COMMONWEALTH OF MASSACHUSETTS

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

Stephen S. Raposa,

Petitioner,

v. Docket No. CR-21-0358

New Bedford Retirement Board, Date: January 10, 2025

Respondent.

Appearances:

For Petitioner: James H. Quirk, Jr., Esq.
For Respondent: Joseph R. Kenyon, Esq.

Administrative Magistrate:

John G. Wheatley

SUMMARY OF DECISION

The New Bedford Police Department filed an involuntary application for accidental disability retirement on behalf of the petitioner, Stephen Raposa. The New Bedford Retirement Board (Board) denied that application, as a matter of law, based on negative opinions by a majority of the three-member regional medical panel. The Board inadvertently omitted the petitioner's prior medical records from the documents it provided the panel for review in advance of their examination of the petitioner, however, as required by the Public Employee Retirement Administration Commission's regulations. Although the Board subsequently provided the prior medical records and requested the panelists to clarify their opinions, one physician on the three-member panel offered a revised opinion on causation that was ambiguous and based on the doctor's misunderstanding of the petitioner's job duties at the time of the work accident. The panel's certificate is legally insufficient because it lacks an unambiguous majority on the question of causation, and this matter is remanded for evaluation by a new medical panel.

DECISION

The petitioner, Stephen Raposa, appeals the New Bedford Retirement Board's decision to deny an application for accidental disability retirement filed on his behalf. Raposa testified on his own behalf at the evidentiary hearing, and I admitted twenty-one exhibits (Exhibits 1-21) into evidence. In addition, as I requested at the hearing, the Board subsequently submitted the package of additional medical records that it had provided to the medical panel, which I have marked as Exhibit 22 and admit into evidence.

FINDINGS OF FACT

Based on the testimony and the documentary evidence presented, as well as the parties' prehearing stipulations, I find the following facts:

1. Stephen Raposa began his employment with the City of New Bedford Police Department on June 27, 1993. (Stip. ¶ 1.)

2. Raposa participated in a pre-employment physical examination, which he passed without restrictions. (Stip. ¶ 2.)

3. In 1998, Raposa was involved in an automobile accident when responding to an emergency call for police assistance. His police cruiser collided head-on into a vehicle that had made an unexpected left turn in front of him instead of pulling over to let him pass. Raposa suffered lower back pain because of this accident. (Testimony.)

4. Raposa's back pain was treated by Dr. Aldo Beretta beginning on August 17, 1998. (Stip. ¶ 3.)

5. The medical treatment records related to Raposa's 1998 injury note that he had pulled a muscle in his back fifteen years prior. (Stip. ¶ 4.)

6. On November 18, 1998, Raposa was seen by neurologist Arun B. Rajan, M.D. Raposa reported having persistent low back pain "described as pressure like sensation" as well as "numbness which radiates from [his] back to his lower extremities bilaterally, left greater than the right." He rated the severity of his pain as 5 on average, and up to 8 at worst, on a scale from 1 to 10. Dr. Rajan's clinical impression was "[p]robable lumbo sacral radiculopathy with involvement of L5, S1 roots." (Exhibit 18.)

7. On December 15, 1998, Raposa was seen by neurologist Mark A. Hosley, M.D. From his physical examination of Raposa, Dr. Hosley notes: "Back exam is notable for spasm and tenderness primarily at the lumbo sacral paraspinal muscles of the left lower back." Dr. Hosley's diagnosis was a "lumbo sacral sprain."
(Exhibit 18; see Stip. ¶ 9.)

8. On December 16, 1998, Earl F. Hoerner, M.D., an orthopedic surgeon, performed an independent medical evaluation of Raposa. In his report, Dr. Hoerner referenced past medical treatment including physical therapy in September and October 1998 followed

by chiropractic care by Dr. Jeffrey Swift in October and November. (Stip. ¶ 7; Exhibit 18.)

9. Dr. Hoerner made the following medical diagnoses:

> "Based on the physical findings and his status, it would be my opinion that the patient's diagnoses are as follows:
>
> 1) Flexion/extension injury to the cervical area resulting in a cervical strain/sprain, resolved.
>
> 2) Thoracolumbosacral flexion/extension injury resulting in a thoracolumbosacral strain/sprain, resolved, but with the presence of Myofascial Syndrome.
>
> 3) Posture abnormality as seen on MRI and on clinical examination of left dorsal and right lumbar scoliosis with secondary supplementary curves in the cervical, thoracic and lumbosacral area with Myofascial Syndrome, secondary to diagnosis #2.
>
> 4) Chronic Pain Syndrome with coping mechanism present developed by the patient secondary to neuropathic development from original injury."

