

**COMMONWEALTH OF MASSACHUSETTS
CONTRIBUTORY RETIREMENT APPEAL BOARD**

CHERYL HALLEN,

Petitioner-Appellant

v.

WORCESTER RETIREMENT BOARD,

Respondent-Appellee.

CR-14-572

DECISION

Petitioner Cheryl Hallen appeals from a decision of the Chief administrative magistrate of the Division of Administrative Law Appeals (“DALA”), affirming the decision of Worcester Retirement Board (WRB) denying her application for accidental disability retirement benefits. The DALA magistrate held a hearing on March 8, 2016 and admitted twenty-two exhibits into evidence. The DALA decision is dated June 9, 2017. Ms. Hallen filed a timely appeal to us.

After considering the evidence in the record and the arguments presented by the parties, we adopt the magistrate’s Findings of Facts 1 – 53 as our own and incorporate the DALA decision by reference. We affirm the DALA decision for the reasons set forth in the Discussion adding the following comments.

With respect to the issue of timeliness, Ms. Hallen urges CRAB to consider her appeal as timely filed despite the fact that her notice of appeal was mistakenly directed to DALA. Ms. Hallen’s counsel filed an affidavit, stating that he had mailed the notice of appeal on June 23, 2017 but inadvertently used DALA’s address in place of CRAB’s address. DALA received the notice of appeal on June 24, 2017 and forwarded it to CRAB on June 26, 2017. DALA did not retain the envelope which contained Ms. Hallen’s notice of appeal. Therefore, there is no postmark to determine the timeliness of her appeal. Nevertheless, Ms. Hallen’s counsel submitted copies of the receipt provided by the Post Office reflecting mail being sent to an address located in the zipcode of 02114, which he contends pertains to DALA’s location.

Accordingly, Ms. Hallen urges CRAB to consider this notice of appeal, sent inadvertently to DALA, as timely filed.¹ WRB, on the otherhand, contends that Ms. Hallen failed to timely file a notice of appeal of the DALA decision.² WRB argues that the Contributory Retirement Appeal Board (CRAB) lacks jurisdiction to hear an appeal even where mail is misdirected to DALA. *See Hanchette v. State Bd. of Retirement*, CR- 07-1071 (DALA Sept. 2011).

Here, there is sufficient evidence to conclude that Ms. Hallen timely filed her notice of appeal of the DALA decision of June 9, 2017. We determine that notice to DALA is notice to CRAB. While there is no postmark to be considered, Ms. Hallen’s counsel submitted evidence for us to conclude that he mailed the notice of appeal on June 23, 2017. We conclude that Ms. Hallen’s notice of appeal was timely filed. Nevertheless, Ms. Hallen’s appeal fails because she did not meet her burden to establish entitlement to accidental disability retirement benefits.

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). Under G.L. c. 32, § 7(1), the 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). 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.”).

An applicant seeking accidental disability retirement benefits must be examined by an independent medical panel. G.L. c. 32, § 6(3)(a); *Kelley v. Contributory Ret. App. Bd.*, 341 Mass. 611, 613 (1961). *See also Malden Ret. Bd v. Contributory Ret. App. Bd.*, 1 Mass. App. Ct. 420, 423 (1973) (panel opines on medical questions “beyond the common knowledge and experience of [a] local retirement board”). A condition precedent to granting accidental disability benefits is the panel’s issuance of an affirmative certification on questions of incapacity, permanence, and

¹ Petitioner Response to Order to Show Cause.

² WRB Response to Order To Show Cause.

causation.³ *Kelley*, 341 Mass. at 613. A medical panel's negative certification can only be overcome by showing that it employed an erroneous standard, failed to follow proper procedure, or that its decision was "plainly wrong." *Kelly*, *supra*.

Because a majority of the medical panel failed to issue a positive certification in connection with her application for accidental disability retirement benefits, Ms. Hallen's application was denied by WRB.⁴ The magistrate upheld WRB's denial because Ms. Hallen failed to meet her burden that her application for accidental disability retirement was denied on the basis of an invalid medical panel certificate. That is, Ms. Hallen failed to show by a preponderance of the evidence that the medical panel employed an erroneous standard, failed to follow proper procedure, or that its decision was "plainly wrong." *Id.*

Ms. Hallen argues that the magistrate erred in his determination because the medical panel lacked pertinent facts and employed an erroneous standard. *Retirement Bd. of Revere v. Contributory Retirement Appeal Bd.*, 36 Mass. App. Ct. 99, 106 (1994). Specifically, she argues that Dr. Yablon fell asleep during the examination and therefore, failed to conduct a proper medical examination.⁵ She further argues that Dr. Sewall failed to fully address the issue of permanency by not determining the timeframe for recovery and that his answers to the three statutory questions were based on his preconceived notion that she was not a candidate for accidental disability retirement benefits.⁶

We agree with the magistrate that Ms. Hallen failed to meet her burden of proof for entitlement to accidental disability retirement benefits. The magistrate did not credit Ms. Hallen's testimony that Dr. Yablon fell asleep during his examination of Ms. Hallen.⁷ Instead, he was more persuaded by Dr. Yablon's response to her contentions that he would not have been able to provide the detailed and comprehensive report in connection with her application had he

³ The panel addresses three questions: (1) whether the applicant is mentally or physically incapacitated for further employment duties; (2) whether such incapacity is likely to be permanent; and (3) "whether or not the disability is such as might be the natural and proximate result of the accident or hazard undergone on account of which [an accidental disability] retirement is claimed." G.L. c. 32, § 6(3).

