COMMONWEALTH OF MASSACHUSETTS
CONTRIBUTORY RETIREMENT APPEAL BOARD

MICHAEL SIBLEY,

Petitioner-Appellee

v.

FRANKLIN REGIONAL RETIREMENT BOARD,

Respondent-Appellant.

CR-15-54

DECISION

Respondent Franklin Regional Retirement Board ("FRRB") appeals from the decision of an administrative magistrate of the Division of Administrative Law Appeals ("DALA"), reversing FRRB's decision to deny petitioner Michael Sibley's application for accidental disability retirement benefits, and ordering FRRB to convene a regional medical panel to examine Mr. Sibley. The DALA magistrate admitted fifteen exhibits into evidence, labeled 1–15. By letter dated June 14, 2017, FRRB and Mr. Sibley requested that a decision be issued based on the submissions pursuant to 801 C.M.R. 1.01(10)(c). The DALA decision is dated March 16, 2018. FRRB filed a timely appeal to us.

After a careful review of the record and consideration of the arguments presented by the parties, we adopt the magistrate's findings of facts 1 – 20 as our own with corrections as noted[1] and incorporate the DALA decision by reference. For the reasons set forth below, we affirm the DALA decision determining that Mr. Sibley met the notice requirement of G.L. c. 32, § 7, but we do so on different grounds. However, we reverse the DALA decision concluding that Mr. Sibley established a prima facie case to be examined by a regional medical panel. Affirmed in part and reversed in part.

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[1] We amend Findings of Fact 11 to reflect that Mr. Sibley's application for accidental disability retirement is dated November 19, 2013. See Exhibit 1.

Summary

We conclude that Mr. Sibley met the notice requirement under G.L. c. 32, § 7(1). Because he based his application for accidental disability retirement on the gradual deterioration theory, the repetitive work activities he was performing throughout the two-year period preceding his application forms the basis of his disability claim. However, his claim for accidental disability retirement fails because Mr. Sibley did not establish a prima facie case for entitlement to an evaluation by a regional medical panel. He did not present sufficient evidence, that if unrebutted and believed, would allow a factfinder to conclude that he is entitled to accidental disability retirement benefits. Thus, FRRB properly denied his application without convening a medical panel.

Background

Mr. Sibley was hired as a Truck Driver/Laborer for the Town of Northfield Highway Department in 1999.[2] In his capacity as a Truck Driver/Laborer, Mr. Sibley's duties included manual work in repair and maintenance of town roads, cemeteries, drainage systems, town infrastructure, as well as snow and ice removal.[3] He operated hand, pneumatic, and power tools, as well as light and heavy equipment and trucks; and lifted bricks, cinder blocks, catch basin covers, and other supplies, often in excess of 50 pounds.[4] He also lifted frames and drainage grates weighing more than 100 pounds.[5] Much of this work was performed outdoors, with exposure to adverse weather conditions.[6]

On December 28, 2010, Mr. Sibley was evaluated by Martin J. Luber, M.D., in connection with a prior workers' compensation claim for an injury to his right shoulder.[7] Dr. Luber's report noted that Mr. Sibley had a known right shoulder rotator cuff tear, and that he was experiencing increasing left shoulder pain.[8] Based on this evaluation, Dr. Luber suspected that Mr. Sibley had a left shoulder rotator cuff tear as well, though Mr. Sibley declined a magnetic resonance imaging (MRI) scan of the left shoulder to confirm.[9]

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[2] Exhibit 12; Finding of Fact 1.
[3] Ex. 4
[4] Ex. 4, 9; FF 2–3, 13.
[5] FF 2.
[6] Ex. 4; FF 3.
[7] Ex. 5; FF 4.
[8] *Id.*
[9] Ex. 5.

