

**COMMONWEALTH OF MASSACHUSETTS**

Middlesex, ss.

**Division of Administrative Law Appeals**

**Brian Dubuc,**  
Petitioner

v.

Docket No. CR-21-0687  
Dated: October 4, 2024

**Attleboro Retirement Board,**  
Respondent

**Appearance for Petitioner:**

Leigh A. Panettiere, Esq.  
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**Appearance for Respondent:**

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**Administrative Magistrate:**

James P. Rooney

**Summary of Decision**

Denial of accidental disability retirement application remanded for a new medical panel. Firefighter who had previously been retired for a few years because of asthma may not rely on the Heart Law presumption because his blood pressure was elevated when he was examined by a medical panel that determined he was no longer disabled by asthma. The matter is remanded to allow the firefighter to be examined by a new medical panel to determine whether he can demonstrate that his disabling hypertension is job-related, this time without the benefit of the presumption.

**DECISION**

Brian Dubuc, a former firefighter in Attleboro, appeals the December 21, 2021 decision of the Attleboro Retirement Board denying his application for accidental disability retirement, which was based on hypertension, despite a favorable medical panel, because the Board concluded that the Heart Law presumption of M.G.L. c. 32, § 94 did not apply to him because he

had high blood pressure when he was rehired by the Attleboro Fire Department after a period of disability related to asthma. I held a hearing on May 11, 2023 at the Division of Administrative Law Appeals. I admitted 63 exhibits into evidence at the hearing and marked the joint prehearing memorandum as Pleading A. Mr. Dubuc was the sole witness. Each party filed a closing brief by October 25, 2023, which closed the record.

### **Findings of Fact**

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

1. Brian Dubuc served as a firefighter with the Attleboro Fire Department from 1986 to 2014. He underwent a pre-employment physical in 1986. The examination showed that his heart was normal and his blood pressure was 120/84, which was normal as well. After a leave of absence in 1990, he underwent another physical. An EKG reading and a treadmill test did not reveal any heart-related problems. (Dubuc testimony; Pet. Exs. 29 and 30.)
2. For ten years, Mr. Dubuc worked in an old, unventilated fire station and was exposed to noxious diesel fumes from the fire trucks. He developed difficulty breathing. His primary care physician thought he had asthma. (Dubuc testimony; Pet. Ex. 7.)
3. In early 2011, Mr. Dubuc responded to a fire in 16 degree weather. After fighting the fire, he had trouble breathing and developed chest tightness. He was taken to Norwood Hospital where he underwent a breathing test and was diagnosed with asthma. He was prescribed albuterol and inhalers for asthma. (Dubuc testimony; Pet. Exs. 5, 7, and 9.)<sup>1</sup>

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<sup>1</sup> At the hearing, Mr. Dubuc testified that these events took place in 2013, but his application and the Employer's Statement both identify 2011 as the correct year. (Pet. Exs. 16 and 17.)

4. In November 2013, Mr. Dubuc applied for accidental disability retirement because of asthma that had kept him out of work since August 2013. He relied on the presumption that his lung problems were related to his work as a firefighter. He was examined separately by three pulmonologists each of whom thought his asthma permanently disabled him and that the cause of the asthma was likely job-related. The reports of two of the doctors listed his blood pressure at 132/90 on January 8, 2014 and 118/80 on March 24, 2014. (Exs. 7, 23-25.) Mr. Dubuc was granted accidental disability retirement based on the presumption. (Pet. Ex. 10.)

5. Mr. Dubuc underwent a PERAC-ordered reevaluation in 2015 to see if he could resume work. He recalls it as the first time he was diagnosed with high blood pressure. He does not recall the exact blood pressure readings, but the first number was 140. His primary care physician thereafter prescribed a low dose of Losartan, a blood pressure medication. (Dubuc testimony.)

6. This was not the first time Mr. Dubuc had a blood pressure test that showed his blood pressure to be high. On May 30, 2013, he went to Cape Cod Hospital complaining of pain. His blood pressure was recorded as 148/98. Later that year, on August 23, 2013, he went to the hospital because he was unable to breathe after an asthma attack. This time, his blood pressure was 176/115. Mr. Dubuc, who worked as an EMT before becoming a firefighter, testified that patients in pain or who have trouble breathing may see a rise in blood pressure readings. (Dubuc testimony; Pet. Ex. 33.)

