COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. **Division of Administrative Law Appeals**

**Cheryl Hallen,**

 Petitioner

v. Docket No. CR-14-572

**Worcester Retirement Board,** Dated: June 9, 2017

 Respondent

**Appearance for Petitioner:**

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**Appearance for Respondent:**

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**Administrative Magistrate:**

Edward B. McGrath, Esq.

Chief Administrative Magistrate

# SUMMARY OF DECISION

The Respondent’s denial of the Petitioner’s Accidental Disability Retirement application is affirmed, because the Petitioner failed to prove that the Regional Medical Panel lacked pertinent information or used an incorrect standard when its majority answered certificate questions in the negative.

# DECISION

# The Petitioner, Cheryl Hallen, timely appealed Respondent, Worcester Retirement Board’s, denial of her application for accidental disability retirement (“ADR”). Each party submitted a pre-hearing memorandum. The Petitioner’s was marked “A” and the Respondent’s “B.” I held an evidentiary hearing on March 8, 2016, which I recorded digitally. The Petitioner was the only witness to testify. I accepted the parties’ proposed exhibits into evidence and marked them as the parties had marked them.[[1]](#footnote-2) Following the hearing, I issued an Order outlining the parties’ stipulations and identifying the exhibits. Both parties submitted closing briefs. The Petitioner’s Closing Brief was marked “C” and the Respondent’s “D.” On July 7, 2016, I closed the administrative 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. Cheryl Hallen (“Petitioner”) was born in 1959. (Stip.)
2. The Petitioner is right hand dominant. (Stip.)
3. Starting in 1997, the Petitioner was employed by the Worcester School Department as a cafeteria helper. Her job duties included cooking and serving food to students. (Stip.)
4. The Petitioner was responsible for organizing breakfast. She had to lift cases of milk, that weighed about 30 pounds. She also had to lift cases of cereal which weighed about 15 pounds. She had to lift these items from shelves above eye level. (Test.)
5. The Petitioner also worked lunch period. (Test.)
6. The Petitioner had to lift trays of pasta that weighed about 15 pounds. (Test.)
7. The Petitioner had to clean freezers and racks, which required reaching over head. (Test.)
8. The Petitioner worked from 7:00 a.m. to 1:00 p.m. (Test.)
9. The Petitioner had a neck injury prior to October 12, 2010. (Test.)
10. On October 12, 2010, the Petitioner injured her right upper extremity while working. This occurred when she was lifting a tray of pasta from an oven rack which was above eye level. She started to drop the tray and, when she stopped it from falling, she felt an ache in the front of her right shoulder. (Test.)
11. She finished working the day of the incident and worked the next day. (Test.)
12. The Petitioner stopped working as a result of a right shoulder injury. (Stip.)
13. The Petitioner collected workers’ compensation benefits as a result of the incident. (Test.)
14. The Petitioner treated with F. Joseph Celona, M.D., at Fallon Clinic Department of occupational medicine. Dr. Celona diagnosed right biceps tendonitis and recommended physical therapy. Dr. Celona told her to stay out of work for a week. (Test., Stip.)
15. After she tried to work for nine days, Dr. Celona told the Petitioner to stop working because of her pain. (Test.)
16. Dr. Celona noted that the Petitioner was progressing slowly and referred her to orthopedics who administered steroid injections, which did not help her symptoms. (Stip.)
17. The Petitioner had physical therapy starting on November 3, 2010. (Resp. Ex. 16.)
18. Gary Peters, M.D., began treating the Petitioner. (Stip.)
19. On February 1, 2011, Dr. Peters performed a right shoulder arthroscopy with subacromial decompression. A rotator cuff tear was noted and repaired during the surgery. (Stip., Res. Ex. 13 pp 5-6.)
20. The Petitioner underwent physical therapy for shoulder pain beginning August 29, 2011 and ending on October 5, 2011. (Pet. Ex. 2 p. 56-72.)
21. On October 6, 2011, Dr. Peters treated the Petitioner with a steroid injection of the right shoulder. (Res. Ex. 6 p. 49.)
22. On February 1, 2012, the Petitioner had a carpal tunnel surgery performed by David Kim, M.D. (Resp. Ex 18, Test.)[[2]](#footnote-3)
23. On May 1, 2012, Dr. Peters performed a right shoulder arthroscopy with biceps tenotomy and subpectoral biceps tenodesis to repair her biceps tendon. (Test., Pet. Ex. 2 p. 14.)
24. On July 31, 2012, Dr. Peters noted that he advised the Petitioner that “I am not sure of the exact cause of her continued and rather diffuse symptoms, especially since I certainly cannot identify any ongoing shoulder problems that have not been addressed by her previous surgeries.” (Pet. Ex. 2 p. 10.).
25. Dr. Peters stated that he injected steroids into the Petitioner’s right shoulder. He wrote: “Although I have not seen any strong evidence that some of her symptoms may be radiating from the cervical spine, we may need to consider further evaluation with an MRI if her symptoms do not improve.” (Pet. Ex. 2 pp. 10-11.).
26. On August 7, 2012 the Petitioner told Dr. Peters’ office that her pain was in her arm and not her neck. (Pet. Ex. 2 p. 9.)
27. On August 14, 2012, Dr. Peters wrote “As I explained to her if her symptoms are nerve related there is a definite possibility that it is originating from the neck, even if she is not having neck pain.” (Pet. Ex. 2 p. 9.)
28. The Petitioner stated that “She is having these sensations in her arm and that it has always been her arm…She was concerned about a neck mri being taken due to this being a w/c claim.” (Pet. Ex. 2 p. 9.)
29. On September 6, 2012, the Petitioner had an MRI of the cervical spine. The findings on the report include:

