

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

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Mark Traynor,

Petitioner,

v.

Docket No. CR-20-0281

Gloucester Retirement Board,

Date: November 17, 2023

Respondent.

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**Appearance for Petitioner:**<sup>1</sup>

Judson L. Pierce, Esq.

**Appearance for Respondent:**

Thomas F. Gibson, Esq.  
Gerald A. McDonough, Esq.

**Administrative Magistrate:**

John G. Wheatley

**SUMMARY OF DECISION**

The Gloucester Retirement Board's decision denying Mark Traynor's application for accidental disability retirement, without convening a medical panel, is reversed. The petitioner has presented sufficient evidence to make a prima facie case for entitlement to accidental disability retirement. The petitioner's evidence, if unrebutted and believed, demonstrates that he was disabled while in active service for the Gloucester Housing Authority due to a work-related injury on March 15, 2017. This matter is therefore remanded to the Gloucester Retirement Board for further proceedings, including convening a medical panel pursuant to G. L. c. 32, § 7(1).

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<sup>1</sup> In addition to his present counsel, I also acknowledge the work done by Attorney Paul F. Applebaum in representing the petitioner in this appeal from its inception through the filing of post-hearing briefs.

**DECISION**

The petitioner, Mark Traynor, appeals the decision of the Gloucester Retirement Board (“Board”) denying his application for accidental disability retirement without convening a medical panel. Mr. Traynor and the Board filed a joint prehearing memorandum, which I have marked as brief “A.”

I held an evidentiary hearing on May 11, 2022, which was recorded. I admitted Exhibits 1-15 into evidence. Mr. Traynor testified on his own behalf at the hearing. No other witnesses were called by either party.

I kept the hearing record open to allow the parties an opportunity to file post-hearing briefs for consideration. The parties each filed a post-hearing brief on August 5, 2022, which I have marked as briefs “B” (for petitioner) and “C” (for respondent). The respondent, with leave granted, filed a reply to the petitioner’s post-hearing brief on August 11, 2022, which I have marked as brief “D.” The hearing record closed once I received the parties’ post-hearing briefs.

**BACKGROUND**

The petitioner presented evidence of the following factual details in support of his application for accidental disability retirement:

1. The petitioner, Mark Traynor, was employed as a maintenance mechanic/plumber for the City of Gloucester Housing Authority from May 3, 1993, through December 29, 2017. (Tr. 8; Exhibit 13 [resignation letter]; Exhibit 7.)<sup>2</sup>
2. The written job description for Mr. Traynor’s position summarizes his responsibilities as follows:

“This type of work involves the performance of semi-skilled and skilled, diversified duties in connection with repairs to and maintenance of buildings and

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<sup>2</sup> “Tr.” stands for Transcript, a copy of which was supplied by the parties.

grounds requiring many skills found at the journeyman level, such as: carpentry for woodwork repairs, plumbing repairs, electrical and mechanical work. An incumbent is expected to have a knowledge of and manual skills in repairing such items as: plumbing and heating valves and pipes, electrical switches, stoves and refrigerators[,] windows, door[s] and other wood materials[, and] mechanical equipment (e.g. snow blowers, power mowers, hedge clippers)[.] [I]n carrying out a full set of maintenance duties, may be required to work under hazardous and adverse conditions such as: sleet, snow, heat, cold, dust, and dirt.”

(Exhibit 13 [job description].)

3. Among his work duties, Mr. Traynor was responsible for clearing “snow and ice from buildings and grounds by shoveling, operating a snow plow, snow blower, etc.” and “sanding or salting all walkways and steps.” (Exhibit 13 [job description].)
4. His work required significant “physical exertion,” including lifting “up to 70 lbs.” and frequent “bending, kneeling, [and] standing” while performing plumbing repairs and maintenance. For example, he needed to lift water heaters, toilets, and appliances when installing new ones or disposing of old ones. The majority of his work as a plumber was done while squatting, kneeling, or crawling, to gain necessary access to plumbing facilities underneath sinks, within crawl spaces, and at toilets. Mr. Traynor completed such tasks independently and on a daily basis. (Tr. 9-10, 18; Exhibit 13 [employer’s statement and job description].)
5. On March 15, 2017, Mr. Traynor was given a priority work assignment in the morning to salt the walkways at a residential development for the elderly. The walkways were covered in ice as a result of rain and a “flash freeze” the night prior. As Mr. Traynor was stepping forward to sling a handful of salt down the walkway, he slipped and fell, injuring his left knee. (Tr. 10.)
6. On March 24, 2017, Mr. Traynor sought treatment at Sports Medicine North with orthopedic surgeon Jeffrey Polansky, MD. Dr. Polansky’s initial assessment was

