COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. Division of Administrative Law Appeals

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 Boston, MA 02114

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**GREGORY HENDERSON**, Fax: (617) 626-7220

 *Petitioner* **www.mass.gov/dala**

 Docket No: CR-15-466

 *v.*

**BOSTON RETIREMENT SYSTEM,** Date: June 15, 2018

 *Respondent*

**Appearance for Petitioner**:

 Teresa Benoit, Esq.

 P.O. Box 478

 Northborough, MA 01532

**Appearance for Respondent**:

 Edward H. McKenna, Esq.

 66 N Street

 Boston, MA 02127

**Administrative Magistrate**:

Angela McConney Scheepers, Esq.

**SUMMARY**

 The Petitioner has failed to prove by a preponderance of the evidence that there is a causal relationship between his incapacity and a workplace injury. The Respondent’s decision to deny accidental disability retirement benefits is affirmed.

**DECISION**

Pursuant to G.L. c. 32, s. 16(4), the Petitioner, Gregory Henderson, appealed the July 22, 2015 decision of the Boston Retirement System (System) denying his application for accidental disability retirement benefits.

I held a hearing at the Division of Administrative Law Appeal (DALA) on November 16, 2016. The hearing was digitally recorded. I marked Mr. Henderson’s Pre-Hearing Memorandum “A” for identification. I marked the System’s Pre-Hearing Memorandum “B” for identification. I admitted one hundred and ninety exhibits (Exhibits 1 – 190) into evidence. Mr. Henderson testified on his own behalf.

Mr. Henderson submitted a Post-Hearing Brief on January 11, 2017. The System submitted a Post-Hearing Brief on February 15, 2017, whereupon the administrative record closed.

**FINDINGS OF FACT**

Based on the documents admitted into evidence and the testimony presented at the hearing, I make the following findings of fact:

1. The Petitioner, Gregory Henderson (DOB 5/5/1952), was hired by the City of Boston Water and Sewer Commission (BWSC) on or about April 24, 1990. (Exhibits 5 and 23.) Mr. Henderson worked as an Operations Service Repair Person I (OSRI). The job entailed the investigation, inspection, testing, maintenance and repair of water and sewer distribution and drainage, working with systems and equipment including pipe lines, gate valves, water hydrants and meters in water, the “Big Dig” construction project, gates, collections, hydrant, sewer, meter installation and machine shop. (Exhibit 8.)
2. According to the BWSC job description, the essential duties of the incumbent of the OSRI position are the following:
* Investigate complaints and reported problems to water and sewer infrastructure and make necessary repairs.
* Excavate job site. Operate pneumatic, hydraulic, electric, gas hand tools and equipment necessary to perform assigned duties.
* Complete required forms and reports.
* Responsible for the maintenance and security of all parts, materials and appropriate tools to perform assigned tasks.
* Reconstruct streets, sidewalks and other public/private ways as needed and regulate casting to grade.
* Perform a variety of maintenance tasks.
* Perform notices on buildings and notify occupants of impending or actual water terminations.
* Perform test on water and sewer services. Operate, inspect, repair and paint fire hydrants. Perform investigations and diagnostic test of water and sewer systems.
* Load and unload stock and equipment. Assist in the use, maintenance, preparation, handling and moving of a variety of materials, tools and equipment.
* Execute simple sketches and plans.
* May be required to testify on behalf on behalf of the commission regarding legal matters.
* Remove snow. May clear obstructed water sources.
* Read, install, replace, tag and seal meters and remote reading devices.
* Fuel, clean and perform minor repairs to vehicles.
* Perform a variety of field and record investigations.
* Install and repair water and sewer pipes and make necessary connections with full responsibility for such installations.
* Drill and tap water mains. Lay and maintain pipes of all types and dimensions for water and sewer lines.
* Thaw frozen pipes.

(Exhibit 8.)

