COMMONWEALTH OF MASSACHUSETTS
CONTRIBUTORY RETIREMENT APPEAL BOARD

JOSE PEREIRA,

Petitioner-Appellant

v.

NEW BEDFORD RETIREMENT BOARD,

Respondent-Appellee.

CR-16-450

DECISION

Petitioner Jose Pereira appeals from a decision by an administrative magistrate of the Division of Administrative Law Appeals (DALA) affirming the decision of the New Bedford Retirement Board (NBRB) to deny his application for accidental disability benefits for an injury to his right knee without convening a medical panel. Magistrate Edward McGrath heard this matter on November 30, 2017 and admitted eleven documents into evidence. The DALA decision was issued on April 20, 2018. Mr. Pereira timely appealed to us.

After considering the evidence in the record and the arguments presented by the parties, we adopt the magistrate's findings of fact 1 -25 as our own and incorporate the DALA decision by reference. We affirm the DALA decision for the reasons set forth in its Discussion and Conclusion, adding the following comments.

Background

Mr. Pereira began working as a welder for the New Bedford Department of Public Infrastructure in October of 1994. His duties included welding, fabricating, brazing, soldering, grinding, heating, and shaping of metal. He welded and repaired large pieces of equipment that could not be picked up and maneuvered, requiring him to have frequent periods in sustained uncomfortable physical positions. He frequently welded items while kneeling on his right knee,

and he testified that the job sometimes required him to contort into "crazy" positions to reach the places he was expected to work.[1] While working as a welder, Mr. Pereira also worked part-time as a bus driver for two or three months.[2]

Around 2011, Mr. Pereira began receiving cortisone shots for knee pain.[3] He continued to work as a welder despite the pain in his knee. In 2013, he hit his right knee against a truck and reported swelling and pain.[4] In 2014, Mr. Pereira engaged in a lighthouse restoration process, which required him to spend a significant amount of time on his knees. During the project, he reported that one of his knees was swollen. While working on the lighthouse, he also hit his left knee against a work truck's trailer hitch. Mr. Pereira sought medical treatment with Michael Egan, M.D., on May 14, 2015, for knee pain but continued to work until May 19 despite the pain, using cold gel pads to help with the swelling.[5]

Mr. Pereira left work on May 19, 2015.[6] He was unable to perform the essential duties of his job due to the right knee disability. A May 2015 Employer's Injury Report reflected a date of injury of May 19, 2015, describing the injury as repetitive movements: "working on knees for the past two weeks welding and grinding, right knee is now hurting and swollen."[7] The City of New Bedford began paying Mr. Pereira worker's compensation benefits for his right knee injury in June of 2015.[8] He filed for accidental disability retirement benefits in October 2015. On the application, he indicated that the reason for his disability was exposure to a hazard over the past 31 years and did not arise out of any specific incident or injury.[9] Dr. Fraser completed a Physician's Statement dated September 8, 2015 in support of his application for accidental disability retirement benefits, noting a date of injury or exposure as May 19, 2015 with a diagnosis of arthropathy of the right knee. He described the onset of the condition as "repetitive work trauma [and] injury of 5/19/15."[10] The NBRB denied his claim on September 28, 2016,

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[1] Findings of Fact 1-3; Exhibits 1, 6, 10.
[2] FF 4; Pereira Testimony p. 26.
[3] FF 6; Ex. 7.
[4] FF 7; Ex. 7.
[5] FF 8-13; Ex. 7.
[6] FF 14; Ex. 7.
[7] FF 15; Ex. 8.
[8] FF 23; Ex. 6, 8, 9.
[9] FF 22; Ex. 7.
[10] FF 20; Ex. 7.

without providing Mr. Pereira an examination by a regional medical panel.[11] Mr. Pereira timely appealed the Board's decision to DALA. Chief Magistrate Edward McGrath affirmed the Board's decision on April 20, 2018, on the grounds that the requirements of the position did not expose him to an identifiable condition not common and necessary to all or a great many occupations.[12]

