**Patricia Considine,**

 Petitioner

 v.

**Somerville Retirement Board,**

 Respondent

and

**Public Employee Retirement Administration Commission,**

 Intervenor

Docket No. CR-16-452

Dated: August 2, 2019

**Appearance for the Petitioner:**

Pro se

**Appearance for the Respondent:**

Brian Fox, Esq.

Michelle De Oliveira, Esq.

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**Appearance for the Intervenor:**

Kenneth Hill, Esq.

Katherine Brady, Esq.

Public Employee Retirement Administration Commission

5 Middlesex Ave., Suite 304

Somerville, MA 02145

**Administrative Magistrate:**

**Kristin M. Palace, Esq.**

**SUMMARY OF DECISION**

The Petitioner is not entitled to accidental death benefits under M.G.L. c. 32, §§ 9 and 94B, the “Cancer Law Presumption,” because her late husband’s cancer was not discovered within five years of the date of his retirement. The decision of the Somerville Retirement Board to deny accidental death benefits to the Petitioner is affirmed.

**DECISION**

Patricia Considine (“Petitioner”) appealed the decision of the Somerville Retirement Board denying accidental death benefits to her following the death of her husband, James Considine, a firefighter. The Public Employee Retirement Administration Commission (PERAC) filed a motion to intervene in these proceedings. The motion was granted on July 13, 2018.

I held a hearing on July 30, 2019 at the Division of Administrative Law Appeals, located at 14 Summer Street, Malden, Massachusetts. The hearing was recorded digitally. PERAC and the Petitioner submitted pre-hearing memoranda. I admitted seven exhibits into evidence (Exhibits 1- 7). I took judicial notice of the fact that “r/o” in the medical profession means “rule/out.” The Somerville Retirement Board did not appear at the hearing. Petitioner was the sole witness. The parties elected not to file closing briefs. The record closed on July 30, 2019 at the end of the hearing.

**FINDINGS OF FACT**

Based on the evidence in the record I find the following facts:

1. Petitioner is the widow of James Considine. (Exhibit 6.)
2. Petitioner was employed in the medical claims field. She is not a physician or a scientist. (Testimony.)
3. James Considine was a firefighter who served with the Somerville Fire Department for 28 years. (Testimony.)
4. During his years of service, Mr. Considine responded to many fire calls, some of which involved chemical spills. (Testimony.)
5. On May 19, 2003, Mr. Considine underwent a procedure to remove a lesion from his right upper shoulder. (Exhibit 4.)
6. The lesion was diagnosed as non-cancerous. (Exhibits 4, 7.)
7. On August 23, 2003, Mr. Considine was granted superannuation retirement from the Somerville Fire Department. He benefitted from an early retirement option that enabled him to add three years to his age and two to his years of service, resulting in his retiring as though he was 55 years old with 30 years of service. (Exhibit 1.)
8. Mr. Considine elected early retirement because he believed he would soon be laid off from his job. (Testimony.)
9. Mr. Considine did not retire pursuant to the cancer presumption (M.G.L. c.32, §94B). (Exhibit 2.)
10. In 2012, Mr. Considine was diagnosed with skin cancer (melanoma) on his right upper shoulder. (Exhibit 4.)
11. Prior to 2012, Mr. Considine had no symptoms of cancer of which he was aware. (Testimony, Exhibit 4.)
12. Mr. Considine died on December 28, 2014. The cause of death was hypoxic respiratory failure as a consequence of melanoma and influenza. (Exhibit 6.)
13. Petitioner applied to the Somerville Retirement Board for accidental death benefits. (Exhibit 2.)
14. The Somerville Retirement Board denied Petitioner’s application on September 30, 2016. (Exhibit 2.)
15. Petitioner timely appealed the Somerville Retirement Board’s denial. (Exhibit 1).

**CONCLUSION AND ORDER**

Accidental death benefits under M.G.L. c. 32, §9 are available to the survivor-beneficiary of a member if the member died as the “natural and proximate result of a personal injury sustained or hazard undergone as a result of, and while in the performance of” the member’s duties. M.G.L. c. 32, §9(1). The burden of proof in an accidental death benefit case is on the individual who seeks the benefit. *Robinson v. Contributory Retirement Appeals Board,* 20 Mass. App. Ct. 634. A beneficiary must present “proper proof” of the natural and proximate causation of the member’s death from the injury sustained or hazard undergone. M.G.L. c. 32, §9(1). Cases requiring an understanding of medical science to determine the causal connection between the member’s death and his duties present questions that are outside the common knowledge and experience of a hearing officer. In these matters, expert testimony is required to guide the finder of fact. *Robinson v. Contributory Retirement Appeals Board,* 20 Mass. App. Ct. 634, 638-639 (1985).

