COMMONWEALTH OF MASSACHUSETTS
Division of Administrative Law Appeals

WAYNE W.,[1] *Petitioner*	:	Docket No. CR-21-0359
v.	:	Date: September 1, 2023
MIDDLESEX COUNTY RETIREMENT SYSTEM, *Respondent*	:	

Appearance for Petitioner:

Ian Collins, Esq.
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Appearance for Respondent:

Thomas Gibson, Esq.
Middlesex County Retirement Board
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Administrative Magistrate:

Eric Tennen

SUMMARY OF DECISION

The Petitioner, a former police officer, applied for accidental disability retirement on account of his Post-Traumatic Stress Disorder ("PTSD"). The Retirement Board's decision declining to even convene a medical panel is reversed. The unrebutted evidence, if believed, demonstrates that the Petitioner was clearly disabled on his last day of work and while a member in service. He was placed on paid administrative leave by the Chief of Police because he was unable to perform his job on account of his PTSD symptoms. Also, the Petitioner's application supports at least one theory of proximate cause—that his work on a criminal case aggravated a pre-existing condition (PTSD).

[1] A pseudonym. *See* G.L. c. 4 § 7, 26th para., (c).

DECISION

Pursuant to G.L. c. 32, § 16(4), the Petitioner, appeals a decision by the Middlesex County Retirement System ("MCRS" or "the Board") denying his application for accidental disability without convening a medical panel. I conducted a hearing via the Webex platform on April 4, 2023. The Petitioner testified on his own behalf; the Board did not present any witnesses. I was able to observe the witness's demeanor throughout his testimony. I admitted Exhibits 1 – 29 into evidence without objection. The Petitioner submitted a closing brief on May 30, 2023; the MCRS submitted a closing brief on July 10, 2023. Thereafter, the administrative record was closed.

FINDINGS OF FACT

Based on the witness testimony, and the exhibits, I make the following findings of fact:[2]

1. The Petitioner began working with the Tewksbury Police Department as a reserve officer in 1994. In 2000, he was appointed a full-time officer. In 2010, he was promoted to Sergeant. (Petitioner Testimony.)
2. Over the course of his career, the Petitioner witnessed many violent and traumatic incidents: he responded to suicides where he discovered dead bodies, saw the aftermaths of violent domestic violence assaults, and he even took lifesaving measures to save a badly injured man. (Petitioner Testimony; Exs. 17-20.)
3. As he would later come to understand, the fall-out from these incidents was psychologically damaging. He has been diagnosed with Post-Traumatic Stress Disorder ("PTSD"). (Petitioner Testimony; Ex. 11.)

[2] As discussed below, at this stage, I must analyze the case as if the Petitioner's account is unrebutted and believed. Therefore, only his version matters. That said, I find the Petitioner was a credible witness. He had a good memory, and his testimony was sincere.

4. Over the course of his career, he developed clear symptoms of PTSD, though he did not recognize them as such at the time. He was depressed and anxious; he had trouble sleeping; he had constant nightmares; he was angry; he had no appetite; he was paranoid; and he had constant flashbacks. (Petitioner Testimony.)
5. His symptoms would come and go, but exposure to new traumatic events would trigger or exacerbate them. (Petitioner Testimony.)
6. The Petitioner began to abuse alcohol around 2016. At its peak, he would drink almost daily, about 12 beers a day—sometimes up to 20. He would often drink by himself, after his kids went to bed, until one or two in the morning. (Petitioner Testimony; Ex. 7, pg 7.)
7. Years later, after engaging in therapy, he finally understood that his alcohol abuse was his attempt to self-medicate his PTSD symptoms. (Petitioner Testimony.)
8. Around 2014 or 2015, the Chief of Police recognized the Petitioner was burnt out. The Chief insisted he take a job as a Court Prosecutor. The Petitioner reluctantly did, feeling as if he had no choice. (Petitioner Testimony.)
9. A Court Prosecutor is the police liaison to the court and district attorney. Their duties included reviewing police reports, preparing exhibits for hearings, discovery disclosure, and prosecuting cases before a magistrate. In this capacity, the Petitioner read countless police reports about violent and traumatic events. This included reviewing pictures and videos from investigations. It also included sometimes interacting with the parties. (Petitioner Testimony; Exs. 21-24.)
10. Exposure to this evidence continued to trigger him. His PTSD symptoms persisted and, at times, worsened. (Petitioner Testimony.)

