

COMMONWEALTH OF MASSACHUSETTS

**Division of Administrative Law Appeals
14 Summer Street, 4th Floor
Malden, MA 02148
www.mass.gov/dala**

Lori McDonald,¹
Petitioner

v.

Docket No. CR-20-0403

Norfolk County Retirement Board,
Respondent

Appearance for Petitioner:

Amy Laura Davidson, Esq.
Sandulli Grace
44 School Street
Suite 1100
Boston, MA 02108

Appearance for Respondent:

Matthew L. Feeney, Esq.
Norfolk County Retirement System
480 Neponset Street, #15
Canton, MA 02021

Administrative Magistrate:

Kenneth Bresler

¹ This appeal entered the Division of Administrative Law Appeals with the petitioner as Joseph McDonald (Lori McDonald). However, Lori McDonald is the correct petitioner and I change the title of this case. Lori McDonald brought the appeal after Joseph McDonald died; she did not succeed him as a party.

SUMMARY OF DECISION

Retirement system's denial of petitioner's application for benefits based on the death of her husband was properly denied without the retirement system's asking for a medical panel because G.L. c. 32, §9 does not provide for medical panels in death benefits cases and because her husband's death was not the proximate result of the injury he sustained.

DECISION

The petitioner, Lori McDonald, appeals the denial by the Norfolk County Retirement System of her application for benefits under G.L. c. 32, §9 based on the death of her late husband.

The parties agreed to proceed on submission of exhibits. 801 CMR 1.01(10)(c). I admitted the 19 exhibits that the parties submitted:

- Ex. 1 Foxborough Police Department reports
- Ex. 2 Steward Health Care record
- Ex. 3 New England Baptist Hospital records
- Ex. 4 Boston Sports & Shoulder Center records
- Ex. 5 Tufts Medical Center records
- Ex. 6 Review of records, Dr. Geoffrey J. Van Flandern
- Ex. 7 Brigham and Women's Hospital records
- Ex. 8 Norwood Hospital records
- Ex. 9 Spaulding Rehabilitation Center records
- Ex. 10 Brigham and Women's Hospital records
- Ex. 11 Death certificate
- Ex. 12 Election of benefits application
- Ex. 13 Letter by Dr. Robert C. Cantu
- Ex. 14 Letter from widow's lawyer to Norfolk County Retirement System
- Ex. 15 Letter from widow's lawyer to Norfolk County Retirement System
- Ex. 16 Independent medical examination by Dr. Julian Fisher
- Ex. 17 Denial by Norfolk County Retirement System
- Ex. 18 Appeal
- Ex. 19 Notice of Receipt of Appeal

I asked the parties for and entered as Exhibit 20 the letter to the Norfolk County Retirement Board from Leigh A. Pantierre, Esq., representing Mrs. McDonald, asking for benefits under G.L. c. 32, §9, dated July 31, 2019.

Both parties submitted briefs.

Findings of Fact

1. Joseph McDonald was a Foxborough Police Officer. (Stipulation)
2. On June 28, 2014 Mr. McDonald injured his right knee while on duty. (Stipulation)
3. On October 19, 2015 Mr. McDonald was cleared to return to work. (Stipulation)
4. In 2019 Mr. McDonald's knee frequently "gave out" or buckled beneath him.

(Stipulation)

5. Mr. McDonald continued to perform his duties as a Foxborough police officer until February 23, 2019. (Stipulation)

6. On February 23, 2019 Mr. McDonald's knee or knees gave out while he was at home. He fell backwards onto a hardwood floor, hit his head, and vomited. (Stipulation, Ex. 16)

7. Mr. McDonald was transported to Norwood Hospital, where his condition was diagnosed as multiple intracranial hemorrhages. He was transferred to Brigham and Women's hospital, where his condition was diagnosed as metastatic brain cancer. (Stipulation)

8. On March 20, 2019 Mr. McDonald died. (Ex. 11)

9. The death certificate read:

Immediate Cause (Final condition resulting in death)
Intercranial Hypertension
Due to or as a consequence of
Brain Metastases
Due to or a consequence of
Metastatic Melanoma.

(Ex. 11) (*italics and bold omitted*) (some capitals reduced to lower case).

10. On July 31, 2019 Mrs. McDonald's lawyer wrote a letter to the Norfolk County Retirement Board asking for benefits under G.L. c. 32, §9. (Ex. 20)

11. On November 19, 2019 Dr. Robert C. Cantu, whose specialty was neurosurgery,

wrote an opinion for Mr. McDonald's lawyer. It stated in part:

I have reviewed the medical records regarding Joseph McDonald[,] who died because of increased intracranial pressure related to multiple large metastatic hemorrhagic melanoma metastases to his brain. The increased intracranial pressure was not only contributed to by the mass of the tumors themselves but also the associated edema that was caused by the tumors themselves and *possibly* aggravated by the brain trauma sustained on February 23, 2019....

