

**COMMONWEALTH OF MASSACHUSETTS**

**Middlesex, ss.**

**Division of Administrative Law Appeals**

**Kelly Kershaw,**  
Petitioner,

No. CR-16-82

Dated: October 18, 2024

v.

**Dukes County Retirement Board,**  
Respondent.

**Appearances:**

For Petitioner: Jennifer N. Smith, Esq.

For Respondent: James H. Quirk, Jr., Esq.

**Administrative Magistrate:**

Yakov Malkiel

**SUMMARY OF DECISION**

The petitioner lost consciousness several times while serving as a police officer, including once while driving a cruiser. There is no dispute that she is permanently disabled. A preponderance of the evidence supports the conclusion that the specific condition she suffers from is “vasovagal syncope.” According to the expert opinions, that condition is a form of heart disease. The petitioner is therefore entitled to retire for accidental disability under the heart law, G.L. c. 32, § 94.

**DECISION**

Petitioner Kelly Kershaw appeals from a decision of the Dukes County Retirement Board (board) denying her application to retire for accidental disability. An evidentiary hearing took place before Administrative Magistrate Mark L. Silverstein in June 2017. The matter was reassigned to the undersigned magistrate in September 2024, and neither party moved for any proceedings to be repeated or supplemented. *See* 801 C.M.R. § 1.01(11)(e). The record consists of an audio recording of the evidentiary hearing and eighteen exhibits.

**Findings of Fact**

I find the following facts.

1. Ms. Kershaw served as a police officer in Tisbury. She took that position in 2004. Her physical examination upon entry into service was unremarkable for cardiovascular issues.

(Exhibit 1; testimony.)

2. This appeal revolves around several “syncopal episodes” or “syncope” that Ms. Kershaw has suffered over the years. Record documents use those medical terms interchangeably with the idioms “fainting” and “passing out.” All four terms denote brief, abrupt losses of consciousness. (Exhibits 1-11.)

3. Ms. Kershaw experienced an early syncopal episode as a teenager, long before she became a police officer. At the time, an orthodontist was attempting to adjust her braces.

(Exhibits 3, 6.)

4. During 2009, Ms. Kershaw suffered from episodic chest pain and palpitations. She was experiencing significant job-related stress then. Her doctors performed an echocardiogram and a nuclear stress test, neither of which revealed any cardiological issues.

(Exhibits 3, 7; testimony.)

5. Ms. Kershaw suffered her first more recent syncopal episode one evening in June 2012. As a result of that episode, she fell and struck her head. Another syncopal episode occurred the very next morning. Neither of these episodes followed any identifiable precipitating event. Another echocardiogram and “Holter” heart monitoring were both normal.

(Exhibits 1, 6-9; testimony.)

6. On November 20, 2012, while Ms. Kershaw was driving her cruiser, she suffered yet another syncopal episode, her third as an adult. Her cruiser crashed. She was placed on a leave of absence and has not since returned to work. Her subsequent medical interventions have

included a third echocardiogram, more Holter monitoring, and lengthier “loop” monitoring. These diagnostics have all been unremarkable. (Exhibits 1, 6-9; testimony.)

7. In September 2013, Ms. Kershaw applied to retire for accidental disability. She originally identified her disabling diagnosis as posttraumatic stress disorder (PTSD). In March 2014, Ms. Kershaw supplemented her application, citing the heart law, G.L. c. 32, § 94, and asserting a diagnosis of “vasovagal syncope.” This type of syncope occurs when the “vagus” nerve instigates sudden drops in a person’s heart rate and blood pressure. (Exhibits 1, 9.)

8. Ms. Kershaw’s supplemented application was supported by statements from three treating physicians. On preprinted forms designed partly for “presumption cases,” each physician certified that he saw “no evidence of a uniquely predominant . . . non-service connected accident or hazard which caused [the] incapacity.” All three physicians diagnosed Ms. Kershaw with “syncope.” Dr. Peter Friedman described the syncope as having an “unknown origin.” Dr. Gerald Yukevich connected the syncope to a “cardiac arrhythmia.” Dr. David Milan offered a more detailed analysis, writing: “Certainly her remote syncopal episode as a child at the orthodontist is consistent with vasovagal syncope. . . . However, [with respect to] her most recent episodes she describes no warning which certainly makes one suspicious for arrhythmia.” (Exhibits 1-5.)

9. A regional medical panel convened to assess Ms. Kershaw’s application. The panel consisted of cardiologist Dr. Larry Weinrauch, cardiologist Dr. Michael Johnstone, and internist Dr. Seth Schonwald. The preprinted forms the panelists received reminded them of the “rebuttable presumption that any impairment of health caused by heart disease or hypertension is service connected.” Each panelist examined Ms. Kershaw in November 2014 and answered a subsequent clarification request. A panel majority consisting of Dr. Johnstone and Dr.