11. During this time, the Petitioner continued to abuse alcohol. In 2018, after a particularly bad binge, his colleagues urged him to check himself into McLean Hospital. He did and was there for a few weeks. Per protocol, he had to undergo a Fitness For Duty ("FFD") evaluation before he could return. (Petitioner Testimony; Exs. 7 & 28.)

12. At the time, he was in denial of his problems. To the extent he recognized his symptoms were problematic, he lied about them and their causes. As the son and grandson of police officers, he was too proud and scared to admit any weakness. (Petitioner Testimony.)

13. He was ultimately cleared to return to work. But his symptoms and drinking persisted. (Petitioner Testimony.)

14. In July 2020, he reviewed the police report and related media for a particularly brutal domestic violence attack. He also had to help the assistant district attorney prepare for a dangerousness hearing, which required reviewing gruesome crime scene photos.[3] (Petitioner Testimony.)

15. This case appeared to hit him harder than prior triggering events. It may be because it involved domestic violence, which mirrored the first traumatic incident to which he recalled responding. He had many flashbacks to that first incident throughout his career. (Petitioner Testimony.)

16. After working on this case, he was angry. He hated everything. He questioned his faith. He even thought he was seeing the defendant out in the community. (Petitioner Testimony.)

[3] The details of this incident are too gory to recount in this opinion. Needless to say, the Petitioner's testimony painted a horrific picture of the crime; the police report corroborates his testimony. As a long-time criminal defense attorney (prior to DALA), the description was objectively one of one of the worst crime scenes I can imagine.

17. A few days later, he called a recorded police line and left an erratic and drunken message. (Ex. 25.)

18. He was immediately placed on paid administrative leave and ordered to undergo another FFD evaluation. (Ex. 26.)

19. He also returned to McLean. He explained he returned because the drinking would not stop, and everything was spiraling out of control. (Petitioner Testimony.)

20. While that is true, the timing suggests he also went back because he was placed on administrative leave.

21. After undergoing this new FFD evaluation, he was deemed unfit to return to work. (Exs. 9 & 10A.)

22. He began attending various treatment programs. (Ex. 13.)

23. On October 14 2020, he was re-assessed for his FFD evaluation. The doctor opined he remained unfit to return for duty. (Ex. 10B.)

24. A few days later, he was arrested for operating under the influence of alcohol. The arrest was prompted by the Petitioner's clear intoxication while on a Zoom call with other police officers. (Ex. 27.)

25. Two weeks later, on October 30, 2020, he retired on superannuation. (Ex. 4.)

26. Even though he retired, another FFD evaluation report was submitted in November 2020. The same doctor continued to opine the Petitioner was still unfit for service. (Ex. 29.)

27. On July 14, 2021, the Petitioner submitted his application for accidental disability. He checked the box for "hazard undergone." (Ex. 1.)

28. He listed several dates for his injury: Nov. 7, 2005, Mar. 1, 2006, July 1, 2011, Nov. 2, 2012, April 1, 2019, and July 7, 2020 (which is clearly a reference to the domestic violence case). (Ex. 1.)

29. He also listed 09/2000-10/2020 under "specific time(s) or if hazard, length of time exposed." (Ex. 1.)

30. The application included a Physician's Statement confirming he met the criteria for accidental disability on account of his generalized anxiety disorder and PTSD. The statement details his PTSD, how his job caused it, and how it would continue to impact him. (Ex. 2.)

