**COMMONWEALTH OF MASSACHUSETTS**

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| Suffolk, ss. | **Division of Administrative Law Appeals**April 15, 2016 |
| **Wayne J. Rosario**, Petitioner v.**Fall River Retirement Board,** Respondent | Docket No. CR-13-233 |

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| **Appearance for Petitioner**:James H. Quirk, Jr., Esq.James H. Quirk, Jr., P.C.P.O. Box 268Yarmouthport, Massachusetts 02675-0268 |
| **Appearance for Respondent**:Michael Sacco, Esq.P.O. Box 479Southampton, Massachusetts 01073-0479 |

**Administrative Magistrate**:

Bonney Cashin

**SUMMARY OF DECISION**

Denial of accidental disability retirement based on failure to satisfy two year notice requirement in G.L. c. 32, §7 is affirmed. Only injuries two years prior to application for accidental disability retirement can be considered. No evidence presented of mental health problems during that time.

**DECISION**

*Introduction*

The petitioner, Wayne J. Rosario, appeals the decision of the Fall River Retirement Board to deny his application for accidental disability retirement benefits. A majority of the medical panel convened on Mr. Rosario’s behalf concluded that he was incapable of performing the essential duties of his job, that his incapacity was likely to be permanent and might be caused by the “hazards undergone” in the course of his employment as a police officer.

The Board’s decision was based on its determination that Mr. Rosario’s claimed psychological injury did not occur within two years prior to his application, and he did not file any injury reports or incident reports about a psychological injury prior to the two year notice period. The incidents relied on in Mr. Rosario’s application occurred well before the two year period.

I held a hearing at the Division of Administrative Law Appeals, One Congress Street, Boston, Massachusetts, on May 6, 2015. The parties submitted pre-hearing memoranda. I admitted documents into evidence. (Exs. 1-25.) Mr. Rosario testified on his own behalf. The Board called no witnesses. I made a digital recording of the hearing. The parties filed closing briefs, and the record closed on August 21, 2015.

**FINDINGS OF FACT**

Based on the evidence in the record and reasonable inferences drawn from it, I make the following findings of fact:

