

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

Michael Welsch,
Petitioner

v.

Docket No. CR-20-0679

Middlesex County Retirement System,
Respondent

Appearance for Petitioner:

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Appearance for Respondent:

Thomas F. Gibson, Esq., Chairman
Middlesex County Retirement Board
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Billerica, MA 01865

Administrative Magistrate:

James P. Rooney

Summary of Decision

The regional medical panel majority did not employ an erroneous standard or lack pertinent facts when it certified in the negative to the issue of causation. CRAB is therefore bound by the panel's negative response. *Malden Ret. Bd. v. CRAB*, 1 Mass. Appeal Ct. 420, 424 (1973); G.L. c. 32, s. 6(3)(a).

DECISION

Michael Welsch is appealing the December 18, 2020 decision of the Middlesex County Retirement Board denying his application for accidental disability retirement. The parties agreed to waive a hearing and have the case decided on the documents pursuant to 801 CMR 1.01 (10)(c). I marked ten exhibits into evidence. I marked the Petitioner's written submission "A" and Respondent's written submission "B". A list of exhibits appears on the last page of this decision.

FINDINGS OF FACT

1. Michael Welsch, born in 1959, worked as a Senior Custodian for the Burlington Public Schools from August 29, 2011 to February 20, 2019 when he stopped working because of pain in his right knee. (Exs. 3, 5.)
2. Mr. Welsch's duties as a custodian included "cleaning, dusting, sweeping, washing, buffing and waxing floors, washing windows, changing light bulbs, policing grounds, sweeping walks, cutting lawns, removing trash, removing snow and ice, operating low pressure heating and ventilation systems, ordering custodial supplies and making minor repairs to buildings, equipment and heating, lighting, ventilating and plumbing systems. Applicant must be able to lift 50lbs." Mr. Welsch was on his feet for most of the day, climbing ladders, stooping, working on uneven surfaces, waxing and sweeping floors, kneeling, and pushing and pulling heavy objects. (Ex. 5, p. 10; Ex. 1, p. 4.)
3. On February 18, 2019, Mr. Welsch was shoveling snow when he felt a severe pain in his right leg, right knee and some pain in his back. On February 20, 2019 he carried a heavy rug. While he was putting the rug down he felt a severe pain in his right leg.
(Ex. 3, p. 7)
4. Mr. Welsch applied for and received workers' compensation benefits commencing on February 20, 2019. (Ex. 5, p. 8.)
5. On the morning of February 21, 2019, Mr. Welsch called the Veterans Affairs (VA) Telephone Care line to report a 'heavy ache' in his right thigh area for the previous 3-4

days. He said he thought he was over-using his right leg because of a below the knee amputation of his left leg. “He says that he is still working as a custodian as he has for the last 9 years and he is starting to believe that he is no longer able to do his job because the demand is so heavy. He says he is required to clean 20 rooms per day and also carry heavy items that need to be moved.” (Ex. 10 (a), pp. 23-24.)

6. Mr. Welsch was seen later that day by a VA staff nurse who noted that Mr. Welsch reported “shoveling large amounts of snow and waking up the next day with pain. Pt. reports high level of stress, states he feels his job is too difficult to continue [due to] [left] leg amputation, but is worried about his finances if he can’t work.” (Ex. 10 (a), p. 22.)
7. Mr. Welsch was then seen by a VA medical doctor who noted his complaint of right thigh pain. An ultrasound was negative for deep vein thrombosis (dvt). The doctor opined that a muscle strain of the quadriceps was a possible source of the pain. (Ex. 10 (a), p. 3.)
8. On February 22, 2019, Mr. Welsch called the VA saying that he was experiencing even more pain in his knee and thigh with weight bearing and requested an Xray of his knee. He was offered a muscle relaxer and Voltaren gel which he accepted. (Ex. 10 (a), p. 1.)
9. On February 26, 2019, Mr. Welsch was seen by Todd Reed, M.D. at the Bedford VA to address “acute knee and back pain.” Dr. Reed opined, “I have advised that he not return to work at this time, as this could exacerbate his condition. He will be reassessed in the future.” (Ex. 10 (b).
10. On March 19, 2019, Mr. Welsch had an MRI of his right knee at the VA that demonstrated “severe lateral patellofemoral osteoarthritis with full-thickness cartilage loss and articular surface remodeling; mild femorotibial degenerative changes with small peripheral osteophyte formation.” (Ex. 10 (b), 3/19/19.)