1. Prior to and during his employment, Mr. Henderson was diagnosed and received care for a myriad of chronic non-work related medical ailments and conditions including poorly controlled insulin type 2 diabetes, severe diabetic neuropathy with diabetic neuropathic foot ulcers, osteomyelitis and insensate feet, severe peripheral neuropathy, plantar fibromatosis, high blood pressure, hypertension, hepatitis C, hypertension, alcohol abuse, prostate cancer, obesity, dysphagia, esophageal reflux, hyperkalemia, acute renal failure osteoarthritis, bursitis, arthralgia and meniscus tears in his left knee which produced bone splints. (Exhibits 9 and 51; Testimony.)
2. Mr. Henderson was prescribed various narcotics and pain medications including oxycodone and morphine for these non-work related conditions. He missed extended periods of time from work and was on numerous Family Medical Leaves of Absences (FMLA) and Personal Leaves of Absences (PLA) and was placed on light duty and desk duty due to these non-work related medical conditions and diseases. (Exhibits 9 and 51.)
3. From December 1, 2000 through November 27, 2001, Mr. Henderson was on intermittent Family Medical Leaves of Absence (FMLA) due to his chronic diabetes and high blood pressure. (Exhibits 9, 120-126.)
4. In 2004, Mr. Henderson received treatments for his chronic alcohol abuse. (Exhibit 66.)
5. On July 13, 2007, Mr. Henderson filed an Employee Incident Report (accident report) describing “constant rubbing by steel toe boots.” Mr. Henderson filed a workers compensation claim. (Exhibits 10 and 12.)
6. On July 17, 2007, a supervisor filed a follow-up Supervisory Accident Investigation Report stating, “This was not an ‘accident’ or ‘incident.’ Employee stated that his boots were causing foot pain. He went to doctor 7/13/07 (while on leave). Doctor recommended he not wear boots pending follow up appointment.” (Exhibit 11.)
7. From December 1, 2005 thru September 21, 2007, Mr. Henderson was on intermittent FMLA due to hypertension, diabetes and osteoarthritis in his left knee. (Exhibits 129-140.)
8. From September 21, 2007 thru August 16, 2010, Mr. Henderson was out of work and on FMLA and Personal Leave of Absence (PLA) due to diabetes, hypertension, prostate cancer and Fournier’s gangrene. (Exhibits 9, 87-95, 110-115, 141-154.)
9. In a letter dated April 30, 2009, the BWSC notified Mr. Henderson that it intended to file for involuntary retirement on his behalf. BWSC noted in the letter that Mr. Henderson had been out of work for nineteen months, and appeared unable to resume the essential duties of his position. (Exhibit 24.)
10. On March 22, 2010, Joel Goldberg, M.D., who had been treating Mr. Henderson for his prostate cancer, cleared him for a return to work. (Exhibits 62 and 63.)
11. After a July 28, 2010 evaluation, physical therapist Judy Hershberg noted that Mr. Henderson has suffered a catastrophic illness, but had sufficient abilities and tolerance to return to the essential duties of his position full-time. (Exhibits 73-78.)
12. On August 12, 2010, Dr. Christine Lui of Harvard Vanguard noted that Mr. Henderson was in stable health, and had no problems driving and operating heavy machinery. (Exhibit 96.)
13. On August 17, 2010, Mr. Henderson returned to work after being out for thirty-five months. (Testimony.)
14. On September 14, 2010, podiatrist Jane A. Brady examined and diagnosed Mr. Henderson with osteomyelitis, toe ulcer, diabetes and neuropathy. She noted that he had a right toe ulcer which he had been treating himself for six weeks. She recorded that at the minimum he would have to have the toe debrided for definitive cure of osteomyelitis, and referred him to podiatrist Philippe Basile for a second opinion. Dr. Brady explained that an amputation of the toe would prevent more destruction of tissue of the foot. Mr. Henderson would be out of work for approximately three weeks until the digit healed, returning to work at a desk job. If a desk job were not available, he would have to refrain from work until the right foot completely healed. (Exhibit 67.)
15. On September 17, 2010, the BWSC responded to Mr. Henderson’s request for reasonable accommodation of his medical condition. The BWSC scheduled a meeting for September 24, 2010 to discuss ADA compliance. (Exhibit 48.)
16. On September 20, 2010, Dr. Basile examined Mr. Henderson and advised him that his toe had to be operated on as soon as possible. Dr. Basile was hopeful that he could save a portion of the toe by removing the head of the proximal phalanx and whatever bone appears to be nonviable during the operation. Dr. Basile also advised Mr. Henderson that he would prophylactically fix the left fourth toe since he was developing a keratotic lesion[[1]](#footnote-1) there, a precursor to the same issue on the right. Dr. Basile changed both bandages, and found maceration on the toes on both feet. The patient was warned that although there were no signs of infection, he had to be more compliant. His sutures are removed and there is no gapping and otherwise healing well. He will continue to stay in the surgical shoe, change a gauze pad with Betadine once a day and return here in one week. (Exhibits 157 and 159.)
17. On September 30, 2010, Dr. Basile notified the BWSC that he had examined Mr. Henderson on September 17, 2010, and that and he would be absent from work for six weeks after an October 6, 2010 scheduled surgery. Dr. Basile gave a work-return date of November 8, 2010. (Exhibit 156.)
18. On October 10, 2010, Dr. Basile documented that Mr. Henderson had failed to show for that day’s scheduled medical appointment. (Exhibit 158.)
19. On October 22, 2010, Dr. Basile examined Mr. Henderson and noted that he had failed to change his bandages that morning. Both of the bandages are soaking wet, with some dirt on the bottoms. Dr. Basile changed the bandages, and found maceration on the toes of both feet. He advised Mr. Henderson that although there were no signs of infection, he had to be more compliant. Dr. Basile removed the sutures, found no gapping and that otherwise the foot was healing well. Mr. Henderson was advised to continue wearing the surgical shoe, and to change the gauze pad on the wound with Betadine once a day. (Exhibit 159.)
20. On October 29, 2010, Dr. Basile examined Henderson and noted that he was postop for bilateral toe surgery, but was in no pain. In spite of Mr. Henderson’s failure to be compliant with caring for his diabetes, both feet showed well-healed incisions. Dr. Basile noted that with this continued rate of healing, Mr. Henderson could advance to a closed shoe and return to work the following week. (Exhibit 161.)
21. On November 1, 2010, Dr. Basile diagnosed Henderson with healed foot surgery and cleared him to return to work on full duty without any restrictions. (Exhibit 160.)
22. On November 5, 2010, Brian Morris, M.D. of All One Health cleared Mr. Henderson to return to work and noted the physical findings and biological tests were within normal limits and he is capable of assuming activities commensurate with job description. (Exhibit 111.)
23. On November 15, 2010, Dr. Basile examined Mr. Henderson due to the development of new foot ulcers. He noted that Mr. Henderson suffered from diabetes and neuropathy, has to wear work boots and had developed new ulcers on both feet. He further noted that Mr. Henderson had significant swelling, and did not know when the neuropathy caused irritation and skin breakdown. In the absence of infection, Dr. Basile recommended wound care with Betadine dressing changes to the affected areas. Mr. Henderson had to keep the affected areas completely dry and protected with surgical shoes, while staying out of work. Mr. Henderson was warned that due to his severe neuropathy, multiple wounds and surgery on the osteomyelitis on his right fourth toe, he was at high risk for further ulcerations and further ablative type surgeries. (Exhibit 162.)
24. In a letter dated November 15, 2010, Dr. Basile requested that BWSC excuse Mr. Henderson from work until December 13, 2010 due to the development of new foot ulcers. (Exhibit 163.)
25. In a letter dated November 19, 2010, the BWSC Chief Operations Officer (COO) notified Mr. Henderson that a termination hearing was scheduled for November 24, 2010. The COO advised that proposed termination was because Mr. Henderson had only worked twenty-four days in the last thirty-eight months:

Following a continuous absence from work which began on September 21, 2007, you were medically cleared to perform the essential duties as an OSRI and you returned to work on August 17, 2010. After working a total of I 9 days, you notified the Commission that you were unable to return to work due to medical reasons and submitted a note from your physician which stated that you required another extended leave of absence and that you would be able to return to work on November 8, 2010.

Although you were not eligible for FMLA leave and did not have sick leave to cover the additional leave which you were requesting in correspondence dated October 4, 2010, you were advised that the Commission would grant you one final continuous personal leave of absence from September 14 thru November 5, 20 I0. You were also informed if you were unable to return to work on November 8, 2010 a hearing would be held before the Executive Director.

Following the Commission’s receipt of medical documentation which stated you were cleared to return to your position as an OSRI without restriction, you resumed your duties on Monday November 8, 2010 thru Friday November 13, 2010. On November 16, 2010, you submitted a note from your treating physician which stated you must remain out of work due to your medical condition until December 13, 2010.

Coming to work is an essential function of your position as an OSRI. In the past 38 months you have reported for work on only 24 days. Therefore, please be advised that a termination hearing will be held on November 24, 2010.

(Exhibit 50.)

1. On November 22, 2010, Dr. Basile noted Mr. Henderson’s continued diabetic neuropathy, foot ulcers and partial amputation of a toe. Because Mr. Henderson could no longer wear boots or stand at work, the podiatrist medically excused him from work until December 22, 2010. (Exhibit 164.)
2. On November 29, 2010, Dr. Basile noted:

Diabetic with multiple problems with neuropathy and insensate feet that have been a precursor to diabetic foot ulcers. He has no new complaints today other than the ulcerations.

The left fourth toe shows the full thickness ulceration and granulation tissue, no purulence. The color to the tip of the toe is normal. There is no cellulitis. The dorsum of the first toe bilateral shows a small ulceration without active drainage. The right fourth toe is fully healed.

Diabetic neuropathic ulcerations. Sterile prep was done left fourth toe and debridement is done today. There are no signs of underlying abscess. There are no deep tissue exposed other than the subq and the granulation tissue. Betadine dressing is applied. He will stay on antibiotics. He will do dressing changes daily, stay off the foot. He is staying out of work and he is doing dressing changes.

(Exhibit 165.)

1. On November 24, 2010, Mr. Henderson appeared at the BWSC termination hearing. In a Termination Notice dated November 30, 2010, the BWSC Executive Director notified Mr. Henderson:

After considering the information presented at the hearing held before me on 11/24/10, it is my decision to terminate your employment effective immediately.

