

COMMONWEALTH OF MASSACHUSETTS
CONTRIBUTORY RETIREMENT APPEAL BOARD

SUSAN POPP,
Petitioner-Appellee

v.

STATE BOARD OF RETIREMENT
Respondent-Appellant.
CR-17-848

DECISION

The respondent State Board of Retirement (SBR) appeals from a decision of an administrative magistrate of the Division of Administrative Law Appeals (DALA) reversing SBR's decision denying the petitioner Susan Popp Group 2 classification. The DALA decision is dated October 22, 2021. SBR filed a timely appeal to us.

After reviewing 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 magistrate's decision that Popp was properly classified in Group 2 for retirement purposes. We agree that despite the patients Popp served had primary diagnoses of hospice, each patient's principal illness and treatment of dementia demonstrates that Popp's duties involved providing direct "care, custody, instruction and other supervision" to mentally defective or ill patients for more than 50% of her working hours. Thus, Popp was correctly classified in Group 2 for retirement purposes.

Background

Popp is a Licensed Practical Nurse II (LPN II) who began her employment at the Soldiers' Home in Holyoke, Massachusetts in 1994. The Soldiers' Home is a facility within the Commonwealth of Massachusetts' Executive Office of Health and Human Services and its Office of Disabilities and Community Services. The Soldiers' Home provides qualifying

Massachusetts veterans with outpatient and inpatient hospital treatment. Popp retired from her position in 2017.¹

The Soldiers' Home had three units with doors that could be locked and opened only with keypads. These units were 1N, 2N, and 3N. Units 1N and 2N were referred to as the Alzheimer's or Dementia units. The doors to these units were kept locked. Unit 3N was the Hospice unit, where Ms. Popp worked. The Hospice Unit was known as a closed unit, meaning the doors to this unit were kept closed but were not typically locked. The Hospice Unit did not lock its doors because family and outside hospice service providers require access to the unit. Although the doors were not locked, elopement of hospice patients was a constant danger such that patients on the unit wore monitors that would notify staff if a patient attempted to open the doors.²

To be admitted to the Hospice Unit, all patients must receive a hospice diagnosis, which becomes their primary diagnosis. As a result, all other illnesses – including those that lead to their hospice care and would ultimately be the cause of death – became secondary diagnoses.³ The majority of patients on the Hospice Unit carried mental health diagnoses including Alzheimer's, Lewy Body Dementia, Vascular Dementia, Alcohol-induced Dementia, Schizoaffective Disorder, and Post-Traumatic Stress Disorder.⁴ Patients on the Hospice Unit displayed agitation, hallucinations, impaired consciousness, paranoia, aggression, and suicidal ideation. The majority of the patients had violent tendencies and posed a risk to the staff. All patients on the Hospice Unit needed to be constantly monitored to prevent elopement and violence.⁵

During Ms. Popp's last year working at the Home, the Hospice Unit housed fifteen patients.⁶ The record contains the charts of twelve of these patients. Of the twelve patients, eleven were diagnosed with some form of dementia and one had a diagnosis of depression with anxiety and mood disorder.⁷ Eight of the twelve patients carried a diagnosis of dementia

¹ Finding of Fact #2.

² Findings of Fact #4-12.

³ Finding of Fact #8.

⁴ Finding of Fact #14; Testimony of Ms. Popp; Petitioner Ex. 15A-L.

⁵ Findings of Fact #13.

⁶ Finding of Fact #15.

⁷ Finding of Fact #15; Petitioner Ex. 15A-L.

(including Alzheimer's disease) which was listed primary to any non-mental-health-related illness within their medical chart.⁸

As an LPN II, Ms. Popp spent a majority of her time providing direct care to the patients on the unit.⁹ Ms. Popp's Form 30 Description indicated she was responsible for delivering "nursing care for adult and geriatric Veterans . . . with carrying degrees of chronic physical disabilities and diseases; as well as psychiatric diagnoses, depression, and various dementia related disorders, to include Alzheimer's disease with accompanying behavioral issues."¹⁰ The care Ms. Popp provided included monitoring patients to ensure their safety, making patients comfortable, and administering psychiatric medication, including anti-psychotics, anti-depressants, sedatives, and mood-altering pain medication.¹¹ Ms. Popp completed a psychotropic flow sheet every night for each patient to evaluate a justification of dispensing or withholding regularly administered medications.¹²

On August 11, 2017, Ms. Pop submitted a Group Classification Application Form requesting her position to be classified as Group 2. She submitted a narrative detailing her reasoning for the assertion that her position should fall into Group 2. In her classification narrative, Ms. Popp stated that the mental health diagnoses and nature of care she provided to her patients on the Hospice Unit entitle her to Group 2 retirement classification.¹³ On September 7, 2017, SBR denied her request to be classified in Group 2 for retirement purposes on the basis that the patients she cared for did not have a primary diagnosis of a mental illness and therefore did not meet the requirements of M.G.L. c. 32, § 3(2)(g).¹⁴ Ms. Popp appealed the decision to DALA on September 20, 2017.¹⁵

On October 22, 2021, the DALA magistrate reversed SBR's decision denying Ms. Popp's request for Group 2 classification, holding that Ms. Popp's dementia patients were principally mentally ill, and a primary diagnosis of hospice came first only as a matter of procedure. SBR

⁸ Finding of fact #15; Respondent Ex. 7; Petitioner Ex. 15A-L.