11. Dr. Reed wrote a note to Mr. Welsch on the MRI report, stating in part, “There is a lot of arthritis, degenerative changes and bone spurs (osteophytes) which are associated with arthritis. If medications (such as motrin/tylenol) and cortisone injections (which can be done here in the rheumatology clinic) are not helpful, the next step would be orthopedics referral in the Boston VA. I read the recent rheumatology note. If physical therapy, the knee brace, and your current medications are not helping I would suggest you return to rheumatology first to discuss injections. If at any time you want me to refer you to Boston VA Orthopedics, let me know.” (Ex. 10 (b), 3/19/19.)
12. By letter of March 20, 2019, Dr. Reed kept Mr. Welsch out of work until April 4, 2019 at the earliest. “I can reassess his condition at that time.” (Ex, 10 (b), 3/20/19.)
13. On March 28, 2019, Mr. Welsch was seen in Rheumatology by Eugene A. Bacorro, M.D. in follow-up for his right knee pain. Mr. Welsch agreed to continue using Tylenol and diclofanec gel, to consider a steroid injection and to continue wearing a knee brace. Dr. Bacorro referred Mr. Welsch to physical therapy to evaluate his ability to perform his work. (Ex. 10 (f).)
14. On April 3, 2019, Mr. Welsch had a physical therapy consultation with Urvika Patel. The note reads, “Vet reports [history] of increasing [right] knee pain over the past year or so but recently within the past few months worsened. Vet states [about] 1 to 1.5 months ago he overdid it shoveling and felt the pain in the next day or so, which worsened when he went back to work. Vet is a custodian working in the Burlington school. Currently he hasn’t been going to work [due to] increased [right] knee pain.” (Ex. 10 (c).)
15. By letter of April 9, 2019, Dr. Reed noted that he had recently seen Mr. Welsch for right knee pain, noting that Mr. Welsch had also been seen by the VA physical therapy and

rheumatology staff. "I have advised that he not return to work at this time, as this could exacerbate his condition. I have suggested that he not return to work for the next 2 months. His condition will be reassessed in the future." (Ex. 10 (b), 4/9/19.)

16. On May 24, 2019, Mr. Welsch was discharged from physical therapy for lack of progress. Although Mr. Welsch reported feeling better since starting physical therapy he continued to report pain in the right knee, difficulty with weight bearing and activities such as prolonged walking, stairs and activities of daily living. Mr. Welsch planned to consult with a non-VA orthopedist. (Ex. 10 (d).)
17. On May 29, 2019, Mr. Welsch consulted Eric Berkson, M.D., an orthopedic surgeon at MGH Sports Medicine. Dr. Berkson diagnosed right knee pain caused by aggravation of underlying degenerative joint disease. He injected Mr. Welsch's right knee with cortisone and gave him a note to keep him out of work until re-examination. (Ex. 10 (g), 5/29/19.)
18. Mr. Welsch had follow-up visits at MGH Sports Medicine with Megan Ellen Lampron, PA on July 7, 2019, August 19, 2019, and September 20, 2019. At the August visit he had another cortisone injection. At each visit he was provided with a note to keep him out of work. By letter of January 3, 2020, Dr. Berkson recommended total right knee arthroplasty. (Ex. 10 (g).)
19. Mr. Welsch began physical therapy at Nashoba Valley Medical Center on June 17, 2019, but was discharged on August 6, 2019 for missing an appointment and not calling to reschedule. (Ex. 10 (h).)
20. On July 9, 2019, Steven Sewall, M.D., an orthopedic surgeon performed an independent medical evaluation of Mr. Welsch for workers' compensation purposes. Dr. Sewall diagnosed exacerbation of underlying degenerative disc disease at L3-4, L4-5 and right

sciatica, with resolved right knee strain. He recommended an MRI of the lumbar spine and physical therapy for the lumbar spine. Dr. Sewall opined that Mr. Welsch was partially disabled and could return to work in a sedentary position with lifting to 10 pounds. He opined that Mr. Welsch had not reached a medical end point with respect to his lumbar spine but had reached a medical end point with respect to his right knee. (Ex. 10 (m), 7/9/2019.)