C5-C6: there is a disc bulge which impinges upon the ventral thecal sac with resultant mild canal stenosis. There is moderate bilateral forminal narrowing. There is mild bilateral facet hypertropic degenerative change.

(Pet. Ex. 2 p. 83.)

1. On September 19, 2012, the Petitioner treated with Erica Bail, M.D. At that time, Dr. Bail noted that the Petitioner’s chief Complaint was “cervical pain.” (Pet. Ex. 2 p. 80.)
2. Dr. Bail wrote:

The [Petitioner] describes that she has some diffuse pain that is located over the superior aspect of the neck with some intermittent radiation down the right arm. She notes that the pain began right around the same time as she had a rotator cuff tear. This has been present for years. She describes the onset of the pain occurred at work when she was pulling heavy racks out of an oven, and since that time she has had radiation of the pain across the neck, around the shoulder and down the right arm.

(Pet. Ex. 2 pp. 80-81.)

1. Dr. Bail noted the findings on the MRI of the cervical spine and opined that:

[The Petitioner] previously had what may have represented some cervical radicular pain but it is very difficult when there are ‘multicrush’ regional injuries to delineate this as pain generator from the underlying anatomical derangements of the shoulder and the wrist.

(Pet Ex. 2 pp. 81-82.)

1. On February 11, 2013, Dr. Peters prepared the Treating Physician’s Statement in which he diagnosed “chronic shoulder pain status post surgery.” (Pet. Ex. 1 p. 20, Stip.)
2. Dr. Peters stated that he reviewed the Petitioner’s job duties and she was physically incapable of performing the essential duties of her position and causally related her disability to the accident of October 12, 2010. (Pet. Ex. 1 p. 20.)
3. Dr. Peters also opined that the Petitioner’s condition was permanent stating: “future treatment is unlikely to improve [Petitioner’s] current status.” (Pet. Ex. 1 pp. 20-21.)
4. On March 25, 2013, the Petitioner filed her application for ADR benefits with the Respondent. (Stip.)
5. When asked on the application to state the medical reason for which she was filing for ADR, the Petitioner wrote: “Chronic right shoulder and neck pain and restrictions resulting from work related injury occurring on October 12, 2010.” (Pet. Ex. 1, p. 2.)
6. A Regional Medical Panel consisting of three orthopedists examined the Petitioner on three different dates in 2013. The Medical Panel consisted of Ronald Rosenthal, M.D., Isadore Yablon, M.D., and Steven Sewall, M.D. (Pet. Ex. 3, Stip.)
7. Dr. Yablon examined the Petitioner on November 13, Dr. Rosenthal examined her on November 15, and Dr. Sewall did so on December 10. (Stip.)
8. Each of the panel members examined the Petitioner’s job description, including the Petitioner’s essential duties, and her medical records. (Pet. Ex. 3)
9. The Petitioner’s attorney was present for each of the examinations. (Test.)
10. Dr. Rosenthal answered the three questions listed on the Medical Panel Certificate in the affirmative. He wrote in his narrative that, while he was unable to connect the Petitioner’s carpal tunnel symptoms to the accident, he:

believe[d] that her shoulder symptoms are a direct result of that accident…she has regained normal motion in her shoulder, but retains a mild degree of atrophy of the right shoulder girdle which I believe to be permanent…I have reviewed her job description; this involves among other things, lifting heavy objects from over her head. I believe that she needs full strength in both upper extremities to do this job safely, and I do not believe that she has full strength in her right upper extremity. It is my opinion that this is a permanent condition. A return to her job would almost certainly put her at risk of re-injury as well as others around her.

