

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

Jill Markos,  
Petitioner

v.

Docket No. CR-21-0579

Haverhill Retirement Board  
Respondent

Appearance for Petitioner:

Robert P. McMullen, Esq.  
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Appearance for Respondent:

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Administrative Magistrate:

James P. Rooney

**Summary of Decision**

Paraprofessional suffered a concussion in 2014 while walking toward her school to begin her workday. She had two other falls while working in 2015 and 2019. Her retirement board denied her application for accidental disability retirement. After a hearing, I determined that her application could not be based on the 2014 fall because she was not in the performance of her duties at the time, and that the evidence failed to show that her two later falls aggravated the symptoms she suffered from her 2014 concussion to the point of disability.

**DECISION**

Jill Markos is appealing the November 9, 2021 decision of the Haverhill Retirement Board to deny her request for accidental disability retirement benefits. I held a hearing on June 22, 2023. I marked 22 exhibits into evidence. The Petitioner testified. The record closed on October 10, 2023 with the filing of post-hearing briefs by both

parties. I marked the Joint Pre-hearing Memorandum “A,” the Petitioner’s post-hearing brief “B,” and the Respondent’s post-hearing brief “C.”

**Findings of Fact**

Based on the testimony, exhibits, and reasonable inferences drawn from them, I make the following findings of fact:

1. Jill Markos worked as a paraprofessional in the Haverhill Public Schools from 2000 to September 5, 2019. Her duties as a paraprofessional were to assist kindergarten, first, and second grade teachers by keeping the students on task and guiding them when necessary. Her work environment was brightly lit and noisy. She retired for superannuation in January 2020. (Exs. 1,10.)

2014 Fall

2. The school day on December 9, 2014 was delayed by a snowstorm, and thus Ms. Markos arrived at school later than she normally would. While walking toward the building to start her workday, Ms. Markos slipped on ice near the front door and hit the back of her head. She lost consciousness. She was taken by ambulance to Lawrence General Hospital where she reported headache, nausea, neck and back pain. A CT scan demonstrated no fracture or bleeding. Ms. Markos was discharged home with diagnoses of concussion and hip contusion. She was advised to take naps, stay in darkened rooms and avoid activities that worsened her symptoms. (Ex. 2; Ex. 8; Ex. 18, pp. 51-57; Ex. 10.) She experienced symptoms of sensitivity to loud sounds; headaches from fluorescent lights; extreme fatigue; body aches; burning shoulders; a heavy head at the end of the day; and concentration and memory issues. She returned to work on December 12, 2014 despite her symptoms. (Ex. 1, pp. 21-22; Ex. 2, p. 1.)

3. Ms. Markos followed-up with her primary care physician, Michael McCartney, M.D., on December 16 and 23, 2014 and January 9, 2015. She initially reported persistent “headaches, feeling disoriented . . . forgetfulness, light sensitivity, and sensitivity to loud noises, . . . and feeling off balance, nauseated intermittently, [and] fatigue.” At her January appointment, she reported that she had “[n]o headaches and [was] feeling back to normal. . . . Only concern is fluorescent lighting in classroom but feels as if she should be able to tolerate it at this time.” (Ex. 18, pp. 59-69.)
4. A notice of injury was prepared on Ms. Markos’s behalf on December 9, 2014, indicating that Ms. Markos slipped on ice injuring her head, back and neck. (Ex. 2, p. 1.)

2015 Fall

5. On April 28, 2015, while going downstairs to copy papers for a second-grade teacher, Ms. Markos slipped on a tread and hit the back of her head. She did not lose consciousness. A notice of injury was filed on her behalf that day by a school clerk indicating that she “strained her back, neck shoulder.” She returned to work after two or three days. She remembers experiencing the same symptoms as after the fall of 2014. (Ex. 1, p. 22; Ex. 2, p. 13; Ex. 10; Tr. 36.)
6. Ms. Markos’s first doctor visit after this fall was on May 5, 2015. This visit was a follow-up of an earlier ER visit, which apparently referred to an incident on April 10, 2015 in which Ms. Markos thought she had pancreatitis. Dr. McCartney advised her to see a gastroenterologist. He noted that she had a history of migraines. His notes do not mention the April 28, 2015 fall. (Ex. 18.)