21. On August 20, 2020, Mr. Welsch filed an application for accidental disability retirement based on two personal injuries sustained on February 18 and February 20, 2019 that resulted in “right knee symptomatic patella-femoral joint arthritis aggravated by work-related injuries on 2/18/19 and 2/20/19.” (Ex. 3, p. 7.)

22. Mr. Welsch claimed that he could not perform the essential duties of his job, including being on his feet all day, climbing ladders, stooping, working on uneven surfaces, waxing and sweeping floors, snow shoveling, kneeling and pushing and pulling heavy objects. (Ex. 3, p. 4.)

23. Mr. Welsch noted that he was scheduled to have a total knee replacement on September 24, 2020 at Newton-Wellesley Hospital, and that the workers’ compensation insurer had been ordered to pay for the surgery. (Ex 3. pp. 4, 9.)

24. John Corsetti, M.D., an orthopedic surgeon, filed a statement in support of the application. He noted that he had performed an independent medical evaluation of Mr. Welsch on December 19, 2019. He certified that Mr. Welsch had right knee osteoarthritis that prevented him from standing, walking climbing and carrying, and that this disability was likely to be permanent. He opined that knee replacement would increase Mr. Welsch’s capabilities. (Ex. 4.)

25. In the report of Dr. Corsetti's independent examination of Mr. Welsch that is appended to exhibit 4, Dr. Corsetti opined with respect to causation, "The patient likely had preexisting arthritis but was entirely asymptomatic and fully functional prior to the injury. The injuries of 2/18/2019 and 2/20/2019 precipitated symptomatology in the previously-asymptomatic right knee in this patient. Had the injuries not occurred, he likely would have continued to enjoy high level knee function for the foreseeable future in spite of any preexisting arthritis". (Ex. 4. Attachment, 12/19/2019.)
26. On September 24, 2020, Mr. Welsch had a total right knee replacement (arthroplasty) performed by Hany S. Bedair, M.D. at Newton-Wellesley Hospital. (Ex. 10 (i).)
27. A single-physician regional medical panel of orthopedic surgeons evaluated Mr. Welsch in October 2020. The panel comprised Louis A. Bley, M.D., Aaron Gardiner, M.D., and Richard N. Warnock, M.D. Dr. Bley certified in the affirmative to the issues of disability and permanence and in the negative with respect to causation. Dr. Gardiner certified in the affirmative to disability and in the negative to permanence and causation. Dr. Warnock answered in the affirmative to disability, permanence and causation. (Exs. 6, 7, 8.)
28. Dr. Bley evaluated Mr. Welsch on October 23, 2020. He reviewed medical records and a job description, took a history and performed a physical examination. Dr. Bley noted that an MRI of the right knee in March 2019 demonstrated "severe tricompartmental osteoarthritis with full-thickness cartilage loss of the patellofemoral joint and bone-on-bone changes with osteophyte formation. He had medial compartment DJD with articular cartilage loss in the central weight-bearing aspect, subcortical cystic changes in the posterior medial tibial plateau. In the lateral compartment, he was found to have

degenerative cartilage loss in the central weight-bearing aspect with degenerative subchondral edema.” Dr. Bley opined that there was no inciting event described by Mr. Welsch while snow shoveling to set off his knee pain, “and similarly his MRI ... does not appear to show any traumatic injury other than the underlying degenerative changes in his knee.” (Ex. 6.)