Discussion

Accidental disability claims are compensable if an individual is permanently disabled by reason of a documented injury or series of injuries sustained or hazard undergone as a result of, and while in the perform of, his duties. G.L. c. 32, § 7(1). To recover for disability arising out of a hazard, the applicant must prove that "an identifiable condition that is not common and necessary to all or a great many occupations" naturally and proximately caused his disability. *Kelly's Case*, 594 Mass. at 688 (quoting *Zerofski's Case*, 385 Mass. 590, 593 (1982)). In order to be entitled to a medical review panel to determine the issue of causation, the claimant must first make out a prima facie case of eligibility. That is, Mr. Periera is required to present sufficient evidence that, if unrebutted and believed, would allow a factfinder to conclude that he suffered a permanent disability based on the knee injury sustained while performing his duties as a welder. *Lowell v. Worcester Retirement Bd.,* CR-06-296 (DALA 2009, no CRAB opinion). Since his claim is based on a hazard theory, this requires that Mr. Pereira first prove that he encountered a condition that is uncommon among all or a great many professions.

If the workplace condition is not uncommon, we classify the injury in question as the result of normal wear and tear, which is not compensable. To determine whether a condition is common or necessary to all or a great many occupations, we evaluate the frequency and intensity of the activity. *Adams v. Contributory Retirement Appeals Board*, 414 Mass. 360 (1993). For instance, in *Tait v. Bristol County Retirement Board*, DALA held that that opening and closing bus doors by moving one's arm in a circular motion over eighty times per shift constituted an unusual working condition. While opening doors alone is not uncommon, the frequency with which an employee was required to make the same repetitive motion was not common to all or a great many other occupations. *See also Kuehn v. Barnstable County Retirement Board, CR-05-*

[11] FF 24; Ex. 5.
[12] Pereira v. New Bedford Contributory Retirement Board, CR-16-450 (DALA 2018).

342 (DALA 2007) (holding that a librarian using her hands to lift and scan between thirty and a hundred books per hour is required to make this motion with enough frequency and intensity to constitute an unusual identifiable condition); *Physic v. Massachusetts Turnpike Authority Employees' Retirement Board*, CR-05-1091 (DALA 2006) (holding that raising one's hand to take toll money over a thousand times per shift constituted an unusual identifiable condition). Notably, these repetitive movements are unusual for the kind of work in question: the majority of individuals who drive for a living do not have to crank a door open eighty times per day. Similarly, most clerical workers like librarians do not have to scan up to one hundred books an hour in a repetitive motion, and most people making sales do not have to raise their hands to take money over a thousand times per day. The SJC has also suggested that adequate conditions could include exposure to "continual traumatic events" or exposure to asbestos in the workplace. *Blanchette v. Contributory Retirement Appeals Board*, 20 Mass. App. Ct. 479, 488 n.7.

In contrast, strenuous work alone does not constitute an uncommon condition. Normal wear and tear can result from the performance of job even when those responsibilities require a high level of physical activity. *Cf. Parent v. Worcester Regional Retirement Board*, CR-11-659 (DALA 2012, aff'd by CRAB 2013) (holding that "physically exertional but routine" conditions of firefighter were common to many that involve heavy work activities); *Curley v. Cambridge Board of Retirement*, CR-12-214 (CRAB 2015) (holding that heavy lifting as mechanic in Fire Department, changing heavy tires, and inspecting and maintaining vehicles did not constitute an unusual condition); *Duggan v. Boston Retirement Board*, CR-98-225 (CRAB 2000) (holding the same in a position requiring frequent stair climbing); *Loura v. Taunton Retirement Bd.*, CR-13-186 (CRAB July 2021, *aff'd* Bristol Superior Ct. CA No. 2021-00576, Nov. 15, 2022)(regularly lifting and moving heavy pipes and machinery, kneeling and lifting in confined spaces and performing water maintenance work were heavy labor work and did not constitute an identifiable condition). Many professions require physical exertion, and because "all jobs have their own special characteristics," it is not sufficient for an applicant to show that his daily duties were unique. *Adams*, 414 Mass. at 365. Rather, the burden is on the applicant to prove that the unique condition arises with such a frequency and intensity as to render it unusual among all or a great many occupations, including occupations that involve the kind of physical work in which he is involved. If the applicant cannot show that his duties involved an unusual identifiable condition,

he cannot claim disability based on a workplace hazard, even if his work may have contributed to his disability. *Id*.

