COMMONWEALTH OF MASSACHUSETTS

Division of Administrative Law Appeals

Francis F.,[1]
Petitioner

v. Docket No. CR-23-0323

Amesbury Retirement System,
Respondent

Appearance for Petitioner:

Mr. Paul Cote, authorized representative

Appearance for Respondent:

Michael Sacco, Esq.

Administrative Magistrate:

Timothy M. Pomarole, Esq.

SUMMARY OF DECISION

The Petitioner is a retired firefighter who was first diagnosed with brain cancer nearly seven years after his retirement. The Respondent retirement board denied his application for accidental disability retirement without referring it to a medical panel on the ground that because the Petitioner's cancer was not discovered within five years after his retirement, he cannot avail himself of the cancer presumption set forth in G.L. c. 32, § 94B.

The Respondent's decision is affirmed. The Petitioner's argument that he is entitled to the presumption if he "should have discovered" this condition within the five-year period is unsupported by the language of the statute. Instead, to claim the benefit of the cancer presumption, without which the Petitioner cannot establish the causal link between his cancer and his work duties, he was required to show that he discovered his cancer no later than five years after his last day of active service. There is no dispute that the Petitioner's cancer was first diagnosed more than five years after his retirement. Although the

[1] At the Petitioner's request, and without objection from the Respondent, a pseudonym is used. *Cf.* G.L. c. 4, § 7, 26th para., (c).

Petitioner experienced headaches for years prior to his diagnosis, the existence of these symptoms does not constitute discovery of his cancer.

Because the Petitioner has not made out a prima facie case that he is entitled to accidental disability retirement benefits, the Respondent was not required to convene a medical panel before denying the Petitioner's application.

DECISION

The Petitioner appeals the decision of the Amesbury Retirement Board ("the Board"), to deny his application for accidental disability retirement without referring his application to a medical panel.

The parties have submitted this appeal upon their written submissions pursuant to 801 CMR 1.01(10)(c).

I admit agreed-upon Exhibits 1-9. I also admit the Petitioner's proposed Exhibit 11, which is a May 23, 2022 letter from his treating physician, Dr. Jose McFaline-Figueroa, MD, PhD. I admit into evidence the parties' stipulated facts, numbered 1-13

I exclude the Petitioner's proposed Exhibit 10, an affidavit from Kevin Blanchette, a retired legislator who served as lead author and Bill Sponsor for the legislation later codified as G.L. c. 32, § 94. This affidavit opines on the legislative intent behind the passage of this law. With all due respect to Mr. Blanchette and his contributions to this legislation, post-enactment statements about legislative intent are not admissible. *Keane v. City Auditor of Boston*, 380 Mass. 201, 207 n. 5 (1980) (stating that the Court was not aware of any cases permitting a legislator to testify after the fact about legislative intent); *McKenney v. Commission on Judicial Conduct*, 377 Mass. 790, 799 (1979) (observing that post-enactment affidavit of House Chairman of Committee on Judiciary is not relevant legislative history).

FINDINGS OF FACT

Based on the evidence presented by the parties, along with reasonable inferences drawn therefrom, I make the following findings of fact:

1. The Petitioner is a former firefighter for the City of Amesbury, who retired for superannuation on June 30, 2015. (Stipulated Fact No. 1).

2. On January 25, 2022, the Petitioner treated with his primary care physician, who reported the following in the Petitioner's progress notes:

> Before he started CPAP, over a year ago, he would have headaches in the [] frontal region. They resolved after CPAP. Over the past couple of weeks he began to have headaches again in the same location. They are not severe but they have occurred nightly and are present when he wakes up in the morning then subsides as the day goes on. There is a history of some family members that have had a history of meningioma [a brain tumor], he mentioned that is what he was really getting at as to whether or not that could be a possibility for him. He has no focal neurological signs or anything in addition to the headache pain itself as described.
>
> (Exhibit 9).[2]

3. The Petitioner had suffered from headaches for about ten years before his January 25, 2022 doctor's appointment; these headaches abated for about one year after the Petitioner started using a CPAP device, but they later resurfaced. These headaches were described by his doctors as "not severe" and "mild," though he did experience them on a daily or almost-daily basis for at least some period of time. (Exhibit 9; Exhibit 11).

