

MACRS
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How Presumptuous! The Three Statutory Presumptions



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Three Presumptions

- **Heart Law**, G.L. c. 32, Section 94, enacted in 1950.
- **Lung Law**, G.L. c. 32, Section 94A, enacted in 1962.
- **Cancer Law**, G.L. c. 32, Section 94B, enacted in 1990.
- **Other Presumptions:** There are none. There's just three.

Required for the Award of Accidental Disability Retirement

For a retirement board to have the authority to award an accidental disability retirement (“ADR”) a Medical Panel must answer the following questions in the affirmative:

1. The member is incapacitated from performing the essential duties of his or her job.
2. The member’s incapacity is permanent.
3. The incapacity is such as might be the natural and proximate result of the personal injury sustained or hazard undergone on account of which retirement is claimed.

The Presumptions' Purpose

- To supply a **“YES”** to Question No. 3
- The Presumptions are not concerned with Questions 1 or 2.
- If Question 1 is not answered in the affirmative, that's the end of the inquiry.
- If Question 2 is not answered in the affirmative, that's the end of the inquiry.
- The Presumptions only “fill in the blank,” so to speak, with regard to Question 3.

Stephen C.

- Laborer in the Town of Quabbin.
- Injures his elbow while sawing a door and can hardly use the arm in question anymore.
- He applies for ADR, but the Medical Panel decides the following to be true after examining him:
 - Question No. 1 – **YES**
 - Question No. 2 – **YES**
 - Question No. 3 – **NO**

Pop Quiz No. 1



With the Medical Panel Certificate rendered as YYN, the retirement board:

- a) Should award the ADR anyway. Clearly a laborer sawing a door has been injured “as a result of, and while in the performance of his duties.”
- b) Should make Findings of Fact that the Medical Panel was way off base and then award the ADR anyway.
- c) Should deny the application or request a clarification from the Medical Panel.

Who is Covered by the Heart Law Presumption?

- A uniformed member of a paid fire department or permanent member of a police department, or of the police force of the Massachusetts Bay Transportation Authority, or of the state police, or of the public works building police, or to any employee in the department of correction or a county correctional facility whose regular or incidental duties require the care, supervision or custody of prisoners, criminally insane persons or defective delinquents, or to any permanent crash crewman, crash boatman, fire controlman or assistant fire controlman employed at the General Edward Lawrence Logan International Airport, members of the 104th fighter wing fire department, members of the Devens fire department established pursuant to chapter 498 of the acts of 1993 or members of the Massachusetts military reservation fire department, a permanent member of the park police of a city or town.

Who is Covered by the Lung Law Presumption?

- A uniformed member of a paid fire department, including, without limitation, any permanent crash crewman, crash boatman, fire controlman or assistant fire controlman employed at the General Edward Lawrence Logan International Airport, members of the 104th fighter wing fire department, members of the Devens fire department established pursuant to chapter 498 of the acts of 1993 or members of the Massachusetts military reservation fire department...

Who is Covered by the Cancer Law Presumption?

- A uniformed member of a paid fire department, or a member of the state police assigned to the fire investigation unit of the department of fire services, or a member of the state police K-9 unit, or to any permanent crash crewman, crash boatman, fire controlman or assistant fire controlman employed at the General Edward Lawrence Logan International Airport, members of the 104th fighter wing fire department, members of the Devens fire department established pursuant to chapter 498 of the acts of 1993 or members of the Massachusetts military reservation fire department,

Kieran C. (1)

- Firefighter in the Town of Quabbin.
- While watching TV at home, he starts feeling nauseous and starts feeling pressure in his chest, such that he can't catch his breath.
- He is rushed to the hospital, where he is diagnosed with a myocardial infarction and luckily, his life is saved.

Kieran C. (2)

- Kieran is a cigarette smoker, with a 20-pack year history, and no regard for Chapter 41, Section 101A.
- Kieran is 5 foot 11 inches tall and weighs 275 pounds. This means he has a body mass index (“BMI”) of 38 and is considered obese.
- Kieran’s father and brother both died from sudden cardiac incidents.
- Kieran applies for ADR under the Heart Law, and the Medical Panel decides the following to be true, after examining him:
 - Question No. 1 – **YES**
 - Question No. 2 – **YES**
 - Question No. 3 – **NO**

Pop Quiz No. 2



With the Medical Panel Certificate rendered as YYN, the retirement board:

- a) Must deny the application as a matter of law.
- b) May award the ADR anyway, the Attorney General's Office has told us to forget about risk factors in doing the Heart Law analysis.
- c) May award the ADR anyway, if it makes findings of fact that the Medical Panel employed an erroneous standard in coming to the conclusions it did.

