

COMMONWEALTH OF MASSACHUSETTS
Division of Administrative Law Appeals

PAUL CONWAY	:	Docket No. CR-22-0439
<i>Petitioner</i>	:	
	:	Date: February 23, 2024
v.	:	
	:	
PUBLIC EMPLOYEE	:	
RETIREMENT ADMINISTRATION	:	
COMMISSION	:	
<i>Respondent</i>	:	

Appearance for Petitioner:

David McBride, *Esq.*

Appearance for Respondent:

Kenneth Hill, *Esq.*

Administrative Magistrate:

Eric Tennen

SUMMARY OF DECISION

The Petitioner, a former firefighter who had been retired for accidental disability, applied for reinstatement. After a comprehensive medical evaluation, the doctor determined he was still unfit to return to duty because he had an automatically disqualifying condition. While his appeal was pending, the Petitioner turned 65, which is the maximum age of retirement for a firefighter. Accordingly, his appeal is moot because, even if he were deemed fit, he cannot fulfill all the requirements of reinstatement at this point. And in any event, there was no error in the doctor's determination that he has an automatically disqualifying condition.

INTRODUCTION

The Petitioner, Paul Conway, timely appeals a 2022 decision by the Respondent, the Public Employee Retirement Administration Commission, ("PERAC"), denying his application

to be restored to duty. I held a virtual hearing on February 1, 2024.¹ The Petitioner testified on his behalf; PERAC called no witnesses. I admitted Exhibits 1-13 into evidence.² The parties each made closing statements at which point I closed the administrative record.

FINDINGS OF FACT

1. The Petitioner was born in 1958. (Stipulated facts.)
2. He began working as a firefighter for the City of Medford in 1984. In 2001, he was awarded accidental disability retirement benefits because of a knee injury. (Stipulated facts.)
3. In 2011, he applied for reinstatement and was denied. (Testimony.)
4. In 2018, he had a liver transplant. The transplant was successful. However, after the surgery, he was given the wrong medication and had a stroke. (Testimony; Ex. 6.)
5. In 2019, he again applied to be reinstated as a firefighter. (Stipulated facts.)
6. PERAC arranged for a comprehensive medical evaluation (“CME”). *See* G.L. c. 32, § 8; 840 Code of Mass Regs. § 10.14. (Stipulated facts.)
7. In a CME report dated October 7, 2019, Dr. Albert Rielly opined that the Petitioner was not able to resume the essential duties of his prior position. The main reason was that

¹ Prior to the hearing, I asked the parties to brief whether the case was moot. PERAC argued it was and urged me to dismiss it; the Petitioner disagreed. After reviewing the party’s submissions, I indicated that although I was inclined to agree with PERAC—and ultimately do as discussed below—I was going to hold the hearing anyway for a few reasons: 1) the parties had already submitted their pre-hearing memorandum and exhibits 2) there was only going to be one witness, the Petitioner, and 3) this would allow the Petitioner to make a full evidentiary record in support of all his arguments.

² PERAC objected to Exhibit 9, which is a thumb drive containing video footage of the Petitioner exercising. I ruled PERAC’s objection went to weight, not admissibility, and overruled its objection.

- history of a stroke “does not permit safe performance of essential job tasks” for a firefighter. Dr. Rielly was also concerned about a possible cerebral aneurysm detected in an MRI. (Ex. 6.)
8. PERAC denied the Petitioner’s application and the Petitioner did not appeal. (Ex. 7.)
 9. In 2022, the Petitioner again applied for reinstatement and PERAC arranged for another CME.³ Dr. Reid Boswell conducted the evaluation. The result was the same. In a September 17, 2022 report, Dr. Boswell opined the Petitioner was still unqualified to return to work. (Ex. 13.)
 10. Most importantly, he noted that the Petitioner’s complicated history included “an episode of ischemic stroke requiring ongoing medical treatment. This is a Category A condition according to the Standards for Municipal Firefighters in the Commonwealth of Massachusetts.” (Ex. 13.)
 11. Category A conditions are “considered absolutely disqualifying.” (Ex. 8.)
 12. Since his transplant and stroke, the Petitioner appears to have turned a corner. He goes to the gym regularly and considers himself to be in good shape. He believes he could perform the essential duties of a firefighter. (Testimony.)
 13. The Petitioner submitted several letters from various treatment providers indicating that, in their medical opinions, he could return to full duty without restrictions. Some of the letters were from 2019 and 2020 (Exs. 1-4, 10), and one was from 2023 (Ex. 11.) The

³ The 2019 CME finding the Petitioner unfit was seemingly grounded in the fact the Petitioner had a Category A diagnosis, a stroke, which was an automatically disqualifying condition. *See, infra*, ¶¶ 10-11. Perhaps because the evaluation did not explicitly mention a “Category A” diagnosis, PERAC arranged for another CME evaluation in 2022 instead of denying the Petitioner’s application outright. In this appeal, PERAC does not argue that the 2019 evaluation precluded a new evaluation.

letters consist of no more than a few sentences. None of the doctors demonstrated they were aware that the Petitioner was trying to be reinstated as a firefighter or what his duties would be if he returned.⁴ None of the doctors showed familiarity with the medical standards for municipal firefighters. Because the letters lack substance, and because none of these doctors appeared as witnesses, I place no weight on these opinions.

