

COMMONWEALTH OF MASSACHUSETTS

**Division of Administrative Law Appeals
14 Summer Street, 4th Floor
Malden, MA 02148
www.mass.gov/dala**

Elaine Yoke,
Petitioner

v.

Docket No. CR-21-0543

Norfolk County Retirement System,
Respondent

Appearance for Petitioner:

William J. Gately, Jr., Esq.
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Appearance for Respondent:

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Administrative Magistrate:

Kenneth Bresler

SUMMARY OF DECISION

Denial of application for accidental disability retirement benefits is affirmed because petitioner received negative panel report and no exception applies.

DECISION

The petitioner, Elaine Yoke, appeals the denial of her application for accidental disability retirement benefits by the Norfolk County Retirement Board (NCRB). The parties agreed to have this appeal decided on submissions. 801 CMR 1.01(10)(b). I admit the 14 exhibits that the parties

submitted. Both parties submitted post-hearing briefs.

Findings of Fact

1. Ms. Yoke was an animal control officer for the Dover Police Department. (Ex. 1, p. 2) (She was also a bus driver for a private company, Ex. 1, p. 2, but she was injured as an animal control officer and that seems to have been her primary job.)

2. On January 27 or 28, 2015, Ms. Yoke was injured. (*E.g.*, Ex. 1, p. 5 (injury was January 27); Stipulation (injury was January 28)).

3. On January 15, 2018, Ms. Yoke applied for accidental disability retirement benefits. (Ex. 1)

4. When asked the “medical reason” for her application, Ms. Yoke identified parts of her body: head, neck, right elbow, and right shoulder. (Ex. 1, p. 2)

5. When asked to describe the duties that she was unable to perform because of her disability, Ms. Yoke did not precisely answer that she was unable to perform duties. Rather, she wrote: “Difficulty lifting, reaching, pulling, pushing. I lack some dexterity.” (Ex. 1, p. 2)

6. Ms. Yoke stated that she ceased being able to perform all the essential duties of her position on January 27, 2015. (Ex. 1, pp. 2)¹

7. Ms. Yoke’s application contained incomplete answers; she seemed to have stopped in mid-answer.

A. When asked about her activities of daily living, she wrote:

I get by. I struggle with my hair with a twisting motion. I notice that around kitchen

(Ex. 1, p. 4)

¹ Ms. Yoke received worker’s compensation for her injury. (Ex. 1, p. 7; Stipulation) Hence, the general two-year deadline for applying for accidental disability retirement benefits after an injury did not apply to her. G.L. c. 32, § 7(3).

B. When asked to describe the incident, she wrote:

Responding to a homeowner complaining of a goose problem in back yard.
Slipped & fell on ice in driveway. Driver, while inspecting property

(Ex. 1, p. 5)²

8. Ms. Yoke's treating physician diagnosed her condition as a right rotator cuff injury with permanent nerve damage. (Ex. 2, p. 2)³

9. Ms. Yoke's treating physician provided more details about Ms. Yoke's injury:

Applicant was walking in driveway in the course of her work on an animal control call when she slipped on ice driveway and fell, striking her head and fracturing her left elbow. She also lost consciousness.⁴

(Ex. 2, p. 3)

10. A regional medical panel was appointed. (*E.g.*, Ex. 5)

11. On December 23, 2020, Dr. Wojciech Bulczynski, a member of the medical panel and orthopedist, examined Ms. Yoke. (Ex. 5, p. 1)

12. Dr. Bulczynski answered yes to the following questions: Is Ms. Yoke physically incapable of performing the essential duties of her job, is her incapacity likely to be permanent,

² One member of the medical panel that examined her wrote that she was "a bit confused about dates," "she was slow," but responded well to questions, and had "occasional memory loss" and ability to choose words. (Ex. , p. 6) I do not know whether these difficulties accounted for her incomplete application answers.

³ For an unexplained reason or reasons, a different version of the treating physician's statement appears in the record as Exhibit 3. The handwriting is different in the two statements, but the substance and treating physician are the same.

⁴ Ms. Yoke might not have lost consciousness. Her account of the accident to Dr. Henry Drinker, a medical panelist, does not include losing consciousness:

She initially was unable to get up and called the police and was assisted....She apparently was able to drive herself home and the following day presented to the emergency room....