Opinion of the Attorney General – March 1, 1985

- Parties involved included: The Public Employee Retirement Administration (“PERA”), the State Board of Retirement (“SBR”), and the Massachusetts State Police (“MSP”).
- A State Trooper applied for ADR under the Heart Law. He had risk factors including smoking, a history of hypertension and a “suggestive family history.”
- PERA remanded.
- AGO’s office: “PERA’s remand...for further consideration of whether the officer’s heart ailment was job-related or attributable to pre-existing cardiac risk factors was unwarranted.”

Excerpt from Medical Panel Certificate for the Heart Law (1)

- Are there any uniquely predominant non-service-connected influences upon this member's mental or physical condition which might have substantially contributed to or resulted in the incapacity of the applicant?
- Are there any non-service-connected accidents or hazards undergone which might have contributed to or resulted in the incapacity of the applicant?

Excerpt from Medical Panel Certificate for the Heart Law (2)

- Is there evidence that although not irrebuttable, so predominates as to obligate a fact finder to come to the conclusion that, for this particular applicant, a uniquely predominant non-service-connected influence on the member's mental or physical condition and/ or non-service-connected accident or hazard caused the incapacity of this applicant?

Mass. General Laws, Chapter 41, Section 101A

- Subsequent to January first, nineteen hundred and eighty-eight, no person who smokes any tobacco product shall be eligible for appointment as a police officer or firefighter in a city or town and no person so appointed after said date shall continue in such office or position if such person thereafter smokes any tobacco products....
- Enacted on January 1, 1988.

Pop Quiz No. 3



Firefighters and police officers (Heart Law only) appointed after January 1, 1988 who smoke tobacco products after that date:

- a) Will be ineligible for the Heart Law Presumption.
- b) Will be ineligible for the Lung Law Presumption.
- c) Will be ineligible for the Cancer Law Presumption.
- d) Will be eligible to invoke the appropriate Presumption, as Chapter 41, Section 101A has absolutely no bearing upon any of the Presumptions.

The Presumptions are Rebuttable

- These Heart, Lung or Cancer conditions are presumed to have been suffered in the performance of a member's duties:
 - **Heart:** Unless the contrary be shown by competent evidence.
 - **Lung:** Unless the contrary be shown by competent evidence.
 - **Cancer:** Unless it is shown by a preponderance of the evidence that non-service-connected risk factors or non-service-connected accidents or hazards undergone, or any combination thereof, caused such incapacity.

Aidan S.

- Police officer for the Town of Magenta.
- Suffers a “cardiac event” while coaching his daughter’s Little League game.
- Is eventually diagnosed with aortic stenosis and advised to apply for ADR under the Heart Law.
- Medical Panel finds that aortic stenosis is a congenital heart condition, and renders the following answers to the certificate questions:
 - Question No. 1 – **YES**
 - Question No. 2 – **YES**
 - Question No. 3 – **NO**

Pop Quiz No. 4



With the Medical Panel answering YYN, the retirement board:

- a) May award the ADR anyway, as long as it explains why in its findings.
- b) May ask for a clarification from the Medical Panel.
- c) Must deny the application, as a congenital heart condition is competent evidence which overcomes the Heart Law Presumption.

Congenital Cardiac Conditions (1)

- Administrative bodies and courts in Massachusetts have found that medical conditions that are congenital in nature are **not work-related** medical conditions and do not fall under the Heart Law Presumption. See Laine v. Taunton Ret. Bd. & PERAC, CR-07-1144, (2012); Harney v. State Bd. of Ret., CR-09-188 (2012); Hayes v. Revere Ret. Bd., CR-95-835 (1996).
- Identified congenital conditions include, but are not limited to: bicuspid aortic valve, aortic stenosis, and familial aortic aneurysm syndrome.

Congenital Cardiac Conditions (2)

- If a member applies based on a congenital condition, they cannot receive benefits under the Heart Law Presumption for that condition.
- However, a member could still be eligible for Heart Law Presumption if they can show that they suffer from another cardiac condition that is disabling absent the congenital condition.

The Elephant in the Room: The Pre-Employment Physical

- All three presumptions contain the requirement for a pre-employment physical on entry into service or subsequent to entry.
- Physical cannot contain “any evidence” of condition for which retirement is sought.
- Purpose is to make sure a member did not come into service with the condition.
- This is far and away the number one reason PERAC is forced to remand an ADR presumption application.
- Physicals are not produced, members failed the physical, physicals showed “any evidence” of a Heart, Lung or Cancer condition, as the case may be.