⁹ Finding of Fact #18; Testimony of Ms. Popp.

¹⁰ Petitioner Ex. 20A.

¹¹ Testimony of Ms. Popp; Respondent Ex. 5; Petitioner Ex. 20A; Petitioner Ex. 20B.

¹² Finding of Fact #21; Testimony of Ms. Popp.

¹³ Petitioner Ex. 8.

¹⁴ Petitioner Ex. 1; Respondent Ex. 1.

¹⁵ Respondent Ex. 2.

timely appealed to CRAB, requesting that we reverse the DALA decision. Specifically, SBR asks us to reject the finding that the hospice population with whom Ms. Popp worked met the statutory criteria of M.G.L. c. 32 §3(2)(g).¹⁶

Discussion

At issue in this case is M.G.L. c. 32 §3(2)(g)'s provision that the Group 2 retirement classification includes "employees of the commonwealth or of any county whose regular and major duties require them to have the care, custody, instruction or other supervision of parolees or persons who are mentally ill or mentally defective or defective delinquents or wayward child."

DALA found, and SBR does not dispute, that Ms. Popp spent a majority of her time providing direct care to patients. Instead, the dispute arises over whether Ms. Popp's patients qualify as "mentally ill" as required by G.L. c. 32 §3(2)(g). We have held that persons must have a "primary diagnosis" of mental illness in order to qualify under the statute.¹⁷ A mental illness cannot be merely incidental to physical illnesses.¹⁸

For purposes of G.L. c. 32 §3(2)(g), patients considered mentally ill include those who suffer from a "substantial disorder of thought, mood, perception, orientation, or memory which grossly impairs judgement, behavior, capacity to recognize reality or ability to meet the ordinary demands of life" and who present symptoms severe enough to qualify for involuntary commitment in that "a failure to hospitalize would create a likelihood of serious harm by reason of mental illness."¹⁹ We have held that patients with dementia or Alzheimer's disease qualify as mentally ill under G.L. c. 32 §3(2)(g) where their dementia presents severe enough symptoms to

¹⁶ State Board of Retirement Ex. C.

¹⁷ *Pulik v. State Bd. of Ret.*, CR-10-605 (CRAB Jul. 10, 1012) (holding that CRAB does not rely on secondary diagnoses in concluding that patients are mentally ill under the statute).

¹⁸ *Nowill v. State Bd. of Ret.*, CR-08-558 (DALA decision July 21, 2011; affirmed by CRAB May 17, 2012; CRAB decision on motion for reconsideration as corrected July 10, 2012) (holding that primary diagnoses control the analysis particularly because symptoms of psychosis, behavioral disturbances, and depression often arise in conjunction with Alzheimer's disease); *Jacqueline Miers v. State Bd. of Ret.*, CR-06-441 (DALA decision August 17, 2007; no CRAB decision).

¹⁹ *Pulik*, CR-10-605 at 5–6 quoting 104 C.M.R. § 27.05 (Massachusetts Department of Mental Health's definition of mental illness) and M.G.L. c. 123, § 12 (criteria for involuntary commitment).

qualify for involuntary commitment and they pose a risk of harm to their caregivers.²⁰ We have found evidence of involuntary commitment where patients are confined to a locked ward or unit for the treatment of severe dementia or serious mental illness.²¹

SBR contends that because Ms. Popp's patients were confined to a closed unit, rather than a locked unit, they do not satisfy the requirement of involuntary commitment and therefore do not qualify as mentally ill.²² However, that patients are housed behind a utilized locked door is not determinative of whether those persons are subject to involuntary commitment. Rather, an analysis of whether persons meet the definition of involuntary commitment focuses on a patient's freedom to ingress and egress from the unit or ward in which they receive treatment.

Here, the fact that Ms. Popp's patients were housed on a closed unit, rather than a locked unit, does not preclude their classification of mentally ill under the statute. Each patient on the Hospice Unit wore devices that would set off an alarm to notify staff if they strayed too close to the exit doors.²³ Ms. Popp's patients were constantly monitored and kept within the unit for safety purposes. The evidence shows that the purpose of the Hospice Unit doors remaining closed instead of locked was for the convenience of outside hospice providers, not because the patients posed no risk to themselves or others.²⁴

SBR further contends that because Ms. Popp's patients had a primary diagnosis of hospice, rather than a mental illness, they do not qualify as mentally ill under G.L. c. 32 §3(2)(g).²⁵ We have previously held that secondary diagnoses should not be relied upon in determining whether patients are mentally ill since symptoms of psychosis, behavioral disturbance, and depression often arise in conjunction with dementia and Alzheimer's disease.²⁶

However, a strict interpretation of the primary diagnosis analysis under G.L. c. 32 §3(2)(g) would deviate from a plain reading of the statute. The purpose of the primary diagnosis test is to evaluate what truly drives the patients care, distinguishing mental illness diagnoses

²⁰ *Nowill*, CR-08-558 at 7–8.

