

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

Philip Tuminelli,
Petitioner

v.

Docket No. CR-21-0335
Dated: November 10, 2023

Somerville Retirement Board,
Respondent

Appearance for Petitioner:

James Hykel, Esq.
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Appearance for Respondent:

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Administrative Magistrate:

James P. Rooney

Summary of Decision

A member who had been injured while working for one retirement system and who later went to work for a second retirement system applied for accidental disability retirement from the latter system. That retirement system declined to process his application because he was no longer "presently employed" within that system. The Somerville Retirement System's decision is reversed and remanded as the public employee retirement statute does not require an applicant for accidental disability retirement to be on a public employer's payroll to be eligible to apply for this benefit.

DECISION

In his career, Philip Tuminelli worked as a project manager for communities in different retirement systems. He injured his knee while a member of one retirement system, but did not stop working until he was a member of a different retirement system when his knee problems failed to resolve.

The involvement of two retirement systems has turned his effort to obtain accidental disability retirement into a long running saga. He originally applied to the retirement system he was working under when he was first injured, the Lynn Retirement System, and appealed when he was turned down. I initially granted him relief, *Tuminelli v. Lynn Retirement Bd.*, CR-18-0229 (July 2, 2020), but later withdrew the decision because the retirement statute seemed to have required him to apply to the last retirement system that he was working for when his disability became permanent. *Tuminelli v. Lynn Retirement Bd.*, CR-18-0229 (Oct. 23, 2020). He has appealed that decision to the Contributory Retirement Appeal Board. He also filed an accidental disability retirement application with the last retirement system under which he worked, which was the Somerville Retirement System. Somerville denied his application as well. He timely appealed.

The parties filed a joint prehearing memorandum with six agreed exhibits. I marked the memo as Pleading A and admitted the six exhibits. I held a hearing on October 13, 2022 that I recorded digitally. Because the sole issue was whether it was appropriate for Mr. Tuminelli to file with the Somerville Retirement Board, no testimony was presented, and the hearing consisted of the parties arguing the merits of their respective positions.

Findings of Fact

Based on the exhibits submitted by the parties, I make the following findings of fact:

1. Phillip Tuminelli worked as a construction project manager for the cities of Lynn and Somerville. When he worked for Lynn, he was a member of the Lynn Retirement System. When he worked for Somerville, he was a member of the Somerville Retirement System. (Ex. 5.)
2. On July 9, 2008, while working for Lynn, Mr. Tuminelli tripped and fell at the construction site he was overseeing and broke his right tibia. The fracture did not heal completely, and hence he had surgery on December 11, 2008. Subsequently, his knee became infected and needed eight corrective surgeries between June 14, 2009 and June 21, 2011. Mr. Tuminelli's contract with Lynn ended on June 9, 2011. (Ex. 5.)
3. Mr. Tuminelli began to work for Somerville on September 18, 2011 as the project manager for the construction of a new building. On December 30, 2011, he went to Mass General Hospital's emergency room because his knee was again infected. He had six further surgeries on his knee between December 31, 2011 and November 6, 2012. He was able to work only a reduced schedule as a consequence. He stopped work on June 9, 2012 and his employment officially ended on November 9, 2012. He had not suffered any new injury while working for Somerville. (Ex. 5.)
4. Mr. Tuminelli applied for accidental disability retirement to the Lynn Retirement Board on February 12, 2013. The Board denied his application on December 11, 2014 because he was not permanently disabled at the time he left the city's employ. After a hearing, I issued a decision on July 2, 2020 reversing the Board's decision and granted Mr. Tuminelli accidental

disability retirement. I concluded that Mr. Tuminelli had suffered a disabling injury while working for Lynn, and the fact that it was not permanently disabling until sometime later when he was working for Somerville was essentially irrelevant because it was the original injury that caused the permanent disability. (Ex. 5.) However, thereafter I solicited comments from the parties as to whether Mr. Tuminelli had filed his application with the right retirement board. On October 23, 2020, I determined that Mr. Tuminelli should have applied to the Somerville Retirement Board and thus I withdrew the final decision in Mr. Tuminelli's favor. (Ex. 6.) He appealed the withdrawal to the Contributory Retirement Appeal Board where it remains pending.

