COMMONWEALTH OF MASSACHUSETTS

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

Reid R.,[1]
Petitioner,

v.

Pittsfield Retirement Board,
Respondent.

Nos. CR-21-0302, CR-21-0379

Dated: August 4, 2023

Appearance for Petitioner:
Melissa Lanouette, Esq.
Boston, MA 02110

Appearance for Respondent:
Joseph Kenyon, Esq.
Michael Sacco, Esq.
Westfield, MA 01085

Administrative Magistrate:
Yakov Malkiel

SUMMARY OF DECISION

The petitioner, a firefighter, applied to retire for accidental disability based on diagnoses of PTSD and hypertension. The respondent retirement board did not convene a psychiatric medical panel. It did convene a cardiological panel. Two cardiological panelists disagreed over whether the petitioner was disabled. When a third panelist certified that the petitioner was disabled with a "coronary artery" problem, the board deemed that certificate "negative" based on its divergence from the original application's focus on "hypertension." When the petitioner submitted another application asserting a "heart disease" diagnosis, the board denied it based on "res judicata." The board's maneuvering elevated form over substance. The matter is remanded for a full, fair, substantive consideration of the petitioner's complex of conditions.

DECISION

The petitioner appeals from a decision of the Pittsfield Retirement Board denying his applications to retire for accidental disability. An evidentiary hearing took place on June 1, 2023. The petitioner was the only witness. During and after the hearing, I admitted into

[1] A pseudonym. *See* G.L. c. 4, § 7, 26th para., (c).

evidence exhibits marked 1-35 (impounding nos. 26 and 27) and stipulations marked 1-39. The record closed upon the submission of hearing briefs.

Findings of Fact

I find the following facts.

1. The petitioner began working as a firefighter in 1998 and as an EMT soon thereafter. His job required him to respond to various types of emergencies, ranging from car accidents to asphyxiating children. (Tr. 22-25; Stipulation 1.)

2. Among the disturbing scenes that the petitioner witnessed were the following: At a motorcycle accident in 2003 or 2004, the motorcyclist had sustained facial trauma so severe that first responders could not locate a jaw to fit a neck brace around. An emergency call in 2005 involved a seven-year-old child who had been struck by a car. In 2008, at another motorcycle incident, the patient was dead by the time of the petitioner's arrival, with a severe head injury and exposed brain matter. (Tr. 25-26, 71; Exhibits 4-7.)

3. In 2016, the petitioner was called to treat an eleven-year-old girl who was foaming at the mouth. In the moment, the petitioner failed to realize that the girl was suffering from a brain aneurism. After that incident, the petitioner allowed his EMT license to lapse, feeling that he was no longer discharging his duties properly. (Tr. 26-27; Exhibits 4, 8.)

4. After at least some of these incidents, the petitioner's mental health deteriorated. His alcohol consumption increased. He began to take anxiety medication. He suffered recurrent panic attacks while working and even while driving. During one or more panic attacks, the petitioner and/or his colleagues measured his blood pressure; the readings were unsafely high. At some point, the petitioner also began to suffer from suicidal thoughts. (Tr. 28-32, 35-37, 50, 56, 67-68; Stipulation 12.)

5. In December 2017, the petitioner attended a suicide-awareness training session. The instructor described various characteristics of individuals who are at high risk for suicide. The petitioner saw those characteristics in himself. He experienced symptoms of a panic attack. He informed his supervisor that he was contemplating self-harm. He was transported to the emergency room and hospitalized for five days in a psychiatric unit. (Tr. 28, 32-35, 51-52; Exhibits 14, 26.)

6. On April 11, 2019, while at work, the petitioner felt tightness in his chest, shortness of breath, hot flashes, tremors, and an ache running down his left arm. He asked for the evening off and went home. The following day, he spoke to his physician, who strongly advised him against remaining in his line of work. (Tr. 37-41; Exhibit 14; Stipulation 5.)

