COMMONWEALTH OF MASSACHUSETTS

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

Steve Ortiz,
Petitioner,

v.

No. CR-23-0481

Dated: September 20, 2024

Public Employee Retirement Administration Commission and **Cambridge Retirement Board**,
Respondents.

Appearances:
For Petitioner: Thomas F. Gibson, Esq.
For Public Employee Retirement Administration Commission: Judith A. Corrigan, Esq.
For Cambridge Retirement Board: James H. Quirk, Jr., Esq.

Administrative Magistrate:
Yakov Malkiel

SUMMARY OF DECISION

The petitioner is retired for accidental disability under the heart law, G.L. c. 32, § 94. For purposes of calculating his retirement allowance under G.L. c. 32, § 7(2)(a)(ii), the petitioner's last day of work counts as "the date . . . [the disabling] hazard was undergone."

DECISION

Petitioner Steve Ortiz is retired for accidental disability. He appeals from the calculation of his retirement allowance performed by the Public Employee Retirement Administration Commission (PERAC). The Cambridge Retirement Board (board) was impleaded, and the appeal was submitted on the papers at the parties' request. I admit into evidence Mr. Ortiz's exhibits marked 1-7, PERAC's exhibits marked 1-2, and the board's exhibits marked 1-3.

Findings of Fact

The following facts are not in dispute.

1. Mr. Ortiz became a public employee in 1987. In 2000, he began working as a permanent fire fighter with the Cambridge fire department. In 2004, on top of his day job, Mr.

Ortiz began to moonlight as a security guard with Cambridge Health Alliance. Both of Mr. Ortiz's employers relayed retirement deductions from his pay to the board.[1] (Petitioner exhibit 1.)

2. Mr. Ortiz's last day of work at both of his positions was May 21, 2021. By that time, he was suffering from severe symptoms of coronary artery disease. Mr. Ortiz's job as a security guard continued to provide him with sick and vacation pay through October 2021. His job as a firefighter continued to entitle him to injured-on-duty pay under G.L. c. 41, § 111F, until April 13, 2023. (Petitioner exhibits 1-2.)

3. In the meantime, in September 2022, Mr. Ortiz applied to retire for accidental disability. The application relied on the heart law, G.L. c. 32, § 94. PERAC approved the application in September 2023.[2] (Petitioner exhibits 2-3.)

4. PERAC's approval decision identified Mr. Ortiz's retirement date as April 13, 2023, the end-date of his § 111F pay. Mr. Ortiz's last year's worth of § 111F pay formed the basis of PERAC's calculation of his retirement allowance. Mr. Ortiz took this timely appeal to challenge PERAC's calculation method. (Petitioner exhibits 3-7.)

Analysis

A Massachusetts public employee may retire for accidental disability upon establishing that he or she is disabled, that the disability is permanent, and that the disability was proximately caused by a workplace "injury sustained or . . . hazard undergone." G.L. c. 32, § 7(1). The requisite proximate cause is rebuttably presumed in cases of firefighters with heart disease.

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[1] The legal relationship between the Cambridge Health Alliance and the board is complex. *See Campbell v. Cambridge Ret. Bd.*, No. CR-21-41, 2023 WL 4264530 (DALA June 23, 2023).

[2] The briefs all share the assumption that Mr. Ortiz was equally disabled as to both of his jobs.

Id. § 94. *See generally Williams v. Norfolk Cty. Ret. Bd.*, No. CR-03-556, at *3 (CRAB Dec. 23, 2004).

The amount of the retirement allowance in accidental disability cases equals 72% of the retiree's previous "annual rate of . . . regular compensation." G.L. c. 32, § 7(2)(a)(ii). That annual rate is calculated as the greater among two options: either the member's actual earnings in "the 12-month period for which he last received regular compensation," or an annualized figure derived from the member's "regular compensation on the date [the] injury was sustained or [the] hazard was undergone." *Id.*

PERAC's calculations rely on § 7(2)(a)(ii)'s first option, i.e., the member's final year of regular compensation. In that year, Mr. Ortiz received only § 111F pay. *See Leary v. Hull Ret. Bd.*, No. CR-06-341, 2012 WL 13406329 (CRAB Apr. 26, 2012). Mr. Ortiz seeks an alternative calculation based on § 7(2)(a)(ii)'s second option, namely "the date [the] injury was sustained or [the] hazard was undergone." He identifies that date as his last day of work—when he was still being paid by both of his jobs.

