

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

Kevin Honan,
Petitioner,

No. CR-23-0606

Dated: September 13, 2024

v.

State Board of Retirement,
Respondent.

Appearances:

For Petitioner: Kevin Honan (pro se)

For Respondent: John Durgin, Esq.

Administrative Magistrate:

Yakov Malkiel

SUMMARY OF DECISION

The petitioner is not entitled to retirement credit for a period during which he was out of work and receiving workers' compensation for "partial" incapacity.

DECISION

Petitioner Kevin Honan appeals from a decision of the State Board of Retirement (board) determining that he is not entitled to retirement credit for a period during which he was out of work. The appeal was submitted on the papers without objection. I admit into evidence exhibits marked 1-10.

Findings of Fact

I find the following facts.

1. Mr. Honan began to work for the trial courts as a court officer in 1990. In April 2005, a prisoner assaulted Mr. Honan and bit his right hand. The prisoner claimed to be positive for HIV and hepatitis C. (Exhibits 1, 3, 10.)

2. Mr. Honan was treated with anti-viral medications, blood tests, and psychotherapy. He missed four and a half years of work, from April 2005 until January 2010. He received workers' compensation throughout. (Exhibits 1, 3, 4, 10.)

3. Records collected by the board list Mr. Honan's workers' compensation payments and the section of the workers' compensation law, chapter 152, under which each payment was made.¹ From April 2005 until mid-November 2006, Mr. Honan was paid \$661 per week under section 34. From mid-November 2006 until January 2010, he was paid \$425 per week under section 35. On top of the foregoing sums, Mr. Honan received certain "supplemental" pay amounts from his employer. (Exhibits 4, 5.)

4. Mr. Honan retired in 2023. In connection with its calculation of his retirement benefits, the board declined to attribute creditable service to Mr. Honan for the portion of his leave running from mid-November 2006 until January 2010. Mr. Honan timely appealed from that decision. (Exhibits 2, 3, 5-7.)

Analysis

Creditable service is an element of the formula that determines a public employee's retirement allowance. *See* G.L. c. 32, § 5(2). The analysis of Mr. Honan's tally of creditable service requires attention both to general principles and to a specific statutory rule.

Generally speaking, each employee is credited with the "service rendered by him as an employee . . . after becoming a member of the [retirement] system." G.L. c. 32, § 4(1)(a).

¹ An employee of the trial courts wrote to the board that, in the workers' compensation records, the code "REG" appears inadvertently instead of the code "ASSAULT." (Exhibit 5.) Although Mr. Honan focuses his attention on this error, I do not find that it bears on the sections of the workers' compensation law under which his payments were made.

“Service” means work “for which regular compensation is paid.” *Id.* § 1. “Regular compensation” means wages “for services performed in the course of employment.” *Id.*

Because workers’ compensation payments are designed for periods of employee incapacity, they are not exchanged “for services performed.” § 1. It has been clear for many years that such payments thus do not count as “regular compensation.” *Zelesky v. Commissioner of Div. of Pub. Emp. Ret. Admin.*, 30 Mass. App. Ct. 106 (1991). More recently, it has become settled that regular compensation also does not include “supplemental pay” offered by employers “to supplement workers’ compensation payments.” *Worcester Reg’l Ret. Bd. v. Public Emp. Ret. Admin. Comm’n (Vernava II)*, 489 Mass. 94 (2022); *Public Emp. Ret. Admin. Comm’n v. Contributory Ret. Appeal Bd. (Vernava I)*, 478 Mass. 832 (2018).

Throughout his years out of work, Mr. Honan received both workers’ compensation and supplemental pay. These sums were not regular compensation, and the corresponding period of time was not “service” under the usual rules.

A special provision relaxes those rules with respect to certain workers’ compensation cases. It states: “Any employee who . . . sustain[ed] an injury . . . on account of which he becomes entitled to payments under . . . provisions of [the workers’ compensation law] shall, during the period while he is receiving weekly payments *for total incapacity* . . . have credited to him . . . creditable service . . .” G.L. c. 32, § 14(1) (emphasis added). Section 14(1) enumerates the specific provisions of the workers’ compensation law, chapter 152, to which it applies. They include § 34, which governs “total incapacity,” but not § 35, which governs “partial incapacity.” *See Buchanan v. Contributory Ret. Appeal Bd.*, 65 Mass. App. Ct. 244, 246-47 & n.4 (2005); *Amoah v. State Bd. of Ret.*, No. CR-00-1001, at *3 (CRAB Feb. 4, 2002); *Visconte v. State Bd. of Ret.*, No. CR-04-340 (DALA Sept. 16, 2005).

Under the special rule of § 14(1), the board was correct to credit Mr. Honan with his period of § 34 “total” incapacity from April 2005 to mid-November 2006. The board was equally correct to determine that Mr. Honan is not entitled to credit for his period of § 35 “partial” incapacity from mid-November 2006 until January 2010.

Conclusion and Order

The board’s decision is AFFIRMED.

Division of Administrative Law Appeals

/s/ Yakov Malkiel

Yakov Malkiel

Administrative Magistrate