7. During August 2019, the acting fire chief filed an application to retire the petitioner involuntarily for accidental disability. The application asserted a diagnosis of "acute PTSD," referencing the petitioner's reaction to the December 2017 training session. (Exhibit 3; Stipulation 7.)

8. On August 30, 2019, the petitioner filed two voluntary applications to retire for accidental disability. The first (PTSD application) cited diagnoses of PTSD, panic disorder, generalized anxiety disorder, and major depressive disorder.[2] The other (hypertension application) described the petitioner's diagnosis as severe paroxysmal hypertension. (Exhibits 4, 12.)

---

[2] The parties stipulated at the hearing that they viewed the assertions in the fire chief's application for involuntary retirement as incorporated into the petitioner's PTSD application. (Tr. 9-12.) In its brief, the board questions that stipulation's logic as a matter of law. But there is no legal impediment to a board (and a member) construing a member's application as incorporating other documents available to the board.

9. The board did not refer the PTSD application to a medical panel. It convened a panel of cardiologists to consider the hypertension application. The panelists examined the petitioner separately during February-March 2020. (Exhibits 14, 19, 24.)

10. Dr. Michael Johnstone declined to certify that the petitioner is incapacitated. He wrote that the petitioner is "physically capable of performing his essential duties from a cardiovascular perspective." (Exhibit 19.)

11. Dr. Madhu Thakur disagreed. After ordering additional testing, he answered "yes" to the statutory questions of incapacity, permanence, and causation. (Exhibit 24.)

12. Dr. Reda Ishak also answered "yes" to the three statutory questions. The board posed a series of clarification requests to Dr. Ishak; in response, he maintained steadfastly that the petitioner is incapacitated, but attributed the incapacity to a "coronary artery" problem, namely "myocardial ischemia and previous infarction." (Exhibit 24; Stipulations 19, 24-32.)

13. On July 29, 2021, the petitioner filed a third application for accidental disability retirement (heart-disease application), attributing his disability to "heart disease, hypertension, and hyperlipidemia." On the following day, the board wrote that it had "voted to deny [the petitioner] an accidental disability retirement based on that the Medical Panel majority opined that [the petitioner is] capable of performing [his] position's essential duties."[3] Thereafter, the board specifically denied the heart-disease application, citing "res judicata" and other reasons. The petitioner filed timely appeals from the board's two decisions. (Exhibits 32, 34.)

[3] This decision certainly addressed the hypertension application. As discussed *infra*, the parties disagree about whether it also covered the PTSD application.

Analysis

A public employee seeking to retire for accidental disability must prove that he is permanently incapacitated as a result of a workplace injury or hazard. G.L. c. 32, § 7(1). The pertinent medical problem is required to have become disabling no later than the member's departure from service. *See Vest v. Contributory Ret. Appeals Bd.*, 41 Mass. App. Ct. 191 (1996). Subject to certain exceptions, the pertinent injury or hazard is required to have occurred during the two years immediately preceding the date of the application. G.L. c. 32, § 7(1), (3).

The petitioner's three applications cited diagnoses of PTSD, hypertension, and heart disease. As the petitioner observes, these conditions tend to produce interrelated medical problems. This dynamic is apparent not only from the evidence in this case but also from various prior decisions. *See Cournyn v. Middlesex County Ret. Sys.*, No. CR-11-670 (DALA Mar. 6, 2015); *Mulvaney v. Worcester Ret. Bd.*, No. CR-99-456 (DALA May 5, 2000); *Boucher v. Lawrence Ret. Bd.*, No. CR-93-921 (DALA Aug. 6, 1996). In essence, hypertension is an important risk factor for heart disease; and PTSD-related symptoms may cause spikes in blood pressure and other cardiovascular symptoms.