In December 2012, Mr. Sibley reported increasing pain in his left shoulder to his treating physician, John Corsetti, M.D.[10] On December 14, 2012, an MRI scan of the left shoulder showed a complete retracted rotator cuff tear with atrophy and retraction to the glenoid, as well as arthritic changes to the AC joint.[11] Between January 2013 and August 2013, Mr. Sibley attended several follow-up visits with Dr. Corsetti and received a series of cortisone injections to both shoulders.[12] Mr. Sibley last worked on or about August 29, 2013.[13]

On November 19, 2013**,** Mr. Sibley applied for accidental disability retirement benefits, alleging disability due to bilateral rotator cuff tears in both left and right shoulders as a result of cumulative stress of heavy work activities.[14] Dr. Corsetti completed the Physician's Statement in support of his application. He reported that Mr. Sibley suffered from bilateral rotator cuff tears of the shoulders and noted the dates of injuries as 2001 for the right shoulder from a lifting injury and December 2010 for the left shoulder from chronic compensatory overuse. He indicated that Mr. Sibley was last able to perform his duties on August 29, 2013.[15]

On December 19, 2013, Mr. Sibley filed an Employee's Clam with the Department of Industrial Accidents ("DIA") describing the injury to his shoulders as "bilateral rotator cuff tears" as a result of "cumulative trauma, lifting, shoveling."[16] On December 23, 2013, Tom Hutcheson prepared an Employer's First Report of Injury, describing the injury as "cumulative trauma, lifting, shoveling" with a diagnosis of bilateral rotator cuff tears.[17] Both reports listed the date of injury as September 6, 2013, and the first day of total or partial incapacity as September 9, 2013.[18]

By letter dated March 5, 2014, Dr. Corsetti expressed that Mr. Sibley was totally disabled due to cumulative stress of work activities through and about September 6, 2013,

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[10] FF 5.
[11] Ex. 6, 10; FF 6.
[12] Ex. 6.
[13] Ex. 1; FF 7.
[14] Ex. 1; FF 11–12.
[15] Ex. 2; FF
[16] Ex. 13; FF 9.
[17] Ex. 12; FF 8.
[18] Ex. 12, 13; FF 8, 9.

indicating his work activities as the major cause of the need for treatment in both shoulders.[19] That same day, Steven Selden, M.D., performed an independent orthopedic evaluation of Mr. Sibley.[20] Dr. Selden noted that the listed date of injury, September 6, 2013, did not refer to a specific incident but the last day Mr. Sibley was actively employed due to cumulative trauma.[21] Dr. Selden's notes indicate that the rotator cuff tears were, more likely than not, causally related to repetitive work over several years.[22]

On March 12, 2014, the DIA issued an Order of Payment ("Order") for workers' compensation benefits pursuant to G.L. c. 152, §§ 34 and 35, beginning January 12, 2014 (the day after Mr. Sibley retired) based on the claims filed with the DIA.[23] On August 15, 2016, a lump sum settlement agreement was reached, listing several dates of injury: August 17, 2001; January 4, 2006; March 24, 2008; June 16, 2009; and September 6, 2013. The agreement provided the following history related to Mr. Sibley's claim:

> The employee has a history of unreported injury at work involving his right shoulder in 2001. He had gradual increased right shoulder pain and eventually was evaluated by Dr. John Corsetti in January 2006. He underwent an MRI that showed a massive irreparable rotator cuff tear that was treated conservatively and was asymptomatic by November 2006. He continued working his regular job that involved daily repetitive heavy work activities and had an exacerbation of right shoulder pain in August 2010. He was seen again by Dr. Corsetti and underwent an injection. In December 2010, he had increasing left shoulder pain, with no specific injury but felt to be caused from his heavy work activities. He was evaluated by Dr. Martin Luber and underwent an MRI of the left shoulder that showed a massive rotator cuff tear, irreparable. Due to his persistent bilateral shoulder pain and his continuous work in a heavy duty capacity, Dr. Luber opined the employee's work activities were a major cause of his total disability and need for treatment for his bilateral shoulders.[24]

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[19] Ex. 7
[20] Ex. 8.
[21] *Id.*
[22] *Id.*
[23] Ex. 3; FF 14.
[24] Ex. 14

At the request of the DIA, Kuhrt Wieneke, M.D., evaluated Mr. Sibley on May 13, 2014.[25] Dr. Wieneke agreed that there was no specific work injury to the left shoulder, but that it was more likely than not related to long-term heavy work activities.[26]

