

**COMMONWEALTH OF MASSACHUSETTS**

**Middlesex, ss.**

**Division of Administrative Law Appeals**

**Marybeth Smith,**  
Petitioner,

No. CR-19-493

Dated: April 22, 2022

v.

**Gloucester Retirement Board and Public  
Employee Retirement Administration  
Commission,**  
Respondents.

**Appearance for Petitioner:**

Joseph M. Orlando, Jr., Esq.  
One Western Avenue  
Gloucester, MA 01930

**Appearance for the Gloucester Retirement Board:**

Thomas F. Gibson, Esq.  
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**Appearance for the Public Employee Retirement Administration Commission:**

Judith Corrigan, Esq.  
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**Administrative Magistrate:**

Yakov Malkiel

**SUMMARY OF DECISION**

The petitioner's late husband served as a firefighter from 1994 to 2012, when he died of cancer. The evidence did not establish that his death was caused by a single fire at a particular time. The petitioner was therefore ineligible for the special benefit awarded to survivors of firefighters killed "in performance of duties." G.L. c. 32, § 100.

## DECISION

### Procedural Posture

Petitioner Marybeth Smith is the widow of firefighter Michael E. Smith, who lost his life to cancer in 2012. Mrs. Smith appeals from a decision of the Gloucester Retirement Board denying her application for a surviving spouse's benefit under G.L. c. 32, § 100.

The board first reviewed and denied Mrs. Smith's application in 2013. On appeal, Administrative Magistrate Mark L. Silverstein held an evidentiary hearing, heard testimony from Mrs. Smith, and admitted 34 exhibits. In his ensuing decision, Magistrate Silverstein made 61 numbered findings of fact and remanded the case to respondents for further proceedings. *Smith v. Gloucester Ret. Bd.*, No. CR-13-249 (DALA Oct. 24, 2018) (*Smith I*).

On remand, PERAC empaneled three physicians to provide medical opinions for the board's consideration.<sup>1</sup> After reviewing the panel's opinions, the board again denied Mrs. Smith's application, concluding that she had not made the factual showing that § 100 requires. Mrs. Smith again appealed.

The parties filed cross-motions for summary decision. Thereafter, the appeal was reassigned to the undersigned magistrate. An order dated March 16, 2022 identified errors in the legal standards applied by the medical panelists and solicited the parties' feedback on how to proceed toward a speedy and fair disposition. The parties then waived the right to an evidentiary hearing. 801 C.M.R. § 1.01(10)(c). At the same time, they asked for the appeal to be decided based on the existing record, including the panelists' legally flawed opinions.

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<sup>1</sup> Two of the physicians provided revised opinions at PERAC's request, because their original opinions relied in error on the "cancer presumption" discussed *infra*.

I admit into evidence the thirty-four exhibits admitted in *Smith I*, marked A-K and 1-23. I also admit twenty-five exhibits attached to the briefs in the instant appeal. The exhibits offered by Mrs. Smith are renumbered AA-OO in DALA's case file.<sup>2</sup> Those offered by the respondents remain marked 24-36 as submitted.

### **Factual Background**

I adopt and incorporate by reference *Smith I*'s 61 numbered findings of fact.<sup>3</sup> Briefly summarized, the essential background to the instant appeal is as follows.

Firefighter Smith began working for the Gloucester Fire Department in 1994. He was twenty-five years old. (Finding 2.)

In August 1998, a fire broke out at Gloucester's Fisherman's Wharf. The materials that burned in the fire included creosote-soaked timbers, gasoline, propane, and plastic fishing nets. Firefighter Smith participated in the firefighting efforts for more than twelve hours, inhaling smoke and toxic fumes. (Findings 6, 7.)

During April-May 2000, firefighter Smith was diagnosed with non-Hodgkin's lymphoma. He was treated with chemotherapy and radiation. By early 2001, he was in remission. He resumed work as a firefighter. Over the ensuing years, firefighter Smith suffered smoke inhalation in additional major fires. (Findings 9-18, 29-34, 37, 42.)

In early 2012, firefighter Smith was diagnosed with metastatic lung cancer. Chemotherapy and radiation did not prevent the disease from progressing rapidly. Firefighter Smith died in July 2012. (Findings 47-56.)

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<sup>2</sup> Exhibits AA-LL were marked 1-12 as attachments to Mrs. Smith's cross-motion for summary decision. Exhibits MM-OO were marked 1-3 as attachments to her motion to strike.

