

**COMMONWEALTH OF MASSACHUSETTS
CONTRIBUTORY RETIREMENT APPEAL BOARD**

MICHAEL PELLIN,

Petitioner-Appellant

v.

FRANKLIN REGIONAL RETIREMENT BOARD,

Respondent-Appellee.

CR-16-125

**DECISION AFTER REMAND
FROM SUPERIOR COURT**

Respondent Franklin Regional Retirement Board (FRRB) appealed from a decision after remand of the Division of Administrative Law Appeals (DALA) reversing its decision denying petitioner Michael Pellin's application for accidental disability retirement. The Contributory Retirement Appeal Board issued a decision on August 31, 2022 affirming the DALA decision. Upon judicial review pursuant to G.L. c. 30A, §14 filed by FRRB, the Franklin County Superior Court vacated CRAB's decision and remanded it back for further proceedings consistent with its Order of June 16, 2023.¹

Pursuant to the Superior Court's order, this case was remanded to CRAB for further consideration of Mr. Pellin's application for accidental disability retirement benefits. The Superior Court noted in its Memorandum of Decision and Order that the remaining questions for CRAB to determine are as follows: (1) whether or not Mr. Pellin's lumbar spine injury resulted in a permanent condition that rendered him incapable of performing the essential functions of his job; and if so, (2) whether or not that incapacity was the result of the aggravation of a pre-

¹ *Franklin Regional Retirement Bd. v. Contributory Retirement Appeal Bd. and Michael Pellin*, Superior Court Docket No. 2278CV00046 (Jun. 16, 2023, Hodge, J.)

existing condition of degenerative lumbar disc disease or the result of the natural progression of the pre-existing condition. *Id.*

After considering the arguments by the parties and after a review of the record, we incorporate the DALA decision by reference and adopt its additional Findings of Fact 40 – 43 and 47 as our own.² We also incorporate the DALA decision of November 2, 2012 and our decision of September 4, 2013 by reference.³ For the reasons discussed below, we affirm.

For purposes of this decision after remand from the Superior Court, we restate the procedural history of this appeal as it appears in our decision of August 31, 2022. On November 25, 2008, the Board denied Mr. Pellin's application for accidental disability retirement after the first medical panel issued a negative certificate. The first medical panel concluded that his disability was not the natural and proximate result of the personal injury sustained on account of which retirement was claimed.⁴ Following Mr. Pellin's appeal of the Board's decision, DALA issued a decision affirming the Board's denial of his application. The magistrate concluded that Mr. Pellin failed to meet his burden of proof to establish that the injury he sustained was the result of his September 25, 2006 work incident. *Michael Pellin v. Franklin Reg'l Ret. Bd.*, CR-08-805, 16 (DALA, Nov. 2, 2012).

Upon appeal, the Contributory Retirement Appeal Board (CRAB) issued a decision on September 4, 2013 remanding the case to the Board with instructions that the medical panel further explain its conclusion on causation based on the issues raised in the decision. *Michael Pellin v. Franklin Reg'l Ret. Bd.*, CR-08-805, 7 (CRAB, Sept. 4, 2013). Following the September 4, 2013 CRAB remand decision, a new medical panel was convened as the previous members were no longer available. The second medical panel answered all three statutory questions in the

² In *Pellin v. Franklin Regional Retirement System*, CR-16-125 (DALA May 11, 2018), the magistrate incorporated the November 2012 DALA decision (CR-08-805) and made additional findings of fact 40 – 47. We note that the magistrate misnumbered the Findings of Fact. The Findings of Fact only consists of 40 - 43 and 47.

³ In our decision of September 4, 2013, we incorporated Findings of Fact 1-32 and 34-39 of the November 2, 2012 DALA decision as our own and amended Finding of Fact 33 (See *Pellin v. Franklin Regional Retirement System*, CR-08-805 (CRAB Sept. 4, 2013)).

⁴ The first medical panel determined that Mr. Pellin's thoracic spine injury to be disabling, and not his lumbar spine condition. Based on this determination, this medical panel answered in the negative to the question of causation – that is, the September 25, 2006 work injury was not the natural and proximate cause of his disabling thoracic spine condition. (Ex. 11). CR-08-805, Finding of Fact 35.

affirmative.⁵ DALA issued a decision on remand, finding that Mr. Pellin was entitled to prevail on his appeal following the unanimous positive medical panel certificate. *Michael Pellin v. Franklin Reg'l Ret. Bd.*, CR-16-8125, 6 (DALA May 11, 2018). The Board filed its timely appeal to CRAB on May 16, 2018, pursuant to G.L. c. 32, §16(4). On August 31, 2022, CRAB affirmed the DALA decision on remand. Upon judicial review pursuant to G.L. c. 30A, §14 filed by FRRB, the Franklin County Superior Court vacated CRAB's decision and remanded it back for further proceedings consistent with its Order of June 16, 2023.