The parties disagree about whether the board has decided the petitioner's PTSD application: the petitioner maintains that the application "remains outstanding with the board," whereas the board believes that it has "denied all three voluntary applications." (Tr. 7-8.) As a procedural matter, that dispute is not properly presented here. The petitioner is not pursuing an appeal rooted in the PTSD application.[4] That is his prerogative. If the petitioner were to pursue

[4] While the petitioner remarks in his closing brief that the PTSD application "should have been brought to a medical panel," he maintains that he "was not [yet] given an opportunity to appeal." (Tr. 8.) As a general matter, a board's failure to act on an application does not leave

such an appeal at some future date, the board might offer up procedural arguments revolving around the decisions at issue in the current proceedings. Only at that juncture would such arguments be ripe for resolution. Nevertheless, preliminary observations about the status and merits of the PTSD application appear in the margin.[5]

With respect to the petitioner's hypertension application, the board conceptualizes the case as one involving a "negative panel," i.e., a panel that has declined to certify that the applicant satisfies the statutory requirements. A negative panel's certificate is conclusive unless the panel applied an erroneous standard or failed to review pertinent facts. *See Foresta v. Contributory Ret. Appeal Bd.*, 453 Mass. 669, 684 (2009); *Retirement Bd. of Revere v. Contributory Ret. Appeal Bd.*, 36 Mass App. Ct. 99, 106 (1994).

Both Dr. Thakur and Dr. Ishak concluded that the petitioner *does* satisfy the statute's three conditions. The board's reason for viewing Dr. Ishak's certificate as negative is that he

---

the member without recourse: he may file a written request for a decision, and take an appeal thirty days later. G.L. c. 32, § 16(4); *Mackin v. MTRS*, No. CR-21-265 (DALA Oct. 7, 2022).

[5] The board's view is apparently that its decision dated July 30, 2021 resolved both the hypertension application and the PTSD application. That may not be the most natural reading of the decision, given its reliance on the cardiology panelists' certificates. *Cf. In the Matter of Retirement Plus*, No. CR-21-369, at *4 (DALA Oct. 22, 2021) (discussing a member's appellate rights in the wake of a "misleading" board decision).

On the merits, it is not obvious why the board refrained from convening a medical panel to consider the PTSD application. That application advanced both "injury" and "hazard" theories. *See Blanchette v. Contributory Ret. Appeal Bd.*, 20 Mass. App. Ct. 479, 485, 487 (1985). Both theories certainly face hurdles. To prevail on the injury theory, the petitioner may need to prove a causal connection between the December 2017 training session—pleaded in the fire chief's application—and his current disability. *Cf. Benoit v. MTRS*, No. CR-15-347, at *12-13 (DALA Feb. 7, 2018). The hazard theory would likely require the petitioner to establish that the traumas of his working life were "constant" or "continual." *See Blanchette*, 20 Mass. App. Ct. at 487 n.7. But to reach a medical panel, the petitioner was only required to make "prima facie" showings as to these and other requirements. *See Hickey v. Medford Ret. Bd.*, No. CR-08-380, at *4 (CRAB Feb. 16, 2012); *St. Martin v. State Bd. of Ret.*, No. CR-21-258 (DALA Feb. 3, 2023).

attributed the petitioner's incapacity to "myocardial ischemia and previous infarction" rather than "hypertension." The merits of that approach are questionable. The medical panel's role in the statutory scheme focuses not on identifying a precise diagnosis but on assessing the applicant's capacity to work. *See Kelsh v. Plymouth County Ret. Sys.*, No. CR-07-159, 2008 WL 7540673 (DALA June 12, 2008); *Hudson v. Boston Ret. Bd.*, No. CR-19-582, 2022 WL 16921456, at *6 (DALA May 6, 2022). A panelist's certificate reflecting sound analysis and an adequate factual basis generally is valid even if the diagnosis it describes differs from the diagnoses of the other panelists or the member's treating physician. *See Ferguson v. PERAC*, No. CR-03-69 (DALA Sep. 23, 2003); *Waitkun v. State Bd. of Ret.*, No. CR-10-127 (DALA May 10, 2013).