31. The Petitioner submitted several police reports for the various incidents he detailed in his application. At least one provided clear notice that he was involved in critical incident which could impact his emotional well-being. Police reports and internal records document that on July 31, 2011, the Petitioner responded to a bloody crime scene. An individual had sustained a laceration to his right arm which resulted in an enormous amount of blood loss. The Petitioner provided first aid which, by all accounts, saved the injured man's life. The Petitioner himself was injured and required medical assistance. (Ex. 19.)

32. He also submitted a police report from November 2012 which documented his response to a scene where an individual had just shot himself. The individual eventually passed away. (Ex. 20.)

33. Nevertheless, the Board denied the Petitioner's application without convening a medical panel. It gave several reasons: he failed to present a prima facie case that he was unable to perform his essential duties on the last day he actually worked, there was no record of

any injuries before or within the two-year application period, and there were no medical records that show any of the events caused his condition. (Ex. 4.)

34. He filed a timely appeal. (Exs. 4 & 5.)

CONCLUSION AND ORDER

A "board is not required to convene a medical panel if an applicant for disability retirement fails to present a prima facie case." *Internicola v. Saugus Ret. Bd.*, CR-20-0385, *3, 2022 WL 17081140 (DALA Nov. 10, 2022), *citing Duquet v. Malden Ret. Bd.*, CR-18-297 (DALA Aug. 28, 2020). However, to be entitled to a medical panel, the Petitioner need only produce "sufficient evidence 'that, if unrebutted and believed, would allow a factfinder to conclude that [the member] is entitled to . . . benefits.'" *Id.*, *quoting Hickey v. Medford Ret. Bd.*, CR-08-380 (CRAB Feb. 16, 2012), *in turn quoting Lowell v. Worcester Ret. Bd.*, CR-06-296 (DALA Dec. 4, 2009). "Proof of a prima facie case requires 'evidence that, until its effect is overcome by other evidence, compels the conclusion that the evidence is true,' and shifts the burden of producing contradictory evidence to the other side, whether at trial or upon a dispositive motion such as a motion for summary judgment." *Leonard v. Boston Ret. Sys.*, CR-12-596, *40 (DALA Aug. 27, 2021), *quoting Burns v. Commonwealth*, 430 Mass. 444 (1999). "[Moreover] at this stage, I cannot judge whether the facts alleged are true; nor may I consider contradictory evidence, no matter how credible it may be." *St. Martin v. State Bd. of Ret.*, CR-21-0258, 2023 WL 1834049 (DALA Feb 3, 2023) (citations omitted).

The Board puts forth two main arguments: that the Petitioner was not disabled on his last day of work and that, in any event, indirect exposure to graphic images is not a hazard—*i.e.* an identifiable condition not common to all or many occupations. The Board's arguments are not persuasive.

1. *The unrebutted evidence, if believed, is that the Petitioner was disabled when he stopped working.*

The unrebutted evidence, if believed, is that the Petitioner was disabled on his last day of service and also while still a "member in service."[4] *See* G.L. c. 32 § 7; *Hollup v. Worcester Ret. Bd., et al.*, No. 21-P-707 (Aug. 25, 2023); *Vest v Contributory Ret. App. Bd.*, 41 Mass. App. Ct. 191 (1996). Whether someone is "disabled" is not defined by any particular diagnosis. Rather, it is defined by whether they can perform the essential duties of their job. Moreover, "a member must establish permanent incapacity . . . based on the same disability for which the member is now seeking accidental disability retirement." *Downey v. Middlesex Cty. Ret. Sys.*, CR-15-0550, *11 (CRAB Jun 23, 2023).