7. Lydia Zuser, M.D. became Ms. Markos's primary care physician in 2017. At Ms. Markos's first visit with her new doctor on July 24, 2017, Dr. Zuser noted as part of Ms. Markos' medical history that she was "status post fall on ice at work in 2014." Ms. Markos reported "few complaints, pains and aches" but also reported her pain level was 8 out of 10. The doctor's notes do not explain the source of this pain. They do not mention the April 28, 2015 fall. The one mention of headaches involved the doctor's assessment that Ms. Markos suffers from "[c]hronic post-traumatic headache." (Ex. 18.)
8. On December 19, 2017, Ms. Markos visited Dr. Zuser for sinusitis. The medical records do not mention her falls in 2014 or 2015. (Ex. 18.)
9. On April 4, 2019, after an office visit, Dr. Zuser wrote a "to whom it may concern" letter stating that "due to [Ms. Makos's] asthma and newly diagnosed COPD, she is unable to work outside in cold weather." Her office notes refer to the 2014 fall, but not the 2015 fall. She described Ms. Markos's current symptoms as "[p]ain in Left side of neck more than in right side, numbness of left arm, and hand. . . . Off balance, memory problems worsening lately, sensitivity [to] bright light, and noises." (Ex. 18.)
10. On May 6, 2019, Ms. Markos saw Bruce Cook, M.D., for a neurological consultation. She told him about the 2014 fall and her symptoms of memory loss, headaches, and pain on the left side of her face. His notes do not mention the 2015 fall. (Ex. 18.)
11. On July 23, 2019, Ms. Markos was seen by neurologist William Mullaly, M.D, complaining that since her fall in 2014 she had "experienced daily global pressure to throbbing headaches that are accompanied by nausea 2 days/week. She is constantly

photophobic and phonophobic. . . . Since the head injury the patient has had memory difficulty that is progressively worsening and she also experiences word finding difficulty.” The doctor thought she “appears to have a long history of chronic migraines without aura that was aggravated by a concussion sustained in 2014.” He recommended that she undergo neuropsychological testing. (Ex. 18.)

2019 Fall

12. On September 5, 2019, Ms. Markos was assisting elementary school students as they walked to their classroom when she fell going up a stairway inside the school and hit the front of her head. She did not file a notice of injury because she was angry that she had fallen on the stairs again, and when she spoke to the school secretary she was advised to keep working and getting her paycheck rather than seek worker’s compensation. She did not return to work after this incident. (Ex. 10 p. 18; Tr. 28-29, 37-38.)
13. Later that day, Ms. Markos was seen by her primary care physician Lydia Zuser, M.D., for her annual physical exam. Ms. Markos remembers that she spoke to the doctor’s physician’s assistant first, told her that she had fallen again, and started crying, saying she could not do it anymore. When the doctor came in, Ms. Markos’s husband chimed in telling Dr. Zuser that Ms. Marko could not do this work anymore. (Tr. 30-31.) In Dr. Zuser’s detailed notes of this visit there is no mention that Ms. Markos’s reported a fall on the stairs earlier that day. She began by stating that Ms. Markos was “very upset on exam, crying, [with] multiple medical issues going on.” She ultimately concluded that in her “medical opinion, and based on the above [recitation of Ms. Markos’s medical problems] I do not believe that Ms. Markos can

continue working in her current job capacity.” (Ex. 18, pp. 311-314.) In 2023, the doctor submitted a statement in which she averred that during the September 5, 2019 visit, Ms. Markos “reported that she had fallen that day, at work[,] and hit her head.” (Ex. 21.)

14. Ms. Markos testified that her symptoms became progressively worse after the 2019 fall. She experiences sharp pains in her head, light sensitivity to the extent that she eats meals in a darkened room and suffers memory problems to the point that she mistakenly put the rings she usually wears in the garbage on the day of her testimony. (Tr. 34.)

15. On October 9, 2019, Ms. Markos was evaluated by Michael Gulliver Erkkinen, M.D.; of Brigham and Women’s neurology department. Ms. Markos told him about her 2014 fall and reported that “[s]ince then, she has experienced a prolonged post-concussive syndrome [including] headaches with photophobia, neck pain, feelings of head ‘heaviness’ and tremors at night, gait unsteadiness, and difficulty following instructions at work. Her husband reports that her symptoms have progressed since their onset.” Dr. Erkkinen diagnosed Ms. Markos with a “mild neurocognitive disorder.” He thought “her cognitive symptoms are of multifactorial origin related to chronic pain, migraine headaches, medications, poor sleep, and anxiety, all of which have been exacerbated [by] her head injury in 2014.” (Ex. 18.)

16. Ms. Markos was seen on October 15, 2019 by Geoffrey Raynor, M.D., of Brigham and Women’s neurology department. Only the 2014 fall is referenced in Dr. Raynor’s notes. He concluded that she meets the “criteria for mild neurocognitive disorder

with multifactorial etiology.” He saw her again on January 22, 2020. This time he offered a more extensive discussion of her situation, stating that:

Ms. Markos’ presentation appears most consistent with functional neurological disorder given the fluctuating cognitive symptoms and associated worsening with stress. The symptoms appear greater and of longer duration than would be expected for her reported concussion. Likely initial symptoms of concussion should improve over weeks were perpetuated and amplified by attentional bias, psychological stressors, and chronic pain.

(Ex. 18.) The doctor did not mention the 2015 or 2019 falls.

