COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. Division of Administrative Law Appeals

 One Congress Street, 11th Floor

 Boston, MA 02114

**ANGELA KOERBER**, (617) 626-7200

 *Petitioner* Fax: (617) 626-7220

 **www.mass.gov/dala**

 *v.* Docket No: CR-15-66

**SOMERVILLE RETIREMENT BOARD,**

 *Respondent*

**Appearance for Petitioner**:

Herbert C. Dike, Esq.

240 Pleasant Street

Malden, MA 01844

**Appearance for Respondent**:

 Jason D. Grossfield, Esq.

 Assistant City Solicitor

 City of Somerville Law Department

 Somerville City Hall

 93 Highland Street

 Somerville, MA 02143

**Administrative Magistrate**:

Angela McConney Scheepers, Esq.

**SUMMARY**

The Somerville Retirement Board’s denial of Angela Koerber’s application for accidental disability retirement is affirmed. The Petitioner has not made out a prima facie case for accidental disability retirement, and thus is not entitled to examination by a medical panel.

**DECISION**

Pursuant to G.L. c. 32, § 16(4), the Petitioner, Angela Koerber, appealed the January 29, 2015 decision of the Somerville Retirement Board (Board) to the Contributory Retirement Appeal Board (CRAB), denying her application for accidental disability retirement benefits.

A hearing was held at the Division of Administrative Law Appeal (DALA) on September 22, 2016. The hearing was digitally recorded. Ms. Koerber testified on her own behalf. I marked Ms. Koerber’s Pre-Hearing Memorandum “A” for identification and the Board’s Pre-Hearing Memorandum “B” for identification. I admitted six exhibits (Exhibits 1 – 6) into evidence. I admitted Ms. Koerber’s appeal to DALA as Exhibit 7.

**FINDINGS OF FACT**

Based on the documents admitted into evidence and the testimony presented at the hearing, I make the following findings of fact:

1. The Petitioner, Angela Koerber, worked as an administrative assistant for the City of Somerville (City) from September 19, 1988 until August 30, 2012. (Exhibit 4A; Testimony.)
2. Ms. Koerber worked for nineteen and a half years in the Auditing Office, supervised by Mary Antonelli, the Deputy City Auditor. (Exhibits 1 and 4A.)
3. On September 3, 2002, Ms. Koerber filed a formal complaint with the City in regard to her treatment by Ms. Antonelli. In the complaint, Ms. Koerber wrote:

… Mary Antonelli has acted in an unprofessional manner towards me while supervising the Auditing Office. She has been very abusive, ridicules me, puts me down, threatens me, physically has touched me, called me a hooker, street walker, say I look and dress like a prostitute, shouts and screams at me constantly, banging things around the office disturbing me, the list of abuse goes on and on. She has abused her position as Deputy City Auditor by intimidating and bullying me. She has turned an office into a mentally unsafe environment to work in. Many years of abuse have taken such a toll on my emotional state that I can’t eat or sleep. I’m crying all the time at home and on occasions at work in the ladies room or break room. It’s emotionally very upsetting to me. I’m getting physically sick over this situation. Her abusive treatment towards me is detrimental to my physical and mental health. For years I feel as though she has put my emotions through an emotional meat grinder. I am now the product of my environment, an emotional wreck. I have reported this abusive treatment to 3 administrations over the years, … and all have asked me not to go to Personnel. I have respected their wishes with the agreement that they would take care of the situation internal without involving anyone else. Over the years the abuse has escalated immensely. It didn’t get any better it got worse. She is out of control and needs to be stopped.

Mary Antonelli retired on June 28, 2002. As a favor to Ed Bean the City Auditor, she was asked to return on a 960 program to train the office on her duties as a Deputy City Auditor. Unfortunately for the city she is the only one who knows how to do her job duties and needs to train the office. During her employment on the 960 program which began on July 1, 2002 she has continued to intimidate me, bully me and has been very verbally abusive towards me. In the mean time she is training the office including myself on her work. Recently, about a couple of weeks ago, she had taken about an1½ hours to train Lucille and myself on Real Estate and Water bills. I had keyed in a group of Water bills on the Warrant Wednesday 8/28/02 and I was under the impression that I had done them correctly. Unfortunately, I made an error in keying them in the system. I am new at this job, and it was my first time keying them in the system. Fortunately it was a very easy fix no big deal. She caused me so much stress screaming, shouting and verbally abusing me about that error repeatedly over and over from 10:30 Am on Wednesday 8/28/02 through Thursday 4:00PM which was when I went home for the day I thought I was on the verge of a emotional breakdown that day. I haven’t returned since. I had a planned vacation for Thursday eve and Friday morning. Ever since this episode last week, I have been an emotional wreck, I’m crying, not sleeping or eating … I just can’t take it anymore. If the city will not take care of this problem I will have to take other means. …