1. Wayne J. Rosario was born in 1966. (Ex. 3).
2. Mr. Rosario was employed by the Fall River Police Department (FRPD) from February 23, 1992 until December 12, 2011. (Rosario Test., Exs. 3, 14).
3. Mr. Rosario was a patrol officer, usually on a 4:00 p.m. to 12:00 a.m. shift, during which he responded to numerous calls he considered routine to serious in nature. (Rosario Test., Ex. 3).
4. In February 1993, during a traffic stop, Mr. Rosario was jumped by three suspects causing him to fear injury or death. In February 1995, he was thrown down a set of stairs during a response to a domestic violence dispute. In July 1997, he was the lead cruiser in a high speed chase that resulted in two deaths and multiple injuries; during the chase, Mr. Rosario feared personal injury. (Rosario Test., Ex. 3).
5. In 2010, the FRPD laid off police officers, which meant that Mr. Rosario was required to respond alone to more calls over a larger geographic area when he was on patrol. (Rosario Test., Ex. 10).
6. Mr. Rosario did not always feel safe when patrolling and responding to calls alone, and he still resents the city’s decision to reduce the police officer patrol force. (Rosario Test.).
7. Mr. Rosario presented at the Charlton Hospital emergency room on March 12, 2010, complaining of a headache, blurred vision and chest pain. (Rosario Test., Ex. 3).[[1]](#footnote-1)
8. He was seen by his primary care physician, Lucas Ryback, M.D., on March 15, 2010, diagnosed with Stage I or II hypertension, and treated first with a diuretic and subsequently with medication for hypertension. (Rosario Test., Exs. 3, 7).
9. Dr. Ryback told Mr. Rosario to lose weight through diet and exercise because he was obese. (Ex. 7).
10. Dr. Ryback referred Mr. Rosario to a psychiatrist, Claude A. Curran, M.D., and a psychologist, Dennis J. Rog. (Rosario Test., Ex. 7).
11. Mr. Rosario saw Dr. Curran about once every four to six weeks for medication. (Rosario Test.).
12. Mr. Rosario remained out of work from March 12, 2010 through August 2010 because of hypertension. (Rosario Test., Ex. 7).
13. During his absence, Mr. Rosario received benefits under G. L. c. 41, § 111F, presumably related to his hypertension. (Rosario Test.).
14. Mr. Rosario had previously received § 111F benefits, and, thus, under FRPD policy, he was considered to be under “house arrest” during his absence, that is, he could leave his home only under certain conditions. Mr. Rosario chafed under these restrictions. (Rosario Test.).
15. Mr. Rosario was absent 87 days in 2010 and 28 days in 2011. (Rosario Test., Ex. 16 at 195, 208).
16. Mr. Rosario’s hypertension was well-controlled with medication. (Ex. 7).
17. After Mr. Rosario returned to the FRPD, he worked only two or three days each week. (Rosario Test.).
18. During Mr. Rosario’s treatment with Mr. Rog, April 12, 2010 through at least December 19, 2011, he regularly expressed his dissatisfaction with his work and with FRPD colleagues. He was often angry and resentful. He hated being in the FRPD building, finding it more stressful than being on the street. (Ex. 19).
19. During Mr. Rosario’s first session with Mr. Rog, he referred to the fatal car chase in 1997, when the city “sold them out” by settling, and he announced “I’m sick of dealing with assholes.” He repeatedly referred to the chase in later sessions. (Ex. 19).
20. Mr. Rosario blamed himself for his son’s seizure disorder and other medical issues because the fatal chase occurred four months before his son’s birth. This was a stressful time for Mr. Rosario and his wife. (Rosario Test., Ex. 7, 19).
21. Throughout treatment, Mr. Rosario often discussed leaving the FRPD. From the first session he was considering accidental disability retirement. He sketched out a rough timetable for action on his application, including time for hearings and an appeal. He considered regular retirement to be “a joke.” (Ex. 19).
22. During an early session, Mr. Rog noted that Mr. Rosario seemed to be “making a case for not returning.” (Ex. 19).
23. Mr. Rog described Mr. Rosario as “guarded, distrustful, resistant … petulant at times.” (Ex. 19).
24. Mr. Rosario was transferred on December 9, 2011 to staff services as an accommodation so he would not be faced with the typical stress of police work. (Ex. 14).
25. On December 11, 2011, Mr. Rosario learned from Detective Lieutenant LaFleur that he was to be transferred to the booking room. (Rosario Test., Ex. 14).
26. Mr. Rosario was not happy about the transfer and initially told Det. Lt. LaFleur that the position would not work for him because of childcare issues,[[2]](#footnote-2) when in truth he did not want to be locked up in a windowless room, and he felt like he was “being pushed out the door.” (Rosario Test., Ex. 14).
27. Mr. Rosario was last able to perform his essential job duties on November 12, 2011. (Rosario Test., Ex. 14).
28. Mr. Rosario filed an Accidental Disability Retirement Application with the Fall River Retirement Board on December 29, 2011. (Ex. 3).
29. Mr. Rosario’s application was premised upon an injury exacerbated over time, ie., “a hazard undergone” in the words of G.L. c. 32, § 7(1). (Ex. 3).
30. Mr. Rosario identified the medical reasons for his application as Post Traumatic Stress Disorder (PTSD), depression, anxiety, and hypertension. (Ex. 3).
31. Dr. Curran, his treating psychiatrist, diagnosed Mr. Rosario with PTSD, major depression, and panic disorder, and found his symptoms to have increased over time, compounded by hypertension and diabetes. He, thus, supported Mr. Rosario’s application. (Ex. 4).
32. Dr. Curran stated that Mr. Rosario’s disability was the result of “significant traumas over the course of his law enforcement career,” and was exacerbated by his hypertension and diabetes.” (Ex. 4).
33. Dr. Curran stated that Mr. Rosario’s disability was likely to continue indefinitely because he was unable to tolerate the typical environment and stress level associated with police work. (Ex. 4).
34. Mr. Rosario also submitted with his application a supporting statement from his psychologist, Mr. Rog. (Ex. 5).
