COMMONWEALTH OF MASSACHUSETTS

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

Rosemarie R.,[1]
Petitioner,

v.

Amesbury Retirement System,
Respondent.

No. CR-22-0590

Dated: June 14, 2024

Appearances:
For Petitioner: Jacqueline A. Hartley, Esq.
For Respondent: Michael Sacco, Esq.

Administrative Magistrate:
Yakov Malkiel

SUMMARY OF DECISION

The petitioner sustained a concussion when the back of a student's head struck her in the face. A unanimous regional medical panel found that she continues to experience disabling symptoms of post-concussion syndrome, including cognitive deficits and frequent migraines. She is entitled to retire for accidental disability.

DECISION

The petitioner appeals from a decision of the Amesbury Retirement System denying her application to retire for accidental disability. An evidentiary hearing took place on April 17, 2024. The petitioner was the only witness. I admitted into evidence exhibits marked 1-23 and stipulations marked 1-7.

Findings of Fact

I find the following facts.

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[1] A pseudonym adopted at the petitioner's unopposed request. *See* G.L. c. 4, § 7, 26th para., (c).

Background

1. The petitioner began working for the Amesbury public schools in late 2012. She had a daughter in that school system and was looking for personally satisfying work. She previously had worked as a credit analyst and a church secretary. (Exhibits 1, 2, 9; Tr. 7-10.)

2. At the Amesbury schools, the petitioner served as a special education paraprofessional. She worked with special needs students and teachers. Most of the students she worked with were three to six years old. Among the petitioner's duties were setting up classrooms, helping students to eat and use the bathroom, and administering applied behavior analysis therapy. Her performance reviews were good. (Exhibits 1, 2, 9, 10, 21; Tr. 7-8, 16, 37.)

3. The petitioner was physically and emotionally abused during her childhood. She has suffered for many years from manageable PTSD, depression, and anxiety. She has been treated for those conditions with antidepressants. The petitioner began to see a psychotherapist in approximately 2006. She occasionally complained to the therapist about workplace annoyances or stress. (Exhibits 1, 23; Tr. 9-11, 24-36, 61-62.)

4. The petitioner has a history of alcohol abuse. She has been sober since October 2016. She attends meetings of Alcoholics Anonymous and works with a sponsor there. In earlier years, the petitioner suffered from occasional non-debilitating headaches. (Exhibits 1, 23; Tr. 9, 17, 27-29, 62-64.)

Incident and Treatment

5. On November 6, 2017, the petitioner was working with a student with autism spectrum disorder. While sitting on the petitioner's lap, the student abruptly became agitated. He slammed his head backwards into the petitioner's nose and forehead. The petitioner suffered immediate pain, dizziness, and nausea. (Exhibits 1, 3, 11, 12, 21, 23; Tr. 11-12, 36-39.)

6. Coworkers brought the petitioner to the school nurse and then to the emergency room. An x-ray performed there showed no fracture. The petitioner was diagnosed with a mild concussion. She was instructed to rest and to follow up. She has not been back to work since. (Exhibit 23; Tr. 12-14, 39.)

7. At a return appointment one week after her ER visit, the petitioner was diagnosed with post-concussion disorder. She was exhibiting headaches and cognitive dysfunction. The examining doctor opined that the petitioner would not be able to work while these symptoms persisted. (Exhibit 23.)

8. During the ensuing years, the petitioner sought treatment with neurologists and other medical providers. Her symptoms were recorded as frequent migraines, neck pain, nausea, confusion, forgetfulness, and sensitivity to light. A CT scan and an MRI disclosed no significant findings. Several drugs did not provide the petitioner with relief. For a time, Botox injections did alleviate the severity and frequency of her migraines. (Exhibit 23; Tr. 65-66.)

9. In October 2020, the petitioner was evaluated at the Cantu Concussion Center at Emerson Hospital. She was diagnosed with concussion, post-concussion syndrome, cognitive disturbance, and post-traumatic headache. She was started on a course of physical therapy. A speech and language evaluation in January 2021 described the petitioner's diagnoses as including an executive function deficit and a cognitive communication deficit. (Exhibit 23.)

10. In workers' compensation proceedings, several evaluating physicians reached divergent conclusions about the petitioner's case. Dr. Avraham Almozlino reported that his neurological examination was normal and that he did not view the petitioner as disabled. Dr. Paul Chervin agreed, doubting that the petitioner had sustained any concussion in the first place, and seeing "no neurological contraindication to [the petitioner's] return to gainful employment."

On the other hand, Dr. Walter Panis stated that the petitioner suffers from "all the symptoms of persistent post-concussion syndrome," including "post traumatic headache related to [the] work injury." Dr. Panis added that the "frequency and level of symptoms of [the petitioner's] headaches are significant enough to cause disability." (Exhibit 23.)

11. The petitioner continues to experience migraines and difficulties with memory and word retrieval. The migraines occur several times per week and last approximately 8-12 hours at a time. While a migraine is in progress, the petitioner rests in the dark and does very little. When she is not having a migraine, the petitioner performs household chores, walks her dog, and maintains a "controlled environment." (Exhibit 23; Tr. 19-20, 64-65.)