<sup>3</sup> This ruling and the admission of Exhibit AA resolve Mrs. Smith's outstanding motion for clarification.

When firefighter Smith was originally diagnosed with non-Hodgkin's lymphoma, several physicians analyzed the disease's causes on his behalf. (Findings 20, 21-23, 25-27.) Additional expert analyses were performed more recently as directed by *Smith I*.<sup>4</sup> The various experts' opinions are analyzed below. To the extent necessary, I find as fact that the medical panelists made the reports described at *infra* pp. 8-9.

### Analysis

#### I

Multiple provisions of the retirement law, G.L. c. 32, provide benefits related to physical harm suffered by public employees. Sections 6 and 7 permit employees to retire based on regular or accidental disability. Section 9 provides an allowance to the beneficiary of an employee who suffered an "accidental death." Sections 100 and 100A provide special benefits to the survivors of emergency-services providers killed while "in performance of duties" (or "in-line-of-duty").

Mrs. Smith has been awarded an accidental death allowance under § 9. The dispute is limited to her entitlement to the special benefit of § 100.

In the case of firefighters, a § 100 benefit is due in three scenarios. The first two require "an accident": either an accident during a response to a fire alarm, or an accident involving a fire-department vehicle. *Norfolk Cty. Ret. Bd. v. Contributory Ret. Appeal Bd.*, 15 Mass. App. Ct. 683, 685 (1983). The third scenario, relevant here, is when a firefighter, "while at the scene of a fire . . . sustains injuries which result in his death."

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<sup>4</sup> In accordance with *Smith I*, PERAC asked the panelists to analyze "whether firefighter Smith's exposure to smoke and toxic fumes while fighting the Gloucester Fisherman's Wharf fire during a 12½ hour period in August 1998 caused him to sustain injuries that resulted in a condition of cancer that caused his death in 2012 . . . ." (Exhibit 24.)

Each one of § 100's scenarios describes a singular event, namely either "an accident" or "a fire." Unlike the provisions concerning disability and accidental death, § 100 does not address work-related "hazards," i.e., harmful conditions of the member's line of work. *See Kelly's Case*, 394 Mass. 684, 688 (1985). And § 100 states expressly that applicants cannot rely on the "cancer presumption" of § 94B.<sup>5</sup> For all of these reasons, it is clear that a § 100 benefit must arise from "a single [occurrence] at a particular time." *Kenney v. Boston Ret. Bd.*, No. CR-13-245, at 14 (DALA Nov. 30, 2018). The theory supporting Mrs. Smith's application is, accordingly, that firefighter Smith's death was caused specifically by the fire at Fisherman's Wharf in August 1998.

Sections 6, 9, and 100A use similar phrases to require "proximate" causation between the workplace occurrence and the harm to the member: "natural and proximate result" in § 6(3)(a); "natural and proximate cause" in § 6(3)(c); "natural and proximate result" in § 9(1); "direct and proximate cause" in § 100A(c). Sections 7 and 100 are drafted otherwise, using only the word "result" to describe the requisite causal nexus. In the case of § 7, the "result" language suffices to impose the same requirement of proximate causation. *Noone v. Contributory Ret. Appeal Bd.*, 34 Mass. App. Ct. 756, 758 n.4 (1993); *Campbell v. Contributory Ret. Appeal Bd.*, 17 Mass. App. Ct. 1018, 1018 (1984). The same is undoubtedly true of § 100.

Causation is a notoriously elusive, diversely operationalized concept. In the context pertinent here, appellate courts have described the applicable causation standard as "strict." *Fender v. Contributory Ret. Appeal Bd.*, 72 Mass. App. Ct. 755, 761 (2008). Their primary

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<sup>5</sup> Where applicable, the presumption provides that certain types of cancer "resulting in total disability or death to a uniformed member of a paid fire department . . . shall, if he successfully passed a physical examination on entry into such service . . . be presumed to have been suffered in the line of duty." G.L. c. 32, § 94B. This presumption is rebuttable. *Id.*

elaboration has been that this standard is not satisfied when the workplace occurrence “is merely a contributing cause of the injury” (or death). *Blanchette v. Contributory Ret. Appeal Bd.*, 20 Mass. App. Ct. 479, 487 (1985). *See Retirement Bd. of Revere v. Contributory Ret. Appeal Bd.*, 36 Mass. App. Ct. 99, 107 (1994).<sup>6</sup>

