COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. Division of Administrative Law Appeals

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**Donna Henry,** Docket No. CR-14-530

 Petitioner

 v.

**State Board of Retirement,**

Respondent

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**Appearance for Petitioner:**

**Boaz N. Levin, Esq.**

KECHES LAW GROUP, P.C.

122 Dean Street

Taunton, MA 027

**Appearance for Respondent**

**Melinda E. Troy, Esq.**

State Board of Retirement

One Winter Street, 8th Floor

Boston, MA 02108

**Administrative Magistrate:**

Bonney Cashin

**SUMMARY OF DECISION**

Medical panel did not lack pertinent facts or apply an erroneous standard when it determined that petitioner was not incapable of performing her job duties of Support Staff, Cambridge District Court for the Middlesex County District Attorney’s Office because the medical panel had access to petitioner’s relevant medical records, her job description, and panel members were able to examine her. Following receipt of a request for clarification by the State Board of Retirement, the medical panel reviewed the correct job description and an operative report of petitioner’s surgery, considered the additional information, and relied on its initial opinion.

**DECISION**

INTRODUCTION

Donna Henry appeals the September 25, 2014 decision of the State Board of Retirement to deny her accidental disability retirement application regarding an accident that occurred on May 23, 2011. She was evaluated by an impartial panel of doctors who determined that her injury did not impede her from doing the essential duties of her position. Ms. Henry asserts that the panel erred in its evaluation because it initially was provided an incorrect job description and lacked an operative report from her surgery. The State Board of Retirement submitted the accurate job description and operative report to the medical panel with a request for clarification, asking it to confirm its initial findings – which the panel did.

On February 2, 2016, I held a hearing and digitally recorded it. At issue was whether or not Ms. Henry was entitled to a new evaluation with a different medical panel. I admitted 11 exhibits. Ms. Henry was the only witness.

FINDINGS OF FACT

Based on the evidence in the record, I make the following findings of fact:

1. Ms. Henry was born in 1957. (Exh. 6).
2. Ms. Henry worked for the Middlesex County District Attorney’s Office from November 12, 1996 until sometime in 2013 under the job title of Support Staff, Cambridge District Court. (Exh. 6; Henry Test.).
3. Her official job duties included: data entry, document scanning and duplication, case preparation, file management, and general office and administrative support. (Exh. 9).
4. On May 23, 2011, while organizing files in a file cabinet, Ms. Henry “pulled something” or “heard something tear” in her right arm. Her injury was described as a potential strain; the severity of the injury was originally noted as “small.” (Exh. 6; Henry Test.).
5. On June 9, 2011, she was examined by Joel A. Saperstein, M.D., an orthopedist, who diagnosed her with tendinitis of her right hip and shoulder with an early frozen shoulder syndrome with restraint and impingement; he gave her a steroid injection and recommended physical therapy. (Exh. 11).
6. On July 12, 2011, she presented with continuing pain that could have been sciatica. (Exh. 11).
7. Effective September 1, 2011, Ms. Henry was placed on leave from her position at the district Attorney’s Office. (Exhs. 5, 6, 11).
8. On September 7, 2011, Dr. Saperstein reported that Ms. Henry had limited motion of the right shoulder with more visceral pain; his treatment was another steroid injection with physical therapy and an MRI recommendation. (Exhs. 6, 11).
9. On September 21, 2011, Ms. Henry told Dr. Saperstein that the limited motion and discomfort in her shoulder had hindered her job performance; he prescribed more physical therapy and anti-inflammatory drugs. He recommended an MRI to rule out the need for surgery. (Exh. 11).
10. On September 23, 2011, Ms. Henry began receiving worker’s compensation. (Exhs. 5, 11).
11. On October 12, 2011, following an MRI on October 5, 2011, Dr. Saperstein revised his diagnosis from tendinitis to an intrasubstance tear of the rotator cuff. Dr. Saperstein provided a steroid injection and told Ms. Henry that if she didn’t improve, she would be evaluated for surgery. (Exh. 11).
12. On November 2, 2011, Dr. Saperstein recommended Ms. Henry be screened for surgery. (Exh. 11).
13. On November 29, 2011, Ms. Henry saw Christian Andersen, M.D., an orthopedist, who diagnosed a “large partial-thickness tear of the supraspinatus” and “a partial split tear off of the superior labrum,” the latter of which did not appear on the MRI, but was consistent with his clinical findings. (Exh. 11).
14. On January 12, 2012, Dr. Andersen noted surgery would be delayed until Ms. Henry’s diabetes was under control. He injected Ms. Henry’s shoulder with cortisone, which relieved her symptoms for about five weeks. (Exh. 11).
15. On March 5, 2012, Kenneth Polivy, M.D. saw Ms. Henry for an independent medical evaluation associated with her worker’s compensation claim. While her shoulder had not fully improved, her range of motion was 80-90 degrees, and he determined she could return to work in a sedentary position with limiting conditions (i.e., using a headset to answer the phone). Surgery may not resolve her pain, and, given her uncontrolled diabetes, she was not then a candidate for it. (Exh. 11).
16. On March 16, 2012, Ms. Henry was issued a “return to work” notice from Human Resources with the offer of reverting to a “light duty” variation with no lifting; she would need to return by March 26, 2012. (Exh. 5).
17. On March 28, 2012, Human Resources notified Ms. Henry’s employer that her worker’s compensation would be terminated on April 6, 2012 because the medical information was insufficient to support a finding of disability, Ms. Henry’s disability was not related to her work injury, the independent medical evaluation found her able to do light duty work, which was available to her. [[1]](#footnote-1) (Exh. 6).
18. Ms. Henry saw a psychologist from April 11, 2012 through September 28, 2012. She was treated for depression resulting from her work injury and lack of mobility and for her difficulty completing tasks of daily living. (Exh. 11).
19. On June 12, 2012, Dr. Polivy reevaluated her and diagnosed her with adhesive capsulitis in the right shoulder with rotator cuff tendinitis; she was deemed a candidate for surgery. Her work injury was the major cause of her need for ongoing treatment. She was able to do sedentary work. (Exh. 11).
20. At a hearing on August 29, 2012, Ms. Henry prevailed at her worker’s compensation hearing and was awarded benefits. (Exh. 11).
21. On November 30, 2012, Ms. Henry underwent rotator cuff repair surgery. (Exh. 11).
22. Following surgery, Ms. Henry followed up with Dr. Andersen and attended physical therapy. Her pain decreased from constant to dull, and her range of motion increased. (Exh. 11).
23. By April 13, 2013, Dr. Anderson reported “remarkably improved range of motion” with discomfort at the extremes and modest weakness with some movements, as expected. (Exh. 11).
24. On April 22, 2013, Ms. Henry’s physical therapist reported her improved range of motion and moderate functional restrictions; she recommended continued skilled physical therapy to maximize functional strength for Ms. Henry’s return to work duties. (Exh. 11).
25. On March 14, 2013, Hillel Skoff, M.D., an orthopedist and hand, wrist, elbow and shoulder specialist conducted an impartial medical examination to evaluate Ms. Henry. He found that her condition was causally related to her injury at work and that she had some work capacity but with the limitations of no lifting and no carrying with the upper right limb. (Exh. 11).
26. On July 15, 2013, Ms. Henry applied for accidental disability retirement benefits with the State Board of Retirement. (Exh. 3).
27. On March 7, 2014, a regional medical panel comprised of two orthopedic surgeons, Glen Ross, M.D. and Louis A. Bley, M.D., and a doctor of pain management, Eduard A. Vaynberg, M.D., examined Ms. Henry. (Exh. 7).
28. The medical panel reviewed a Support Staff job description provided to it, which was modified for light duty. It essentially described a receptionist’s position and did not include responsibility for file management. (Exhs. 5, 8).
29. The medical panel examined Ms. Henry, asked her questions, and reviewed her medical records, which did not include the operative report of Ms. Henry’s November 2012 surgery. (Exhs. 8, 9, 10; Henry Test.).
30. Ms. Henry told the medical panel that her job involved frequent lifting and carrying of several files that varied in size. (Exh. 8; Henry Test.).
31. The medical panel estimated that the files weighed about five to ten pounds. (Exh. 8).
32. Ms. Henry estimated the files on average weighed ten to fifteen pounds. (Henry Test.).
33. The medical panel noted that lifting and carrying five to ten pounds of files should require only use of the elbow and not the shoulder, nor should it require overhead use. (Exh. 8).
34. Despite not having the operative report, the medical panel was able to determine from other records and from questioning Ms. Henry that the surgery helped her. (Exh. 8; Henry Test.).
35. On March 28, 2014, the medical panel transmitted its report to the Public Employee Retirement Administration Commission (PERAC) who relayed its findings to the State Board of Retirement. (Exh. 8).
36. On April 18, 2014, the Board sought clarification from the medical panel because the “light duty” variation of the position was not the position held by Ms. Henry. The Board also sent the operative report to the medical panel for its review. (Exh. 9).
37. The medical panel re-evaluated its findings with respect only to the job description that matched the position Ms. Henry held and the operative report. (Exh. 10).
38. The medical panel did not contact Ms. Henry after its interview and examination on March 7, 2013. (Henry Test.)
39. On May 26, 2014, the medical panel transmitted an addendum to its original evaluation. It confirmed that, after reviewing both the operative report of Ms. Henry’s surgery and her proper job description, its opinion remained unchanged. The medical panel explained that Ms. Henry’s job description did not indicate any significant lifting requirements and the tears to her rotator cuff were not massive or significant in size. The operative report confirmed the medical panel’s previous opinion regarding her surgery. (Exh. 10).
40. On September 25, 2014, the Board issued its denial of Ms. Henry’s accidental disability retirement application. (Exh. 1).
41. On October 3, 2014, Ms. Henry timely appealed the Board’s decision. (Exh. 2).