4. On March 4, 2022, a lesion was discovered on the left frontal lobe of the Petitioner's brain. This lesion was later diagnosed as oligodendroglioma (a brain tumor).

[2] "CPAP" stands for "continuous positive airway pressure." A CPAP device, a common treatment for sleep apnea, uses mild air pressure to keep the user's airways open during sleep.

(Stipulated Fact No. 2).

5. The tumor was likely present years prior to March 2022. It is likely that if advanced neuroimaging had been pursued in the early 2010s (approximately when the Petitioner started having headaches), the brain tumor would have been detected. (Exhibit 11).
6. On March 20, 2023, the Petitioner filed an application for accidental disability retirement. The application asks the member to select among three reasons for the member's disability: "Personal Injury," "Hazard," or "Presumption." The Petitioner selected "Presumption." (Exhibit 5).
7. The Treating Physician's Statement accompanying the Petitioner's application was completed by Jose Ricardo McFaline-Figueroa, MD, PhD. Dr. McFaline-Figueroa opined that the Petitioner cannot work because of the side effects from his brain tumor and from his chemotherapy treatment. Dr. McFaline-Figueroa also opined that the Petitioner's disability is likely to be permanent. (Exhibit 6).
8. Dr. McFaline-Figueroa also stated that the Petitioner "has had headaches and fatigue for past ten years." (Exhibit 6).
9. Although the Petitioner applied for accidental disability retirement under a "presumption" theory, Dr. McFaline-Figueroa did not complete the section of the form titled "Causation with Presumptions."[3] Instead, Dr. McFaline-Figueroa completed the sections of the Treating Physician's Statement form titled "Causation

[3] In the "Causation with Presumptions" section, Dr. McFaline-Figueroa wrote "N/A" on the left margin, did not answer two questions related to non-service related causes for the claimed disability, and checked the "yes" box in response to the question whether the incapacity is "such as might be the natural and proximate result of the claimed personal injury sustained or hazard undergone while in the performance of the applicant's duties."

(Without a Presumption)" and "Causation Without Presumptions." His responses to the questions posed in these sections are as follows:

- When asked to describe the "event(s) or onset of condition(s) that in [his] opinion led to applicant's disability," Dr. McFaline-Figueroa wrote: "[Illegible] likely developed years to a decade prior to diagnosis. Possibly related to toxic exposures though data on this is lacking." (Section titled "Causation (Without a Presumption)").

- When asked what "other life event\circumstance\condition in the applicant's medical history may have contributed to or resulted in the disability claimed," Dr. McFaline-Figueroa wrote: "Occupational exposures possibly contributed. Data is unclear." (Section titled "Causation (Without a Presumption)").

- When asked whether, upon "weighing the medical evidence, is it more likely that the disability was caused by the job-related personal injury or hazard undergone, or the non-work related event or circumstances or condition," Dr. McFaline-Figueroa wrote: "Unclear." (Section titled "Causation (Without a Presumption)").

- When asked whether "said incapacity" is "such as might be the natural and proximate result of the claimed personal injury sustained or hazard undergone while in the performance of the applicant's duties," Dr. McFaline-Figueroa marked the box for "yes." (Section titled "Causation Without Presumptions").

(Exhibit 6).

10. On May 25, 2023, the Board voted to deny the Petitioner's application on the ground that he did not qualify for the § 94B presumption.

11. The Petitioner timely appealed this decision to the Division of Administrative Law Appeals. (Stipulation No. 6).

CONCLUSION AND ORDER

G.L. c. 32, § 7(1), allows for accidental disability retirement, provided that a qualified member (1) "is unable to perform the essential duties of his job" and (2) "such inability is likely to be permanent before attaining the maximum age for his group," (3) "by reason of a personal injury sustained or a hazard undergone as a result of, and while

in the performance of, his duties." The applicant bears the burden of proving entitlement to accidental disability retirement by a preponderance of the evidence. *Lisbon v. Contrib. Ret. App. Bd.*, 41 Mass. App. Ct. 246, 255 (1996).

Although a retirement board may deny an application for disability retirement at any stage of the proceedings if it determines that "the member cannot be retired as a matter of law," 840 CMR §10.09(2), a board should not deny a claim for accidental disability retirement without referring the matter to a medical panel if the applicant has made out a prima facie case that he or she is entitled to benefits. *Traynor v. Gloucester Ret. Bd.*, CR-20-0281, 2023 WL 8170656, at *4-5 (Div. Admin. Law App. Nov. 17, 2023).

