

**COMMONWEALTH OF MASSACHUSETTS  
CONTRIBUTORY RETIREMENT APPEAL BOARD**

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**BERNARD KELLY,  
Petitioner-Appellant**

**v.**

**BOSTON RETIREMENT BOARD,  
Respondent-Appellee.**

**CR-13-202**

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**DECISION**

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Petitioner Bernard Kelly appeals from a decision of an administrative magistrate of the Division of Administrative Law Appeals (DALA), affirming the decision of the respondent Boston Retirement Board (BRB)<sup>1</sup> denying Mr. Kelly's application for accidental disability retirement benefits. Mr. Kelly waived a hearing under 801 CMR 1.01(10)(c). The DALA magistrate admitted forty-six exhibits. The magistrate's decision is dated March 3, 2017. Mr. Kelly filed a timely appeal to us.

After considering the arguments by the parties and after a review of the record, we incorporate the DALA decision by reference and adopt its Findings of Fact 1 – 26 as our own. We affirm the DALA decision, adding the following comments.

In order to be eligible for accidental disability retirement benefits, a member must prove that, as of his last day of employment, he was "unable to perform the essential duties of his job," that "such inability is likely to be permanent," and that the disability was the result of a personal injury or hazard sustained "as a result of, and while in the performance of, his duties."<sup>2</sup> In the

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<sup>1</sup> This is the predecessor to the Boston Retirement System. For consistency with the DALA decision, the CRAB decision will use the same caption.

<sup>2</sup> G.L. c. 32, § 7(1) (in pertinent part); *see generally Murphy v. Contributory Retirement Appeal Bd.*, 463 Mass. 333, 345 (1985).

case of a police officer with no pre-existing heart condition, causation is generally presumed if the disability arises from a heart condition.<sup>3</sup>

To establish entitlement to accidental disability retirement benefits, Mr. Kelly has the burden of proving each element of his claim by a preponderance of the evidence. *Bagley v. Contributory Retirement Appeal Bd.*, 397 Mass. 255, 258 (1986)(petitioner has burden of proving his case by the preponderance of evidence); *Lisbon v. Contributory Retirement Appeal Board*, 670 N.E. 2d 392, 41 Mass. App. Ct. 246 (1996); *Daley v. Contributory Retirement Appeal Bd.*, 60 Mass. App. Ct. 1110, 801 N.E. 2d 324 (2004); *Hough v. Contributory Retirement Appeal Bd.*, 309 Mass. 534, 36 N.E. 2d 415 (1941); *Wakefield Contributory Retirement Bd. v. Contributory Retirement Appeal Bd.*, 352 Mass. 499, 226 N.E.2d 245 (1967).

#### *Applicability of the Heart Law Presumption*

In cases such as this where the applicant had no pre-existing heart condition prior to becoming a police officer, causation is generally presumed if the disability arises from a heart condition – also known as the Heart Law presumption.<sup>4</sup> This presumption can only be rebutted by competent evidence.<sup>5</sup> In this instance, CRAB is confronted with a unique situation – whether the heart law presumption applies in a case where the petitioner has two distinct periods of service and two physical examinations, the latter examination corresponding to the second period of employment that revealed evidence of hypertension. Mr. Kelly asserts that the heart law presumption does not require additional examinations beyond the initial examination “on entry to such service.” G.L. c. 32, § 94. Because section 94 makes no reference to additional possible examinations, he argues that the heart law does not bar those laid off and recalled to service from accessing its provisions.<sup>6</sup> On the other hand, BRB argues that it is Mr. Kelly’s burden to establish that the heart law presumption applies. BRB further contends that because Mr. Kelly was found to have a heart murmur on initial physical examination prior to his admission to the BPD, this presumption would not apply in this instance.<sup>7</sup>

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<sup>3</sup> G.L. c. 32, § 94.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Petitioner Response to Order For Further Briefing.

<sup>7</sup> Respondent Response to Order For Further Briefing.

