COMMONWEALTH OF MASSACHUSETTS

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

**Linda Hanover,**

 Petitioner

v. Docket No. CR-12-575

 Dated: October 21, 2016

**State Board of Retirement,**

 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 in reaching its decision.

# DECISION

# The Petitioner, Linda Hanover, timely appealed Respondent State Board of Retirement’s denial of her application for accidental disability retirement. Each party submitted a pre-hearing memorandum. The Petitioner’s was marked “B” and the Respondent’s “C.” I held a hearing on November 4, 2015, which I recorded digitally. The Petitioner was the only witness to testify. For reasons discussed below, the Petitioner’s Proposed Exhibit 3 was not admitted as evidence and was marked “A” for identification. I accepted the parties’ other proposed exhibits into evidence without objection and marked them as the parties had marked them. Following the hjiearing, I issued an Order outlining the parties’ stipulations and identifying the exhibits. Both parties submitted closing briefs. The Petitioner’s Closing Brief was marked “D” and the Respondent’s “E.” The Petitioner filed a response to the Respondent’s Closing Brief and that was marked “F.” On January 5, 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. Linda Hanover (“Petitioner”) was born in 1953. (Stip.)
2. The Petitioner was employed by the Dukes County Sheriff’s Office starting on

January 16, 1968. Her position was Director of Civil Process. (Stip.)

1. In 2008, water damage was reported at the Petitioner’s office. (Pet. Ex. 8)
2. In May 2009, mold was found in the Petitioner’s office. (Testimony/Pet. Ex. 9)
3. The Petitioner went out on sick leave in 2010 after being diagnosed with Stage IA

Adenocarcinoma of lung. (Testimony/Pet. Ex. 5)

1. On April 15, 2010, the Petitioner had lung cancer surgery: Partial Right Lower

Lobectomy. (*Id.*)

1. On April 27, 2010, the Petitioner reported to Dana-Faber/Brigham and Women’s

Cancer Center that “she tolerated the procedure extremely well. She has had no complications.” (Pet. Ex. 5)

1. Following the surgery, the Petitioner developed chronic pain as a result of post-

thoracotomy syndrome, which was caused by the incision site over the intercostal nerve. (Pet. Ex. 6)

1. The Petitioner had a second surgery and injections to resolve the pain, but still suffers

from it. (Testimony)

1. The Petitioner returned to work and continues to work full time, because of financial

necessity. (Testimony)

1. The Petitioner’s office has an air purifier in it. (Testimony)
2. While her employer has not made any accommodations for her, colleagues and

attorneys assist her with her duties on occasion. The Petitioner has difficulty driving because of pain and, therefore, many meetings that would ordinarily be held elsewhere are held in her office. The Petitioner gets extremely tired and shortens her work day when she can. When she lived on the island, she went home and took naps during the work day. The Petitioner continues to make arrests as needed. (Testimony)

1. The Petitioner suffers from frequent colds. (Testimony)
2. On November 21, 2011, the Petitioner submitted a “Member’s Application for

Disability Retirement” to the Respondent, citing “chronic nerve pain associated with thoracic surgery (lung cancer).” The Petitioner applied for both Accidental Disability Retirement and Ordinary Disability Retirement. (Stip./Pet. Ex. 1)

1. The Petitioner stated in her application that she ceased to be able to perform all of the

essential duties of her position as of April 15, 2010, which was the date of her first surgery. (Pet. Ex.1)

1. On January 11, 2011, Michael T. Jaklitsch, M.D. wrote:

Most recently, she was taking down Christmas decorations and fell landing on a brick on her right side which is the ipsilateral side of the surgical resection…I find her ready to return to work…because of the pain around the seventh rib, there has been a referral for her to be evaluated by Dr. Jeff Jacqueline.

