

COMMONWEALTH OF MASSACHUSETTS CONTRIBUTORY
RETIREMENT APPEAL BOARD

LEONID KOTKIN,

Petitioner-Appellee

v.

STATE BOARD OF RETIREMENT

Respondent-Appellant

CR-17-1024

DECISION

The respondent State Board of Retirement (SBR) appeals from a decision of an administrative magistrate of the Division of Administrative Law Appeals (DALA) reversing SBR's decision denying the petitioner Leonid Kotkin, Group 2 classification. The magistrate heard this matter on January 13, 2022 and admitted nine (9) exhibits.¹ The DALA decision is dated May 27, 2022.² SBR filed a timely appeal to us.

After reviewing the evidence in the record and both parties' arguments, we adopt the magistrate's Finding of Fact 1-13 as our own. We affirm the magistrate's decision that Dr. Kotkin was properly classified in Group 2 for retirement purposes. Dr Kotkin's regular and major job duties required him to have the "care, custody, instruction and other supervision" of mentally ill or incarcerated patients pursuant to G.L. c. 32, § 3(2)(g). Thus, Dr. Kotkin was properly classified in Group 2.

Background. Dr. Kotkin was a Physician Specialist and Chief of Urology, who began his employment for the Department of Public Health (DPH) at Lemuel Shattuck Hospital (LSH) on February 1, 2004. He worked part-time and retired on November 30, 2017 with 10 years and

¹ The Exhibits total 25 pages. SBR's Memorandum of Specific Objections and Joint Pre-Hearing Memorandum total 28 pages. The Hearing Transcript totals 123 pages.

² The DALA decision total 10 pages.

3 months of creditable service.³ Dr. Kotkin's job description and his annual performance review reflect that a majority of his general duties were administrative and supervisory. However, in practice, Dr. Kotkin was the only urologist at LSH and did not train or supervise any students or staff.⁴ Specifically, he was required to "diagnose and manage patients with urological problems on inpatient and ambulatory settings." He was to "carry out surgical interventions including operative procedures, including pre-operative assessment, intra operative management and post-operative care and follow up."⁵

LSH is a facility that provides healthcare to patients from multiple different communities including the Department of Corrections (DOC), Department of Mental Health (DMH), and the Department of Public Health (DPH).⁶ The DOC sends inmates to LSH to address acute medical problems. While receiving surgical treatment by Dr. Kotkin, two (2) correction officers would generally accompany an inmate, with one stationed outside the examination room and one inside the room. Once a patient is given anesthesia, the officer would leave the operating room and maintain guard outside.⁷

Dr. Kotkin also treated patients from the DMH. These patients were diagnosed with serious mental illnesses, such as schizophrenia, psychosis, bipolar disorder, or depression. The patients tended to be on psychotropic medications and were housed in locked wards in the facility which required them to be accompanied by staff members to appointments. Some patients were treated by Dr. Kotkin because they had inserted foreign objects into their genitals, which required surgical removal. Most of the DMH patients were able to make medical decisions for themselves but if they were not, Dr. Kotkin would obtain consent from a guardian.⁸ The community patients treated by Dr. Kotkin resided in shelters or group homes. Half of these patients were outpatient clients of the DMH and all of them had mental health or substance abuse issues.⁹

³ Finding of Fact 1.

⁴ Finding of Fact #2; Exhibit 5; Testimony of Dr. Kotkin.

⁵ Ex. 3.

⁶ Finding of Fact #1; Ex. 4; Testimony of Dr. Kotkin.

⁷ Finding of Fact #5; Testimony of Dr. Kotkin.

⁸ Finding of Fact #6; Testimony of Dr. Kotkin.

⁹ Finding of Fact #7; Testimony of Dr. Kotkin; Testimony of Tapia-Arcos.