This action is being taken due to your stated and documented incapacity to perform the essential duties of your position which includes coming to work now and in the foreseeable future. In the past thirty-eight months you have reported to work on only twenty-four days.

Following a continuous thirty-five month absence from work which began on September 21, 2007, you were medically cleared to return to work on August 17, 2010. After working a total of nineteen days, you notified the Commission that you were unable to report for work due to medical reasons and requested another extended leave of absence.

Although under no legal or contractual obligation to do so, in a correspondence dated 10/4/10, you were notified that the Commission granted you one final continuous personal leave of absence from 9/14/10 thru 11/5/10.

You were medically cleared to return to work on Monday November 8, 2010.

You then worked for a total of five days before requesting yet another extended leave of absence for medical reasons.

(Exhibit 51.)

*Independent Medical Examinations*

1. On June 8, 2011, Mr. Henderson underwent an Independent Medical Examination (IME) with Dr. Kenneth M. Leavitt. Dr. Leavitt issued a report on June 15, 2011 that noted:

I am in possession of your questions and will do my best to answer them based upon my exam and the limited notes provided. *It should be noted that I asked the patient several times to return after his 6/8/11 visit with his work shoes so that I could make this evaluation more complete but the patient refused.*

Let me also state for the record that the notes in my possession are spotty and do not appear to cover all of the treatment the patient received beginning the time period of 8/12/10 when he was cleared to return to work by Dr. Liu to the present. There are no operative notes for procedures performed in the fall of 2010 nor are there any treatment records leading up to his visit with me. When he presented to me on the 8th, he had a dirty bandage on his right forefoot which when removed demonstrated an extremely swollen draining right great toe which apparently had been operated on sometime this year within the past five months, 2011. I’ve made repeated attempts to acquire all treatment notes for this patient but have been unable to get them. Regardless, I believe that I can provide you with answers to your questions to the best of my ability from the notes that I have received.

Mr. Henderson is a type 2 diabetic male but is also a poor historian. According to his testimony and the medical records reviewed, he has been a type 2 insulin dependent diabetic for many years. He has a history of hypertension.

Regarding ongoing treatment for the right foot, since I am in possession of no note on this patient regarding his most recent right foot care. I was able to discern somewhat that apparently he had an attempt at fusion of the interphalangeal joint of the right great toe. He went on to develop an infection and removal of the hardware.

Multiplex-rays were taken bilateral feet and ankles this date. Patient’s bone stock is consistent with his age. Medical calcinosis noted throughout multiple arteries throughout the feet from the rear foot to the forefoot consistent with a very long history of type 2 insulin dependent diabetes.

On the left foot, there is evidence of removal of the head of the proximal phalanx of the fourth toe consistent with a surgical procedure performed sometime last fall.

Again, I am not in possession of the operative report or notes indicating that surgery was performed on an exact date. There is an allusion to a surgical date of I 0/6/10 on a handwritten piece of paper by Dr. Basile but again there is no operative note.

Regarding the right great toe, there is an abundant soft tissue swelling noted involving the entire right great toe. There is remarkable and rather dramatic dissolution of the distal phalanx of the right great toe and evidence of an osteotomy having been performed at the base of the distal phalanx remaining in the head of the proximal phalanx remaining. The dissolution of the remaining distal phalanx where there is also a ghost track down to the center and into the remaining proximal phalanx consistent with ongoing fulminant osteomyelitis.

I would like to reference back to a note dictated by Dr. Brady on 9/14/10 where it says that ultimately when his foot is healed and he is able to return to work he should go back to custom molded shoes and inserts.

(Exhibit 40.) (Emphasis added.)