Here, the Petitioner has produced facts that he was suffering from PTSD. The Board argues that the Petitioner did not experience symptoms of PTSD due to any work events, citing the Diagnostic and Statistical Manual, 5th Edition ("DSM-5"), but does not elaborate. Had it focused on the criteria a little more, it would be clear the Petitioner presents a paradigmatic case of PTSD. *See Witkowski v. Massport Employees Ret. Sys.*, CR-20-255, *22-24, 2021 WL 9697049 (DALA Sep. 3, 2021) (listing the full criteria of PTSD). The Petitioner's description of his symptoms and feelings was a virtual checklist of symptoms and feelings associated with PTSD. These were present for a long time—certainly before the Chief moved him to the police prosecutor position, and clearly continued while he worked in that capacity. There is nothing in the Petitioner's personal life to suggest he was exposed to trauma outside of his job. Rather, his

[4] Just last week, the Appeals Court issued a decision undoing the requirement that disability is measured from the last day the employee performed services. *See Hollup v. Worcester Ret. Bd., et al.*, No. 21-P-707 (Aug. 25, 2023). Nevertheless, I find the Petitioner was disabled prior to his last day of service and satisfies CRAB's interpretation of *Vest* anyway.

exposure to trauma, and re-exposure to trauma, and exposure to triggering events, continued to occur only at work.

Further, the Petitioner has produced facts that he was incapable of performing his job. The Petitioner had been struggling at work for a while. He was so incapable of working in the field his Chief practically forced him to be a police prosecutor. Yet, he could not perform that job either. It required him to review reports and visual media; that, in turn, continually triggered him, thereby setting off a cycle of more drinking and more emotional trauma. He was an alcoholic whose drinking covered up his untreated symptoms of PTSD. *See e.g. Scipione v. Barnstable Ret. Sys.*, CR-12-196, *29 (DALA Sept. 4, 2015) ("police duties involve dangerous, high stress situations and are vital to public safety, and they cannot be performed safely and effectively by a person whose PTSD is aggravated by the very stresses that a police officer is supposed to address. This is particularly true in Mr. Scipione's case because his efforts to self-medicate with alcohol further reduced his ability to perform his job"). His PTSD symptoms prevented him from doing his job. *See Kurt K. v. HCRRB*, CR-21-631 & CR-22-0117 (DALA Jul. 21, 2023) ("the petitioner was disciplined for conduct that, in hindsight, reflected his medical inability to perform his duties.").

Admittedly, the Petitioner was placed on leave after he called the station sounding erratic and under the influence. It may have appeared the Petitioner was simply an out-of-control alcoholic and that is why the Chief placed him on leave. But dig deeper and the real problem was the Petitioner's PTSD. *See Kane v. Worcester Reg. Ret. Bd.*, CR-14-52 (CRAB, June 8, 2021) (Decision on Motion for Reconsideration and Clarification) ("We do not agree . . . that *Vest* requires that the *reason* for the member's leaving work be his disability."). After his drunken phone call, the Chief immediately placed him on paid administrative leave; given his history, the

Chief also immediately scheduled another follow-up appointment with a psychologist. It was clear to the Chief—indeed, it would have been clear to anyone—that the Petitioner was incapable of working as a police officer by that point, even as a police prosecutor. The psychologist concurred in his report a few weeks later. This was not the first time the Petitioner had to see a psychologist. And it was not the first time he needed a FFD evaluation to return to work. But it was the first time he was not cleared to return. Thus, the Petitioner produced facts that the reason he was unable to perform the essential duties of his job was because of his then untreated and undiagnosed PTSD.

To review, at this stage, the Petitioner's burden is to show that the facts of his case, if true, demonstrate he was disabled prior to being placed on leave by the condition for which he claims disability. I do not know how the Petitioner could make a stronger case. He easily meets this burden.

2. *The unrebutted evidence, if believed, is that the Petitioner's disability was proximately caused by a workplace incident. The July 2020 exposure aggravated a pre-existing condition.*

The second issue is whether the Petitioner has put forth information to make a prima facie case that his disability was caused by a personal injury or hazard undergone. The Board agrees that "[w]here, as here, such an application is based on an emotional injury, a member may proceed on either (or both) of two theories." *Zajac v. State Bd. of Ret.*, CR-12-444 (CRAB Aug 21, 2015).

