COMMONWEALTH OF MASSACHUSETTS

**Division of Administrative Law Appeals**

**1 Congress Street, 11th Floor**

**Boston, MA 02114**

**www.mass.gov/dala**

**Antonio Ibanez**,

Petitioner

v. Docket No. CR-13-386

**Boston Retirement Board**,

Respondent

**Appearance for Petitioner**:

James H. Quirk, Jr., Esq.

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**Appearance for Respondent**:

 Edward H. McKenna, Esq.

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**Administrative Magistrate**:

Kenneth Bresler

**SUMMARY OF DECISION**

The Retirement Board’s denial of the petitioner’s application for accidental disability retirement benefits is affirmed. The petitioner suffered from pre-existing mental conditions and did not meet his burden of proving that his work aggravated them to the point of disability.

**DECISION**

 The petitioner, Antonio Ibanez, appeals the Boston Retirement Board’s denial of his application for accidental disability retirement benefits.

 I held a hearing on December 23, 2015, which I recorded digitally. Mr. Ibanez was the only witness. I have accepted into evidence 23 exhibits.[[1]](#footnote-1) Both parties submitted post-hearing briefs.

**Findings of Fact**

 1. From September 2007 through June 2010, Mr. Ibanez was a teacher at the Orchard Gardens Pilot School in Boston. (Ex. 3.)

 2. From September 2010 to December 8, 2010, Mr. Ibanez was a teacher at the Hennigan School in Boston. (Ex. 3.)

 3. Mr. Ibanez was a special education teacher. In November 2009, the Orchard Gardens Pilot School assigned him to be a bilingual teacher and for three months, he was both a special education and bilingual teacher. (Testimony; ex. 3.)

 4. On September 23, 2011, Mr. Ibanez applied for accidental disability retirement benefits. (Ex. 3.)

 5. On his application, Mr. Ibanez asserted that he was applying for accidental disability retirement benefits because of “Post Traumatic Stress Disorder – ADHD, Bipolar/Depression/ Anxiety triggered by work stress.” He also asserted that he underwent “[o]ngoing harassment by staff and administration leading to ongoing stress related disability.” (Ex. 3.)

 6. On his application, Mr. Ibanez asserted that he was last able to perform all the essential duties of his position on December 8, 2010. (Ex. 3.)[[2]](#footnote-2)

 7. On his application, Mr. Ibanez asserted that he sustained a personal injury beginning in September 2008 that lasted for a month; an injury from November 2008 through January 2009 that lasted three months; an injury from January through March 2010 that lasted for three months; and an injury from September through December 2010 that lasted for two-and-one-half months; and an injury on December 8, 2010 that is ongoing. (Ex. 3.)[[3]](#footnote-3)

 8. On his application, when asked if he had filed a grievance under a collective bargaining agreement, Mr. Ibanez wrote, “January 13, 2010 – Grievance filed” and “December 6, 2010 – Voluntary Disclosure statement of disability.” (Ex 3.) [[4]](#footnote-4)

 9. When asked on his application whether his employer took “any administrative or disciplinary action,” Mr. Ibanez wrote:

November 2009 – Demoted from ETF Position, assigned additional job of bilingual resource. Required additional overtime.[[5]](#footnote-5)

January – March 2010 – Unfavorable evaluation.[[6]](#footnote-6) They requested verbally that I resign from my position.[[7]](#footnote-7)

September – December 2010 – Two written reprimands, disciplinary hearing.[[8]](#footnote-8)

(Ex. 3.)

 10. A medical panel examined Mr. Ibanez on September 21, 2012. It consisted of Dr. Melvyn Lurie, a psychiatrist; Dr. Thomas R. Sciascia, a neurologist; and Dr. Joseph Albeck, a psychiatrist. (Ex. 6.)

 11. The medical panel opined that Mr. Ibanez was mentally incapable of performing the essential duties of his job, his incapacity was likely to be permanent, and that his incapacity was such as it might be the natural and proximate result of the personal injury that he claimed. (Ex. 6.)

 12. The Certificate for Accidental Disability, after the third question, reads:

Aggravation of a Pre-Existing Condition Standard: If the acceleration of a pre-existing condition or injury is as a result of an accident or hazard undergone, in the performance of the applicant’s duties, causation would be established. However, if the disability is due to the natural progression of the pre-existing condition, or was not aggravated by the alleged injury sustained or hazard undergone, causation would not be established.

(Ex. 6.)

 13. The medical panel diagnosed Mr. Ibanez’s condition as bipolar affective disorder, with his most recent episode being depressed. (Ex. 6.)

 14. The medical panel opined that Mr. Ibanez was incapable of performing his duties as a teacher because he was unable to organize his thoughts, leading to inability to plan, organize, and assimilate the evaluations he was given. (Ex. 6.)