Discussion. To be eligible for accidental disability retirement benefits under G. L. c. 32, § 7, an applicant must establish that he is "unable to perform the essential duties of his job and that such inability is likely to be permanent . . . by reason of a personal injury sustained or hazard undergone as a result of, and while in the performance of, his duties." G.L. c. 32, § 7(1). An applicant must prove that his disability stemmed from either (1) a single work-related event or series of events, or (2) if the disability was the result of gradual deterioration, that his employment exposed him to an "identifiable condition . . . that is not common or necessary to all or a great many occupations." *Blanchette v. Contributory Ret. App. Bd.*, 20 Mass. App. Ct. 479, 485 (1985). An applicant, such as the Plaintiff, may also 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).

Under G.L. c. 32, § 7(1), an applicant must prove that the work-related injury was the "natural and proximate cause" of the disability. *Campbell v. Contributory Ret. App. Bd.*, 17 Mass. App. Ct. 1018, 1018-19 (1984). 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.").

⁵ The second medical panel, however, determined Mr. Pellin presented with a disabling lumbar condition, not a thoracic spine injury, and answered the question of causation in the affirmative, opining that the September 25, 2006 work incident to be the natural and proximate cause of Mr. Pellin's disabling lower back condition. (Ex. 45). CR-16-125, FF 40.

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 the panel’s issuance of an affirmative certification on questions of incapacity, permanence, and causation.⁶ *Kelley*, 341 Mass. at 613. The panel’s certification “is not conclusive of the ultimate fact of causal connection but stands only as some evidence on the issue,” it is merely a statement of “medical possibility.” “The final determination ... whether causation was proved [is] reserved to [CRAB], based on the facts found and all the underlying evidence, including both the medical and non-medical facts.” *Lisbon*, 41 Mass. App. Ct. at 254 (internal quotations and citations omitted).

In this decision after remand from the Superior Court, we rely on the Findings of Fact established by the November 2, 2012 and May 11, 2018 DALA decisions and our September 4, 2013 decision regarding Mr. Pellin’s medical history, employment history, and his back injury sustained on September 25, 2006 while placing batteries weighing approximately eighty to one hundred pounds into a floor cleaning machine.⁷ In so doing, we conclude that after reviewing the totality of the medical and nonmedical evidence in the record, we agree with the magistrate that Mr. Pellin is entitled to accidental disability retirement benefits.

According to Mr. Pellin in his notice of injury, he sustained an injury to his lower back while attempting to install heavy batteries into a cleaning machine on September 25, 2006.⁸ The Employer’s First Report of Injury also reflects an injury to the mid and lower back.⁹ The second medical panel confirmed that Mr. Pellin’s physical disability was, in fact, the result of a lower back injury sustained in the performance of his duties on September 25, 2006. In its certificate,

⁶ 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).

⁷ CR-08-805, FF 1-39; CR-16-125, FF 40-43, 47; CRAB Decision Sept. 4, 2013.

⁸ Ex. 9, 14; FF 9, 10.

⁹ Ex. 7, 8, 14, FF 32.

the panel rendered diagnoses of chronic back pain secondary to lumbar strain, osteoarthritis of the lumbar spine and exaggerated by obesity and deconditioning. While the panel noted that Mr. Pellin's disability was likely "not" the direct result of a work-related incident or accident, the panel concluded in its certificate that such incapacity is such as might be the natural and proximate result of a personal injury sustained or hazard undergone on account of which retirement was claimed. It also explained in its response to clarification questions by the Board that the word "not" was inappropriate in the statement of disability and reiterated its conclusion in the certification report. The panel reaffirmed that Mr. Pellin's disability was the result of the work-related injury. It determined that he could not return to a physical labor occupation due to the likelihood of a recurrence of back pain. The panel stated that the injury to his lower back would be further exacerbated should he return to performing physical labor.¹⁰ The magistrate agreed with the unanimous decision of the second medical panel and reversed the Board's decision denying Mr. Pellin's application for accidental disability retirement. *Pellin v. Franklin Regional Retirement Bd.*, CR-16-125 (DALA May 11, 2018).