(Exhibit 4A.)

1. In addition to filing the complaint, Ms. Koerber sought counseling off and on in order to deal with the stress at work. In September 2002, she was prescribed Ativan as needed, Effexor and Paxil. (Exhibit 5.)
2. Ms. Koerber had a family history of depression. Her sister was diagnosed with depression and her father was disabled with depression. In January 1999, after the death of her second husband, Ms. Koerber was depressed and emotional. She was treated with the antidepressant Zoloft and trazadone, a sleep aid. Ms. Koerber improved, attended grief counseling and, by March 1999, was more stable and less distraught. (Exhibit 5.)
3. Ms. Koerber sought a transfer and was assigned to the Purchasing Office in 2007, where she spent five years. Her supervisor was Karen Mancini. (Exhibit 4A; Testimony of Koerber.)
4. Ms. Koerber’s position was clerical, and including sitting at a desk and typing, answering phones, walking documents from one office to another, organizing files (some bending and lifting – nothing over five pounds). (Exhibit 2; Testimony.)
5. The incumbent of the Administrative Assistant position had the following essential duties:

… responsible for monitoring the processing of all contracts … in Purchasing, ensuring that requisitions were properly paired with the corresponding contracts and to alert the department’s management team (Director and Asst. Director) of any requisitions that had been pending for more than one week and ensuring that … they were addressed. … entering all contracts were entered into the electronic database and ensuring that the data on the contracts are accurate. This position conducts the completeness and accuracy check of each contract before it goes to the City’s signatories, starting with the department head for the purchase and the Purchasing Director.

Additionally, the Administrative Assistant is critical to the year-end procedures and assisting the management team with ensuring that contracts are up to date in the database and the Purchasing files. The Administrative Assistant also trains employees citywide in the MUNIS software system – requisition entry, approvals and how to print POs [purchase orders] and look up contracts. The Administrative Assistant plays a crucial role in the department’s frontline, including answering phones, greeting members of the public, vendors and other city employees that come into the department. The Administrative Assistant supervises and trains the principal clerk and summer staff.

(Exhibit 2, Attachment A.)