osteoarthritis and a possible medial meniscal tear. Although Dr. Polansky cleared Mr. Traynor to work without restrictions, he noted that Mr. Traynor had continued working after the injury and did not want to miss any work because he was the Gloucester Housing Authority's only plumber. Dr. Polansky's initial treatment included an aspiration, a cortisone injection, a hinged knee brace, and referral to physical therapy. (Exhibit 5, at 1-2.)

7. In a one-month follow-up visit with Dr. Polansky, Mr. Traynor reported having "a lot of sharp pain as well as buckling sensations" in his knee. Dr. Polansky referred him for an MRI to further evaluate a possible meniscal tear. (Exhibit 5, at 4.)
8. An MRI of Mr. Traynor's left knee on May 2, 2017, showed a tear in the posterior horn of his medial meniscus. (Exhibit 5, at 8, 13.)
9. On May 25, 2017, Dr. Polansky performed arthroscopic surgery on Mr. Traynor's knee, including a partial medial meniscectomy. (Exhibit 5, at 13; Tr. 11.)
10. Mr. Traynor returned to work by mid-July 2017. Although he did not feel ready to return, he urged Dr. Polansky to release him to work because he "needed to earn a living."<sup>3</sup> His return to work was difficult. He "struggled daily" trying to perform work tasks and would begin to have "significant pain" in his knee mid-day.<sup>4</sup> He was unable to kneel or squat, and lifting anything heavy would cause him to have significant pain in his left knee. (Tr. 11-14; Exhibit 5, at 18 [July 14, 2017, office note].)

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<sup>3</sup> Mr. Traynor received workers' compensation indemnity benefits at various times, but such compensation was only a fraction of his ordinary wages (typically 60% of a worker's pre-injury average weekly wage for temporary total disability compensation). See, e.g., Exhibit 10; G. L. c. 152, § 34.

<sup>4</sup> Dr. Polansky's notes were prepared by transcription, which in printed form state that Mr. Traynor would begin to have significant pain in his knee "mid May." In context, it seems clear that he is referring to "mid-day" at work, not "mid May."

11. Mr. Traynor needed assistance from his co-workers to complete certain tasks, such as transporting water heaters, toilets, or other fixtures that he needed to install. Some projects he was incapable of doing at all. For example, he was not able to replace a water main in a housing project because of the kneeling required to do the work, and his supervisor had to complete the job for him. He often had to end his shift early due to these problems. (Tr. 14-15.)
12. Mr. Traynor's direct supervisor, Ernie Desrocher, observed Mr. Traynor having difficulty doing his job after his reported work injury. He often saw Mr. Traynor "wincing in pain," favoring his left knee when moving or doing his work, and seeking assistance when moving heavy equipment. Mr. Desrocher indicated that Mr. Traynor would often need to cease working and leave before the end of his shift because of the pain that he appeared to have in his knee. Mr. Desrocher observed Mr. Traynor having these difficulties up to the time he retired. (Exhibit 12.)
13. A series of injections in August provided temporary relief. However, on December 21, 2017, Mr. Traynor reported to Dr. Polansky that the pain had resumed, which he felt was "no longer tolerable and forcing him to retire." Dr. Polansky kept him out of work for the remainder of the week (ending December 23, 2017) and referred him to a specialist for a total knee arthroplasty. (Exhibit 5, at 18-30.)
14. Mr. Traynor resigned from his position with the Gloucester Housing Authority in December 2017. His last day of employment was on Friday, December 29. (Exhibit 13 [resignation letter dated December 15, 2017].)