35. Mr. Rog opined that Mr. Rosario had a major depressive disorder, PTSD, and symptoms of generalized anxiety disorder (GAD) and panic disorder, all of which would persist if he continued to work as a police officer. (Ex. 5).
36. Mr. Rog stated that Mr. Rosario’s disability related to the fatal car chase over 14 years earlier. (Ex.5).
37. In his application, Mr. Rosario relied upon the February 1993 car stop, the February 1995 domestic violence dispute; and the July 1997 fatal car chase. (Rosario Test., Ex. 3).
38. Mr. Rosario received benefits under G. L. c. 41, § 111F during 1997 and 1998, although none of these benefits were for psychological injuries sustained as a result of the events in 1993, 1995, or 1997 that he described in his accidental disability application. (Rosario Test., Exs. 3, 24).
39. Neither Mr. Rosario nor his employer filed injury reports or incident reports describing a psychological injury arising from any of these three events. (Rosario Test.).
40. Mr. Rosario was aware that he was required to file an injury report if he was injured at work regardless of whether an arrest or incident report he or another officer completed noted the injury. (Rosario Test.)
41. In his application, Mr. Rosario further relied upon unspecified “thousands of other calls which included fatal accidents, drug overdoses, [and] hangings,” but he did not identify when these events occurred. (Rosario Test., Ex. 3).
42. An Employer’s Statement form that is part of a member’s accidental disability application was completed by the FRPD Deputy Chief Charles Cullen and Chief of Police Daniel Racine, who described Mr. Rosario’s disability as PTSD and further noted that Mr. Rosario refused the FRPD’s offered modifications of his job because of his medical condition. (Ex. 14).
43. The statement did not identify any incidents or hazards that might have contributed to Mr. Rosario’s claimed disability, nor did it address directly his claimed disability. (Ex. 14).
44. Chief Racine submitted an addendum to the statement in which he referenced Mr. Rosario’s discipline after the 1997 car chase episode and the FRPD’s offered accommodations in December 2011. (Ex. 14).
45. PERAC, pursuant to G.L. c. 32, §§ 6(3) and 7(1), convened a regional medical panel comprised of three psychiatrists to examine Mr. Rosario. (Exs. 9, 10, 11).
46. Helenita Hammer, M.D. examined him on November 28, 2012, Robert W. Ferrell, M.D. examined him on December 7, 2012, and Michael W. Kahn, M.D. examined him on December 14, 2012. (Exs. 9, 10, 11).
47. The panel members reviewed Mr. Rosario’s accidental disability application and supporting statements, his medical records, and his job description. (Exs. 9, 10, 11).
48. All panel members reviewed the following: medical records from the office of Dr. Curran for September 2010 through April 2012, notes from the office of Mr. Rog from April 2010 through December 2011; Charlton Memorial Hospital ER records dated May 3-, 2010 and September 11, 2011; and medical records from the office of Dr. Ryback for April 2010 through December 201. (Ex. 18).
49. The panel members considered Mr. Rosario’s diagnosis of hypertension as part of their review. (Exs. 9, 10, 11).
50. Drs. Hammer and Ferrell concluded that Mr. Rosario was mentally incapable of performing the essential duties of his job as described in the job description, his incapacity was likely to be permanent, and it was the result of the events in 1993, 1995, and 1997, described in paragraph 4, above. (Exs. 9, 10).
51. Dr. Kahn agreed with Drs. Hammer and Ferrell about Mr. Rosario’s incapacity to perform his job duties and its permanency, but disagreed with them about the cause of Mr. Rosario’s incapacity, which Dr. Kahn attributed to Mr. Rosario’s dissatisfaction with his job and with the performance of his fellow officers. (Ex. 11).
52. At some point while his application was pending before the Fall River Retirement Board, Mr. Rosario realized that he needed to show that he was injured within two years prior to the date he filed his application for accidental disability retirement. (Rosario Test.).
53. Six reports of arrests, summons, and incidents provided to the Retirement Board by Mr. Rosario for events from January 14, 2010 through August 24, 2011 describe routine police events and do not describe Mr. Rosario’s reaction to the events. The reports do not describe a psychological injury to Mr. Rosario arising out of the events. (Ex. 13).[[3]](#footnote-3)
54. Mr. Rosario’s various medical records do not refer to any psychological trauma resulting from these six incidents. (Exs. 19, 20, 21, 22).
55. Dr. Curran filed five physician reports with the FRPD between June 8, 2011 and December 7, 2011 that referenced diagnoses of major depression, anxiety disorder, and PTSD based on “past traumatic events (work-related).” His reports did not refer to any incidents that occurred in 2011. (Ex. 6).
56. Documents from June 27, 1992 through January 14, 2012 and titled Captain’s Report of Men Absent on Account of Illness identify “stress” as a reason for Mr. Rosario’s absence on various days beginning in July 16, 1997, but do not identify an event that caused the stress. (Ex. 16).
57. In February or early March 2011, Mr. Rosario responded to a call concerning an IV drug user suffering from gangrene in his arm, the appearance of which caused Mr. Rosario to vomit. (Rosario Test., Exs. 19, 24).
58. The Board denied Mr. Rosario’s accidental disability application on April 11, 2013 because he failed to “satisfy his burden of causation” in that, “as a matter of law, [he] has failed to satisfy the 2-year notice requirement of Section 7 of M. G. L., Chapter 32.” (Ex. 1).
59. Mr. Rosario appealed the Board’s decision by letter dated April 16, 2013. (Ex. 2).
60. On June 7, 2013, the Board granted an Involuntary Application for Ordinary Disability retirement filed by Chief Racine, on behalf of Mr. Rosario. He did not appeal the Board’s decision. (Rosario Test., Ex. 17).

