THE COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. **Division of Administrative Law Appeals**

Rene Maillet,

 Petitioner

 v. **Docket No. CR-13-327**

 **DATED:** June 3, 2016

State Board of Retirement,

 Respondent

**Appearance for Petitioner:**

Charles E. Berg, Esquire

321 Foundry Street

South Easton, MA 02375

**Appearance for Respondent:**

Crystal Matthews, Esquire

State Board of Retirement

436 Dwight Street, Room 109A

Springfield, MA 01103

**Administrative Magistrate:**

Judithann Burke

 **Case Summary**

The Petitioner, a former Steam Fireman for Fitchburg State College, has not met his burden of proving that he is entitled to accidental disability retirement benefits by virtue of an alleged work-related exposure to natural gas fumes and subsequent hand injury which he claimed to have occurred during an emergency room blood draw.

 **DECISION**

The Petitioner, Rene Maillet, is appealing from the May 30, 2013 decision of the Respondent, State Board of Retirement (SBR), denying his application for Section 7 accidental disability retirement benefits. (Exhibit 1.) The appeal was timely filed on June 14, 2013. (Exhibit 2.) I held a hearing on December 3, 2015 at the offices of the Worcester Registry of Deeds, 90 Front Street, Worcester, MA.

 At the hearing, the Petitioner testified in his own behalf. The Respondent called no witnesses. The hearing was digitally recorded. The parties submitted both pre-hearing and post-hearing memoranda of law. (Attachments A & C-Respondent; Attachments B & D-Petitioner.) The last of the submissions was received at this agency on January 28, 2016, thereby closing the record.

 **FINDINGS OF FACT**

Based upon the testimony and documents submitted at the hearing in the above-entitled matter, I hereby render the following findings of fact:

1. The Petitioner, Rene Maillet, born in 1959, began employment as a Steam Fireman at Fitchburg State College (FSC) on January 1, 1989. (Exhibits 4 & 6.)
2. The Petitioner’s duties as a Steam Fireman included: pulling chains to open valves; firing and maintaining the operation of steam boilers and ventilating systems in the power plant; assisting in repairs to operating parts; maintaining good housekeeping in the power plant and other areas as required; operating and maintaining feed and vacuum pump and other boiler room apparatus; adjusting firing controls for air-fuel mixture for optimum efficiency; and repairing, replacing and maintaining a variety of heating and cooling equipment and air handling equipment such as valves, steam controllers, and condensate pumps throughout the campus. (*Id.*)
3. Beginning on or about April 27, 2006, the Petitioner was involved with the conversion of the FSC boiler system to natural gas. (Exhibit 4.)
4. On October 17, 2006, while a third party was installing natural gas lines in or near the boiler room, the Petitioner entered the boiler room and felt dizzy. Fearing he was having a stroke, he left work and drove home. (Exhibits 4 & 6.)
5. The Petitioner’s claim is that he was exposed to natural gas on October 17, 2006 and that said exposure resulted in his feeling light-headed. However, the 2006 log sheets from the power plant reflect no mention of any gas leak. One loose flange was discovered that caused small amounts of fat to leak for approximately one week until it was tightened. The exact date of this discovery is unclear. No gas leak was located by a third party who employed detection equipment to investigate the premises. No other employees claimed illness or injury due to gas exposure at the time of the Petitioner’s alleged October 2006 exposure. (Exhibit 6.)
6. After being home for a couple of hours, the Petitioner was accompanied to the Heywood Hospital Emergency Department by his sister. He presented at approximately 11:30 AM on October 17, 2006. The chief complaint at that time was noted as “C/O ? stroke.” (Exhibit 9[1].)
7. It was noted in the Emergency Physician Record that the Petitioner reported he had right arm weakness off and on for the previous week. It was noted further that he had “similar symptoms previously, one year ago.” (Exhibit 9[1].)
8. Notes from the physical examination in the Heywood Emergency Department indicate that the Complete Blood Count (CBC) and blood chemistry tests rendered normal results. The clinical impression was listed as “weakness.” The Petitioner’s blood pressure reading in the Emergency Department was 184/120. (*Id.*)
9. The Heywood Hospital Emergency Nursing Record reflects a chief complaint of “? +Possible stroke.? chemical gas-(R) side numbness longer than one week. Worse over weekend. Decreased use of arm. Worse today.” The Petitioner reported that he felt frustrated and that he was confused by simple commands. Recorded neurological findings included weakness, facial droop and tongue deviation. Speech was noted to be slurred. Additional findings included “progressive “(R) side sluggish” now occurs outside of work-getting worse.” (*Id.*)
10. The CT scan of the head performed during the visit on October 17, 2006 was normal. (*Id.*)
11. Additional notes in the “actions taken” section of the Emergency Department record reflect that the patient insisted that his right side was not right. It was further noted that he demonstrated good grasp in both hands and “arm ?” (illegible.) (*Id.*)
12. The Petitioner returned to full duty in October 2006. (Exhibits 4 and 6.)
13. The next chronological medical record in this case is a June 19, 2007 note from Fitchburg Adult Medicine. The Petitioner complained to his primary care physician, Eric L. Knutson, M.D. of low back pain after having moved a canoe with heavy batteries over the previous weekend. He also complained of a painful neuropathy in his right hand after having blood drawn. He indicated that he believed “they struck a nerve in the dorsum of his hand.” Dr. Knutson noted that motor function remained normal but that the patient complained of subjective tenderness and would receive a referral to neurology. (Exhibit 9[2].)
14. Handwritten notes pertaining to a message left on Dr. Knutson’s answering service on June 19, 2007 reflect that the Petitioner had neuropathy in the right hand after a blood draw the previous November. (*Id.*)
15. On June 27, 2007, Dr. Knutson noted that the Petitioner’s past medical history included “depression/anxiety disorder, hypertension, nicotine addiction.” The doctor rendered the same diagnoses following the office visit. He noted further that the Petitioner continued to complain of pain in his right hand which he believed was the result of a blood draw the previous year. The Petitioner indicated that he would obtain records from the facility. (*Id.*)
16. In July 2007, the Petitioner presented to Dr. Knutson with extremely high blood pressure. The doctor noted that he warned the patient about the possibility of a sudden heart attack and stroke as a result of untreated hypertension. (*Id.*)