(Exhibit 18.)

10. Because Raposa received injury leave compensation under G. L. c. 41, § 111F,[1] due to his 1998 back injury, St. G. Tucker Aufranc, M.D., performed an independent medical evaluation on February 26, 1999. In his report, Dr. Aufranc notes from his medical record review:

> "The lumbar MRI scan of October 21, 1998 demonstrated a mild scoliosis to the left and mild facet joint degenerative

[1] The statute provides, in pertinent part: "Whenever a police officer . . . is incapacitated for duty because of injury sustained in the performance of his duty without fault of his own . . . he shall be granted leave without loss of pay for the period of such incapacity[.]"

> changes, greatest at L5-S1 with a disc bulge at L3-4 slightly greater to the left with borderline contact with the left L3 nerve root. There was a loss of disc water content at L3-4 from degenerative disc disease. Conclusion was that of scoliosis and mild degenerative disc changes."

(Stip. ¶¶ 5-6; Exhibit 18.)

11. Dr. Aufranc's medical diagnosis/impression was intervertebral disc disease. (Stip. ¶ 6; Exhibit 18.)

12. At his own request, Raposa returned to work with symptoms. (Stip. ¶ 7.)

13. Raposa was injured at work on February 9, 2001, described in a medical report as follows:

> "PROBABLE (L) CHEST MUSCULAR STRAIN
> . . . .
> RESTRAINING ENGAGED MALE"

(Stip. ¶ 10.)

14. On October 13, 2004, Raposa fell over the handlebar of a mountain bike during a work-training exercise. Raposa suffered a fractured elbow as a result, which kept him out of work from April 16, 2005, to approximately October 12, 2006. (Stip. ¶ 11.)

15. Anthony Caprio, M.D., an orthopedic surgeon, performed an independent medical evaluation of Raposa on March 29, 2005, regarding his October 2004 work injury. Dr. Caprio's resulting report states, in part:

> "He is status post intraarticular displaced impacted left radial head fracture as the result of an injury on 10/13/2004. . . . X-rays . . . showed an intraarticular impacted fracture of the left radial head. . . . [A] CT scan of the left upper extremity done sometime around

> January 2005 . . . demonstrates an intraarticular fracture with a solitary fragment involving the volar aspect with displacement by 1-mm of depression. . . . He continues with discomfort over the left anterior shoulder with a history consistent with anterior impingement and left wrist loss of flexion and motion because of jamming the radial head.
>
> . . . .
>
> PHYSICAL EXAMINATION
>
> . . . Tenderness in the bicipital groove with anterior impingement of the left shoulder, but full range of motion with rotator cuff intact. He lacked today, about 10 to 15 degrees of full extension.
>
> There is tenderness over the radial head with pronation and supination. He has decreased power grip, but there is no grinding. There is soreness over the radius itself when he dorsiflexes the wrist because of the fracture of the radial head.
>
> COMMENTS AND CONCLUSIONS
>
> **Diagnosis:**
> - A work-related intraarticular comminuted displaced fracture of the left radial head, healed evidently in a displaced fashion. Chronic elbow pain and loss of motion aggravated by activity.
> - Anterior impingement syndrome of the left shoulder.
> - Left wrist pain secondary to the fracture of the left radial head.
>
> . . . .
>
> Patient continues with left elbow pain, loss of function and loss of strength."

(Stip. ¶ 17; Exhibit 18.)

16. Dr. Caprio performed a second independent medical evaluation of Raposa on January 13, 2006. He opined that Raposa should be able to return to work without restriction, subject to a functional capacity evaluation to confirm that his elbow is strong enough for

him to perform the essential duties of his position. (Stip. ¶ 18 Exhibit 18.)

17. After returning to work, Raposa was recommended for a lifesaving award in an attempted suicide encounter while on duty on April 25, 2007. (Stip. ¶ 12.)

18. On January 28, 2008, Raposa, while on duty and in the course of his employment, was a passenger in a police cruiser involved in a police pursuit when the officer operating the cruiser lost control due to poor road conditions and struck a utility pole. Both officers were injured and were transported by New Bedford EMS to St. Luke's Hospital for treatment. (Stip. ¶ 13.)