⁴ Finding of Fact 51; Petitioner Exhibit 7; Stipulation.

⁵ Petitioner Memorandum at 5-6.

⁶ Petitioner Memorandum at 6-8.

⁷ DALA decision at 11.

fallen asleep.⁸ The magistrate also determined that Ms. Hallen's credibility was further undermined by her assertion that she did not incur neck problems from the work injury but emphasized that her application for accidental disability retirement was based solely on a right shoulder injury.⁹ While Ms. Hallen testified at the hearing that she only sustained an injury to her right shoulder, she, nevertheless, claimed in her application of neck and right shoulder pains and restrictions as a result of the work injury.¹⁰ The magistrate also pointed out that treatment notes of September 2012 from her treating physician, Dr. Bail,¹¹ and a medical report from Dr. Linson, who performed an independent medical examination in April 2015,¹² reflect that Ms. Hallen had reported an injury involving her neck and subsequent neck pain from the work injury. Accordingly, he found Ms. Hallen's credibility was undercut by these contradictions. Here, determinations of credibility by the magistrate are entitled to substantial deference. *Vinal v. Contributory Retirement Appeal Bd.*, 13 Mass. App. Ct., 85, 99-100 (1982).

We also agree with the magistrate that Ms. Hallen failed to establish that Dr. Sewall based his certification on an improper standard. The magistrate concluded that Dr. Sewall did not focus on the wrong body part because Dr. Sewall's opinion was not inconsistent with the medical records of Ms. Hallen's treating physicians. Specifically, Ms. Hallen had complained to Dr. Bail of neck pain radiating to the right shoulder and down her right arm as a result of a work injury.¹³ Dr. Peters also noted that if Ms. Hallen's symptoms were nerve related, there was a possibility it was originating from her neck.¹⁴ Based on these indications, an MRI was obtained on September 6, 2012 revealing disc bulge impinging upon the ventral thecal sac with resultant mild canal stenosis; moderate bilateral foraminal narrowing; and mild bilateral facet hypertrophic degenerative change. Dr. Sewall noted in his report that Ms. Hallen reported numbness and pain in the right arm radiating into the neck. He explained that the MRI confirmed his diagnosis that Ms. Hallen's problem was "a flare-up of preexisting cervical spondylosis of her neck as a result

⁸ FF 46; Respondent Ex. 2.

⁹ DALA decision at 11.

¹⁰ FF 37; Petitioner Ex. 1.

¹¹ FF 31; Petitioner Ex. 2 (pp80-81).

¹² Petitioner Ex. 11.

¹³ FF 30-31; Petitioner Ex. 2 (pp 80-81).

¹⁴ FF 25, 27; Petitioner Ex. 2 (p. 9-11).

of the incident of October 12, 2010.”¹⁵ Based on the evidence in the record, the magistrate determined that Dr. Sewall did not improperly focus on examining Ms. Hallen’s neck.

Additionally, Ms. Hallen refutes that Dr. Sewall’s opinion adequately addressed the question of permanency because his opinion failed to provide a definitive timeline for recovery and that the report from Dr. Linson contradicts Dr. Sewall’s opinion. The magistrate determined that having concluded the neck injury to be disabling, Dr. Sewall properly considered the issue of permanency and fulfilled his statutory duty in answering the three statutory questions. Dr. Sewall’s opinion and answers to the statutory questions had ample support and were based on his review of the medical reports and his examination of Ms. Hallen. While there may be contrary opinions to his opinion, it is not evidence that an incorrect standard was applied. *Generelli v. Worcester Retirement Bd.*, CR-11-766 (CRAB May 2017), citing *Malden Retirement Bd. v. CRAB*, 1 Mass. App. Ct. 420 (1973); *Curley v. Cambridge Bd. of Retirement*, CR-12-214 (CRAB May 2017); *Jenkins v. State Bd. of Retirement*, CR-06-222 (DALA May 2007). Moreover, because the magistrate found the medical panel did not employ an erroneous standard, Ms. Hallen’s argument that Dr. Sewall’s statement that she was not a candidate for accidental disability retirement did not render his certification invalid. The magistrate did not err in concluding that Dr. Sewall did not employ an improper standard. In this instance, we defer to the magistrate’s subsidiary findings. *Vinal, supra*.

Ms. Hallen failed to meet her burden that she was denied a proper medical panel. She is not entitled to accidental disability retirement benefits pursuant to G.L. c. 32, § 7. The DALA decision is affirmed. *Affirm*.

SO ORDERED.

CONTRIBUTORY RETIREMENT APPEAL BOARD



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¹⁵ FF 48-49; Petitioner Ex. 3 (pp 29-30).

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Date: October 6, 2023

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