COMMONWEALTH OF MASSACHUSETTS

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

Robin Rogers,
Petitioner,

v.

Worcester Retirement Board,
Respondent.

No. CR-22-164

Dated: January 26, 2024

Appearance for Petitioner:
Vincent A. Murray, Jr., Esq.

Appearance for Respondent:
Christopher J. Collins, Esq.

Administrative Magistrate:
Yakov Malkiel

SUMMARY OF DECISION

The petitioner suffered from a serious preexisting spinal condition. Her back pain became disabling soon after a workplace accident. But she did not prove that the proximate cause of her disability was that accident, as opposed to the natural progression of her preexisting condition. The petitioner therefore is not entitled to retire for accidental disability.

DECISION

Petitioner Robin Rogers appeals from a decision of the Worcester Retirement Board denying her application to retire for accidental disability. An evidentiary hearing took place on November 29, 2023. The petitioner was the only witness. During and after the hearing, I admitted into evidence exhibits marked 1-46 and stipulations marked 1-48.

Findings of Fact

I find the following facts.

1. In 1997, Ms. Rogers was involved in a serious car accident. She was approximately twenty-eight years old at the time. She has suffered from chronic back pain ever

since. In 2008, she underwent her first spinal surgery, which combined a laminectomy and spinal fusion. (Exhibit 41; Stipulations 1-3; Tr. 25-26.)

2. In 2013, Ms. Rogers began working as an instructional assistant in the Worcester Public Schools. She was then forty-four. Her job was to help special education students to learn and function at school. In certain situations, it was Ms. Rogers's responsibility to restrain students assigned to her, which she was certified to do. Ms. Rogers also worked concurrently for an education-related business. (Exhibits 4, 5; Stipulations 1, 4; Tr. 23-25.)

3. Ms. Rogers continued to seek treatment for her ongoing back issues. In December 2015, she underwent a second spinal surgery, another laminectomy. It went well. Ms. Rogers returned to work in early January 2016. Her surgeon did not see a need for additional follow up "unless problems develop." He advised Ms. Rogers to avoid physical interactions at work, especially "restraints." (Exhibit 35; Stipulations 5-10; Tr. 26-28.)

4. On February 4, 2016, a young student assigned to Ms. Rogers became violent. He had a history of dangerous assaults. No other staff members in Ms. Rogers's vicinity were able and willing to restrain her student. Alarmed for another student's safety, Ms. Rogers jumped over a desk to reach her student.[1] She restrained him for a period of several minutes until help arrived. During that period, the student twisted and thrashed. Ms. Rogers experienced severe back pain throughout the episode. (Exhibits 7, 35; Stipulations 11, 12; Tr. 28-35.)

5. Ms. Rogers's chronic pain returned. She attempted to return to work but found the pain intolerable. An MRI in April 2016 showed two synovial cysts on her spine. In August

[1] Notwithstanding the advice that Ms. Rogers received from her surgeon, I do not find that Ms. Rogers's employer modified her job duties such that performing a restraint to protect a student's safety exceeded the scope of those duties. Contrast *Glynn v. Boston Ret. Bd.*, No. CR-14-295 (CRAB Apr. 5, 2022).

2016, Ms. Rogers underwent a third spinal surgery, which included another fusion. (Exhibits 5, 34, 35, 39; Stipulations 14, 15; Tr. 36-38, 46.)

6. In June 2017, Ms. Rogers applied to retire for accidental disability. PERAC convened a medical panel consisting of Dr. Arthur Safran, Dr. Hwa Hsin Hsieh, and Dr. Nabil Basta. (Exhibits 1-4, 10.)

7. The original medical panel conducted a joint examination and issued a joint report. Using checkmarks on a preprinted PERAC form, the panel indicated that Ms. Rogers was incapacitated, that the incapacity was permanent, and that the incapacity was such as might be the natural and proximate result of Ms. Rogers's workplace injury. But in their narrative report, the panelists described the disability as permanent only "absent further treatment," explaining that "further intervention in terms of a work hardening program, and further follow-up by the pain center . . . would seem appropriate." (Exhibit 10.)

8. In response to two requests for clarification, the panel wrote that further treatment "more likely that not" would permit Ms. Rogers to return to her job. With respect to causation, the panel stated that Ms. Rogers's synovial cysts "likely were aggravated by the injury," adding: "it is more likely than not that Ms. Rogers's permanent disability was proximately caused by the [February 2016] injury rather due to the natural progression of her underlying preexisting condition." (Exhibits 11-14.)

