

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

Margaret FitzPatrick,
Petitioner,

No. CR-17-204

Dated: December 20, 2024

v.

**Massachusetts Teachers' Retirement
System,**
Respondent.

Appearances:

For Petitioner: Margaret FitzPatrick (pro se)

For Respondent: Salvatore Coco, Esq.

Administrative Magistrate:

Yakov Malkiel

SUMMARY OF DECISION

The petitioner applied to retire for ordinary disability based on fibromyalgia, depression, and numerous other diagnoses. A regional medical panel declined to certify that she is disabled. The panel committed no reversible error in its evaluation of the petitioner's physical conditions. But the panelists themselves stated that they did not evaluate the petitioner's mental health issues and would be unable to do so. The petitioner is entitled to a remand for the limited purpose of an assessment of those remaining issues.

DECISION

Petitioner Margaret FitzPatrick appeals from a decision of the Massachusetts Teachers' Retirement System (board) denying her application to retire for ordinary disability. An evidentiary hearing took place before Administrative Magistrate Mark L. Silverstein in June 2018. The witnesses were the petitioner herself, Dr. Patricia Potter, and Ms. Cindy Steinberg. The matter was reassigned to me in December 2024. Neither party wished for any proceedings to be repeated or supplemented. *See* 801 C.M.R. § 1.01(11)(e). The record consists of exhibits marked 1-24 and A-K and an audio recording of the evidentiary hearing.

Findings of Fact

I find the following facts.

1. The petitioner has been a teacher since 1987. In 1998, she took a full-time position teaching first grade in a Somerville elementary school. (Exhibits 3-5; petitioner.¹)

2. Over the years, the petitioner has suffered from multiple medical issues. She was diagnosed with lower back pain in 2007, which eventually led to surgery. She was diagnosed with fibromyalgia in 2011. She is in remission with monitoring from chronic lymphocytic leukemia. She also has been treated for asthma, allergies, acid reflux, insomnia, hypertension, and sleep apnea. (Exhibit 8; petitioner.)

3. The petitioner has been in psychotherapy since 2005 or earlier. In 2014, she began to see a psychiatrist on a monthly basis. She has been prescribed Cymbalta since that time, in place of another antidepressant she had taken earlier. (Exhibit 15; Potter.)

4. In January 2015, the petitioner requested medical leave from work, complaining primarily of pain. Her school granted the request. The petitioner has not returned to work since then. (Exhibit 4; petitioner.)

5. In November 2015, the petitioner applied to retire for ordinary disability. In her application, she identified the following disabling diagnoses: “chronic fatigue due to fibromyalgia, chronic back pain, depression, obstructive sleep apnea, osteoarthritis, colitis, asthma & carpal tunnel syndrome.” (Exhibit 3.)

6. The application was supported by a treating physician’s certificate from the petitioner’s general practitioner, Dr. Eva Gassiraro. Dr. Gassiraro offered the following diagnoses: “osteoarthritis . . . fibromyalgia, chronic fatigue syndrome, obstructive sleep apnea,

¹ The testimony is cited by witness.

depression, obesity, asthma, colitis, carpal tunnel.” She listed the petitioner’s medications as including Cymbalta, Gabapentin (a nerve-pain medication), and nine other drugs. She described the petitioner’s treatment history as including “physical therapy,” “mental health treatment,” and other interventions. Summarizing her view of the petitioner’s disability, Dr. Gassiraro wrote: “Cannot manage a classroom due to difficulties managing stress, trouble staying focused, exhaustion, fatigue, chronic back pain, generalized fibromyalgia pain.” (Exhibit 6.)

7. Among the documents assembled by the petitioner in support of her application was a letter from her psychotherapist, Stephen Schlein, Ph.D. Dr. Schlein described the petitioner’s diagnosis as “chronic major depressive disorder.” He wrote:

[The petitioner] has suffered several major losses in her life and these powerful experiences have had a serious impact on her overall psychological state and emotional well-being, including her ability to manage the stresses of daily life. . . .

[The petitioner] has increasingly reported exhaustion and feeling overwhelmed by her responsibilities, both at work and at home. The pressures at work have increased year by year. She reports that this stress causes her physical pain and fatigue at increased levels

[Teaching] is overwhelming for [the petitioner] and she has seriously struggled to maintain her focus and competence Under this pressure, she begins to break down psychologically. She becomes easily distracted when unexpected interruptions occur and frequently has difficulty with word retrieval, including simple everyday objects and names. . . . [Her] reactions to this overwhelming stress have made teaching an unbearable situation.

(Exhibit 15.)

8. A regional medical panel convened to evaluate the petitioner’s application. The panel consisted of Dr. Julian Fisher (neurology), Dr. Louis Bley (orthopedics), and Dr. Vivek

Shah (orthopedics). They conducted a joint physical examination approximately twenty-five minutes long in August 2016. (Exhibit 8.)²

9. In a concise joint report, the panelists declined to certify that the petitioner is disabled, providing substantially the following narrative:

CURRENT STATUS[.] At the present time, she notes that her pain in the low back radiates to her hips bilaterally, buttocks bilaterally, and occasionally to the right knee. She is on gabapentin for pain from the back and for the fibromyalgia, as well as Cymbalta for depression and pain control. . . .

