

COMMONWEALTH OF MASSACHUSETTS
CONTRIBUTORY RETIREMENT APPEAL BOARD

LINDA HANOVER
Petitioner - Appellant

v.

STATE BOARD OF RETIREMENT,
Respondent - Appellee

CR-12-575

DECISION

Petitioner Linda Hanover appeals from a decision of an administrative magistrate of the Division of Administrative Law Appeals (DALA) affirming the State Board of Retirement's (SBR) decision to deny Ms. Hanover's application for accidental disability retirement benefits. The DALA magistrate heard the matter on November 4, 2015 and admitted twelve exhibits. The magistrate's decision is dated October 21, 2016. Ms. Hanover filed a timely appeal to us.

After considering all the arguments presented by the parties and after a review of the record, we incorporate the DALA decision by reference and adopt the DALA magistrate's Findings of Fact 1-31 as our own. In rendering this decision, we are mindful of and sympathetic to Ms. Hanover's diagnosis and the symptoms and treatments she has endured in addressing her medical condition. Nevertheless, based on our review of the objective evidence in the record, we affirm the decision of the DALA magistrate for the reasons set forth in its Conclusion and Order adding the following comments.

Background. Ms. Hanover began her employment with the Dukes County Sheriff's Office beginning January 16, 1968. She is employed as Lieutenant Deputy Sheriff, Director of Civil Process, which requires her to supervise the execution of the department's civil process

actions, the transportation of civil arrests, and the use of physical force to maintain and restore order in accordance with the Sheriff's Office policies.¹

In 2008, water damage was reported at the Edgartown District Court, where Hanover worked. At that time, the Department of Public Health, Bureau of Environmental Health (BEH) conducted an indoor air assessment. The assessment by BEH revealed elevated levels of carbon dioxide at 878 parts per million (ppm) in the Sheriff's Office with a standard of 800 ppm and microbial/moisture concerns due to less than optimal ventilation and water damage. The building was noted as lacking mechanical ventilation, and instead, relied on natural ventilation. While many windows were not open at the time of the assessment, BEH declared that the ventilation issue be solved by opening windows and running the window A/C units in "Fan" mode in conjunction with radiators.² As for the microbial and moisture concerns, BEH noted that the floors, ceilings, and other porous surfaces suffered from water damage, which could result in microbial growth and resulting odor. The building had some ceilings which were no longer intact due to water damage, and a custodial closet wall was damaged to reveal a white substance. This white substance was not identified, but BEH was concerned that the wall could possibly contain asbestos materials given the age of the building. To resolve these issues, BEH recommended ventilation, replacing the mop frequently, and consulting with Environmental Protection Agency (EPA) guidance documents.³

In May 2009, there was mold reported at the Edgartown District Court during an investigation conducted by Nauset Environmental Services (NES) after a partial collapse of the ceiling from leakage resulting in post-leak mold/moisture. NES found visible mold growth, a mix of dry and damp conditions with the plaster walls and settled spores in the air sampling. The sampling did not directly identify the exact species of mold present, but there were no spores of the toxic black *Stachybotrys* mold.⁴

In March 2010, Ms. Hanover was diagnosed with Stage A1 adenocarcinoma of the lung.⁵ She took leave from her position with the Duke's County Sheriff's Office to receive treatment.

¹ Exhibit 7.

² Ex. 8.

³ *Id.*

⁴ Ex. 9.

⁵ Ex. 5.

On April 15, 2010, she underwent a partial right lower lobectomy at South Shore Hospital.⁶ She subsequently developed chronic pain from thoracotomy syndrome caused by the incision site over the intercostal nerve.⁷ Ms. Hanover was administered injections in 2011 to address her nerve pain and underwent a second surgery in 2012 without significant improvement.⁸

Ms. Hanover returned to work in 2010 after the initial surgery to remove the cancer and continues to work full time due to financial need. She indicated that she has an air purifier in her office.⁹ She has not received any accommodations from her employer, but colleagues and attorneys have assisted her on occasion. Ms. Hanover indicated that she has difficulty driving due to pain. Therefore, many meetings that were ordinarily held elsewhere were being held in her office. As a result of the surgery, Ms. Hanover explained that she gets extremely tired and shortens her workday when possible, including going home and taking naps during the workday.¹⁰