**DISCUSSION**

Accidental disability retirement is granted to a retirement system member who is unable to perform his essential job duties, when such inability is likely to remain permanent until retirement age, and when the disability is by reason of an injury or series of injuries or of a hazard undergone as a result of, and while in the performance of, his job duties. G. L. c. 32, §7(1). An applicant must demonstrate either that a disability “stemmed from a single work-related event or series of events” or, “if the disability was the product of gradual deterioration, that the employment [had] exposed [the employee] to an identifiable condition…that is not common or necessary to all or a great many occupations.” *Blanchette v. Contributory Ret. App. Bd*., 20 Mass. App. Ct. 479, 485 (1985) (internal citations and quotations omitted).

A mental or emotional disability resulting from a single injury or a series of work–related injuries has been recognized as a “personal injury” under c. 32, §7(1). *Blanchette*, 20 Mass. at 482. The term “personal injury” is to be “interpreted in harmony with c. 152,” the workers’ compensation statute. *Sugrue v.Contributory Ret. App. Bd*., 45 Mass. App. Ct. 1, n.4 (1998). Under this statute, personal injuries “include mental or emotional disabilities only where the predominant contributing cause of such disability is an event or series of events occurring within employment.” G. L. c. 152, § 1(7A).

Mr. Rosario bases his claim that he is mentally incapacitated from performing his duties as a police officer on an injury exacerbated over time, that is, a hazard undergone. Consequently, under *Blanchette*, he must show the presence of “an identifiable condition…is not common or necessary to all or a great many occupations” that lead to his disability.

Whether one relies on an injury or series of injuries or on a hazard undergone, the only matters that may be considered in an application for accidental disability retirement are injuries or hazards undergone on the job within two years of the date on which the application for accidental disability retirement was filed, unless a written notice of injury was timely provided to the member’s retirement board or if an exception applies. G. L. c. 32, §§ 7(1) and 7(3)(a) and (b).

As a starting point, the notice requirements in c. 32 determine the time period that may be evaluated for the purpose of determining Mr. Rosario’s eligibility for accidental disability retirement. Mr. Rosario traces the onset of his mental problems to events in 1993, 1995, and 1997. He did not file injury reports describing a psychological injury arising from any of these events. I may not consider, thus, those injuries that occurred more than two years prior to the filing of his application in 2011 unless an exception applies.

Failure to file a written notice of injury would not bar the claim if Mr. Rosario received worker’s compensation for the injury. G. L. c. 32, §7(3)(a). This part of the statute does not apply to Mr. Rosario because police officers, as members of Group 4, are not eligible to receive worker’s compensation. As an alternative, c. 32 provides that an employee not eligible for worker’s compensation can satisfy the notice requirement if there is a record of a mental injury he sustained or a hazard undergone on file in the official records of his department. G. L. c. 32, §7(3)(a). Such records are often injured-on-duty records for which G. L. c. 41, § 111F benefits are received, an employee-filed injury report or an employer-filed injury report sent to the local retirement board. Mr. Rosario did not produce such a record for the events in 1993, 1995, or 1997.

Failure to file written notice also would not matter if the head of the injured employee’s department knew of a personal injury suffered by the employee as a result of, and in the performance of, his duties. G. L. c. 32, §7(3)(b). In that circumstance, the department would be required to notify the retirement board in writing of the “time, place, cause, and nature of such injury.” *Id*. Nothing in the record establishes that any official in the FRPD knew that Mr. Rosario suffered mental injuries in 1993, 1995, or 1997, or that the FRPD had reason to send notice to the retirement board about these events and their consequences. *Brown v. Boston Ret. Bd*., CR-12-52 (Div. Admin. Law App., Dec. 6, 2013) (no written notice of injury or other documentation showed that firefighter was mentally injured during fire early in his career). The FRPD was aware that Mr. Rosario had filed incident reports about physical injuries arising out of the events in 1993, 1995, and 1997 and that he was out on leave during some portion of those years. Mr. Rosario, however, first sought mental health treatment when he saw Mr. Rog on April 12, 2010 and Dr. Curran on June 22, 2010. Their diagnoses of PTSD and depression were based on these past events, particularly the fatal car chase, which Mr. Rosario repeatedly referred to, rather than more recent events.