The Massachusetts legislature has seen fit, under some circumstances, to ease the evidentiary burden on a surviving beneficiary by establishing certain legal presumptions. For example, sections 94, 94A, and 94B of chapter 32 provide that firefighters who develop heart conditions, lung disease, and cancer, respectively, are presumed to have suffered these conditions in the line of duty, subject to certain conditions. The cancer presumption law is relevant to this case. M.G.L. c. 32, §94B provides:

…[a]ny condition of cancer affecting the skin … resulting in total disability or death to a uniformed member of a paid fire department … shall, if he successfully passed a physical examination on entry into such service or subsequent to such entry, which examination failed to reveal any evidence of such condition, be presumed to have been suffered in the line of duty, unless it is shown by a preponderance of the evidence that non-service connected risk factors or non-service connected accidents or hazards undergone, or any combination thereof, caused such incapacity. …. Any person first discovering any such condition within five years of the last date on which such person actively so served shall be eligible to apply for benefits hereunder, and such benefits, if granted, shall be payable as of the date on which the employee last received regular compensation. The provisions of this section shall not apply to any person serving in such position unless such person shall first establish that he has regularly responded to calls of fire or their investigation at the scene during some portion of the period of his service in such position.

Here, if Petitioner can meet all of the prerequisites of §94B, the causal connection between Petitioner’s husband’s death as a result of skin cancer and his service as a firefighter would be established by presumption, obviating the need for expert testimony. Unfortunately for the Petitioner, she is not able to bring her case within the scope of §94B.

Petitioner was able to establish through her testimony that her late husband responded regularly to fire calls. She was unable to provide any information on whether he had passed a physical examination at the time of entry into service. Even if, however, that hurdle could be overcome, a bigger one exists: Mr. Considine’s cancer was not discovered until nine years after he had retired. In order to be entitled to the presumption of §94B, a member must have discovered the cancer within five years of his last date of active duty.

Petitioner argues that she believes that her late husband’s cancer must have been present for several years before it was diagnosed because the cancer had metastasized significantly at the time it was discovered in 2012. She testified that although she was not a medical expert, she strongly believed that the cancer had to have been present by 2008 at the latest in order for it to have spread so thoroughly by 2012. She drew a connection between the benign skin lesion excised from Mr. Considine in 2003 and the cancerous lesion that appeared in the same area in 2012. On this point, she offered a letter from Mr. Considine’s physician, David McDermott, M.D. Dr. McDermott writes: “The source of the patient’s melanoma was likely on the skin of the right shoulder … The original [2003] skin lesion was likely the source of the melanoma.”

Dr. McDermott’s letter is unsupported by any expert testimony and without sufficient detail in the letter to explain how he reached his conclusion and what bearing that conclusion might have on whether Mr. Considine’s cancer occurred within five years of his retirement. The letter is devoid of Dr. McDermott’s qualifications, his thought process, the facts on which he relied, any discussion of the growth rates of the melanoma, and the scientific basis for his conclusion that the 2003 non-cancerous skin lesion was the source of the later cancer.[[1]](#footnote-1) Without these, Dr. McDermott’s letter boils down to a speculative conclusion and, as such, it is insufficient for me to rely on in drawing any conclusion about a causal connection between the two lesions. *Gravallese v. Cambridge Retirement Board,* Docket No. CR-90-1290 (Div. of Admin. L. App., October 15, 1992) at 3 (“Medical evidence must be competent, reliable, and material to the question raised. It must not be based on mere conjecture…”) (no Contrib. Ret. App. Bd. Decision).