17. Ms. Markos underwent a neuropsychological evaluation on November 5, 2019, conducted by psychologist Pamela Friedman, who she made aware of all three falls.

Dr. Friedman noted that:

Ms. Markos reports ongoing cognitive difficulties starting after the first fall but getting progressively worse over time. For example, she had difficulty remembering students’ names and directives from teachers. She recalls walking to the first floor of the school and forgetting what she intended to do. She had to write things down more than she used to. The florescent lights in the school bothered her so she started wearing sunglasses at work.

(Ex. 18.)

Dr. Friedman concluded that:

Ms. Markos is a 62-yr old right-handed woman with a history of chronic migraine, fibromyalgia, and hyperlipidemia, who reports a progressive cognitive decline beginning after a fall in 2014. Performance on the current exam was notable for impaired memory acquisition and retrieval, mild variability on a few tasks of attention and executive functioning, and her self-report of a moderate level of emotional distress. In contrast, she performed WNL [within normal limits] on other tasks of attention and executive functioning, language, and visuospatial ability, and memory storage was preserved.

Ms. Markos’ exam is suggestive of impairment at the level of frontal network processing. Her history and presentation are not overly concerning for neurodegenerative process, and I agree with Drs. Raynor and Erkinen that the etiology of her cognitive and functional difficulties is likely multifactorial, including contributions from chronic pain, migraines, medications, depression, anxiety, and impaired sleep.

*Id.*

18. Ms. Markos underwent a speech and language evaluation on December 2, 2019 by speech and language pathologist Emily Hinckley, who noted that Ms. Markos “was referred for a cognitive-linguistic evaluation in the setting of cognitive changes following mTBI [concussion] in 2014 and two subsequent falls with a head strike.”

(Ex. 18.) Ms. Hinkley concluded that Ms. Markos:

Presents with mild-moderately severe cognitive-communication disorder in the areas of immediate and short-term memory and attention. Based on today’s assessment and pt. report, suspects deficits in functioning as well. Cognitive deficits are consistent with post-concussive syndrome, however, it is concerning that 1) these symptoms have persisted for 5 years and 2) pt feels that her symptoms are getting worse as this is not expected.

(Ex. 18.)

First Accidental Disability Retirement Application

19. Ms. Markos filed an application for accidental disability retirement benefits on March 10, 2020. In the body of the application, she cited the injuries of December 9, 2014 and April 28, 2015, but omitted the incident of September 5, 2019. She claimed to be disabled by post-concussion syndrome, pain in both arms, pain in her neck, memory problems and chronic pain. In a letter attached to the application, she stated that she sought disability retirement because her “health has been compromised on three specific events at Walnut Square School.” She did not then describe the September 5, 2019 fall *per se*. Rather, she stated that:

This year in particular [presumably the 2019-2020 school year] when I began I was given the challenge of second floor duties which included bringing classes/children up and for various needs all day. I tripped frequently on the stairs due to balance and stair tread issues.



(Ex. 1.) As for the two earlier falls, she described her symptoms from the 2014 fall as sensitivity to loud sounds, headaches from fluorescent lights, extreme fatigue, body aches with burning shoulders and her head heavy at the end of the school day, and issues with concentration and memory. She described her symptoms from the 2015 fall as headaches with essential tremors, dizziness and balance issues, shoulder pain and trouble grasping objects leading to dropped objects, and nausea. *Id.*

20. Dr. Zuser, in her physician's statement in support of the application, diagnosed Ms. Marko with post-concussion syndrome, brain atrophy and possible dementia. When addressing causation, she discussed Ms. Markos's 2014 fall on ice that led to "multiple issues and aggravated chronic problems." In an addendum, Dr. Zuser stated that Ms. Markos had multiple health problems and her diagnosis is not entirely clear. She concluded that she did not "believe that Ms. Markos can continue working in her current job capacity. She should be considered for Disability Retirement due to condition[s] related to her injury at work in 2014." (Ex. 1.)
21. Ms. Markos was evaluated by a regional medical panel in September and October 2020. The panel members were Albert Fullerton, M.D., a neurologist; Julian Fisher, M.D., a neurologist; and Eugene Brady, M.D., an orthopedic surgeon. (Exs. 4, 5, 6.)
22. Dr. Fullerton evaluated Ms. Markos on October 6, 2020. He noted all three of the claimed injuries, although the September 5, 2019 incident does not appear in the application. Dr. Fullerton certified in the affirmative to the questions of disability, permanence, and causation. The doctor described Ms. Markos as "alert and attentive with occasional difficulty retrieving substantive information." (Ex. 4.) He concluded that:

She is currently disabled with respect to her previous occupation and said disability is likely to be permanent. The disability is the result of work-related incidents described [her three falls], though her previous fibromyalgia and functional issues [unexplained] may contribute. If it were not for the accidents in question, I believe she would not have the multiple problems she has today and would still be working. In my opinion, having fallen three times, returning to work would stand a significant chance of producing re-injury.