Schonwald certified that Ms. Kershaw suffers from a permanent incapacity attributable to her public employment through the heart law. (Exhibits 6-11.)

10. Dr. Johnstone wrote in his certificate that Ms. Kershaw is incapacitated by her “recurrent syncope.” He opined that the syncope “may be vasovagal in nature.” In his clarification letter, Dr. Johnstone elaborated: “I am not sure it is vasovagal. Given a previous cardiac workup and no diagnosis of seizures, this is one type of syncope for which there is little or no diagnostic testing.” With respect to the heart law’s applicability, Dr. Johnstone wrote in his certificate: “Given that this occurred while working as a police officer, this incapacity is the proximate result of her job.” In his clarification letter, Dr. Johnstone insisted that his answer would not change if Ms. Kershaw “had a similar event as a teenager.” He described Ms. Kershaw’s condition as a “cardiac disability” resulting from her employment. (Exhibits 7, 10.)

11. Dr. Schonwald agreed that Ms. Kershaw is permanently disabled, stressing the danger “of her losing consciousness unpredictably during the course of her activities.” In his certificate, Dr. Schonwald mentioned a “possibility” that Ms. Kershaw’s condition is related to an arrhythmia. In his clarification letter, Dr. Schonwald acknowledged that Ms. Kershaw’s history would also be consistent with vasovagal syncope. But noting that arrhythmias are a “very common etiology,” Dr. Schonwald continued to see a “statistical possibility that [Ms. Kershaw] may . . . be having . . . dangerous heart rhythms which leave her unconscious.” He explained that arrhythmias may remain undetected even in intensive testing. (Exhibits 8, 9.)

12. Dr. Weinrauch agreed with the majority physicians that Ms. Kershaw is disabled. He answered “no” on permanence and causation on the basis that no specific etiology of her condition has been confirmed. Dr. Weinrauch wrote: “The presumptive diagnosis of vasovagal events has not been substantiated in testing, and diagnostic testing of [neurological issues] has

not been performed. Given the absence of such testing and of a verified diagnosis I am unable to assess whether this incapacity can be considered permanent.” Dr. Weinrauch similarly declined to certify causation “given the absence of a verified diagnosis.” As another reason to question Ms. Kershaw’s causal theory, Dr. Weinreich referenced her “history of presumed vasovagal events that preceded her work assignments.” (Exhibits 6, 11.)

13. Guided by the various experts’ opinions, I find that the etiology of Ms. Kershaw’s recurrent syncope cannot now be pinpointed with certainty, but that vasovagal syncope is the most likely explanation. That theory draws support from the opinions of panelist Dr. Johnstone, panelist Dr. Schonwald, and treating physician Dr. Milan. Arrhythmia is an alternative explanation for Ms. Kershaw’s condition, but it is no more than plausible. It is so described by Dr. Schonfeld and Dr. Milan; it is referenced firmly but without elaboration by treating physician Dr. Yukevich. No other explanations for Ms. Kershaw’s condition are supported by the record evidence. (Exhibits 1-11.)

14. In February 2016, the board denied Ms. Kershaw’s application, stating that it “did not feel the evidence . . . met the [statutory] requirement of heart disease in order to [retire] under the heart law.” Ms. Kershaw timely appealed. The board subsequently granted Ms. Kershaw ordinary disability retirement benefits under G.L. c. 32, § 6. (Exhibits 12, 13.)<sup>1</sup>

### **Analysis**

A Massachusetts public employee who is permanently disabled as a result of a workplace injury or hazard is entitled to retire for accidental disability. G.L. c. 32, § 7(1). The parties agree

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<sup>1</sup> In January 2017, Ms. Kershaw filed a separate appeal from the board’s late-2016 denial of her PTSD-based application (No. CR-17-025). A separate order will issue in that docket, where no proceedings appear to have taken place, and which apparently remains open, but which may be mooted by the current decision.

that Ms. Kershaw is permanently disabled. The dispute focuses on whether the disability was caused by Ms. Kershaw's period of public employment.

In the usual case, an applicant for accidental disability retirement must prove a "natural and proximate" causal connection. *Noone v. Contributory Ret. Appeal Bd.*, 34 Mass. App. Ct. 756, 758 n.4 (1993). That requirement may be difficult to satisfy in cases of heart disease produced by stressful employment conditions. The heart law ameliorates this problem by providing that:

any condition of impairment of health caused by hypertension or heart disease resulting in total or partial disability or death to a . . . permanent member of a police department . . . shall, if [the member] successfully passed a physical examination on entry into such service . . . 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.