1. Later, Angela Allen was hired as the Assistant Director of the Purchasing Office. Upon Ms. Allen’s hire, Ms. Koerber was told that she had to change her name to Angie because there could not be two Angelas in the office. Ms. Koerber complied. (Exhibit 4A; Testimony.)
2. At work, Ms. Allen tracked Ms. Koerber’s attendance via the publicly shared office Microsoft calendar. Ms. Allen did not track any other employees in this manner. Ms. Allen had to make up tardiness of one or two minutes by deductions from her lunch or breaks, while other employees were not required to do so. Unlike other employees, Ms. Koerber was not allowed to work through breaks and lunch and leave the office early. If Ms. Koerber had a telephone call, Ms. Allen would immediately exit her office and come to Ms. Koerber’s desk to ask if it had been a personal call. She did not do this for other employees. If a clerk dropped off a contract or asked a question about one of the city program, Ms. Allen would hover around Ms. Koerber’s desk in order to monitor the conversation. If the conversation veered off business topics, Ms. Allen would intervene and end the conversation. (Exhibit 4A; Testimony.)
3. Ms. Koerber suffered panic attacks when she had to approach Ms. Mancini and felt harassed and bullied by Ms. Allen. (Exhibit 4A; Testimony.)
4. Ms. Koerber sought out Bruce Freedman, a licensed social worker and EAP counselor, for treatment for depression and stress. She began treating with Eleni Soteris, a psychologist and social worker. Dr. Soteris collaborated with David Y. Ting, M.D., and Mr. Freedman, the individual EAP psychotherapist in Ms. Koerber’s treatment. Ms. Koerber attended all her therapy appointments with Dr. Soteris and was an active participant. She was prescribed antidepressants. (Exhibit 6.)
5. Ms. Koerber began taking medication for a thyroid disorder. She missed days from work due to diverticulitis and colitis. She became progressively withdrawn, and incapable of engaging in regular work or other activities. (Exhibits 1 and 4A.)
6. Ms. Koerber’s last day at work was August 30, 2012. (Testimony.)
7. In a letter dated September 27, 2012, the Somerville Municipal Employees Association (SMEA) union counsel wrote the City’s Personnel Director on behalf of Ms. Koerber, inquiring about the City’s policies on harassment, bullying and lateral violence.[[1]](#footnote-1) In the letter, counsel gave examples of “lateral violence” towards Ms. Koerber, citing the non-confidential criticism of Ms. Koerber in front of her peers by management; derogatory and foul language and aggressive physical behavior directed at Ms. Koerber; and arbitrary stringent rules for Ms. Koerber, lenient rules for others. The letter also gave instances where Ms. Koerber was treated differently from other employees in the Purchasing Department. (Exhibit 4A.)
8. The letter further alleged that the treatment of Ms. Koerber was in violation of the City’s bargaining obligation under G.L. c. 150E, and Counsel demanded that the City (1) cease its special negative treatment of Ms. Koerber; (2) address her alleged tardiness in the confidential manner consistent with past practice; (3) approve Ms. Koerber’s repeated request for FMLA due to her mental distress from foregoing, other acts of lateral violence and abusive management action against her; (4) have Ms. Allen refrain from repeatedly telephoning Ms. Koerber at home to inquire about her return to work; and (5) cease all direct communication to Ms. Koerber. Counsel further advised that Ms. Koerber would be filing for workers’ compensation. (Exhibit 4A.)
9. In a letter dated February 21, 2013, Renee Mello, the City’s workers’ compensation agent, advised Ms. Koerber that an independent medical examination (IME) had been scheduled for March 4, 2013. (Exhibit 5.)
10. On March 4, 2013, Ms. Koerber was examined by Michael Mufson, M.D. As part of the IME, Dr. Mufson reviewed Ms. Koerber’s medical records from Massachusetts General Hospital (MGH), her psychiatric records from MGH, her psychiatric records from Mr. Freeman, her medical records from Eliot Community Health Services and her November 2, 2012 Department of Industrial Accidents claim. Dr. Mufson also administered the MMPI-2 test on March 4 and 7, 2013. (Exhibit 5.)
11. Dr. Mufson learned that Ms. Koerber had been previously diagnosed with bipolar disorder. Ms. Koerber revealed that in her previous position, her supervisor called her a “slut” and a “whore” because of her style of dress. After sixteen years, she filed a complaint and was told not to let the comments bother her. She was angry over her treatment during this time. Ms. Koerber described being passed over for other positions, and believed that she secured her position in the Purchasing Department after she filed a grievance. She was also a union representative and had passed along her written observations to the union president. (Exhibit 5.)
12. Ms. Koerber said that she had left work after crying too much and feeling depressed and upset. She believed that she was singled out so that she would leave her job. She stated that her position was posted. She felt that she could not return to work as she would cry too much and her anxiety and depression would return. (Exhibit 5.)
13. On March 4, 2013, Ms. Koerber completed the MMPI-2 test with “x” marks in the circular bubbles, contrary to Dr. Mufson’s instructions and the illustrations in the test booklet. Although Dr. Mufson provided her with a notepad for any questions she had, she wrote all over the test booklet. She then began the test anew, and proceeded at such a slow pace she had to return on March 7, 2013 to complete the test. (Exhibit 5.)
14. Dr. Mufson concluded that Ms. Koerber did not suffer from an acute psychiatric disorder causally related to work stress. (Exhibit 5.)
15. Dr. Mufson reported in the IME, dated March 8, 2013:

Ms. Koerber does not have mental or emotional instability. She is subjectively claiming disability and this is due to her longstanding personality problems including her passive dependent style and is not related to work stress or injury. She is also exaggerating symptoms in an attempt to present herself as disabled and is entering a regressive psychological state in which she portrays herself as disabled. There is also her longstanding personality style and not to any psychological disorder related to a work stress. She is malingering for secondary gain and this is also related to her personality problems.