Retirement Proceedings

12. In September 2021, the petitioner applied to retire for accidental disability. The accompanying physician's statement was made by Dr. Jonathan March, who wrote in part that "the disability was, without doubt, caused by the job-related personal injury." The record also includes a separate letter in which Dr. March wrote that "any of [the petitioner's] prior medical issues have no bearing on her clinical status at this time." (Exhibits 1, 23.)

13. A regional medical panel was convened to evaluate the petitioner's application. The panel physicians were Dr. Diana Apetauerova, Dr. Julian Fisher, and Dr. Aymen Elfiky. They conducted separate examinations during March 2022. Each examination lasted approximately thirty minutes and featured neurological testing. The three panelists all reviewed the petitioner's medical records, which included psychotherapy notes, and asked her questions about those records. After their examinations, the panelists agreed unanimously that the petitioner is incapacitated, that the incapacity is permanent, and that it is such as might be the natural and proximate result of the November 2017 workplace incident. (Exhibits 4-6; Tr. 20-23, 52-59.)

14. Dr. Apetauerova diagnosed the petitioner with post-concussion syndrome, post-concussion migraines, and cognitive deficits. She acknowledged the petitioner's history of PTSD, depression, and alcohol abuse. In a clarification letter, Dr. Apetauerova wrote: "Her symptoms of subjective cognitive problems were aggravated by the concussion . . . . Her chronic headaches were likely triggered by her concussion on November 6, 2017. . . . Both symptoms are permanently incapacitating." At the board's invitation, Dr. Apetauerova stated that the causal connection between the petitioner's disability and her workplace accident was a medical "probability," not merely a "possibility." (Exhibits 4, 18.)

15. Dr. Fisher diagnosed the petitioner with "full-blown post-concussion syndrome." He described her symptoms as including migraines and problems with balance, memory, and concentration. Dr. Fisher viewed several of the petitioner's symptoms as "manifest" and "evident." He believed that they "preclude her returning to work in the school system in any way whatsoever." In a clarification letter, Dr. Fisher declined to attribute the petitioner's symptoms to any "pre-existing conditions," explaining that "her work injuries were more than sufficient to justify a determination of permanent medical disability." Dr. Fisher added that the petitioner's prior occasional headaches "have now become as a result of the traumatic brain injury a disabling aspect of her life." (Exhibits 6, 20.)

16. Dr. Elfiky described the petitioner's diagnosis as post-concussion syndrome. He reported her symptoms as including frequent migraines, cognitive impairment, sensitivity to light, and fatigue. He characterized the petitioner's workplace accident as a "severe physical trauma." In his clarification letter, Dr. Elfiky emphasized that the petitioner's medical records "clearly detail the facts of her diagnosis and ongoing issues related to the diagnosis." (Exhibits 5, 19.)

17. In November 2022, the board denied the petitioner's retirement application, citing "inconsistencies in the regional medical panel's examinations, narrative reports and clarification responses, as well as [the petitioner's] documented pre-existing conditions." The petitioner timely appealed. (Exhibits 7, 8.)

Analysis

A public employee seeking to retire for accidental disability must establish three essential elements: that she is "unable to perform the essential duties of [her] job," that the incapacity is "likely to be permanent," and that the incapacity was caused by a "personal injury sustained . . . as a result of, and while in the performance of, [the employee's] duties." G.L. c. 32, § 7. The board focuses its argument on the first of the elements, stating: "[T]he Board simply does not believe [the petitioner's] symptoms are genuine."

The retirement law sends applicants for accidental disability retirement to be examined by regional medical panels. The point of this procedure is "to vest in the medical panel the responsibility for determining medical questions which are beyond the common knowledge and experience of the members of the local board (or the Appeal Board)." *Malden Ret. Bd. v. Contributory Ret. Appeal Bd.*, 1 Mass. App. Ct. 420, 423 (1973). *See Retirement Bd. of Revere v. Contributory Ret. Appeal Bd.* (*DiDonato*), 36 Mass. App. Ct. 99, 111 (1994). Questions surrounding incapacity and permanence are especially unlikely to be covered by common knowledge. *Id.*; *Cohen v. MTRS*, No. CR-17-210, at *6 (DALA Sept. 10, 2021). As a result, when a medical panel concludes that a member is permanently disabled, it is rare for a nonexpert

factfinder to find cause to disagree. *Desantis v. MTRS*, No. CR-21-332, 2022 WL 17185576, at *3 (DALA Nov. 18, 2022).[2]

