

CMMONWEALTH OF MASSACHUSETTS

Middlesex. ss.

Division of Administrative Law Appeals

Diana Cummings,
Petitioner

v.

Docket No. CR-20-0322
Dated: June 9, 2023

Gloucester Retirement Board,
Respondent

Appearance for Petitioner:

Judson L. Pierce, Esq.
Pierce, Pierce & Napolitano
27 Congress Street, Suite 301
Salem, MA 01970

Appearance for Respondent:

Thomas F. Gibson, Esq.
Law Offices of Thomas F. Gibson
2400 Massachusetts Avenue
Cambridge, MA 02140-1854

Administrative Magistrate:

James P. Rooney

Summary of Decision

This application for ordinary disability retirement is denied because the Petitioner has not submitted a Physician Statement certifying that she is permanently unable to perform the essential duties of the job of Library Assistant, and because the Petitioner has not demonstrated that she was permanently unable to perform the essential duties of her job on her last day of work.

DECISION

Diana Cummings appeals the July 30, 2020 decision of the Gloucester Retirement to deny her application for ordinary disability retirement. The parties agreed to have the case decided on the documents in lieu of a hearing under the provision of 801 CMR 1.01 (10) (c). I admitted fourteen exhibits into evidence. A list of exhibits appears on the last page of this decision.

Findings of Fact

1. Diana Cummings was born in 1970. She worked as a Library Assistant for the City of Gloucester from July 16, 2015 to June 12, 2019. Her employment ended on August 5, 2019. She retired for superannuation on November 1, 2019 with more than 15 years of creditable service. (Exs. 3, 7, 13.)
2. On August 14, 2019, Ms. Cummings filed an application for ordinary disability retirement claiming that she was unable to perform the essential duties of her job because of “anxiety, depression, suicidal ideation, insomnia, agoraphobia, isolation, low energy, sadness, poor motivation due to overwhelming and long enduring mental health issues.” (Ex. 3.)
3. Marcie Sidman, M.D., Ms. Cummings’ primary care physician, submitted a Physician’s Statement in support of the application certifying that Ms. Cummings was unable to perform the essential duties of her job as of June 12, 2019 because of her inability to focus and concentrate when depressed. In response to the question of whether the disability was likely to be permanent Dr. Sidman responded, “I defer to the pts psychiatric team.” (Ex. 4.)
4. By letter of November 26, 2019, the Gloucester Retirement Board (Board) requested that Dr. Sidman complete the form by certifying with respect to permanence, as well as adding when her Family Practice license was issued, and answering the questions on page 3. Dr. Sidman failed to certify with respect to permanence. (Ex. 5.)
5. On July 11, 2019, Ms. Cummings saw Dr. Sidman for a full physical exam. Dr. Sidman noted that Ms. Sidman “has a normal mood and affect. Her behavior is normal. Judgment and thought content normal,” and her behavior was “[n]egative for confusion, decreased

concentration, dysphoric mood, hallucinations, self-injury and suicidal ideas. The patient is not nervous/anxious.” (Ex. 8, pp. 1, 7.)

6. On June 12, 2020, Ms. Cummings’ counsel filed a second Physician’s Statement completed by Janine Post-Anderle on May 20, 2019, who counsel believed was Ms. Cummings’ treating psychiatrist. Ms. Post-Anderle is in fact a Nurse Practitioner. (Ex. 6; Ex. 3, pp. 2, 11.)
7. A Physician Statement must be completed by a licensed medical doctor in accordance with 840 CMR 10.06 (1)(b). Ms. Post-Anderle is not a licensed medical doctor, and she “certified” to Ms. Cummings’ permanent inability to perform the essential duties of her job in May 2019, a month before Ms. Cummings stopped working on June 12, 2019. (Ex. 6.)
8. At a visit to Lahey Health Behavioral Services on September 18, 2019, Ms. Cummings stated that she was working part-time at the Salem Public Library and “I’m happy with the location, I’m familiar and feel comfortable with no drama.” (Ex. 9, p. 2.)
9. Payroll records from the City of Salem demonstrate that Ms. Cummings had worked intermittently at the Salem library since 2016. Her most recent start date after leaving Gloucester was August 15, 2019. (Ex. 11, p. 10.)
10. On July 30, 2020 the Board denied Ms. Cummings’ application “as a matter of law.” (Ex. 1.)
11. Ms. Cummings filed a timely appeal to the Contributory Retirement Appeal Board on August 4, 2020. (Ex. 2.)
12. On September 8, 2020, Ms. Cummings’ counsel filed with the Gloucester Retirement Board a third Physician’s Statement signed by Paul Fallon, M.D. dated September 2, 2020. Dr. Fallon submitted a xeroxed copy of the form submitted by Ms. Post-Anderle; he merely removed her signature and inserted his own. (Exs. 6, 12.)