9. Ms. Rogers's retirement application remained pending while she underwent a course of treatment designed to respond to the panel's recommendations. The treatment was overseen by Dr. Pablo Diaz Collado. In March-April 2021, Dr. Diaz Collado discharged Ms. Rogers, writing, "goal not achieved." He opined that further treatment, whether in a work

hardening program or at a pain clinic, would not enable Ms. Rogers to return to work. (Exhibits 15, 33; Stipulations 25, 26; Tr. 42-43.)

10. PERAC convened a second medical panel.[2] This time the panelists conducted separate examinations. All three panelists agreed that Ms. Rogers is permanently incapacitated. They offered different analyses with respect to the causal relationship between her incapacity and her workplace injury. (Exhibits 16-19, 21, 23, 27.)

11. Dr. Thomas Sciascia answered "yes" to whether Ms. Rogers's disability is such as might be the result of her workplace accident. But he offered a nuanced analysis, writing: "It is more likely than not that the disability was caused by the condition of the prior lumbar difficulty that led to surgery in the weeks prior to the February 2016 accident. I base this opinion on the clinical nature of low back pain, particularly following a lumbar spine surgery procedure, where a common clinical outcome is for the natural history to be one of progressive decline in mobility and pain. Therefore, the member's current problem could be considered a natural progression of her preexisting condition. However, given the fact that the member did return to work and was functioning in her typical job duties at the time of the work-related accident, there is a real possibility that the member's clinical condition is an aggravation of the preexisting condition." Dr. Sciascia stood by his analysis in response to two requests for clarification.[3] (Exhibits 17, 20, 21, 26, 27.)

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[2] The original panelists had become unavailable by then. (Exhibit 46.)

[3] In his first clarification letter, Dr. Sciascia included the language: "With the understanding that I consider the use of the phrase 'more likely than not' to be greater than 50% probability, I continue to find the member is disabled due to an aggravation of the underlying condition . . . ." In the context of the rest of his letter, it is reasonably clear that Dr. Sciascia continued to view the "natural progression" of Ms. Rogers's preexisting condition as the "more likely than not" cause of her disability, and her workplace accident as a "possible" cause only. (Exhibit 21.)

12. Dr. Marc Linson also answered "yes" on causation. His analysis was equally measured but ultimately more favorable to Ms. Rogers: "The incident in February 2016 represents a major cause of her ongoing back pain. In the absence of that injury, it is speculative as to whether she would have as much difficulty at the present time . . . . There is also a natural progression of her lumbar degenerative changes. There is an extremely high incidence of individuals who will have adjacent level troubles to a prior fusion that will progress, with or without interceding injuries. Nonetheless, there is a documented February 2016 injury, which in my opinion represents a major causal factor." (Exhibit 18.)

13. Dr. Ryan Friedberg answered "no" on causation. He wrote: "I do not feel . . . that the incapacity is the natural and proximate result of the personal injury . . . . It is my opinion that Ms. Rogers had a significant preexisting condition . . . . I feel the major and predominant reason for inability to do all of the functions of her job would be . . . the preexisting condition." Initially, Dr. Friedberg's understanding of the February 2016 incident was that Ms. Rogers "basically was holding the child for a pronged period of time until help could arrive." In a clarification request, the board emphasized that Ms. Rogers also reportedly had to jump over a desk. Dr. Friedberg responded that his "opinion does not change," and that Ms. Rogers's "continued disability is due to her serious preexisting conditions and not . . . any possible injury that may have occurred from the restraint." (Exhibits 19, 22, 23.)[4]

[4] Ms. Rogers contends that Dr. Friedberg arrived late and conducted an uninterested exam. Her attorney was present, and they did not raise any contemporaneous concerns with the board or with PERAC. (Tr. 44, 57.) I make no findings about the exam's duration or nature. I also see no factual or legal basis to disregard Dr. Friedberg's opinion as a "nullity" rooted in "bias."

14. Ms. Rogers was examined by other physicians in connection with workers' compensation proceedings. In June 2016, evaluating Ms. Rogers's need for her post-accident surgery, Dr. Kenneth Polivy wrote: "[W]hether the incident of [February 2016] occurred or not, Ms. Rogers would have gone on to need the proposed surgery. . . . [H]er need for treatment is a continuation of her preexisting degenerative facet arthropathy and degenerative disc disease." Dr. John R. Corsetti later disagreed, writing: "[T]he injury of [February 2016], combined with her preexisting disease, did cause her ongoing pain syndrome. . . . Had the injury not occurred, she likely would have continued to enjoy excellent recovery after her . . . surgery without any . . . difficulties for the foreseeable future." (Exhibits 9, 31, 43.)

15. In April 2022, the board denied Ms. Rogers's retirement application, offering the explanation: "Negative Medical Panels from Drs. Sciascia and Friedberg."[5] Ms. Rogers timely appealed. (Exhibits 28, 29.)