On a typical workday, Dr. Kotkin arrived at 7:15 a.m. and began prepping and performing surgery. He met with patients, explained the procedure, and obtained consent for surgery. Dr. Kotkin was in surgery from anywhere between three and seven hours and then checked on patients in recovery. After surgery, he performed prostate biopsies and then tended to outpatient clinic patients, which were scheduled by appointment only.¹⁰ Approximately 85% of Dr. Kotkin's patients were inmates or mentally ill individuals housed in units operated by the DMH. Although Dr. Kotkin was not certified to provide mental health treatment, he received training on dealing with psychotic patients.¹¹

On October 10, 2017, Dr. Kotkin submitted a Group Classification Questionnaire to the SBR, requesting his position be classified in Group 2 for retirement purposes. He submitted a letter detailing his reasons for entitlement to Group 2. In his narrative, Dr. Kotkin stated that 90% of his patients fell under the required statutory population and that he provided direct care for those patients for more than half of his time.¹² On November 10, 2017, he filed his application for superannuation retirement.¹³ On November 27, 2017, the SBR denied Dr. Kotkin's request for Group 2 classification because he did not prove he worked with the correct statutory population for more than half of his time, nor had he provided psychiatric care to the patients.¹⁴ Dr. Kotkin appealed the decision to DALA on December 4, 2017.¹⁵ On May 27, 2022, the DALA magistrate allowed Dr. Kotkin's request for Group 2 classification

Discussion. At issue in this case is G.L. c. 32, §3(2)(g)'s provision that Group 2 classification includes "employees of the commonwealth or of any county whose regular and major duties require them to have the care, custody, instruction or other supervision of...prisoners or persons who are mentally ill or mentally defective..." "Regular and major" job duties are those that require the employee to spend more than half their time performing. *Forbes v. State Bd. of Retirement*, CR-13-146 (DALA Dec. 23, 2016, aff'd CRAB Jan. 8, 2020) and *Curtin v. State Bd. of Retirement*, CR-13-317 (CRAB Jan. 8, 2020). Therefore, to be entitled to

¹⁰ Finding of Fact #3; Testimony of Dr. Kotkin; Testimony of Galvin.

¹¹ Finding of Fact #4; Testimony of Dr. Kotkin; Testimony of Tapia-Arcos; Testimony of Galvin.

¹² Finding of Fact #8-9; Ex. 3.

¹³ Finding of Fact #12; Ex. 9.

¹⁴ Finding of Fact #13; Ex. 1.

¹⁵ Finding of Fact #13; Ex. 2.

Group 2, the employee must be engaged in the “care, custody, instruction, or other supervision of parolees or persons who are mentally ill or mentally defective” for more than half their work time. *Richard v. State Bd. of Retirement*, CR-16-72 (DALA Feb. 2, 2020).

The SBR does not explicitly dispute that Dr. Kotkin spent a majority of his workday providing direct care to patients. Rather, the issues in this appeal involve whether the magistrate properly determined that Dr. Kotkin provided the required “care” of mentally ill patients and had the “care and custody” of prisoners under G.L. c. 32, § 3(2)(g). SBR contends that the patients being treated by Dr. Kotkin must have primary diagnoses of a mental illness in order to be classified in Group 2, and because their primary diagnoses were not mental disorders, Dr. Kotkin was not providing the care specified in §3(2)(g) for a Group 2 population. Additionally, SBR argues that because Dr. Kotkin was not exclusively caring for or had exclusive custody of the patients he was treating, he should not be classified in Group 2. Consequently, SBR concluded that he was not engaged in the “care, custody, instruction or other supervision” of mentally ill persons, and therefore, he is not eligible for Group 2 classification. We do not find these arguments compelling.

To determine an employee’s Group classification, we look to the employee’s current duties at the time of retirement. *Maddocks v. Contributory Retirement Appeal Bd.*, 369 Mass 488 (1976). In making this determination, we consider the job description and the actual duties performed. *Gaw v. Contributory Retirement Appeal Bd.*, 4 Mass. App. Ct. 250 (1976). We agree with the magistrate that the evidence in the record supports the conclusion that Dr. Kotkin’s regular and major job duties consisted of providing “direct care” to a Group 2 patient population. *Forbes v. SBR*, CR-13-146 (CRAB Jan. 8, 2020). Our reasons follow.