7. A PERAC examination in early 2017 determined that Mr. Dubuc was still disabled by asthma from being a firefighter. (Bd. Exs. 23 and 26.) But in August 2017, he was reevaluated to see if he could return to work. He underwent a three-hour-long physical and was examined by

three pulmonologists. Each of the doctors thought his asthma was asymptomatic and that he could return to firefighting. As for his blood pressure, Dr. Beshar Jaznati measured it at 140/90, Dr. David Kenarch at 138/86. Dr. Jaznati added that he “has no cardiac symptom or active cardiac disease.” Mr. Dubuc was still taking a low dose of Losartan to keep his blood pressure under control. He had discontinued albuterol in December 2014, but kept an inhaler to use on an as-needed basis. Mr. Dubuc was cleared to return to service on October 11, 2017. (Dubuc testimony; Pet. Exs. 10 and 11; Board Exs. 7 and 10-12.)

8. Mr. Dubuc recalled that his blood pressure was under control for the next few years. He and his fellow firefighters were aware of the danger that hypertension posed to members of their profession. They frequently took blood pressure readings at the fire station. (Dubuc testimony.) None of these readings are in evidence.

9. On March 2, 2020, at the end of a week in which he worked 93 hours, Mr. Dubuc went to fight a house fire where there had been explosions. When using a fire extinguisher to put out a fire caused by a downed electrical line, some of the chemical retardant blew back in his face. He soon started to feel weak and was transported by emergency medical services to Sturdy Hospital. His blood pressure and pulse were high while he was being transported. He stayed at the hospital for three hours. He was given a nebulizer to help him breathe and his blood pressure was recorded at 142/98. Over the next few days, he filled out an injury report and paperwork, but did not perform any active duty. (Dubuc testimony; Pet. Ex. 36.)

10. On the night of March 6, 2020, Mr. Dubuc woke up with a pounding headache. When he tried to get up, he felt dizzy. He was taken by ambulance to Cape Cod Hospital. His blood pressure was 183/130 in the ambulance and shortly thereafter rose to 198/52. The hospital

attempted to bring his blood pressure down by giving him labetalol. His blood pressure later dropped to 136/94. A CT scan of his head was negative. (Dubuc testimony; Pet. Ex. 35.)

11. Mr. Dubuc's primary care physician, Dr. Arnold, told him not to go back to work until his blood pressure was under control. He has since been prescribed four different blood pressure medications. His doctor told him he is being prescribed the maximum amount of blood pressure medication. His blood pressure remains variable, nonetheless. (Dubuc testimony.)

12. On February 16, 2021, Mr. Dubuc applied for accidental disability retirement based on "hypertension w/ presumption Chap. 32/94." He checked that he was applying under the Heart Law. The Employer's Statement confirmed that he was injured at a 3-alarm fire on March 2, 2020 "while using a dry chemical fire extinguisher." He "suffered smoke inhalation and over exertion from physical activity." (Pet. Exs. 16 and 17.)

13. Mr. Dubuc's application was supported by a physician's statement from Anne Marie Kelly, M.D., who had been treating him for one year. She wrote that he was permanently disabled by job-related hypertension. On the form she filled out she evaluated Mr. Dubuc's situation under the Heart Law Presumption; she did not fill out the form with respect to causation without the presumption. (Pet. Ex. 18.)

14. Mr. Dubuc was examined separately by a medical panel made up of cardiologists, Christopher A. Clyne, M.D. and Michael Johnstone, M.D., and an internist, Ayman Elfiky, M.D. The instruction the doctors received asked them to consider the Heart Law presumption when evaluating causation. Each of the doctors determined that Mr. Dubuc was disabled, the disability was permanent, and that the disability was work-related. (Pet. Exs. 26-28.)

15. Dr. Johnstone recorded Mr. Dubuc's blood pressure as 158/106, his height at 5' 11", and his weight at 280 pounds. He reported on Mr. Dubuc's visit to the hospital on March 6, 2020 with high blood pressure. He observed that following the March 6, 2020 episode, Mr. Dubuc:

had difficulty with controlling his blood pressure and has been put on 3 different antihypertensives [losartan, labetalol, and hydrochlorothiazide]. Since that time, he has felt that he could not go full throttle in his activities because he feels frequently that he had a feeling of pressure. Furthermore, he has had episodes of chest pressure since that time.

(Pet. Ex. 26.) The doctor concluded that:

Brian Dubuc has poorly-controlled hypertension, and until his blood pressure is well controlled, he certainly cannot return to work. Based on his lack of response thus far to multiple medications, I believe this incapacity is likely to be permanent. I feel that he is physically incapable of performing the essential duties of his job as described in the current job description and that this incapacity is likely to be permanent, and is attributable to his years of service in the fire department.