17. Neurologist Thomas Mullins, M.D. of the Fallon Clinic evaluated the Petitioner on September 18, 2007. The Petitioner informed Dr. Mullins that his problems dated back to the previous October 2006 when he had a blood sample drawn with a needle being inserted on the dorsum of his right hand in the metacarpal area. He stated further that, following that incident, he had continuous radiating pain with radiating pins and needles extending down the long finger. He reported that he was showing signs of improvement. The Petitioner reported that he was continuing to golf and that he did not have any complaints of sensation, tingling or sensory problems in his feet. Dr. Mullins opined that the Petitioner had sustained a local injury to the tendon with a bit of a nerve injury to the branches of the superficial radial nerve which should get better with time. Conservative treatment included tendon stretches, vitamins and herbs. (Exhibit 9[3].)
18. The Petitioner continued to treat with Dr. Knutson and he continued to complain of right hand pain. On September 29, 2008, he reported to the doctor that he continued to have right hand discomfort, which he claimed followed an intravenous injection or blood draw two years prior. He indicated to the doctor that he believed there was a retained piece of metal in his hand from the injection. (Exhibit 9[2].)
19. X-rays of the right hand taken on September 29, 2008 revealed mild degenerative joint disease. An October 31, 2008 MRI confirmed this diagnosis. (Exhibits 6, 9[4] and 9[5].)
20. The Petitioner was seen by Harvey G. Clermont, M.D. on August 3, 2009. On August 7, 2009, Dr. Clermont reported that, three years prior, there had been documented leaks of natural gas at FSC and that the Petitioner had been exposed. The doctor reported further that the Petitioner had sharp shooting pains going into the third finger of his right hand immediately on insertion of a needle during a blood draw in the Heywood Hospital Emergency Department. The Petitioner informed Dr. Clermont that the pain had persisted in the right hand ever since that day and had progressed to the point where he had weakness in grasp and difficulty with motion in the middle finger of the right hand. Dr. Clermont’s diagnosis was “chronic regional pain syndrome.” He opined that the Petitioner was permanently partially disabled as a result and that it was impossible for him to work in his usual occupation, which involved strength and stability of both upper extremities to function without injury. (Exhibit 9[4].)
21. The Petitioner continued to work and perform all of his duties. (Exhibits 4, 6, 8 and 9.)
22. The Petitioner eventually came under the care of Thomas Breen, M.D. On September 10, 2009 he reported to Dr. Breen that he had been having issues with his right long finger since October 17, 2006 when he felt excruciating pain on the skin overlying the dorsal aspect of the proximal phalanx of the right hand. He indicated that the pain had been constant and unchanging since the time of the injury, and, that trials of Vicodin and Neurontin had not been helpful. Dr. Breen prescribed a course of physical therapy. (Exhibit 9[5].)
23. A radiological study on September 10, 2009 revealed a 5 mm rounded sclerotic density over the lateral distal radius and tiny cysts within the first metacarpal. (*Id.*)
24. On November 25, 2009, Dr. Breen performed an excision of a neuroma of the right middle finger on the radial aspect of the PIP joint. This provided some relief from the pain, but some degree of pain continued. The Petitioner underwent physical therapy following the procedure. (*Id.* and Exhibit 6.)
25. Following the surgery, the Petitioner experienced some relief of local mid-finger pain and reduced range of motion to flexion in that finger. (Exhibit 9[4].)
26. The Petitioner and his attorney, James Ellis, completed an Employee’s Claim on January 21, 2010 and cited October 17, 2006 as the date of injury. It was alleged therein that a third party installation of natural gas lines exposure to gas fumes at work resulted in Emergency Room hospitalization and injury to hand at the Emergency Room. (Exhibit 6.)
27. On January 28, 2010, Jessica Murdoch of the Fitchburg State College Human Resources Division completed a Notice of Injury Report wherein she indicated that the employee stated that he was exposed to natural gas over the course of two or so months after the college switched to gas on April 27. 2006. He claimed he experienced numbness and tingling in his upper extremities. The nature of the injury was noted to be middle finger pain and pain and difficulty in using it. The date of injury was listed as April 27, 2006. (*Id.*)
28. The Petitioner was seen by Lalit Savla, M.D. on March 6, 2010. The doctor’s diagnosis was “post traumatic painful paresthesia question chronic regional pain syndrome. Status post right middle finger neuroma primarily involving the proximal phalanx.” Dr. Savla recommended a follow up visit with Dr. Breen and continued occupational therapy. The doctor noted that, with difficulty making a complete hand grip, the Petitioner would not be able to perform his duties as a steam boiler engineer. The doctor opined that the symptoms were causally related to the pain sustained while blood was drawn at Heywood Hospital on October 17, 2006. (Exhibit 6[6].)
29. The Petitioner underwent an independent medical evaluation performed by Isadore G. Yablon, M.D. on March 18, 2010. He informed the doctor that he had been exposed to natural gas one to two weeks prior to October 17, 2006 and, that on that date, he lost function of the right side of his body and the ability to think. He indicated that he was told at the hospital that he did not have a stroke and that the weakness and confusion dissipated after several weeks while he continued to work throughout. The Petitioner indicated that he did not have full range of motion in the right hand and experienced varying degrees of pain. Dr. Yablon’s diagnosis was “pain over the dorsum of the right hand with temporary loss of function of the right side for which there is no explanation. Dr. Yablon concluded that this was not work related and that exposure to natural gas did not cause the symptoms of which the Petitioner was complaining. The doctor added that the neuroma which Dr. Breen excised was not caused by work. The doctor indicated that there was no atrophy or any abnormality of the skin on the right hand and that the pain was of unknown etiology. (Exhibit 9[8].)