To establish a prima facie case, the applicant must produce "sufficient evidence that, if unrebutted and believed, would allow a factfinder to conclude that [the member] . . . is entitled to accidental disability retirement benefits." *Lowell v. Worcester Ret. Bd.*, CR-06-296, at *25 (Div. Admin. Law App. Dec. 4, 2009). "Proof of a prima facie case requires 'evidence that, until its effect is overcome by other evidence, compels the conclusion that the evidence is true,' and shifts the burden of producing contradictory evidence to the other side, whether at trial or upon a dispositive motion[.]" *Leonard v. Boston Ret. Sys.*, CR-12-596, at *40 (Div. Admin. Law App. Aug. 27, 2021) (quoting *Burns v. Commonwealth*, 430 Mass. 444 (1999)). Thus, a tribunal considering whether a party has made a prima facie case acts as "a data collector, not as a fact finder." *Cepeda v. Kass*, 62 Mass. App. Ct. 732, 737–38 (2004) (internal quotation marks and citations omitted). To put it another way, the party's "burden is one of production, not one of persuasion." *Id.* at 378.

In some instances, the evidence offered by the applicant, although "believed and unrebutted," nevertheless falls short of establishing a prima facie case. *See Hickey v. Medford Ret. Bd.*, CR-08-380, 2012 WL 13406342, at *1 (Contrib. Ret. App. Bd. Feb. 16, 2012) (affirming denial without medical panel referral where the three treating physicians' statements submitted with application lacked narratives explaining their conclusions); *Walsh v. Malden Ret. Bd.*, CR-19-517, 2024 WL 215930 (Div. Admin. Law App. Jan. 12, 2024) (deciding that because applicant's evidence "believed and unrebutted" showed that he could perform the "essential duties" of his position, he could not retire for accidental disability).

In this appeal, the Board does not dispute that the Petitioner has set forth a prima facie case that he is disabled from performing the essential duties of his job or that this disability is likely to be permanent. Instead, the Board argues that he is not entitled to the benefit of the cancer presumption recited in G.L. c. 32, § 94B, and therefore has not established a prima facie case that his cancer was caused by and in the performance of his duties as a firefighter.

As a threshold matter, I note that, although it is clear that the Petitioner seeks the benefit of the cancer presumption, it appears that the Petitioner may *also* be arguing in this appeal that, even without the benefit of the cancer presumption, the supporting documentation from Dr. McFaline-Figueroa establishes a prima facie case that his cancer was caused by his work responsibilities.

Insofar as the Petitioner makes this argument, it is unavailing. Dr. McFaline-Figueroa candidly stated that the Petitioner's cancer was "[p]ossibly related to toxic exposure," but noted that "data on this is lacking." In a similar vein, he also stated that

"[o]ccupational toxic exposure possibly contributed," adding that the "[d]ata is unclear." Notwithstanding the forgiving standard under which evidence in support of an applicant's prima facie case is assessed, these statements are insufficient.

First, to meet the causation requirement, it is not sufficient for the workplace hazard or injury to be a "mere contributing cause"; it must be the "natural and proximate" cause of the disability. *Ret. Bd. of Revere v. Contrib. Ret. App. Bd.*, 36 Mass. App. Ct. 99, 107 (1994) (quoting *Campbell v. Contrib. Ret. App. Bd.*, 17 Mass. App. Ct. 1018, 1019 (1984) (internal quotation marks omitted)). Here, Dr. McFaline-Figueroa's statements that toxic work exposures were possibly related or contributed to the Petitioner's cancer suggests only that such exposures merely contributed to his disability.

Second, an opinion setting forth the mere possibility of causation, based on admittedly "unclear" or "lacking" data, is a tenuous basis for grounding a prima facie case of causation. *See Manning v. Plymouth County Ret. Bd.*, 2021 WL 12297897, at *6 (Contrib. Ret. App. Bd. Oct. 28, 2021) (prima facie case was not established where, although treating physician stated condition was "such as might be caused" by member's work incident, he "provided no narrative explaining this conclusion" and when asked in the form about key tests, imaging, or other data supporting this conclusion, he cited MRI and EMG studies that contradicted his diagnosis); *Phoenix v. State Bd. of Ret.*, CR-04-482, at *13-14 (Div. Admin. Law App. Jan. 25, 2005) (determining that statement by treating physician that it was possible the member contracted hepatitis C at work, but other sources were also possible, did not suffice to establish prima facie case for causation).