(Pet. Ex. 26.)

16. Dr. Elfiky recorded Mr. Dubuc's blood pressure as 155/85. He concluded:

Mr. Dubuc is a 57-year-old gentleman with a diagnosis of labile hypertension, which was identified within the context of a hypertensive urgency which he experienced in March 2020. The difficulty in controlling his fluctuating blood pressure is evidenced by his need for 4 separate antihypertensive medications, as well as the ongoing effort by his primary care physician to optimize and address his episodes of high blood pressure readings.

Notably, as he experienced last year, the danger to both himself, as well as to . . . firefighter colleagues in the event that he was to experience another hypertensive urgency while on duty can be catastrophic to himself, as well as to his colleagues who depend on him while at a call or attending to any urgent situation as part of his job duties and responsibilities. Similarly, given his need to continue indefinitely on his slew of blood pressure medications, his new baseline fatigue is directly attributable to the medications.

For these reasons, he is unable to perform the essential functions of a firefighter. This inability would be attributable to his years of service and exposures to hazards within the fire department.

(Ex. 27.)

17. Dr. Clyne recorded Mr. Dubuc’s blood pressure as 173/107 and listed four blood pressure medications he was taking. He concluded that:

Mr. Dubuc has significant hypertension that remains perilous even on multiple medications for his hypertension (4). Given the danger of his job and his symptoms during hypertensive urgencies in the past, it is my opinion that he is incapable of performing the essential duties of his job as described in the current job description.

(Pet. Ex. 28.)

18. The Attleboro Retirement Board denied Mr. Dubuc’s application on December 21, 2021.

It wrote:

After review of the medical evidence in this case, the Board determined that Mr. Dubuc had pre-existing hypertension prior to his return to work in 2017 precluding him from the use of the presumption for hypertension. Further, the Board reviewed the issue of causation under Section 7 and determined that because the application was restricted to hypertension, the member does not meet the burden of proof required for causation.

(Pet. Ex. 19 and 20; Bd. Ex. 1.) The Board granted Mr. Dubuc superannuation retirement. (Bd. Ex. 25.)

19. Mr. Dubuc filed a timely appeal. (Bd. Ex. 2.)

**Discussion**

The Heart Law presumption of the public employee retirement statute provides that:

any condition of impairment of health caused by hypertension or heart disease resulting in total or partial 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 subsequently successfully passed a physical examination, which examination failed to reveal any evidence of such condition, be presumed to have been suffered in the line of duty, unless the contrary be shown by competent evidence.

M.G.L. c. 32, § 94.

It has long been recognized that the Heart Law:

read as a whole, including its title, and its very broad first clause, discloses a legislative purpose to provide accidental disability retirement allowances and death benefits even though the nature of the injury, hypertension or heart disease makes it difficult or impossible to pinpoint the exact time and place and thereby prove that the injury was suffered in line of duty.

Op. Atty. Gen. Nov. 21, 1956, p. 38.

Mr. Dubuc underwent a pre-employment physical before he joined the Attleboro Fire Department. His blood pressure was recorded as 120/84, which is within the normal range. He underwent another physical in 1990 after a leave of absence. Again, the physical showed no heart-related problems. Looking at these two physicals standing alone, it would seem that when he applied for accidental disability retirement in 2021 with uncontrolled hypertension after around 30 years of service as a firefighter, he should be entitled to the Heart Law presumption.

The issue here is whether his ability to invoke the presumption is impacted by his retirement for accidental disability retirement in 2014 based on disabling asthma and his reinstatement in 2017 after a medical exam in which two of the doctors who examined him to see if he should be reinstated noted that his blood pressure was higher than normal.

To determine this, I look first at the retirement statute's provision on reexamination and reinstatement of persons retired for accidental disability. The statute requires reexamination of such retirees to determine if "the member is able to perform the essential duties of the position from which he retired or a similar job within the same department" unless "reexamination is unwarranted based on the catastrophic nature of the member's illness or injury." M.G.L. c. 32, § 8(1)(a). These examinations "are necessary to determine whether the disability for which the member was retired continues to render the member unable to perform the essential duties of his job." *Id.*



What this means is that the reexaminations focuses solely on the reason the member was determined to be disabled in the first place and whether that particular disability no longer interferes with the member's ability to perform the essential duties of what had been his job. This has an impact on whether or not a public employer must rehire a disabled member. The reinstatement provision states that if more than two years have lapsed since the member retired, then if:

the regional medical panel determines that the retired member is qualified for and able to perform the essential duties of the position from which he retired or a similar position within the same department, as determined by the personnel administrator, said member shall be returned to said position, provided the position is vacant. If the position has been filled, the member shall be granted a preference for the next available position or similar position for which he is so qualified.