The objective psychological testing supports this clinical impression and reveals a woman with negative work attitudes and a woman with exaggeration of symptoms. She is a woman who blames others for her problems and this is seen in the clinical history as well. Her lack of motivation to return to work is the major impediment to returning to the work place. She could return to work if she were so motivated.

(Exhibit 5.)

1. On May 13, 2013, Ms. Koerber was evaluated by Michael W. Kahn, M.D., an impartial psychiatrist, for her workers’ compensation case. Ms. Koerber wept throughout the interview. (Exhibit 5.)
2. Dr. Kahn diagnosed her with depression, not otherwise specified, as well as maladaptive personality traits on the borderline and/or histrionic category. He concurred with Dr. Mufson that Ms. Koerber was psychologically regressed and lacked the ability to put things behind her and move on. He wrote:

She had a rather obsessional way of going over and over a litany of many prior abuses she feels she underwent, and though she did not seen psychotic, there was a relentless fixation on her having been treated poorly by multiple colleagues for over two decades. Her affect was tearful and sad, her mood “depressed,” she was alert and oriented, and showed no overt limitations.

(Exhibit 5.)

1. Dr. Kahn opined in his May 15, 2013 IME that Ms. Koerber was psychiatrically disabled, with the disability being total but temporary. He did not believe that a psychiatric end point had been reached. While he acknowledged that Ms. Koerber may indeed have suffered some degree of mistreatment at the hands of her coworkers, Dr. Kahn did not believe that there was a causal connection between her condition and the events described at work. (Exhibit 5.)

*Application for Accidental Disability Retirement*

1. On March 28, 2013, Ms. Koerber filed a Member’s Application for Disability Retirement (Application) for accidental disability. In the Application, she claimed that she had “depression and anxiety disorder.” She described her duties as “... processing contracts and orders for vendors dealing with the city. I must perform data entry and reports. I also deal with the public and city workers both in person and by telephone.” She stated that she ceased being able to perform these duties when she “... broke down after years of harassment and mental abuse on the job. On or about August 30, 2012 after being harassed by my superior Karen Muncin that day. I have not worked since. ” Ms. Koerber stated that as a result of her disability, she “can no longer concentrate in order to do these functions effectively, accurate[ly] and timely. I also cannot deal with people regularly as I cry uncontrollably on a daily basis.” (Exhibit 1.)
2. Under the heading “Reason for Disability,” Ms. Koerber checked the “personal injury” box on her application, and stated under the heading of “(1)Date(s)” that:

I have suffered ongoing harassment and abuse for 20 or more years of my employment with the City of Somerville. The last straw was on or about August 30, 2012 when my supervisor harassed me multiple times during the day.

(Exhibit 1.)

1. She described the specific time or length of time exposed to the “incident(s) or hazard” in the application as:

I have been harassed multiple times through my employment but it has continued and worsened in a lot of ways since I have been in the purchasing dept since I asked to go there to be removed from a bad situation in Auditing Dept. I bidded out of Auditing and was rewarded – Purchasing Position after a 4 year grievance.

(Exhibit 1.)

1. Ms. Koerber described the location as the Purchasing Office, and the description of incident(s) or hazard as:

I am targeted for ridicule and public harassment on a daily basis. I am treated differently than my coworkers by both Assistant Director of the Dept and my supervisor and manager of my Dept Finance Director – of Purchasing Dept.

(Exhibit 1.)

1. Ms. Koerber stated that she was performing her regular job duties on August 30, 2012. The office was short-staffed, and Ms. Koerber was arranging her books so as to ensure coverage in the Department. The “last straw” occurred when her supervised harassed her “multiple times” throughout the day. Ms. Koerber identified two witnesses by name. (Exhibit 1.)
2. In the application, Ms. Koerber wrote that she had filed a formal complaint in 2002 against Deputy City auditor Mary Antonelli, which was not acted upon. In that complaint, Ms. Koerber alleged that Ms. Antonelli:

… called me a hooker, having a hooker show, publicly humiliating me about my dress code, yelling daily at me in front of staff and public, giving me wedgies and adjusting my bra, shirts publicly adjusting my clothing. Singling me out saying, “I don’t want to see the whites of your eyes.” Scaring me by dropping heavy reports next [to] me, harassing me all day long physically and verbally. Banging shoulders as she walked to me.