(Ex. 3 pp 8-9.)

1. Dr. Yablon answered the first question on the Medical Panel Certificate in the negative opining that the Petitioner was not physically incapable of performing the essential duties of her job. (Pet. Ex. 3 p. 13.)
2. In his narrative, Dr. Yablon accurately recorded the Petitioner’s history, including how long the Petitioner’s attempt to return to work lasted. He also accurately recorded the description of the incident at issue. He described the Petitioner’s present complaints as:

Stiffness and numbness of her right shoulder. She complains of stiffness at the base of the thumb and this is accompanied by parasthesiae and occasional burning at the back of her arm.

 (Pet. Ex. 3 p. 16.)

1. In his report, Dr. Yablon stated that when he examined the Petitioner “there was no atrophy.” He stated that: “There are no objective findings related to the right shoulder which would prevent her from returning to her usual work without restrictions.” He concluded his narrative as follows: “The surgical procedures successfully corrected the problems and would not be a reason to prevent her from returning to her usual work without restrictions and limitations.” (Pet. Ex. 3 p. 19.)
2. Dr. Yablon did not fall asleep while taking the Petitioner’s history or examining her. (Resp. Ex. 2.)
3. Dr. Sewall answered the first and third questions on the Medical Panel Certificate in the affirmative, stating that the Petitioner was physically incapable of performing the essential duties of her job and that the disability was such as might be the natural and proximate cause of the personal injury sustained. Dr. Sewall did not think the incapacity was likely to be permanent, however. He, therefore, answered the second question on the certificate “No.” (Pet. Ex. 3 p. 25.)
4. Dr. Sewall noted in his narrative that the Petitioner was complaining of intermittent pain in her right shoulder. He described the incident at issue and stated that the Petitioner reported “a pulling in the right shoulder.” He noted the Petitioner’s treatment for her right shoulder injury and carpal tunnel. Dr. Sewall stated that the Petitioner was complaining of persistent numbness and pain in the right arm going into the neck. He said the Petitioner had an MRI of her neck which showed “bulging disks at C4-5, C5-6 and C6-7 with some evidence of canal stenosis.” (Pet. Ex. 3 p. 29.)
5. He wrote that: “It is my opinion that the patient’s problem was a flare-up of preexisting cervical spondylosis of her neck as a result of the incident on October 12, 2010” and he noted that she had not had physical therapy for her neck injury. (Pet. Ex. 3 p. 30.)
6. The Respondent, through PERAC, obtained a clarification of Dr. Sewall’s opinion. When asked his diagnosis Dr. Sewell responded “[the Petitioner] is post surgery x2 for impingement syndrome and biceps tenodesis.” When asked if Ms. Hallen was unable to perform the essential duties of a cafeteria helper due to the impairment of her shoulder, he responded “she had full range of her right shoulder, so far as her right shoulder is concerned, she is capable of doing the essential duties of a cafeteria helper.” When asked: “If Ms. Hallen suffers from a right shoulder impingement, is this likely to be permanent.” Dr. Sewall said “The answer is no.” He then wrote that: “[The Petitioner] does not have a shoulder problem. Her problem, I believe, is that she has cervical spondylosis in her neck referring to her shoulder.” (Pet. Ex. 3 pp. 32-33.)
7. On October 16, 2014, the Respondent denied the Petitioner’s application for ADR benefits. (Pet. Ex. 7, Stip.)
8. On October 20, 2014, the Petitioner filed her appeal of the Respondent’s decision. (Pet. Ex. 8, Stip.)
9. On April 15, 2015, Marc Linson, M.D. examined the Petitioner at the request of the Department of Industrial Accidents. The Petitioner told Dr. Linson that “She was injured lifting a rack from an oven on October 12, 2010 developing pain in her neck, shoulder…). (Pet. Ex. 11.)