19. As a result of his injuries on January 28, 2008, Raposa was out of work for nearly two years. (Stip. ¶ 14; Testimony.)

20. Louis Fuchs, M.D., an orthopedic surgeon, performed an independent medical examination of Raposa on May 12, 2008, regarding the January 28, 2008, injury. In his report, he noted that Raposa's complaints at that time primarily involved his cervical spine as well as strong headaches. Dr. Fuchs reached the following conclusions from his evaluation:

> "**Diagnosis:**
> Traumatic lumbosacral and cervical myofascitis.
>
> . . . .
>
> **Work Capacity:**
> Mr. Raposa is not capable of returning to work as a police officer with his requirements of full, pain free motion of the cervical spine.

> **Causal Relationship:**
> Mr. Raposa's history and physical findings appear causally related to the . . . recent injury of January 28, 2008, as described to me by him, and superimposed upon an already compromised axial spine."

(Exhibit 18.)

21. Because Raposa was receiving injury leave compensation under G. L. c. 41, § 111F, an independent medical evaluation was performed by orthopedic surgeon Gilbert Shapiro, M.D., on September 18, 2008. Dr. Shapiro noted injury predominantly to the cervical spine with pain in the neck and low back along with a momentary loss of consciousness. The report indicates that Raposa began chiropractic treatment for his low back pain and had increasing difficulty in the cervical spine area. (Stip. ¶ 15.)

22. Dr. Shapiro concluded from his September 2008 evaluation:

> "**Diagnoses:**
> - Acute lumbosacral strain, resolved.
> - Acute cervical strain.
>
> . . . .
>
> **Causal Relationship:**
> Based on the history as presented, the above diagnoses would appear to be causally related to the stated motor vehicle accident as described of January 28, 2008.
>
> . . . .
>
> **Work Status:**
> Mr. Raposa is not capable of performing the activities required of a police officer at the present time."

(Exhibit 18.)

23. Dr. Shapiro performed a further evaluation on January 15, 2009. His report notes:

> "An MRI was done of the cervical spine, which demonstrated some mild degenerative disease and C4-C5 and C5-C6 . . . .
>
> . . . .
>
> **Diagnoses:**
> - Acute lumbosacral strain, resolved
> - Acute cervical strain with preexisting degenerative cervical disk disease, C4-C5, C5-C6."

(Stip. ¶ 19.)

24. When Raposa did not recover from his January 25, 2008, injury, the New Bedford Police Department filed an involuntary application for accidental disability retirement on Raposa's behalf in February 2009. The police department sent Raposa written notice of the application. The medical reason supporting the application was Raposa's injury sustained in the January 2008 motor vehicle accident. (Exhibit 18; Stip. ¶ 20.)

25. The New Bedford Retirement Board accepted the involuntary application for accidental disability retirement and requested the Public Employee Retirement Administration Commission to establish a regional medical panel to examine Raposa. (Stip. ¶ 21.)

26. The Public Employee Retirement Administration Commission appointed a medical panel consisting of three orthopedists: John H. Chaglassian, M.D.; Richard E. Greenberg, M.D.; and James Leffers, M.D. (Stip. ¶ 22.)

27. The first regional medical panel examination was performed by Dr. Chaglassian on June 23, 2009. Dr. Chaglassian answered all the certificate questions in the affirmative—i.e., that Raposa was incapable of performing the essential duties of his job, that the incapacity was likely to be permanent, and that the incapacity was such "as might be the natural and proximate result of the personal injury sustained or hazard undergone on account of which retirement [was] claimed." In the history portion of the doctor's narrative, he acknowledged Raposa's 1998 motor vehicle accident. (Stip. ¶ 23; Exhibit 18.)

28. The second regional medical panel examination was performed by Dr. Leffers on June 25, 2009. Dr. Leffers answered all the certificate questions in the affirmative. (Stip. ¶ 24.)

29. The third regional panel examination was performed by Dr. Greenberg on June 29, 2009. Dr. Greenberg answered all the certificate questions in the affirmative. He acknowledged Raposa's 1998 back injury, from which Raposa had not fully recovered, and concluded that the January 2008 accident exacerbated his condition. Dr. Greenberg concluded that Raposa was incapable of performing the duties of a police officer and was at risk of re-injury if he were to return to work. (Exhibit 18; Stip. ¶ 25.)