(Exhibit 1.)

1. In the application, Ms. Koerber described other circumstances, events or physical conditions that contributed to her disability as:

cold sore, impetigo, PTSD, depression, insomnia, anxiety, can’t focus, can’t concentrate, cry all the time, obsessive talk of traumatic (thoughts, flashbacks), fybromyalgia, migraine headaches, nausea and throwing up, thryroid hypo, diverticulitis, colitis, nervousness, nightmares of work related incident.

(Exhibit 1.)

1. Ms. Koerber submitted two Treating Physician’s Statements Pertaining to a Member’s Application for Disability Retirement. The first Physician’s Statement (Ting Physician’s Statement) was submitted by Ms. Koerber’s primary care physician, David Y. Ting, M.D. and dated March 22, 2013. Accidental was checked off as the type of disability claimed. In the Statement, Dr. Ting asserted that Ms. Koerber was unable to perform the essential duties of her position, her incapacity was permanent, and that the natural and proximate cause of the personal injury was sustained in the performance of her duties. (Exhibit 6.)
2. In the Physician’s Statement, Dr. Ting diagnosed Ms. Koerber with PTSD/depression/anxiety. He wrote that the injury occurred for months prior to the last day of work on August 30, 2012, when Ms. Koerber was last able to perform the essential duties of her job. He noted that Ms. Koerber has seen psychiatrists, her condition had not improved over the past six months– instead had gone downhill and gotten much worse in August, and that the member had taken many medications. Dr. Ting also noted that the member had reported persistent harassment and bullying at work for years. In the Physician’s Statement, he noted that Ms. Koerber had been healthy in the past. She had complained of the abuse for years, and her superior had done nothing, the City had done nothing. (Exhibit 6.)
3. In the addendum to the Statement, Dr. Ting wrote:

Re question #2 on p. 3

She meets your definition on p. 5:

“If you are unable to determine when the application will no longer be disabled you must consider the disability to be permanent.”

 She has not improved in 6 months + seeing unlikely to improve in the near future.

 She was healthy prior to abuse that occurred at work.

(Exhibit 6.)

1. Another Physician’s Statement (Soteris Physician’s Statement) was filed by Eleni Soteris, a clinical psychologist and social worker. Accidental was checked off as the type of disability claimed. In the undated Statement, Dr. Soteris asserted that Ms. Koerber was unable to perform the essential duties of her position, her incapacity was permanent, and that the natural and proximate cause of the personal injury was sustained in the performance of her duties. (Exhibit 6.)
2. Dr. Soteris noted that Ms. Koerber was last able to perform the essential duties of her job on August 30, 2012. Thereafter she was too depressed, disorganized, and anxious to currently return. She diagnosed Ms. Koerber with PTSD, major depression, general anxiety. Ms. Soteris noted that Ms. Koerber’s condition had not changed over time. She also stated that the member was in the process of changing her medications because she had not responded to any psychiatric medications thus far. (Exhibit 6.)
3. Dr. Soteris opined:

… this time there is no improvement, thus it is not possible to predict if or whether she’ll improve.

At this point in time, I cannot predict when Ms. Koerber would return to the normal premorbid functioning. Several different psychotropic meds have been tried with no improvement. …

Pt has had long years of health functioning as an adult in both her family, social and work life. She has been a caring wife, mother and daughter. She reports success at other work positions. …

I feel strongly and stated above the major perceptions as seen by Ms. Koerber has been work-related and not personal based. This is the final time in Pt’s life she has so seriously decompensated despite having faced other hardships.

(Exhibit 6.)

1. In an attached addendum dated March 27, 2013, Dr. Soteris wrote:

I met Ms. Koerber shortly after leaving her job of over twenty years at the City of Somerville. I was in touch with Dr. Ting, her PCP, Mr. Freedman, her individual EAP psychotherapist, and met with her partner. All sources, including Ms. Koerber, describe the sharp decline in Ms. Koerber’s health directly related to the year of accumulated, unaddressed harassment at her place of work. She had never had a similar breakdown of functioning as she experienced in August of 2012. The amount of depression and stress she was experiencing made working impossible. Ms. Koerber reports that until the present she experiences daily depression, anxiety, tearfulness, sleeplessness, anhedonia, repetitive obsessional speech and intrusive traumatic thoughts.