5. On February 22, 2021, Mr. Tuminelli filed an accidental disability retirement application with the Somerville Retirement Board. (Ex. 1.) On August 27, 2021, that board denied his application as a matter of law. (Ex. 3.) Mr. Tuminelli appealed three days later. (Ex. 4.)

Discussion

The public employee retirement statute addresses applications for accidental disability retirement by individuals who work in a different retirement system than the one they were in when they were injured. It reads:

Any member who was injured while a member of a retirement system established in any governmental unit other than that by which he is presently employed, and who has complied with the provisions of this section as to notice, or whose case falls under paragraph (3), shall file such application with the retirement board of the unit where he is presently employed. Such board shall secure a statement of facts and records, which it shall be the duty of the retirement board of the first governmental unit to furnish, and on which it shall be entitled to make recommendations.

M.G.L. c. 32, § 7(1).

When I first examined this language in connection with Mr. Tuminelli's application to the

Lynn Retirement Board, I summarized the parties' arguments and ruled:

The Lynn Retirement Board maintains that this section applies to Mr. Tuminelli and, as a consequence, his application should be denied. Mr. Tuminelli asserts that he has complied with the section because "presently employed" refers to the time when his disability manifested, which was when he was working for Lynn, and thus it was appropriate for him to apply to the Lynn Retirement Board.

This statutory section makes a distinction between a disability retirement applicant's present public employer and a former public employer that is a part of a different public employee retirement system. The section refers, not to the time that the applicant became disabled, but to the time he was injured. Thus, it makes a distinction between the applicant's employer at the time of injury and a different employer at the time when the member decides to apply for accidental disability retirement. It requires that the member who worked for two systems just described apply for accidental disability retirement to the retirement board associated with his present employer, not the board associated with his employer at the time of injury.

(Ex. 6; footnote omitted.)

Now the Somerville Retirement Board argues that the "presently employed" language in Section 7(1) means that if events related to a disability have occurred across a time period in which the member worked for two retirement systems, he must apply for accidental disability retirement while he is still employed by the last retirement system within which he worked. Consequently, according to the Board, because Mr. Tuminelli filed his accidental disability retirement application years after he left the employ of the City of Somerville, he has lost his opportunity to have his application considered.

"Presently employed" in ordinary usage refers to a person actually employed in the present. If a statute's language is clear and unambiguous, the language is conclusive as to legislative intent, but may be rejected if it produces an absurd result. *Conservation Comm' of Norton v. Pesa*, 488 Mass. 325, 331 (2021).

The Somerville Retirement Board's interpretation that this phrase as used in Section 7(1) limits the ability of a disabled employee to apply for accidental disability retirement to the time when he is still employed by his last employer would produce an absurd result. The Board's position would leave Mr. Tuminelli in no man's land. He cannot have his accidental disability retirement application considered by the Lynn Retirement System, even though he was injured while working in that system, because he did not stop working until after he worked within the Somerville Retirement System. And, even though the legislature has established a procedure to address the situation in which an employee is injured while working in one retirement system but seeks to apply for accidental disability after working in another system, Mr. Tuminelli cannot have his application for accidental disability retirement heard by the Somerville Retirement Board either because he failed to file the application while he was still an employee of the City of Somerville.

When an employee suffers a disabling job-related injury, and there is no second retirement system involved, Section 7(1) does not require the employee to file an application for accidental disability retirement while he is still employed within that system. He cannot sensibly apply while still working the job that he claims to be disabled from because then he would not be disabled. Only after he has stopped working may he apply. Some applications are made when the injured employee has stopped working, but is still nominally employed in the retirement system. But many application are filed sometime after the employee is no longer on his former employer's payroll. Even employees who have retired on superannuation are not barred from later applying for accidental disability retirement.

There is no evidence that the paragraph dealing with the two employer situation was

meant to change this. Its purpose is to identify for injured employees and for retirement boards which board the employee should file his accidental disability retirement board with and then to describe briefly the role of the two retirement boards. There is no indication in Section 7(1) that the timing rules for when the employee must file his application should be different depending on how many retirement boards are involved.

