

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals

Maria Simpreux,
Petitioner

v.

Docket No. CR-14-770

Dated: March 25, 2016

Cambridge Retirement Board,
Respondent

Appearance for Petitioner:

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Appearance for Respondent:

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Administrative Magistrate:

James P. Rooney, Esq.

Summary of Decision

Denial of application for accidental disability retirement based on a failure to provide notice of the initial injury to the retirement board and a lack of receipt of workers' compensation benefits for the injury is affirmed. There is no evidence a notice of injury was filed with the retirement board, a lump sum settlement without admission of liability on the part of the employer of a workers' compensation claim filed more than five years after the injury is not the workers' compensation payment on account of injury contemplated by M.G.L. c. 32, § 7(3)(a), and there is no evidence of an injury within the performance of the employee's duties within two years of the filing of the application for accidental disability retirement.

DECISION

Maria Simpreux¹ appeals a November 12, 2014 decision of the Cambridge Retirement

¹ Petitioner's name is alternatively spelled Simpreux or Simpreaux in the record. I will use Simpreux because that is the spelling on her application for accidental disability retirement and on her appeal of the Cambridge Retirement Board's denial of her application.

Board denying her application for accidental disability retirement. I held a hearing in the appeal on February 9, 2016 at the Division of Administrative Law Appeals, which I recorded digitally. I accepted fifteen documents into evidence at the hearing. Ms. Simpreux was the sole witness. The record closed on March 9, 2016 when both parties filed post-hearing briefs. I mark Ms. Simpreux's prehearing memorandum as Pleading A, her post-hearing brief as Pleading B, the Board's prehearing memorandum as Pleading C, and its post-hearing brief as Pleading D. Ms. Simpreux's counsel attached a decision by the Department of Industrial Accidents to his brief. I mark that decision as Exhibit 16.

Findings of Fact

Based on the testimony and evidence presented, and the reasonable inferences drawn from them, I make the following findings of fact:

1. Maria Simpreux, who was born in 1955 in El Salvador, was employed by the Cambridge Health Alliance as a mental health worker/health aide from 1996 to 2009. (Pleading A.) As a consequence of her employment, she became a member of the Cambridge Retirement System. (Pleading C.)
2. The Cambridge Health Alliance required its employees to obtain annual flu shots.² In October 2007, Ms. Simpreux was told to join other employees in getting a flu shot. After receiving the shot, she went back to work, but a few hours later some of her fellow employees told her she looked unwell. Her face and hands were red, and her lips were swollen. She went

² This was in accordance with public health regulations requiring that:

Each hospital shall . . . at no cost to any personnel, provide or arrange for vaccination of all personnel who cannot provide proof of current immunization against influenza.

to the Alliance's emergency room three times over the next two days, and was given benadryl. She also saw her personal physician, David Baron, M.D., who also worked for the Cambridge Health Alliance. She was admitted to the hospital for one week because of her reaction to the flu shot. (Simpreux testimony.)

3. Ms. Simpreux spoke to her boss, Mary McLean, about filing a notice of injury. Ms. McLean assured her that she had filed one, but none can be located.³ (Simpreux testimony.)

There is also no evidence that she applied for or received workers' compensation for the week she spent out of work shortly after receiving the flu shot.

4. In January 2008, she was seen again by Dr. Baron for continued redness at the site of the vaccination. After being prescribed Keflex, an antibiotic, for suspected cellulitis, she developed a rash on her body and a fever. Dr. Baron thought she had a "serum sickness" caused by the flu vaccine. He prescribed her benadryl and a steroid cream to treat the rash. (Ex. 5.)

5. In February 2009, Ms. Simpreux again was treated for a rash in the same spot. She was hospitalized for five weeks at Massachusetts General Hospital to treat the rash, a fever, and malaise. (Exs. 5 and 6.)

6. Around October 2009, she was diagnosed with Still's disease.⁴ (Ex. 5.) On October 10,

³ The record contains an undated "R.I.S.K. Down Time Occurrence Report Form" concerning Ms. Simpreux's October 2007 injury. It is signed by a nurse who prepared it years after the October 2007 flu shot, as it refers to much later events, including the surgeries and multiple organ failures Ms. Simpreux suffered. It refers to Ms. Simpreux as "staff," and hence I assume it is a Cambridge Health Alliance form, but there is no indication on the document whether or when it was filed with the Health Alliance.

⁴ Still's disease is "a disorder featuring inflammation, is characterized by high spiking fevers, salmon-colored rash that comes and goes, and arthritis. Still's disease is also referred to as systemic-onset juvenile idiopathic arthritis. Still's disease was first described in children, but it is now known to occur, much less commonly, in adults." The cause is unknown. It can lead to inflammation of internal organs, including inflammation around the heart (pericarditis).