M.G.L. c. 32, § 8(2).

If, in the interim, other potentially disqualifying facts have come to the attention of the public employer, the employer is still obligated to reinstate a member determined by a medical panel to no longer be medically disabled by the conditions that led to his accidental disability retirement. The Supreme Judicial Court (SJC), in examining whether reinstatement was required, noted that the statute had previously given a public employer some discretion when considering rehiring someone who had been retired for accidental disability but had been cleared to return by a medical panel, declaring:

The Legislature removed all discretionary language when it amended G.L. c. 32, s. 8(2). It clearly demonstrated its intent to direct automatic reinstatement of these employees by replacing the operative language of "may, with the approval of the head of any department" with "shall" [be returned to his position].

*White v. City of Boston*, 428 Mass. 250, 252-54 (1998). As a consequence, in *White* the Court determined that the City of Boston had to rehire a police officer who had been physically

disabled by a car accident for 14 years because a panel of orthopedists had cleared him to return to work even though the Police Department had found some “problems discovered during [a] background check.” *Id.* at 251.

If the reason the Boston Police Department wished not to rehire the officer was left somewhat vague in the *White* decision, the reason was described much more explicitly in a companion case. The Cambridge Police Department did not want to rehire a disabled police officer because he had “been brought up on criminal charges, had a protective order entered against him, was alleged to have committed perjury in a 1994 deposition, and had provided false information on his 1996 application for reinstatement to the department.” *O’Neill v. City of Cambridge*, 428 Mass. 257, 258 (1988). The SJC acknowledged that the allegations were disturbing but ruled that “[n]othing in the statute, however, allows the defendant to prevent reinstatement of the plaintiff based on allegations of this type” when a medical panel had cleared him to return to work. *Id.* at 259. The Court observed that, although the Cambridge Police Department was required to rehire O’Neill, it could quickly act under the civil service law to remove him if the facts warranted it. *Id.*

The import for the present case is that when Mr. Dubuc was evaluated by a panel of pulmonologists to see if his asthma no longer prevented him from resuming work as a firefighter, the panel’s role was it seems to address asthma, and asthma alone. It cleared him to work based on his lack of asthma symptoms and his no longer needing asthma medication. Although two of the doctors noted elevated blood pressure readings, they were not asked to opine on these readings, nor did they. As for the Fire Department, the medical clearance by the pulmonologists compelled the Department to rehire Mr. Dubuc whatever it may have thought

about his latest blood pressure readings. There is nothing in the record to suggest that the Fire Department had any doubts about Mr. Dubuc's ability to perform the essential duties of a firefighter as a consequence of those blood pressure readings, and indeed he worked as a firefighter for another two and one-half years.

Still, do the findings by two of the medical panelists that Mr. Dubuc had high blood pressure when he was being evaluated for reinstatement have an impact on whether the Heart Law presumption applies when he became disabled by high blood pressure a few years later? The *White* and *O'Neill* decisions make clear that employing authorities may act on additional potentially disqualifying information they learn when a member applies for reinstatement, even if they cannot stop the reinstatement of someone cleared to resume work. However, the Heart Law presumption, when it applies, applies as a matter of law, not as a matter of choice by an employing authority.

The presumption applies to a firefighter under one of two conditions. The most obvious one is when a firefighter candidate passes a pre-employment physical that does not show evidence of hypertension or heart disease. M.G.L. c. 32, § 94. But it also applies if a firefighter "subsequently successfully passed a physical examination, which examination failed to reveal any evidence of" hypertension or heart disease. *Id.* Otherwise, the member does not qualify for the presumption. Although the statute focuses on the circumstances in which the presumption applies, it also makes clear that the presumption applies only if the examination or reexamination fails to reveal any evidence of hypertension or heart disease.<sup>2</sup>

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<sup>2</sup> Mr. Dubuc had three physicals at his employer's direction. I assume that it is government-required physicals that are the subject of the Heart Law.