# Discussion

In order to qualify for an award of accidental disability retirement benefits under G.L. c. 32, § 7(1), an applicant must prove that she is totally and permanently unable to perform the essential duties of her job as the natural and proximate result of a personal injury sustained or hazard undergone, as a result of, and while in the performance of her duties, at some definite place and at some definite time. The applicant bears the burden of proving that she is entitled to benefits by a preponderance of the evidence. *Lisbon v. Contributory Ret. App. Bd.*, [41 Mass. App. Ct. 246](http://sll.gvpi.net/document.php?id=sjcapp:41_mass_app_ct_246), 255 (1996); *Campbell v. Contributory Ret. App. Bd.,* [17 Mass. App. Ct. 1018](http://sll.gvpi.net/document.php?id=sjcapp:17_mass_app_ct_1018), 1019 (1984); *McClain v. Barnstable Cnty. Ret. Bd*, No. CR-12-173, at \* 8 (DALA Apr. 17, 2015).

Before an applicant collects ADR benefits, a three-physician Regional Medical Panel, following an examination of the applicant, must issue a certificate addressing the applicant’s mental or physical incapacity to perform the essential duties of her job. *See* G.L. c. 32, § 6(3)(a); *Malden Ret. Bd. v. Contributory Ret. App. Bd.*, [1 Mass. App. Ct. 420](http://sll.gvpi.net/document.php?id=sjcapp:1_mass_app_ct_420), 423 (1970).

The medical panel plays two roles in the application process. First, it acts as a gatekeeper. Second, it provides medical expertise. *Sinclair v. State Bd. of Retirement*, CR-10-302 \* 9 (DALA July 12, 2013). The purpose of the medical panel examination and certificate is to “vest in the medical panel the responsibility for determining medical questions which are beyond the common knowledge and experience of the members of the local [retirement] board.” *Malden Retirement Bd*., 1 Mass. App. Ct. at 423. “The Panel's negative response to any of the three questions on the certification precludes the allowance of the claimant's application for benefits unless the panel applied an erroneous standard, failed to follow the proper procedure, or its decision is ‘plainly wrong.’” *LeDuc v. Contributory Ret. App. Bd*., 1573CV00617 at \*12 (Bristol Sup. Ct. 9/19/2016) *citing* *Foresta v. Contributory Ret. App. Bd.,* 453 Mass. 669, 684 (2009); *Quincv Ret. Bd. v. Contributory Ret. App. Bd.*, 340 Mass. 56, 60 (1959); *Malden Ret. Bd. v. Contributory Ret. App. Bd.* 1 Mass. App. Ct. at 424; *see Gosson v. Dukes Cnty. Contributory Ret. Bd.*, 79 Mass. App. Ct. 1127 at \*2 (2011) (Memorandum and Order pursuant to Rule 1:28) (discussing Panel’s gatekeeper role and requirement for affirmative answer on causation question).

 In the instant case the panel majority answered certificate questions in the negative. Therefore, the Petitioner in this case had the burden of proving by a preponderance of evidence that the Board improperly denied her application for accidental disability retirement on the basis of an invalid Medical Panel Certificate. I find that the Petitioner has not met her burden.

The Petitioner testified that Dr. Yablon was late for her appointment and stopped writing and talking during the examination. She testified that his head dropped and came back up quickly a few times. According to her testimony, it appeared to the Petitioner that Dr. Yablon fell asleep.

In his affidavit, Dr. Yablon denied falling asleep and pointed out that it would be impossible to obtain an accurate history and examine the Petitioner if he had fallen asleep. In addition, he stated that, if he was late to the appointment, his being late would have no effect on the Petitioner’s examination. I was persuaded by Dr. Yablon’s affidavit and not the Petitioner’s testimony on these points.

 The Petitioner also contends that, during his examination of the Petitioner, Dr. Sewall improperly focused on her neck and improperly spent more time on her neck than her shoulder. To support her argument, the Petitioner testified at hearing that she did not have problems with her neck when she was injured on October 12, 2010. The Petitioner’s testimony, however, is contradicted by her application. On her application, she wrote that the medical reason for which she was filing her application for accidental disability benefits was: “Chronic right shoulder and neck pain and restrictions resulting from work related injury occurring on October 12, 2010.” (Finding 23).

Having described the medical reasons for her application as she did and then testifying that her neck was not involved, the Petitioner undercut her credibility and created a number of other issues that complicate her case. *See Diana Bruno v. Boston Ret. Bd.*, CR-11-507 \*13-14 (DALA 10/17/2014 aff’d CRAB 8/9/2016). Further, in September 2012, the Petitioner told Dr. Bail that she had cervical pain and related its start to the incident at issue. (Finding 31). In addition, in 2015 Marc Linson, M.D. noted that the Petitioner told him that on October 12, 2010 she “developed pain in her neck, shoulder…” (Finding 38). I find the histories provided to Dr. Bail and Dr. Linson by the Petitioner concerning her neck pain probative on the issue of her credibility especially when they are supported by the description of her injury that she put in her application. These histories are also important because they undercut the Petitioner’s argument that Dr. Sewall spent too much time examining her neck.

