COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss. **Division of Administrative Law Appeals**

Roger Jameson,
Petitioner,

v.

Lawrence Retirement Board,
Respondent.

No. CR-21-0109

Dated: October 13, 2023

Appearance for Petitioner:
Joseph G. Donnellan, Esq.

Appearance for Respondent:
Christopher J. Collins, Esq.

Administrative Magistrate:
Yakov Malkiel

SUMMARY OF DECISION

The petitioner, a firefighter, suffers from severe knee pain. He applied to retire for accidental disability, citing two occasions on which his knee "buckled" at work. A medical panel declined to certify that the petitioner's workplace incidents caused his disability: the panel majority instead viewed the disability as the natural result of an underlying, progressive, degenerative condition. The panel did not apply erroneous standards, lack pertinent information, or follow improper procedures. There was therefore no error in the respondent board's denial of the petitioner's application.

DECISION

Petitioner Roger Jameson appeals from a decision of the Lawrence Retirement Board denying his application to retire for accidental disability. An evidentiary hearing took place by WebEx on August 9, 2023. Mr. Jameson was the only witness. I admitted into evidence exhibits marked A-Q. The hearing was recorded and transcribed, and the record closed with the submission of hearing briefs.

Findings of Fact

I find the following facts.

1. Mr. Jameson grew up in the Lawrence area. Early in his working life, he took jobs in construction, at a Home Depot store, and in auto repair. These jobs required him to bend at the knees on a regular basis. (Tr. 16, 21-22.)

2. Mr. Jameson became a firefighter for the Lawrence Fire Department in around November 2002. His firefighting duties included responding to emergency calls, carrying and extending ladders, engaging in training exercises, and wearing heavy protective gear. These tasks imposed wear and tear on Mr. Jameson's knees. (Tr. 16-17; Exhibit A.)

3. In October 2017, during a response to an emergency call, Mr. Jameson's left knee "buckled" as he descended a flight of stairs in heavy gear. He underwent an x-ray and an MRI. His diagnoses included a meniscal tear and chondromalacia, i.e., a breakdown of cartilage. Mr. Jameson was treated with meniscal surgery and physical therapy. He was out of work for approximately eight months. (Tr. 22-23; Exhibits A, B, G, Q.)

4. During September 2019, Mr. Jameson's left knee buckled again during a training exercise. His knee pain forced him to stop working. A "vision scope" diagnostic procedure revealed no acute findings. In November 2019, Mr. Jameson attempted to return to his job but was unable to do so. He has been out of work since. (Tr. 17, 24-26; Exhibits A-D.)

5. In July 2020, the Lawrence fire chief filed an application for ordinary and accidental disability retirement on Mr. Jameson's behalf. The application cited Mr. Jameson's knee-related workplace incidents of 2017 and 2019. (Exhibit A.)

6. In light of the COVID-19 pandemic, Mr. Jameson was offered the option of being examined by a medical panel by telehealth (videoconference). He executed a form selecting that option. The examinations were conducted separately by three orthopedists during October 2020. All three panelists certified that Mr. Jameson is permanently incapacitated. Their opinions

differed with regard to whether his condition is such as might be the result of his workplace injuries. (Tr. 18, 27-28; Exhibits E, F, G, N.)

7. Dr. Richard Warnock's examination was approximately twenty minutes long. With respect to the scope of his physical examination, Dr. Warnock wrote: "I was able to observe that he is able to stand, walk with a slight [limp]. His knee comes to full extension on the left and flexes to 120. I could not check for stability, effusion, or tenderness. I could not evaluate for patellar tracking or patellar crepitus." Dr. Warnock discussed Mr. Jameson's two knee-related workplace incidents, diagnosing chondromalacia. With respect to causation, Dr. Warnock concluded that Mr. Jameson's incapacity is such as might be the result of his workplace incidents. He added that, in his opinion, Mr. Jameson's incapacity "represents a significant aggravation of a preexisting condition." (Tr. 18-19; Exhibit E.)