 15. The medical panel wrote that “another condition...might have contributed to or resulted in the disability claimed,” namely, “bipolar affective disorder.” The panel opined that “it is more likely than not” that Mr. Ibanez’s disability was caused by his bipolar affective disorder, rather than “the personal injury sustained...which is the basis for the disability claim....” The panel further opined that Mr. Ibanez’s condition “is not an aggravation of a pre-existing condition” but “due to the natural progression of the pre-existing condition.”

 Apparently contradictorily, the panel continued and concluded its narrative as follows:

Finally, it is the opinion of the panel that the condition and incapacity is such as might be the natural and proximate result of the personal injury sustained....

(Ex. 6.)

 16. On November 9, 2012, the Boston Retirement Board, focusing on the opinions in the previous paragraph, asked for a clarification. (Ex. 7.)

 17. On November 19, 2012, the Public Employee Retirement Administration Commission asked the medical panel for a clarification. (Ex. 8.)

 18. On December 5, 2012, Dr. Lurie, writing for the medical panel, attempted to clarify its previous opinion. Dr. Lurie wrote that “the non-work related condition is more likely the reason for the incapability.” The panel concluded that the pre-existing condition “accelerat[ed]” due to its “natural progression” and was not “an aggravation caused by the work related alleged injury....” (Ex. 9.)

 19. Dr. Lurie continued that “the work related alleged injury/hazard MIGHT” have caused Mr. Ibanez’s disability and repeated that the panel concluded that the natural progression of Mr. Ibanez’s pre-existing condition “is more likely the cause.” (Ex. 9)(capitalization in the original.)

 20. Dr. Lurie went on to explain the “MIGHT”: Even if a 49% or less chance existed that Mr. Ibanez’s work caused his disability, “there is still a possibility it is the cause.” (Ex. 9.)

 21. On July 16, 2013, the Boston Retirement Board notified Mr. Ibanez that it had denied his application for accidental disability retirement funds for the reasons stated in the hearing officer’s recommended decision, which was attached to the notice of denial. The notice added, “Specifically, the member’s current disability is related to a pre-existing condition.” (Ex. 2.)

 22. On July 19, 2013, Mr. Ibanez timely appealed. (Ex. 1.)

**Discussion**

 I uphold the Boston Retirement Board’s denial of Mr. Ibanez’s application for accidental disability retirement benefits for two reasons.

 Mr. Ibanez suffered from a pre-existing condition

 The medical panel’s opinion, its clarification, and the Certificate for Accidental Disability (“if the disability is due to the natural progression of the pre-existing condition... causation would not be established”) lead me to conclude that the medical panel answered the third question incorrectly. When asked,

Is said incapacity such as might be the natural and proximate result of the personal injury sustained or hazard undergone on account of which retirement is claimed?

(Ex. 6)(all capital letters reduced to lower case), the panel should have answered “No.” And had the panel correctly answered “No,” Mr. Ibanez’s application could generally not proceed. *E.g.*, *Quincy Retirement Board v. Contributory Retirement Appeal Board*, 340 Mass. 56, 60 (1959). However, despite the request for a clarification, the panel answered “Yes.”

 Despite its “Yes” answer, the medical panel agreed that Mr. Ibanez’s conditions were pre-existing. The Boston Retirement Board could rely on that opinion in denying Mr. Ibanez’s application. I uphold the BRB’s decision that “the member’s current disability is related to a pre-existing condition.” (Ex. 2.)

 Mr. Ibanez has not met his burden of proof

Mr. Ibanez’s testimony lacked organization, details, and dates.[[9]](#footnote-9) See above notes 2 to 8. For example, he testified that the principal at his school (presumably the Hennigan School) received a letter (Mr. Ibanez didn’t say from whom, what it said or how he knew about the letter) and had a conversation with Mr. Ibanez’s previous principal. (Mr. Ibanez didn’t say what the conversation was about or how he knew about it.) He started being treated differently (presumably by the principal, although Mr. Ibanez didn’t identify *how* he was treated differently; he may have been referring to letters of reprimand). Mr. Ibanez received letters of reprimand (presumably from the principal, although they were not entered as exhibits). All resources were removed. (Mr. Ibanez didn’t say what they were and who removed them.) They (Mr. Ibanez didn’t identify who “they” were; he may have been referring to his principal) called his peer assistant to the office with Mr. Ibanez’s supervisor (whom he didn’t identify), where she (presumably the principal) made it clear that she was going to supervise Mr. Ibanez. She wanted assurances from both of them (presumably the peer assistant and the supervisor) that they wouldn’t interfere with the evaluation process. The peer assistant returned to the classroom, concerned about the meeting and let Mr. Ibanez know that Mr. Ibanez would be supervised to the point of termination.

Even if I accepted this hearsay and double hearsay (Mr. Ibanez’s testimony about what the peer assistant reported the principal said), G.L. c. 30A, § 11 (2), and I do not, Mr. Ibanez’s testimony was not specific enough for me to rule for him. I instructed Mr. Ibanez’s lawyer during the hearing to break up Mr. Ibanez’s narrative testimony so that I could follow it. And I instructed Mr. Ibanez to listen to his lawyer’s questions and answer only what he asked. Despite these instructions, Mr. Ibanez’s testimony was not specific enough for him to make his case.