PAST HISTORY[.] She has a past medical history which is rather complex, consisting of chronic lymphocytic leukemia, diagnosed in 2021, currently in remission, but being followed[;] sleep apnea, being treated with mask and modafinil[;] chronic fatigue syndrome in association with the fibromyalgia[;] migraine[;] carpal tunnel syndrome bilaterally . . . now using cock-up splints at night and wrist protection by day[;] weak/sprained ankles bilaterally[;] gastroesophageal reflux disease[;] asthma[;] major depressive disorder[;] morbid obesity[;] and a right fifth trigger finger treated with cortisone

PHYSICAL EXAMINATION[.] On exam, she is seen to be a markedly overweight individual in no acute distress. The general physical examination is unremarkable. Her neurological examination showed normal gait and stance, balance without problems, muscle strength 5/5 overall, no sensory deficits. No evidence of cerebellar dysfunction. Cranial nerves II-XII intact. She had on palpation diffuse tenderness of her back, but no clear measure of pain visible in her face. She had full flexibility of the back and all joints.

COMMENTS AND CONCLUSIONS[.] There is no clear indication^[3] that she cannot fulfill the role of a teacher She has a number of medical conditions, all of which are being treated and controlled.

(Exhibit 8.)

² The original correspondence convening the panel indicated incorrectly that the petitioner was seeking to retire for accidental disability. The error was corrected before the panel completed its examination, and in any event would not have impacted the key question of whether the petitioner is capable of performing the duties of her job. (Exhibit 14; petitioner.)

³ See *infra* p. 6 note 4.

10. At the board's initiative, PERAC sent the panelists an eight-part clarification request prepared by the petitioner's counsel. The panelists responded in February 2017. They agreed that the petitioner had a substantial history of widespread pain. They clarified that they found no "tender points" in their examination, explaining that they observed no manifestations of pain and no limitations of the petitioner's range of motion. Restating their reasons for declining to find the petitioner disabled, the panelists wrote: "[The petitioner] has a history of various chronic illnesses, all in remission or being controlled. None of these chronic conditions appeared to affect her general medical examination . . . sufficiently to prevent her from fulfilling her job responsibilities." (Exhibits 12, 13.)

11. The clarification request also asked the panelists to address Dr. Schlein's opinion that the petitioner suffers from serious issues relating to focus, distractedness, word retrieval, and stress. They responded: "This was not a psychological evaluation and no physician on this panel is a psychologist or psychiatrist. We did not perform a psychological assessment and would defer to the appropriate specialist to comment on this question." (Exhibit 12, 13.)

12. In April 2017, the board denied the petitioner's application, citing the panel's negative certificate. This timely appeal followed. (Exhibits 1, 2.)

Analysis

Public employees become eligible to retire for ordinary disability upon completing either ten or fifteen years of service, depending on the particular retirement system. *See* G.L. c. 32, § 6(1). The petitioner satisfies this condition. The additional elements that she must prove are that she "is unable to perform the essential duties of [her] job" and that the disabling condition "is likely to be permanent." *Id.*

A regional medical panel's refusal to certify these elements decisively defeats the member's application. *See Foresta v. Contributory Ret. Appeal Bd.*, 453 Mass. 669, 684 (2009).

Further proceedings in such circumstances are available only if the panel's work was infected by a critical error evaluable by non-medical-specialists, i.e., an "error of law," or a failure by the panel to "conform[] to the required procedure of physical examination and review of all the pertinent facts," or a "plainly wrong" certificate. *Kelley v. Contributory Ret. Appeal Bd.*, 341 Mass. 611, 617 (1961). "[T]he applicant does not have an opportunity for a retrial of the medical facts" *Id.*

The petitioner claims that her medical panel assessed her application as a case of acute pain, when in fact her pain is chronic. For present purposes, it is not necessary to deconstruct the petitioner's characterization of this claim as involving an "erroneous standard." *Foresta*, 453 Mass. at 684 (paraphrasing *Kelley*, 341 Mass. at 617).⁴ The medical panel acknowledged that the petitioner's issues have been chronic. It is clear that they saw her back pain and fibromyalgia as among those chronic issues. It was up to the panel to identify the medical tests and analyses best suited to evaluating the petitioner's capacity to perform her duties. In a nutshell, the panelists believed that a member incapacitated by fibromyalgia and related conditions would have displayed indicators of pain discernible to them in their examination. Whether this judgment may seem sound or counterintuitive to a layperson, it is the type of medical matter on which the Legislature intended for legal factfinders to defer to the panelists' training, skill, experience, and learned intuitions. *See Malden Retirement Bd. v. Contributory Ret. Appeal Bd.*,

⁴ In context, the panelists' statement that they saw no "clear indication" of disability most likely reflected only an imperfect recitation of the "preponderance" standard. *See Lisbon v. Contributory Ret. Appeal Bd.*, 41 Mass. App. Ct. 246, 255 (1996).