2009, after she began showing mental status changes, she was seen at the Massachusetts General Hospital emergency room.⁵ She had a seizure in the emergency room, then suffered acute renal failure and was put on a ventilator. (Ex. 6.) As described by Dr. Baron, in a note he wrote in her medical records on February 3, 2010, Ms. Simpreux then underwent a series of long and complicated hospitalizations. She “[a]lmost died,” had two strokes, seizures, and pericarditis, and was in the MGH intensive care unit for weeks. Later that year, she had a brain abscess, seizures related to the brain abscess, and continued pericarditis. (Ex. 5.) She also suffered from liver failure and hearing loss that affected her balance. (Simproux testimony.)

7. By February 2010, Ms. Simpreux was chronically ill. Dr. Baron noted that her workplace had asked her to go on long term disability because of her inability to work. (Ex. 5.)

8. Ms. Simpreux was last able to perform her job on October 19, 2009, although the formal end of her employment occurred later. According to the Cambridge Health Alliance, her employment ended on July 1, 2011. (Ex. 10.) She treats her employment as ending on April 3, 2010. (Ex. 7.)

http://www.medicinenet.com/stills_disease/article.htm.

The Cambridge Health Alliance medical records are missing pages, including the page listing the date on which she was diagnosed with Still’s disease. The page that first mentions Still’s disease lists a subsequent visit on October 5, 2009. (Ex. 5.) The Massachusetts General Hospital records list a an emergency room visit on October 10, 2009, in which she is described as having a “history of Still’s disease.” This is evidently a reference to a note in the MGH’s records of an evaluation made of her condition on April 6, 2009, in connection with her hospitalization for the recurring skin rash. The doctor’s note from the evaluation stated that the presumptive diagnosis was of adult onset Still’s disease, but that “we do not have any explanation of that right arm rash which did not look like typical adult Still disease rash.” (Ex. 6.)

⁵ When she was examined in the emergency room on October 10, 2009, she did not have a skin rash. (Ex. 6.)

9. On May 10, 2013, Ms. Simpieux filed a claim for workers' compensation based on an injury in October 2007. That claim was withdrawn by the Department of Industrial Accidents conciliation unit on May 30, 2013.⁶ Ms. Simpieux then filed a new claim a few days later using an injury date of April 3, 2010. (Exs. 7 and 10.) That claim was administratively withdrawn by the Department of Industrial Accidents on July 3, 2013. According to the settlement she ultimately reached with the Health Alliance's insurer, both claims were withdrawn because of "statute of limitations, lack of notice to the employer, and causal relationship issues." (Ex. 7.) Ms. Simpieux appealed the latter withdrawal and on May 7, 2015 entered into a lump sum settlement. Liability was not established, but the Cambridge Health Alliance's insurer agreed to pay her \$10,000, split between future vocational rehabilitation payments and payments for M.G.L. c. 152, § 36 benefits for specific injuries, which include hearing loss. (Ex. 7.)

10. Ms. Simpieux applied for accidental disability retirement benefits on May 17, 2013. She described her injury as "[s]evere anaphylactic reaction to influenza vaccine, resulting in chronic pain and Still's disease." She stated that she had received the vaccine in October 2007, and that it caused an immediate reaction, which ultimately led to her inability to perform her job. (Ex. 8.)

11. Her application was supported by a physician's statement from Ronald Nasif, M.D., of Parkway Orthopedics and Sports Medicine. Dr. Nasif concluded that she was permanently disabled following a "severe anaphylactic reaction in response to an influenza vaccine which she received in October 2007." He opined that her allergic reaction to this vaccination caused the "onset of systemic changes consistent with . . . Still's disease." (Ex. 9.)

⁶ In an email, an attorney who represented either the Cambridge Health Alliance or its insurer reported that the claim had been withdrawn because it had not been filed within the four-year statute of limitations applicable to workers' compensation claims. (Ex. 10.)

12. The Cambridge Health Alliance, in its employer's statement, disputed that Ms. Simpreux had a disability related to her work. It noted that the medical record of a visit to MGH on March 10, 2009 includes a report that she had a "history of arthralgias (joint pains) dating back to 2002" and had a "rash occurring on exposure to sunlight on her upper body, including her arms, episodically occurring since 2002." (Ex. 10.)

13. On November 13, 2013, the Cambridge Retirement Board wrote to the Public Employee Retirement Administration Commission (PERAC) asking, in the absence of a notice of injury filed within two years of the injury, as required by the retirement statute, the Board could rely on emergency room records or co-employee witness statements. (Ex. 11; M.G.L. c. 32, § 7(1).) PERAC responded that, unless Ms. Simpreux could prove receipt of workers' compensation benefits, emergency room records or witness statements would not substitute for the statutorily required notice of injury. (Ex. 12.)