8. Dr. Louis Bley's examination was approximately thirty minutes long. Discussing the limits of his examination, Dr. Bley wrote: "The exam . . . is . . . visual-only . . . . Mr. Jameson is unable to fully extend the knee, including missing the terminal 2 degrees of extension and 2 to 3 degrees of hyperextension. He reports he is unable to do a straight leg raise, owing to pain in the front of the knee. His flexion is limited to 90 degrees. Visually, there does not appear to be any swelling or effusion. His quads and hams visually appear intact as do his calf muscles." Dr. Bley declined to certify that Mr. Jameson's incapacity is such as might be the result of his workplace incidents. When the board requested a more detailed analysis on causation, Dr. Bley wrote: "[T]he chondromalacia is a chronic degenerative condition not related to a traumatic injury. . . . [T]he initial work-related injury of a meniscal tear would be expected to only temporarily exacerbate signs and symptoms of chondromalacia, not cause permanent disability . . . . [H]e had 2 diagnostic imaging studies performed, which showed no

worsening or change in the underlying chondromalacia in the interval between injury two and injury one. Thus I cannot conclude that there is any exacerbation or cumulative injury based on the repeat or second injury . . . ." (Tr. 20-21, 29; Exhibits F, H, I.)

9. Dr. Aaron Gardiner's exam was also approximately thirty minutes long. Dr. Gardiner wrote: "He is able to stand and bear full weight. He is able to walk with a normal gait. He will not squat due to pain in the left knee. When asked to localize his pain, he points to the anterior of the left knee. The skin on the left knee is intact with no visible scars. There is no visible swelling. There is no erythema or skin changes. He has full extension. Active flexion is limited to 90 degrees." Dr. Gardiner, too, declined to certify that Mr. Jameson's incapacity is such as might be the result of his workplace incidents. He explained as follows: "Mr. Jameson has chondromalacia . . . . This is a degenerative condition. . . . In my medical opinion, Mr. Jameson most likely sustained a temporary exacerbation of the symptoms of his chondromalacia from his 2 injuries [in] [2017] and [2019], respectively. These exacerbations would be expected to last for a period of weeks until his symptoms returned to their baseline. In my medical opinion, Mr. Jameson's permanent incapacity is not more likely than not[1] the natural and proximate result of the [2017] and [2019] injuries." (Tr. 19-20, 28-29; Exhibit G.)

10. Each of the three panelists completed a standard PERAC form. With respect to causation, the form asked each panelist: "Is [the member's] 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?" The form's detailed instructions about causation included the following: "Aggravation of a pre-existing condition standard: If the acceleration of a pre-existing condition of injury is as a result of an accident or hazard undergone, in the performance

[1] Dr. Gardiner's use of the term "more likely than not" is discussed *infra*.

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." Each panelist signed his name next to the statement: "I hereby certify that I have examined the member . . . and that the findings stated in this certificate and narrative express my professional medical opinion . . . ." (Exhibits E, F, G.)

11. In connection with an application for "injured on duty" benefits, Mr. Jameson was examined in June 2020 by Dr. Kenneth Polivy. That examination took place in person. Dr. Polivy wrote, in part: "The cause of Mr. Jameson's inability to permanently return to fire fighter duties is the aggravated . . . chondromalacia that occurred as result of his most recent work injury of [2019] on top of the prior injury in [2017]." (Exhibit J.)

12. In December 2020, the board denied Mr. Jameson's application as to accidental disability, allowing him to retire for ordinary disability only. He timely appealed. (Exhibit K.)

Analysis

A Massachusetts public employee is entitled to retire for accidental disability if he or she is "unable to perform the essential duties of his job," the incapacity is "likely to be permanent," and the incapacity was caused by a "personal injury sustained . . . as a result of, and while in the performance of, [the employee's] duties." G. L. c. 32 § 7.

A regional medical panel's affirmative certificate as to disability, permanence, and causation is a condition precedent to accidental disability retirement. *Blanchette v. Contributory Ret. Appeal Bd.*, 20 Mass. App. Ct. 479, 483 (1985). A medical panel's refusal to certify these elements decisively defeats the member's application unless the panel employed an erroneous standard, failed to review pertinent facts, or followed improper procedures. *See Kelley v.*

Contributory Retirement Appeal Board, 341 Mass. 611 (1961); *Foresta v. Contributory Ret. Appeal Bd.*, 453 Mass. 669, 684 (2009).