Welding inherently involves physical exertion and moving into uncomfortable positions. While the specifics of welding large objects might be unique to a field welder, moving into uncomfortable positions is not an uncommon element of jobs that require manual labor. Mr. Pereira's activities seem to match with the kind of physically exertional, but routine responsibilities that are common to a great many professions. A wide variety of other professions require kneeling and awkward positioning: mechanics, bricklayers, landscapers, and plumbers often enter these positions. Kneeling and reaching are also relatively common activities that occur outside of work. While it is possible that he knelt on one knee with such a frequency as to constitute an unusual identifiable condition, the burden of proof in this matter rests on the petitioner. *Wakefield Contributory Retirement Bd. v. Contributory Retirement Appeal Bd*., 352 Mass. 499, 226 N.E.2d 245 (1967). We do not believe Mr. Pereira differentiated his activities from other professions that involve kneeling or physical activities in a manner sufficient to meet this burden of proof. *Sugrue v. Contributory Retirement Appeal Bd.*, 45 Mass. App. Ct. 1, 694 N.E.2d 391 (1998). The DALA magistrate was also unconvinced that the movements were so frequent or excessive as to constitute an identifiable condition, noting that Mr. Pereira took frequent breaks from staying in one position to accommodate his knees. On subsidiary findings of fact, such as the exact amount of time Mr. Pereira spent in this position, we afford substantial deference to DALA. *Vinal v. Contributory Retirement Appeal Bd.*, 13 Mass.App.Ct. 85, 430 N.E.2d 440 (1982). The magistrate's findings were reasonable and supported by the facts, and so we affirm this finding.

We also find unconvincing the argument that Mr. Pereira is entitled to a finding that his responsibilities were not common to all or a great many occupations based on the decision of the City of New Bedford to grant him workers' compensation. Both workers' compensation and accidental disability claims can be based on a hazard theory, and both require the applicant to prove he was exposed to an identifiable condition not common to all or a great many occupations. *Zerofski's Case*, 385 Mass. 590, 595 (1982); *Adams v. CRAB,* 414 Mass. 360, 365 (1993). However, the City of New Bedford's determination that Mr. Pereira met that burden of proof is not binding upon the NBRB. The two are separate entities, and the Board is entitled to

make its own determinations on these matters subject to review by DALA and CRAB on appeal. Moreover, we note that the requirements for workers' compensation are significantly lower than the requirements for accidental disability. Workers' compensation provides "broad protection against work-related injury" and only requires that the injury in question arise out of and in the course of employment, *Zerofski's Case*, 385 Mass. at 592, while accidental disability retirement benefits require that the incapacity be the "natural and proximate result of a personal injury sustained or hazard undergone." G.L. c. 3,2 § 7. The language of G.L. c. 32, § 7 is "much more restrictive" than that of the workers' compensation statute, *Boston Retirement Bd. v. Contributory Retirement Appeal Bd*., 340 Mass. 109, 111, 162 N.E.2d 821 (1959), because accidental disability retirement benefits "are more generous than those available under ordinary retirement or under a nonservice-connected receipt of accidental disability retirement benefits." *Damiano v. Contributory Retirement Appeal Bd*., 72 Mass. App. Ct. 259, 261-262, 890 N.E.2d 173 (2008).

Conclusion

Mr. Pereira failed to make a prima facie case for an evaluation by a regional medical panel. He was not disabled as a result of an identifiable condition not common or necessary to all or a great many occupations and is not entitled to accidental disability retirement benefits pursuant to G.L. c. 32, § 7. The DALA decision is affirmed.

SO ORDERED.

CONTRIBUTORY RETIREMENT APPEAL BOARD

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