The parties have identified only one DALA decision that dealt with an employee who sought accidental disability retirement in a situation in which two retirement boards were involved. The decision is not all the helpful, but it does shed a glimmer of light on the situation. *Northbridge Retirement Bd. v. Public Employee Retirement Administration and Worcester County Retirement Bd.*, CR-92-723 (DALA, Jan. 17, 1994). The employee involved, Michael Gauthier, injured his left knee while working for the Northbridge Highway Department. He was let go a few years later for reasons unrelated to the knee injury. He then went to work for the Highway Department of the Town of Dudley and became a member of the Worcester County Retirement System. On this job, he re-injured the same knee. He underwent surgery to repair a graft that had been placed after the first injury and was out of work receiving workers' compensation benefits for five months. He tried to resume work in April 1988, but could not continue because his leg became swollen. In January 1989, he applied for and was granted accidental disability retirement by the Worcester Retirement Board. That board asked for an opinion from PERA as to whether the Northbridge Retirement System was liable for a portion of Mr. Gauthier's accidental disability retirement benefit. PERA calculated Northbridge's pro-rata share, and thereafter Worcester billed Northbridge for this amount. Northbridge then appealed to DALA.

The decision did not end with a substantive conclusion as to how much each retirement system was responsible for paying Mr. Gauthier's benefit. Magistrate Maria Imperato decided that because Mr. Gauthier had withdrawn all his contributions from the Northbridge Retirement System, he had severed all his ties with that system and thus Northbridge was not required to pay a pro-rata share of his accidental disability retirement benefit.

What the case illustrates is how this process is supposed to work. The employee is to file a disability application with the last retirement system for which he worked and, if a determination is made that he is entitled to disability retirement, then a further determination must be made as to the share each retirement system must pay toward that benefit.

Counsel for the Somerville Retirement Board contends that Mr. Gauthier applied for accidental disability while still employed by the Dudley Highway Department. Counsel may possess some information I do not have, but that is not evident from the opinion itself. As I noted above, Mr. Gauthier took five months off after his second accident and surgery, made a brief, failed attempt to return to work, and then applied for accidental disability retirement eleven months later. There is no indication in the decision as to when he left the payroll of the Dudley Highway Department, which leads me to conclude that this date was unimportant, at least to the issues presented to Magistrate Imperato.

Requiring an employee who has been employed in more than one retirement system to apply for accidental disability retirement to the latest system in which he worked is consistent with the legislature's preference in the public employee retirement statute to have a member who has been employed in more than one retirement system apply for a benefit with his latest retirement system. For example, M.G.L. c. 32, § 3(5) provides that:

any member of any system who rendered service in any governmental unit other than that by which he is presently employed, in a temporary, provisional, or substitute position and who was excluded from membership by the rules of any board, may, before the date any retirement allowance becomes effective for him, pay into the annuity savings fund of the system in one sum, or in instalments, upon such terms as the board may prescribe, an amount equal to that which would have been withheld as regular deductions from his regular compensation for such previous period.

What this means is that if a person worked part-time in a retirement system that excluded him from membership because he worked too few hours, and then went on to establish membership in another retirement system, he must apply to the retirement system in which he is a member to purchase his earlier service in the other retirement system. This situation is not exactly analogous to the present situation because one of the conditions that applies to members who wish to purchase service is that they must be actively employed by a retirement system when they make their application. That is because "[t]he purchase or transfer of creditable service must be accomplished while a government employee is a member in service. G.L. c. 32, § 3(1)(a)(I)." *Zavaglia v. Gloucester Retirement Ed*, CR-09-459, Decision at 5 (DALA, Jan. 10, 2014). But that simply reemphasizes the reason why members who wish to apply for accidental disability retirement are governed by different rules. Such an application cannot validly be made until after the member is permanently disabled for a job. And hence, a requirement that members must still be employed by the job from which they are disabled would make no sense.

Conclusion

For the reasons stated above, I reject the Somerville Retirement Board's position that Mr. Tuminelli was ineligible to apply for accidental disability retirement from that board and remand

the matter to that Board to consider his application on the merits.

DIVISION OF ADMINISTRATIVE LAW APPEALS

James P. Rooney

James P. Rooney

Acting Chief Administrative

Dated: November 10, 2023