As of yet she has not improved in response to treatment. The various trials of psychiatric medications have failed. New medication regimes are being tried. She does come to her therapy appointments and is an active participant. I would hope in time that she would respond to treatment and return to her premorbid status of fairly healthy functioning. However, as she has not improved at this point in time, I cannot say if, or when she would be improving.

(Exhibit 6.)

1. On June 11, 2013, William Roche, the Director of Personnel, sent Ms. Koerber a Return to Work order for July 1, 2013. (Exhibit 2, Attachment D.)
2. On June 13, 2013, counsel for Ms. Koerber responded, informing Mr. Roche that Ms. Koerber could not comply with the Return to Work order because she was physically and mentally unable to do so. He stated that the City had taken no action to correct Ms. Koerber’s abusive working conditions or to protect her from the same. He further advised that Ms. Koerber had filed an application for accidental disability retirement. (Exhibit 2, Attachment D.)
3. Mr. Roche replied to Ms. Koerber’s counsel on July 1, 2013, advising that the City could not leave the position open indefinitely, and would be filing an involuntary superannuation retirement on Ms. Koerber’s behalf. Mr. Roche denied the existence of “abusive working conditions.” He noted that the City had initiated a “prompt and thorough investigation” of the allegations, which had been put on hold because Ms. Koerber had been unable to meet with the investigators. Because Ms. Koerber had failed to meet with the investigators, based on the evidence gathered, the City had concluded that the claims were unsubstantiated. (Exhibit 2, Attachment D.)
4. On August 15, 2013, the Board voted to accept the involuntary retirement application filed on Ms. Koerber’s behalf. (Exhibit 2, Attachment B.)
5. In a letter dated November 20, 2013, the Board advised Mr. Roche that Ms. Koerber was retired on a superannuation benefit effective July 30, 2013. (Exhibit 2, Attachment C.)
6. On April 7, 2014, Ms. Allen submitted the Employer’s Statement Pertaining to a Member’s Application for Disability Retirement (Employer’s Statement). She checked off the box indicating that the application was for an accidental disability retirement benefit. On behalf of the City, Ms. Allen noted that the City denied that the claimed injury was job-related. She wrote:

The applicant was absent with, then without, leave for an extended period and refused to return to duty after being ordered to do so. The applicant retired effective July 30, 2013 for non-medical reasons.

(Exhibit 2.)

1. Ms. Allen noted that Ms. Koerber had applied for Workers’ Compensation benefits. She also noted that the City had appealed after an order of payment pursuant to paragraph 30 (mental health payments) was approved on March 22, 2013. (Exhibit 2.)
2. On December 15, 2014, Candace Cooper, Deputy Director of Personnel, and Robert Collins, Chief Labor Counsel, forwarded Mr. Roche an executive summary and recommendations in regard to Ms. Koerber’s bullying complaint. The document noted that the City launched an investigation on October 3, 2012 after receiving Ms. Koerber’s September 27, 2012 complaint of bullying by several of her coworkers. On November 12, 2014, SMEA informed the City that it no longer represented Ms. Koerber and provided the name of her new attorney. The City tried to schedule an interview with Ms. Koerber via her attorney, but there was no response from the attorney via email and US Mail. (Exhibit 4.)
3. Unable to contact her through the new attorney, the City conducted the investigation without Ms. Koerber’s participation. Sarah Kloos, the Director of Personnel, and Robert Collins, Chief Labor Counsel conducted the interviews. They interviewed Ms. Allen, Ms. Mancini, Orazio DeLuca and Bonnie Tanner. On December 10, 2014, the City concluded that Ms. Koerber’s complaints were unsubstantiated. No credible or substantial objective evidence was produced by Ms. Koerber. None of the coworkers corroborated Ms. Koerber’s allegations of harassing behavior. (Exhibit 4.)
4. In a letter dated February 3, 2015, the Board informed Ms. Koerber that it had voted at its January 29, 2015 meeting to deny her accidental disability retirement application “based on insufficient evidence.” (Exhibit 3.)
5. On February 23, 2015, Ms. Koerber filed a timely appeal at DALA. (Exhibit 7.)