14. On November 12, 2014, the Retirement Board sent a letter to Ms. Simpreux describing its exchange with PERAC and concluding that "while [the Board has] great sympathy for your medical condition and wish[es] you the best of health, [it was] compelled to vote to deny your Application for Accidental Disability Retirement benefits because the claimed injury was on October 19, 2007 and the record does not contain a Notice of Injury." (Ex. 13.) Ms. Simpreux timely appealed. (Ex. 14.)

15. On November 13, 2014, Dr. Baron, Ms. Simpreux's primary care physician, wrote a letter describing the reasons for her delay in seeking disability retirement. He noted that she became very ill in 2009 from a "complex and rare illness" caused by her reaction to a flu vaccine that put her in a coma, required brain and open heart surgeries and caused her permanent brain injury. He stated that:

Because of such debilitating complications, the need for extensive services, and her cognitive and physical injuries Maria was not able to get in to apply for disability services. Also, she had high hopes that she could return to work, which she loves and only over time came to accept that this was not possible. Her delay in applying should in no way be counted against her as she was fighting for her life in early years, then accommodating to her serious, permanent disabilities, including her cognitive disorganization, which made it hard for her to organize to apply.

(Ex. 4.)

16. On December 19, 2014, Department of Industrial Accidents Senior Judge Omar Hernandez remanded Ms. Simpieux's claims to an administrative judge. The remand was for the purpose of resolving when Ms. Simpieux should have realized that the October 2007 vaccination was the likely cause of her health problems, and thus whether her claims were filed within the workers' compensation statute of limitations. (Pleading C.) No decision following this remand is in the record.

Discussion

An applicant may receive accidental disability retirement benefits when she can show permanent and disabling injuries that were sustained during the performance of essential job duties by "a specific incident or series of incidents" or as a product of "hazards undergone" that are not common to other professions. M.G.L. c. 32, § 7(1). However, no application for accidental disability retirement can 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.

M.G.L. c. 32, § 7(1). Nonetheless, "[l]apse of time or failure to file notice of an injury sustained or a hazard undergone" . . . shall not be a bar to proceedings [for accidental disability retirement benefits] . . . if such member received payments on account of such injury or hazard under the

provisions of chapter one hundred and fifty-two [the workers' compensation statute]." M.G.L. c. 32, § 7(3)(a).

Ms. Simpieux's application is based on an injury that she alleges occurred when she received a job-required vaccination in October 2007. She did not file for accidental disability retirement benefits until more than five years later. There is no evidence that either Ms. Simpieux or her supervisor filed a notice of injury with the Cambridge Retirement Board concerning the negative reaction she had to the 2007 vaccination that caused her to be hospitalized for one week.⁷ Thus, events more than two years before the filing of her application may not be considered as a basis for awarding accidental disability retirement, unless she received workers' compensation benefits for the injury that is the basis of her application. Looking back only two years from the date of her application will not help Ms. Simpieux because she stopped working in October 2009, more than two years before she filed her

⁷ Ms. Simpieux's counsel has pointed to workers' compensation cases in which an employee failed to file a notice of injury, but this failure was excused because a supervisor's awareness of the injury was imputed to the employer. *Davidson's Case*, 338 Mass. 228, 231, 154 N.E.2d 601, 604 (1958). Even though the evidence shows that Ms. Simpieux's supervisor knew of her negative reaction to the 2007 vaccination, this is not relevant under the retirement statute because the notice must be to the retirement board, not just the employer. M.G.L. c. 32, § 7(1). Section 7(3) provides that if the "record of such injury sustained or hazard undergone is on file in the official records of [her] department," this will satisfy the notice requirement, but only when the employee is not eligible for workers' compensation because she is a member of groups 2, 3, or 4. This exception does not apply to Ms. Simpieux, who was eligible for workers' compensation.

Counsel also argues that Ms. Simpieux did not know of the connection between her reaction to the vaccination and her subsequent health problems until she was evaluated by Dr. Nasif in 2013. Even if true, this does not aid her claim. She knew in October 2007 that she had a negative reaction to the flu shot that caused her to be hospitalized. Thus, she had sufficient knowledge at the time to file the notice of injury. That she later learned that the 2007 vaccination may have caused her subsequent disabling health problems gave her a basis on which to file for accidental disability retirement, but did not relieve her of the obligation to file a notice of injury for what, at the time, would not have been so obviously a significant injury.

application. Consequently, she could not have suffered an injury while in the performance of her duties within the two-year period prior to her application.