To prove her entitlement to benefits, Mrs. Smith must show proximate causation by a preponderance of the evidence. *Lisbon v. Contributory Ret. Appeal Bd.*, 41 Mass. App. Ct. 246, 248 (1996); *Sparuk v. State Bd. of Ret.*, No. CR-11-268, at 10 (DALA Dec. 9, 2011). Because questions of medical causation tend to exceed common knowledge and experience, the finder of fact is expected to be “guided” on such questions by expert testimony. *Robinson v. Contributory Ret. Appeal Bd.*, 20 Mass. App. Ct. 634, 639 (1985). Correspondingly, the member’s proof of causation ordinarily must draw on one or more expert opinions. *Id. See generally Santiago v. Rich Prod. Corp.*, 92 Mass. App. Ct. 577, 585 (2017); *Pitts v. Wingate at Brighton, Inc.*, 82 Mass. App. Ct. 285, 289 (2012).

## II

A preponderance of the evidence does not establish that firefighter Smith’s death was caused by any single fire.<sup>7</sup> This conclusion is guided by the analyses of the series of experts who have analyzed this case from a medical perspective.

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<sup>6</sup> A recent tort law precedent radically constrains the use of the “substantial contributing factor” test, casting doubt on that test’s continued viability even in “toxic tort cases.” *Doull v. Foster*, 487 Mass. 1, 18 n. 22 (2021).

<sup>7</sup> Respondents originally maintained that any causal connection between firefighter Smith’s firefighting and his death was severed by an “intervening” cause, namely the radiation with which firefighter Smith’s original lymphoma was treated. *See Smith I, supra*, at 47, 51. Respondents have since withdrawn that theory, conceding that firefighter Smith’s fatal metastatic cancer represented a “return” of his original lymphoma. *See Resps.’ Mot. Summary Decision 2*. Moreover, pertinent out-of-state case law supports the view that, if an employee is injured in an industrial accident, and ordinary medical treatment for the injury causes the employee’s death,

When firefighter Smith was first being treated for cancer in 2000, three experts addressed the causes of his illness. One was his treating oncologist, Dr. Jonathan Friedberg, who opined that no clear evidence connects firefighter Smith's diagnosis to his history of inhalation exposures. *Smith I, supra*, at 16.

The two other contemporaneous experts were more supportive of the Smiths' case. Dr. Anne Golden, an environmental/occupational epidemiologist, wrote:

[F]irefighters are exposed to known human carcinogens in their work environment . . . . [E]very study of firefighters that evaluated non-Hodgkin's lymphoma found a marked increase in risk. . . . I believe that Mr. Smith's work as a firefighter, and the chemical carcinogenic exposures he has experienced . . . are consistent with an increased risk of developing non-Hodgkin's lymphoma.

Exhibit E. *See Smith I, supra*, at 16-19. A similar view was offered by Dr. Jacqueline Moline, an occupational medicine physician. Dr. Moline began her discussion with the Fisherman's Wharf fire specifically:

Non-Hodgkin's lymphoma has been associated with exposure to benzene and 1,3 butadiene, two compounds commonly encountered at fires, especially when plastics and gasoline are present. By all descriptions of the fire at Fisherman's Wharf, it is virtually certain that Mr. Smith was exposed to these chemicals in the course of fighting that fire.

Exhibit D. In the final analysis, however, Dr. Moline could connect firefighter Smith's diagnosis only to the ongoing, general hazardousness of his work:

In conclusion, I have personally interviewed and examined Mr. Smith, and evaluated the facts of his diagnosis of non-Hodgkin's lymphoma. His occupation as a firefighter for the Gloucester Fire Department was a substantial contributing cause to the development of this cancer. I base this conclusion, which I hold to a reasonable degree of medical certainty,

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then the original accident must be viewed as the proximate cause of the eventual death. *See, e.g., Tavares v. Aramark Corp.*, 841 A.2d 1124, 1129 (R.I. 2004); *Home Ins. Co. v. Gillum*, 680 S.W.2d 844, 851 (Tex. App. 1984).

on the history of exposure to carcinogens in the line of duty, the clinical history and the pathological diagnosis.

*Id.* See *Smith I*, *supra*, at 20-21.