I believe that the brain trauma on February 23, 2019 that precipitated his initial hospitalization and recognition of his hemorrhagic melanoma brain tumor metastases *may have contributed* to the edema[,] although its primary contribution would have been from the brain tumors themselves.

....

It is therefore my opinion that the work-related injury that would be responsible for the right knee pain and the fall and head trauma that subsequently occurred *may have accelerated* Mr. McDonald's unexpected death that occurred on March 20, 2019.

(Ex. 13) (emphasis added)

12. On August 10, 2020 Dr. Julian Fisher, a neurologist, wrote an independent medical examination report for the Public Employees Retirement Administration Commission. He wrote in part about Mr. McDonald's arrival at Norwood Hospital:

An evaluation revealed by MRI, multiple intracranial hemorrhages and metastatic brain cancer, initially undetermined type. Further questioning of the patient and wife reported that there were lesions on his skin in other areas that appeared cancerous. They reported they had forgotten that he had cancer of melanoma type 2 years earlier that they had though was totally gone.

....

In reviewing this case, it is evident that Mr. McDonald had suffered a work-related injury to his right knee in 2014 with a consequent osteoarthritis....Over the several days prior to his admission to Norwood Hospital, he had several episodes of being unable to stand and falling. These episodes represented the increasing intracranial effect of the prior melanoma from 2 years earlier that had proceeded to become metastatic to the brain. This is an independent medical process from the knee injury and consequent osteoarthritis in that the event of February 23, 2019 was one of several losses of stability unrelated to the knee injury, but related to the growing intracranial pressure from the metastatic

melanoma. It is of note from the emergency room report from Norwood Hospital that his fall immediately prior to admission to hospital left him confused, but did not involve loss of consciousness and involved both knees giving out for up to 3 days previous to the sentinel event....

The important points to note are that there were multiple falls over a period of at least 3 days involving both knees, the one affected by the work injury and left knee as well....It is more likely than not that the multiple days of instability and falling related not to unilateral knee prior injury, but to the increasing effect of intracranial masses, the metastatic melanoma, related to prior surface melanoma 2 years previously. In addition, the fall at work did not accelerate any intracranial pressure or have any impact on his ultimate passing.

(Ex. 16)

13. On September 28, 2020 the Norfolk County Retirement Board

denied Mrs. McDonald's application for § 9 benefits for two independent reasons: 1) The Plaintiff did not sustain her burden of proof on the question of causation; and 2) in a case such as this where there was conflicting expert testimony, the Board credited and relied upon the opinions of Dr. Julian Fisher rather than the report and opinions of Dr. Robert Cantu.

(Ex. 17)

14. On October 5, 2020 Mrs. McDonald timely appealed. (Ex. 18)

Discussion

If the board, upon receipt of proper proof, finds that any member in service died as the natural and proximate result of a personal injury sustained or a hazard undergone as a result of, and while in the performance of, his duties at some definite place and at some definite time on or after the date of his becoming a member or prior to such date while any provision of this chapter relating to non-contributory pensions was applicable to him, without serious and wilful misconduct on his part, the payments and allowances hereinafter referred to in this section shall be granted to his beneficiary or beneficiaries....

G.L. c. 32, §9.

The issue is whether Mrs. McDonald is entitled to death benefits. The issue is not, as both parties assume in their briefs, whether Mrs. McDonald is entitled have a regional medical panel convened to consider her case.

General Laws Chapter 32, sections 6 and 7, which address ordinary and accidental disability retirement, mention regional medical panels that evaluate applicants for these benefits who are alive when the panel evaluates them. So does section 8. However, section 9, governing death benefits, does not. *Iannelle v. Fire Commissioner of Boston*, 331 Mass. 250, 252 (1954) (discussing canon of statutory construction, *expressio unius est exclusio alterius* / the express mention of one thing excludes all others).

A positive report by a regional medical panel is not a prerequisite for a retirement board to award death benefits under G.L. c. 32, §9. Rather, a prerequisite is “receipt of proper proof.” G.L. c. 32, §9. Mrs. McDonald quotes section 9 and then glides into a discussion of sections 6 and 7 while eliding over the connection between sections 9 on one hand and sections 6 and 7 on another. If the cases that the parties cite concern regional medical panels in death benefits cases, I have not found the references. If other cases exist about regional medical panels in death benefits cases, I have not found them. *But see Marybeth Smith v. Gloucester Retirement Board and Public Employee Retirement Administration Commission*, CR-13-249 (DALA 2018) (ordering medical panel in case under G.L. c. 32, §100, which does not mention medical panels).