In his Physician Statement in support of Ms. Hanover's application for accidental disability retirement completed on October 10, 2011, Dr. Michael Jaklitsch listed her diagnoses as adenocarcinoma and post-thoracotomy pain syndrome. He concluded that she was disabled as a result of post-thoracotomy pain syndrome caused by the environment, and opined that her incapacity was such as might be the natural and proximate result of the hazard undergone.¹¹ Dr. Jaklitsch's treatment notes from April 2010 to August 2010 reflect no recurrence of cancer. In January 2011, Dr. Jaklitsch released Ms. Hanover to return to work, but noted that she sustained trauma to the right seventh rib, requiring 8-12 weeks to completely resolve. Consequently, he restricted her from performing strenuous activity upon her return to work.¹²

On November 21, 2011, Ms. Hanover applied for accidental disability retirement benefits based on a hazard undergone theory, citing chronic nerve pain associated with thoracic surgery for lung cancer. She explained that she was exposed to a hazard from 2004-2005 to 2010 in particular, describing that the building had ceiling failure, leaky roof, mold and mildew, odor

⁶ *Id.*

⁷ Ex. 6.

⁸ Transcript 11-13.

⁹ Tr. 19.

¹⁰ Tr. 19, 25-26.

¹¹ Ex. 1-2.

¹² Ex. 1, 6.

from everywhere in the building, and possible asbestos in the hall closet. She noted that she ceased to be able to perform all of the essential duties of her position as of April 15, 2010.¹³

On June 28, 2012, a medical panel was convened to examine Ms. Hanover and concluded that she was physically incapable of performing the essential duties of her job and that her incapacity was likely permanent. The panel, however, determined that her exposure to mold resulting in lung cancer and thoracic pain syndrome from surgery was not likely the natural and proximate cause, as “there [was] no solid medical evidence linking mold exposure to the development of lung cancer.”¹⁴ On September 27, 2012, SBR denied Ms. Hanover’s application for accidental disability retirement benefits.¹⁵

Discussion. To be awarded accidental disability retirement benefits under G.L. c. 32 § 7(1), Ms. Hanover must prove that she is totally and permanently unable to perform the essential duties of her job as a natural and proximate cause of a personal injury or hazard undergone while in the performance of her duties at some definite place and at some definite time. She bears the burden of proving that she is entitled to benefits by a preponderance of the evidence. *Lisbon v. Contributory Retirement Appeal Board.*, 41 Mass. App. Ct. 246, 255 (1996).

A panel of physicians is convened in accidental disability retirement cases to examine the applicant. Its function is to determine medical questions that are beyond the common knowledge and experience of a local retirement board. The medical panel must determine: (1) whether the member is unable to perform the essential duties of her job; (2) whether the inability is likely to be permanent; and (3) whether the disability is such as might be the natural and proximate result of the personal injury or hazard that is the basis for the claim. *See* 840 C.M.R. § 10.10(9); G.L. c. 32 §§ 6(3)(a), 7(1); *Malden Retirement Bd. v. Contributory Retirement Appeal Bd.*, 1 Mass. App. Ct. 420, 423 (1973). An affirmative answer to all three statutory questions by a majority of the panel physicians is a condition precedent to the award of accidental disability retirement. *Id.* at 424. Unless the panel lacked pertinent facts or applied an erroneous standard, a negative certification precludes the award of accidental disability retirement benefits. *See id.* at 424; *Kelley v. Contributory Retirement Appeal Bd.*, 341 Mass. 611, 617 (1961).

¹³ Ex. 1.

¹⁴ Ex. 10.

¹⁵ Ex. 11.

We agree with the magistrate that the medical panel issued a proper certificate. While the medical panel answered the questions of disability and permanence in the affirmative, it determined that there was no causal connection between the exposure to mold and the development of Ms. Hanover's lung cancer and resulting thoracotomy pain syndrome. G.L. c. 32, § 6(3)(a) requires that the medical panel "review the pertinent facts in the case, and such other written and oral evidence as the applicant and the employer may present to be reviewed in making a determination of the member's medical condition. . ." The medical panel did not lack pertinent information in issuing its certification. It reviewed all information that was provided by the retirement board and "such other written and oral evidence as the applicant and the employer may present." It affirmed that it reviewed Ms. Hanover's job description and received and reviewed records provided. The medical panel explicitly indicated that it also reviewed medical records from Ms. Hanover's pain specialist, thoracic surgeon, and employer. It satisfied its duty to "review the pertinent facts in the case" as established in G.L. c. 32, § 6(3)(a).