Both Dr. Golden and Dr. Moline clearly believed that, to some degree,<sup>8</sup> firefighter Smith's cancer was causally connected to his firefighting. But neither of them could lay the blame at the feet of one, specific fire. By the time of his original diagnosis, firefighter Smith had been engaged for six years in a career that—according to the literature on which Dr. Golden and Dr. Moline relied—tends to cause cancer among its entire population. The science driving these doctors' opinions thus tended to suggest that firefighter Smith's cancer resulted from his years of recurring carcinogenic exposures.

The flawed expert opinions provided by the panel commissioned in accordance with *Smith I* do not provide landscape-altering support for Mrs. Smith's causation case.

The flaw in the opinions of Dr. Douglas Tisdale and Dr. Karl D'Silva was that they focused largely on whether the cause of firefighter Smith's death can be identified “definitively” or “with certainty” (rather than by a preponderance). The best that Dr. Tisdale could say for Mrs. Smith was that her husband's original lymphoma “*may have been* linked to smoke and toxic fume exposure sustained during his work as a firefighter in August 1998.” Exhibit 28 (emphasis added). Dr. D'Silva added that “the exposure to toxic fumes and chemicals *during his career as a firefighter* contributed to [firefighter Smith's] ultimate cancer diagnoses and ultimately his

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<sup>8</sup> Dr. Golden spoke of firefighter Smith incurring an “increased risk” of cancer due to his firefighting; Dr. Moline spoke of firefighting being a “substantial contributing cause” to firefighter Smith's cancer. It is unlikely that these formulas satisfy the measure of causation required in this context. See *supra* pp. 5-6.



passing.” Exhibit 29 (emphasis added). Neither opinion supports the causal connection that Mrs. Smith is required to prove.

Dr. Aymen Elfiky was the panel’s third member. His opinion featured a bottom-line conclusion facially favorable to Mrs. Smith’s case:

[W]ith regards to the question of whether Mr. Smith’s exposure to smoke and toxic fumes during a firefight in August 1998 . . . contributed to<sup>9</sup> his subsequent development of lung cancer in 2012, my opinion is yes.

Exhibit 25. But the key legal error in Dr. Elfiky’s legal opinion was his failure to separate the consequences of the specific fire at Fisherman’s Wharf from the cumulative damage that firefighting inflicts over time. Throughout his report, Dr. Elfiky tied firefighter Smith’s death to the collective impact of an extended firefighting career:

[F]irefighters are at a higher risk of developing lung cancer as a result of accumulated exposures over the course of their careers. . . .

[O]ver time as firefighters are exposed to . . . toxic materials on a semi chronic basis . . . the carcinogenic agents . . . continue to have an [e]ffect . . . and their effect becomes cumulative over time . . . .

[T]he histopathologic characterization of [firefighter Smith’s] lung cancer [was] poorly differentiated adenocarcinoma, which has a very aggressive nature . . . . [T]umors of such an aggressive nature are very commonly seen in individuals with chronic exposures such as those experienced by firefighters.

*Id.*

Firefighter Smith fought fires from 1994 to 2012, approximately eighteen years in all. It is easy to see why the experts analyzing his case struggled to isolate a single fire as the cause of his eventual death. His cancer may well have been attributable to his firefighting career as a whole. Perhaps the specific fire at Fisherman’s Wharf fire was a “contributing cause” to his

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<sup>9</sup> Again, the causal role of “contributing to” a member’s death is likely insufficient here.

death. But a preponderance of the evidence does not establish the requisite form of “proximate” causation between firefighter Smith’s death and a single fire at a particular time. *See Blanchette*, 20 Mass. App. Ct. at 487; *Kenney, supra*, at 14.

*III*

This case is a reminder that firefighters sacrifice their lives and wellbeing in the service of their communities’ safety. The retirement law recognizes this painful fact through the cancer presumption of § 94B, which here enabled Mrs. Smith to receive an accidental death allowance. The special benefit of § 100 is unavailable to Mrs. Smith because the Legislature restricted that benefit to cases of death originating in a single, identifiable event. This result does not detract from the debt of gratitude that the Commonwealth owes both to Mrs. Smith and to her late husband’s memory.

**Conclusion and Order**

The board’s decision is AFFIRMED.

Division of Administrative Law Appeals

/s/ Yakov Malkiel

Yakov Malkiel

Administrative Magistrate