Taken together (and perhaps even individually), the two issues identified above render Dr. McFaline-Figueroa's opinion insufficient to state a prima facie case for causation. Nor does Dr. McFaline-Figueroa's May 23, 2022 letter make out a prima facie case for causation. (Exhibit 11). That letter provides no opinion that the Petitioner's cancer was caused by his firefighting duties.[4]

Turning to the cancer presumption, G.L. c. 32, § 94B, the Petitioner did not establish a prima facie case that he is entitled to the presumption. Section 94B "sets forth a presumption that certain cancers that public employees who fight fires develop are job-related." *Kimble v. Boston Ret. Sys.*, CR-16-566, at *8 (Div. Admin. Law App. Feb. 14, 2020). Application of the presumption eases the evidentiary burden associated with establishing causation. *Considine v. Somerville Ret. Bd., et. al.*, CR-16-452, at *7 (Div. Admin. Law App. August 2, 2019). Section 94B(1) provides in pertinent part:

> [A]ny condition of cancer affecting the skin, breasts or the central nervous, lymphatic, digestive, hematalogical, urinary, skeletal, oral, reproductive or prostate systems, lung or respiratory tract, resulting in total disability or death to uniformed member of a paid fire department … shall, if he successfully passed a physical examination on entry into such service or subsequent to such entry, which examination failed to reveal any evidence of such condition, be presumed to have been suffered in the line of duty, unless it is shown by a preponderance of the evidence that non-service connected risk factors or non-service connected

[4] There is an additional issue: the Petitioner's application proceeds under a presumption theory, but Dr. McFaline-Figueroa's statement concerns causation without a presumption. The purpose of the treating physician's statement is to make an initial showing that there is a plausible medical connection between the injury or hazard asserted and the claimed disability. *Whooley v. Middlesex County Ret. Sys.*, CR-19-0530, at *11-12 (Div. Admin. Law App. April 2, 2021). Accordingly, prior decisions from this Division have concluded that a treating physician's statement is insufficient to ground a prima facie case where the statement does not match the basis on which the member is applying for accidental disability retirement benefits. *See, e.g., id.* (citation omitted). It is therefore possible that Dr. McFaline-Figueroa's treating physician statement is incapable of grounding a prima facie case for this reason as well. I do not need to reach this issue, however, because I conclude that Dr. McFaline-Figueroa's statement falls short for the reasons outlined above.

> accidents or hazards undergone, or any combination thereof, caused such incapacity.

The second sentence of the next subsection, §94B(2), expands eligibility for the presumption to certain individuals no longer in active service: "Any person first discovering any such condition within five years of the last date on which such person actively so served shall be eligible to apply for benefits hereunder." This provision appears to be based on the hypothesis that a cancer caused by conditions encountered over the course of a career will likely advance to a stage such that it would be discovered within five years of the last date of service. By contrast, cancers that are not discovered within that time period are perhaps less likely to have been caused by conditions encountered by the member in the course of his or her service.[5]

Here, because the Petitioner is no longer in active service, he must show that his cancer was first discovered within five years of his last day of active service. *Casey v. Lynn Ret. Bd.*, CR-20-0319, at *2 (Div. Admin. Law App. Sept. 15, 2023).[6] To meet this requirement, he must show that his cancer was "actually discovered" within that time-period. *Logan v. Public Employee Ret. Admin.*, CR-00-1002, at * 6 (Div. Admin. Law

[5] As a mechanism to encompass cancers more likely to have been caused from workplace conditions, while excluding those that are less likely to be workplace-related, a five-year time frame (at both the beginning of active service and post-retirement) may be too long in some instances and too short in others. But this is a dynamic endemic to legislative line-drawing generally. *Cf. Harlinfinger v. Martin*, 435 Mass. 38, 48 (2001) ("Legislative line drawing requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line." (citation and internal quotation marks omitted)). Imprecision may also be the result of some of the difficulties of evidence and proof that gave rise to the need for a presumption in the first place.