**DISCUSSION**

G.L. c 32, § 7(1) sets out the conditions for allowance of an accidental disability retirement application. *See Malden Ret. Bd. v. Contributory Ret. App. Bd*., 1 Mass. App. Ct. 420, 422-23 (1970) (setting forth the statutory requirements for approval of accidental disability retirement application). G.L. c. 32, § 6(3)(a) requires that a three-physician regional medical panel, after examining an accidental disability retirement applicant, issue a certificate as to (1) the applicant’s physical or mental incapacity for duty, (2) the likelihood that the incapacity is 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 retirement is claimed.” G.L. c. 32, § 6(3)(a); *see also Malden Ret. Bd*., 1 Mass. App. Ct. at 423.

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 Ret. Bd*., 1 Mass. App. Ct. at 423. Once the regional medical panel issues a proper certificate, the local retirement board is bound by the medical panel’s conclusion when a majority of the doctors on the panel responds in the negative to any of the three questions presented, unless the medical panel employed an erroneous medical standard in reaching its conclusions or lacked pertinent facts when it made its determination. *See id*. at 423 n.6, 424.

 The medical panel concluded that Ms. Henry was not physically incapable of performing the essential duties of her job as described in her current job description; that is, the panel answered the first question in the negative.[[2]](#footnote-2) In order to overcome the medical panel’s negative certificate, Ms. Henry must prove, by a preponderance of the evidence, that it used an erroneous standard or lacked pertinent information. *Retirement Bd. of Revere v. Contributory Ret. App. Bd.*, 36 Mass. App. Ct. 99, 106 (1994).

When the medical panel examined Ms. Henry, it tested her shoulder’s and arm’s range of motion and strength. The medical panel’s initial report stated that Ms. Henry showed modest loss of range of motion.

The medical panel asked her about the cause and extent of her injury and her job duties. Ms. Henry explained that her duties included removing case folders from a filing cabinet and refiling them. While filing case folders is not a listed duty in her job description, Ms. Henry is required to manage files, and the medical panel understood what this duty entails. The medical panel also understood that, while her job description did not require an ability to lift objects of a particular weight, carrying files involves lifting them. The panel estimated the files weighed five to ten pounds, which is close to Ms. Henry’s estimated weight of ten to fifteen pounds. The medical panel determined that, based on Ms. Henry’s answers to questions and on the job description it was provided, she was capable of performing the essential duties of her job.

However, the job description initially provided to the medical panel was not for the job Ms. Henry was performing before her injury. Rather it described a support staff position modified for light duty.

The Board recognized the error and provided the medical panel with the correct job description. It also provided the medical panel with a copy of the operative report for Ms. Henry’s shoulder surgery. The Board asked the medical panel to revisit its opinion, taking into account the correct job description and the operative report.

Ms. Henry argues that she should have been re-examined when the medical panel received the operative report and the correct job description. However, an additional physical examination and interview would not have provided any new information. Ms. Henry described her job duties based on the correct job description, which was the job she had performed prior to her injury.

Even though the medical panel initially lacked the operative report from her surgery, it reviewed the chronology of Ms. Henry’s treatment and the various medical opinions about her condition. The operative report simply confirmed the medical panel’s understanding of what it learned from Ms. Henry and her medical records.

Ms. Henry failed to prove that the medical panel applied an erroneous standard or lacked pertinent facts. The medical panel’s ultimate decision was based on Ms. Henry’s correct job description and her complete medical records and history.

Ms. Henry’s request for a new medical panel is denied. The Board’s denial of Ms. Henry’s application is affirmed.

DIVISION OF ADMINISTRATIVE

LAW APPEALS

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Bonney Cashin

Administrative Magistrate

Dated: October 21, 2016

1. The termination form provides these conclusions, but no facts supporting the finding of no disability and lack of causation. [↑](#footnote-ref-1)
2. As noted on the medical panel certificate form, once a medical panel answers “no” to one of the three questions, it need not answer questions that follow. [↑](#footnote-ref-2)