

**COMMONWEALTH OF MASSACHUSETTS
CONTRIBUTORY RETIREMENT APPEAL BOARD**

MATTHEW GALE,

Petitioner-Appellant

v.

STATE BOARD OF RETIREMENT,

Respondent-Appellee.

CR-13-205

DECISION

Petitioner Matthew Gale appeals from a decision of an administrative magistrate of the Division of Administrative Law Appeals (“DALA”), affirming the decision of Respondent State Board of Retirement (SBR) denying his application for accidental disability retirement benefits. The DALA magistrate held a hearing on January 21, 2016 and admitted fifteen exhibits into evidence. The DALA decision is dated March 3, 2017. Gale filed a timely appeal to us.

After considering the evidence in the record and the arguments by the parties, we adopt the magistrate’s findings of fact 1 – 68 as our own and incorporate the DALA decision by reference. For the reasons stated in the Conclusion and Order, we affirm, adding the following comments.

To be eligible for accidental disability retirement benefits under G. L. c. 32, § 7, an applicant must establish that he is “unable to perform the essential duties of his job and that such inability is likely to be permanent . . . by reason of a personal injury sustained or hazard undergone as a result of, and while in the performance of, his duties.” G.L. c. 32, § 7(1). An applicant must prove that his disability stemmed from either (1) a single work-related event or series of events, or (2) if the disability was the result of gradual deterioration, that his employment exposed him to an “identifiable condition . . . that is not common or necessary to all or a great many occupations.” *Blanchette v. Contributory Ret. App. Bd.*, 20 Mass. App. Ct. 479, 485 (1985). Emotional or mental disability is recognized as a personal injury, which can serve as

the basis for accidental disability retirement benefits. *Fender v. Contributory Ret. App. Bd.*, 72 Mass. App. Ct. 755, 761-62 (2008). An applicant, such as Gale, may also be entitled to accidental disability retirement benefits when a work injury aggravates a pre-existing condition. *Robinson v. Contributory Ret. App. Bd.*, 20 Mass. App. Ct. 634, 638 (1985).

Under G.L. c. 32, § 7(1), an applicant must prove that the work-related injury was the “natural and proximate cause” of the disability. *Campbell v. Contributory Ret. App. Bd.*, 17 Mass. App. Ct. 1018, 1018-19 (1984). Further, when an applicant seeks accidental disability retirement benefits for a mental or emotional disability, he must also prove that the predominant cause of the injury was work-related. G.L. c. 152, § 1(7A); *see also Fender*, 72 Mass. App. Ct. at 761 (noting that the term “personal injury” as defined in G.L. c. 152, § 1(7A) is given the same meaning under G.L. c. 32). The applicant bears the burden of proving the causal relationship by a preponderance of the evidence. *Murphy v. Contributory Ret. App. Bd.*, 463 Mass. 333, 345 (2012); *Lisbon v. Contributory Ret. App. Bd.*, 41 Mass. App. Ct. 246, 255 (1996) (applicant must show it was “more likely” that the disabling injury, flowing from a work accident, was directly caused by or was the aggravation of a preexisting condition, “than by the natural, cumulative, deteriorative effects of his preexisting diseased condition and unhealthy habits.”).

To succeed, Gale has to prove one of two hypotheses: that his disability stemmed from “a single work-related event or series of events,” *Kelly’s Case*, 394 Mass. 684, 688, 477 N.E.2d 582 (1985); or, if the disability was the product of gradual deterioration, that “the employment [had] exposed [the plaintiff] to ‘an identifiable condition ... that is not common and necessary to all or a great many occupations.’ ” *Ibid.*, quoting from *Zerofski’s Case*, 385 Mass. 590, 595, 433 N.E.2d 869 (1982). Proof of either hypothesis has to satisfy the strict causation standard imposed by the controlling statute: that the plaintiff’s employment was “a natural and proximate cause of the incapacity.” *Campbell v. Contributory Retirement Appeal Bd.*, 17 Mass. App. Ct. 1018, 1018, 460 N.E.2d 213 (1984). We find that the magistrate correctly concluded that Gale failed to meet his burden to establish entitlement to accident disability retirement benefits for the reasons in the DALA decision with the additional comments below. Further, although Gale did not receive workers’ compensation benefits for the claimed work-related incidents, he settled his claim in 2013 through a lump sum settlement. This lump sum settlement only serves to demonstrate that the parties engaged in legal compromise, rather than a resolution for entitlement to benefits. *Zajac v. State Bd. of Retirement*, CR-12-444 (DALA 2014).

1. Events or series of events.

G.L. c. 32, § 7(1) states the following:

[N]o [accidental disability] retirement shall be allowed unless such injury was sustained or such hazard was undergone within two years prior to the filing of such application, ***unless written notice thereof was filed with the board . . . within ninety days after its occurrence.***

(emphasis added). The plain language of the statute establishes that only injuries or events occurring within two years prior to the filing for accidental disability retirement can be considered. The exceptions to this are if written notice was provided to the board of the injuries or events within ninety days of their occurrences or if workers' compensation was received.¹

Looking at the contemporaneous incident reports submitted by Gale,² we agree with the magistrate that there is insufficient evidence to establish events on November 4, 2009 and November 22, 2011 to serve as bases for his application for accidental disability retirement. *See Zajac v. State Bd. of Retirement*, CR-12-444, (DALA 2014, *aff'd* CRAB 2015) (application for accidental disability retirement may not be amended to include to include new injuries or new incidences). First, Gale did not file any incident reports relating to incidents occurring on these dates. Gale's application for accidental disability retirement cannot be based on the incident that occurred on November 4, 2009, but rather, it can only be based on events occurring between the two year period prior to his application - March 30, 2010 and March 30, 2012. *See Sugrue v. Contributory Retirement Appeal Bd.*, 45 Mass. App. Ct. 1 at 4-5 (1998). Thus, the event of November 4, 2009 cannot serve as a basis for Gale's application for accidental disability retirement.