30. Raposa did not want to retire, and he urged the Board to allow a further independent medical examination to evaluate whether he

was capable of returning to work. The Board approved his request, with the consent of the city solicitor. (Testimony.)

31. Dr. Giles C. Floyd, an orthopedic surgeon, performed the independent medical evaluation of Raposa on December 7, 2009. Dr. Floyd opined that the January 2008 accident caused a temporary aggravation of Raposa's pre-existing low back condition. He further concluded that Raposa had returned to his pre-injury baseline and was able to "return to full unrestricted work activities." (Exhibit 18.)

32. Raposa returned to work full duty following Dr. Floyd's evaluation, and the Board denied the involuntary retirement application. (Testimony.)

33. On January 3, 2019, Raposa was exiting his cruiser to assist police patrol responding to a disturbance call when he felt a "tweak" in his lower back. Toward the end of his shift, Raposa returned to the police station to review reports. As he was exiting his cruiser, Raposa felt "a significant amount of pain" in his back. He proceeded to complete his report reviewing duties and then again felt significant pain when he got up from his chair. (Testimony; Exhibit 3.)

34. On January 4, 2019, Raposa received medical treatment at Tristan Medical Care Center for his lower back. The treating nurse practitioner, Susan Wareing, determined that Raposa was not fit for full or light duty work. (Exhibit 4; Stip. ¶ 26.)

35. A report from further treatment at Tristan Medical Care Center on January 9, 2019, indicates that the injury was job related. The report further notes that an x-ray of Raposa's lumbo-sacral spine was negative. (Exhibit 4; Stip. ¶ 26.)

36. A further treatment report from Tristan Medical Care Center on January 25, 2019, notes physical findings of "limited ROM, LLE weakness, [and] paresthesias[,]" and a diagnosis of a "lumbar strain with radiculopathy." (Exhibit 4; Stip. ¶ 26.)

37. On January 29, 2019, Raposa was treated by nurse practitioner Marie Aguiar at Southcoast Physicians Group. The resulting report states:

> "Physical Findings:
> Intact motor – severe back pain with
> Radiation
>
> Diagnosis:
> Hx herniated lumbar disc
> Bilateral Low back pain with sciatica"

(Exhibit 4; Stip. ¶ 26.)

38. Raposa was referred for physical therapy. He also had a lumbar spine MRI on February 9, 2019, with comparison to an October 9, 2011, lumbar spine MRI. It showed:

> "IMPRESSION:
> Multilevel degenerative changes of the lumbar spine, as described, without significant spinal canal stenosis. Mild left L3-L4 and L4-L5 neural foraminal stenosis. No visualized cord or nerve root compression."

The MRI report noted that a disc extrusion previously identified on the 2011 MRI at the L5-S1 level had resolved. (Exhibit 14; Stip. ¶ 27.)

39. James Nairus, M.D., an orthopedic surgeon, performed an independent medical examination of Raposa on March 2, 2019, regarding his injury on January 3, 2019. Dr. Nairus diagnosed Raposa with a "[l]umbar spine strain on top of some mild degenerative disk disease and some minimal disk bulges" and "[l]eft hip and leg pain of unknown etiology." He further opined that Raposa was able to perform a light duty, sedentary position. (Exhibit 5.)

40. On March 13, 2019, Raposa returned to work, performing only light duty work assignments. (Exhibit 20.)

41. An EMG performed on March 27, 2019, "revealed evidence of mild axonal dennervation [*sic*] in the left L3 distribution" and "[e]lectrodiagnostic evidence of mild early left L3 radiculopathy." (Exhibit 15; Stip. ¶ 27.)

42. Robert J. Nicoletta, M.D., an orthopedic surgeon, performed an independent medical examination of Raposa on May 10, 2019. He concluded in his report:

> "**DIAGNOSES**
>
> - Chronic lower back pain, pre-existing
> - Multilevel degenerative changes of the lumbar spine; spondylosis L3-4, L4-5 and neural foraminal stenosis, pre-existing

- Degenerative disc disease, pre-existing
- Recent exacerbation of his chronic lower back pain."

(Exhibit 6.)