Analysis

A public employee seeking to retire for accidental disability must prove that she "is unable to perform the essential duties of [her] job," that the incapacity "is likely to be permanent," and that the incapacity arose "by reason of a personal injury sustained . . . as a result of, and while in the performance of, [her] duties." G.L. c. 32, § 7(1). A supportive certificate of a regional medical panel is a condition precedent to a local board's allowance of an accidental disability retirement application. *See Malden Ret. Bd. v. Contributory Ret. Appeal Bd.*, 1 Mass. App. Ct. 420, 423-24 (1973).

[5] As discussed *infra*, this explanation was imprecise.

Ms. Rogers contends that the board here should have allowed her application, without convening a second panel, upon receiving Dr. Diaz Collado's update that Ms. Rogers's supplemental course of treatment had not succeeded. The board acted correctly in this regard. Although the original panel had checked the checkboxes for incapacity, permanence, and causation, it is the substance of the certificate that controls. *See Rowley v. Everett Ret. Bd.*, No. CR-19-579, 2022 WL 16921467, at *5 (DALA May 6, 2022). The first panel was of the opinion that further treatment would likely eliminate Ms. Rogers's incapacity. The necessary implication of that opinion was that the incapacity was not permanent. *See Retirement Bd. of Revere v. Contributory Ret. Appeal Bd.* (*DiDonato*), 36 Mass. App. Ct. 99, 107-12 (1994). Accordingly, when the board received Dr. Diaz Collado's report, it did not have before it a positive panel certificate, and it lacked the authority to allow Ms. Rogers's application. *See Malden*, 1 Mass. App. Ct. at 423-24.

The second panel did issue a majority positive certificate. The board now so concedes. It is also beyond serious dispute that Ms. Rogers has successfully proven incapacity and permanence.[6] The pivotal disagreement concentrates on causation, which Ms. Rogers bears the burden of proving. *See Campbell v. Contributory Ret. Appeal Bd.*, 17 Mass. App. Ct. 1018, 1018 (1984).

The causal connection between the member's workplace injury and her permanent incapacity is required to be "direct and proximate." *Campbell*, 17 Mass. App. Ct. at 1018. This

[6] At the hearing, the board suggested that permanence may remain a live issue. But the only evidence pointing against Ms. Rogers on this point is the outdated opinion of the original panel, which did not have the opportunity to revisit Ms. Rogers's case in light of Dr. Diaz Collado's supplemental course of treatment. Also, no medical opinion or other significant record evidence suggests that Ms. Rogers could have prevented her disability from becoming permanent by better obeying her doctors' recommendations. *See DiDonato*, 36 Mass. App. Ct. at 107-12.

requirement is satisfied if the workplace injury aggravated a preexisting condition to the point of disability. *Baruffaldi v. Contributory Ret. Appeal Bd.*, 337 Mass. 495, 501 (1958). It is not satisfied if the incapacity resulted from "the natural, cumulative, deteriorative effects of [a] preexisting diseased condition." *Lisbon v. Contributory Ret. Appeal Bd.*, 41 Mass. App. Ct. 246, 255 (1996). The question in preexisting-condition cases is therefore hypothetical, i.e., whether the condition would have progressed naturally into the member's current symptoms even if the workplace accident had not occurred. This analytical problem is beyond the realm of common knowledge. A finder of fact faced with such problems must be guided by expert input. *See Robinson v. Contributory Ret. Appeal Bd.*, 20 Mass. App. Ct. 634, 639 (1985).

The retirement statute asks the medical panel whether the requisite causal connection is "possible" or "plausible." *Narducci v. Contributory Ret. Appeal Bd.*, 68 Mass. App. Ct. 127, 134, 144 (2007). But the panelists also are permitted to state their views as to the likelihood that the member's accident *actually* caused the disability. *Id.* at 134-35. *See Pease v. Worcester Reg'l Ret. Bd.*, No. CR-21-82, 2022 WL 19762164, at *5-6 (DALA Dec. 23, 2022). Such statements from the panelists tend to carry substantial weight, given the retirement law's choice to assign them the primary responsibility for specialized questions of medicine. *See Christopher C. v. Boston Ret. Bd.*, No. CR-19-342, 2023 WL 3434934, at *7 (DALA May 5, 2023); *Thomson v. MTRS*, No. CR-20-340, 2023 WL 183536, at *11 (DALA Jan. 6, 2023); *Caldieri v. MTRS*, No. CR-14-299, 2023 WL 2455518, at *75, *93 (DALA Mar. 3, 2023); *Burchell v. Barnstable Cty. Ret. Syst.*, No. CR-20-204, at *14 (DALA Apr. 23, 2021). *See also Hollup v. Worcester Ret. Bd.*, 103 Mass. App. Ct. 157, 163-64 & n.5 (2023).

