

**COMMONWEALTH OF MASSACHUSETTS
CONTRIBUTORY RETIREMENT APPEAL BOARD**

CRAIG MULVEY,

Petitioner-Appellee

v.

CHICOPEE RETIREMENT BOARD,

Respondent-Appellant.

CR-16-55

DECISION

Respondent Chicopee Retirement Board (CRB) appeals from a decision of an Administrative Magistrate of the Division of Administrative Law Appeals (DALA) remanding for a new regional medical panel examination in connection with petitioner Craig Mulvey's application for accidental disability retirement benefits. The magistrate held a hearing on June 5, 2017 and admitted twenty-eight exhibits. The DALA decision is dated March 30, 2018. The CRB filed a timely appeal to us.

After a review of the record and the arguments by the parties, we incorporate the DALA decision by reference and adopt the Findings of Fact 1 – 20 as our own. For the following reasons, we affirm.

Mr. Mulvey was employed by the City of Chicopee from September 26, 1994 until his ordinary disability retirement on January 14, 2016 as a rubbish collection laborer.¹ His responsibilities included picking up and loading trash and recycling materials throughout the city, and his duties included running a hopper, picking up trash and recycling materials, loading trash into the hopper, cutting brush and grass and litter clean-up.²

¹ Exhibits 1, 18; Findings of Fact 1-2; Stipulation.

² Ex. 2; FF 2; Petitioner Testimony

The record reflects that Mr. Mulvey sustained two back injuries. On March 20, 2013, Mr. Mulvey twisted his back when he lifted a bag of trash and was treated at Holyoke Medical Center.³ On May 31, 2013, he again injured his back in the performance of his duties while picking up a trash bag that was heavier than anticipated. He explained that he continued to work for a few more hours and when he attempted to bend over to retrieve another trash bag, he was unable to get up. He used a street sign to upright himself. Mr. Mulvey did not return to work following this injury.⁴

After the second back injury, Mr. Mulvey received treatment for his back injury at Holyoke Hospital and was initially diagnosed with a lumbar strain on May 31, 2013. In June 2013, he was found to have sciatica and a lumbar strain. He underwent conservative treatment, consisting of narcotic pain management and physical therapy and restrictions were advised.⁵ Under the care of an orthopedist, a diagnostic study was obtained to evaluate his condition.⁶ A lumbar spine MRI of July 26, 2013 revealed spondylosis at L4-L5 and L5-S1; moderate broad based right foraminal disc protrusion at L4-L5 causing significant right neural foramen narrowing with right L4 nerve root compression.⁷ No improvement was reported with physical therapy, and after consultation with a pain management specialist, lumbar epidural steroid injections were recommended only with better control of his diabetes.⁸ Surgery was not recommended due to his medical history.⁹ Also, the record reflects Mr. Mulvey's longstanding history of diabetes and morbid obesity. The medical reports reflect diabetes related complications, two amputations of the toes, diabetic retinopathy, peripheral vascular disease, osteomyelitis, Charcot joint, gouty arthritis with knee problems and foot surgeries.¹⁰

Mr. Mulvey filed an application for accidental disability retirement on November 20, 2014, claiming that as a result of the May 31, 2013 injury, he was permanently unable to perform the essential duties of his job.¹¹ Thomas Gartman, M.D., his primary care physician, completed

³ Ex. 25; FF 3.

⁴ Ex. 1, 19; FF 4; Petitioner Testimony.

⁵ Ex. 8, 22; FF 5-6.

⁶ Ex. 10; FF 9, 12.

⁷ Ex. 7, 14.

⁸ Ex. 11;

⁹ Ex. 7.

¹⁰ Ex. 8-14, 22-28; FF 10-11.