Further, hypertension and coronary artery disease are interrelated conditions. The Heart Law, G.L. c. 32, § 94, so recognizes. Both conditions were well within the cardiology panelists' field of expertise. In concluding that Dr. Thakur's diagnosis exceeded the bounds of the hypertension application, the board subjected the application to the sort of rigid pleading rules that even the courts in formal, adversarial proceedings abandoned long ago. *See generally* Mass. R. Civ. P. 8(a), (e)(1), (f); *Windross v. Vill. Auto. Grp., Inc.*, 71 Mass. App. Ct. 861, 865-67 (2008); Joseph R. Nolan & Bruce R. Henry, *Civil Practice* § 9.2 (3d ed. 2004).

The board made matters worse through its treatment of the petitioner's heart-disease application. In substance, that submission sought to amend the petitioner's case for retirement so as to cover a diagnosis not stated explicitly in his original papers. Presumably, a board possesses a measure of discretion to allow or deny amendments to members' applications. *See generally Collins v. Boston Ret. Bd.*, No. CR-10-58 (CRAB Apr. 13, 2015); *Crowley v. State Bd. of Ret.*, No. CR-96-844 (DALA June 26, 1997).

But here the board's refusal to allow an amendment was entirely unreasonable. *See Kooken v. Amesbury Ret. Bd.*, No. CR-17-112, at *17 (DALA June 5, 2020). *See generally L.L. v. Commonwealth*, 470 Mass. 169 n.27 (2014) (defining abuse of discretion); *Frawley v. Police Comm'r of Cambridge*, 473 Mass. 716 (2016) (same). A board's adjudication of a retirement application is not an adversarial proceeding. *See Kooken*, supra, at *17. The petitioner's procedural path was not designed to generate delay, impose burdens, or achieve an unfair tactical advantage. His requested amendment would have accomplished the salutary goal of conforming the pleadings to the evidence. *Cf.* Mass. R. Civ. P. 15(b); *Goulet v. Whitin Mach. Works, Inc.*, 399 Mass. 547, 554 (1987). It would have placed before the board an aspect of the petitioner's medical situation that was both inherently related to the problems described in the original application and identified as pivotal by a neutral, expert panelist. Presumably, the amendment would have required additional attention to the petitioner's case from Dr. Johnstone and Dr. Thakur. But that extra expenditure of time and effort would have been no more than commensurate with the series of follow-up requests that the board had posed to Dr. Ishak.

The board contends that the petitioner's heart-disease application was barred by the doctrine of res judicata, also called "claim preclusion."[6] That doctrine "makes a valid, final judgment conclusive on the parties and their privies, and prevents relitigation of all matters that were or could have been adjudicated in the action." *Kobrin v. Board of Registration in Med.*, 444 Mass. 837, 843 (2005).

---

[6] The board's decision letter applied the res judicata argument in a more targeted fashion, as limited to the hypertension element of the heart-disease application. The decision letter suggested also that the petitioner's heart disease was not caused by his employment and matured later than his departure from work; but those lines of reasoning were premature at the pre-panel stage of the proceedings, where the petitioner was only required to make a prima facie case. *See Hickey*, *supra*; *St. Martin*, *supra*.