Mr. Jameson contends that the panelists' telehealth examinations amounted to an improper procedure in this case. The board's response relies on part on Mr. Jameson's agreement to be examined remotely, and thereby to avoid delays related to COVID-19. However, a member's consent to telehealth examinations cannot necessarily be construed as a waiver of the right to a medically effective panel. It is reasonable to interpret such a waiver as stating, "Please examine me remotely, if you can." By the same token, if a medical panelist were to discover that a remote examination of a particular member does not provide an adequate foundation for a sound medical opinion, then the panelist would be duty-bound to so inform PERAC, without issuing a positive or negative certificate.

It is clear that the telehealth context limited the array of tests that the panelists otherwise might have performed on Mr. Jameson. But that does not mean that the examinations were improper. "It is within the panelists' purview to select the tests and inquiries that, in their expert opinion, a particular case warrants." *Robillard v. State Bd. of Ret.*, No. CR-18-470, 2022 WL 18283524, at *3 (DALA Dec. 19, 2022). That general rule holds true for telehealth examinations. *Pease v. Worcester Reg'l Ret. Bd.*, No. CR-21-82, 2022 WL 19762164, at *6 (DALA Dec. 23, 2022). Each of Mr. Jameson's panelists certified that he "examined the member" and arrived at a "professional medical opinion." *See supra* p. 5. The necessary implication of these statements is that the panelists considered the telehealth platform to be sufficiently instructive to support sound medical conclusions. The record offers no reason to doubt this shared opinion. *See also Joniaux v. Framingham Ret. Bd.*, No. CR-21-183, 2023 WL 5774614, at *13 (DALA Sept. 1, 2023).

Further, the majority panelists agreed that Mr. Jameson *is* incapacitated, and that his incapacity *is* permanent. Their conclusion adverse to Mr. Jameson is limited to the causal connection between his disability and the pertinent workplace injuries. On this point, the majority panelists focused in their narratives on Mr. Jameson's history, prior diagnostics, and overall diagnosis. It is reasonably clear that, as to causation, more comprehensive physical examinations would not have altered their conclusion.

Mr. Jameson's remaining argument is that the majority panelists failed to consider whether his workplace incidents aggravated a preexisting condition to the point of disability. *See Baruffaldi v. Contributory Ret. Appeal Bd.*, 337 Mass. 495, 501 (1958). The argument is groundless. The panelists' PERAC forms reminded them that, "[i]f the acceleration of a pre-existing condition of injury is as a result of an accident . . . causation would be established." *See Brocato v. Taunton Ret. Bd.*, No. CR-19-319, at *6 (DALA June 25, 2021). Both Dr. Bley and Dr. Gardiner clearly complied with this instruction, reaching identical conclusions: They both determined that Mr. Jameson's incidents of 2017 and 2019 only temporarily exacerbated an underlying, degenerative condition. They both believed that the underlying condition was the cause of Mr. Jameson's disability through its natural, cumulative, deteriorative effect. *See Lisbon v. Contributory Ret. Appeal Bd.*, 41 Mass. App. Ct. 246, 255 (1996).[2]

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[2] An isolated remark in Mr. Jameson's hearing brief appears to attribute his disability not to the specific incidents of 2017 and 2019 but to "nearly twenty years of emergency calls." The theory implicit in this statement is that Mr. Jameson suffered "gradual deterioration" resulting from "an identifiable condition . . . that is not common and necessary to all or a great many occupations." *Blanchette*, 20 Mass. App. Ct. at 485. This theory is not supported by Dr. Polivy's opinion. It was not presented to the medical panel. *See Zajac v. State Bd. of Ret.*, No. CR-12-444, at *4-5 (CRAB Aug. 21, 2015), *aff'd*, No. 1579-00660 (Hampden Super. Aug. 8, 2016); *Pereira v. New Bedford Ret. Bd.*, No. CR-16-450, at *8 (DALA Apr. 20, 2018). And CRAB has refused to view "heavy labor" as an "uncommon" hazard. *Sibley v. Franklin Reg'l Ret. Bd.*, No. CR-15-54, at *7 (CRAB May 26, 2023).

