COMMONWEALTH OF MASSACHUSETTS
CONTRIBUTORY RETIREMENT APPEAL BOARD

JOSEPH STRONG,

Petitioner-Appellant

v.

WORCESTER REGIONAL RETIREMENT SYSTEM,

Respondent-Appellee.

CR-15-597

DECISION

Petitioner Joseph Strong appeals from a decision after remand of an administrative magistrate of the Division of Administrative Law Appeals (DALA) affirming the decision of the Worcester Regional Retirement System (WRRS) denying his application for accidental disability retirement. The DALA magistrate held a hearing on September 8, 2016 and admitted the original exhibits 1 – 29 and an additional three exhibits. The DALA decision is dated June 30, 2017. Mr. Strong filed a timely appeal to us.

After considering all the arguments presented by the parties and after a review of the record, we incorporate the DALA decision by reference and adopt its Findings of Fact 1-35 as our own. For the reasons discussed below, we affirm.

I. Medical Panel Evaluation

Under G.L. c. 32, § 7, a public employee is eligible for accidental disability retirement benefits if the employee demonstrates that he is "unable to perform the essential duties of his job and that such inability is likely to be permanent ... by reason of a personal injury sustained or a hazard undergone as a result of, and while in the performance of, his duties at some definite place and at some definite time."

To establish entitlement to accidental disability retirement benefits, Mr. Strong has the burden of proving each element of his claim by a preponderance of the evidence. *Bagley v. Contributory Retirement Appeal Bd.*, 397 Mass. 255, 258 (1986)(petitioner has burden of proving his case by the preponderance of evidence); *Lisbon v. Contributory Retirement Appeal Board*, 670 N.E. 2d 392, 41 Mass.

App. Ct. 246 (1996); *Daley v. Contributory Retirement Appeal Bd.*, 60 Mass. App. Ct. 1110, 801 N.E. 2d 324 (2004); *Hough v. Contributory Retirement Appeal Bd.*, 309 Mass. 534, 36 N.E. 2d 415 (1941); *Wakefield Contributory Retirement Bd. v. Contributory Retirement Appeal Bd.*, 352 Mass. 499, 226 N.E.2d 245 (1967).

An applicant seeking accidental disability retirement benefits must be examined by an independent medical panel. G.L. c. 32, § 6(3)(a); *Kelley v. Contributory Ret. App. Bd.*, 341 Mass. 611, 613 (1961). *See also Malden Ret. Bd v. Contributory Ret. App. Bd.*, 1 Mass. App. Ct. 420, 423 (1973) (panel opines on medical questions "beyond the common knowledge and experience of [a] local retirement board"). A condition precedent to granting accidental disability benefits is the panel's issuance of an affirmative certification on questions of incapacity, permanence, and causation.[1] *Kelley*, 341 Mass. at 613. A medical panel's certification is given deference unless it is based on an erroneous standard, fails to follow proper procedures, is improperly compromised, or unless the certificate is "plainly wrong." *Malden v. Contributory Ret. Appeal Bd*., 1 Mass. App. Ct. 420, 423 (1973); *Kelley*, 341 Mass. 611 (1961).

Mr. Strong argues that the medical panel employed an erroneous standard in its certification. Specifically, he concluded that reports of Drs. Goss and Rosenthal amounted to an unqualified negative opinion violating the principle in *Noone v. CRAB* 34 Mass. App. Ct. 756, 616 N.E.2d 126 (1993). He also contends that Dr. Sewall failed to properly consider the aggravation of a pre-existing condition in issuing his certification. Mr. Strong, therefore, asserts that he is entitled to an evaluation by a new medical panel.

Medical panels are responsible for determining "medical questions that are beyond the common knowledge of the local retirement board and CRAB." *See Malden Ret. Bd v. Contributory Ret. App. Bd.*, 1 Mass. App. Ct. 420, 423 (1973) (panel opines on medical questions "beyond the common knowledge and experience of [a] local retirement board"). An applicant's case must be reviewed by the retirement board, which considers the panel's findings, in addition to other medical and nonmedical evidence, and determines whether the applicant has satisfied his burden. *Kelley v. Contributory Retirement Appeal Bd*., 341 Mass. 611, 613 (1961).

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[1] The panel addresses three questions: (1) whether the applicant is mentally or physically incapacitated for further employment duties; (2) whether such incapacity is likely to be permanent; and (3) "whether or not the disability is such as might be the natural and proximate result of the accident or hazard undergone on account of which [an accidental disability] retirement is claimed." G.L. c. 32, § 6(3).