*Id.*

23. Dr. Fisher evaluated Ms. Markos on September 22, 2020. He noted only the 2014 and 2015 injuries. Dr. Fisher certified in the affirmative to the questions of disability, permanence and causation. (Ex. 5.) He concluded that Ms. Markos:

Continues to suffer the effects of the multiple concussions with multiple cognitive deficits and balance and cereb[ral] deficits. The head tremor in conjunction with truncal instability would suggest a midline insult also involving cereb[ral] structures.

*Id.* He thought she was permanently disabled as “the result of the work related falls, as described.” *Id.*

24. Dr. Brady evaluated Ms. Markos on September 15, 2020. He noted all three of the claimed injuries. He diagnosed her with post-concussive syndrome, cervical spondylosis and cervical stenosis.<sup>1</sup> Dr. Brady certified in the negative with respect to disability because Ms. Markos did not suffer an orthopedic injury, and her claim of neurologic injury was outside his area of expertise. He did say that Ms. Markos’s symptoms have gotten progressively worse over time and that she “appears to be disabled from a neurologic standpoint.” (Ex. 6.)

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<sup>1</sup> Dr. Brady’s diagnosis of also mentioned that her medical records once mentioned posttraumatic stress disorder (PTSD). (Ex. 6.) Psychologist Pamela Friedman noted that Ms. Markos was diagnosed with PTSD in her 30s after an assault. (Ex. 11.) Ms. Markos is not claiming to be disabled by PTSD.

25. The Retirement Board told Ms. Markos that it was prepared to vote to deny her application despite the positive medical panel but gave her an alternative: withdraw her existing application and refile a new application discussing the September 5, 2019 injury.<sup>2</sup> On February 8, 2021, Ms. Markos withdrew her first accidental disability retirement application. (Pleading A – agreed facts.)

*Second Accidental Disability Retirement Application*

26. In March 2021, Ms. Markos filed a second application for accidental disability retirement. She listed the medical bases on which she was applying as post-concussion, pain in her left and right arms, memory problems, and chronic pain. She mentioned in her application only the first two injuries she suffered. In an attached affidavit, she described all three and declared that “[m]y concussion symptoms began with my first injury, and substantially worsened with the additional two workplace injuries. I am now totally disabled due to the exacerbation of my concussion due to the 2015 and 2019 fall injuries.”<sup>3</sup> (Ex. 8.)

27. Dr. Zuser again filed a physician’s statement in support of the application. She wrote that Ms. Markos was incapacitated by “post concussive syndrome after [a] fall at work, outside of the school.” She stated that Ms. Markos “continues to have headaches, memory problems, tremors, fogginess of brain, confusion, disorientation,

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<sup>2</sup> The reason the Board intended to deny Ms. Markos’s first application is only hinted at in the record. The Board’s closing brief expresses skepticism that Ms. Markos experienced a head injury in 2015 because the clerk who filled out the notice of injury did not mention that Ms. Markos had injured her head. (Pleading C.)

<sup>3</sup> One of the exhibits offered by Ms. Markos was statement from Judith A. Reilly, the head teacher at her school, corroborating her description of her work difficulties. Ms. Reilly stated that “after her falls at school,” Ms. Markos “[o]ften times seemed confused and complained of headaches and memory problems. . . . Her work ethics persisted but it was a challenge for Jill to keep up the pace expected of her.” (Ex. 20.)

[and] unsteady gait.” She attributed these symptoms to “multiple falls at work place with consequences that led to her disabilities.” (Ex. 9.)

28. At the Retirement Board hearing on June 8, 2021, the Board determined that the December 9, 2014 injury was not sustained while in the performance of Markos’s duties, and that because there was no documentation to corroborate Ms. Markos’s September 5, 2019 fall, or her claim that she suffered any injury that day, the incident was not a personal injury. The Board voted to send the matter to a new medical panel based solely on the April 28, 2015 injury. (Ex. 13; Pleading A.)
29. By memorandum of June 9, 2021, the Board requested that the new panel address a series of issues in their narrative report: 1) If the panel reaches the causation question, the issue is whether the permanent incapacity “is such as might be the natural and proximate result of the April 28, 2015 injury;” 2) Offer an opinion as to what role the December 9, 2014 injury plays with respect to Ms. Markos’s permanent incapacity; 3) If the panel concludes Ms. Markos’s permanent incapacity might be the natural and proximate result of the April 28, 2015 injury, discuss with reference to the medical records, the basis of that conclusion; 4) If the panel gives an affirmative certification to causation, opine whether it is more likely than not that the April 28, 2015 injury proximately caused Ms. Markos’s permanent incapacity; 5) The Board uses the word “aggravation” to mean a fundamental worsening of a condition, and the word “exacerbation” to mean a transient symptom increase that does not cause a fundamental worsening.<sup>4</sup> Please state whether you ascribe a different meaning to either word if used in your narrative; 6) Discuss Ms. Markos’s medical condition on

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<sup>4</sup> In standard English, the two words are synonyms.