30. The Petitioner saw Dr. Savla again on May 16, 2011. At that time he informed the doctor that in the fall of 2006, he had noted the smell of rotten eggs and experienced at least two episodes of the onset of right arm numbness and the feeling of weakness for 10-15, and then 30-40 minutes, each prior to October 17, 2006. He told the doctor that he had reported these incidents to his superiors and was advised to use a spray bottle as it would be easier to find the leak. He told Dr. Savla that further evaluation of the boiler room had revealed there were numerous areas of leaks present. Regarding the blood draw at Heywood Hospital, the Petitioner told the doctor that after blood drawn from the left hand was coagulated, and that several attempts were then made to draw blood from the dorsum of the right hand before a sample was collected. He indicated that soon after the drawing he started to experience a fair degree of pain. The Petitioner indicated that he was continuing to work. Dr. Savla opined that he was not capable of performing the level of work that was required of him. (Exhibit 9[6].)
31. Patrick Connolly, M.D. performed an independent examination of the Petitioner on July 9, 2011. The Petitioner informed him that he went to the Heywood Hospital Emergency Room on October 17, 2006 due to exposure of natural gas and that he had been having problems ever since one of the nurses drew blood from the hand. Dr. Connolly noted tenderness in the metacarpophalangeal joint of the middle finger with full extension of the joint and no atrophy. The doctor concluded that the Petitioner had “neuroma radial nerve associated with the blood draw of October 17, 2006 by history.” Dr. Connolly concluded that the Petitioner was capable of working full time without restriction and that he had no causally related employment disability associated with the date of October 17, 2006. (Exhibit 9[7].)
32. On July 11, 2011, Dr. Breen reported that the Petitioner had a longstanding history of difficulties with the middle finger and had undergone multiple therapies and a surgical procedure, all to no avail. There was no satisfactory relief of his symptoms. Accordingly, on that same day, the doctor performed a second surgery. The digital nerve, radial on the right finger, was excised. (Exhibit 9[5].)
33. According to his June 2012 application for accidental disability retirement benefits, the Petitioner stopped working for the last time on April 13, 2012. (Exhibit 4.)
34. The Petitioner’s application for accidental disability retirement benefits was received by the SBR on June 14, 2012. On page 2 of his application, the Petitioner indicated that the medical reason for which he was unable to do his job was that his hands were unable to grip. (*Id.*)
35. On page 5 of his application, the Petitioner indicated that he had been exposed to natural gas fumes in the boiler room and that the ER nurse had been incompetent. (*Id.*)
36. In an addendum to his retirement application, the Petitioner hand-wrote that the installer (3rd party) had left numerous leaks in the high pressure steam boiler power plant. He indicated that he could detect “a rotten egg smell” and that that the right side of his body immediately went useless. The Petitioner reported that, several days later, the loss of use of his right arm reoccurred and that he reported leaks (natural gas?) to his supervisor and was provided with a spray bottle of warm, soapy water (to use for detection). The Petitioner went on to describe in detail the events of October 17, 2006. (*Id.*)
37. Dr. Clermont’s Physician’s Statement was received by the SBR on June 14, 2012. He cited exposure to natural gas and the attempted blood draw as events leading to the onset of the Petitioner’s disabling, chronic regional pain syndrome. (Exhibit 5.)
38. John Fattmore, M.D. conducted an independent medical examination of the Petitioner on June 27, 2012. The Petitioner informed the doctor that he had last worked on February 15, 2012 at which time he felt he could no longer perform the duties of his job. He complained of continued pain in the hand that caused him great dysfunction. Dr. Fattmore reported that it was unclear to him why the Petitioner had stopped working in February 2012 after functioning in his job since the date of the claimed injury. He opined that the Petitioner was capable of continuing to work. (Exhibit 6.)
39. Single physician medical panel doctor Steven Sewall, M.D. evaluated the Petitioner on February 5, 2013. He answered “no” to Question 1 on the certificate, thereby indicating that he did not find the Petitioner to be incapable of performing his essential duties. (Exhibit 8.)
40. In his narrative report, Dr. Sewall noted that, while the Petitioner had some mild stiffness of the PIP joint in the long finger and .5 inch atrophy of the muscles of his forearm, he was able to do all the work that was required of him as a steam fireman. (*Id*.)
41. Single physician medical panel doctor Eduard Vaynberg, M.D. evaluated the Petitioner on February 7, 2013. He answered the certificate “yes, yes, yes,” thereby indicating that he