Mr. Ortiz's position is supported by *McShane v. Public Emp. Ret. Admin. Comm'n*, No. CR-98-36 (DALA Apr. 28, 1999, *aff'd*, CRAB Sept. 28, 1999),[3] and *Quigley v. State Bd. of Ret.*, No. CR-03-497 (DALA Oct. 1, 2004). In both cases, the disability was caused by a "hazard," i.e., a persistent workplace condition resulting in a gradual deterioration of the member's health. *See Favazza v. Massachusetts Teachers' Ret. Syst.*, No. CR-21-150, 2024 WL 215934, at *5 (DALA Jan. 12, 2024). By its nature, a hazard is not undergone on one specific date. To give effect to § 7(2)(a)(ii)'s phrase, "the date . . . [the] hazard was undergone," *McShane* and *Quigley*

[3] *McShane* is not decisive in the manner of most CRAB decisions because it was issued by an equally divided panel. *See Durant v. Essex Co.*, 90 Mass. 103, 108 (1864).

construe it as denoting the most recent date of the hazard. *See generally Commonwealth v. Garcia*, 95 Mass. App. Ct. 1, 6 n.7 (2019). *See also Sibley v. Franklin Reg'l Ret. Bd.*, No. CR-15-54, 2023 WL 11806176, at *6-7 (CRAB May 26, 2023) (for purposes of § 7's two-year limitation period, a hazard is "undergone" on its most recent date).[4]

The approach adopted by *McShane* and *Quigley* suits § 7(2)(a)(ii)'s legislative purpose. *See generally Rotondi v. Contributory Ret. Appeal Bd.*, 463 Mass. 644, 648 (2012). It is common for employees who have begun to experience health problems either to remain at work or to take leave in the hope of returning thereafter. *See Pease v. Worcester Reg'l Ret. Bd.*, No. CR-21-82, 2022 WL 19762164, at *4 (DALA Dec. 23, 2022). Such efforts generally are worthy of encouragement. During the period when an employee is no longer healthy, but has not yet given up hope of recovering, his or her compensation may suffer. The employee may experience reductions in hours, responsibilities, or benefits. If such an employee does eventually need to retire, the effect of § 7(2)(a)(ii)'s two options is to prevent injury-related pay reductions from carrying over into the pension calculations. The employee is instead entitled to the benefit of his or her pre-injury compensation. In hazard cases, that statutory goal is advanced—even if not fully accomplished—by a construction that allows the member's "annual rate" to be derived from his or her compensation on the hazard's most recent date.

The workplace circumstances that result in retirement under the heart law are a type of hazard: § 94's underlying premise is that the persistent pressures of emergency work tend to

[4] The analysis would change only subtly if the Legislature had a different meaning in mind for the specific word "hazard." *See Favazza*, 2024 WL 215934, at *5 n.3. There is no question that the categories "injury" and "hazard" together cover cases of gradual deterioration resulting from persistent workplace conditions. *See Blanchette v. Contributory Ret. Appeal Bd.*, 20 Mass. App. Ct. 479, 485 (1985). In order to retain some effect *as to such cases*, § 7(2)(a)(ii)'s second option (the date of the injury *or* hazard) would need to refer to the end-date of the deterioration-causing condition.

result in gradually deteriorating cardiovascular health. *McShane* and *Quigley*'s textual and purposive rationales apply equally in this context. Since the phrase "the date . . . [the] hazard was undergone" in § 7(2)(a)(ii) must mean the last date of the hazard (in order to retain some effect), that phrase in heart law cases must denote the employee's last day at his or her stress-intensive job.[5] And heart law-covered professionals who remain employed and/or take leave in the early days of serious cardiovascular symptoms are among those who should not be penalized for those efforts.

PERAC does not argue that *McShane* and *Quigley* were wrongly decided. Its theory is that their shared holding should be restricted to members who retire based on hazards not covered by the heart law. In support of that theory, PERAC asserts that retirees under the heart law and related provisions are numerous. But that line of argument is not rooted in the controlling considerations of statutory language and legislative intent. *See Rotondi*, *supra*.

Conclusion and Order

PERAC's decision is REVERSED. For purposes of the calculation formula stated in G.L. c. 32, § 7(2)(a)(ii), "the date . . . [the] hazard was undergone" in Mr. Ortiz's case was May 21, 2021, when he was still employed at both of his jobs. On remand, PERAC is directed to recalculate Mr. Ortiz's allowance accordingly.

Division of Administrative Law Appeals

/s/ Yakov Malkiel
Yakov Malkiel
Administrative Magistrate

[5] *Cf. Benoit v. Everett Ret. Bd.*, No. CR-14-821, 2023 WL 11806155, at *4-5 (CRAB Sept. 14, 2023) (a member seeking to retire under the heart law must comply with § 7's two-year limitation period, apparently analyzed as commencing with the member's departure from work).