43. Dr. Nicoletta performed a second independent medical examination of Raposa on September 24, 2019. His diagnoses were unchanged from his prior evaluation of Raposa in May 2019. He further opined that Raposa was permanently disabled from performing his regular job duties, but would be able to perform a light duty, sedentary job. (Exhibit 7; Stip. ¶ 29.)

44. On January 30, 2020, the New Bedford Police Department filed a second involuntary application for accidental disability retirement with the New Bedford Retirement Board. (Stip. ¶ 30.)

45. The Public Employee Retirement Administration Commission appointed a medical panel of three orthopedists to examine Raposa, which included: Henry Drinker, M.D.; John Golberg, M.D.; and William Donahue, M.D. (Stip. ¶ 30.)

46. The first examination of Raposa was performed by Dr. Golberg on August 4, 2020. Dr. Golberg answered all the certificate questions in the affirmative. Under the history portion of his narrative, the doctor referenced an "episode of back pain" that kept Raposa out of work ten years prior, but did not otherwise mention his previous injuries in 1998, 2004, and 2008. Dr. Golberg concluded that Raposa was permanently incapacitated from his work

as a police officer due to his back injury. The doctor made the following diagnoses:

> "Chronic axial back pain; Degenerative disk disease of the lumbar spine; Unresolved radicular symptoms of the left leg and groin of unknown cause . . . ."

(Stip. ¶ 31; Exhibit 8.)

47. The second regional medical panel examination was performed by Dr. Drinker on August 6, 2020. Dr. Drinker answered affirmatively to the questions concerning incapacity and permanence but responded negatively as to causation. In the history portion of his narrative, Dr. Drinker references Raposa's prior back injury from the 2008 motor vehicle accident, as described by Raposa. Dr. Drinker notes that Raposa had an MRI at that time, the results of which were unknown. Medical records available for his review were limited to 2019. He did not have any records of other work injuries or treatment. Dr. Drinker's diagnosis was "[c]hronic lumbar spondylosis with degenerative disc disease and L3-L4 radiculopathy." He further opined that Raposa was "permanently disabled with respect to the performance of duties required of a police officer in any capacity and that this incapacity is the proximate and natural result of the steady progression of degenerative lumbar disc disease rather than any acute event to which it could be attributed." (Stip. ¶ 32; Exhibit 10.)

48. The third regional medical panel examination was performed by Dr. Donahue on August 14, 2020. Dr. Donahue determined that Stephen Raposa was not incapacitated and stated that he was a poor historian. His diagnosis: "Degenerative disc disease L3-L4 with radiculopathy, lumbar spondylosis." (Stip. ¶ 33; Exhibit 12.)

49. After the Board received the regional medical panel responses, it voted to seek clarification from each of the members of the regional medical panel. (Stip. ¶ 34.)

50. The Board provided the medical panel with Raposa's medical records pertaining to his 2008 motor vehicle accident and other prior work-related injuries. The Board noted that these records were inadvertently omitted from the records that were sent to the panelists prior to their examinations of Raposa. The Board requested the panelists to review the additional records and "provide clarification as to whether the new medical reports result in a change of opinion regarding but not limited to, medical capacity, extent of injury, exacerbation and causation." (Exhibits 9, 11, 13.)

51. After reviewing the supplemental medical records, Dr. Golberg's opinions remained the same. Dr. Golberg acknowledged Raposa's pre-existing degenerative disc disease. He noted, however, that Raposa was working without restrictions at the time of the January 2019 accident, which caused "an acute aggravation of his prior conditions without a return to his baseline

capabilities that allowed him to work full duty." (Stip. ¶ 35; Exhibit 9.)

52. Dr. Drinker's response was more equivocal. He indicated that his prior opinions remained unchanged. Dr. Drinker provided some elaboration, however, regarding his negative response to the question on causation:

> "[T]he records further confirm that the applicant was removed from normal police officer detail work prior to [January 3, 2019,] and placed on a different job description which he had maintained up to the point of the recent incident on 1/3/19, thus indicating that in fact he was disabled from the performance of the usual duties of a full-time police officer before the incident of 1/3/19. It was on that basis that I responded to the causation question in the medical panel certificate as, 'no.' In other words, it was my opinion within a reasonable degree of medical possibility that the incident of 1/3/19 could not have been connected causally to the subsequent incapacity due to the fact that the applicant was already incapacitated from the usual duties of a full-time police officer before that date."

(Exhibit 11.)