(Pet. Ex. 3)

1. On February 1, 2011, the Petitioner treated with Christin McMurray, M.D. Following

that visit, Dr. McMurray wrote that “[s]he does have some allergies to yeast and gluten as well as seasonal allergies…Review of Symptoms: Negative for fevers or constitutional symptoms…” (Pet. Ex. 4)

1. On June 28, 2011, Dr. Jaklitsch reported that the Petitioner stated that:

She has suffered from a chronic post mini thoracotomy pain syndrome for which she sees Dr. McMurray…This has several component parts including hypesthesia that makes it very irritating for her clothes to rub against the skin as well as muscle spasm in the rhomboid muscles and unrelenting pain. She experiences the pain every day and is extremely frustrated by its chronic nature.

(*Id.*)

1. Dr. Jaklitsch prepared the treating Physician’s Statement dated October 7, 2011. Dr.

Jaklitsch listed the Petitioner’s diagnoses as: “1. Actenocarcinoma, 2. Post-thoracotomy pain syndrome.” (Res. Ex. 4)

1. When asked to explain other life events or onset of conditions that in his opinion led

to applicant’s disability, Dr. Jaklitsch wrote: “thoracic surgery, possible environmental exposures.” When asked if it was more likely that the disability was caused by the job-related personal injury or hazard undergone or the non-work related circumstance or condition, he opined: “Disability is definitely from surgery. Surgery clearly caused by environment.” (*Id.*)

1. A Regional Medical Panel consisting of Stephanie Bernstein, M.D., a hematologist,

Mohammed Akbarian, M.D., an internist, and Daniel K. Finger, M.D., an oncologist, was assembled by PERAC to jointly examine the Petitioner. (Stip.)

1. On June 1, 2012, the Regional Medical Panel examined the Petitioner. (Res. Ex. 7)
2. The examination lasted approximately 15 - 20 minutes. (Testimony)
3. At the time of the examination, the Panel took the Petitioner’s history. The Petitioner

told the Panel that “[t]he building was evaluated by an environmental specialist who found visible mold growth and settled spores.” (Res. Ex. 7)

1. The Panel reviewed the Petitioner’s job description, her medical records, including

those of Dr. Jaklitsch, and the report of Nauset Environmental Services Air Quality Company. (Res. Ex. 6)

1. After examining the Petitioner, the Panel opined that the Petitioner was physically

incapable of performing the essential duties of her job and said incapacity was likely to be permanent. (Res. Ex. 7)

1. The Panel also opined that said incapacity was not such that might be the natural and

proximate result of the personal injury sustained or the hazard undergone on account of which retirement is claimed. (*Id.*)

1. The unanimous Panel explained its opinion concerning causation when it concluded

its narrative, dated June 11, 2012, stating:

Even though her work conditions appeared to be less than ideal prior to her development of lung cancer, there is no solid medical evidence linking mold exposure to the development of lung cancer.

(*Id.*)

1. Based upon the negative answer as to causation rendered by the Regional Medical

Panel, the Respondent denied the Petitioner’s application for Accidental Disability Retirement on September 27, 2012. (Stip./Res. Ex. 1) [[1]](#footnote-2)

1. The Petitioner timely appealed the Respondent’s action on October 4, 2012.

(Stip./Res. Ex. 2)

1. The Petitioner began treating with Dr. Lisa Nagy. Dr. Nagy examined the Petitioner,

and performed urine and blood tests. Dr. Nagy also tested for allergy to mold. (Testimony)

# 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).

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 \* 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 \* 2 (2011) (Memorandum and Order pursuant to Rule 1:28) (discussing Panel’s gatekeeper role and requirement for affirmative answer on causation question). The medical panel has no statutory authority to give an unqualified negative opinion as to causation and such an opinion, if expressed, is a nullity because the local board is entitled to know whether the panel believes there is a medical possibility that a causal relationship exists. *Leduc, supra* \* 14.