¹¹ Ex. 1; FF 13.

a Treating Physician Statement in support of his application. The doctor listed Mr. Mulvey's diagnoses as consisting of chronic back pain, traumatic amputation of toes, diabetic Charcot foot and uncontrolled type II diabetes mellitis and cited the May 31, 2013 injury as the cause of his permanent incapacity.¹² A regional medical panel was convened to evaluate him. The panel answered the questions of disability and permanency in the affirmative but failed to find that the back injury of May 31, 2013 was the natural and proximate cause of his disability.¹³ The medical panel's answer to the question of causation did not change after clarification questions were presented to it.¹⁴

Based on the certification of the medical panel, the CRB denied Mr. Mulvey's application for accidental disability retirement benefits. Mr. Mulvey then appealed that determination.¹⁵ The DALA magistrate concluded that Mr. Mulvey met his burden to establish that he was denied a proper medical panel evaluation and remanded the matter back for another medical panel evaluation. The CRB appealed this decision to us.

Discussion. The issue in this appeal is whether Mr. Mulvey met his burden of proof to establish he was deprived of a proper medical panel evaluation. To meet his burden, Mr. Mulvey must demonstrate that the medical panel employed an erroneous standard, failed to follow proper procedure, or that its decision was "plainly wrong." *Kelley v. Contributory Ret. App. Bd.*, 341 Mass. 611 (1961). For the reasons discussed below, we conclude that the medical panel employed an erroneous standard and therefore, Mr. Mulvey was deprived of a proper medical panel evaluation. This matter is remanded back for another medical panel evaluation.

An applicant seeking accidental disability retirement benefits must be examined by an independent medical panel. G.L. c. 32, § 6(3)(a); *Kelley v. Contributory Ret. App. Bd.*, 341 Mass. 611, 613 (1961). *See also Malden Ret. Bd v. Contributory Ret. App. Bd.*, 1 Mass. App. Ct. 420, 423 (1973) (panel opines on medical questions "beyond the common knowledge and experience of [a] local retirement board"). A condition precedent to granting accidental disability benefits is

¹² Ex. 17; FF 14.

¹³ Ex. 3; FF 15-18.

¹⁴ Ex. 5-6; FF 17-18.

¹⁵ Ex. 15-16; FF 19-20.

the panel's issuance of an affirmative certification on questions of incapacity, permanence, and causation.¹⁶ *Kelley*, 341 Mass. at 613.

The medical panel concluded in its certification that Mr. Mulvey was disabled, the disability was likely to be permanent, but that it was not causally related to his work injury. The panel noted his diagnoses to include diabetes mellitus with extensive complications including diabetic neuropathy, peripheral vascular disease, multiple amputations of 2nd, 3rd, and 4th toes for chronic osteomyelitis, Charcot joint, gouty arthritis with knee joint problems and surgical history of knee surgery and foot surgery; and chronic low back pain. The panel reviewed the July 2013 magnetic resonance imaging (MRI) of Mr. Mulvey's lumbar spine and reported the findings were consistent with chronic degenerative disc disease, facet changes, spondylosis and a protruding L4-5 disc with minimal impingement. Upon physical examination, the panel found limited range of motion in all directions by 20% and localized tenderness at the S1 joint. The panel concluded that there was no disability related to his low back. Instead, it determined that Mr. Mulvey was disabled based on his obesity and diabetes, because those conditions prevented him from resolving his back pain. Its reasoning behind this conclusion was that Mr. Mulvey found physical therapy not beneficial and that epidural steroid injections were not available as a treatment option due to his diabetic condition.¹⁷

The medical panel was then posed several clarification questions on September 24, 2015¹⁸ to which it again concluded that Mr. Mulvey's pre-existing medical conditions of morbid obesity and diabetes were his main incapacitating factors. The panel deemed that the July 2013 lumbar spine MRI reflected significant pre-existing multi-level degenerative disc disease at L4-5 and L5-S1 and concluded that the findings were not caused by the May 31, 2013 injury. The panel felt that Mr. Mulvey's chronic low back pain, while incapacitating, was not related to the May 31, 2013 injury. Instead, it deemed it was the result of Mr. Mulvey's pre-existing degenerative disc disease, Charcot joint and amputations. It stated that the injury of May 31,

¹⁶ The panel addresses three questions: (1) whether the applicant is mentally or physically incapacitated for further employment duties; (2) whether such incapacity is likely to be permanent; and (3) "whether or not the disability is such as might be the natural and proximate result of the accident or hazard undergone on account of which [an accidental disability] retirement is claimed." G.L. c. 32, § 6(3).

¹⁷ FF 16.