To determine whether the Heart Law presumption applies under this circumstance, a further examination of that provision is required. G.L. c. 32, § 94 states in pertinent part:

Notwithstanding the provisions of any general or special law to the contrary affecting the non-contributory or contributory system, any condition of impairment of health caused by hypertension or heart disease resulting in total or partial disability or death to a uniformed member of a paid fire department or *permanent member of a police department...* 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.

(emphasis added). This provision applies to individuals who became a “permanent member of a police department” and refers only to an initial examination “on entry into such service.” G.L. c. 32, § 94. Here, Mr. Kelly became a permanent member of the Boston Police Department upon his initial entry in September 1979. When he was laid off in July 1981 and recalled to duty in November 1982, he still maintained his status as a permanent member of the police department and did not require to undergo an additional probationary period. Logic follows that if Mr. Kelly became a permanent member of the police department upon entry to service in September 1979, then the only examination applicable under these circumstances is his pre-employment examination of April 5, 1979. While the BRB argues that Mr. Kelly’s pre-employment examination showed evidence of a heart murmur, we disagree. An undated medical note from William Wigglesworth, M.D., pertaining to this examination revealed there to be a question of a heart murmur. Charles Bruschi, M.D., who examined Mr. Kelly on June 5, 1979, allowing his entrance to the police department, indicated that he found no evidence of a heart murmur, nor were there indications of hypertension or a cardiac disease. Based on the objective medical evidence, we conclude that Mr. Kelly successfully passed a physical examination and that examination did not reveal any evidence of any condition of impairment of health caused by hypertension or heart disease. Therefore, Mr. Kelly can pursue his claim for accidental disability retirement under the heart law presumption pursuant to G.L. c. 32, § 94.

*Cardiac Disability*

According to the medical records, Mr. Kelly presented to Brigham and Women's Hospital (BWH) emergency room (ER) in early August 2008 with worsening shortness of breath for the past month and trouble climbing stairs. He had not received medical care for fifteen (15) years and was found to be in atrial fibrillation with rapid ventricular rate to 130s. Coumadin was initiated. An echocardiogram obtained on August 4, 2008 revealed an ejection fraction of 34-40% with moderately reduced left ventricular function, global right ventricular systolic function; moderate to severe mitral regurgitation (MR); and mild pulmonary regurgitation without evidence of significant pericardial effusion. Based on these findings, Mr. Kelly underwent left and right heart catheterization on August 7, 2008. He remained hospitalized until August 13, 2008 for diagnoses of atrial fibrillation with rapid ventricular rate and cardiomyopathy.<sup>8</sup>

Since that hospitalization, Mr. Kelly remained on anticoagulation therapy with Coumadin.<sup>9</sup> He presented for an initial consultation with Marshall Katz, M.D., on March 17, 2010 for management of atrial fibrillation and prior resolved dilated cardiomyopathy. Dr. Katz noted he had mild exertional fatigue and dyspnea, possibly due to obesity and deconditioning and depression, untreated sleep apnea, as well as mild diastolic dysfunction from atrial fibrillation. He recommended anticoagulation therapy based on a CHAD score of 2 (if including prior cardiomyopathy and possible hypertension), or even a CHAD score of averaging 1 (with cardiomyopathy but resolved in plus or minus hypertension undiagnosed in the past).<sup>10</sup> While Coumadin management was provided through the Anticoagulation Program at Harvard Vanguard Medical Associates (HVMA),<sup>11</sup> Mr. Kelly maintained regular evaluations with Dr. Katz for his history of nonischemic dilated cardiomyopathy.<sup>12</sup>

In a Boston Police progress note dated February 1, 2012, Nurse Practitioner Greenstein indicated that Mr. Kelly presented with numerous health problems, was taking more than twelve medications, including Warfarin, and could not stand or walk for prolonged periods. NP Greenstein also noted he was morbidly obese and had difficulty changing positions. She found he was physically limited and determined that he should not be on street duty. Consequently, a medical note from his doctor was requested to limit Mr. Kelly to light duty. In the meantime,

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<sup>8</sup> Ex. 44 (8/2/2008-8/13/2008).

