COMMONWEALTH OF MASSACHUSETTS
Division of Administrative Law Appeals

DARREN DESISTO *Petitioner*	:	Docket No. CR-24-0035
	:	Date: June 27, 2025
v.	:	
BOSTON RETIREMENT SYSTEM *Respondent*	:	

Appearances

For Petitioner: Lauren Van Iderstine, Esq.
For Respondent: Michael Sacco, Esq.

Administrative Magistrate:

Eric Tennen

SUMMARY OF DECISION

The City of Boston rejected the Petitioner's application for accidental disability. It did so after one doctor changed his opinion that the Petitioner's workplace accident caused his disability. However, the doctor's opinion was based on a factual misunderstanding of the Petitioner's accident and injuries. And his change in opinion was apparently influenced by the Board's clarification letter, which itself showed bias against the Petitioner and provided an erroneous interpretation of his application. Accordingly, the matter is remanded for a new medical panel.

INTRODUCTION

Pursuant to G.L. c. 32, § 16(4), the Petitioner timely appeals the Boston Retirement System's ("BRS") decision to deny his application for accidental disability. I conducted a hearing, in person, at the Division of Administrative Law Appeals office on April 3, 2025. The Petitioner was the only witness. I entered exhibits 1-17 into evidence. Both parties submitted post-hearing briefs on June 5, 2025, at which point I closed the administrative record.

FINDINGS OF FACT

1. The Petitioner previously worked at a trucking company. While working there, in July 2014, he injured both knees and elbows in a workplace accident. (Ex. 15; testimony.)
2. Following that injury, he did not return to work there. (Testimony.)
3. The Petitioner was then employed with the City of Boston's Public Works Department as a motor equipment manager from November 10, 2014 until August 5, 2015. (Agreed facts.)
4. When he was hired, he was able to perform all the physical tasks the job required. (Ex. 15; testimony.)
5. His job was physically demanding on all parts of his body: he had to fill potholes, shovel, plow, jump in and out of garbage trucks, etc. (Testimony.)
6. Medically, he continued to experience pain from his 2014 injury. For example, a May 14, 2015 medical record notes that both knees were causing discomfort (because of the 2014 injury). A doctor suggested two different paths, one for each knee. For the right, he needed a better diagnosis "so a treatment plan can be established." For the left, he recommended arthroscopic surgery and other further interventions. (Ex. 17, pg. 28.)
7. Before any of that could happen, on June 8, 2015, the Petitioner was injured while on the job. During training, he was struck by a moving vehicle. He was hit on his right side. He twisted his right arm and right leg and fell to the ground. (Testimony.)
8. Though in pain, he worked the rest of the day. However, the pain in his knee was too much and he went to the hospital that afternoon. (Ex. 17, pg. 29.)
9. He was given pain medicine, had x-rays, and left with crutches. There were no

fractures or dislocation, but he was diagnosed with a right knee sprain and right elbow contusion. (Ex. 17.)

10. June 8, 2015 would turn out to be the last day he was able to work. (Agreed facts.)

11. After that, he had many medical appointments and a variety of treatments, including surgeries, for all his injuries to both knees and both arms. (Ex. 17.)

12. In 2020, he applied for accidental disability retirement. For the "medical reason" he only wrote "Employee was a pedestrian struck by a passing car." (Ex. 3.)

13. He submitted the required treating physician's statement that confirmed his inability to perform the duties of his job. (Ex. 4.)

14. It also contained a medical diagnosis: bilateral knee arthrosis. (Ex. 4.)

15. The matter eventually made it to a medical panel. The Petitioner was individually evaluated by three orthopedic specialists: Drs. Aaron Gardiner, Louis Bley, and Vivek Shah. (Exs. 8-10.)

16. The three doctors agreed the Petitioner was permanently disabled. The only dispute among the three was which injury was disabling and which accident caused it. (Exs. 8-10.)

17. Dr. Gardiner opined that the effects of the 2015 accident were temporary and his "current knee symptoms and inability to return to work are due to the natural history of his pre-existing conditions and not to the injury that occurred on June 8, 2015." (Ex. 8.)

18. Drs. Bley and Shah, in contrast, thought his current inability to work was on account of the 2015 accident. (Exs. 9 & 10.)

19. Dr. Bley's report was short and to the point. He recounted the June 2015 accident and

how it caused right knee and wrist pain. He acknowledged the "limited range of motion of the left total knee and his persistent pain in the right [knee.]" He concluded that the "work accident in June 2015 aggravated his pre-existing right knee condition, thus causality is established." (Ex. 9.)

20. Dr. Shah appears to have misread the medical records. He began by describing the Petitioner's "left knee" injury from the June 2015 accident. He then focused on the various treatments the Petitioner received for his left knee over the years. As for the Petitioner's current diagnosis, it was "pre-existing bilateral patellofemoral pain/dysfunction and is status post left total knee arthroplasty." (Ex. 10.)