Ms. Simpreux did apply for workers' compensation benefits, but not until the same month in which she filed for accidental disability retirement, more than five years after she had received the vaccination to which she attributes her later serious health problems. She ultimately received a \$10,000 lump sum settlement. This settlement is not the sort of workers' compensation payment that would excuse a failure to file a notice of injury with the retirement board. The notice requirement and the workers compensation provision both serve similar purposes. The retirement board, in the case of notice filed with it, and the employer, in case of a workers' compensation claim, are each put on notice of an alleged work injury and will have the opportunity, reasonably contemporaneously, to gather information and evaluate the legitimacy of the claim. When the claim is not filed until more than five years after the injury-causing event, that opportunity would have substantially dissipated.

It is not clear that Ms. Simpreux's filing occurred after the statute of limitations applicable to workers' compensation claims had expired. Such claims must be filed "within four years from the date the employee first became aware of the causal relationship between his disability and [her] employment." M.G.L. c. 152, § 41. Ms. Simpreux did not become seriously ill, let alone disabled, until 2009, and thus it is possible that her initial application for workers' compensation benefits was timely.⁸ Senior Judge Hernandez's remand of Ms. Simpreux's

⁸ Section 41 of Chapter 152 also provides that:

No proceedings for compensation payable under this chapter shall be maintained unless a notice thereof shall have been given to the insurer or insured as soon as practicable after the happening thereof.

claims for further review by a Division of Industrial Accidents administrative judge demonstrates that this workers' compensation issue has yet to be resolved.

But whether timely or not, this initial application for workers' compensation benefits was withdrawn by the Department of Industrial Accidents. Ms. Simpreux filed a new claim, which was withdrawn again by the Department of Industrial Accidents. She appealed this second withdrawal, and then settled her claim for a lump sum, without an acceptance of liability by her employer.

A lump sum settlement entered into in connection with an untimely workers' compensation claim without acceptance of liability by the employer has previously been treated by DALA as a payment in lieu of workers' compensation, and thus not a payment under the provisions of Chapter 152. *Fant v. Middlesex County Ret. Bd.*, Docket No. CR-13-68 (Mass. Div. of Admin. Law App., July 31, 2013). Here, her initial claim may ultimately be found to be timely and the settlement payment was for hearing loss, which is a specific type of injury for which payments are provided under the workers' compensation statute. Nonetheless, it was a lump sum settlement entered into years after the injury and without admission of liability by the employer. The Contributory Retirement Appeal Board has held that such settlements made in compromise are not payments on account of injury that would satisfy the requirements of Section 7(3). It has noted further that "[l]ump sum settlements of workers' compensation claims cannot serve to avoid or extend the two-year deadline for giving notice of injury because they do not provide timely notice of the claim." *Coletti v. State Board of Retirement*, CR-10-306, Decision at 2 (CRAB, Jul. 3, 2014).

Based on the description of events in the lump sum settlement, lack of the notice required by this section was raised as an issue.

Furthermore, this payment could not help Ms. Simpreux meet the requirements of Section 7(3) because her second claim for workers' compensation, which is the one that settled, was for an injury occurring on April 30, 2010. In order for a workers' compensation payment to qualify under Section 7(3), it must be for the same injury on which the applicant bases a claim for accidental disability retirement. Ms. Simpreux's application for accidental disability retirement is based on an injury occurring in October 2007, not on an injury in 2010 – as it could not be for accidental disability retirement purposes when she had last worked in October 2009. Thus, even if the lump sum settlement could count for Section 7(3) purposes if the claim was based on an April 30, 2010 injury, it cannot waive the failure to file a notice of injury for the October 2007 vaccination reaction injury. As a consequence, Ms. Simpreux's claim can be based only on events within the two years before she filed her accidental disability retirement application. Because no work injury occurred within those two years, her application for accidental disability retirement cannot be granted.

Although there was a dispute as to whether Ms. Simpreux's disability was caused by the October 2007 vaccination, the Cambridge Retirement Board need not have processed the matter further because at "any stage of a proceeding on an . . . accidental disability retirement application the retirement board may terminate the proceeding and deny the application if it determines that the member cannot be retired as a matter of law." 840 C.M.R. § 10.09(2). I credit the willingness of the Board to contact PERAC to inquire whether there was a way to process Ms. Simpreux's application given the seriousness of her injury. However, I must conclude that there is no exception to the notice requirement that would allow her application to

proceed and, accordingly, I affirm the Cambridge Retirement Board's denial of her application.

DIVISION OF ADMINISTRATIVE LAW APPEALS

James P. Rooney
First Administrative Magistrate

Dated: March 25, 2016