Mr. Sibley stipulates that he did not file an injury report with the FRRB within ninety days of suffering an injury while in the performance of his duties, nor was one filed on his behalf within fifteen days of suffering the injury.[27] By letter dated February 5, 2015, FRRB denied Mr. Sibley's application for accidental disability retirement benefits without convening a regional medial panel.[28] The letter stated the reasons for denial as the injury to the right shoulder was time barred pursuant to the notice requirements of G.L. c. 32, §§7(1) and (3); the 2006 injury was an exacerbation of the original injuries and not an acute injury; and the left shoulder injury was not compensable because Mr. Sibley's position did not expose him to an identifiable condition not common to all or a great many occupations.[29] On February 13, 2015, Mr. Sibley filed a timely appeal to DALA, indicating he was pursuing a claim for his left shoulder only.[30]

On March 16, 2018, the DALA magistrate issued a final decision reversing FRRB's decision to deny Mr. Sibley accidental disability retirement benefits without convening a regional medical panel. The magistrate determined that Mr. Sibley had met the notice requirements by virtue of being awarded workers' compensation benefits related to cumulative stress in his left shoulder resulting in a rotator cuff tear. The magistrate further concluded that Mr. Sibley had offered preliminary evidence to indicate that the repetitive nature of his heavy labor activities distinguished his occupation from everyday life activities and those of a great many other occupations.

Discussion

To be entitled to an examination by a regional medical panel, Mr. Sibley must first provide sufficient evidence that, if unrebutted and believed, would allow a fact finder to conclude that he satisfies the threshold requirements to qualify for accidental disability

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[25] Ex. 9; FF 1.3
[26] Ex. 9; FF
[27] FF 15–16.
[28] Ex. 10; FF 18.
[29] *Id.*
[30] Ex. 11; FF 19–20.

retirement. *Robert Happy v. Worcester Regional Retirement Board*, CR-13-281 (DALA 2014) ("to reach the medical panel stage, an applicant for accidental disability retirement must make out a prima facie case"); *David Church v. Marblehead Retirement Board*, CR-10-38 (DALA 2013) (an applicant must make "a threshold showing that he is entitled to a medical panel to examine him"); *Lowell v. Worcester Regional Retirement Board*, CR-06-296 (DALA 2009) ("the statute does not make a medical panel's certification a prerequisite to denying accidental disability retirement benefits"). Consequently, if one or more of the *prima facie* requirements are not met, the reviewing retirement board may properly deny an application for accidental disability retirement without convening a medical panel.

To establish a *prima facie* case for accidental disability retirement benefits, Mr. Sibley must show that (1) he is physically or mentally incapable of performing the essential duties of his job, (2) his disability is likely to be permanent, and (3) he sustained a personal injury or hazard undergone that was the proximate cause of his disability. G.L. c. 32, §7(1). To establish causation, Mr. Sibley must show that this personal injury either stemmed from a single work-related event, or by gradual deterioration as a result of exposure to "an identifiable condition that is not common or necessary to all or a great many occupations." *Adams v. Contributory Retirement Appeal Board*, 414 Mass. 360, 365 (1993); *Kelly's Case*, 394 Mass. 684, 688 (1985); *Zerofski's Case*, 385 Mass. 590, 595 (1982). Either theory must satisfy "the strict causation standard[.]" *Blanchette v. Contributory Retirement Appeal Bd.*, 20 Mass. App. Ct. 479, 485 (1985).

Additionally, Mr. Sibley must provide proper notice of the injury pursuant to G.L. 32, §7(1) or satisfy an exception to this requirement. G.L. c 32, § 7(1)[31] limits the incident(s) that form the basis of Mr. Sibley's accidental disability retirement claim to an injury sustained or a hazard undergone to those occurring within two years prior to the filing of his application, or if occurring earlier, notice of the injury or hazard must be given to the board within ninety days of its occurrence by Mr. Sibley or on his behalf. *See also O'Brien v. State Board of*

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[31] G.L. c. 32, § 7 provides in pertinent part the following:

> "no such retirement shall be allowed unless such injury was sustained or such hazard was undergone within two years prior to the filing of such application or, if occurring earlier, unless written notice thereof was filed with the board by such member or in his behalf within ninety days after its occurrence."

Retirement, CR-11-755 (DALA 2015) ("limiting review to matters that occurred in the recent past makes it easier to determine their validity"). However, the lapse of time or the lack of notice will not bar his claim for accidental disability retirement where he received "payment on account of such injury or hazard under the provisions of chapter one hundred and fifty-two," the Workers' Compensation statute. G.L. c. 32, § 7(3).