29. Dr. Bley observed that in 1977 Mr. Welsch had a below-the knee left leg amputation as the result of a motorcycle accident. He opined, “the trauma from his motor vehicle accident and the subsequent need to rely on the right knee for weight-bearing of an increased nature appears to have resulted in end-stage osteoarthritis of his right knee.” (Ex. 6.)

30. Dr. Bley noted that “[i]n an April 2019 note, Mr. Welsch reports at the VA Medical Center that he had a history of increasing right knee pain over the past year or so, but within the past few months it had worsened ... Based on the MRI, there does not appear to be any evidence of a work-related trauma to the knee above and beyond the progression of the underlying osteoarthritis, and thus this would be a non-accidental disability determination.” (Ex. 6.)

31. Dr. Gardiner evaluated Mr. Welsch on October 28, 2020. He reviewed medical document and a job description, took a history and performed a physical examination. Dr. Gardiner observed that Mr. Welsch was one month out from his knee replacement so was not at a medical endpoint “with regard to his right knee osteoarthritis” to explain his negative response with respect to permanence. (Ex. 7.)

32. Dr. Gardiner noted that Mr. Welsch had osteoarthritis of the right knee prior to February 18, 2019, based on the physical therapy note from April 2019. He opined, “[t]his is a

progressive degenerative condition that takes time to develop ... In my medical opinion [Mr. Welsch] most likely sustained a temporary exacerbation of his symptoms of his underlying osteoarthritis from the injury on February 18, 2019. In my medical opinion, the current disability is due to the natural progression of the pre-existing condition and causation is not established.” (Ex. 7.)

33. Dr. Warnock evaluated Mr. Welsch on October 20, 2020. He reviewed medical records and a job description, took a history and performed a physical examination. He offered a diagnosis of osteoarthritis of the right knee, status post total knee replacement. He opined, “I find his current disability and need for treatment related to the date of injury February 18, 2019. This represents an aggravation of a preexisting condition. He is not at a medical end result and the extent of his recovery is not certain in any determinable timeframe; as such, his disability is permanent based on the PERAC standard.” (Ex. 8.)

34. By letter of December 18, 2020, the Middlesex County Retirement Board denied Mr. Welsch’s application for accidental disability retirement “due to the failure of a majority of the medical panel to certify that your disability was such as might be the natural and proximate result of the injury upon which your application was based, which is a necessary prerequisite to the Board’s further review of your application.” (Ex. 1.)

35. Mr. Welsch filed a timely appeal. (Ex. 2.)

CONCLUSION

The decision of the Middlesex County Retirement Board to deny this application for accidental disability retirement is affirmed because the Petitioner has failed to meet his burden of proof with respect to causation.

In order to qualify for an award of accidental disability retirement benefits, the Petitioner must prove that he is unable to perform the essential duties of his job as the proximate result of a personal injury sustained or hazard undergone while in the performance of his duties under G.L. c. 32, s. 7(1). The Petitioner bears the burden of proof to demonstrate a causal nexus between a personal injury or hazard undergone and the claimed disability. *Campbell v. CRAB*, 17 Mass. App. Ct. 1018 (1984).

In order to meet his burden, the Petitioner must prove one of two hypotheses: that his disability was caused by a single or series of work-related events, or that his employment exposed him to an “identifiable condition...that is not common and necessary to all or a great many occupations” that resulted in disability through gradual deterioration. *Blanchette v. CRAB*, 17 Mass. Ap. Ct. 479, 485 (1985) (quoting *Zerofski’s Case*, 385 Mass. 590, 595 (1982)). The Petitioner advances the first hypothesis: that his disability is the proximate result of two work related events in February 2019.

In order to succeed on his application, the Petitioner must be examined by a regional medical panel that certifies that he is permanently mentally or physically incapacitated for further duty and that the disability is such as “might be the natural and proximate result of the accident or hazard undergone” under G.L. c. 32, s. 6(3)(a). The final determination with respect to causation is reserved for the Contributory Retirement Appeal Board (CRAB), “based on the facts found and all the underlying evidence, including both the medical and non-medical facts.” *Blanchette*, 20 Mass. App. Ct. at 483.