When the petitioner filed his heart-disease application, the board had not yet issued any decision. Accordingly, at that juncture, preclusion certainly did not bar the board from considering the new application. Instead of doing so, the board generated a preclusion argument by issuing a negative decision on the hypertension application. The reasons for that maneuver are unclear. But in any event, the preclusion argument is erroneous. A final agency decision is preclusive only if it arises from robust proceedings, at which the affected party received an opportunity to present evidence and legal arguments. *See Tringali v. Medford Ret. Bd.*, No. CR-12-415 (DALA July 12, 2013); *White v. Somerville Ret. Bd.*, No. CR-17-863 (DALA July 17, 2020). *See generally* Restatement (Second) of Judgments § 83(2) (1982). The record does not suggest that such proceedings occurred here. Further, even if the board's decision here *were* preclusive, it is not clear that the precluded "claim" would have encompassed successive applications based on new diagnoses. *See Tringali*, *supra*; *Galello v. Newton Ret. Bd.*, No. CR-03-750 (DALA July 6, 2004); *Salvo v. Salem Ret. Bd.*, No. CR-92-867 (DALA Nov. 15, 1993). *See generally Holewinski v. Commissioner of Soc. Sec. Admin.*, No. 22-cv-00199, 2022 WL 17717416, at *12 (N.D. Ohio Sept. 20, 2022).

The pertinent events may be restated as follows. When Dr. Ishak attributed the petitioner's incapacity to a form of heart disease, the board deemed that condition to be irreparably different from the hypertension described in the petitioner's application. Thereafter, when the petitioner sought to present a heart-disease theory to the board, the board deemed that theory fatally similar to—and therefore precluded by—the hypertension claim that the board had decided to reject. This type of procedural roadblocking is inconsistent with the board's duty to ensure that members receive "all benefits to which [they are] entitled." 840 C.M.R. § 10.02. *See*

Chaves v. Taunton Ret. Bd., No. CR-18-0204, at *68 (DALA Dec. 3, 2021); *Rowley v. Everett Ret. Bd.*, No. CR-19-579, 2022 WL 16921467, at *5 (DALA May 6, 2022).

The panel reports generated by the proceedings below do not prove by a preponderance of the evidence that the petitioner satisfies the governing statutory requirements. It appears that the petitioner so concedes. It is difficult to assess the weight of Dr. Ishak's opinion, given that the other panelists restricted their analyses to hypertension. And all three panel reports are uninformative as to whether the petitioner's incapacity matured before his departure from work. *See Vest*, *supra*. *Cf. Carnevale v. Barnstable Cty. Ret. Bd.*, No. CR-20-105, at *17 (DALA Sept. 16, 2022). The panelists did not yet have the benefit of PERAC's updated standard form, which specifically instructs panelists to consider this issue. *See Kurt K. v. Hampden Cty. Reg'l Ret. Bd.*, No. CR-21-631, 2023 WL 4846321, at *6 (DALA July 21, 2023).

The petitioner suffers from a complex of medical problems that implicates an array of legal issues. The soundest path toward properly adjudicating his case is a remand for further proceedings free of excessive procedural maneuvering. In essence, one or more panels should be permitted to consider the gamut of the petitioner's medical issues in light of the *Vest* rule and any other applicable legal concerns. The order that follows provides additional operative instructions.[7]

[7] In addition to them, the board is urged to reexamine whether the PTSD application remains pending, to consider further whether that application should proceed to a medical panel, and to inform the petitioner in writing of its determinations as to these matters. *See supra* notes 3, 4.

Order

The board's denials of the petitioner's hypertension application and heart-disease application are VACATED. The matter is REMANDED to the board for additional proceedings consistent with this decision and the following provisions:

1. The petitioner's hypertension application shall be deemed amended to include the diagnoses asserted in his heart-disease application.

2. PERAC and the board shall consider replacing the original members of the medical panel. If they do so, then they shall consider including both one or more psychiatrists and one or more cardiologists on the panel.

3. However the panel is composed, its members shall be instructed to address: (a) the full series of medical conditions described in *at least* the hypertension application and the heart-disease application; (b) the possibility that panic attacks or other symptoms of PTSD might cause the petitioner to experience dangerous blood-pressure spikes; and (c) if the petitioner is incapacitated, the likely start date of his incapacity.

SO ORDERED.

Division of Administrative Law Appeals

/s/ Yakov Malkiel
Yakov Malkiel
Administrative Magistrate