While it is not disputed that Mr. Sibley experienced a permanently disabling injury, whether a prima facie case was established for an evaluation by a regional medical panel and whether such injury satisfied the notice requirement merit some discussion.

1. Causation Based on Gradual Deterioration

While he applied for accidental disability retirement based on a personal injury, Mr. Sibley proceeds on the gradual deterioration theory of causation, such that he was exposed to an identifiable condition not common and necessary to all or a great many occupations. Evaluations by Dr. Corsetti, Dr. Selden, and Dr. Wieneke independently assess Mr. Sibley as having no specific date of injury, but that the bilateral rotator cuff tear, more likely than not, is related to repetitive long-term heavy work activities.[32]

In *Adams v. Contributory Retirement Appeal Board*, the Supreme Judicial Court established that the "frequency" and "intensity" of the daily activity of the applicant's occupation compared to those of other occupations are the factors which distinguish compensable injuries from those caused by general wear and tear. *Adams*, 414 Mass. at 365. Accordingly, injuries which result from general wear and tear, even where due to long-term and frequent activity, are not injuries for which the retirement statute provides a remedy.

The DALA magistrate concluded that Mr. Sibley's duties, which required him to frequently lift equipment and materials in excess of 50 pounds, often outdoors and subject to adverse and changing weather conditions, may have distinguished his duties as an uncommon hazard. However, it is Mr. Sibley's burden to establish the causal nexus between his injury and his disability. *See Campbell v. Contributory Retirement Appeal Bd.*, 17 Mass. App. Ct. 1018, 1019 (1984). We conclude that he has failed to do so. This decision does not in any

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[32] While his accidental disability retirement application was based on bilateral rotator cuff tears of both the left and right shoulders, Mr. Sibley indicated in his Memorandum of Specific Objections that he was seeking accidental disability retirement based a rotator cuff tear of the left shoulder. See Petitioner's Memorandum at *3. See also Ex. 11; FF 19, 20.

manner diminish the important and difficult work Mr. Sibley performed on behalf of the town of Northfield, but it is based on the strict causal connection required for entitlement to accidental disability retirement. *Blanchette v. Contributory Retirement Appeal Bd*., 17 Mass. App. Ct. 1018 (1984).

We have consistently held that heavy labor, in and of itself, is not a hazard uncommon to many occupations. *See Loura v. Taunton Retirement Board*, CR 13-186 (CRAB 2021) (gradual deterioration of underlying disc disease culminating in a thoracolumbar sprain as a result of cumulative heavy labor in water maintenance did not expose petitioner to an uncommon hazard); *Lee Parent v. Worcester Regional Retirement Board*, CR-11-659 (CRAB 2013) ("performing firefighting tasks, including those requiring high levels of physical activity is not the sort of 'identifiable condition' that is compensable"); *Lyman Maccabee v. Worcester Regional Retirement Board*, CR-08-757 (DALA 2012) (duties of a custodian, including pushing and pulling, heavy lifting, carrying, and moving, were not uncommon hazards); *Frank Ciampa v. Saugus Retirement Board*, R-00-1027 (DALA 2001; *aff'd* CRAB 2001) (stating that repetitive heavy lifting and manual labor is an activity common to many occupations in the field of skilled labor). Many other occupations, like Mr. Sibley's role in town infrastructure maintenance, expose the employee to heavy outdoor labor in inclement conditions. Such occupations include, but are not limited to, farm labor, construction work, water and infrastructure maintenance, waste disposal, and firefighting.