In this instance, the magistrate properly concluded that the patients Dr. Kotkin treated were mentally ill or mentally defective and that they also required treatment for physical medical conditions. LSH is a facility that provides healthcare to patients from DOC, DMH, and DPH. The patients from DMH were diagnosed with serious mental illnesses, such as schizophrenia, psychosis, bipolar disorder, or depression. They tended to be on psychotropic medications and were housed in locked wards in the facility. As the magistrate highlighted, DALA had deemed in *Tomaszewski v. State Bd. of Retirement*, CR-16-431 (DALA Dec. 2019)(*aff’d* CRAB Apr. 2024) that patients admitted to LSH suffered from mental illnesses. Based on the record evidence the

magistrate determined that the patient population cared by Dr. Kotkin was mentally ill and therefore, he was properly classified in Group 2. In so deciding, the magistrate credited Dr. Kotkin's testimony. We conclude the magistrate's decision is reasonable and defer to the magistrate's subsidiary and credibility findings. *Vinal*, Mass. App. Ct. 85, 97, 100 N.E.2d 440 (1982), *Kalu v. Boston Retirement Bd.*, 61 N.E.3d 455, 464 (Mass. App. 2016).

With regard to SBR's argument that the primary diagnosis test requires that the "care" in the context of §3(2)(g) is restricted to psychiatric or psychological treatment, we find this also lacks merit. "We interpret the language of the statute 'in accordance with its plain meaning, and if the language is clear and unambiguous, it is conclusive as to the intent of the legislature,'" *New England Auto Max, Inc. v. Hanley*, 494 Mass. 87, 91 (2024) (Statutes are to be interpreted in accordance with their plain words); See also *Commonwealth v. Hatch*, 438 Mass. 618, 622 (2003) (quoting *Sullivan v. Brookline*, 435 Mass. 353, 360 (2001))("[S]tatutory language should be given effect consistent with its plain meaning and in light of the aim of the Legislature unless to do so would achieve an illogical result."). Here, we do not read §3(2)(g) as limiting care to psychiatric or psychological treatment. We agree with the magistrate that SBR's argument produces an erroneous result by excluding prisoners or mentally ill persons, who receive various types of "care, custody, instruction or other supervision." While we have held that persons must have a "primary diagnosis" of mental illness to qualify for Group 2 under G.L. c. 32, §3(2)(g),¹⁶ we explained in *Popp v. State Bd. of Retirement*, CR-17-848 (CRAB 2023) that a strict application of the primary diagnosis analysis would deviate from the plain reading of § 3(2)(g) and noted that the purpose of the primary diagnosis test is to distinguish between mental illness diagnoses that are incidental to physical illnesses from principally mentally ill patients.¹⁷

¹⁶ *Pulik v. State Bd. Of Ret.*, CR-10-605 (CRAB Jul. 10, 2012) (holding that CRAB does not rely on secondary diagnoses in concluding that patients are mentally ill under G.L. c. 32 §3(2)(g)); *Lorrey v. State Bd. of Ret.*, CR-09-553 (DALA decision Nov. 22, 2013; affirmed by CRAB Dec. 19, 2014).

¹⁷ *Nowill v. State Bd. Of Ret.*, CR-08-558 (DALA decision July 21, 2011; affirmed by CRAB May 17, 2012; CRAB decision on motion for reconsideration as corrected July 10, 2012) (excluding patients admitted for treatment of neuromuscular disorders with secondary mental illnesses); *Pulik*, CR-10-605 at 7 (discussing the unimportance of symptoms that merely correlate with a patient's principal illness); *Popp v. State Bd. Of Ret.*, CR-17-848 (DALA decision Oct. 22, 2021; affirmed by CRAB Nov. 16, 2023) (held that an LPN II is not excluded from Group 2 classification because the purpose of the patient's hospice diagnosis was to allow

In this instance, the above distinction still holds true. Dr. Kotkin testified that around 85% of the patients he cared for were either prisoners or mentally ill and many were housed in units operated by the DMH.¹⁸ Many of the patients were on psychotropic medications for serious mental illnesses and are housed in locked wards. Some patients came into his care because they inserted foreign objects into their genitals, which is likely due to their mental illnesses. They were escorted to appointments by staff and were not permitted to freely move about the facility. Furthermore, half of the community patients that Dr. Kotkin treated were outpatient clients of the DMH.¹⁹ To be eligible to receive services from the DMH, individuals need to be at least 22 years old and have a serious and persistent mental illness. The evidence shows that the patients treated by Dr. Kotkin either suffered from mental illnesses or were prisoners, and therefore, Dr. Kotkin's "regular and major job duties" at the time of his retirement required him to have the "care, custody, instruction or supervision" of a statutory population in G.L. c.32 §3(2)(g).²⁰