[6] An accidental disability retirement applicant relying on the §94B cancer presumption must meet several requirements. For example, the applicant must have passed a physical examination prior entry into service that did not reveal any evidence of the cancer. § 94B(1), (2). The only requirement at issue in this appeal pertains to the Petitioner's discovery of the cancer.

App. July 2, 2001). It would not be sufficient to show that the cancer may have been present, but undiscovered, during the five-year period. *Casey, supra*, at *2 (citations omitted) ("The statute requires that the condition be *discovered* within five years of active service, not that the condition be present within such time." (emphasis in original)); *see also DelGizzi v. Newton Ret. Bd., et. al.*, CR-00-1147 (Div. Admin. Law App. Jan. 19, 2001) (*aff'd* Contrib. Ret. App. Bd. May 25, 2001) (rejecting as insufficient a medical opinion that cancer may have been present during the five-year period, noting that the "statute refers specifically to the date of discovery of the condition, not to the speculative date of onset").

The Petitioner disputes that he is required to show actual discovery. He argues that he is entitled to the presumption if he can establish that his cancer "should have been discovered" within the relevant five-year period. The Petitioner relies upon language contained in the first sentence of § 94B(2), which provides that the presumption is inapplicable if the condition of cancer was "first discovered, or should have been discovered," within the first five years of a member's active service. This provision appears to be based on the supposition that five years is likely insufficient time for a work-related cancer to mature into a condition that would be, or should be, discovered.

The Petitioner seems to argue that the "or should have been discovered language" from the first sentence of § 94B(2) applies to the second sentence as well. A similar conclusion was reached in *Curley v. Stoneham Ret. Bd.*, CR-15-218 (Div. Admin. Law App. March 8, 2021), in which the magistrate determined that "should have been discovered" is the standard applicable to individuals no longer in active service. For the reasons set forth below, I do not believe that is a sound interpretation of the statute.

The first two sentences of § 94B(2) are distinct provisions. The first sentence pertains to persons in active service who have served in their position for fewer than five years. The second sentence concerns individuals who have retired from active service. And these provisions have opposite effects: the former narrows the scope of individuals able to rely upon the presumption; the latter widens it.

Ultimately, basic principles of statutory construction militate against the Petitioner's argument. The second sentence of § 94B(2) is clear and unambiguous: when an individual has retired, the presumption only applies if the cancer is discovered within five years of retirement. Further, because the Legislature included the "or should have been discovered language" in the first sentence of § 94B(2), but omitted it from the very next sentence, it should not be read into that second sentence. *Fernandes v. Attleboro Housing Auth.*, 470 Mass. 117, 129 (2014) ("It is well established that we do not read into [a] statute a provision which the Legislature did not see fit to put there." (citation and quotation marks omitted)); *Beeler v. Downey*, 387 Mass. 609, 616 (1982) ("[W]here the Legislature has employed specific language in one [part of a statute], but not in another, the language should not be implied where it is not present.").

Although the purpose of the presumption is to ease applicants' evidentiary burdens, the range of applicants eligible to rely on that assistance is not boundless. *Logan*, *supra*, at *6 ("By establishing a period of five years after leaving active service during which the cancer has to be first discovered, it is clear that the legislature did not intend that eligibility for the presumption was to be indefinite."). The inclusion of a "should have been discovered" standard for early-career applicants will tend to expand the range of applicants found ineligible for the presumption as compared to an exclusion

triggered only by discovery. The omission of a "should have been discovered" standard for granting eligibility to post-retirement applicants, on the other hand, will tend to narrow the range of such individuals found eligible to claim the entitlement. In both provisions, then, the Legislature's approach suggests an intent to rigorously police eligibility for the presumption in boundary cases.