²¹ *Id.*; *Johnson v. State Bd. of Ret.*, CR-18-586 (DALA, April 8, 2022); *Neergheen v. State Bd. of Ret.*, CR-07-439 (DALA July 24, 2009; CRAB Nov. 3, 2009; *Pulik*, CR-10-605 at 6.

²² Respondent Ex. C.

²³ Finding of Fact #12; Testimony of Ms. Popp.

²⁴ DALA decision, p. 9; Testimony of Ms. Popp.

²⁵ Respondent Ex. C.

²⁶ *Pulik*, CR-10-605 at 6.

which are merely incidental or derivative of physical illnesses from principally mentally ill patients.²⁷ A diagnosis of mental illness is what should govern the care a patient receives.

The evidence shows that the dementia diagnoses that Ms. Popp's patients received is what governed the care she provided to them.²⁸ In fact, as we noted above, the charts of twelve of Ms. Popp's patients in the record, reflect eleven patients were diagnosed with some form of dementia and one patient had a diagnosis of depression with anxiety and mood disorder.²⁹ Eight of the twelve patients carried a diagnosis of dementia (including Alzheimer's disease) which was listed primary to any non-mental-health-related illness within their medical charts.³⁰ We agree with DALA's decision and defer to the magistrate's finding, that in this case the hospice diagnosis was assigned as a matter of procedure and served as a designation or classification of the patients' care. The purpose of the hospice diagnosis was to allow the patients better access to care for their dementia as their life was ending. In spite of the hospice diagnosis, the treatment Ms. Popp provided to her patients remained centered on their mental infirmities as indicated by her daily administration of psychiatric medication and completion of a psychotropic flow sheet each night she worked.³¹

In this particular case, the primary diagnosis of hospice does not obviate Ms. Popp's Group 2 classification. However, this narrow holding does not stand for the broad proposition that all primary hospice diagnoses are presumptively ignored when determining whether a patient is mentally ill. The analysis still prioritizes the primary diagnosis of a patient. When the facts are ambiguous as to whether patients are primarily mentally ill, an evaluation of secondary diagnoses are helpful in determining what the patient's primary ailment is. This is particularly useful where a patient receives a diagnosis for procedural purposes.

²⁷ *Nowill*, CR-08-558 at 9 (excluding patients admitted specifically for treatment of neuromuscular disorders with subsidiary mental illnesses); *Pulik*, CR-10-605 at 7 (discussing the unimportance of symptoms that merely correlate with a patient's principle illness).

²⁸ Petitioner Ex. 15; Respondent Ex. 3; Testimony of Ms. Popp.

²⁹ Finding of Fact #15; Petitioner Ex. 15A-L.

³⁰ Finding of fact #15; Respondent Ex. 7; Petitioner Ex. 15A-L.

³¹ Finding of Fact #20; Finding of Fact #21; Testimony of Ms. Popp.

The Legislature intended to afford Group 2 classification to those individuals who cared for mentally ill patients during the last year of their employment.³² We cannot read G.L. c. 32 §3(2)(g) so rigidly as to contradict common-sense notions of who is mentally ill. Such an interpretation would yield results contrary to the goals the statute means to accomplish.

Furthermore, CRAB affords deference to DALA in subsidiary findings of fact and substantial deference to the magistrate's determination of credibility.³³ Based on the evidence in the record, the magistrate's determination that Ms. Popp's major job duties constituted "care, custody, instruction or other supervision of . . . persons who are mentally ill" is reasonable. As such, Ms. Popp is properly classified in Group 2 for retirement purposes.

Conclusion

Ms. Popp's major and regular job duties involved the care, custody, instruction, or other supervision of mentally ill or defective individuals. Accordingly, she is entitled to Group 2 classification for her service with the Soldiers' Home. The DALA decision is affirmed.

SO ORDERED.

CONTRIBUTORY RETIREMENT APPEAL BOARD



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³² *Pysz v. Contributory Ret. Appeal Bd.*, 403 Mass. 514, 518 (1988) (stating the central legislative purpose of the retirement law's grouping system is to provid[e] early retirement incentive to employees with hazardous duties."); *See Spencer v. Civ. Serv. Comm 'n*, 479 Mass. 210,220 (2018); *Pub. Emp. Ret. Admin. Comm 'n v. Madden*, 86 Mass. App. Ct. 1107 (2014) (unpublished memorandum opinion).

³³ *Vinal v. CRAB*, 13 Mass. App. Ct. 85, 101 (1982); *Morris v. Bd. of Reg. of Medicine*, 405 Mass. 103, 109 (1989).

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