1 Mass. App. Ct. 420, 424 (1973); *Rosemarie R. v. Amesbury Ret. Syst.*, No. CR-22-590, 2024 WL 3101692, at *4 (Div. Admin. Law App. June 14, 2024).⁵

The petitioner's next argument is that her panel was procedurally defective in its makeup: whereas the panel consisted of a neurologist and two orthopedists, the petitioner describes fibromyalgia as a condition best evaluated by rheumatologists. This claim also is not compelling. A medical panel is required to "consist of three physicians . . . [who] shall, so far as practicable, be skilled in the particular branch of medicine or surgery involved in the case." G.L. c. 32, § 6(3)(a). The caveat "so far as practicable" carries particular significance when an application will present three physicians with a myriad of medical conditions. In such circumstances, it may be unlikely that each diagnosis will be fielded by a panelist whose expertise concentrates on that diagnosis. When choices need to be made about the elements of the application that will be evaluated by physicians with more generalized expertise, it is especially vital for applicants to interpose any reservations about the panel's makeup before the panel tackles its assignment. *See Larson v. State Ret. Bd.*, 53 Mass. App. Ct. 1111 (2002) (unpublished memorandum opinion); *Queenan v. Contributory Ret. Appeal Bd.*, No. 952109, 2001 WL 292410, at *4 (Super. Ct. Feb. 21, 2001), *aff'd*, 56 Mass. App. Ct. 1114 (2002); *Packish v. Dukes Cty. Ret. Bd.*, No. CR-09-162, 2014 WL 13121794, at *1 (Contributory Ret. App. Bd. July 17, 2014).

The petitioner's application described her as suffering from eight or more disabling diagnoses. The application form and treating physician's statement tended to suggest that the relevant conditions could be assessed by a generalist physician. The petitioner did not claim any

⁵ The petitioner's specific bases for challenging the panelists on this point are not strong, consisting of testimony from non-physician Ms. Steinberg and a series of online articles. *Cf. Hollup v. Worcester Ret. Bd.*, 103 Mass. App. Ct. 157, 162 (2023).

problem with the panel's makeup either when the panelists were selected or when they conducted their exam. The panelists themselves believed that they possessed sufficient expertise to evaluate applicants with fibromyalgia. *Cf. Jameson v. Lawrence Ret. Bd.*, No. CR-21-109, 2023 WL 6900309, at *3 (Div. Admin. Law App. Oct. 13, 2023). That determination was also one primarily of medical expertise.

The petitioner's final theory is that the medical panel failed to take her mental health issues into account. The assertion that the petitioner is incapacitated by depression appeared both in her application form and in Dr. Gassiraro's certificate. Dr. Gassiraro also referenced the petitioner's Cymbalta prescription, her "mental health treatment," and her issues with "managing stress" and "staying focused." These problems were all underscored and detailed by Dr. Schlein in his letter.

This claim of error stands on a different footing from the others, because it is supported by the medical panel's feedback. The panel stated that it "did not perform a psychological assessment," that its members were not the "appropriate specialists" to conduct such an assessment, and that they "would defer to" other experts on matters of mental health. The context to these remarks indicates that the panelists included the petitioner's issues with "focus," "word retrieval," and "stress" among the matters that exceeded the scopes of their expertise and evaluation.

The petitioner's application listed her mental health issues among a long series of other problems. It is not now possible to form confidence that the mental health issues in particular are disabling. Nonetheless, the petitioner's application materials, "if unrebutted and believed, would allow a fact finder to conclude that [she] satisfies the [statutory] requirements." *Sibley v. Franklin Reg'l Ret. Bd.*, No. CR-15-54, 2023 WL 11806176, at *4 (Contributory Ret. App. Bd.

May 26, 2023). *See Hollup v. Worcester Ret. Bd.*, 103 Mass. App. Ct. 157, 164 n.5 (2023). *See also Cepeda v. Kass*, 62 Mass. App. Ct. 732, 737-38 (2004). The petitioner is entitled to an assessment of whether her mental health issues are permanently disabling, and that assessment—according to the panel—has not yet taken place.

Conclusion and Order

In view of the foregoing, the board's denial of the petitioner's retirement application is VACATED. The matter is REMANDED to the board for additional proceedings limited to the issue of whether the petitioner is permanently incapacitated by the mental health issues asserted in her application materials. The board shall alert the Public Employee Retirement Administration Commission to the original panel's stated inability to assess these issues. The board in its discretion shall consider whether any additional medical records need to be collected.

Division of Administrative Law Appeals

/s/ Yakov Malkiel

Yakov Malkiel

Administrative Magistrate