Second, even if also considering the event of November 4, 2009, the incident reports for November 4, 2009 and November 22, 2011 were submitted by other individuals involved in those events.³ They made no reference to Gale and failed to provide any details with respect to whether he was on duty, whether he witnessed the event, or what duties he was performing at the time of the events. Notably, there is no indication from the record that Gale received medical treatment as a result of these incidents. Additionally, Gale's reference to suicides and suicide attempts by corrections officers is not evidence of a compensable injury. Injuries to third parties

¹ The exception where worker's compensation has been received, G.L. c. 32, § 7(3), is not applicable here. While he applied for workers' compensation, Gale's application was denied. (FF 37; Ex. 6).

² Ex. 14.

³ Ex. 14; FF 8-9.

do not amount to a personal injury to the applicant. *Fender v. Contributory Retirement Appeal Bd.*, 72 Mass. App. Ct. 755 (2008). Accordingly, the magistrate correctly determined that Gale had failed to meet his burden that he sustained compensatory injuries from incidents occurring on November 4, 2009 and November 22, 2011.

In considering the evidence in the record, the magistrate further determined that Gale's underlying anxiety and depression caused his disability. Specifically, she found compelling treatment notes from Gale's primary care physician, Dr. Farb. She noted that the evidence reflects Gale had been suffering from anxiety and depression for some time and was diagnosed with major depression in April 2010 according to the treatment records from Dr. Farb. His treatment notes also reflect that Gale was prescribed Lexapro.⁴ The magistrate further indicated that the independent medical examination report from Dr. Nestelbaum reflect and mentioned treatment notes from Dr. Farb, that is not in evidence, that Gale was taking Lexapro for anxiety prescribed by him as early as 2008.⁵ We see no reason to overturn the magistrate's decision, which was made after reviewing the evidence.

With respect to the May 29, 2011 event, we agree with the magistrate that the evidence in the record fails to show that this event was a "significant contributing" factor by aggravating Gale's underlying anxiety and depression. Therefore, this event was not the "natural and proximate" cause of his disability. *Blanchette*, 20 Mass. App. Ct. at 485; *Campbell*, 17 Mass. App. Ct. at 1019. *See also Burke v. Contributory Retirement Appeal Bd.*, 34 Mass. App. Ct. 212, 213 (1993). Instead, the evidence demonstrates Gale was suffering from and was being treated for anxiety and depression well before becoming a corrections officer. Further, the witness statement provided by CO Hannula failed to show any compensable incident. Rather, it described concerns by Gale of his health and state of mind.⁶ While Gale claimed that the May 29, 2011 incident resulted in his psychological disability, the magistrate determined that Gale's underlying anxiety to be the cause of his disability, concluding that the May 29, 2011 event was not a "significant contributing" cause of his disability. In making this determination, the magistrate considered the evidence in the record, including the reports of the medical panel and Gale's testimony. Nevertheless, the magistrate was not persuaded by the evidence or by his

⁴ Ex. 9, pp 9, 15, 42.

⁵ Ex. 6, p. 16.

⁶ Ex. 6, p. 10.

testimony that he met his burden for entitlement to accidental disability retirement as required by G.L. c. 32, § 7(1). When considering this appeal, we give the DALA magistrate's findings of facts "some deference," and her findings are entitled to "particular deference" when they are based on determinations of credibility. *Vinal v. Contributory Retirement Appeal Bd.*, 13 Mass. App. Ct., 85, 99-100 (1982).

2. Hazard.

Whether or not a disabling condition was caused by a routine aspect of a job is relevant if the cause of disability was a hazard undergone while working. That is because an applicant claiming a disability related to a job hazard must show "an identifiable condition . . . that is not common or necessary to all or a great many occupations." *Blanchette*, 20 Mass. App. Ct. at 485, 481 N.E.2d at 220. Here, Gale's application for accidental disability retirement was also based on a gradual deterioration over time, based on his exposure to aspects of his job as a corrections officer during the year and a half that he performed these duties. The magistrate disagreed, noting that when he became a corrections officer in July 2009, Gale had the work environment common to other correction officers.

We agree with the magistrate that Gale has not established that he became disabled as a result of a gradual deterioration of his condition by being exposed to an identifiable condition that is not common or necessary to all or a great many occupations. The events that Gale described, some of which were discussed by the magistrate,⁷ were common to a great many professions, including probation officers, police officers, firefighters, parole officers and numerous professions in the medical field. *Knowles v. State Bd. of Retirement*, CR-09-1087 (DALA Mar. 2013) (*aff'd* CRAB Dec. 2013). Consequently, they cannot be relied upon as "a personal injury" for purposes of accidental disability retirement benefits. *Blanchette*, 20 Mass. App. Ct. at 485.

As troubling as the events were as described by Gale, he has failed to meet his burden to establish that he became disabled as a result of the claimed injury. This decision is based purely on the application of G.L. c. 32, § 7(1) and in no way should be taken as diminishing the valuable service Gale provided, nor minimize what Gale experienced. Nevertheless, Gale is not entitled to accidental disability retirement benefits. The decision of the DALA magistrate is affirmed.

⁷ DALA decision at *22-23; Ex. 6.

SO ORDERED.

CONTRIBUTORY RETIREMENT APPEAL BOARD



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Date: October 19, 2023

SO ORDERED.

CONTRIBUTORY RETIREMENT APPEAL BOARD

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