**CONCLUSION AND ORDER**

The decision of the Somerville Retirement Board denying her claim is affirmed. Angela Koerber has not made out a prima facie case for accidental disability retirement, and thus is not entitled to examination by a medical panel. There is no reliable evidence in the record that Ms. Koerber was disabled as of the last day that she performed her duties, as is required under *Vest v. Contributory Retirement Appeal Bd.,* [41 Mass. App. Ct. 191](http://sll.gvpi.net/document.php?id=sjcapp:41_mass_app_ct_191) (1996). *See also Forrest v. Weymouth Retirement Bd*., CR-12-690 (CRAB 2015). Rather, she voluntary stopped working in the City’s Purchasing Department on August 30, 2012.

 To be entitled to a medical panel examination, an applicant must provide sufficient evidence that, if unrebutted and believed, would allow a fact finder to conclude that the applicant is entitled to accidental disability retirement. G. L. c. 32, § 7(1); *DeFelice v. Norfolk Cty. Retirement Bd*., CR-08-200 (DALA 2012); *Lowell v. Worcester Reg. Retirement Bd*., CR-06-296 (DALA 2009). In other words, to reach the medical panel stage, an applicant for accidental disability retirement must make out a prima facie case. *Church v. Marblehead Retirement Bd*., CR-10-38 (DALA 2013); *Lowell*, CR-06-296. The rationale for this standard is that “an order to convene a medical panel must be sought under M.G.L. c. 32, § 7(1),” and thus “relief requires proof of the alleged disability’s permanency and a causal nexus between the disabling injuries and the applicant's work.” *Lowell*, CR-06-296.

To establish a prima facie case for disability retirement, a petitioner must show that (1) she is physically or mentally incapable of performing the essential duties of her job either with or without accommodation from his employer; (2) her disability is likely to be permanent; and (3) she was a member in service at the time he became disabled. *Bloomquist v. Massachusetts Teachers’ Retirement Bd.*, CR-04-266 (DALA), (CRAB 2006). The burden is on the petitioner to prove these factors by a preponderance of the evidence. *Bloomquist*, CR-04-266; *see Lisbon v. Contributory Retirement Appeal Bd*., Mass. App. Ct. 1996.

Ms. Koerber presented that she was harassed while working as an administrative assistant in the City’s Auditing and Purchasing Departments. She worked in the Auditing Department from 1988 until 2007. During her tenure, Ms. Koerber was allegedly bullied and disparaged by her supervisor, Ms. Antonelli. According to Ms. Koerber, Ms. Antonnelli called her a slut, a prostitute and a street walker. Ms. Koerber filed a complaint against Ms. Antonnelli in 2002.

When Ms. Koerber transferred to the Purchasing Department in February 2007, her situation was not greatly improved under her new supervisor, Ms. Mancini. After Ms. Allen was hired as the Assistant Director, she requested that Ms. Koerber change her name. Ms. Allen singled out Ms. Koerber by placing her arrival, lunch break and departure times on the non-private electronic office calendar. Ms. Allen pointedly hovered in Ms. Koerber’s work area if she were on the phone or discussing work-related matter with another employee. If the matter veered off into pleasantries or other business, Ms. Allen intervened.

Ms. Koerber argued that her twenty-four years of harassment at work was not common, and that her supervisors’ actions did not qualify as bona fide personnel actions. Ms. Koerber contended that she had been specific, identifying the behavior and the perpetrators by name, and had put the City on notice when she filed her 2002 claim. Ms. Koerber cited August 30, 2012 as the date of her injury, when her supervisor’s repeated taunts that day were purportedly the last straw.

Ms. Koerber argued that the Board never heard from her and did not conduct its own investigation. The Board noted that the City had opened an investigation of Ms. Koerber’s allegations of harassment on October 3, 2012 after receiving the September 27, 2012 bullying complaint. Ms. Koerber did not participate in the City investigation. Although Ms. Koerber identified two witness co-workers in her application, no one corroborated her accounts of harassing behavior. On December 10, 2014, the City concluded that the complaints were unsubstantiated.