September 5, 2019 and whether or not any incapacity she suffers became permanent that day; 7) Please limit your incapacity, permanence and causation responses to the medical conditions pertaining to her April 28, 2015 fall. (Ex. 13.)

30. A second regional medical panel evaluated Ms. Markos in July, August and September 2021. The panel comprised Daniel D. Vardeh, M.D., who is board certified in neurology, pain medicine and headache medicine; Francis X. Rockett, M.D., a neurosurgeon; and Jay M. Ellis, D.O., who is board certified in neurology. Drs. Rockett and Ellis certified in the affirmative to the issues of disability, permanence and causation. Dr. Vardeh certified in the negative to the issue of disability. (Exs. 13, 14, 15.)

31. Dr. Rockett evaluated Ms. Markos on August 10, 2021. He reviewed a job description and medical records, took a history and performed a physical examination. Dr. Rockett diagnosed post-concussion syndrome with a poor prognosis. (Ex. 14.) He had her perform a “mini-psychometric exam.” He reported that:

She did not write the date. She did not write her name clearly. She did not bisect a line. She drew a clock with no numbers, just hands. Her drawing of a person was quite primitive. She was alert, oriented, and fluent. She appeared to be quite anxious. She was able to recall 2 out of 3 unrelated objects after 20 minutes. Her attention span and concentration were tested with Serial 7s which she hesitated to perform at all. Her answers were given slowly with the assistance of her fingers for counting and she had many errors before stopping. Her language was normal in formation and content. Her fund of knowledge was tested by asking her to name US Presidents backwards in order. She was only able to name Biden, Trump and Obama.

*Id.*

32. Based on Ms. Markos’s medical record, job description and physical examination Dr. Rockett concluded that Ms. Markos is physically incapable of performing the

essential duties of her job due to “fatigue, balance issues, memory loss, and repeated head injuries.” He opined that the disability is likely to be permanent “based on the fact that she has exceeded the time that normal post-concussion syndrome symptoms to heal.” As to which fall caused her present disability he opined that the December 9, 2014 fall was the “initial start of her issues with memory, balance, and photophobia. . . . Her subsequent falls of 04/18/2015 and 09/05/2109 permanently aggravated her conditions of imbalance, memory loss, and photophobia.” (Ex. 14.)

33. Dr. Rockett concluded that the disability might be the natural and proximate result of the personal injury undergone. He opined “the injury of 12/9/2014 occurred while she was on work grounds entering the school building. While she may not have commenced her duties due to a delayed start to the school day . . . she was at her workplace at the time of her injury. That injury was the initial start of her issues with memory, balance, and photophobia. Her migraines pre-dated this injury. Her subsequent falls on 4/18/2015 and 9/5/2019 permanently aggravated her conditions of imbalance, memory loss, and photophobia.” (Ex. 14.)

34. Dr. Ellis evaluated Ms. Markos on September 21, 2021. He reviewed a job description and medical records, took a history and performed a physical examination. He noted that Ms. Markos was quite distressed by the fluorescent lighting in his office. When the doctor conducted a neurologic examination, Ms. Markos “answered all the questions independently.” Dr. Ellis diagnosed post-concussion syndrome headaches; chronic migraine history; essential tremor involving the head and the extremities; complex cognitive disorder of a functional nature involving multiple components including medications, possibly the falls, and the

presence of anxiety and/or depression and sleep disturbance, based on records reviewed. (Ex. 15.)

35. Dr. Ellis noted Ms. Markos's complaints of headaches three or four times a week requiring the use of ibuprofen, impaired balance, and marked sensitivity to light, noise and odors. He opined that:

The prognosis is good for stability but not good for complete recovery within the timeframe that one would like to see. The headaches, which have been a long-term problem, are likely to continue. It is well known that head injuries can exacerbate [a] history of migraine. In addition, the light sensitivity that has evolved after the head injuries will continue to be a problem unless proper prescription glasses, that are light filtering, are available. It is unclear to me whether the ones she currently has are completely adequate. The prognosis for cognitive impairment is that it will likely remain stable, or aging will produce gradual progressive worsening.<sup>5</sup>

(Ex. 15.)

36. In answer to the question raised by the Board in its memorandum of June 9, 2021 as to whether the injury of April 28, 2015 could be the proximate cause of the symptoms that cause the disability Dr. Ellis opined "it is more likely than not that the fall of April 28, 2015 aggravated a pre-existing history of migraine headaches and the upper back and neck complaints. It is clear that the member did not have severe light sensitivity and sensitivity to noise and commotion prior to the injury of 2015 and, at

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<sup>5</sup> Ms. Markos told Dr. Ellis that she had been "advised that she had significant atrophy" of her brain. Dr. Ellis rejected this:

There is no finding on her imaging tests to indicate that. Finding of cerebral atrophy in a 64-year-old is not at all abnormal. In fact, comments are made in the reports that no specific abnormalities are found typical of neurodegenerative illness.