15. Mr. Traynor did not return to work after his last appointment with Dr. Polansky due to the pain he was in and his belief that he was no longer capable of performing his job.

(Tr. 13.)

16. On January 3, 2018, Mr. Traynor presented for treatment with orthopedic surgeon Benjamin Schwartz, MD. He opted to proceed with the knee replacement surgery. Dr. Schwartz advised that he remain out of work until post-surgical reassessment of his condition. (Exhibit 5, at 33-35.)

17. Dr. Schwartz performed the total knee arthroplasty on April 13, 2018. (Exhibit 6.)

18. Mr. Traynor's knee has improved somewhat, but he is still unable to kneel, squat, or lift anything heavy. He believes he is unable to work as a plumber because the majority of the work is done while squatting, kneeling, or crawling, which he cannot do. (Tr. 18.)

19. Mr. Traynor filed an application for accidental disability retirement with the Board on July 8, 2019, based on the March 15, 2017, work accident and injury to his left knee. (Exhibit 1A.)

20. In his original application, Mr. Traynor reported that he ceased being able to perform the essential duties of his position on January 1, 2018. Prior to the evidentiary hearing, however, he amended his application to clarify that he ceased being able to perform his essential duties prior to his retirement.<sup>5</sup> His application, as amended, states:

“I returned to work on July 14, 2017, after receiving treatment for my knee. Upon my return, I was incapable of performing all the essential duties of my job and this problem continued until December 30, 2017 when I received a superannuation retirement.”

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<sup>5</sup> Prior to the hearing, Magistrate Rooney granted Mr. Traynor's motion to amend his application to correct a “mistake” in his reported date of disability. The Board has requested that I reconsider that ruling. Although it is likely within my discretion as the hearing magistrate to reconsider this amendment (see, e.g., *Goulet v. Whitin Machine Works, Inc.*, 399 Mass. 547, 554 (1987)), I decline to disturb Magistrate Rooney's well-reasoned decision in ruling on the motion to amend.

(Exhibit 1B.)

21. Dr. Schwartz completed the treating physician's statement pertaining to Mr. Traynor's application. He opined that Mr. Traynor was incapable of performing the essential duties of his former position as a plumber with the Gloucester Housing Authority and that he was last capable of performing such duties prior to the injury on March 15, 2017. Dr. Schwartz further opined that Mr. Traynor was at "maximum medical improvement," his condition was likely to be permanent, and that his incapacity is causally related to the work injury. (Exhibit 2.)

22. The employer's statement pertaining to Mr. Traynor's application was prepared and signed by an individual identified as the assistant director of operations (i.e., the "department head" of operations) for Gloucester Housing Authority, Cliff O'Neil, rather than his direct supervisor.<sup>6</sup> Mr. O'Neil confirmed that Mr. Traynor was incapable of performing some of the physical requirements of his (former) position because of the claimed disability. Although he believed that reasonable accommodations may permit Mr. Traynor to perform the essential duties of his position, he did not identify what accommodations could be provided, he was "unsure" if there were any positions that Mr. Traynor could fulfill either at present or in the future, and the Gloucester Housing Authority did not offer Mr. Traynor any modification of his job duties or other

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<sup>6</sup> On his application for accidental disability retirement, Mr. Traynor identified Ernie Desrocher as his direct supervisor. (Exhibit 1.) The employer's statement, in contrast, lists Richard Gallant as his direct supervisor. (Exhibit 13.) Mr. Desrocher ceased working for the Gloucester Housing Authority in 2018 (Exhibit 12), i.e., after Mr. Traynor had retired but before he submitted his application, which may be the reason for this difference. Regardless, it appears that Mr. O'Neil was an appropriate representative to complete and sign the employer's statement in this case, and I note that he was not Mr. Traynor's direct supervisor merely to provide context for the employer's statement and not as a criticism in its preparation of that statement.

accommodations for his medical condition. Mr. O’Neil was also unaware of any work-related accident in which Mr. Traynor was injured, and he was “unsure” whether Mr. Traynor’s medical condition had affected his job performance or attendance or whether his claimed disability was in any way related to his employment. (Exhibit 13.)