In addressing the question of causation, the SBR was entitled to know the medical possibility of a relationship between the development of lung cancer and the exposure to mold. *Leduc v. Contributory Retirement Appeal Bd.*, 657 N.E.2d 755, 756 (Mass. 1995). Ms. Hanover argues that following *Noone v. Contributory Retirement Appeal Bd.*, 34 Mass. App. Ct. 756 (1993), the DALA decision was erroneous by relying on an erroneous medical panel opinion that made an unqualified negative opinion. In the instant case, the medical panel opinion on causation was not centered on risk factors as in *Noone*, nor was it an unqualified negative opinion. The medical panel's report indicates that it reviewed documents as provided to it, including medical records from Ms. Hanover's treating physicians and the Physician Statement by Dr. Jaklitsch. It also referenced an environmental study, which revealed visible mold growth and settled spores. The medical panel's report demonstrates that it considered the exposure to mold in Ms. Hanover's disability, but based on the records reviewed and its examination of Ms. Hanover, the medical panel did not find that her disability was such as might be the natural and proximate cause of the personal injury sustained or hazard undergone. The panel provided an explanation for its answer to the statutory question, stating "[e]ven 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.”¹⁶ There is no requirement that the medical panel repeat the words of the statutory standard. *Fairbairn v. Contributory Retirement Appeal Bd.*, 54 Mass. App. Ct. 353 (2002). The medical panel’s response indicated that it concluded there was no medical possibility based on the evidence in the record that the mold caused Ms. Hanover’s lung cancer. Its clear and qualified answer to the question of causation was appropriate. The medical panel did not make its decision based on risk factors, but relied on the facts present in the reports and records before it, Ms. Hanover’s own report, and its examination of her.

Although Ms. Hanover argues that the medical panel failed to perform tests to further evaluate her condition, 840 CMR § 10.10(3) only 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 panel is allowed, but not required, under 840 CMR § 10.10(3) to suggest noninvasive testing in order to render a decision. That none of Ms. Hanover’s treating sources recommended such tests should be performed further undermines her argument.

Additionally, Ms. Hanover sought to introduce a post-panel report from Dr. Lisa Nagy, who conducted various allergy and salivary tests for Ms. Hanover. Her report also included various articles and research experiments on the connection between mold and the diagnosis of lung cancer. The findings of Dr. Nagy did not rely on information which the medical panel had not already considered, and the report she submitted in July 2015 was subsequent to the medical panel examination.¹⁷ Therefore, the magistrate properly excluded this report. Ms. Hanover does not have the opportunity to retry the medical facts of the case unless the panel is shown to have applied an improper procedure. *Kelley v. Contributory Retirement Appeal Board*, 341 Mass. 611, 617 (1961). Here, the magistrate’s decision that the medical panel applied a proper standard of review when answering the question of causation is supported by the substantial evidence in the record. The medical panel properly provided the SBR with information on the medical possibility of a relationship between the development of lung cancer and the exposure to mold.

While we agree with the magistrate that Ms. Hanover failed to establish the medical panel applied an erroneous standard or lacked pertinent information in its certification or that it

¹⁶ Ex. 10.

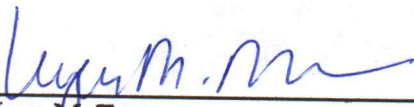
¹⁷ Ex. A.

failed to recommend noninvasive testing, we do so based on the objective evidence in the record. This decision does not diminish the work that Ms. Hanover has done through the years or her commitment to ensure that the responsibilities of her office has been fulfilled even after her cancer treatment, especially in light of the inferior infrastructure resulting in less than ideal work conditions.

Conclusion. The DALA decision is affirmed. Ms. Hanover is not entitled to accidental disability retirement benefits.

SO ORDERED.

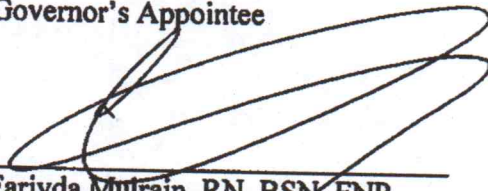
CONTRIBUTORY RETIREMENT APPEAL BOARD



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Chair
Attorney General's Appointee

Did not participate

Nicolle M. Allen, Esq.
Governor's Appointee



Fariyda Mulrain, RN, BSN, FNP
Commissioner of Public Health Appointee

Dated: July 29, 2021