 2002 and 2011, I find these references were typographical errors. His notes dated April 8, 2008, September 7, 2007, April 5, 2007, and the Physician’s Statement all refer to the October, 2001 incident. (Ex. 5, Ex. 8, Ex 12)

I was also persuaded by the Petitioner’s credible testimony concerning the incident and her immediate symptoms. In addition, there was no reference in the medical records or the Employer’s Statement to a prior back injury or back symptoms interfering with the performance of her job duties prior to October 7, 2001.

I note Dr. McConville’s opinion that Cobb’s inability to work as a Nursing Assistant is related to her exogenous obesity. I was not persuaded by his opinion, because it did not address the fact that Cobb’s symptoms started with the injury at issue and he did not explain why Cobb has been unable to perform her duties since that incident. For the same reasons, I did not follow Dr. Nicoletta’s reasoning.

 The Respondent contends that Cobb’s failure to produce any medical records dated between the date of her injury and her superannuation retirement and a record of the MRI referred to in some of the narrative reports means that she did not meet her burden of proof. (Ex. B p. 5) I am not persuaded by that argument. While Cobb had the burden of proof, once she met her burden, the burden shifted to her opponent to produce evidence to the contrary. *Kalu v. Boston Ret. Bd.*, 90 Mass. App. Ct. 501, 511 n. 15, 61 N.E.3d 455, 466 n. 15 (2016).

**CONCLUSION and ORDER**

I conclude that the Petitioner proved, by a preponderance of the evidence, that the incident at issue caused her disability and, therefore, I reverse the decision of the Respondent to deny the Petitioner’s Application for Accidental Disability and direct it to award the Petitioner Accidental Disability Retirement Benefits.

SO ORDERED.

DIVISON OF ADMINISTRATIVE LAW APPEALS

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Edward B. McGrath, Esq.

Chief Administrative Magistrate

Dated: February 3, 2017

1. I note that G.L. c. 32 § 7 (3) (a) provides that an applicant may avoid having her claim for accidental disability barred by a failure to file her claim within two years of the injury sustained or the hazard undergone if she received workers' compensation benefits for the injury. *See Sirisavath v. Boston Retirement Bd.,* CR-14-123 \* 15 (DALA 5/6/2016). [↑](#footnote-ref-1)