Heart Law Pre-Employment Physical Requirement

- Shall, if he successfully passed a physical examination on entry into such service, or subsequently successfully passed a physical examination, which examination failed to reveal any evidence of such condition, be presumed to have been suffered in the line of duty, unless the contrary be shown by competent evidence.

Lung Law Pre-Employment Physical Requirement

- Shall, if he successfully passed a physical examination on entry into such service or subsequent to such entry, which examination failed to reveal any evidence of such condition, be presumed to have been suffered in the line of duty, as a result of the inhalation of noxious fumes or poisonous gases, unless the contrary be shown by competent evidence.

Cancer Law Pre-Employment Physical Requirement

- Shall, if he successfully passed a physical examination on entry into such service or subsequent to such entry, which examination failed to reveal any evidence of such condition, be presumed to have been suffered in the line of duty, unless it is shown by a preponderance of the evidence that non-service connected risk factors or non-service connected accidents or hazards undergone, or any combination thereof, caused such incapacity.

Mark S.

- Firefighter for Town of Periwinkle.
- Suffers a career ending stroke.
- Applies for the Heart Law Presumption.
- His pre-employment physical contains the notation
“This man is hypertensive for his age on this exam. It may be transient, but he may want to follow up with a doctor.”

Pop Quiz No. 5



Given the notation on the exam, should the retirement board continue to process this application?

- a) Yes, because Mark S. will be able to demonstrate he didn't really have hypertension, he just had "white coat syndrome" on the day of the exam.
- b) Yes, because the retirement board can ask the Medical Panel to interpret the notation's meaning.
- c) Yes, because it wasn't much of a notation in the first place.
- d) No, because the notation is "any evidence" of heart disease or hypertension.

Jim K.

- Entered service as a police officer in Quabbin in March of 1993.
- The Town cannot find his pre-employment physical. They've really looked!
- His Police Chief writes a note saying: "We cannot find Jim K's physical, but he never would have been hired in the first place if he had a heart condition or hypertension."
- The Quabbin Retirement Board processes the ADR application, with the Medical Panel deciding as follows:
 - Question No. 1 – **YES**
 - Question No. 2 – **YES**
 - Question No. 3 – **YES**

Pop Quiz No. 6



The Quabbin Retirement Board approves the application. PERAC receives Jim K's application for its Section 21(1)(d) review. PERAC will:

- a) Go ahead and approve it, it's close enough.
- b) Approve it because at least the Town tried to find the physical.
- c) Remand it for lack of a pre-employment physical.

Adam L.

- Firefighter for the Town of Periwinkle.
- Appointed to the PFD on April 17, 1999.
- Prior to his appointment, he underwent a pre-employment physical exam.
- Although it showed no evidence of hypertension or heart disease, he did not pass the physical on two unrelated grounds.
- The Medical Panel renders the following certificate:
 - Question No. 1 – **YES**
 - Question No. 2 – **YES**
 - Question No. 3 – **YES**

Pop Quiz No. 7



May the Periwinkle Retirement Board approve Adam L.'s application?

- a) Yes, the Medical Panel voted YYY.
- b) Yes, there was proof of a pre-employment physical.
- c) Yes, the presumption works in Adam L.'s favor.
- d) No, because he didn't pass the physical.

Recent PERAC Remands Regarding the Pre-Employment Physical

- Physical exam shows evidence of heart disease or hypertension, and a subsequent physical cannot cure this.
- Physical notes “Elevated BP w/o dx of hypertension.”
- Attempt to substitute Chief’s letter due to lack of physical.
- Notation of “MVP” (mitral valve prolapse) on physical.

Sullivan v. Contributory Ret. Appeal Bd.

- **Case citation:** 61 Mass. App. Ct. 1106, *3 (2004) (Rule 1:28 decision.)
- The word “any” is clear and unequivocal. It is undisputed that there was evidence of hypertension on plaintiff’s pre-employment examination. Dr. Cowan noted plaintiff's blood pressure to be 170/80 and stated that plaintiff was 'hypertensive for his age.' This statement, whatever its qualification, comes within the 'any evidence' requirement of G.L. c. 32, § 94. Thus, given the statutory language, because plaintiff's pre-employment physical of 1977 reveals some evidence of hypertension, plaintiff is not entitled to the legal presumption afforded by G.L. c. 32, § 94.

Benjamin L.

- Police officer in the Town of Magenta.
- Suffers from asthma.
- He says his job has given him the asthma, because of the inhalation of noxious fumes or poisonous gases throughout his career.
- He asks to be retired under the Lung Law.
- May the Magenta Retirement Board proceed with his application?