(Ex. 15.)

this time, those findings are the cause of her disabling dysfunction.” He opined, “[t]his incapacity is likely to be permanent.” (Ex. 15.)

37. Dr. Vardeh evaluated Ms. Markos on July 31, 2021. He reviewed a job description and medical records, took a history and performed a physical examination. He noted that Ms. Markos presented with “a prolonged post-concussive syndrome.” (Ex. 16.)

38. Dr. Vardeh noted Ms. Markos’s complaints of ‘brain fog,’ daily headaches that feel like previous migraines, fatigue attributable to poor sleep, and light sensitivity that requires her to wear sunglasses outdoors and indoors. (Ex. 16.)

39. Dr. Vardeh opined that Ms. Markos’s prolonged post-concussive syndrome began “after a slip and fall accident on ice in December 2014.” He was unable to find an organic cause or neurologic disease to explain her cognitive difficulties. He was unable to detect any difficulties or deficits on physical examination. “Her language, speech, retrieval of events and following commands are excellent. Her neurological exam including motor testing, balance and gait are within normal limits, especially when encouraged.” He concluded, “I am unable to identify any objective evidence for an incapacitating condition which would prevent her from going back to work. I believe that her initial slip and fall injury has likely caused a concussion, but no objective brain injury.” (Ex. 16.)

40. By letter of November 12, 2021, the Board denied Ms. Markos’s application because “the Panel majority that affirmatively answered all three Panel Certificate questions did not restrict their respective affirmative causation answers to the April 28, 2015 injury, which the Board determined pursuant to 840 CMR 10.09(1) was the only compensable injury Ms. Markos suffered in the performance of her duties.



Accordingly, since there was no Panel majority that affirmatively opined that any alleged permanent neurological incapacity from which Ms. Markos suffers was such as might be the natural and proximate cause upon which her Application was based, Ms. Markos failed to establish causation. Finally, even assuming the Panel majority's opinions are viewed in a light most favorable to Ms. Markos, the Panel majority failed to adequately explain how an April 28, 2015 injury proximately caused a permanent incapacity on September 5, 2019 when Ms. Markos was last in the performance of her duties." (Ex. 17.)

41. Ms. Markos filed a timely appeal. (Ex. 17.)

### **Discussion**

The evidence concerning Jill Markos's application for accidental disability presents numerous facts to be evaluated and matters in dispute: her three alleged injuries, her two disability retirement applications along with six different reports by medical panelists who evaluated her and evaluations by many other doctors, and the question of whether her 2019 alleged injury should be part of the consideration. I begin by examining what role each of her three injuries play, then turn to the diametrically opposing theories presented by the parties, and then offer my own analysis.

#### *A. Markos's Three Injuries*

For a member to be eligible for accidental disability retirement from a permanently disabling injury, the injury must have occurred "in the performance of [her] duties." M.G.L. c. 32, § 7(1). There is no dispute that the injury Ms. Markos suffered in 2014 occurred at a time that would have been within her normal workday. But her day started late because of a snowstorm. As she was about to enter the school building to

start her work, she slipped on ice and fell before she reached the door of the school. Prior decisions have held that injuries that occur while walking into the building where the member works to begin one's workday are not injuries in the performance of the member's duties and hence do not make the member eligible for accidental disability retirement. *See Coggins v. Hull Retirement Bd.*, CR-10-314 (DALA June 7, 2013; CRAB Jan. 16, 2014). This means that Ms. Markos's application cannot properly be based on the 2014 injury *per se*, but it does not make the injury irrelevant. If subsequent workplace injuries aggravated the medical conditions she suffered as a consequence of the 2014 fall to the point of permanent disability, then she would have a viable basis to seek accidental disability retirement.

The injuries Ms. Markos alleges occurred in 2015 and 2019 are injuries that can be considered if they aggravated Ms. Markos's condition to the point of disabling her from continuing to work as a paraprofessional. The Haverhill Retirement Board, after urging Ms. Markos to file a second application that this time mentioned the 2019 injury, declined to allow a second medical panel to consider that injury because it did not believe an injury occurred. The evident reason for this disbelief was because Ms. Markos did not file a notice of injury and did not tell her doctor of the fall when she visited the doctor later in the day. Her failure to file a notice of injury is not germane. While the public employee retirement statute typically precludes an accidental disability retirement applicant from basing an application on an injury that occurred more than two years before the application if no notice of injury was filed. *See M.G.L. c. 32, § 7(1)*. Ms. Markos's alleged September 5, 2019 injury was well within two years of her March 10, 2020 application for accidental disability retirement, and hence it may properly be

considered. The Board's skepticism about whether the event occurred is also not of particular importance. The version of events offered by an applicant is sufficient to send an application for review by a medical panel when the version, if credited, would be sufficient to make out a *prima facie* case for accidental disability retirement. *Lowell v. Worcester Reg. Ret. Bd.*, CR-06-296 (DALA Dec. 4, 2009). In any event, I credit Ms. Markos's testimony that she did fall on stairs within the school on September 5, 2019.