Consequently, no exception under G. L. c. 32, §7(3)(a) or (b) applies. To prevail, Mr. Rosario must rely on an injury or injuries that exacerbated his underlying condition and that occurred between December 30, 2009 and November 12, 2011, the last day he worked as a police officer. I treat his mental health problems that arose before that time as pre-existing injuries, and consider whether the evidence shows that his underlying condition was aggravated after December 30, 2009. *Brown v. Boston Ret. Bd*. at 10 (citation omitted).

No evidence establishes that Mr. Rosario’s pre-existing mental health condition was aggravated by any work-related injury or hazard that occurred after December 30, 2009. Mr. Rosario did not reference an injury after December 30, 2009 in his accidental disability retirement application. His general reference to “thousands of other incidents” is insufficient to provide notice to the retirement board of any specific incidents between December 30, 2009 and November 12, 2011 that he relied on as bases for his application. *Zajac v. State Bd. of Ret.*, CR-12-444, Decision at 4-5 (Contributory Ret. App. Bd., Aug. 21, 2015). On this basis alone Mr. Rosario’s claim must fail. He may not amend his application to add new injuries or incidents. *Id*. at 4. To allow Mr. Rosario to rely on injuries not specifically mentioned in his application would violate the notice and two-year look-back requirement in c. 32, § 7(1). *Madonna v. Fall River Ret. Bd*., CR-10-175, Decision at 5-6 (Contributory Ret. App. Bd., Nov. 1, 2013).

Nonetheless, I briefly consider, and reject, Mr. Rosario’s claims raised at the hearing about alleged incidents within the two-year window. The documents Mr. Rosario relies on to establish an injury during this time period do not help him. The incident reports do not describe a psychological injury to Mr. Rosario. He did not miss any work in connection with these incidents. (Ex. 16).

 Mr. Rosario asserts that he received c. 41, § 111F benefits for PTSD in 2010. The pay stub he provided (Ex. 24) and his testimony are insufficient to establish such benefits for an incident he did not specify. I do not consider the arguments made in the cover letter to Ex. 24 as evidence.

Mr. Rosario’s encounter in 2011 with a man with gangrene, while no doubt unpleasant, is insufficient to establish an injury that aggravated his mental health problems. The man posed no personal threat or harm to Mr. Rosario. Mr. Rosario only mentioned it once to Mr. Rog. There is no indication that it triggered a PTSD response. Everyday exposure to routine trauma as a police officer does not rise to the level of a personal injury or hazard undergone. *LePage v. Fall River Ret. Bd.*, CR-13-248 (Div. Admin. Law App., Mar. 28, 2014).

Mr. Rosario struck me as an incomplete and unreliable historian of his work history and medical condition. He repeatedly failed to recall various events and was generally unfamiliar with the police reports and medical records he offered into evidence. His incomplete and inconsistent memory affected his credibility. I would have expected a petitioner who bears the burden of demonstrating entitlement to an accidental disability retirement to be familiar with the reports and records he seeks to rely on in support of his case.

His focus on past events and his animosity toward his fellow officers and supervisors as shown in his testimony and Mr. Rog’s records lead me to conclude that Mr. Rosario was dissatisfied with being a police officer and wanted to leave the FRPD. He did not want to accept a regular retirement pension, however, because it was “a joke.” Failure to get along with co-workers and superiors is not so uncommon as to constitute an “identifiable condition.” *Madonna* *v. Fall River Ret. Bd*., at 6. *See also Moran v. State Bd. of Ret*., CR-02-724 (Div. Admin. Law App., May 21, 2004) at 13.

**CONCLUSION**

 Mr. Rosario has failed to establish by a preponderance of the evidence that he is eligible for an accidental disability retirement.

 DIVISION OF ADMINISTRATIVE LAW APPEALS

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 Bonney Cashin

 Administrative Magistrate

DATED: April 15, 2016

1. The parties do not dispute this fact, although there is no medical record of this visit in evidence. [↑](#footnote-ref-1)
2. The transfer may have necessitated a change in Mr. Rosario’s hours, although the record is not clear on this point. [↑](#footnote-ref-2)
3. Exhibit 13 is mistakenly referred to on the digital recording as Exhibit 14. [↑](#footnote-ref-3)