<sup>9</sup> Ex. 46 (8/22/2008, 8/27/2008, 10/14/2008).

<sup>10</sup> Ex. 46 (3/17/2010).

<sup>11</sup> Ex. 46 (3/2010-4/2011).

<sup>12</sup> Ex. 46 (12/7/2010).

Mr. Kelly was placed on light duty to avoid mandatory work at the Super Bowl.<sup>13</sup> According to records from the Boston Police Department, he was placed on desk duty as a Peer Counselor beginning February 1, 2012.<sup>14</sup> On April 5, 2013, Mr. Kelly resigned from his position.

Just prior to this accommodation, Mr. Kelly applied for accidental disability retirement benefits on November 23, 2011.<sup>15</sup> He claimed that he ceased being able to work on August 13, 2008 following his cardiac catheterization and diagnosis of atrial fibrillation.<sup>16</sup> His treating physician, Dr. Katz, confirmed in his Treating Physician Statement of July 29, 2011 that he was incapable of performing the essential duties of his job due to nonischemic dilated cardiomyopathy. He noted his heart function was stable (mildly severe) and concluded there was evidence of uniquely predominant non-service connect influence on his mental or physical condition and/or nonservice connected accident or hazard.<sup>17</sup>

In an Employer Statement dated February 29, 2012, Mr. Robin Hunt, Director of Human Resources, and Edward Davis, the Boston Police Commissioner, indicated that Mr. Kelly was a police officer from September 19, 1979 and that he was last able to perform the essential duties of his position on February 1, 2012. They explained that Mr. Kelly was prohibited from participating in any physical aspects of the police officer position and was limited to inside duty. As a result, Mr. Kelly was being accommodated with an inside position.<sup>18</sup>

A medical panel was convened to evaluate his condition. Madhusadan Thakur, M.D., noted in his report of April 24, 2012 that Mr. Kelly suffered from cardiomyopathy; congestive heart failure; chronic atrial fibrillation; COPD; and morbid obesity. He answered all three statutory questions in the affirmative.<sup>19</sup> In his responses to a request for clarification, he explained that Mr. Kelly's heart failure was not related to prior myocardial infarctions. Rather, he indicated that Mr. Kelly had a non-ischemic cardiomyopathy with unclear etiology. He noted that the potential causes of non-ischemic cardiomyopathies included prior viral infections, long-

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<sup>13</sup> Ex. 44 (2/1/2012).

<sup>14</sup> Ex. 5, 34.

<sup>15</sup> Ex. 3; Finding of Fact 2.

<sup>16</sup> Ex. 3.

<sup>17</sup> Ex. 4; FF 3-4.

<sup>18</sup> Ex. 5.

<sup>19</sup> Ex. 8.

standing hypertension, obesity, atrial fibrillation, nutritional and environmental factors, and idiopathic (i.e., unknown).<sup>20</sup>

Michael Johnstone, M.D., concluded in his medical report of April 19, 2012 that Mr. Kelly suffered from atrial fibrillation that initially resulted in a tachyarrhythmia-induced cardiomyopathy causing pulmonary edema that had resolved with medication. He explained that a very common cause of a cardiomyopathy is the condition of very fast atrial fibrillation. This very fast heart rate weakened the heart muscle causing it to function at a less than adequate level. This is called a tachyarrhythmia induced cardiomyopathy. Dr. Johnstone noted that if Mr. Kelly remained on Coumadin, this would put him at significant risk should he perform all his duties and not solely a desk job. He answered in the affirmative to questions regarding disability and causation and prefaced that should Mr. Kelly require use of Coumadin that his disability would be permanent.<sup>21</sup>

While Dr. Johnstone questioned Mr. Kelly's Coumadin therapy with a CHAD score of 1, Dr. Katz, his treating physician, felt there was a cardiac condition present for which the use of Coumadin was warranted.<sup>22</sup> Dr. Katz's opinion in conjunction with the medical records, and Mr. Kelly's required therapy with Coumadin, as well as the medical opinions of Drs. Thakur and Johnstone, support that Mr. Kelly suffers from a disabling cardiac condition.

