

**COMMONWEALTH OF MASSACHUSETTS**

**Middlesex, ss.**

**Division of Administrative Law Appeals**

**Mark Selden,**  
Petitioner,

No. CR-23-0354

Dated: September 20, 2024

v.

**Boston Retirement System,**  
Respondent.

**Appearances:**

For Petitioner: Kathleen Kiley-Becchetti, Esq.

For Respondent: Timothy J. Smyth, Esq.

**Administrative Magistrate:**

Yakov Malkiel

**SUMMARY OF DECISION**

After serving as a firefighter for twenty-three years, the petitioner contracted a severe case of COVID-19. He became permanently disabled with pulmonary embolism, pulmonary fibrosis, and acute respiratory disease syndrome. A regional medical panel certified that the petitioner's disability is attributable to his service as a firefighter by operation of the lung law, G.L. c. 32, § 94A. The panelists explained essentially that the petitioner's years of firefighting work were responsible for the severity of his COVID-19 complications. The panelists applied the lung law properly. No competing medical evidence conflicts with their conclusions. The petitioner is entitled to retire for accidental disability.

**DECISION**

Petitioner Mark Selden appeals from a decision of the Boston Retirement System (board) denying his application to retire for accidental disability. The appeal was submitted on the papers under standard rule 10(c).<sup>1</sup> I admit into evidence stipulations numbered 1-23 and exhibits marked 1-12.<sup>2</sup>

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<sup>1</sup> In accordance with G.L. c. 30A, § 9, the "standard rules" in this context are the provisions of 801 C.M.R. § 1.01.

<sup>2</sup> Exhibits 1-10 were marked and filed jointly. Exhibits 11-12 were filed unmarked by the board. They are a transcript and a review memorandum, respectively.

**Findings of Fact**

I find the following facts.

1. Mr. Selden grew up in Boston. He is a veteran of the U.S. Army. In January 1997, Mr. Selden became a firefighter with the Boston Fire Department. His pre-employment physical examination was unremarkable for lung or respiratory issues. (Stipulations 1-2; exhibits 3-8, 11.)

2. As a firefighter, Mr. Selden’s duties involved responding to fire alarms, controlling and extinguishing fires, and protecting lives and property. He was required to climb ladders, apply fire-suppressing chemicals, and create openings into buildings. His lungs were frequently and repeatedly exposed to hazardous materials, gases, and vapors. (Stipulation 3; exhibits 3-8, 11.)

3. In March 2020, Mr. Selden contracted COVID-19. It is not possible to determine whether he caught the virus while at work or off duty. He developed flu-like symptoms, including congestion, fever, sore throat, and fatigue. (Stipulations 4-5; exhibits 6-8, 11.)

4. Mr. Selden was instructed to quarantine. At home, his health worsened. He was returned to Boston Medical Center, where he was admitted, placed in intensive care, and intubated. His diagnoses included hypoxia and acute respiratory disease syndrome (ARDS). Imaging revealed pathologies including pneumonia, pulmonary embolisms, and traction bronchiectasis. (Stipulations 5-9; exhibits 6-8, 11.)

5. In April 2020, Mr. Selden was transferred to Carney Hospital, where he remained for approximately two weeks. He was given supplemental oxygen, blood thinners, and steroids. After his discharge, Mr. Selden underwent rehabilitation at home for approximately six months. He has not returned to work since. He continues to suffer from chronic fatigue and from shortness of breath even with minimal activity. (Stipulations 10-11; exhibits 6-8, 11.)

6. In August 2021, Mr. Selden applied to retire for accidental disability. A regional medical panel was convened to evaluate the application. The panel consisted of pulmonologist Dr. Richard Ashburn, internist Dr. Eric Cohen, and pulmonologist Dr. Michael Zack. The panelists examined Mr. Selden separately during March 2022. All three then certified that Mr. Selden is permanently incapacitated. They all also viewed the incapacity as job-related under the lung law, G.L. c. 32, § 94A. (Exhibits 3-8.)