G.L. c. 32, § 94. When the heart law's prerequisite conditions are satisfied, the member is excused from proving causation in the first instance; the causation element is viewed as satisfied unless it is disproved by a preponderance of the evidence. *Williams v. Norfolk Cty. Ret. Bd.*, No. CR-03-556, at \*3 (CRAB Dec. 23, 2004).

The board maintains that the heart law's prerequisites are not met here. The board does not dispute that Ms. Kershaw became disabled while serving as a permanent police officer; it agrees that Ms. Kershaw's preemployment physical disclosed no evidence of her now-disabling medical condition. *See Cabral v. Fall River Ret. Bd.*, No. CR-15-673, at \*20-23 (DALA June 5, 2020). What the board appears to be arguing is that Ms. Kershaw's condition is not one "caused by hypertension or heart disease." § 94.

At first blush, the board's position may appear to have legs. To start with, the evidence does not prove that Ms. Kershaw suffers from arrhythmia. That hypothesis remains no more than plausible.

As for the better-supported explanation for Ms. Kershaw's case, vasovagal syncope, that condition involves not only a person's heart and blood pressure but also the nervous system. Laypersons might therefore wonder whether vasovagal syncope arises from "hypertension or heart disease." § 94. But the question whether a particular medical condition is most accurately classified as cardiovascular is first and foremost a medical one. On such questions, the finder of fact must be guided by expert opinions, *Robinson v. Contributory Ret. Appeal Bd.*, 20 Mass. App. Ct. 634, 639 (1985), especially those of the regional medical panel, *Malden Ret. Bd. v. Contributory Ret. Appeal Bd.*, 1 Mass. App. Ct. 420, 423 (1973). Those opinions are one-sided here. Majority panelists Dr. Johnstone and Dr. Schonwald both answered "yes" to causation specifically based on the statutory presumption for cases of "heart disease or hypertension," which their standard forms described. Dr. Johnstone called Ms. Kershaw's condition a "cardiac disability." The three treating physicians who supported Ms. Kershaw's retirement application also classified her condition as a heart problem, with Dr. Friedman doing so implicitly and the other two physicians being more explicit. Even minority panelist Dr. Weinrauch did not deny that vasovagal syncope is a form of heart disease; his dissent stemmed from lingering uncertainty as to whether that problem is the one from which Ms. Kershaw suffers.<sup>2</sup>

With the heart law's prerequisites met, causation is satisfied unless it is disproved by a preponderance of the record evidence. *Williams, supra*, at \*3. It is for the finder of fact to determine whether a statutory presumption has been rebutted. *See McLean v. City of Medford*, 340 Mass. 613, 617 (1965). Even so, theories about the medical causes of complex conditions

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<sup>2</sup> The analysis would change very little if the question whether vasovagal syncope is cardiovascular in nature were to be viewed as one that is decidable based on common knowledge and experience. It would remain true that the relevant record evidence revolves around the various experts' standard forms and narrative reports.

are incapable of bearing weight without support from competent experts. *See Robinson*, 20 Mass. App. Ct. at 639.

There is no expert support here for a theory that Ms. Kershaw's syncopes were caused by neurological issues or any other non-cardiovascular factors. Dr. Weinrauch did imply that Ms. Kershaw's condition might have arisen pre-employment, i.e., as early as her teenage years; but that comment alone cannot overcome the combined force of the statutory presumption, the steadfast disagreements of the majority panelists, and the additional views of Ms. Kershaw's three treating physicians—all of whom apparently saw no connection between Ms. Kershaw's single syncopal event as a teenager (precipitated by orthodontic care) and her serial events as an adult (lacking any apparent precursors).

It is easy to see why the board might have found this case enigmatic. But the experts' input leads inexorably to a result in Ms. Kershaw's favor. She is permanently disabled, as the board concedes. By a preponderance of the evidence, the specific condition that she suffers from is vasovagal syncope. The experts classify that condition as a heart disease. With the heart law triggered, the evidence of a non-cardiovascular or non-work-related basis for Ms. Kershaw's disability is too minimal to rebut the statutory presumption of causation. The fact is that the retirement law does not require applicants for accidental disability retirement—*especially* in presumption cases—to prove their cases with perfect certainty. *See Selden v. Boston Ret. Syst.*, No. CR-23-354, 2024 WL 4345240, at \*3 (DALA Sept. 20, 2024); *Smith v. Gloucester Ret. Bd.*, No. CR-19-493, 2022 WL 16921469, at \*3 (DALA Mar. 16, 2022).

**Conclusion and Order**

In view of the foregoing, Ms. Kershaw is entitled to retire for accidental disability. The board's contrary decision is REVERSED.

Division of Administrative Law Appeals

/s/ Yakov Malkiel

Yakov Malkiel

Administrative Magistrate