In this instance, Mr. Sibley has not established that his occupation as a Truck Driver/Laborer exposed him to a hazard that is distinguishable from those of many other occupations which require heavy and consistent outdoor manual labor. Rather, the facts of Mr. Sibley's case are consistent with those in which accidental disability retirement benefits have been denied due to the petitioner's disability stemming from wear and tear despite lengthy periods of frequent activity and manual labor. *See Spalla's Case*, 320 Mass. 416, 418 (1946) ("bodily wear and tear resulting from a long period of hard work" is not a compensable injury); *Doyle's Case*, 269 Mass. 310 (1929) (finding no compensable injury where evidence showed the employee's back had been weakened by years of physical exertion); *Burns' Case*, 266 Mass. 516 (1929) (denying compensation for heart deterioration caused in part by miles of nightly walking); *Case of Reardon,* 275 Mass. 24 (1931) (determining that injury to a moulder's hand caused by the gradual breaking down of tissue as

a result of years of continuous labor in the course of his employment was not compensable). The record contains evaluations by Dr. Corsetti, Dr. Selden, and Dr. Wieneke, which indicate that Mr. Sibley's bilateral rotator cuff tears were more likely than not related to repetitive long-term heavy work activities. Mr. Sibley and his employer also noted the cumulative stress of repetitive heavy work activities to be his injury or hazard. Based on these descriptions and the evidence in the record, we conclude that his disability did not result from an "identifiable condition ... that is not common and necessary to all or a great many occupations," *Sugrue v. Contributory Retirement Appeal Bd.,* 45 Mass. App. Ct. 1, 5, 694 N.E.2d 391 (1998), quoting from *Blanchette v. Contributory Retirement Appeal Bd.,* 20 Mass. App. Ct. at 487, 481 N.E.2d 216, but is more akin to an injury from wear and tear and is not compensable under the retirement law.

Based on the above reasons, Mr. Sibley failed to establish a prima facie case for an evaluation by a regional medical panel. FRRB properly denied Mr. Sibley's application for accidental disability retirement without convening a medical panel.

2. Notice

G.L. c. 32, § 7(1) provides in pertinent part that no accidental disability retirement benefits "shall be allowed unless such injury was sustained or such hazard was undergone within two years prior to the filing of such application or, if occurring earlier, unless written notice thereof was filed with the board by such member or in his behalf within ninety days after its occurrence." Section 7(3) provides an exception to the notice requirement for an injury sustained or hazard undergone occurring earlier than the two-year period, where "a member receive[s] payments on account of such injury or hazard under the provisions of chapter one hundred and fifty-two," the Workers' Compensation statute. G.L. c. 32, §7(3).

We do not agree with the magistrate that Mr. Sibley satisfied the exception to the notice requirement in G.L. c. 32, § 7(3) by virtue of his receipt of workers' compensation "payments on account of such injury or hazard." *Zajac v. State Bd. Of Retirement*, CR-12-444 (DALA 2014, *aff'd* CRAB 2015) (receipt of workers' compensation years after the alleged injury or incidents cannot serve the purpose of the notice exception, which is intended to allow for an opportunity to investigate). Instead, we conclude that Mr. Sibley met the notice requirement because the repetitive heavy work activities he performed throughout the two-year period preceding his application for accidental disability retirement forms the basis

of his claim pursuant to the gradual deterioration theory. As he explained in his application, Mr. Sibley sought accidental disability because he became disabled as a result of the cumulative stress of repetitive heavy work activities he performed on a regular basis.[33] In this instance, there would not be any specific dates of injuries associated with his claim for accidental disability retirement but instead, Mr. Sibley's application would be based on the cumulative effects of performing repetitive heavy work in his position for the two-year period preceding his application date. The cumulative effects of the work he performed during this period resulted in his ceasing work on or around August 29, 2013 and his date of disability of September 6, 2013 noted in his claim for workers' compensation. Nevertheless, while Mr. Sibley meets the notice requirement under G.L. c. 32, § 7(1), his claim for accidental disability retirement fails because he did not establish a prima facie case for an evaluation by a regional medical panel as discussed above.

Conclusion

Mr. Sibley satisfied the notice requirement because his claim for accidental disability retirement is based on a gradual deterioration of his condition during the two-year period preceding his application for accidental disability retirement. Nevertheless, he failed to establish a prima facie case for an evaluation by a regional medical panel because his injury was in the form of a "wear and tear" injury. FRRB properly denied Mr. Sibley's application for accidental disability retirement without convening a medical panel. The DALA decision reversing FRRB's denial of accidental disability retirement benefits and awarding Mr. Sibley an examination by a regional medical panel is *reversed*. The DALA decision determining that Mr. Sibley met the notice requirement is *affirmed*.

SO ORDERED.

CONTRIBUTORY RETIREMENT APPEAL BOARD

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[33] Ex. 1.

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