(Ex. 7, p. 5)

and is her incapacity such as might be the natural and proximate result of her personal injury?
(Ex. 5, p. 2-3)

13. Dr. Bulczynski diagnosed Ms. Yoke's conditions, with a reasonable degree of medical certainty, as cervical and right shoulder sprain, aggravation of pre-existing cervical spinal stenosis, and right shoulder tendinitis. (Ex. 5, p. 7)

14. On December 29, 2020, Dr. Nabil Basta, a member of the medical panel and orthopedist, examined Ms. Yoke. (Ex. 6, p. 1)

15. Dr. Basta answered yes to the following two questions: Is Ms. Yoke physically incapable of performing the essential duties of her job, and is her incapacity likely to be permanent? (Ex. 6, p. 2)

16. When asked if Ms. Yoke's incapacity was such as might be the natural and proximate result of her personal injury, Dr. Basta answered no. (Ex. 6, p. 3)

17. In the narrative, Dr. Basta seemed skeptical of Ms. Yoke. Dr. Basta began four paragraphs with "Elaine Yoke claims" or "She claims." Dr. Basta seemed to question why she claimed to have experienced pain and weakness in her arm without doing anything about these conditions for two years. (Ex. 6)

18. Dr. Basta diagnosed Ms. Yoke's condition as post laminectomy C4-7 with cervical myelopathy. (Ex. 6, p. 7)

19. Dr. Basta wrote in part:

I see no evidence to correlate her injury on January 28, 2015, to her present findings. I see no correlation orthopedic-wise that the incident on January 28, 2015 is contributing to her present disability. This is ongoing myelopathy, which was pre-existing, caused by multilevel degenerative disc disease and spinal stenosis, which was temporarily exacerbated by her work injury but there was no aggravation, in my opinion.

(Ex. 6, p. 7)

20. On January 13, 2021, Dr. Henry Drinker, a member of the medical panel and orthopedist, examined Ms. Yoke. (Ex. 7, p. 1)

21. Dr. Drinker answered yes to the following two questions: Is Ms. Yoke physically incapable of performing the essential duties of her job, and is her incapacity likely to be permanent? (Ex. 7, p. 2)

22. When asked if Ms. Yoke's incapacity was such as might be the natural and proximate result of her personal injury, Dr. Drinker answered no. (Ex. 7, p. 3)

23. Dr. Drinker diagnosed Ms. Yoke's conditions as:

1. Fracture right olecranon.
2. Sprain, right wrist.
3. Degenerative soft tissue disease, right shoulder, with adhesive capsulitis.
4. Chronical cervical spondylosis and degenerative disc disease.

(Ex. 7, p. 7)

24. Dr. Drinker opined

within a reasonable degree of medical possibility [sic] that said incapacity is not a major result of the work injury sustained on 1/27/2015 but instead is the result of an accumulative progressive degenerative process involving the cervical spine and the right shoulder. It is further the opinion of this examiner within a reasonable degree of medical certainty that this applicant had prior to the date of injury of 1/27/15 a significant pre-existing condition involving the cervical spine and right shoulder of which she was asymptomatic.

The above opinion is further established on the basis of the subsequent discovery of degenerative soft tissue disease of the right shoulder and degenerative disease of the cervical spine [that] were not symptomatic until some months after said injury and, therefore, could not realistically be considered to have been caused by the event of 1/27/15.

(Ex. 7, pp. 7-8)

25. On February 25, 2021, NCRB asked Dr. Drinker to clarify his opinion by answering two questions:

- 1) Did Ms. Yoke have a pre-existing degenerative condition?

2) Did the work-related injury aggravate and/or exacerbate the pre-existing condition?

(Ex. 8)

26. On March 3, 2021, in response to the request for clarification, Dr. Drinker wrote:

I have referenced my original report...in which I opined that the pre-existing conditions of cervical spondylosis and degenerative cervical disc disease and soft tissue degenerative disease of the right shoulder were not identified nor did they constitute the basis of complaints for many months following the injury in question....Consequently, I opined that the accident in question could not realistically be considered an aggravation of her pre-existing condition. The condition of record which resulted from the injury in question involved the wrist and the elbow fracture, which have healed uneventfully after treatment.

(Ex. 9)

27. Thus, Dr. Drinker answered the first clarification question as follows: Ms. Yoke had pre-existing conditions of cervical spondylosis, degenerative cervical disc disease, and soft tissue degenerative disease of the right shoulder. He answered the second question as follows: The injury did not aggravate the pre-existing conditions. (To the extent that aggravation and exacerbation differ, Dr. Drinker did not mention exacerbation.)

