

**COMMONWEALTH OF MASSACHUSETTS
CONTRIBUTORY RETIREMENT APPEAL BOARD**

ROBERT KANE,

Petitioner-Appellant

v.

WORCESTER REGIONAL RETIREMENT BOARD,

Respondent-Appellee.

CR-14-52

**DECISION ON MOTION FOR
RECONSIDERATION AND CLARIFICATION**

This case is before us on a Motion for Reconsideration and Clarification, filed by the respondent Worcester Regional Retirement Board (WRRB) on August 30, 2018, within a week of our decision of August 23, 2018. We sincerely regret the delay in our response, due to an administrative error and the vacancy resulting from the public health emergency, and apologize to the parties and to the DALA magistrate.

The motion seeks clarification of the portion of our decision that remands this appeal to the Division of Administrative Law Appeals (DALA) for consideration of whether the petitioner has met his burden to prove entitlement to ordinary disability retirement benefits under G.L. c. 32, § 6(1). In particular, where Kane was out of work with an injury to his elbow when he first alleged he was unable to return to work due to post-traumatic stress disorder,¹ issues are presented as to whether he has proven the elements required for ordinary disability retirement, including disability, permanence, and whether he was still “actively

¹ We have previously ruled that Kane has not shown that his emotional condition was causally related to an experience nine years earlier, in which he responded to a traumatic event involving the death of a child, where no mention was made of the incident over many years of mental health treatment. We affirmed the DALA magistrate’s conclusion that Kane was not entitled to accidental disability retirement and remanded for consideration of whether he was entitled to ordinary disability benefits.

employed” under the reasoning in *Vest v. Contributory Retirement Appeal Bd.*, 41 Mass. App. Ct. 191, 193-194 (1996). These issues must be addressed by DALA on remand.

We did not reach any conclusion as to ordinary disability because such a decision requires further determinations of both fact and law. In framing the issues to be considered at DALA, we noted the elements of ordinary disability retirement include: (1) status as a member in service, (2) sufficient creditable service to qualify, in this case ten years, (3) that, while actively employed under the *Vest* decision, the member became unable to perform the essential duties of his job, and (4) that the inability is likely to be permanent.

As to “active employment” under *Vest*, we noted that, unlike accidental disability, ordinary disability may arise from any source and need not be job-related. Thus, it would not be not logical to read *Vest* to require that a member seeking ordinary disability be disabled on the last day when he performed his work duties. For instance, if a member is seriously injured in an automobile accident in the evening after work or over a weekend, it would be illogical to conclude he was not still “actively employed” or that the injury was “late-maturing” under *Vest*.² But the more difficult question is whether any type of leave – and if so what type – may still qualify as “active” employment: e.g., vacation leave, sick leave, a longer injured-on-duty absence under G.L. c. 41, § 111F, worker’s compensation leave, or other long-term absence. It is evident, however, that at some point an injury must be considered “late-maturing” under *Vest*, at which time the member’s employment would no longer be

² We do not agree with the WRRB that *Vest* requires that the *reason* for the member’s leaving work be his disability. Although this will nearly always be the case in practice, it is possible, even in accidental disability cases, for a member to have left work for an unrelated reason and still show he was disabled as of his last day at work. See, e.g., *Travers v. Winchester Retirement Bd.*, CR-13-647 (CRAB July 23, 2018) (denial of reconsideration) (firefighter disabled as of last day of active duty despite leaving work for other reasons), *affirmed*, *Winchester Retirement Bd. v. Contributory Retirement Appeal Bd.*, No. 1881CV02212 (Middlesex Super. Ct. Oct. 7, 2019), *notice of appeal filed* (Nov. 2, 2019); cf. *Khramova v. Boston Retirement Bd.*, CR-11-522 (CRAB July 25, 2016) (disability matured before last day of work despite stopping work for winter school vacation and diagnosis a week later), *affirmed*, *Boston Retirement Bd. v. Contributory Retirement Appeal Bd.*, Appeals Court No. 18-P-156 (Rule 1:28 decision Mar. 11, 2019); *Walsh v. Boston Retirement Bd.*, CR-13-29 (CRAB July 7, 2017) (member not told of MRI result and continued working, doctor directed her to stay out of work in evening after last day of work), *affirmed*, *Boston Retirement Bd. v. Contributory Retirement Appeal Bd.*, Appeals Court No. 18-P-1126 (Rule 1:28 decision Sept. 3, 2019).

considered “active.” Again, this is an issue that must be addressed, if it is reached, by the DALA magistrate.³

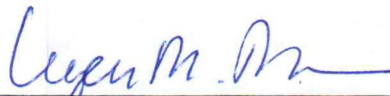
We note that it is possible that the DALA magistrate may not find it necessary to reach this issue, depending on her determinations of the other elements of ordinary disability retirement. Those elements include whether Kane is disabled from performing the essential duties of his job and, if so, whether that disability is likely to be permanent. The DALA magistrate should make findings on these issues. If she finds these elements in the affirmative, then she will need to address the question under *Vest* as to whether Kane’s disability arose while he was still actively employed.

Conclusion

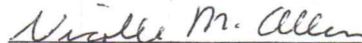
We allow the motion for clarification based on our comments above. Pursuant to 801 C.M.R. 1.01(7)(l), we deny the motion for reconsideration.

SO ORDERED.

CONTRIBUTORY RETIREMENT APPEAL BOARD



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³ We noted that the relevant facts here are that Kane was out on “injured-on-duty” benefits under G.L. c. 41, § 111F from July 27, 2012 until he gave notice of his emotional injury approximately three months later, on November 5, 2012; that Kane was expected to return to work on November 12, 2012; and that he was eventually terminated on October 9, 2013. We expressed no opinion as to whether Kane was “actively employed” on any of these dates.



Fariyda Mulrain, RN, BSN, FNP
Commissioner of Public Health Appointee

Date: 6/8, 2021