53. Contrary to Dr. Drinker's report, Raposa had been working full, unrestricted duty at the time of the January 2019 accident. (Testimony.)

54. Dr. Drinker commented further on causation as follows:

> "Even though there was both an established incapacity with respect to the original duties of a full-time full-capacity police officer prior to 1/3/19, [Raposa] was able to function in his reduced capacity for that department before that date and was unable to do so after. Additionally, prior to 1/3/19 the medical records indicate a radiculopathy involving the L5-S1 nerve roots, not the L3-L4 nerve roots. Following the incident of 1/3/19, further extensive evaluation in the form of both EMGs and MRIs of the lumbar spine document radiculopathy now involving the higher level of L3-L4.

> Whether that change represents a spontaneous natural progression of his pre-existing and well-documented pre-existing lumbar degenerative disc disease including the L3-L4 level or whether that change represents an acute change resulting from the incident of 1/3/19 cannot be known. *However, given that the term "possibility" is applied to this question, I would have to respond that it is medically possible that such a change in the level of radiculopathy could have resulted from the twisting events of 1/3/19. If viewed in that light under those assumptions, I would therefore change my initial responses to the panel certificate and say that the injury claimed from 1/3/19 within a reasonable degree of medical possibility could represent a major cause for the subsequent need for treatment and resulting incapacity and that as such, said incapacity could within a reasonable degree of medical possibility be the result of the injury occurring and hazard undergone on that date*" (emphasis added).

(Exhibit 11.)

55. Dr. Donahue responded that his opinions remained the same and confirmed his prior determination that Raposa "was able to perform the essential duties of a police sergeant" and "would not be at risk of re-injury." (Exhibit 13.)

56. On September 27, 2021, the Board denied the accidental disability retirement application as a matter of law, citing a "[n]egative medical panel majority on causation[.]" (Exhibit 1.)

57. On October 1, 2021, Raposa timely appealed the Board's decision. (Exhibit 2.)

DISCUSSION

To be eligible for accidental disability retirement, an applicant must first be examined by a regional medical panel. G. L. c. 32, §§ 6(3)(a) & 7(1). The medical panel must consider

whether the applicant is incapacitated, whether such incapacity is likely to be permanent, and whether "the disability is such as might be the natural and proximate result of the accident or hazard undergone on account of which retirement is claimed." G. L. c. 32, § 6(3)(a). A "'condition precedent' to accidental disability retirement" is that the medical panel certify "affirmative answers to all three questions." *Fairbairn* v. *Contributory Retirement Appeal Bd.*, 54 Mass. App. Ct. 353, 354 (2002), quoting *Hunt* v. *Contributory Retirement Appeal Bd.*, 332 Mass. 625, 627 (1955).

Only one of the three panel physicians who examined Raposa, Dr. Golberg, responded affirmatively to all three questions. As for the other two physicians, Dr. Donahue responded negatively on the question of incapacity, and Dr. Drinker responded negatively as to causation. A negative certification by a majority of the panel is fatal to Raposa's application, unless the panel applied an "erroneous medical standard,"[2] "lacked

[2] *Malden Retirement Bd.* v. *Contributory Retirement Appeal Bd.*, 1 Mass. App. Ct. 420, 424 (1973).

pertinent facts,"[3] failed to follow proper procedure, or issued a "plainly wrong medical certificate."[4]

1. Medical Panel Certificate and Request for Clarification

Under the Public Employee Retirement Administration Commission's regulations, the Board was required to send the medical panel, prior to their examination of Raposa, all medical records and any other pertinent information that the Board had obtained during its investigation. 840 Code Mass. Regs. §§ 10.08(6) & 10.09(1). The Board was also required to provide the panelists "copies of all documents in the member's file that may be of assistance to the panel" and to "advise the panel of the availability and location of any other medical data or reports known to the [Board]." 840 Code Mass. Regs. § 10.08(6). The Board did not satisfy its obligation to furnish such information and documentation to the panel because it did not provide the panel Raposa's prior medical records in advance of their examination and it did not advise the panel that such medical records were available.

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[3] *Sean Stokes-DeSalvo* v. *State Bd. of Retirement*, No. CR-12-401, 2020 WL 14009543, at *7 (Contrib. Ret. App. Bd. Jan. 8, 2020).