¹⁸ Ex. 5; FF 17.

2013 resulted in aggravation of low back pain, which was transient. The panel also related the limitations in ranges of motion on examination to the pre-existing findings. It concluded that had Mr. Mulvey not had pre-existing comorbid issues, the injury of May 31, 2013 would have resolved with rest and physical therapy.¹⁹

Before addressing the medical panel's opinion on causation, we find it necessary to clarify the magistrate's discussion on the implications of pre-existing conditions in determining causation. An applicant, such as Mr. Mulvey, may be entitled to accidental disability retirement benefits when a work injury aggravates a pre-existing condition. *Robinson v. Contributory Ret. App. Bd.*, 20 Mass. App. Ct. 634, 638 (1985). The applicant bears the burden of proving the causal relationship by a preponderance of the evidence. *Murphy v. Contributory Ret. App. Bd.*, 463 Mass. 333, 345 (2012); *Lisbon v. Contributory Ret. App. Bd.*, 41 Mass. App. Ct. 246, 255 (1996) (applicant must show it was "more likely" that the disabling injury, flowing from a work accident, was directly caused by or was the aggravation of a preexisting condition, "than by the natural, cumulative, deteriorative effects of his preexisting diseased condition and unhealthy habits."). While the magistrate noted that disability law follows the tort rule that we must "take the victim as we find him," this is only correct to the extent that, if a work injury aggravates any pre-existing conditions to the point of disability, the petitioner may be entitled to accidental disability retirement benefits. See *Kelly, supra*. However, if the work injury does not substantially change the progression of the underlying condition to the point of disability – that is, if the applicant would have become disabled anyway within the same general timeframe due to the natural progression of the pre-existing condition – then the work injury is not the proximate cause and accidental disability retirement is not available.

Here, the medical panel's certification report and response to clarification questions fail to adequately address the question of causation. The medical panel noted that Mr. Mulvey had suffered from morbid obesity, uncontrolled diabetes and complications, and degenerative disc disease. In its certification report, the panel noted Mr. Mulvey's main incapacitating conditions were nonwork-related conditions of morbid obesity and diabetes and their complications. It did not find any symptoms from the back pain to substantiate a disability resulting from the low back injury.²⁰ The medical panel also expressed in its response to clarification questions that Mr.

¹⁹ Ex. 6; FF 18.

²⁰ Ex. 3.

Mulvey presented with significant pre-existing degenerative disc disease that resulted in a back strain which was exacerbated by the injury of May 31, 2013. It also stated at number 5 that “[its] opinion [was] that chronic back pain [was] incapacitating but not related to his May 31, 2013 injury,” which appears inopposite of its statement in the certification report reflecting that his disability was caused by diabetes and morbid obesity. The panel also concluded in its response to clarification questions that Mr. Mulvey sustained an aggravation of his low back pain that was transient in nature as a result of the injury in question.²¹ In reviewing the certification report and the responses to clarification questions, the medical panel’s opinion appears internally inconsistent and contradictory. We could not readily ascertain Mr. Mulvey’s disabling condition from the panel’s report or its responses. Therefore, another medical panel evaluation must be performed to identify Mr. Mulvey’s disabling condition and determine whether that disabling condition was proximately caused by the injury of May 31, 2013. Depending on the medical panel’s opinion regarding Mr. Mulvey’s disabling condition, this would then determine whether an additional standard, such as the aggravation of a pre-existing condition, needs to be addressed.

Conclusion. The DALA decision is affirmed. Mr. Mulvey met his burden that he was deprived of a proper medical panel evaluation. This matter is remanded back for another medical panel evaluation. **Affirm.**

SO ORDERED.

CONTRIBUTORY RETIREMENT APPEAL BOARD



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Assistant Attorney General
Chair
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Governor’s Appointee

Fariyda Mulrain, RN, BSN, FNP

²¹ Ex. 6.

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Conclusion. The DALA decision is affirmed. Mr. Mulvey met his burden that he was deprived of a proper medical panel evaluation. This matter is remanded back for another medical panel evaluation. *Affirm.*

SO ORDERED.

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²¹ Ex. 6.

Commissioner of Department of Public Health Appointee

Date: May 22, 2024