Even if Dr. McDermott’s letter rose to the level of evidence sufficient for me to rely on, the connection he makes would be unavailing. The law requires that the cancer be *discovered* within five years from the last date of a member’s active service. In 2003, six months prior to Mr. Considine’s retirement, he had a lesion – a mole-like growth – removed from his right shoulder. The purpose of the procedure, according to the medical records contained in Exhibit 4, was to remove the lesion in order to determine whether it was a benign growth (also known as an irregular lentigo) or melanoma. The pathology report reflects that melanoma was ruled out. Petitioner testified that her late husband had no symptoms suggestive of cancer until 2012. Her recollection is consistent with a December 2012 note in the medical record from Dr. Elizabeth Buchbinder who saw Mr. Considine for the lesion that had reoccurred. Dr. Buchbinder writes: “Overall, [Mr. Considine] notes he is feeling absolutely great. He has no issues with chest pain or shortness of breath. He personally has not noticed any new adenopathy, nodularity, abdominal complains, nausea, vomiting, or bowel changes.” The documentary evidence and the testimony paint a picture of a man who had a non-cancerous mole removed in 2003, lived symptom-free for nine years thereafter, and was then diagnosed with cancer. Because Mr. Considine’s cancer was not discovered within the five year period required by §94B, the Cancer Presumption does not apply to Petitioner’s case. *Compare, Connery v. Revere Retirement Board, Public Employee Retirement Administration Commission,* Docket No. CR-02-1314 (Div. of Admin. L. App., December 12, 2003) (no Contrib. Ret. App. Bd. Decision) (Petitioner found eligible for accidental death benefit under the presumption of §94B where decedent firefighter’s cancerous symptoms appeared within the five year period although a definitive diagnosis was not offered until six years after the decedent retired) *with Logan v. Public Employee Retirement Administration Commission,* Docket No. CR-00-1002 (Div. of Admin. L. App., July 2, 2001) *dismissed as moot* (Contrib. Ret. App. Bd., December 10, 2001) (Petitioner not eligible for accidental death benefit under the presumption of §94B where decedent firefighter was diagnosed with advanced-stage lung cancer exactly six years after the date of retirement, despite medical opinion that the decedent’s extensive and advanced stage of malignancy made it highly likely that the lung cancer had been present for at least one year prior to diagnosis.) *See also DelGizzi v. Newton Retirement Board and Public Employee Retirement Administration Commission,* CR-00-1147 (Div. of Admin. L. App., January 19, 2001) (“The statute refers specifically to the date of discovery of the condition, not to the speculative date of onset of the condition.”) *aff’d* (Contrib. Ret. App. Bd., May 25, 2001).

Petitioner has also offered a number of articles which conclude that firefighters are more likely than the general population to contract melanoma. This may be true, but it is not helpful to Petitioner’s case as she must prove, absent any presumption, that the melanoma that caused her husband’s death was causally connected to his work as a firefighter. Proof of the general is not proof of the specific. Further, as noted above, establishing causation in a case such as this one requires the opinion of qualified experts who can interpret the scientific evidence and apply it to the facts of the case at bar. The submission of articles, without more, does not provide the trier of fact with the expertise needed to decide questions outside the expertise of a layperson.

Lastly, Petitioner argues that the statute causes unfair results in that a firefighter who developed job-related cancer more than five years after retirement is no less worthy than a firefighter who developed that cancer within the five year period. She also notes that had her late husband not taken advantage of early retirement because he feared he would be laid off, there is a good possibility that he would still have been working at the time his cancer was discovered (and thus eligible for the presumption). The Petitioner’s frustration is understandable, but the language of the statute is unambiguous. The legislature did not intend that the presumption apply for an indefinite time. *Logan* at 5. Even if I were convinced that the result in this case is unfair, I would have no power to alter it. DALA has no ability to provide equitable relief. *See* *Petrillo v. Public Employee Retirement Admin*., Docket No. CR-92-731(Div. of Admin. L. App., Feb. 15, 1993); *aff'd* (Contrib. Ret. App. Bd., Oct. 22, 1993) (CRAB does not have the "authority to employ an equitable remedy in the face of specific statutory language [to the] contrary."); *Bristol County Ret. Bd. v. Contributory Ret. App. Bd.,* [65 Mass. App. Ct. 443](http://sll.gvpi.net/document.php?id=sjcapp:65_mass_app_ct_443), 451-52 (2006).

The decision of the Somerville Retirement Board is affirmed.

DIVISION OF ADMINISTRATIVE LAW APPEALS

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Kristin M. Palace

Administrative Magistrate

1. Dr. McDermott’s entire letter reads as follows: “To whom it may concern, I am contacting you in regards to a patient under my care who passed away of metastatic melanoma on 12/28/2014, Mr. James P. Considine. The source of the patient’s melanoma was likely on the skin of the right shoulder. This area was biopsied in 2003 which revealed lentiginous compound dysplastic nevus with moderate atypia. 10 years later, this same area was biopsied and the patient was diagnosed with melanoma. The original skin lesion was likely the source of the melanoma.” [↑](#footnote-ref-1)