On balance, Ms. Rogers has not carried her burden of proving that her disability was the result of her workplace accident, as opposed to the natural progression of her preexisting spinal

condition. All three members of the second medical panel indicated that it is common for the type of condition that afflicted Ms. Rogers to decline progressively. Dr. Sciascia emphasized "the clinical nature of low back pain, particularly following a lumbar spine surgery procedure, where a common clinical outcome is for the natural history to be one of progressive decline in mobility and pain." Dr. Friedberg declined to view Ms. Rogers's disability even as one that "might be" the result of her workplace accident.[7] And Dr. Linson, who was more supportive of Ms. Rogers's case, nonetheless recognized "an extremely high incidence of individuals who will have adjacent level troubles to a prior fusion that will progress, with or without interceding injuries." Dr. Polivy expressed a similar viewpoint in the workers' compensation case.

The chronology of Ms. Rogers's disability contributes to the weakness of her causation case. By the time of her accident, she had suffered from back problems for nearly twenty years. She had undergone two surgeries unconnected to her employment. The apparent success of her second surgery was tested only by a few weeks of good health. This is not the type of case in which a workplace accident was the clear line of demarcation between an earlier period of sustained health and a subsequent period of sustained symptoms. *Compare Desantis v. MTRS*, No. CR-21-332, 2022 WL 17185576, at *5 (DALA Nov. 18, 2022), *with Wood v. Lawrence Ret. Bd.*, No. CR-21-83, 2022 WL 17081141, at *3 (DALA Aug. 19, 2022) (collecting cases).

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[7] Portions of Dr. Friedberg's narrative and clarification letter suggest that he may have focused on the not-quite-correct question of whether Ms. Rogers's February 2016 accident actually, more-likely-than-not, caused her disability. It is not entirely clear whether Dr. Friedberg erred, given that he also provided a bottom-line answer compliant with the statute ("not such as might be"). *See Jameson v. Lawrence Ret. Bd.*, No. CR-21-109, 2023 WL 6900309, at *4-5 (DALA Oct. 13, 2023) (analyzing *Fairbairn v. Contributory Ret. Appeal Bd.*, 54 Mass. App. Ct. 353 (2002)). Perhaps more importantly, the result of the case would remain unchanged if Dr. Friedberg's certificate were reinterpreted as stating that causation is technically possible but realistically implausible. *Id.*

The evidence on Ms. Rogers's side is weaker. The theory that her preexisting condition would not have become disabling but for the February 2016 accident draws support from her treating medical providers, from the original medical panel (in its clarification letter),[8] from Dr. Corsetti (in the workers' compensation case), and to some extent from Dr. Linson. But these physicians' explanations were mostly conclusory. Ms. Rogers certainly identifies no reason to prefer the opinions favorable to her over the analyses of panelists Dr. Sciascia and Dr. Friedberg. *See generally Robillard v. State Bd. of Ret.*, No. CR-18-470, 2022 WL 18283524, at *5 (DALA Dec. 19, 2022).

Ms. Rogers's remaining argument concerns the board's total of five clarification requests to the original panel, Dr. Sciascia, and Dr. Friedberg. It is true that the statutory scheme does not intend for proceedings before the board to be adversarial. *See Kooken v. Amesbury Ret. Bd.*, No. CR-17-112, at *17 (DALA June 5, 2020). The board's twin goals must be, in equal measures, to allow the application if it is meritorious, and to deny it if not. *See* 840 C.M.R. § 10.02. It would be inappropriate for a board to undercut an application through a one-sided clarification request. *See Chaves v. Taunton Ret. Bd.*, No. CR-18-204, at *68 (DALA Dec. 3, 2021).

But here the board's requests for clarification evinced reasonable evenhandedness. It is noteworthy that the clarification request to Dr. Friedberg mostly advised him that Ms. Rogers's accident may have been more dramatic than he initially realized. In any event, none of the

[8] The board's argument that the original panel's opinions lack all evidentiary significance is counterintuitive and unsupported. The cases cited by the board make the more moderate point that the original panel's certificate is of secondary importance. *See, e.g.*, *Ferreira v. Boston Ret. Bd.*, No. CR-12-665, at *5 & n.12 (CRAB Apr. 15, 2015); *Manning v. Plymouth Cty. Ret. Bd.*, No. CR-15-557 (DALA May 12, 2017); *Wojtczak v. State Bd. of Ret.*, No. 08-290 (DALA July 30, 2010).

panelists appear to have changed their minds in response to the board's questions. *See Pease*, 2022 WL 19762164, at *6.

Conclusion and Order

For the foregoing reasons, the board's decision is AFFIRMED.

Division of Administrative Law Appeals

/s/ Yakov Malkiel
Yakov Malkiel
Administrative Magistrate