7. Dr. Ashburn opined that Mr. Selden is permanently disabled with “pulmonary fibrosis.” He added: “Although it is not possible to determine if his actual exposure to COVID happened at work or was unrelated to his occupation, it can be presumed that, by application of the Lung Law, his occupation as a firefighter caused him to be more susceptible to the complications of COVID, leading to pulmonary fibrosis and permanent disability.” (Exhibit 6.)

8. Dr. Cohen described Mr. Selden’s diagnoses as “post-COVID-19 fibrotic lung disease and . . . associated post-COVID-19 late symptoms.” With respect to causation, Dr. Cohen wrote: “It is not clear or certain where, how, or from whom he got his COVID exposure, as this could have been related to patient exposure as an EMT or from the community. However, it is certainly reasonable to assume that his prior exposure to smoke and chemicals at work would have caused him to experience more severe complications related to his COVID infection, leading to permanent disability.” Dr. Cohen concluded that “based on the Lung Law . . . causation is established.” (Exhibit 7.)

9. Dr. Zack reported that Mr. Selden’s medical issues include ARDS, pulmonary embolism, and fibrosis. Dr. Zack attributed Mr. Selden’s disability primarily to his work history, writing: “[H]is pulmonologist . . . opined that his condition was job related. In my opinion, although Mr. Selden did suffer from acute COVID symptoms and sequelae, these do not

represent enough significant evidence to outweigh the exposure suffered from a long history of employment as a firefighter. The lung law would still take precedence.” (Exhibit 8.)

10. Guided by the experts’ opinions, I find as fact that Mr. Selden’s disability is the combined result of his firefighting service and his case of COVID-19. The virus played a direct role in producing Mr. Selden’s key symptoms. But it was Mr. Selden’s years of smoke and fume inhalation that caused his COVID-19 complications to be as severe as they were. (Exhibits 6-8.)

11. In February 2023, the board denied Mr. Selden’s application. The board relied on the recommendation of a board-appointed hearing officer, who wrote that the medical panelists’ views “strained credulity.” Mr. Selden timely appealed. (Exhibits 9-10.)

### **Analysis**

A public employee seeking to retire for accidental disability must establish three essential elements: that he or she is disabled, that the disability is permanent, and that the disability was caused by “a personal injury sustained or a hazard undergone as a result of . . . [the employee’s] duties at some definite place and at some definite time.” G.L. c. 32, § 7(1). The dispute here concentrates on the third element, i.e., causation.

In the usual case, an applicant for accidental disability retirement must prove a “natural and proximate” causal connection between the disability and a specific workplace injury or hazard. *Noone v. Contributory Ret. Appeal Bd.*, 34 Mass. App. Ct. 756, 758 n.4 (1993). This requirement is “strict.” *Fender v. Contributory Ret. Appeal Bd.*, 72 Mass. App. Ct. 755, 761 (2008). It is not satisfied when the workplace injury or hazard was “merely a contributing cause of the injury.” *Retirement Bd. of Revere v. Contributory Ret. Appeal Bd.*, 36 Mass. App. Ct. 99, 107 (1994). *See Campbell v. Contributory Ret. Appeal Bd.*, 17 Mass. App. Ct. 1018 (1984);

*Buchanan v. Contributory Ret. Appeal Bd.*, 62 Mass. App. Ct. 1105 (2004) (unpublished memorandum opinion).

Special statutory provisions approach causation very differently in the case of certain diseases suffered by members of certain professions. The provision at issue here is the lung law, G.L. c. 32, § 94A, which states:

any disease of the lungs or respiratory tract, resulting in total disability . . . to a uniformed member of a paid fire department . . . shall . . . be presumed to have been suffered in the line of duty, as a result of the inhalation of noxious fumes or poisonous gases, unless the contrary be shown by competent evidence.

The lung law makes this rebuttable presumption available only to a member who passed a preemployment physical exam that disclosed no evidence of the pertinent condition. *Id.* The lung law is similar in structure and many particulars to the heart law, § 94, and the cancer law, § 94B.