 The Petitioner tries to buttress the argument that Dr. Sewall focused on the wrong body part by pointing out that the parties stipulated, at hearing, that the incident at issue injured the Petitioner’s shoulder. Dr. Sewall’s opinion is not inconsistent with the stipulation. The Petitioner complained of right shoulder and arm pain. Dr. Sewall opined that it was caused by a neck injury. Dr. Bail and Dr. Peters certainly considered that cause and ordered the MRI dated September 6, 2012 for that reason. Dr. Sewall believed the results of the cervical MRI confirmed his diagnosis.

 In addition, the Petitioner’s argument concerning the stipulation ignores the fact that, when Dr. Sewall examined the Petitioner, there was no such stipulation. Moreover, given the role of the medical panel it would be inappropriate to allow the parties to circumvent the medical panel by entering stipulations at DALA. *See Commonwealth v. Buswell*, 468 Mass. 92, 104 (2014) *citing Loring v. Mercier*, 318 Mass 599 (1945) (court may vacate stipulation if it is improvident or not conducive to justice).

 The Petitioner also argues that Dr. Sewall failed to adequately address the permanency issue. I am not persuaded by that argument. Permanency has been defined as:

 ... [a] disability is ‘permanent’ if it will continue for an indefinite period which is likely never to end, even though recovery at some remote or unknown time is possible, but if recovery is reasonably certain after a fairly definite time, the disability cannot be classed as ‘permanent’ which is the opposite of temporary or transient and is not a synonym for eternal, endless or lifelong.

*Sean Stokes-de Salvo v. State Bd. of Ret*.,CR-12-401 \*26 (DALA 7/29/2016) *citing Yoffa v. Metropolitan Life Insurance Co*., [304 Mass. 110](http://sll.gvpi.net/document.php?id=sjcapp:304_mass_110), 111 (1939); *Hovhanesian v. New York Life Ins. Co*., [310 Mass. 626](http://sll.gvpi.net/document.php?id=sjcapp:310_mass_626) (1942); *Donnell v. State Bd. of Ret*., CR-99-296 (DALA), aff'd (CRAB 2000). Dr. Sewall having found the Petitioner’s neck injury disabling correctly considered the value of future physical therapy treatment. *See* *Retirement Bd. of Revere v. CRAB*, 36 Mass. App. Ct. 99, 113 (1994).

 The Petitioner argues that Dr. Linson’s post-panel report should be used to refute the panel majority opinion. This argument ignores that “[t]here is no requirement that the panel physicians agree with the opinions or findings of other clinicians.” *Turner v. State Bd. of Ret.*, CR- 06-27 \*10 (DALA 2007) (finding that panel did not employ erroneous standard and panel was not obligated to agree with opinions of other physicians). “[T]he fact that another physician offered a contrary opinion... is not evidence of the use of an erroneous standard by the medical panel.” *Hickney v. State Bd. of Ret.*, CR-07-511\* 7 (DALA decision March 19, 2009; no CRAB decision); *see Jenkins v. State Bd. of Ret.*, CR-06-222 (DALA 2007) (noting that “contrary opinions cannot take the place of the medical panel’s properly made assessment”); *see also Grannum v. State Bd. of Ret*., CR-12-501 \* 8 (DALA 10/2/2015) (post-panel medical reports not relevant on medical issue properly addressed by panel).

**CONCLUSION AND ORDER**

The Petitioner did not establish that the Regional Medical Panel lacked pertinent information or used an erroneous standard, and I, therefore, affirm the decision of the Respondent to deny the Petitioner’s claim for accidental disability benefits.

DIVISON OF ADMINISTRATIVE LAW APPEALS

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Edward B. McGrath, Esq.

Chief Administrative Magistrate

Dated: June 9, 2017

1. For reasons discussed below, I admitted Petitioner’s Ex. 11, a post-panel medical report, over the Respondent’s objection. [↑](#footnote-ref-2)
2. The Petitioner does not seek ADR benefits as a result of the carpal tunnel injury. [↑](#footnote-ref-3)