> First, he may claim "that his disability stemmed from a single work-related event or series of events." Second, he may claim that his disability "was the product of gradual deterioration" which resulted from exposure at work "to an identifiable condition that is not common and necessary to all or a great many occupations." Both theories are subject to the retirement law's requirements that the injury or hazard must have occurred "as a result of, and while in the performance of, his duties at some definite place and at some definite time."

Ibid. (citations omitted); *Zerofski's Case*, 385 Mass. at 594-95. The member's application must generally detail the injury and/or incident(s) upon which he relies.

One reason the Board denied the application is because the Petitioner did not submit any notices of injury for various incidents referenced in his application. Generally, a Petitioner may rely on events which occurred within two years of his application. G.L. c. 32 § 7(1).[5] A Petitioner may rely on older incidents, but only if there was a contemporaneous notice of injury. *Id; but see Jessica J. v. MTRS*, CR-20-0288, *6 n. 5, 2022 WL 18673981 (DALA Jun 3, 2022) ("The hazard alleged by the petitioner persisted into the two-year period leading up to her retirement application. In such circumstances, it is possible (though not certain) that the application may rely on the gradual deterioration caused by the hazard's entire duration."). Absent contemporaneous notice, "acts that occurred prior to that date may [at the very least] be relevant in establishing the existence of an underlying condition." *B.G. v. State Bd. of Ret.*, CR-20-0207 (DALA Oct. 8, 2021).

The Petitioner can hardly be blamed for not having submitted notices of these older incidents. The rules around notice and accidental disability applications have yet to catch up to the reality of mental health injuries, especially PTSD. *See, e.g., Carnevale v. Barnstable Cty. Ret. Bd.*, CR-20-0105 (DALA Sep. 16, 2022). Usually, someone is suffering from PTSD well before they are ever diagnosed with it. PTSD is an after-the-fact emotional reaction to traumatic incidents. It can take years for someone to recognize their symptoms are connected to prior

[5] The purpose of the notice requirement is to allow an opportunity to investigate. *See Zajac, supra,* at 8. It would be putting form over substance to say that the Chief did not have notice of the Petitioner's inability to perform his job. That is why the Chief, on his own initiative, took the Petitioner out of the field and put him in the courtroom. *See Kooken v. Amesbury Ret. Bd.*, No. CR-17-112, at *17 (DALA June 5, 2020) (records of a police chief's decision to place officers on leave for purposes of psychological counseling "serve[] the very purpose [§ 7(1)] is designed to address").

trauma. *See Kurt K, supra*. Sometimes they do not have access to mental health counseling that could help them identify this sooner; sometimes, like the Petitioner, they also must overcome the fear of admitting this to others (and the consequences it may bring for their careers). Nevertheless, until the notice requirement changes, the Petitioner is handcuffed by these strict reporting requirements. The only incident within the two-year window in his application is his July 2020 work on the domestic violence case.[6] The question, then, is whether that could have proximately caused his disability.

The Petitioner has put forth facts that he had PTSD, caused by events he experienced on the job well before July 2020. Given that he already had PTSD, the Petitioner's application supports a theory that his work on the criminal case in July 2020 was an event which aggravated his pre-existing condition to the point of disability. The unrebutted evidence, if believed, leaves no doubt about that. The Petitioner experienced triggering events over his career. These exacerbated harmful symptoms which he dealt with by engaging in self-destructive conduct such as drinking. These symptoms prevented him from doing his job such that the Chief reassigned him. As a police prosecutor, he would continue to be triggered and continue to drink; he continued to work and suffer his symptoms silently in his personal life. However, by July 2020, he had reached a point in which his struggles spilled over into his professional life so that he

[6] Though not necessary to decide this appeal, the incident reports from July 2011 and November 2012 may also be sufficient "written notice" of his exposure to a potentially disabling condition. *See Kurt K., supra* ("The petitioner did not recognize his PTSD symptoms or report them to his employer until more than two years after the October 2017 car crash. The contemporaneous incident report that the petitioner filed did not assert that he had suffered any emotional harm. Still, that incident report was not limited to a description of the petitioner's activities. It flagged the car crash as a 'critical incident,' explaining that the reason for that label was a 'death or serious injury to a child.' The very purposes of the 'critical incident' label were to identify events that might compromise employee wellbeing and to provoke mental-health interventions, including the Critical Incident Stress Management Debriefing Session that the petitioner attended.").