Mrs. McDonald’s evidence that she is entitled to a death benefit is weak. Dr. Cantu, writing to her lawyer, opined:

- “The increased intercranial pressure was...*possibly* aggravated” by Mr. McDonald’s fall.
- Mr. McDonald’s fall and head injury “*may have contributed* to the edema[,] although its primary contribution would have been from the brain tumors themselves.”
- “[T]he fall and head trauma that subsequently occurred *may have accelerated* Mr. McDonald’s unexpected death....”

(Ex. 13) (emphasis added).

Furthermore, Dr. Cantu's weak opinion was countered by two sources. The most obvious source was Dr. Fisher, who opined:

It is more likely than not that the multiple days of instability and falling related not to unilateral knee prior injury, but to the increasing effect of intracranial masses, the metastatic melanoma.... In addition, the fall at work did not accelerate any intracranial pressure or have any impact on his ultimate passing.

(Ex. 16)

The second source countering Dr. Cantu's opinion was the death certificate. It stated that the "[f]inal condition resulting in death" was "[i]ntercranial [h]ypertension [d]ue to or as a consequence of [b]rain [m]etastases...." (Ex. 11) It did not mention Mr. McDonald's fall.

As the Appeals Court stated in a §9 case:

The probative value of the expert testimony is for the fact-finding tribunal to decide, and where there is conflicting expert testimony, the fact finder may completely discount the testimony of one expert and rely exclusively on the other.

Sheila Robinson v. Contributory Retirement Appeal Board, 20 Mass. App. Ct. 634, 639 (1985).

The Norfolk County Retirement Board properly denied Mrs. McDonald's application because the board did not receive "proper proof" under G.L. c. 32, §9. Dr. Fisher's expert opinion was stronger than Dr. Cantu's weak opinion.

Mrs. McDonald's application was properly denied for another related reason. She would be entitled to benefits if her late husband had

died as the natural and proximate result of a personal injury sustained...as a result of, and while in the performance of, his duties....

G.L. c. 32, §9. The key words are "proximate result."

Chapter 32 does not define the key words. G.L. c. 32, §1. Nor do any appellate cases. Instead, I rely on a definition of "proximate cause," a concept developed in tort cases:

The proximate cause is that which in a continuous sequence, unbroken by any new cause, produces an event and without which the event would not have occurred.

Wallace v. Ludwig, 292 Mass. 251, 254 (1935) (personal injury and death case).

Mrs. McDonald's claim fails because proximate result is absent. The "proximate cause" that *Wallace* refers to, namely, Mr. McDonald's knee injury, was not part of "a continuous sequence, unbroken by any new cause." *Wallace*. Rather, the sequence was broken by the new cause of Mr. McDonald's brain cancer. What was the "event" here that *Wallace* refers to? Mr. McDonald's death. Can it be said that Mr. McDonald's death "would not have occurred" when it did had he not fallen? No.

Even Mrs. McDonald's theory of the case is insufficient to establish her entitlement to death benefits. In her brief, she argues that "it was the injury in 2014 which caused the fall in 2019 which then *accelerated* the pressure." (Pet. Br. 4) (emphasis added) An injury on June 28, 2014 supposedly leading to a fall on February 23, 2019, almost five years later, is not "a continuous sequence." *Wallace*. Nor was Mr. McDonald's death in 2019 the "proximate result" of a knee injury in 2014. G.L. c. 32, §9. Mrs. McDonald does not seem to so argue; her post-hearing brief continued:

In February 2019, Officer McDonald's knee gave out while he was at home, causing him to suffer head trauma which *accelerated his death* by increasing the intercranial pressure in his brain.

(Pet. Br. 5) (emphasis added).

Again, Mrs. McDonald argues that her husband's knee injury *hastened* his death, rather than *caused* it. She does not seem to argue that Mr. McDonald's death in 2019 was the "proximate result" of his knee injury in 2014. G.L. c. 32, §9.

Conclusion and Order

The Norfolk County Retirement Board's denial of the petitioner's application for death benefits without requesting a regional medical panel to examine the application is affirmed.

DIVISION OF ADMINISTRATIVE LAW APPEALS

/s/

Kenneth Bresler
Administrative Magistrate

Dated: November 3, 2023