The lung law's purposes are apparent. Firefighters take on a severe risk of sustaining disabling lung diseases. But the causal link between a specific firefighter's work history and his or her lung disease may be very difficult to prove. *See Wilson v. Malden Ret. Bd.*, No. CR-17-104, 2023 WL 9190004, at \*14 n.7 (DALA Dec. 15, 2023). The lung law's rebuttable presumption excuses firefighters from establishing that link in the first instance. *See Diorio-McGonnell v. Essex Ret. Bd.*, No. CR-17-781 (DALA Sept. 20, 2019). *See also Vaughan v. Auditor of Watertown*, 19 Mass. App. Ct. 244, 245 (1985); *Town of Ware v. Town of Hardwick*, 67 Mass. App. Ct. 325, 328 (2006). Courts in other jurisdictions have described analogous statutes as reflecting policy decisions to compensate firefighters even in the face of factual ambiguities about the causes of their conditions. *See Spivey v. City of Bellevue*, 389 P.3d 504, 513-14 (Wash. 2017); *Wanstrom v. North Dakota Workers Comp. Bureau*, 621 N.W.2d 864, 867 (N.D. 2001); *Cunningham v. City of Manchester Fire Dep't*, 525 A.2d 714, 718 (N.H. 1987);

*Byous v. Missouri Loc. Gov't Emps. Ret. Sys. Bd. of Trustees*, 157 S.W.3d 740, 749 (Mo. Ct. App. 2005).

The requirements that trigger the lung law's presumption are present here. Mr. Selden was "a uniformed member of a paid fire department." G.L. c. 32, § 94A. He passed a pre-employment physical that disclosed no lung or respiratory issues. *Id.* He is disabled by a "disease of the lungs or respiratory tract." *Id.* Accordingly, Mr. Selden's disability must be "presumed to have been suffered in the line of duty, as a result of the inhalation of noxious fumes or poisonous gases, unless the contrary be shown by competent evidence." *Id.*

The essential question in this appeal is whether the lung law's presumption is rebutted by the evidence concerning Mr. Selden's case of COVID-19. The case law makes clear that the presumption is not easily rebutted:

The introduction of contrary evidence is not enough . . . . [T]he fact that the disability is not job-related must be 'shown' . . . by a preponderance of the evidence . . . . In effect, the presumption shifts the burden of proof from requiring the applicant to prove by a preponderance of the evidence that a job-related condition caused the disability to requiring the Board to grant the application unless it is convinced by a preponderance of the evidence that a non-job-related condition or event caused the disability.

*Williams v. Norfolk Cty. Ret. Bd.*, No. CR-03-556, at \*3 (CRAB Dec. 23, 2004). *See Sinclair v. State Bd. of Ret.*, No. CR-10-302, at \*12 (DALA July 12, 2013). *See also McLean v. City of Medford*, 349 Mass. 116, 120 (1965). By way of example, the presumption may be rebutted by evidence that the member's disabling condition predated his or her entry into service. *See Atwood v. Lawrence Ret. Bd.*, No. CR-12-258, at \*15 (DALA Jan 27, 2017).

Mr. Selden's disabling condition stems from a combination of causes, i.e., his years of firefighting coupled with his case of COVID-19. *See supra* p. 4, ¶ 10. For present purposes, it is fair to assume that only the former cause counts as "the inhalation of noxious fumes or poisonous gases." § 94A. Literally speaking, the words "fumes" and "gases" could conceivably cover air

that contains infectious particles. *See Webber v. Revere Ret. Bd.*, No. CR-00-1192, at \*8-9 (DALA Aug. 10, 2001). But the risk of contracting a virus is shared by workers in many occupations. *See* Glenn W. Garcia, *A Novel Virus Brings Novel Issues in the Area of Workers' Compensation*, 7 St. Thomas J. Complex Litig. 46, 46-47, 53-55 (2021). Given that the lung law concentrates on the unique dangers of firefighting, it is unlikely that virus-containing air is among the fumes and gases that the law means to reach. *See generally Ortiz v. Examworks, Inc.*, 470 Mass. 784, 788 (2015).