I turn now to the question of whether the Petitioner has made out a prima facie case that his cancer was discovered within the five-year period following his retirement. There is no dispute that the Petitioner's cancer was not diagnosed until March 4, 2022, more than six years after his June 30, 2015 retirement. That said, it is possible for a condition of cancer to be "discovered" prior to a formal diagnosis. *See* 840 CMR 10.04(3)(c) (providing that a retired member can avail himself or herself of the presumption if, within five years of retirement, the member first "discovered the condition [of cancer], even if not formally diagnosed"). Moreover, in at least one prior decision from this Division, the magistrate determined that a not-yet diagnosed cancer was discovered upon the onset of "important and new health problems" during the five years after the member's retirement, including "relentless pain in [the member's] spine" and "unexplained weight loss." *Connery v. Revere Ret. Bd. & Public Employee Ret. Admin. Comm.*, CR-02-1314, at *15-16 (Div. Admin. Law App. Dec. 12, 2003).

I am not convinced that the approach taken in *Connery* is entirely sound. The word "discover" is defined as "obtain sight or knowledge of for the first time." *See, e.g.*, *Merriam-Webster's Collegiate Dictionary* 331 (10th ed. 1994). The use of the preposition "of" suggests that a certain directness is required. It is not "knowledge *related to*" or even "knowledge *about*." An example relating to sight may be helpful. We might see an

object's shadow before seeing the object itself, but it is only when we see the object that we first "obtain sight" of it; seeing its shadow is not sufficient. Turning to the context of discovery of a disease, the onset of symptoms may precipitate the *search* for a cause, but it is not the *discovery* of that cause.[7] Nevertheless, leaving this reservation aside, and assuming the soundness of *Connery's* approach for the sake of argument, the record does not reflect anything like discovery within five years of the Petitioner's June 30, 2015 retirement.

Based on the record before me, the possibility of brain cancer was first discussed on January 25, 2022. Prior to that point, the Petitioner had reportedly suffered from headaches for as long as a decade.[8] After he began using a CPAP device, however, the headaches subsided for about one year. The Petitioner's primary care physician reports

[7] It is possible that matters might stand on a different footing where the symptom is itself a direct manifestation of the cancer itself, such as where there is a visible or palpable lump or mass that is comprised of the cancerous cells. Similarly, it is possible that discovery could perhaps be said to occur upon the onset of symptoms that are so strongly correlated with the cancer that discovery of the one is almost tantamount to discovery of the other. Neither of the two scenarios just outlined were present in *Connery* and neither are present here. Accordingly, I need not and do not make any determination regarding those two possibilities.

[8] The record contains references to other possible symptoms. The treating physician's statement in support of his application states that he had suffered from fatigue for ten years. (Exhibit 6). It is not clear how severe this fatigue was or whether it has a causal connection to the Petitioner's underlying cancer. There are also some references in the records related to the Petitioner's cancer treatment to the effect that he "noticed that he occasionally trips over his right foot when he walks." (Exhibit 9). It is not clear when this possible symptom first arose, but it does not appear from the record that the Petitioner took much notice of it until sometime after his January 2022 doctor's appointment. These brief, undeveloped references to fatigue and tripping, even when viewed in tandem with the reported headaches, do not establish the sort of "new and important" heath developments at issue in *Connery*.

that the headaches resurfaced a couple of weeks prior to his January 25, 2022 doctor's appointment.

Unlike the symptoms in *Connery*, the Petitioner's headaches during the five-year period between June 30, 2015 and June 30, 2020 were not a new development. And there is no indication they were as drastic or conspicuous as the symptoms described in *Connery*. In fact, the progress notes from his primary care physician for October 2018, October 2019, and January 2020 state he was "negative for headaches," (Exhibit 9), further suggesting that, for years, they were not viewed as especially noteworthy. In sum, unlike the claimant in *Connery*, who was said to have discovered his cancer insofar as he was confronted by the emergence of a new and pressing, albeit undiagnosed, medical situation, the record in this case indicates that the Petitioner experienced non-urgent symptoms that persisted over the course of years. This was not the discovery of a condition of cancer, but the absence of discovery.[9]

Because the Petitioner is not able to avail himself of the presumption set forth in G.L. c. 32, § 94B and has not otherwise set forth a prima facie case that his disability was caused by his work duties, the decision of the Amesbury Retirement Board to deny the Petitioner's application for accidental disability retirement without first referring it to a medical panel is affirmed.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

[9] As noted above, the preceding discussion assumes for the sake of the argument the soundness of the approach taken in *Connery*, which reflects an expansive understanding of "discovery."

/s/ Timothy M. Pomarole

Timothy M. Pomarole, Esq.
Administrative Magistrate

Dated: January 31, 2025