21. He opined the Petitioner was totally disabled because of the June 2015 accident:

> I do believe his inability to perform the duties of a heavy machine operator is secondary to his work accident and subsequent left total knee arthroplasty, which is now painful and subjectively unstable. In my opinion, I feel the work injury in 2015 aggravated his pre-existing patellofemoral condition to the point where he was no longer able to work and perform the full duties of his position as reviewed.

(Ex. 10.)

22. In response, the BRS was allowed to send requests for clarification to Drs. Shah and Bley. In fact, it sent them each virtually identical letters. (Exs. 11 & 13.)

23. To Dr. Bley, the BRS summarized that his examination focused on "bilateral knee conditions which pre-dated the injury date of June 8, 2015, which resulted in right knee and wrist pain which is the injury for which is the basis of the application. The persistent deficits are related to his left knee pain which pre-date the June 8, 2015 injury he is claiming." (Ex. 11.)

24. To Dr. Shah, the BRS summarized that his examination focused on the Petitioner's "left

knee which pre-dated the injury date of Jun 8, 2015, which resulted in right knee and wrist pain which is the injury for which is the basis of the application. The persistent deficits are related to his left knee pain which pre-date the June 8, 2015 injury he is claiming." (Ex. 13.)

25. The letters to both continued identically. First, the BRS characterized its assessment of the Petitioner's testimony at a different hearing. "[The Petitioner] had injured both knees the year before (2014) . . . At a fact-finding hearing, he downplayed those injuries in his testimony and indicated that he was capable of performing his job duties without restrictions, the medical notes indicated that he had experienced constant pain in both knees since the 2014 injury and had received treatment, including cortisone injections which provided no relief." (Exs. 11 & 13.)

26. The letter continued: "In light of the fact that the applicant did not include his left knee on his application or in the Incident Report on June 8, 2015, a diagnosis of bilateral knee problems after the injury does not get him to the finish line. You would need to consider whether the applicant's left knee issues qualify for the same conclusions as the right knee." (Exs. 11 & 13.)

27. Finally, the BRS asked the doctors to consider three questions. Two were the same:

    1) Do you believe Mr. DeSisto's inability to perform the duties of a heavy machine operator is directly related to his work accident on June 8, 2015 right knee and right wrist?

    2) Do you believe that Mr. DeSisto is disabled by the left total knee replacement due to injuries he sustained **prior** to his employment with the City of Boston? If so how is this related to the work injury of June 8, 2015?

(Exs. 11 & 13.)

28. It asked the third question slightly differently. For Dr. Bley, it asked, "What medical evidence did you rely on to make the determination that his left total knee replacement was a result of the June 8, 2015 incident?" (Ex. 11.)

29. For Dr. Shah, it asked "What medical evidence did you rely on to make the determination that his Bilateral knee condition was a result of the June 8, 2015 incident? (Ex. 13.)

30. The third question was curious since Dr. Shah had originally focused on the left knee injury and Dr. Bley on the bilateral injuries. (Exs. 9 & 10.)

31. Nevertheless, each doctor responded. Dr. Bley did not change his opinion. "In my report, I clearly state[d] he had symptoms in both knees . . . and although he did have preexisting injuries and treatment . . . he had a clear work-related injury where he was hit by a car, which clearly aggravated his bilateral knee symptoms." (Ex. 12.)

32. He concluded that the Petitioner "is heading for a right knee replacement second and is still nonfunctional based on bilateral knee pain, which, by definition, includes his right knee." (Ex. 12.)

33. However, the clarification letter caused Dr. Shah to change his opinion. Now, Dr. Shah did not believe the workplace injury caused the Petitioner's disability. "He has noted injuries to his employment with regards to his left knee and his current left knee instability after total knee replacement, which would be unrelated to the injury in question." (Ex. 14.)

34. Because Dr. Shah changed his opinion, there were now two doctors who opined the Petitioner's disability could not have been on account of the June 2015 accident.

Accordingly, the BRS denied the Petitioner's application because he "has a majority negative medical panel certificate and medical report." (Ex. 1.)

DISCUSSION

Accidental disability retirement requires three elements: 1) that the applicant was "mentally or physically incapacitated for further duty," 2) that their "incapacity is likely to be permanent," and 3) that their disability "is such as might be the natural and proximate result of the accident or hazard undergone." G.L. c. 32, § 6(3)(a). If a majority of the reviewing medical panel does not agree that the Petitioner meets each of these three elements, it is commonly known as a "negative panel", and the application cannot proceed. However, "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.'" *Coppage v. State Bd. of Ret.*, CR-22-0081, 2023 WL 6537987 (Div. Admin. Law App. Sep. 29, 2023), *citing Beauregard v. Fall River Ret. Bd.*, CR-18-0498, *2-3, 2022 WL 16921428, (Div. Admin. Law App. Mar. 11, 2022); *Kelley v. Contributory Ret. App. Bd.*, 341 Mass. 611, 617 (1961). Relatedly, sometimes a doctor (or panel) report is so imprecise or confusing as to require a remand for clarification or a new panel. *McEachern v. Weymouth Ret. Bd.*, CR-17-855, 2025 WL 1092634 (Div. Admin. Law App. Apr. 4, 2025); *Raposa v. New Bedford Ret. Bd.*, CR-21-0358 (Div. Admin. Law App. Jan. 10, 2025).