The result thus turns on whether and when a statutory presumption may be rebutted when a member's disability results *both* from the pertinent type of public-service work *and* from non-service-related facts. In such circumstances, it remains true that "a job-related condition caused the disability," but also that "a non-job-related condition or event caused the disability." *Williams, supra*, at \*3. The general guidance of cases such as *Williams, Sinclair*, and *Atwood* does not resolve this particular problem.

Other precedents reveal that the statutory presumptions are not automatically defeated whenever the member's disability is attributable in part to ineligible causes or factors. *See Webber, supra*, at \*8-10 (presumption not rebutted by the member's HIV immunodeficiency); *Setterlund v. Lexington Ret. Bd.*, No. CR-96-1234, at \*8-9 (DALA Nov. 25, 1997) (presumption not rebutted by the member's history of smoking cigarettes); *D'Amato v. Costine*, 33 Mass. L. Rptr. 556 (Middlesex Super. 2001) (presumption not rebutted by the member's history of alcohol abuse). The Superior Court in *D'Amato* explained: "Merely because something is a 'causative factor' does not show that it was *the* cause or even the *predominant* cause . . . . There frequently are multiple 'causative factors' for a particular medical condition." 33 Mass. L. Rptr. at 561-62 (emphasis added). The lung law would accomplish very little if its presumption were ineffective

whenever a firefighter's lung disease relates to more than one cause. *See Wilson*, 2023 WL 9190004, at \*14 n.7.

On the other hand, it also cannot be true that the lung law's presumption remains unrebutted whenever the member's service made even the slightest contribution toward the disability. PERAC's standard-form instructions for statutory-presumption cases appreciate this point by guiding the panelists to consider whether any "*uniquely predominant* non-service connected influence . . . caused the incapacity" (emphasis added). *See Lombardo v. Public Emp. Ret. Admin. Comm'n*, No. CR-12-159, at \*4-6 (DALA Feb. 5, 2016). An inquiry into whether a non-service-related cause of the disability "predominated" is also supported by statements of the Superior Court in *D'Amato*, 33 Mass. L. Rptr. at 561, and the magistrate in *Wilson*, 2023 WL 9190004, at \*9, \*14. This approach makes sense. Where the evidence shows that a disability resulted predominantly from irrelevant factors, the disability remains "job-related," *Williams, supra*, at \*3, only in a non-meaningful sense. An award of accidental disability retirement in such circumstances would exceed the sphere of the evidentiary problems that the lung law is designed to address. *See Wilson, supra*.

In principle, determinations as to whether the lung law's presumption is established and/or rebutted are for the finder of fact, whatever the medical panel's opinion may be. *See McLean*, 340 Mass. at 617; *Mathewson v. Contributory Ret. Appeal Bd.*, 335 Mass. 610, 615-16 (1957). Realistically, the relative impacts of smoke-inhalation and a respiratory virus on the progression of an individual's lung diseases are beyond the realm of common knowledge and experience. On such matters, a finder of fact must be guided by expert analysis. *Robinson v. contributory Ret. Appeal Bd.*, 20 Mass. App. Ct. 634, 639 (1985). *See Malden Ret. Bd. v. Contributory Ret. Appeal Bd.*, 1 Mass. App. Ct. 420, 423 (1973).



The panelists' opinions are by far the best available source of insight into whether the lung law's presumption is rebutted here. The panelists all answered this question in Mr. Selden's favor. Dr. Ashburn explained that Mr. Selden's years of firefighting made him "more susceptible to the complications of COVID." Dr. Cohen believed that Mr. Selden's prior exposures to smoke and chemicals "caused him to experience more severe complications related to his COVID infection." Dr. Zack opined that Mr. Selden's COVID-19 "d[id] not . . . outweigh the exposure suffered from a long history of employment as a firefighter." The panelists all saw a causal link between Mr. Selden's current disability and his many years of firefighting. None of them identified his case of COVID-19 as the disability's predominant cause. The board's contrary medical theories are not supported by any expert medical analysis.

**Conclusion and Order**

In view of the foregoing, Mr. Selden is entitled to retire for accidental disability. The board's decision is REVERSED.

Division of Administrative Law Appeals

/s/ Yakov Malkiel  
Yakov Malkiel  
Administrative Magistrate