The board's essential position is that "[s]ince there is no objective evidence of any neurological impairment . . . the medical opinions in this case . . . are of little evidentiary value." This attitude is thoroughly incorrect. Some medical conditions are observable, measurable, and objectively recordable. Others are unobservable, immeasurable, and only subjectively reportable. Medical expertise is just as germane to the latter types of problems. The gulfs between the skill sets of expert physicians and lay hearing officers are not meaningfully larger or smaller in cases of headaches, depression, fractures, or infarctions. Whatever the member's medical issues may be, the expert panelists approach the evaluative task with learning, diagnostics, and experience-based intuitions that laypersons lack. It is the panelists who are best situated to assess whether a member's subjective report rings true and likely reflects genuine incapacity. It is they who can competently compare the member's complaints to her history, her course of treatment, her physical exam, the medical literature, and the innumerable other patients they have seen. *See Kirsten K. v. MTRS*, No. CR-20-675, 2023 WL 415580, at *4 (DALA Jan. 6, 2023); *Hudson v. Boston Ret. Syst.*, No. CR-19-582, 2022 WL 16921456, at *6 (DALA May 6, 2022); *Back v. Barnstable Cty. Ret. Bd.*, No. CR-18-361, 2020 WL 13607017, at *11 (DALA Nov. 13, 2020); *Laumann v. Norfolk Cty. Ret. Syst.*, No. CR-10-822, at *13-14 (DALA June 20, 2014); *Smith v. Chelsea Ret. Bd.*, No. CR-99-554, at *8 (DALA Oct. 30, 2000).[3]

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[2] The rare outliers will tend to feature non-medical evidence available to the factfinder but not to the medical panel.

[3] On a "serial sevens" test in the workers' compensation case, Dr. Chervin concluded that the petitioner exhibited an "apparently feigned inability to perform simple subtraction." (Exhibit 23.) That conclusion was within the scope of Dr. Chervin's role as an evaluating expert. But it was equally proper for the PERAC panelists to disagree with Dr. Chervin, and it is their

The three medical panelists were unanimous in their view that the petitioner is permanently incapacitated. Their certificates and clarifications disclose no misgivings. The board's reasons for doubting the petitioner's incapacity all arise from information that the panelists had before them. The retirement law calls on a retirement board to resolve medical questions based on the panel's expert input, not the board's own instincts. *Malden*, 1 Mass. App. Ct. at 423; *DiDonato*, 36 Mass. App. Ct. at 111. The board possessed no pertinent non-medical evidence or any other good reason to conclude that the petitioner is not incapacitated.

The board adds a brief challenge to the causation element of the petitioner's case, theorizing that her current symptoms may be attributable to her preexisting mental health issues. The causation requirement is not satisfied where preexisting conditions are responsible for the member's incapacity through their "natural, cumulative, deteriorative effects." *Lisbon v. Contributory Ret. Appeal Bd.*, 41 Mass. App. Ct. 246, 255 (1996). On the other hand, a workplace injury that "aggravated" a preexisting condition to the point of disability is sufficient for causation purposes. *Baruffaldi v. Contributory Ret. Appeal Bd.*, 337 Mass. 495, 501 (1958).

On causation, the medical panelists' analyses do not dominate the analysis like their views of incapacity and permanence. The statutory causation question to the panelists is whether the member's disability is "such as might be" the causal result of the workplace accident. G.L. c. 32, § 6(3)(a). The Legislature thus charged the panel with determining whether causation is medically "possible" or "plausible." *Narducci v. Contributory Ret. Appeal Bd.*, 68 Mass. App. Ct. 127, 134-35 (2007). It is the legal finder of fact who must determine whether causation is ultimately established. *Id.*

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assessment that the retirement law and *Malden* look to for guidance. It may be instructive to consider how hopelessly unqualified hearing officers would be to conduct their own "serial sevens" tests.

Even so, the analysis of whether a member's disability results from a workplace accident or from a preexisting condition generally exceeds the scope of common knowledge. On such issues, nonexpert factfinders have no choice but to be guided by expert input. *See Robinson v. Contributory Ret. Appeal Bd.*, 20 Mass. App. Ct. 634, 639 (1985). Dr. March, Dr. Panis, Dr. Apetauerova, and Dr. Fisher all saw a firm causal connection between the petitioner's incapacity and the November 2017 incident. The views of medical panelists Dr. Apetauerova and Dr. Fisher in particular carry "substantial weight." *Rogers v. Worcester Ret. Bd.*, No. CR-22-164, 2024 WL 413690, at *4 (DALA Jan. 26, 2024).[4] On the other side of the scale, the hypothesis that the petitioner became disabled through the natural, cumulative, deteriorative progression of her preexisting mental health issues is supported by no expert opinions at all.

Conclusion and Order

The petitioner is entitled to retire for accidental disability. The board's contrary decision is REVERSED.

Division of Administrative Law Appeals

/s/ Yakov Malkiel
Yakov Malkiel
Administrative Magistrate

[4] Panelist Dr. Elfiky did not necessarily opine that causation in the petitioner's case was more than medically "possible." With respect to the permissibility of panelists opinions as to whether causation is not only possible but probable or established, see *Narducci v. Contributory Ret. Appeal Bd.*, 68 Mass. App. Ct. 127, 134-35 (2007); *Pease v. Worcester Reg'l Ret. Bd.*, No. CR-21-82, 2022 WL 19762164, at *5-6 (DALA Dec. 23, 2022).