1. In the June 15, 2011 IME report, Dr. Leavitt summarized in response to BWSC questions that Mr. Henderson’s great toe showed signs of recent surgical intervention and was unable to engage in any work activities involving the use of his right foot. He noted that Mr. Henderson showed signs of a general inability to feel his feet, particularly his skin and associated deeper soft tissue structures. Dr. Leavitt noted that while he had not seen Mr. Henderson’s work boots, he could state with a reasonable level of medical certainty that profound advanced diabetic neuropathy in the presence of ill-fitting foot gear could have caused the foot ulcerations as described and treated in Mr. Henderson’s medical records made available to him. Dr. Leavitt concluded that the pre-existing diabetic neuropathy was a major contributing factor to the diabetic foot ulcers requiring treatment, as a person without diabetic neuropathy would not have been able to wear ill-fitting shoes for a length of time sufficient to have caused the diabetic ulcers as documented in medical records he reviewed. (Exhibit 40.)
2. On March 20, 2012, Dr. Leavitt performed a second IME and submitted an updated April 7, 2011 IME report. In the second IME report, Dr. Levitt noted that Mr. Henderson was a poor historian. He lacked vibratory sense from his ankles to forefoot and was absent Semmes Weinstein fiber sensation consistent with severe longstanding diabetic neuropathy. An examination showed evidence of near complete amputation of the right great toe and a new ulceration in the fifth toe. Updated x-rays taken on March 20, 2012 compared to those taken on June 6, 2011 showed removal of nearly completely all of the right great toe. (Exhibit 39.)
3. In response to BWSC questions, Dr. Leavitt noted that Mr. Henderson had successfully recovered from the amputation of his right great toe, had a new ulceration on the fifth toe of right foot, but had returned to relatively normal shoe gear and was ambulatory. He opined that Mr. Henderson could have full work capacity if he could be accommodated in some form of work that would not require the use of shoe gear that would negatively impact his feet such as steel-toed boots. Dr. Leavitt stated that according to the “spotty” medical records provided to him, he could conclude that Mr. Henderson had diabetic and lower extremity neuropathy all related to his diabetes at the time of the IME exam on September 14, 2010, and that the preexisting diabetic neuropathy in combination with steel-toed shoes did cause the need for the treatment of foot ulcers. He concluded again that the major, not necessarily a predominant contributing cause of the disability and need for treatment is the preexisting diabetic neuropathy which renders the patient insensate and unable to wear restrictive shoe gear which would cause skin and soft tissue breakdown. (Exhibit 39.)
4. On November 22, 2014, Dr. Zimon saw Mr. Henderson for an IME. He reviewed the medical and employment records that formed the basis of Mr. Henderson’s accidental disability claim. Dr. Zimon diagnosed Mr. Henderson with prostatic cancer, diabetes mellitus, poorly controlled insulin dependence and S/P multiple toe infections with partial amputation(s). Dr. Zimon noted that Mr. Henderson was a sixty-four year old laborer with poorly controlled insulin dependent (Type I) due to compliance issues, had developed severe peripheral neuropathy with diminished sensation in his feet, and spent a good deal of his work in steel-toe protected boots. (Exhibit 37.)
5. Dr. Zimon further noted that when Mr. Henderson injured his back and left knee in September 2007, he was seen at Baptist Hospital. He received physical therapy, was out of work for several months, but was cleared to return to work on August 17, 2010. After working a total of ten days, he told his supervisors that due to a medical condition he was required to take a medical leave of absence and would be able to return to work on or about November 8, 2010. A final continuous Personal Medical Leave covered him until Friday, November 5, 2010, when he was informed by letter that he had to return on November 8, 2010. Mr. Henderson returned to work on November 8, 2010 and worked for only five days. On Monday, November 16, 2010, he presented a note from his podiatrist excusing him from work due to chronic foot problems. Mr. Henderson has not returned to work. Dr. Zimon noted that Mr. Henderson was presently claiming he cannot return to his original position due to his feet, which had undergone a number of surgical procedures (including partial amputation of the fourth toe on his right foot), and this foot problem was due to the ill-fitting work-issued boots. He also claimed loss of balance due to his foot problems. (Exhibit 37.)
6. Dr. Zimon reviewed the three questions presented to the medical panel. Dr. Zimon responded in the affirmative to questions one and two in regard to incapacity and permanence; but answered in the negative to question three in regard to causation. He wrote in regard to question three:

The applicant claims that he is no longer able to carry out the essential functions of his job since he has lost the use of or has problems with his toes and cannot “balance” properly. He also claims the boots were at fault causing his disabling foot condition!! The Review of the Records Confirms that the applicant was not compliant with medical advice and often cared for his own feet. Furthermore difficulty with balance is a common symptom associated with Diabetic Neuropathy. It is my opinion that his inability to return to his job is due to the natural progression of his chronic illness, insulin dependent diabetes mellitus.

(Exhibit 37.)

*Workers Compensation Claim*

1. On March 29, 2012, Henderson entered into a Lump Sum Settlement for his workers compensation claim, with the injuries reported as having occurred on or about September 14, 2010. (Exhibits 27 and 29.)
2. The settlement stated:

On September 14, 2010, the Employee alleges that while working in the sewers, he developed ulcers on his feet due to the physical activity in wet, steel-toed boots. ...

On October 4, 2010, the Employee had his right fourth toe amputated. The surgical site of the toe amputation healed and the Employee returned to work on November 8, 2010. On November 15, 2010, he developed new ulcers which prevented him from working. Presently, the Employee has been fitted for orthopedic shoes and has completed treatment for his ulcers resulting from wearing steel-toed boots from September 2010 and November 2010.

... The Employee’s claim is settling ... with liability for any medical treatment that is deemed necessary, reasonable and related to the ulcers that developed in September and November of 2010 as a result of wearing steel-toed boots while in the employment of Boston Water & Sewer Commission.