[4] *Kelley* v. *Contributory Retirement Appeal Bd.*, 341 Mass. 611, 617 (1961). See *Foresta* v. *Contributory Retirement Appeal Bd.*, 453 Mass. 669, 684 (2009); *Hollup* v. *Worcester Retirement Bd.*, 103 Mass. App. Ct. 157, 159 (2023); *Mercadante* v. *State Bd. of Retirement*, No. CR-17-887 (Contrib. Ret. App. Bd. Dec. 17, 2024).

The Board acknowledged that it had inadvertently omitted Raposa's medical records concerning his prior work-related accidents from the records that it made available for the panel's review before their examination of Raposa. There is no question that Raposa's prior medical records concerning his back injuries/condition contain "pertinent information" that may have assisted the panel in their evaluation. At least two of the panelists referred to the lack of available medical records in their original reports.[5] The panelists thus lacked pertinent details from Raposa's medical history when they issued their responses to the medical certificate questions. See, e.g., *Rowley* v. *Everett Retirement Bd.*, No. CR-19-579 (Div. of Admin. L. App. May 6, 2022) (concluding medical panel lacked pertinent facts because the retirement board possessed but did not provide the panel a certain medical report).

The Board subsequently provided the omitted records to the panel, however, and sought clarification as to whether the additional medical records impacted the panel's opinions. While untimely, none of the panelists indicated a further examination

[5] Dr. Drinker referenced the MRI examination following Raposa's 2008 motor vehicle accident, noting that "the specific results" of that MRI were "unknown" to him. (Exhibit 10.) Dr. Donahue also made a passing reference to the lack of information concerning prior diagnostic testing, commenting further that "[r]elative to [the 2019] injury, there, fortunately, are records available . . . ." (Exhibit 12.)

of Raposa was necessary considering the additional medical history available. I accept the Board's supplemental submission as sufficient, therefore, to allow the panel to address the medical certificate questions in responding to the request for clarification.

2. Medical Panel's Revised Opinions Lack Clear Majority

The panel's supplemental reports raise a significant question as to causation. Although two of the panelists (Dr. Golberg and Dr. Donahue) confirmed their prior opinions without reservation, Dr. Drinker's opinion on causation is unclear. His response reveals that his negative opinion as to causation was based largely on his mistaken belief that Raposa was disabled and working only in a limited capacity at the time of the January 2019 accident. To the contrary, Raposa was working full duty at the time of the accident, and he later returned to work in a limited capacity about two months thereafter.[6] Dr. Drinker further opined that, based on the "reduced capacity" position he

[6] Dr. Golberg, who responded affirmatively as to causation, noted that Raposa had been working full time and in normal capacity at the time of accident and then returned to work only in a limited capacity the following March. Dr. Drinker does not cite a source for his contrary understanding that Raposa was working limited duty at the time of the accident, which is inconsistent both with Raposa's testimony and with information provided by the New Bedford Police Department in its involuntary application for accidental disability retirement.

believed Raposa had been working, his incapacity to work such a position may have resulted from the January 2019 work accident.

Dr. Drinker's opinion as to causation is therefore ambiguous and based on an incorrect understanding of Raposa's position and job duties at the time of the accident. See, e.g., *Retirement Bd. of Revere* v. *Contributory Retirement Appeal Bd.*, 36 Mass. App. Ct. 99, 108 (1994) (concluding that reliance on panel's certification was "fatally inapt" due to "panel report's ambiguity regarding causation"); *Noone* v. *Contributory Retirement Appeal Bd.*, 34 Mass. App. Ct. 756, 761-762 (panel opinion was ambiguous and did not address medical possibility of causal relation). Dr. Drinker's opinions are further flawed by his mistaken belief that Raposa was incapacitated from his usual police duties at the time of the accident. The factual basis for his opinion on causation is simply incorrect. Dr. Drinker's medical certificate is therefore invalid, leaving the remaining panel split and without a majority opinion. See *Ferraro* v. *Contributory Retirement Appeal Bd.*, 57 Mass. App. Ct. 728, 731 (2003) (panel lacks majority opinion if remaining two panelists are split).

CONCLUSION

For the foregoing reasons, the Board's denial of the involuntary application for accidental disability retirement is vacated, and this matter is remanded to the Board for further

proceedings including evaluation by a new medical panel, in accordance with *Ferraro*, 57 Mass. App. Ct. at 731-732.

Division of Administrative Law Appeals

/s/ John G. Wheatley

John G. Wheatley
Administrative Magistrate