Disability is the inability to perform the essential duties of one's job. Implicit in this definition is the notion that an employee is unable to perform the duties of one's job where there is a "considerable risk of re-injury." See *Dimitropoulos' case*, 343Mass. 341, 345, 178 N.E. 2d 497, 499-500 (1961). The proper standard to be applied in evaluating the risk of re-injury or harm to third parties for determining disability under the retirement laws is whether the employee is able to perform the essential duties of his or her position without a reasonable probability of substantial harm to himself or third parties. To make this determination, consideration must be given to (1) the likelihood of re-injury or harm to the employee or third parties posed by the employee's return to work; and (2) the seriousness of the consequences to the employee or third parties of the injury to be risked. We have stated that it is not enough that there is some risk of some harm, but that there must be a reasonable probability of substantial harm. *Filipek v. Bristol County Retirement Bd.*, CR-03-672 (CRAB Dec. 23, 2004) (panel must consider whether correctional officer nearly beaten to death in riot faces unreasonable risk of re-injury at work because of his depression, anxiety, and post-traumatic stress disorder).

¹⁰ Ex. 43, 45; FF 40, 42.

In assessing his claim for disability retirement benefits, the medical panel explained that Mr. Pellin should not return to performing physical labor because of the risk of recurrence of back pain, noting that the injury to his lower back would be further exacerbated. This opinion establishes that Mr. Pellin is unable to perform his essential job duties due to the considerable risk of re-injury. *See, e.g., Tatro v. State Bd. of Retirement*, CR-09-67 (DALA Jan. 8, 2010) (correctional officer with compromised facial bone structure and airway, who had received direct threats by prisoners aware of prior assault, faced unreasonable danger of repeat assault); *Filipek*, CR-03-672 (CRAB Dec. 23, 2004). We, therefore, agree with the magistrate that Mr. Pellin met his burden to demonstrate that he is disabled as a result of the work incident of September 25, 2006 in which he injured his low back. The magistrate was persuaded by the record evidence and in particular, the medical panel certification. When considering this appeal, we find the magistrate's decision reasonable and determine that it is entitled to deference. *Vinal v. Contributory Retirement Appeal Bd.*, 13 Mass. App. Ct., 85, 99-100 (1982).

Conclusion. The DALA decision after remand is affirmed. Mr. Pellin has met his burden to establish entitlement to accidental disability retirement benefits pursuant to G.L. c. 32, § 7.

SO ORDERED.

CONTRIBUTORY RETIREMENT APPEAL BOARD

Uyen M. Tran

Uyen M. Tran
Assistant Attorney General, Chair
Attorney General's Appointee

Nicolle M. Allen

Nicolle M. Allen, Esq.
Governor's Appointee

Fariyda Mulrain, NP, BSN, FNP
Department of Public Health Appointee

Date: March 29, 2024

In assessing his claim for disability retirement benefits, the medical panel explained that Mr. Pellin should not return to performing physical labor because of the risk of recurrence of back pain, noting that the injury to his lower back would be further exacerbated. This opinion establishes that Mr. Pellin is unable to perform his essential job duties due to the considerable risk of re-injury. *See, e.g., Tatro v. State Bd. of Retirement*, CR-09-67 (DALA Jan. 8, 2010) (correctional officer with compromised facial bone structure and airway, who had received direct threats by prisoners aware of prior assault, faced unreasonable danger of repeat assault); *Filipek*, CR-03-672 (CRAB Dec. 23, 2004). We, therefore, agree with the magistrate that Mr. Pellin met his burden to demonstrate that he is disabled as a result of the work incident of September 25, 2006 in which he injured his low back. The magistrate was persuaded by the record evidence and in particular, the medical panel certification. When considering this appeal, we find the magistrate's decision reasonable and determine that it is entitled to deference. *Vinal v. Contributory Retirement Appeal Bd.*, 13 Mass. App. Ct., 85, 99-100 (1982).

Conclusion. The DALA decision after remand is affirmed. Mr. Pellin has met his burden to establish entitlement to accidental disability retirement benefits pursuant to G.L. c. 32, § 7.

SO ORDERED.

CONTRIBUTORY RETIREMENT APPEAL BOARD

Uyen M. Tran
Assistant Attorney General, Chair
Attorney General's Appointee

Nicolle M. Allen, Esq.
Governor's Appointee

Fariyda Mulrain, NP, BSN, FNP
Department of Public Health Appointee

Date: March 29, 2024