Found the Petitioner to be totally and permanently incapacitated from performing his essential duties and that said incapacity was such as might be the natural and proximate result of the alleged exposure to gas fumes at work and the subsequent blood draw on account of which retirement was claimed. (*Id.*)

1. Single physician medical panel doctor Reva Klein, M.D. answered Questions 1 and 2

on the certificate in the affirmative, thereby indicating that she found the Petitioner to be totally and permanently incapacitated from performing his essential duties. Dr. Klein answered Question 3, pertaining to causation, in the negative, indicating that she did not believe that the disability was such as might be the natural and proximate result of a work related cause. (*Id.*)

1. In her narrative report, Dr. Klein noted that the Petitioner’s current status was directly caused by the incident on October 17, 2006, the traumatic neuroma from a blood draw. She did not opine that there was a job-related connection. (*Id.*)
2. The SBR denied the Petitioner’s application for accidental disability retirement benefits on May 30, 2013. (Exhibit 1.)
3. The Petitioner filed a timely appeal on June 14, 2013. (Exhibit 2.)

**CONCLUSION**

 The Petitioner is not entitled to prevail in this appeal as a matter of law. His case fails

on both procedural/administrative and legal grounds.

 This case does not satisfy the notice requirements of M.G.L. c. 32,§ 7(1), which provides

that “no such retirement shall be allowed unless such injury was sustained or such hazard was

undergone within two years prior to filing of such application, or, if occurring earlier, unless written notice thereof was filed with the board by such member or in his behalf within ninety days after its occurrence.” The injuries alleged by the Petitioner to have resulted in his disability occurred on October 17, 2006. The first notice of injury report in the record was not submitted until January 28, 2010. The Petitioner’s first claim to the Department of Industrial Accidents was not submitted until January 21, 2012, each more than three years following the alleged injuries. Even the Petitioner’s contentions that he notified his superiors of a gas leak at or around the time of the alleged exposure are not supported in the record.

The Petitioner’s accidental disability retirement application was received by the SBR on June 14, 2012. Therefore, any injury or hazard would necessarily have to have occurred no earlier than June 14, 2010 in order to satisfy the notice requirement set forth in Section 7(1).

 The Section 7(1) notice requirement is deemed waived if the disability applicant collected Workers’ Compensation benefits for the disabling injury. See G.L. c. 32, § 7(3). In this case, the Petitioner continued working until February 2012, more than five years following the events on October 17, 2006. There is no evidence he suffered any further work injuries between October 2006 and that time or that he incurred any injury on his last day of work that he reported to his employer. Further, there is no evidence in the record that the Petitioner ever received Workers’ Compensation benefits pursuant to Chapter 152. Therefore, his case is not covered by the Section 7(3) exception to the notice requirement for Group 1 members. It should also be noted here that Drs. Connolly and Fattmore, who each performed independent medical examinations for the Workers’ Compensation insurers concluded that he was capable of performing all of his duties.