Here, there are a few reasons why the matter must be remanded. Even before the BRS sent a clarifying letter, Dr. Shah seems to have mixed up the Petitioner's injuries; put another way, he lacked "all the pertinent facts." He wrote that the June 2015 accident resulted in an injury to the Petitioner's *left* knee. He then went on to discuss the various procedures the

Petitioner had on his left knee before concluding that the left knee was the cause of the disability. The problem is that the June 2015 accident injured the Petitioner's *right* knee. Dr. Shah could have meant the "right" knee and put "left" by mistake. And Dr. Shah's conclusion that the Petitioner was disabled could still be valid even if he did mean the left knee. But his confusion of the Petitioner's injuries makes his report too uncertain to be reliable.

Given that Dr. Shah wrote an addendum to his opinion, he might have been able to clear this confusion up. That is not the case, however. The addendum was based on a clarification letter that itself was problematic for a few reasons. To begin with, the letter was not neutral. It negatively characterized the Petitioner's testimony, noting he "downplayed" prior injuries. The tone of the sentence implies the Petitioner was shaping his testimony to fit a narrative. BRS then suggested an outcome, writing that "a diagnosis of bilateral knee problems after the injury does not get him to the finish line." The BRS should not have disparaged the Petitioner nor implied what it thought the result should be. *See Rogers v. Worcester Ret. Bd.*, CR-22-164, 2024 WL 413690, (Div. Admin. Law Apps. Jan. 26, 2024) ("It would be inappropriate for a board to undercut an application through a one-sided clarification request."); *Rowley v. Everett Ret. Bd.*, CR-19-579, at *8, n. 6, 2022 WL 16921467 (Div. Admin. Law Apps. Jun. 10, 2022), *citing Chaves v. Taunton Ret. Bd*., CR-18-204, at *68 (Div. Admin. Law Apps. Dec. 3, 2021) (board's questions showed it had prejudged the issues).

Moreover, it was not true that a diagnosis of "bilateral knee problems" could not form the basis of the application. The letter stated that the Petitioner did not include his left knee injury in his application. But in fact, the physician statement did—his doctor described his injury as

"bilateral" (which means both knees).[1] This statement in the letter was misleading, and appears to have further confused Dr. Shah, or at least led him down the wrong path. After receiving the clarification letter, Dr. Shah's response did not show that he was aware the June 2015 injury was to the Petitioner's right knee. Yet he changed his mind, but without referring at all to the right knee that was struck in the accident.

Given these problems, Dr. Shah's report is unreliable. The remaining two panelists are split, which means there is no majority one way or the other, thus requiring a remand. *See McEachern*, *supra* ("With one "yes" and one "no" on causation, without a definite answer from Dr. Nicoletta it is thus not possible to determine whether a majority of the panel has opined that Mr. McEachern's disability was caused by his workplace injuries."); *Raposa*, *supra*.

The BRS argues that even if the clarification letter was improper, and tainted Dr. Shah's report, I can still conduct a *de novo* review of whether there is sufficient (or more precisely insufficient) evidence of causation. I expressed skepticism of this argument at the hearing and the post-hearing briefing has not convinced me otherwise. Conducting a review of causation requires expert input. *See Malden Ret. Bd v. Contributory Ret. App. Bd*., 1 Mass. App. Ct. 420, 423 (1973) (panel opines on medical questions "beyond the common knowledge and experience of [a] local retirement board."). Indeed, it requires three experts. One result of having three doctors is that there will always be at least two doctors that opine an applicant does, or does not, meet the criteria for accidental disability. However, "[i]f one panel member is disqualified, two

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[1] The Board argues that, because the Petitioner listed the June 2015 accident as the incident that led to his disability, and because that accident was only to his right side, any injuries to his left knee were not part of his application. I reject this argument for a few reasons. First, his doctor indicated his injury was "bilateral knee problems," not just "right" knee problems. Also, the Board's position eliminates the possibility that an injury to one part of the body may be responsible for injuries to other parts of the body. This is something that experts should address in the first instance.

affirmative votes are sufficient, as discussed above. But if the two surviving votes are split, the plaintiff cannot be deprived of [their] right to the consideration of a third neutral panel member by the simple observation that one is not a majority of two." *Ferraro v. Contributory Ret. Appl Bd.*, 57 Mass. App. Ct. 728, 731 (2003). Moreover, the legal standard of review differs if there is a negative panel or a positive panel. But without Dr. Shah's opinion, there is neither a positive nor negative panel in this case so I cannot even reach the threshold question of what standard governs my review.

CONCLUSION

Accordingly, the decision of the Boston Retirement System denying the Petitioner's application for accidental disability benefits is hereby **vacated** and **t**he matter is **remanded** for a new medical panel to consider the case. *See Ferraro*, *supra*.

SO ORDERED

DIVISION OF ADMINISTRATIVE LAW APPEALS

Eric Tennen

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Eric Tennen
Administrative Magistrate