The panel's approval "is not conclusive of the ultimate fact of causal connection but stands only as some evidence on the issue." *Blanchette v. Contributory Retirement Appeal Bd*., 20 Mass. App. Ct. at 483, 481 N.E.2d 216. The panel's approval is a statement of "medical possibility," and "[t]he existence of such an affirmative certification is not in itself a basis for concluding that an applicant has satisfied his burden of proving the causal connection between his disability and a work-related accident or incident." *Lisbon v. Contributory Ret. App. Bd.*, 670 N.E.2d 392, 399 (Mass. App. 1996). Unless the panel used an erroneous standard or failed to follow proper procedures, or unless the certificate is "plainly wrong," the local board may not ignore the panel's findings. *Kelley v. CRAB*, 341 Mass. 611, 171 N.E. 2d 277 (1961). The final determination of causality is reserved to CRAB after considering all the evidence in the record, including both the medical and non-medical facts. *Wakefield Contributory Ret. Bd. v. Contributory Ret. Appeal Bd*., 352 Mass. App. Ct. 499, 502 (1967); *Lisbon,* 41 Mass. App. Ct. at 254; *Blanchette*, 20 Mass. App. Ct. at 483.

We find Mr. Strong's contentions unavailing. In this instance, the magistrate correctly determined that Mr. Strong was not deprived of a proper medical panel. In the present matter, Mr. Strong was evaluated by a medical panel as a prerequisite to determine if he qualified for accidental disability retirement. The medical considered whether the work injury of September 2014 aggravated his pre-existing spine disease. To determine if the appropriate standard was utilized, we examine certifications of each medical panel doctor.

Dr. Gross stated:

> I believe he is permanently disabled from performing many of the requirements of his job. *However, this disability is unrelated to the occupational event of 9/10/14 which appears to have been a relatively minor bony / soft tissue injury to his lower back with a full recovery in 4-6 weeks expected but rather due to the aforementioned significant pre-existing multi-level degenerative disease involving his lumbosacral spine*. Therefore, based on my examination today it's my opinion that Mr. Strong is physically incapable of performing the essential duties of his job as a senior custodian as described in the current job description and that said incapacity is likely to be permanent. It's also my opinion that said incapacity is not such as might be the natural and proximate result of a personal injury sustained on 9/10/14 or hazard undergone on account of which retirement is claimed.

(Exhibit 12).

Dr. Rosenthal reported:

> In my opinion the accident in question of 9/10/14 was superimposed upon pre-existing degenerative changes. *I do not believe that any permanent change occurred from the accident itself, which in my opinion was a contusion which would have resolved within a matter of six to nine months at the very most. It is my opinion that his continued symptoms are a progression of his underlying condition*. It is my opinion that he is disabled at the present time from returning to his occupation. In my opinion, he would be a candidate for either epidural steroid injections or nerve branch blocks. I do not believe that he is a surgical candidate. It is possible that with this treatment, his condition will improve to the point where he can eventually return to work; however, it cannot be predicted at the present time, and, therefore, I would have to consider his disability to be permanent at this time. *However, again, I do not believe that this is a result of the accident in question, but due to the progression of underlying conditions*.

(Exhibit 10).

Dr. Sewall concluded:

> Mr. Strong has sustained *a flare-up of preexisting degenerative disk disease*, with perhaps some left sciatica. I do not think that he is, at this point, a candidate for accidental disability as he has not undergone sufficient treatment. He should be seen at a pain clinic, where he would undergo epidural steroid injections at L3-4, L4-5, and L5-S1, particularly on the left side, which might very well relieve his symptoms. He also would benefit from an aggressive course of physical therapy for his back. Mr. Strong has not reached a medical endpoint. Therefore, he is not a candidate for accidental disability.

(Exhibit 11).

Mr. Strong has not demonstrated that the medical panel lacked pertinent facts in its determination that his permanent incapacity was not caused by the work injury of September 2014. Instead, Mr. Strong made conclusory statements without providing a basis for remanding this matter back for another medical panel evaluation. Notably, the most convincing evidence in support of the medical panel's conclusions was the presence of multiple MRIs to evaluate Mr. Strong's pre and post-work injury condition of his spine. The panel was provided with a February 28, 2012 MRI and a November 8, 2014 MRI. DALA Decision at *3, 5; Exhibits 16, 18. These pre and post injury MRIs, respectively, concluded that degenerative changes occurred

but that there were no significant changes between the pre-injury MRI and the post-injury MRI.[2] Upon examination by the panel, they unanimously agreed that the work injury of September 2014 did not aggravate his pre-existing condition to the point of disability and therefore, was not the natural and proximate cause of his disability.[3]