On February 18, 2019, the Petitioner had end stage osteoarthritis of the right knee. He shoveled snow and his right knee hurt. He returned to work February 20, 2019 and felt pain in his right knee after lifting a heavy rug. An MRI of the right knee in March 2019

demonstrated the extent of the degeneration of his right knee by the osteoarthritis probably caused by the over reliance on his right knee caused by his left leg below the knee amputation. He reported to a physical therapist in April 2019 that he had been experiencing pain in his right knee for the past year. (Finding 14.) It is on these facts that the medical panel majority concluded that the Petitioner's disability, that is, his inability to perform the essential duties of his job, was more likely caused by the natural progression of osteoarthritis rather than by the two episodes of knee pain he experienced shoveling snow and lifting a rug. The MRI demonstrated degenerative changes, rather than traumatic damage, to his knee.

The Contributory Retirement Appeal Board (CRAB) is bound by the negative response of the panel majority to any certificate question unless the panel employed an erroneous standard or lacked pertinent facts. *Malden Retirement Bd. v. CRAB*, 1 Mass. App. Ct. 420, 424 (1973); G.L. c. 32, s. 6 (3)(a).

The panel majority, Dr. Bley and Dr. Gardiner, did not employ an erroneous standard to the issue of causation when certifying in the negative. The panel certificate includes issues to be considered by the panel when determining causation. The certificate states:

Aggravation of a pre-existing condition standard: if the acceleration of a pre-existing condition or injury is as a result of an accident or hazard undergone, in the performance of the applicant's duties, causation would be established. However, if the disability is due to the natural progression of the pre-existing condition, or was not aggravated by the alleged injury sustained or hazard undergone, causation would not be established.

In view of the fact that the Petitioner had end stage osteoarthritis, had been experiencing pain for the previous year, and felt pain, but did not experience a traumatic injury to his knee on February 18 or February 20, 2019, it was reasonable for the panel majority to conclude that the Petitioner's inability to perform the essential duties of his job was due to the "natural

progression of the pre-existing condition” of osteoarthritis, rather than to the two episodes of pain experienced in the performance of his duties.

I also conclude that based on the voluminous medical documentation in this record that the panel considered all “pertinent facts” as required under G.L. c. 32, s. 6 (3)(a).

The decision of the Middlesex County Retirement Board to deny this application for accidental disability retirement is affirmed.

DIVISION OF ADMINISTRATIVE LAW APPEALS

James P. Rooney
Acting Chief Administrative Magistrate

DATED: August 4, 2023

EXHIBITS

1. Letter of denial – 12/18/2020
2. DALA Notice of Receipt of Appeal – 12/23/2020
3. Member’s Application for Disability Retirement
4. Physician’s Statement and 12/19/2019 report of Dr. Corsetti
5. Employer’s Statement with Job Description and Injury Report
6. Medical Panel Certificate and Report of Dr. Bley
7. Medical Panel Certificate and Report of Dr. Gardiner
8. Medical Panel Certificate and Report of Dr. Warnock
9. Petitioner’s Certification of Medical Records
10. Medical Records Provided to the Medical Panel
 - a. Dept. of Veterans Affairs 7/1/2020 – 6/30/2015
 - b. Dept. of Veterans Affairs Disability Notes 2/26/19, 3/19/19, 3/20/19, 4/9/19
 - c. Veterans Admin. Consultation 4/3/19
 - d. Veterans Admin. Progress Note 5/24/19
 - e. Veterans Admin. Progress Note 3/19/19
 - f. Veterans Admin. Progress Note 3/28/19
 - g. MGH Sports Medicine 5/29/19 – 1/3/20
 - h. Nashoba Valley Medical Center 6/17/19 – 8/6/19
 - i. Newton Wellesley Hospital 9/24/20 -9/29/20
 - j. Newton Wellesley Hospital 6/9/20
 - k. Newton Wellesley Hospital 11/12/19
 - l. Dr. Jorge Villafuerte 6/20/19
 - m. Dr. Steven Sewall 7/9/19, 2/27/20