The statute does not spell out which particular post-employment physicals it is referring to, no doubt because they may be occasioned by a variety of circumstances. Mr. Dubuc's situation is an example of that for early on in his career, he needed to take a physical after a leave of absence. But even if the statute does not describe in detail which subsequent physical exams are to be considered for purposes of the Heart Law presumption, what seems evident is that physicals performed for purposes similar to a pre-employment physical should count. A pre-employment physical's purpose for a firefighter candidate is to medically clear that person to perform as a firefighter. If a firefighter candidate takes a pre-employment physical that reveals non-disabling hypertension, this person may still be hired as a firefighter, but if that person later is disabled by hypertension, the Heart Law presumption does not apply. Similarly, if a firefighter candidate passes a pre-employment physical that shows no evidence of hypertension or heart disease, but later has to take another physical to clear that person for further employment as a firefighter, and the physical reveals hypertension, then the firefighter does not have the benefit of the Heart Law presumption because the statute precludes application of the presumption if a subsequent physical reveals evidence of hypertension.

Here, Mr. Dubuc was disabled for a time by asthma, but the physical he took that allowed him to be reinstated revealed non-disabling hypertension. The hypertension did not prevent him from being re-employed as the determination that he was no longer disabled by asthma required his re-employment. But when he became a firefighter for a second time, this time with hypertension, the Heart Law presumption no longer applied to him because his reemployment physical revealed hypertension.

That does not mean he cannot receive accidental disability retirement for disabling hypertension. It just means he will have to prove, without the benefit of the presumption, that his hypertension was caused by his many years of work as a firefighter.

Mr. Dubuc now asks that he be allowed to prove, as an alternative to his reliance on the Heart Law, that the March 2, 2020 incident in which chemical flame retardant blew in his face aggravated his underlying blood pressure to the point of disability. Although he did not indicate on his application that he was also applying under this theory, that does not preclude him from asking that an aggravation theory be considered. The issue is whether this is an attempt to amend the application while on appeal, which would not be allowed. As Magistrate Kenneth Forton pointed out in the context of the similar Lung Law presumption, the presumption and a theory of disability not based on the presumption are simply different legal theories applied to the same facts. No new theories of disability are introduced, and hence the addition of a new legal argument is not precluded. *Diorio-McGonnell v Essex Regional Retirement Bd.*, CR-17-781, Decision at 12 (DALA Sept. 20, 2019).

There are roadblocks to this effort, however. First, the doctor who completed a physician's statement in support of Mr. Dubuc's application did not comment on whether a link between his hypertension and his career as a firefighter was established absent the presumption. DALA has long held that the physician's statement must support the particular grounds on which an applicant seeks accidental disability. See *Lewis v Worcester Retirement Bd.*, CR-07-5, Decision at 11-14 (DALA July 24, 2009) (application based on carpal tunnel syndrome; physician's statement discussed rotator cuff injury). While in *Diorio-McGonnell* Magistrate Forton held that it was immaterial that the physician's statement did not discuss the Lung Law

presumption, because the presumption applied by the force of law, *id.* at 12-13, here the Heart Law presumption does not apply, and there is no force of law that would necessarily lead a retirement board to review Mr. Dubuc's application without the benefit of that presumption. Given the difficulty of attributing a long-developing disease like hypertension to a particular cause, an applicant may choose to rely solely on the presumption and not make the effort to attempt to prove causation without it. That seems to be the way Mr. Dubuc's application was considered for the medical panelists were told to look to whether the presumption applied.

It is not clear however whether that is what the panelists did. Dr. Clyne did not explain his causation finding. Finding 17. The long development of disabling hypertension is what the other two panelists focused on. Dr. Johnstone concluded that Mr. Dubuc's disabling hypertension was "attributable to his years of service in the fire department." Finding 15. Dr. Elfiky similarly attributed Mr. Dubuc's inability to continue working as a firefighter to "his years of service and exposures to hazards within the fire department." Finding 16. Neither doctor referred to the presumption. By focusing on Mr. Dubuc's long career, were they referring to the presumption that hypertension can be associated with a career in firefighting? Alternatively, were they declaring that they thought what Mr. Dubuc experienced over his career had adequately showed that his disabling hypertension was related to his particular experience as a firefighter? Which one of these two alternatives the doctors meant cannot be discerned from their brief statements.

### **Conclusion**

I therefore remand this matter to the Attleboro Retirement Board to convene a new medical panel to consider whether Mr. Dubuc can demonstrate eligibility for accidental

disability retirement without the benefit of the Heart Law presumption. Before the matter can be sent to a medical panel, Mr. Dubuc must file a new Physician's Statement in support of his disability application without relying on the presumption.

DIVISION OF ADMINISTRATIVE LAW APPEALS

***James P. Rooney***

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James P. Rooney  
First Administrative Magistrate

Dated: October 4, 2024