The settlement terms did not include medical coverage for Mr. Henderson’s pre-existing diabetic neuropathy. (Exhibit 27.)

*Mr. Henderson’s Application for Disability Retirement*

1. On July 9, 2014, Mr. Henderson filed his Application for Disability Retirement. Mr. Henderson failed to provide a medical reason or a personal injury for the filing of the Application. He also failed to provide the date when he became unable to perform the essential duties of his position. He stated that the medical reason undergirding his claim was the fact that workers compensation had approved his claim. (Exhibit 3.)
2. In the application, Mr. Henderson alleged that BWSC provided the required uniform to incumbents in his position, including steel-toe boots. However, BWSC refused to provide him with properly fitting boots, even after numerous requests and awareness of his diabetic condition. (Exhibit 3.)
3. In the application, Mr. Henderson narrated that it was his job “to assist and help in cleaning and helping operation of sewer truck, open manholes, assist in procuring equipment, explaining problems to customers, and helping maintain safety equipment on truck, lifting equipment, etc. Must have protective foot boots!” He stated that just prior to his injuries, he was working in boots that were too small, they cut into his feet and toes, and sewage and e. coli bacteria leaked into the boots and caused infection. He further narrated that he performed these duties every day that he was on the truck, in addition to overtime. (Exhibit 3.)
4. As a result of his disability, Mr. Henderson asserted that he could not stand for long periods of time, was unable wear steel toe boots, and could not lift heavy weights because of toe amputations, stability and balance issues. (Exhibit 3.)
5. In response to the application question in regard to the date of injury, Mr. Henderson wrote, “When steel toe boots (which were never sized or replaced) and infection set in and toes got amputated.” (Exhibit 3.)
6. Mr. Henderson described proscribed daily activities due to the “amputation of toes due to boot injuries,” and his inability to “play sports at all, physical exercise is almost nonexistent.” (Exhibit 3.)
7. Dr. Basile submitted a Treating Physician’s Statement Pertaining to a Member’s Application for Disability Retirement on July 3, 2014. Dr. Basile wrote that Mr. Henderson was last able to perform the essential duties of his job in October 2010. (Exhibit 4.)
8. Dr. Basile diagnosed Mr. Henderson with diabetes, neuropathy, foot ulcers, osteomyelitis, partial toe amputation and full toe amputation. Dr. Basile further opined that Mr. Henderson’s condition was likely to regress; his maximum medical improvement (MMI) had not yet been reached; he suffered from irreversible diabetic neuropathy, was already partial to toe amputation and at extremely high risk for loss of a foot or a leg. (Exhibit 4.)
9. Dr. Basile opined that Mr. Henderson’s incapacity was causally related to his severe neuropathy - the lack of protective sensation in the feet caused foot ulcers when Mr. Henderson wore the work issued steel-toe boots. (Exhibit 4.)
10. On October 16, 2014, the BWSC filed the Employer’s Statement Pertaining to a Member’s Application for Disability Retirement (Employer’s Statement). The Employer’s Statement noted that there was insufficient evidence to determine whether Mr. Henderson could perform the essential duties of his job if the BWSC reasonably accommodated him, and that the BWSC had granted him a thirty-five month leave of absence in order to accommodate his medical condition. (Exhibit 5.)
11. On December 11, 2014, PERAC convened a neurological medical panel for accidental disability with Doctors Michele L. Masi, Mark Friedman, and Walter Panis. G.L. c. 32, §§ 6(3) and 7(1), The panel reviewed the following records: the OSRI job description; the DIA report; the 2008 records of prostate cancer treatment; the September 4, 2010, records of Dr. Brady, Harvard Vanguard; March , June and July 2011 records from Dr. Basile and the June 15, 2011 IME from Dr. Leavitt. (Exhibit 6.)
12. The panel doctors examined Mr. Henderson on January 13, 2015, and issued a unanimous certification in the affirmative to disability, permanence and work-related causation. (Exhibit 6.)
13. Dr. Masi issued the findings on behalf of the panel. He found that Mr. Henderson was a poor historian with regard to dates. At the January 13, 2015 examination, Mr. Henderson wore sneakers with a lift due to a recent right total hip replacement. The doctors found that he had history of diabetes of over ten years, numbness in his feet, vibratory sense and a cold touch sensation in the right foot. (Exhibit 6.)
14. Mr. Henderson informed the panel that he last worked in 2010 at Boston Water and Sewer when he was “asked to leave.” He stated that his job duties involved walking in sewage, climbing ladders, being on his feet all day long, and lifting manhole covers.” Mr. Henderson also reported that he has been using steel toe boots at work for at least three years. He said that his boots were too small, and during work would become wet to the point of his socks being soaked through. Mr. Henderson narrated that as a result of wearing these boots, he developed ulcers in his right toes, leading to amputation of one and a half toes. (Exhibit 6.)
15. The panel found that Mr. Henderson’s incapacities were due to his diabetic neuropathy, a history of foot ulcer and toe amputations which led to gait instability, difficulty walking/standing for prolonged periods, and susceptibility to further skin breakdown, ulcers and amputations due to the requirements of his occupation. Dr. Masi wrote the wearing of improperly fitted shoes by an individual with Mr. Henderson’s underlying diabetic neuropathy could lead to foot ulcers and amputation. (Exhibit 6.)