Nor will I accept Mr. Ibanez’s accounts as recorded by various doctors, for a few reasons. I assume that they are trained in recording relevant medical information and general related information, such as Mr. Ibanez’s difficulties at work. But I have no information about how trained they are in collecting and recording information that would be useful to me, such as who said exactly what on which date. And if Mr. Ibanez’s accounts to various doctors resembled his account to the medical panel and his testimony, they were rambling and barely coherent. The doctors’ accounts, which are unsworn and not subject to cross-examination or my questions, go to the heart of his case and thus are not “the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs.” G.L. c. 30A § 11(2).

I recognize the potential injustice and irony of requiring an applicant whose disability includes “his inability to organize his thoughts,” as the medical panel put it (Ex. 6), to prove his disability by presenting organized thoughts at a hearing. However, Mr. Ibanez had an experienced lawyer representing and questioning him at the hearing. I did not let Mr. Ibanez flounder and founder at the hearing, only to rule against him later. I asked both Mr. Ibanez and his lawyer to improve the presentation of evidence during the hearing.

 This is Mr. Ibanez’s case to make, *Lisbon v. Contributory Retirement Appeal Board*, 41 Mass. App. Ct. 246, 255 (1996), and he has not made it.

Potential issue of whether Mr. Ibanez’s employer(s) engaged *bona fide* personnel actions

I do not and cannot reach this issue. Mr. Ibanez did not present sufficient evidence about what his employer(s) did, and aside from one evaluation (Ex. 5), the Boston Retirement Board did not present evidence that would allow me to ascertain whether the employer(s) engaged in *bona fide* personnel actions regarding Mr. Ibanez. *See e.g.*, *Burgess v. Plymouth County Retirement Board*, CR-03-4 (DALA 2004).

Boston Retirement Board’s motions

 It is unclear why after a hearing and submission of post-hearing briefs, the BRB is moving to dismiss Ibanez’s appeal and/or grant it summary decision. The BRB has not explained the advantage of granting the motions rather than ruling against Mr. Ibanez on the merits of his appeal. I deny both motions.

**Conclusion and Order**

 The denial of Mr. Ibanez’s application for accidental disability retirement benefits is affirmed. His condition declined because of the natural progression of his pre-existing mental conditions. If his work aggravated them to the point of disability, he did not so prove.

 DIVISION OF ADMINISTRATIVE LAW APPEALS

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 Kenneth Bresler

 Administrative Magistrate

Dated: May 13, 2016

1. Although I did accept Exhibits 20 to 22 into evidence, I give them nearly no weight. Exhibit 20 purports to be a Treating Physician’s Statement, but it is the second such statement in evidence and is dated September 30, 2015, four years after Mr. Ibanez’s application, which the statement is supposed to accompany. Exhibit 21 is a similar report of a psychiatric examination dated September 23, 2015, which was done at the request of Mr. Ibanez’s lawyer. Exhibit 22 is an unsworn hearsay account, dated October 5, 2015, by Mr. Ibanez’s former colleague of his memory of events and circumstances from November 2008 to June 2010, between five and seven years earlier. [↑](#footnote-ref-1)
2. The only further information I have about this date is undetailed hearsay, which I do not accept. On behalf of the medical panel, Dr. Melvyn wrote that Mr. Ibanez “said on December 8, 2010 he just froze ceased working.” (Ex. 6.) [↑](#footnote-ref-2)
3. Mr. Ibanez did not testify about or otherwise specify what caused these five injuries. He did not testify about their symptoms. [↑](#footnote-ref-3)
4. Nothing further about the grievance or statement, which was reportedly filed two days before Mr. Ibanez’s last day, is in evidence. [↑](#footnote-ref-4)
5. “ETF” stands for “Education Team Facilitator.” (Ex. 6.) It is not clear how Mr. Ibanez was both demoted and assigned an *additional* job. Presumably, the added responsibility required Mr. Ibanez to work overtime. If Mr. Ibanez’s employer ordered him to work overtime, it is not in evidence. [↑](#footnote-ref-5)
6. An unfavorable evaluation from November 2010 is in evidence (Ex. 5), but no evaluation from this three-month period. [↑](#footnote-ref-6)
7. Presumably, the principal asked him to resign from the school, not one of his two positions. The date or approximate date of this request is not in evidence. [↑](#footnote-ref-7)
8. Nothing further about the reprimands or hearing is in evidence. [↑](#footnote-ref-8)
9. The medical panelists made a similar observation. Dr. Lurie wrote in the narrative report, “It was difficult to proceed with the examination without stopping him in the course of his rambling answers to the simplest questions.” [↑](#footnote-ref-9)