In answering the question of causation, Drs. Gross and Rosenthal both acknowledged the presence of Mr. Strong's pre-existing degenerative disc disease when addressing the issue of aggravation of a pre-existing condition but ultimately concluded that he had sustained a minor bony/soft tissue injury or a contusion which would have resolved within a matter of six to nine months. We conclude that there is no evidence in the record to indicate that Drs. Gross and Rosenthal applied an incorrect standard in their certifications. Dr. Sewall found that Mr. Strong was not at a medical endpoint, and therefore, concluded that his incapacity was not permanent. He also determined the claimed injury was not such as might be the natural and proximate cause of his disability. Here too, we did not find evidence that Dr. Sewall applied an incorrect standard in his certification report. Without evidence that the medical panel used an erroneous standard or failed to follow proper procedures, or that the certificate was "plainly wrong," Mr. Strong is not entitled to a new medical panel evaluation. *Kelley,* 341 Mass. 611 (1961).

II. Causation - Aggravation of a Pre-Existing Condition

Under G.L. c. 32, § 7(1), Mr. Strong must prove that the work-related injury was the "natural and proximate cause" of his disability. *Campbell v. Contributory Ret. App. Bd.*, 17 Mass. App. Ct. 1018, 1018-19 (1984). To be the natural and proximate cause of his disability, the work injury must be more than a "contributing" or "aggravating" factor to his pre-existing condition. *Blanchette v. Contributory Retirement Appeal Bd.*, 20 Mass. App. Ct. at 485; *Campbell*, 17 Mass. App. Ct. at 1019. *See also Burke v. Contributory Retirement Appeal Bd*., 34 Mass. App. Ct. 212, 213 (1993). Aggravation of a pre-existing condition by a work injury is compensable under G.L. c. 32.[4] If a condition or incident at work aggravates a pre-existing health problem, the employee has suffered a personal injury and may recover from the employer

[2] FF 6, 12; Ex. 16, 18.
[3] Ex. 10-12; FF 28-32.
[4] *See Baruffaldi v. Contributory Retirement Appeal Bd., 337 Mass. 495, 501; Robinson v. Contributory Retirement Appeal Bd*., 20 Mass. App. Ct. 634, 638 (1985).

for his entire disability without apportionment. *Zerofski's Case*, 385 Mass. at 593, 433 N.E.2d 869 (1982).

The Supreme Judicial Court has determined that for an event of employment to be more than a "contributing cause," it must be "a significant contributing cause to [the] employee's disability." *Ann Marie Robinson's Case*, 416 Mass. 454, 460, 623 N.E.2d 478 (1993). Here, no treating or examining physician has described the September 2014 injury as more than a significant contributing cause to Mr. Strong's disability. Here, a unanimous panel answered in the negative to the question of causation - that the incapacity was not the "natural and proximate result of the personal injury sustained. . . on account of which retirement is claimed." The panel doctors had the opportunity to exam all the pertinent evidence, as well as Mr. Strong himself. They implicitly determined that there was no fundamental worsening of his chronic multi-level degenerative disc disease with stenosis. In essence, the unanimous panel did not believe the incident aggravated his pre-existing condition to the point of rendering him totally and permanently disabled, if it aggravated the condition at all.

In addition to the medical panel, there are physicians, such as Dr. Nairus in his March and July of 2015 report, that determined that the incident caused a "mild exacerbation of his pre-existing lumbar spine condition."[5] Dr. Nairus, in providing an explanation for an exacerbation of a condition and an aggravation of a condition, stated that: "an exacerbation is defined as a temporary increase in an individual's symptoms following an injury that did not cause any structural damage. An aggravation is defined as an increase in an individual's symptoms following an injury that also has additional structural damage." (Exhibit 31). Further, when Mr. Strong's pre-injury magnetic resonance imaging (MRI) was compared to his post-incident MRI, the scans did not show any significant changes.[6] The post-injury MRI did show edema at the end plates of his L4 and S1 discs, which Dr. Vinton opined as consistent with deteriorating back pain.[7] Based on the evidence in the record, we agree with the magistrate that Mr. Strong failed to meet his burden of proof that the September 10, 2014 work injury aggravated his pre-existing spinal disease to the point of disability. *Robinson v. Contributory Retirement Appeal. Bd.*, 20

[5] Ex. 30, 31; FF 20, 21, 24.
[6] Ex. 16, 18; FF 6, 12.
[7] Ex. 28; FF 27.

Mass. App. Ct. 634, 638 (1985). Mr. Strong is, therefore, not entitled to accidental disability retirement.

III. Conclusion

For the foregoing reasons, the DALA decision is affirmed. Mr. Strong failed to meet his burden that he was deprived of a proper medical panel and that his work injury of September 2014 aggravated his pre-existing injury to the point of disability. Thus, he is not entitled to accidental disability retirement benefits.

SO ORDERED.

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