 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. It is clear from the Medical Panel’s narrative that, although it did not phrase its opinion in terms of possible causation, it considered whether there was a causal connection between the mold and the Petitioner’s cancer.

The Petitioner argues that the instant case is controlled by the Appeals Court case of *Noone v. Contributory Ret. App. Bd*. 34 Mass. App. Ct. 756 (1993). The facts of this case, however, are akin to those in *Fairbairn v. Contributory Ret. App. Bd.*, 54 Mass. App. Ct. 353 (2002). As the Appeals court stated in *Fairbairn*,

We think the import of *Noone* was that as far as one could tell from the certificate, the medical panel considered only the risk factors. There was nothing in the materials forwarded to the retirement board to suggest that the panel ever considered the relationship between the nature of the disability and the employee's job, or to explain why the panel determined there was no possibility of a connection between Noone's heart ailments and his work.

*Id.* at 360. In the instant case, although the Panel did not phrase its opinion in terms of possibility, it is clear that the Panel considered the role that mold may have played in the Petitioner’s disability. The Panel took the Petitioner’s history and knew that the building she worked in “was evaluated by an environmental specialist who found visible mold growth and settled spores.” (Finding 24) The Panel also had Dr. Jaklitsch’s Treating Physician’s Statement dated October 7, 2011 in which he opined that the Petitioner’s surgery was “clearly caused by environment.” The Panel also had the Petitioner’s medical records and the records from Nauset Environmental Services Air Quality. The Panel answered the statutory questions and explained the reasons for their answer in their narrative. The Panel wrote:

Even though her work conditions appeared to be less than ideal prior to her development of lung cancer, there is no solid medical evidence linking mold exposure to the development of lung cancer.

(Pet. Ex. 10). The Respondent was entitled to know whether there was a medical possibility that the causal relationship exists and, as in *Fairbairn*, the Regional Medical Panel complied with that requirement. *See Fairbairn* 54 Mass. App. Ct. at 360. The record demonstrates that the Panel properly considered and rejected the medical possibility of a causal connection between mold and the Petitioner’s cancer. *See Leduc, supra* at 15 (discussing medical possibility).

The Petitioner’s 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 the panel did not employ an erroneous standard and the panel was not obligated to agree with the 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").

I excluded Dr. Nagy’s post-panel report, because, as a post-panel report, it is not relevant. *Grannum v. State Bd. of Ret.*, CR-12-501 \* 8-9 (DALA 10/2/2015). The Petitioner does not have an opportunity to have a retrial of the medical facts of the case, where the Panel applied proper procedures and correct principles of law. *See Kelley v. Contributory Ret. App. Bd.,* [341 Mass. 611](http://sll.gvpi.net/document.php?id=sjcapp:341_mass_611), 617 (1961). In addition, the history provided by the Petitioner and Dr. Jaklitsch’s opinion concerning the alleged causal connection between mold and cancer provided the Panel with the information it needed to properly perform its function.To the extent that the Petitioner’s argument is that the Panel failed to perform tests that it should have performed, I note that 840 CMR §10.10 (3) provides that: “The Panel *may* suggest any ‘non-invasive’ test *which the panel considers necessary* to render an opinion of the member’s medical condition.” (emphasis added) The record does not contain any evidence that Dr. Jaklitsch or any other physician suggested that the tests should be performed before the Medical Panel examined the Petitioner.

**CONCLUSION AND ORDER**

The Petitioner has not established 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: October 21, 2016

1. The record does not reflect if any action was taken on the Petitioner’s application for Ordinary Disability Retirement and I do not address that issue. Nor do I address the issue of the Petitioner’s disability and the application of *Vest* *v. Contributory Ret. App. Bd*., [41 Mass. App. Ct. 191](http://sll.gvpi.net/document.php?id=sjcapp:41_mass_app_ct_191), 194 (1996) (Precluded consideration of Petitioner's condition that became disabling for the first time after she stopped working). [↑](#footnote-ref-2)