A final point merits discussion even though Mr. Jameson does not raise it. Dr. Gardiner wrote in his narrative that Mr. Jameson's incapacity "is not more likely than not" the result of his workplace injuries. With respect to causation, the question that the retirement law poses to the panelists is whether the member's disability is "such as might be" the result of the workplace incident. G.L. c. 32, § 6(3)(a). The panelists are asked to say whether it is "possible" or "plausible" that the pertinent incident caused the disability. *Narducci v. Contributory Ret. Appeal Bd.*, 68 Mass. App. Ct. 127, 134, 144 (2007). That question is not addressed squarely by a panelist's statement that causation is ultimately less likely than not. *See Kelley*, 341 Mass. at 616; *Noone v. Contributory Ret. Appeal Bd.*, 34 Mass. App. Ct. 756, 763-64 (1993).

It remains far from certain that Dr. Gardiner erred here. PERAC's standard form asks the panelists (emphasis added):

> Is there any other event or condition in the member/applicant's medical history . . . that might have contributed to or resulted in the disability claims? *Is it more likely than not* that the disability was caused by the condition or event described rather than the personal injury sustained or hazard undergone which is the basis for the disability claim . . . ?

See also Retirement Bd. of Revere v. Contributory Ret. Appeal Bd., 36 Mass. App. Ct. 99, 106 n.9 (1994). The reference to a "more likely than not" standard in this context is not necessarily conducive to precision. Even so, it is logically possible for a panelist to consider which factors "more likely than not" caused the disability (per PERAC's form) before turning to certify whether the factor blamed by the member is "such as might be" the cause (as statutorily required).

This point is demonstrated by *Fairbairn v. Contributory Ret. Appeal Bd.*, 54 Mass. App. Ct. 353 (2002). The panelists there wrote, as a matter of ultimate fact, that the member's disability resulted from a progressive, degenerative condition. But the Appeals Court did not discern an "infirmity" in the panel's certificates; the court's interpretation was that the panelists

"considered the [various] possibilities," and ultimately "answered the statutory questions as required." 54 Mass. App. Ct. at 361. Dr. Gardiner likewise included in his certificate—in addition to his "not more likely than not" comment—the requisite statement that Mr. Jameson's incapacity was not "such as might be" the result of his workplace accidents.

In any event, the result here would remain unchanged even if Dr. Gardiner applied an incorrect, more-likely-than-not standard *and* would have answered "yes" under the correct, "such as might be" standard. When a medical panel certifies that a member satisfies the statutory requirements, the legal factfinder must determine whether causation is ultimately proven. *Narducci*, 68 Mass. App. Ct. at 134-35. That determination takes into account, among other facts, the "narrative statements of the doctors who comprise the . . . panel, including clarifications." *Id.* at 135. *See Pease*, 2022 WL 19762164, at *5-6.

The panel certificates and the record overall do not support an ultimate determination that Mr. Jameson's workplace incidents caused his disability. The substantive analyses offered by Dr. Bley and Dr. Gardiner are consistent, forceful, and cogent. They merit substantial weight. *Christopher C. v. Boston Ret. Bd.*, No. CR-19-342, 2023 WL 3434934, at *7 (DALA May 5, 2023). *See also Hollup v. Worcester Ret. Bd.*, 103 Mass. App. Ct. 157, 163-64 & n.5 (2023). The contrary opinions of panelist Dr. Warnock and non-panelist Dr. Polivy are more thinly reasoned and less persuasive. *See also Robillard*, 2022 WL 18283524, at *4. As a result, even if the panel had certified a *possibility* that Mr. Jameson's disability resulted from his 2017 and 2019 incidents, a preponderance of the evidence would favor the ultimate conclusion that the disability was caused by Mr. Jameson's underlying, naturally deteriorating chondromalacia, with only a temporary worsening attributable to the workplace incidents. A remand of Mr. Jameson's

case to the panel or the board would thus serve no practical purpose. *Cf. Wakefield v. Worcester Ret. Bd.*, No. CR-02-1399, at *6-7 (CRAB Oct. 25, 2004).

Conclusion and Order

For the foregoing reasons, the board's decision is AFFIRMED.

Division of Administrative Law Appeals

/s/ Yakov Malkiel
Yakov Malkiel
Administrative Magistrate