23. By letter dated June 26, 2020, the Board denied Mr. Traynor’s application, without convening a medical panel, on the ground that his “application and information provided by [his] employer” indicated, at least in the Board’s view, that Mr. Traynor remained capable of performing the essential duties of his position up to the date of his retirement. The Board concluded that Mr. Traynor does not qualify for accidental disability retirement because he did not become disabled from his work prior to his separation from service. (Exhibit 3.)

24. On June 29, 2020, Mr. Traynor timely appealed the Board’s decision. (Exhibit 4.)

#### **DISCUSSION**

A retirement board may deny a disability retirement application, at any stage of the proceeding, if it determines “that the member cannot be retired as a matter of law.” 840 Code Mass. Regs. § 10.09(2). When an applicant fails to present a prima facie case for disability retirement, the retirement board may deny the application without convening a medical panel. *Hickey v. Medford Retirement Bd.*, CR-08-380, at 2-3 (CRAB Feb. 16, 2012). To establish a prima facie case, the applicant must present “sufficient evidence ‘that, if unrebutted and believed, would allow a factfinder to conclude that [the applicant] is entitled to accidental disability retirement benefits.’” *Id.* at 3, quoting *Lowell v. Worcester Regional Retirement Bd.*, CR-06-296, at 2-3 (DALA Dec. 9, 2009).



General Laws c. 32, § 7(1), sets forth the requirements for accidental disability retirement. Specifically, the applicant must show 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.” G. L. c. 32, § 7(1). In addition, the disabling condition must occur while the applicant is a member in service, and therefore a disability that arises sometime after retirement or separation from service does not qualify for accidental disability retirement. *Hollup v. Worcester Retirement Bd.*, 103 Mass. App. Ct. 157, 164 (2023). The present appeal involves the latter of these criteria, that is, whether the petitioner became disabled while he was still a member in service (i.e., prior to his retirement).

The petitioner presented testimony and documentary evidence that, if unrebutted and believed, is sufficient to show that he was disabled before he retired from his position with the Gloucester Housing Authority. See *Benoit v. Everett Retirement Bd.*, CR-14-821, at 8 (CRAB Sept. 14, 2023) (“[W]ithout evaluation by a medical panel, it can in most cases be difficult to conclude whether a member was disabled as of his last day of work[.]”). He testified that he was unable to return to work at the end of December due to the injury to his left knee. His supervisor witnessed him struggling in trying to perform his work duties after his March 15, 2017, work injury. Dr. Schwartz’s statement submitted in support of Mr. Traynor’s application indicates that he became disabled as of March 15, 2017. And the last treatment record from Dr. Polansky, from a visit that was one week prior to Mr. Traynor’s retirement, notes he reported having intolerable pain in his knee and the doctor therefore kept him out of work for the remainder of the week. The evidence is also sufficient to show that the disability is due to the injury to his left

knee when he slipped and fell while performing his work duties on March 15, 2017, in particular the treating physician's statement by Dr. Schwartz.

Accordingly, Mr. Traynor has met his burden, at this stage of the proceeding, to present a prima facie case for accidental disability retirement. See, e.g., *Wayne W. v. Middlesex Cty. Retirement Sys.*, CR-21-0359 (DALA Sept. 1, 2023) (member presented sufficient evidence to show he was disabled while still a member in service). He is therefore entitled to proceed to a medical panel for further evaluation under G. L. c. 32, § 7(1).

#### **CONCLUSION AND ORDER**

For the forgoing reasons, the decision of the Gloucester Retirement Board denying Mr. Traynor's application for accidental disability retirement without convening a medical panel is vacated. This matter is remanded to the Board for further proceedings, including convening a medical panel pursuant to G. L. c. 32, § 7(1).

Division of Administrative Law Appeals

*/s/ John G. Wheatley*

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John G. Wheatley  
Administrative Magistrate