*Hearing before the Board*

1. After a March 26, 2015 hearing, independent Hearing Officer, James M. Mulhern, Esq., issued a Recommended Decision. Mr. Mulhern found that the medical panel had employed an erroneous standard, its conclusion was not binding, and therefore the Board could substitute its judgment for that of the panel. *Malden Retirement Bd. v. Contributory Retirement App. Bd*., 1 Mass. App. Ct. 420 (1973). (Exhibit 29.)
2. After receiving the parties’ comments, on July 1, 2015, Mr. Mulhern issued a Supplemental Decision to the Board and the parties confirming his May 27, 2015 Recommended Decision. (Exhibits 29 and 33.)
3. At the July 22, 2015 Board meeting, the Executive Director, the Disability Specialist Supervisor, the General Counsel and the Workers Compensation Specialist reviewed Mr. Henderson’s accidental disability claim. After the review, the System, voted to deny Mr. Henderson’s application. (Exhibit 1.)
4. In a notice dated August 3, 2015, the System informed Mr. Henderson that it had denied his application based on the Hearing Officer’s Recommended Decision. (Exhibit 1.)
5. On August 10, 2015, Mr. Henderson filed a timely appeal. (Exhibit 2.)

**CONCLUSION AND ORDER**

 The decision of the Boston Retirement System to deny Mr. Henderson’s accidental disability retirement application is affirmed. Mr. Henderson was unable to provide a specific date for the onset of his injuries, and has failed to prove by a preponderance of the evidence that there is a causal nexus between his disability and his employment.

 G.L. c. 32, § 7 governs accidental disability retirement, which is granted to a member when he is unable to perform his essential job duties, when such inability is likely to remain permanent until retirement age, and when the disability is by reason of an injury or series of injuries or of a hazard undergone as a result of, and while in the performance of, his duties. G.L. c. 32, s. 7(1).[[2]](#footnote-2) PERAC has promulgated regulations to give retirement boards further guidance in processing applications for disability retirement. *See* 840 CMR 10.00. 840 C.M.R §10.09(2) provides: “At any stage of a proceeding on an ordinary or accidental disability retirement application the retirement board may terminate the proceeding and deny the application if it determines that the member cannot be retired as a matter of law.” “If the retirement board decides to deny an application under 840 CMR 10.09, notice of the decision, basis for the board’s decision, and right to appeal shall be sent to all parties ... .” 840 C.M.R 10.09(3).

 According to section 7, in order for a member to establish that a disability “arose out of” his employment, he must establish that he was disabled by “by reason of a personal injury sustained or a hazard undergone” while he was performing his duties. Under this requirement, the member must establish that the job-related injury or hazard was the “natural and proximate cause” of the disability. *Campbell v.* *Contributory Retirement Appeal Bd*., 17 Mass. App. Ct. 1018, *review denied* 391 Mass. 1105 (1984); *Blanchette v.* *Contributory Retirement Appeal Bd*., 20 Mass. App. Ct. 479, 485 (1985); *Boston Retirement Bd. v.* *Contributory Retirement Appeal Bd*., 340 Mass. 109, 110-11 (1959). The applicant bears the burden of proving each element of an accidental disability claim, and must do so by a preponderance of the evidence. *Lisbon v. Contributory Retirement Appeal Bd*., 41 Mass. App. Ct. 246, 255 (1996). This is true as to the issue of disability and, for section 7 disability cases, the issue of the causal nexus between the disability and a job-related personal injury. *See Daley v. Contributory Retirement Appeal Bd.*, 60 Mass. App. Ct. 1110 (2004); *Wakefield Contributory Retirement Bd. v. Contributory Retirement Appeal Bd.*, 352 Mass. 499, 502 (1967); *Hough v. Contributory Retirement Appeal Bd.,* 309 Mass. 534, 540 (1941).