13. By communication dated September 15, 2020, Board counsel informed Ms. Cummings' counsel that the Board "is disinclined to revisit its decision in Ms. Cummings' case."
(Ex. 14.)
14. The duties of a Library Assistant in Gloucester are to "help maintain the daily operations of the library by performing varied circulation, interlibrary loan and network transfer tasks, materials processing and shelf management." The Library Assistant is responsible for providing "excellent customer service in person and remotely and creating a safe and welcoming environment for people of all ages." (Ex.7, p. 16-17.)
15. The duties of a Library Assistant in Salem are to provide circulation services including checking library materials in and out, reserving books, answering telephone inquiries, Giving basic technical assistance, reserving and checking museum passes and providing printing, faxing and copying assistance. (Ex. 10.)

Conclusion

The decision of the Gloucester Retirement Board not to process the application of Diana Cummings for ordinary disability retirement by convening a medical panel is affirmed for two reasons. The application does not provide a Physician Statement certifying that the Petitioner is permanently unable to perform the essential duties of the job of Library Assistant, as required by 840 CMR 10.06, and the Petitioner has not demonstrated that she was permanently unable to perform the essential duties of her job on her last day of work as required under the holding in the case of *Vest v. CRAB*, 41 Mass. App. Ct. 191 (1996).

M.G.L. c. 32, § 6 provides for the grant of an ordinary disability retirement to "[a]ny member in service who is unable to perform the essential duties of his job and that such

inability is likely to be permanent after completing fifteen or more years of creditable service.”

The first Physician’s Statement from Dr. Sidman indicated that the Petitioner is unable to perform the essential duties of her job but fails to certify whether that disability is likely to be permanent. Dr. Sidman indicated that she would defer to the Petitioner’s psychiatric team with respect to the question of permanence. Dr. Sidman failed to respond to the question despite the Board’s request that she do so.

The second Physician’s Statement from Janine Post-Anderle fails to meet the requirement of 840 CMR 10.06 (1)(b) that the statement be issued by a medical doctor. Ms. Post-Anderle is a Nurse Practitioner (NP). Furthermore, Ms. Post-Anderle’s statement is dated one month prior to the date the Petitioner last worked.

The third Physician’s Statement signed by Paul Fallon, M.D. was not completed by him. He merely signed a xeroxed copy of Ms. Post-Anderle’s statement. In any event, the statement was not filed until after the Petitioner had already filed an appeal with the Contributory Retirement Appeal Board (CRAB) of the Board’s denial of her application. The Board has no obligation to reopen the case at this juncture.

Even if the Board did agree to entertain the statement filed by Dr. Fallon, the Petitioner would still not prevail because she has not demonstrated that she was disabled, that is, unable to perform the essential duties of her job on her last day of work. Dr. Sidman opined that the Petitioner was unable to perform her essential duties as of June 12, 2019 because she was unable to focus and concentrate when she was depressed. Yet a mere month later, in July 2019, Dr. Sidman noted that the Petitioner did not demonstrate decreased concentration, was not confused or dysphoric, or nervous or anxious. In fact, on August 15, 2019 the Petitioner

began performing the essential duties of a Library Assistant at the Salem library and claimed to be comfortable and happy with her work. The job duties in the Gloucester and Salem libraries to assist the public are basically the same. Clearly, the facts demonstrate that the Petitioner was not permanently disabled on her last day of work on June 12, 2019. *See Vest v. CRAB*, 41 Mass. App. Ct. 191 (1996).

The decision of the Gloucester Retirement Board to deny this application for ordinary disability retirement is affirmed.

DIVISION OF ADMINISTRATIVE LAW APPEALS

James P. Rooney
Acting Chief Magistrate

Exhibits

1. Letter of Denial
2. Letter of Appeal
3. Application for Ordinary Disability Retirement
4. Treating Physician's Statement – Marcie Sidman, M.D.
5. Board request to Dr. Sidman, November 24, 2019
6. Treating Physician's Statement – Janine Post-Anderle, N.P.
7. Employer's Statement
8. Dr. Sidman Treatment Record – July 11, 2019
9. Lahey Clinic Record – September 18, 2019
10. Job Description Salem Library
11. City of Salem Payroll Records
12. Treating Physician's Statement – Paul Fallon, M.D.

13. Petitioner's Superannuation Retirement Allowance

14. Board's refusal to revisit case in response to Fallon submission