Pop Quiz No. 8



The Magenta Retirement Board:

- a) May process the application, so long as Benjamin L. passed a physical on entry into service.
- b) May process the application, but not under the Lung Law Presumption as police officers are not included in that presumption.
- c) May want to consider having Benjamin proceed under the “hazard undergone” theory.

Geoff H.

- Geoff is a police officer for the Town of Vermelho.
- Geoff was born on October 10, 1953, and was appointed as a police officer at the age of 21.
- Geoff loves his job, and works until he must retire for superannuation, on October 31, 2018.
- Geoff's daughter gets married in December of 2018, and at the wedding reception, Geoff suffers a myocardial infarction.
- After he recovers enough to do so, he goes to the Vermelho Retirement Board to file an ADR application under the Heart Law.

Pop Quiz No. 9



■ **The Vermelho Retirement Board should:**

- a) Process Geoff's application, because he had to have had heart disease while still a member in service.
- b) Process Geoff's application, because a police officer is presumed to have acquired a heart condition "as a result of, and while in the performance of, his duties."
- c) Decline to process the application, as Geoff was not incapacitated by a heart condition while a member in service, and there is no latency period for benefits under the Heart Law.

Tyler M.

- Becomes a firefighter for the Town of Azul on May 5, 2003.
- At the time of his appointment, he is 28 years old.
- He loves being a firefighter, but unfortunately, in 2007, he is diagnosed with kidney cancer.
- Following surgery and treatment, he will be okay but can no longer serve as a firefighter due to the lingering side effects of the treatment and the risk of reinjury.
- He goes to the Azul Retirement Board, and files to retire under Section 94B.

Pop Quiz No. 10



The Azul Retirement Board should:

- a) Process the application, a case like this is exactly why the Cancer Presumption was enacted.
- b) Gather information to make sure Tyler regularly responded to fires.
- c) Inform Tyler he is not eligible for the Presumption, as he has been in service less than five years.

Special Rules for the Cancer Presumption

- Must have held the position for a minimum of five years prior to applying for retirement under the presumption.
- Must prove that they regularly responded to calls of fire or regularly investigated fire scenes.
- Only certain kinds of cancer suffice, but the list seems pretty all encompassing.
- Chapter 148 of the Acts of 2018 added breast and reproductive cancers to the statute.

William Q.

- William was born on April 17, 1952.
- William has a long and distinguished career as a firefighter in the Town of Fuchsia.
- He turns 65, and achieves maximum age for his group on April 30, 2017, at which point he retires for superannuation.
- Retirement goes smoothly for several years, but he begins to have some digestive issues in 2019, and these escalate to the point of debilitation as time goes on.
- In February of 2023, William is diagnosed with stomach cancer.
- Unfortunately, he dies shortly thereafter.

Pop Quiz No. 11



William's wife, Mary, applies for Section 9 benefits after his passing. She applies under Section 94B. The Fuchsia Retirement Board should:

- a) Not process the application, because Section 9 benefits are not available to surviving spouses.
- b) Not process the application, because he was diagnosed with cancer more than five years after he last actively served as a firefighter.
- c) Process the application, with attention paid to whether the cancer was actually "discovered" within five years.

Very Special Cancer Presumption Rule

- A retired firefighter (or other person covered by this Presumption) may apply for ADR.
- Cancer must be “discovered” within 5 years of the last date on which such person actively so served.
- *Connery* case, DALA, 2003 distinguishes between the words “discovered” and “diagnosed.”
- Surviving spouses may also apply for Section 9 benefits.
- The only one of the three presumptions which offers a latency period for an application.

There are No Other Presumptions.

- Nevertheless, applications are made for members who claim the equivalent of a presumption.
- Most notably, Massachusetts does not have an “infectious disease presumption.”
- Massachusetts does not have a “PTSD presumption.”
- To obtain benefits for infectious diseases or PTSD, exposure or exposures must be documented in the typical Section 7 manner.

Presumption Potpourri

- Should a member with Lung Cancer apply under the Lung Law or the Cancer Law?
- What is the “effective date of retirement” for a Presumption in calculating benefits?
- If a member is on Section 111F benefits, what is the effective date of retirement?
- Do call firefighters qualify for the Presumptions?

Final Points

- The Presumptions are an important part of our retirement law.
- Perhaps the Legislature will enact other presumptions in the future.
- Every effort should be made to preserve a member's right to invoke the given Presumption by making sure a physical is undergone, and proof of the physical is safeguarded.
- If a member isn't eligible for a Presumption for whatever reason, the retirement board should investigate a possible path to retirement under Section 7, if that avenue is available.

Conclusion

- If a question on this topic arises in the future:
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ANY QUESTIONS?