 The Supreme Judicial Court has noted that in order for an event of employment to be more than a “contributing cause,” it must be found to be “a significant contributing cause to [the] employee’s disability.” *Ann Marie Robinson’s Case*, 416 Mass. 454, 460 (1993); *Blanchette v.* *Contributory Retirement Appeal Bd*., 20 Mass. App. Ct. at 485 (1985); *Campbell v.* *Contributory Retirement Appeal Bd*., 17 Mass. App. Ct. 1018, *review denied* 391 Mass. 1105 (1984). In *Campbell*, the Appeals Court noted that “[w]hen work is merely a contributing cause of the injury the ‘natural and proximate result’ test for causation necessary to the recovery of accidental disability retirement benefits under G.L. c. 32, §7(1), has not been satisfied.” *Campbell v.* *Contributory Retirement Appeal Bd*., 17 Mass. App. Ct. at 1018. S*ee also Burke v.* *Contributory Retirement Appeal Bd.*,34 Mass. App. Ct. at 1018 (1993).

 The medical panel certificate is not conclusive of the ultimate fact of causation. *Noone v. Contributory Appeal Bd.*, 20 Mass. App. Ct. 634, 641 (1985); *Blanchette*, 20 Mass. App. Ct. at 485 (1985); *Wakefield Contributory Retirement Bd. v. Contributory Retirement Appeal Bd.*, 352 Mass. at 502 (1967). It is a mere statement of “medical possibility.” *Moore* v. *Contributory Retirement Appeal Bd.,* 34 Mass. App. Ct. 756, 762 (1993). “The final determination ... whether causation was proved [is] reserved to [CRAB], based on the facts found and all the underlying evidence, including both the medical and non-medical facts.” *Blanchette, see also Kelley v. Contributory Retirement Appeals Bd.,* 341 Mass. 611, 616 (1961).

 In this case, the medical panel unanimously opined that Mr. Henderson’s incapacity was such as might be the natural and proximate result of the personal injury sustained; but this affirmative certificate not conclusive as the ultimate fact of causation. *See* *Blanchette.* The question remains – was there is a causal relationship between Mr. Henderson’s incapacity and a work-related incident?

 The System does not dispute that Mr. Henderson is permanently disabled from performing the essential duties of his job as an OSRI person. He suffered from poorly controlled insulin dependent diabetes due to noncompliance, progressive neuropathy of his feet, and had toe amputations and other medical procedures on his feet.

The preponderance of the evidence shows that performing the essential duties of the OSRI positon did not cause the injuries to Mr. Henderson’s feet. Mr. Henderson suffered from the progressive symptoms of diabetes, and failed to mitigate the circumstances. The record is replete in showing that Mr. Henderson inhibited his own healing by failing to care for his diabetic condition generally, and by failing to care for his insensate feet. Physicians noted that Mr. Henderson’s diabetes was poorly controlled due to noncompliance with periodical care procedures. Physicians noted on more than one occasion that he appeared at appointments with bandages that had not been changed. Sometimes he presented himself at medical appointments with dirt on his bandages.

Mr. Henderson testified that he returned to work in September 2010 after an absence of thirty-five months, wearing tight boots that had been exposed to sewage. According to Mr. Henderson, although the boots hurt his feet and he believed that they were the source of the decline of his foot health, he continued to wear them. Mr. Henderson testified that new boots ranged in price from $100 to $200, but he declined to purchase them on his own because he believed it was BWSC’s responsibility to supply him with shoes. A party has the duty to mitigate his damages. It is not reasonable that a member would expose himself to pain, infection, ulcers and, ultimately amputation, if the situation could have been remedied by the-not-too onerous purchase of new boots. There is no evidence, moreover, that Mr. Henderson requested that BWSC accommodate him by purchasing his new boots or defraying their expense.

I find that Mr. Henderson’s pre-existing diabetic neuropathy was a major contributing factor to his diabetic foot ulcers, as a person without diabetic neuropathy would not have able to wear ill-fitting shoes for a length of time sufficient to have caused the diabetic ulcers.

Following the long line of cases that have consistently and strictly construed the requirements of the accidental disability retirement statute, I conclude that Mr. Henderson’s disability was not owing to “a personal injury sustained or a hazard undergone . . . while in the performance of [his] duties.” *See* *Damiano v. Contributory Retirement Appeal Bd*., 72 Mass. App. Ct. 259 (2008), quoting *Namvar v. Contributory Retirement Appeal Bd*., [422 Mass. 1004](http://sll.gvpi.net/document.php?field=jd&value=sjcapp:422_mass._1004), 1005 (1996). Accordingly, the Boston Retirement System’s denial of Gregory Henderson’s application for accidental disability retirement is affirmed.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

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Angela McConney Scheepers

Administrative Magistrate

DATED:

1. [↑](#footnote-ref-1)
2. G.L. c. 32, § 7 provides in pertinent part:

(1) Conditions for Allowance. Any member in service … who is unable to perform the essential duties of his job and that such inability is likely to be permanent before attaining the maximum age for his group by reason of a personal injury sustained or a hazard undergone as a result of, and while in the performance of, his duties at some definite place and at some definite time on or after the date of his becoming a member … [↑](#footnote-ref-2)