28. On July 12, 2021, NCRB apparently asked the medical panelists to clarify their opinions by answering three more questions,⁵ these at request of Ms. Yoke's lawyer:

- 1) Did Ms. Yoke sustain an injury to her shoulder as result of the work-related incident that occurred on January 27, 2015;
- 2) If so, standing alone and not as an exacerbation or aggravation of any pre-existing injury [sic], did that shoulder injury incapacitate her; and
- 3) If so, was that incapacity permanent?

⁵ A letter to Dr. Drinker is in the exhibits (Ex. 10), but not letters to Dr. Bulczynski and Dr. Basta. However, Dr. Bulczynski's and Dr. Basta's answers to these questions are in the exhibits. (Exs. 11, 13)

(Ex. 10)

29. On July 14, 2021, Dr. Bulczynski answered the first clarification question no. He answered the second question “yes, the shoulder injury did incapacitate her...as did her cervical injury” to a lesser extent. He answered the third question yes, by stating that she “is permanently disabled from her usual occupation as a result of the shoulder injury (as well as her cervical spine injury).” (Ex. 11)

30. On July 21, 2021, the Public Employee Retirement Administration Commission (PERAC), for reasons that are not significant here, instructed BNCRB not to send its second request for clarification to Dr. Drinker. (Ex. 12)

31. On August 26, 2021, Dr. Basta answered the first clarification question yes. Dr. Basta did not exactly answer the second question, but wrote,

The injury to the right shoulder, standing alone, is not the cause of her present pain and incapacity. It is due to cervical myelopathy, which was pre-existing.

Dr. Basta did not answer the third question. (Ex. 13)⁶

32. On October 27, 2021, NCRB voted to deny Ms. Yoke’s application for accidental disability retirement benefits because the medical panel evaluating her claim had been negative. On October 28, 2021, NCRB notified Ms. Yoke of its vote. (Ex. 14)

33. On November 11, 2021, Ms. Yoke timely appealed. (Ex. 15)

⁶ Dr. Basta’s incomplete answers to the clarification questions is not significant. Neither party remarked on it. Dr. Basta’s negative medical report remains negative and is not plainly wrong.

Discussion

The medical panel...issued a so-called negative panel report. *Lynne M. Saulnier v. State Board of Retirement*, CR-98-156 (DALA 1999). A negative panel report generally precludes an applicant from receiving accidental or involuntary disability retirement benefits. *Quincy Retirement Board v. Contributory Retirement Appeal Board*, 340 Mass. 56, 60 (1959) (“A certification of incapacity is a condition precedent to accidental disability retirement by the local board.”) (citations omitted).

The general rule that a negative panel ends an application for accidental or involuntary disability retirement benefits has a few exceptions: if the medical panel did not “conform[] to the required procedure of physical examination”; it lacked “all the pertinent facts”; it used an erroneous legal standard; or the medical certificate was “plainly wrong.” *Kelley v. Contributory Retirement Appeal Board*, 341 Mass. 611, 617 (1961).

Paul Beauregard v. Fall River Retirement Board, CR-18-0498 (DALA 2021)

Ms. Yoke’s argument is difficult to follow. For one thing, she does not identify which exception to the general rule she invoked. It may be the plainly-wrong exception. (Pet. Br. 4 (referring to “two major errors”)) However, that exception does not entitle her to “an opportunity for a retrial of the medical facts.” *Kelley*, 341 Mass. at 617. A medical panelist’s negative opinion is not plainly wrong because a lay petitioner or lawyer disagrees with it.

Ms. Yoke may have invoked the erroneous-legal-standard exception. (Pet. Br. 4 (seeming to argue that that Drs. Basta and Drinker did not understand the relationship between a pre-existing condition and a work injury)) However, Dr. Basta did properly consider the relationship between Ms. Yoke’s pre-existing condition and work injury in both the original narrative (Ex. 6, p. 7) and answer to the request for clarification. (Ex. 13). So did Dr. Drinker. (Exs. 7, 9) Those two panelists did not use an erroneous legal standard when they answered no to the causation question.

Conclusion and Order

The Norfolk County Retirement Board properly denied Ms. Yoke's application for accidental disability retirement benefits because the medical panel issued a negative report on causation, and Mr. Yoke did not establish an exception to the general rule that a negative panel report ends such an application.

DIVISION OF ADMINISTRATIVE LAW APPEALS

/s/

Kenneth Bresler
Administrative Magistrate

Dated: April 26, 2024