#### *Application of Vest*

Although Mr. Kelly suffers from a disabling cardiac condition, we agree with the magistrate that his claim for accidental disability retirement benefits cannot be granted because he has failed to prove by a preponderance of the evidence that he was disabled as of his last day of work. Due to his required use of Coumadin, Mr. Kelly is disabled from performing his job duties as a police officer, but a later maturing disability cannot serve as a basis for accidental disability retirement benefits. *Vest v. Contributory Retirement Appeal Bd.*, 41 Mass. App. Ct. 191 (1996) (employee who has left government service without established disability may not, after termination of government service, claim accidental disability retirement status on basis of subsequently matured disability). We have consistently interpreted *Vest* to stand for the proposition that a member must establish permanent incapacity as of the date he or she last

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<sup>20</sup> Ex. 17; FF 7-11.

<sup>21</sup> Ex. 10; FF 18-22.

<sup>22</sup> Ex. 46 (3/17/2010, 12/7/2010).

actively performed his or her essential duties based on the same disability for which the member is now seeking accidental disability retirement. See *Mathew Tinlin v. Weymouth Retirement Bd.*, CR-13-361 (CRAB Aug. 9, 2016); *Lauren Forrest v. Weymouth Retirement Bd.*, CR-12-690 (CRAB Apr. 13, 2015); *Myra Wolovick v. Teachers' Retirement Bd.*, CR-02-1410 (CRAB Oct. 12, 2004); *Jose Chavez v. PERAC*, CR-04-427 (CRAB Dec. 23, 2004). Said differently, when an applicant seeks accidental disability retirement, he or she must establish that the same reason he or she stopped working is the same reason for which he or she later seeks the benefit.

Here, it is important to note that Mr. Kelly claimed he became unable to perform the essential duties of his job as of August 8, 2008 after having undergone cardiac catheterization. However, he returned to work as a police officer thereafter and then, more than three years later, filed for accidental disability retirement in November 2011. It was only after he filed for accidental disability retirement benefits that it was determined Mr. Kelly should be limited to indoor duty and was transferred to the position of Peer Counselor by BPD to accommodate his medical conditions and physical limitations beginning February 1, 2012.<sup>23</sup> Mr. Kelly then subsequently resigned on April 5, 2013.<sup>24</sup> Based on this specific set of facts, the magistrate correctly concluded that Mr. Kelly has failed to establish that he was permanently unable to perform the essential duties of his position as of the last day he worked. Accordingly, Mr. Kelly is not entitled to accidental disability retirement benefits.

Because we have determined that Mr. Kelly failed to prove that he was disabled as of his last day of work, it is not necessary to address whether Mr. Kelly was disabled from performing his duties as a police officer or whether he was disabled from performing the essential duties of a peer counselor, the position provided by BPD to accommodate his medical conditions and physical limitations pursuant to *Foresta v. Contributory Retirement Appeal Bd.*, 453 Mass. 669 (2009). Nor is it necessary to address the issue of whether the magistrate was within his authority to take administrative notice of certain medical information contained in a variety of online websites.

The DALA magistrate's decision is affirmed. Mr. Kelly is not entitled to accidental disability retirement benefits.

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<sup>23</sup> FF 1.

<sup>24</sup> FF 24.

SO ORDERED.

CONTRIBUTORY RETIREMENT APPEAL BOARD



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Uyen M. Tran  
Assistant Attorney General  
Chair  
Attorney General's Appointee



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Nicolle M. Allen, Esq.  
Governor's Appointee



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Melissa Adigun, P.A., M.B.A.  
Commissioner of Department of Public Health Appointee

Date: January 13, 2023