In order to receive accidental disability retirement benefits under G.L. c. 32 § 7, an applicant must establish by a preponderance of the evidence, including an affirmative medical panel certificate, that he is totally and permanently incapacitated from performing the essential duties of his position as a result of a personal injury sustained or hazard undergone while in the performance of his duties. The medical panel’s function is to determine “medical questions which are beyond the common knowledge and experience of the local board (or Appeal Board).”

*Malden Retirement Board v. Contributory Retirement Appeal Board,* 1 Mass. App. 420, 298 N.E. 2d 902 (1973). Unless the panel applies an erroneous standard or fails to follow proper procedures, or unless the certificate is “plainly wrong,” the local board may not ignore the panel’s medical findings. *Kelley v. Contributory Retirement Appeal Board*, 341 Mass. 611, 171 N.E. 2d 277 (1961).

 In addition to the failed notice requirement, the Petitioner has not met his burden of proving that he sustained a compensable personal injury within the meaning of G. L. c. 32 s. 7(1). The right sided weakness and confusion that he experienced on October 17, 2006 have not been proven to be related to a work-place exposure to natural gas. It is noteworthy that his blood pressure reading in the Emergency Department was 184/120. The Emergency Department blood test results do not confirm any compromise from gas exposure. Neither do the doctor’s or nurse’s notes. The Petitioner’s primary concern at the time of the Emergency Department visit was that he was experiencing stroke symptoms. He did not elaborate on work-place exposures or supervisor interactions until 2010 and later. The employer’s 2006 logs do not confirm any significant gas leaks. No other employees complained of symptoms from natural gas exposure.

There is no medical evidence or expert testimony in the record that supports the notion that natural gas can result in the symptoms experienced by the Petitioner in October 2006. Rather one small leak was found that was patched within a week. The date of this is unclear.

Dr. Yablon opined that natural gas does not generate the symptoms reported by the Petitioner on October 17, 2006. No other physicians report to the contrary.

 The doctors who treated or independently evaluated the Petitioner following October 2006 all accept his assertions at face value without medical or other independent support in the record. Accordingly, their assumptions that he developed a reaction to natural gas exposure that manifested itself in an Emergency Department visit on October 17, 2006 are based on an unsupported premise. Thus, their opinions that he sustained an occupational exposure on that date cannot be afforded any weight.

It necessarily follows then, that if there was a problematic blood draw during the October 2006 hospitalization, it has not been proven to have a work-related connection. It should be noted, however, that there is no mention in the Emergency Department record that the Petitioner complained of excruciating pain during the blood draw. The notes do reflect that he demonstrated good grasp in both hands. It is also noteworthy that the next medical record in support of the Petitioner’s claim of a hand injury was not until June 19, 2007 when he saw Dr. Knudson. The doctor’s notes from that day are vague as to when the blood draw occurred. The Petitioner did inform the doctor at that time that he had moved heavy batteries over the previous weekend. Dr. Knudson’s July 2007 notes reflect that the Petitioner had uncontrolled hypertension. In September 2007, the Petitioner informed Dr. Mullins that he had continued to play golf. The large gap in the medicals, the Petitioner’s golfing and lifting of heavy items; along with his continuing to work during the period between 2006 and 2007 all create a cloud of doubt as to whether he sustained any disabling injury on October 17, 2006. It was documented as early as 2008 that he suffered from degenerative arthritis in the right hand.

Lastly, the Petitioner does not have positive medical panel certification that his disability is work-related. In answering no to questions 1 and 3, Drs. Sewell and Klein, respectively, did not employ an erroneous standard. Their certificates are not plainly wrong.

In conclusion, the lack of valid notice and both the murky non-medical evidence and paucity of reliable medical evidence in this case all support the notion that Petitioner’s claim for

accidental disability retirement benefits must fail. The decision of the SBR denying his Section 7 application is affirmed.

 So ordered.

 Division of Administrative Law Appeals,

 BY:

 Judithann Burke

 Administrative Magistrate

DATED: June 3, 2016