The cases cited by SBR to support its argument that the care referred to in §3(2)(g) refers to mental health treatment are distinguishable from this matter.²¹ In *Miers*, DALA determined that there was no evidence that the patients who were admitted to the Western Massachusetts Hospital for treatment of their neuromuscular conditions and not psychiatric disorders, suffered from mental illnesses. Therefore, Group 2 classification was denied. Unlike the patients in *Miers*, the record here reflects that Dr. Kotkin cared for patients with mental illnesses. In *Pulik*, the primary issue was whether dementia is deemed to be a mental illness. In this instance, the parties do not dispute that the patients served by Dr. Kotkin have mental illnesses. The *Borucki*, *Digris*, and *Massai* cases all involve the issue of whether the petitioners satisfied the criteria that they spent more than half their time engaged in the "care, custody, instruction or supervision" of

patients better access to care for dementia and that Popp's work was still centered on the patient's mental infirmities).

¹⁸ Finding of Fact #4; Testimony of Dr. Kotkin.

¹⁹ Finding of Fact #7.

²⁰ DALA Decision Fn. 1; *Neergheen v. State Bd. of Ret.*, CR-07-439 (DALA July 24, 2009; CRAB Nov. 3, 2009) (patient population was deemed mentally ill under statute because they had illnesses that satisfied the conditions for being able to receive DMH services).

²¹ *Miers v. State Bd. of Retirement*, CR-06-441 (DALA Aug. 2007); *Pulik v. State Bd. of Retirement*, CR-10-605 (DALA Aug. 2011)(*aff'd* CRAB July 2012); *Borucki v. State Bd. of Retirement*, CR-12-683 (DALA Apr. 2016); *Digris v. State Bd. of Retirement*, CR-13-109 (DALA July 2015); and *Massai v. State Bd. of Retirement*, CR-15-6 (DALA Feb. 2018).

mentally ill persons. This is not at issue here. There is no dispute that Dr. Ktokin spent more than half his time engaged in direct care of the patients. In *Richard*, the patients were admitted for treatment in response to a medical diagnosis and not a psychiatric diagnosis. Here, LSH is a facility that provides care to populations of DOC, DMH, and DPH. These cases do not assist the SBR in this appeal.

Additionally, SBR contends that Dr. Kotkin should not be classified in Group 2 because the prisoners were in the custody of guards who accompany them to their appointments and therefore, Dr. Kotkin did not engage in the specific duties for Group 2 classification. We agree with the DALA decision that this is an improper analysis of statutory language. The Legislature used the word “or” not “and” in drafting this specific provision. A plain reading of the statute establishes that a member seeking Group 2 classification must have one of the listed responsibilities. Here, it is possible for Dr. Kotkin to be providing care, while the patient is also in the custody of the COs. Dr. Kotkin still satisfies one of the listed responsibilities of G.L. c. 32 §3(2)(g) for Group 2 classification.

The magistrate correctly concluded that Dr. Kotkin’s regular and major duties involved providing direct care of prisoners and mentally ill individual both of which are a Group 2 population. The magistrate’s decision is reasonable, and we defer to the magistrate’s subsidiary and credibility findings in making this determination. *Vinal v. Contributory Ret. Appeal Bd.*, Mass. App. Ct. 85, 97, 100 N.E.2d 440 (1982), *Kalu v. Boston Retirement Bd.*, 61 N.E.3d 455, 464 (Mass. App. 2016).

Conclusion. Dr. Kotkin’s regular and major job duties involved the care, custody, instruction, or other supervision of mentally ill or incarcerated patients pursuant to G.L. c. 32, § 3(2)(g). Accordingly, Dr. Kotkin is entitled to Group 2 classification for his service at Lemuel Shattuck Hospital. The DALA decision is affirmed. ***Affirm.***

SO ORDERED.

CONTRIBUTORY RETIREMENT APPEAL BOARD

Did not participate

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