14. PERAC again denied the Petitioner's application in a letter dated September 28, 2022, explaining that after reviewing his medical information, he was still "unable to perform the essential duties of the position from which [he] retired, with or without rehabilitation." (Ex. 7.)
15. The Petitioner timely appealed, and a hearing was eventually scheduled for February 2024.
16. While the appeal was pending, in August 2023, the Petitioner turned 65. The mandatory retirement age for a firefighter is 65. M.G.L. c 32, §§ 1.

DISCUSSION

A member who receives accidental disability retirement may be reinstated under very specific circumstances. The first step requires the member to participate in an evaluation, i.e. the CME. G.L. c. 32, § 8(1)(a). If a CME reveals that the member *may* no longer be disabled, the member moves on to the next stage: a mental or physical examination by a three-member

⁴ The Petitioner had not worked as a firefighter since 2001 but had worked in an administrative capacity for a roofing company. (Ex. 13.); *Conway v. PERAC*, CR-11-195 (CRAB Jul. 25, 2016). It is not clear whether, in indicating he was able to return to work, the doctors were referring to the Petitioner's recent job, i.e., his administrative work for the roofing company, or the physically demanding job of a firefighter.

regional panel.⁵ G.L. c. 32, §§ 8(1)(a) & (b); 840 Code Mass. Regs. § 10.15. Even if the panel opines the member is fit for duty, reinstatement is not automatic. A member who has been separated for more than five years may first have to undergo retraining. G.L. c. 31, § 39; *see Ciccone v PERAC*, CR-04-376 & 626, 2005 WL 4541574 (DALA Oct 14, 2005). And whether or not a member must undergo training, they are only eligible to return to their prior (or similar) position “provided the position is vacant.” G.L. c. 32, § (2). While the member is waiting for a vacant position to open, they continue to receive their disability retirement allowance. *Id.*; 840 Code Mass. Regs. § 10.15(2)(e).

The Petitioner’s quest to be reinstated stems from his desire to retire for regular superannuation, and not disability, because that is more advantageous. For example, it would allow him to work additional hours without having to pay back certain excess earnings. The Petitioner was forthright about this, and I ascribe no ill-motive on his part. But because he was unable to complete the reinstatement process before he reached his maximum age of retirement, he cannot obtain this result.

The Petitioner argues that I have the power to declare him fit, *nunc pro tunc*, to the date of his 2022 evaluation, which pre-dates him turning 65. He believes that would effectively reinstate him. Putting aside whether such a finding now could be applied *nunc pro tunc*, it would not have the effect the Petitioner desires. Here, the Petitioner had only undergone the CME. At most, if there had been some mistake in that process, I could order only that the Petitioner move on to the next stage: the medical panel evaluation. *Rideout v. PERAC*, CR-05-024, 2006 WL 4211609, (DALA Jun. 9, 2006) (remanding to PERAC to convene medical panel after finding

⁵ If the CME determines the member may be able to perform their duties after certain rehabilitation, the member must complete that rehabilitation program before being referred to the panel evaluation. 804 Code Mass. Regs. §§ 10.15, 10.19.

errors in the CME). I cannot declare the Petitioner fit and reinstated, thereby skipping the various steps a member must undergo before being placed back in their original (or similar) position: medical panel evaluation, retraining, and availability of a vacancy. Accordingly, PERAC argues, and I agree, that the Petitioner's case is moot because he reached the maximum age of retirement before he was reinstated. *Ciccione, supra* (reinstatement not possible when Petitioner unable to fulfill all legal requirements for reinstatement prior to reaching maximum age of retirement).

Even were I to reach the merits of the appeal, there was no error in PERAC's determination that the Petitioner remains unable to perform the essential duties of his position. There is no question that the Petitioner's stroke is a Category A condition that, under the medical standards used to evaluate a firefighter's fitness, is absolutely disqualifying. PERAC correctly applied the provisions of G.L. c. 32, § 8 and was justified in rejecting the Petitioner's reinstatement application. *Peter v. PERAC*, CR-02-293 (DALA Dec. 5, 2003); *Vallee v PERAC*, CR-01-900 (Dec. 21, 2001); *Porrovecchio v PERAC*, CR-99-416 (DALA Mar. 24, 2000) *affirmed by* CRAB (undated decision).⁶

⁶ Prior cases simply reviewed whether PERAC "correctly applied" the provisions of G.L. c. 32, § 8 and its own regulations, *Peter*, or whether it was "justified" in its determination. *MacDougall v. PERAC*, CR-01-007 (DALA Jan. 18, 2002); *Vallee*; *Porrovecchio*. At the hearing, I asked counsel what they believed the standard of review was and PERAC suggested the proper standard is the same as a negative panel. I need not decide if that is the proper standard because, in this case, the result would still be the same. Dr. Boswell had all the pertinent facts, applied the correct legal standard, and was not plainly wrong. *Beauregard v. Fall River Ret. Bd.*, CR-18-0498 (DALA Mar. 11, 2022) ("The general rule that a negative panel ends an application for accidental or involuntary disability retirement benefits has a few exceptions: if the medical panel did not 'conform[] to the required procedure of physical examination'; it lacked 'all the pertinent facts'; it used an erroneous legal standard; or the medical certificate was 'plainly wrong.'").

CONCLUSION AND ORDER

The Board's decision to deny the Petitioner's application for reinstatement is **affirmed**.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

Eric Tennen

Eric Tennen
Administrative Magistrate