*B. Dr. Vardeh's Opinion*

The Board maintains that there is no need to figure out the cause of Ms. Markos's symptoms because she is not disabled, as evidenced by Dr. Vardeh's examination of her. Ms. Markos claims to have persistent headaches, memory problems, brain fog, and an unsteady gait, which is how her own doctor, Dr. Zuser, described her symptoms.

(Finding 26.) Dr. Vardeh, on the other hand, found that Ms. Markos's "language, speech, retrieval of events and following commands are excellent. Her neurological exam including motor testing, balance and gait are within normal limits, especially when encouraged." He concluded, "I am unable to identify any objective evidence for an incapacitating condition which would prevent her from going back to work." (Finding 38.) It is not clear from his report what tests Dr. Vardeh made to reach his conclusion.

Dr. Rocket, who examined Ms. Markos ten days later also found her to be "alert, oriented, and fluent." (Finding 30.) But his testing showed neurological deficits. As he described these tests, Ms. Markos:

did not write the date. She did not write her name clearly. She did not bisect a line. She drew a clock with no numbers, just hands. Her drawing of a person was quite primitive. . . . She appeared to be quite anxious. She was able to recall 2 out of 3 unrelated objects after 20 minutes. Her attention span and concentration were tested with Serial 7s which she hesitated to perform at all. Her answers were given slowly with the assistance of her fingers for counting and she had many

errors before stopping. Her language was normal in formation and content. Her fund of knowledge was tested by asking her to name US Presidents backwards in order. She was only able to name Biden, Trump and Obama.

*Id.*

I see no reason in the record to credit Dr. Vardeh's disability conclusion over Dr. Rockett's -- or the other doctors who determined that Ms. Markos is disabled. The Board points to Dr. Vardeh's focus on the lack of "objective evidence" of a disability, which I take to mean some bodily malfunction that can be seen on an x-ray or a scan. No evidence was introduced to show that every pain-related symptom must have a defined, observable organic source, and retirement law does not require it either. Dr. Vardeh concedes that Ms. Markos had a concussion. He did not say that the symptoms she reports are not ones that could be caused by a concussion. Thus, I do not find Dr. Vardeh's report alone is enough to decide this matter.

*C. Other Medical Panelist Opinions*

Ms. Markos urges that I consider the rest of the medical panelists who by-and-large supported her. Of the doctors on the first panel, I discount Dr. Brady's negative opinion, because as an orthopedist, he could competently say that she did not have an orthopedic injury, but that had no necessary bearing on whether she has a neurologic injury. Drs. Fullerton and Fisher each say the Ms. Markos is disabled by falls at work, but they do not address which fall or falls made her disabled. They each could have thought that the disabling event was the 2014 fall, which would not be useful to Ms. Markos, because that fall did not occur during the performance of her duties and thus cannot be the basis of recovery.

As for the two other doctors on the second panel, Dr. Rockett mistakenly believed that Ms. Markos's fall in 2014 was an on-the-job injury, but he did not attribute her disability directly to it. Rather he declared that "[h]er subsequent falls of 04/18/2015 and 09/05/2109 permanently aggravated her conditions of imbalance, memory loss, and photophobia." (Finding 31.) Dr. Ellis focused on the 2015 fall, as the Board had directed. He thought that "it is more likely than not that the fall of April 28, 2015 aggravated a pre-existing history of migraine headaches and the upper back and neck complaints. It is clear that the member did not have severe light sensitivity and sensitivity to noise and commotion prior to the injury of 2015 and, at this time, those findings are the cause of her disabling dysfunction." (Finding 35.)

Thus, there are two medical panelists that support an aggravation theory of recovery. Dr. Ellis's opinion is based on the assertion that Ms. Markos did not suffer severe light or noise sensitivity after the 2014 fall, and hence her symptoms were made worse by the 2015 fall. However, Ms. Markos testified that sensitivity to fluorescent lights and loud noises were symptoms she experienced after the 2014 fall. (Finding 3.) She claims that other symptoms began in 2015 after her second fall - headaches with essential tremors, dizziness and balance issues, shoulder pain and trouble grasping objects leading to dropped objects, and nausea. (Findings 18.) Dr. Ellis did not say these were the aggravating symptoms that cause her disability.