Ms. Koerber was examined by two independent psychiatrists. In the IMEs, Ms. Koerber went on at length about the derision she suffered at the hands of her coworkers. In his March 8, 2013 IME, Dr. Mufson diagnosed Ms. Koerber with longstanding personality problems and longstanding anxiety and mood disorder. He found that Ms. Koerber had negative work attitudes and exaggerated symptoms. He concluded that she could return to work if she were so motivated.

In his May 15, 2013 IME, Dr. Kahn diagnosed Ms. Koerber with maladaptive personality traits, in the borderline/histrionic category. He found that Ms. Koerber had a significant degree of victimization, and concurred with Dr. Mufson that she had lost the ability to put things behind her and move on.

The psychiatrists concluded that Ms. Koerber was a malingerer for secondary gain which was related to her longstanding personality style. The physicians found that while it was possible that Ms. Koerber may have been subject to mistreatment by her coworkers, there was no causal connection between her condition of depression and the events described at work. They were aware of Ms. Koerber’s family history of depression, but neither psychiatrist diagnosed her with a mental disability. They both found that she was seething with anger at her former Auditing Department coworkers to a significant degree, although she had left the position almost five years before.

I accept the opinions of the independent medical examiners.

There is no evidence that Ms. Koerber was mentally disabled when she left her employment on August 30, 2012. August 30, 2012 is the date to be used in determining disability. *See, e.g. Myles McGrail v. Boston Retirement Bd.*, CR-90-296 (DALA 1990). There has to be some evidence to demonstrate that Ms. Koerber stopped working due to the medical condition on which her application is based. Here, Ms. Koerber has not presented a prima facie case in support of her application for accidental disability retirement. *See Forrest v. Weymouth Retirement Bd*., CR-12-69, (DALA 2014), *aff’d* (CRAB 2015).

Even if Ms. Koerber began experiencing symptoms after her last day performing her duties, it would be irrelevant. At best she would have a “subsequently matured disability,” which cannot not form the basis for a disability retirement. *See Forrest*, CR-12-690. *Vest v. Contributory Retirement Appeal Bd.* stands for the proposition that a disability must mature no later than the last day that the member performs her duties. 41 Mass. App. Ct. 191, 192. In *Vest*, the member police officer became disabled due to hypertension four years after he left the police department. The officer had been diagnosed with hypertension 12 years before his last day of service. Nevertheless, he was able to perform the essential duties of a police officer until his severance for nonmedical reasons. The court concluded that the injury had not matured into a disabling one while the officer was a member in service, and held that the officer “could not claim accidental disability retirement status on the basis of a subsequently matured disability.” *Id*. at 192-194.

Ms. Koerber is not eligible for accidental disability benefits because she was not totally and permanently disabled on her last day work due to a work-related disabling condition or incapacity. She was unable to prove that her condition was due to a work-related injury, and thus could not be so injured on the last day of her employment.

 Ms. Koerber has not made out a threshold showing of entitlement to Section 7 benefits.

Accordingly, the Somerville Retirement Board’s denial of Angela Koerber’s application for accidental disability retirement is affirmed.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

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Angela McConney Scheepers

Administrative Magistrate

DATED: August 4, 2017

1. Counsel defined “lateral violence” sometimes known as “horizontal violence” as hostile or aggressive behavior by an individual or group members toward another member or group of members of the larger group, and is generally non-physical inter-group conflict that is manifested by overt and covert behaviors of hostility. Usually these are psychologically, emotionally and spiritually damaging behaviors, which can have devastating long-term effects on the recipients. E. Duffy, *Horizontal Violence, A Conundrum for Nursing*, Collegial Journal of the Royal College of Nursing Australia, 5 (1995); P. Freire, *Pedagogy of the Oppressed* (1972); W. Wilkie, *Understanding the Behavior of Victimized People in Bullying, from Backyard to Boardroom*, (P. McCarthy, M. Sheehan and W. Wilkie, eds., 1996), <http://www.hawaiinurses.org/news-a-publications/hna-news-archive/44-general-news/187-horizontal-violence-or-beyond-the-bully.html>. [↑](#footnote-ref-1)