could not even perform the job of police prosecutor. *See, e.g., Burchell v. Barnstable Cty. Ret. Sys.*, CR-20-0204 (DALA Apr. 23, 2021); *Travers v. Winchester Ret. Bd.*, CR-13-647 (CRAB Dec. 21, 2017); *Scipione, supra*.

The Board relies heavily on *Morse v. CRAB*, 96 Mass. App. Ct. 1114 (2019) (decision pursuant to rule 1:28), which affirmed the underlying CRAB decision. Morse was a court reporter who claimed she was disabled "by the vicarious trauma she experienced through exposure to the details of violent crimes during her employment." *Id*. at 1. Morse proceeded only under a theory that this exposure was an "identifiable condition" not common to most professions. CRAB, and then the Appeals Court, held it was not because "the type of [indirect] exposure experienced by Morse is common across a broad spectrum of jobs in the judicial system, medical fields, and law enforcement. These jobs included police officers, victim advocates, attorneys, judges, court officers, interpreters, and medical personnel." *Id*. at 2.

Morse is distinguishable. First, *Morse* was an appeal after a medical panel evaluated the Petitioner (which limited the scope of review to its findings). Second, unlike Morse, who only argued she had an "identifiable condition," the Petitioner here need not rely on that theory because he has put forth facts supporting a different theory: that a specific event listed in his application—his work on the criminal case in July 2020—aggravated a pre-existing condition (his PTSD). Under that theory, it does not matter if the incident is or is not considered "common" to many professions. *See Plymouth County Ret. Bd. v. CRAB*, 60 Mass. App. Ct. 114, 118 n. 3 (2003).[7]

[7] Even if the Petitioner were limited to the "identifiable condition" theory, there is reason to doubt *Morse's* continuing validity, or at least limit it to its facts. *See Shea v. Marlborough Ret. Bd.*, CR-14-185 (DALA Aug. 25, 2017). Morse was not diagnosed with PTSD at the time she applied (though she probably would meet the diagnosis under the new definition in the DSM-V adopted after her case). *Id*. at 18-19. But also, Morse only ever had indirect exposure to trauma. The Petitioner here has been diagnosed with PTSD and has had significant direct exposure to

As noted, the Board agrees that "[w]here, as here, such an application is based on an emotional injury, a member may proceed on either (or both) of two theories." *Zajac*. It disputes the Petitioner meets either test because he can only rely on the July 2020 incident (since that is the only incident within the two-year notice window). The Board also takes issue with the Petitioner relying on prior incidents in his testimony, arguing that he cannot "amend" his application by adding new incidents or injuries. But his testimony about these prior incidents was not an amendment to his application. Rather, it was necessary to establish the basis for the Petitioner's PTSD. The PTSD was the pre-existing condition which the July 2020 exposure aggravated. *See B.G., supra*. The Petitioner's evidence, if unrebutted and believed, therefore supports at least one theory of injury—an event (or series of event) which aggravated a pre-existing condition. He need not rely on the "hazard undergone" theory at this stage to get to a medical panel.

Because the Petitioner has put forth facts which, if unrebutted and believed, demonstrate that a workplace injury caused his permanent disability, he is entitled to be evaluated by a medical panel. The Board's decision is **reversed**.

SO ORDERED

DIVISION OF ADMINISTRATIVE LAW APPEALS

Eric Tennen

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Eric Tennen
Administrative Magistrate

trauma which formed the basis of that diagnosis. He did not just hear people talk about trauma, he saw it in person, over and over; and he could not escape it as a police prosecutor, where he still saw vivid photos and videos and interacted with the various parties.