Dr. Rockett's opinion reflects that it is conceivable that the falls of 2015 and 2019 aggravated Ms. Markos's symptoms to the point that she became disabled. He did not, however, point to anything in the medical record to suggest that this is what actually happened.

*D. Medical Record*

And that presents what is the essential problem. The record demonstrates that Ms. Markos had a concussion from the 2014 fall and experienced symptoms as a consequence of that fall. The record is sparse as to the consequences from the two later falls. Some of this relates to what Ms. Markos did or did not do, but much of it relates to how the doctors who examined her thought about the source of her fall-related medical problems.

When Ms. Markos fell in 2014, she was taken to the hospital that day and followed up with her primary care doctor three times over the next month. (Finding 2.) Thus, there are contemporaneous records of the diagnoses she received (concussion) and the symptoms she experienced (headaches, light and noise sensitivity, balance issue and occasional nausea, etc.). When she fell in 2015, she did not see a doctor about the fall. She made a visit to her primary care doctor one week later for another reason. (Finding 6.) The doctor's notes do not mention the fall. Thus, there are no contemporaneous records as to the impact of the 2015 fall on her health.

Dr. Zuser became Ms. Markos's primary care physician in 2017. Dr. Zuser's notes of Ms. Markos's first visit in July 2017 state that Ms. Markos suffers from chronic post-traumatic headache and that she was "status post fall on ice at work in 2014." (Finding 7.) The doctor's notes do not mention the 2015 fall. Similarly, when Ms. Markos had a neurological consultation with Dr. Cook in May 2019 and another neurological exam with Dr. Mullaly in July 2019, both doctors in their notes mentioned the 2014 fall but not the 2015 fall. (Findings 10 and 11.) Dr. Mullaly specifically attributed her symptoms to aggravation of her migraines after her 2014 fall and noted that

Ms. Markos had told him her symptoms had gotten progressively worse since then. (Finding 11.) It is not clear whether Ms. Markos told these doctors about the 2015 fall. If she did not, then it is most likely that she herself did not think that fall had made her condition noticeably worse. If she did, then the doctors did not think that fall was significant enough to mention.

When Ms. Markos fell again in 2019, she had an annual physical that day with Dr. Zuser. (Finding 13.) I accept Ms. Markos's and Dr. Zuser's representation that Ms. Markos told the doctor about her fall earlier in the day. The fact that Dr. Zuser did not mention the fall in her notes tends to show that she did not think the fall marked a significant change in Ms. Markos's condition. The doctor's opinion that Ms. Markos should stop working because of her falls did not necessarily mean that Dr. Zuser thought the falls subsequent to 2014 made her worse off, just that her continuing falls made it clear that she could hurt herself further and it was time to stop her lengthy effort to continue working after the 2014 fall. Indeed, Dr. Zuser's physician's statements are not a full-throated endorsement of the aggravation theory on which Ms. Markos bases her application. Dr. Zuser's statement in support of the first application addressed only the 2014 fall. (Finding 20.) Her statement in support of the second application attributed Ms. Markos's symptoms to "multiple falls at work place with consequences that led to her disabilities," while at the same time declaring that Ms. Markos was incapacitated by "post concussive syndrome after [a] fall at work, outside of the school," i.e., the 2014 fall. (Finding 27.)

The examinations Ms. Markos underwent after her last fall also hardly demonstrate that the 2015 or 2019 falls are what disables her. Dr. Erkkinen thought her

symptoms had a multifactorial origin and that the 2014 fall exacerbated her prior health problems. (Finding 15.) Dr. Raynor also thought that multiple factors were involved and that her concussion symptoms should not have lasted this long. (Finding 16.) Dr. Friedman accepted Ms. Markos's description that she had a progressive cognitive decline since the 2014 fall and she agreed with Dr. Erkkinen that "the etiology of her cognitive and functional difficulties is likely multifactorial, including contributions from chronic pain, migraines, medications, depression, anxiety, and impaired sleep." (Finding 17.) Speech pathologist Hinckley thought her symptoms were consistent with post-concussive syndrome but was surprised that they had lasted for five years (after the 2014 fall) and had gotten worse. (Finding 18.) None of these specialists attributed Ms. Markos's condition following the 2015 and 2019 falls to those falls.

Ms. Markos had the burden to show that the 2015 and 2019 falls aggravated her post-concussion symptoms to the point of disability. The evidence, however, tends to show that the 2014 fall was a serious injury and that her symptoms became progressively worse over time without a particular triggering event. This is insufficient to prove that she is disabled by the 2015 or 2019 falls.

### **Conclusion**

For the reasons stated above, I affirm the Haverhill Retirement Board's refusal to grant Jill Markos accidental disability retirement.

DIVISION OF ADMINISTRATIVE LAW APPEALS

***James P. Rooney***

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James P. Rooney  
First Administrative Magistrate

Dated: October 4, 2024