

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

Mary Zelten,
Petitioner,

No. CR-22-0457

Dated: February 9, 2024

v.

State Board of Retirement,
Respondent.

Appearance for Petitioner:
Mary Zelten (pro se)

Appearance for Respondent:
Yande Lombe, Esq.

Administrative Magistrate:
Yakov Malkiel

SUMMARY OF DECISION

The petitioner provides occupational therapy to patients with interrelated physical, psychiatric, and developmental issues. The psychiatric and developmental issues “truly drive[] the patients’ care.” *Popp v. State Bd. of Ret.*, No. CR-17-848, at *5 (CRAB Nov. 16, 2023). The petitioner is therefore entitled to be classified in group 2 under G.L. c. 32, § 3(2)(g).

DECISION

Petitioner Mary Zelten appeals from a decision of the State Board of Retirement denying her request to be classified in group 2 under G.L. c. 32, § 3(2)(g). At a February 7, 2024 evidentiary hearing, Ms. Zelten was the only witness. I admitted into evidence Ms. Zelten’s exhibits nos. 1-8 and the board’s exhibits nos. 1-4.

Findings of Fact

I find the following facts.

1. Ms. Zelten is an occupational therapist. She has worked at the Tewksbury Hospital since 1995. (Testimony; petitioner’s exhibit 7; respondent’s exhibit 1.)

2. Tewksbury Hospital operates multiple inpatient units. Ms. Zelden is primarily assigned to the A4 unit. Admissions to A4 focus on patients with complicated medical problems, such as strokes, brain injuries, infections, wounds, and severe fractures. Patients admitted to the hospital only for psychiatric treatment are assigned elsewhere. (Testimony; petitioner’s exhibit 7; respondent’s exhibits 1, 2.)

3. Alongside their medical problems, the great majority of the patients in A4 also suffer from mental illnesses, developmental disabilities, or both. Ms. Zelden’s supervisor estimates that “at least 95% of the patients [have] a diagnosis of developmental disabilities.” The supervisor adds that A4 is the “primary medical floor” for psychiatric patients who “need . . . medical services.” The mental health diagnoses common among A4’s patients include bipolar disorder, borderline personality disorder, anxiety, depression, and schizoaffective disorder. (Testimony; petitioner’s exhibit 7; respondent’s exhibit 1.)

4. Medical patients generally arrive at Tewksbury Hospital because their psychiatric or developmental issues make them unsuited for other facilities. A newsletter from the Commissioner of Public Health reports that the “average” patient at the hospital “has been denied placement by three or more health care facilities because of behavioral issues or a high-risk history.” (Petitioner’s exhibits 7, 8; respondent’s exhibit 1.)

5. Occupational therapists such as Ms. Zelden strive to bring patients back to functional mobility. They work with patients on day-to-day skills such as bathing, dressing, and grooming. They help patients to improve their strength, balance, dexterity, and range of motion. They also teach patients how to use compensatory strategies and assistive equipment. (Testimony; petitioner’s exhibit 7; respondent’s exhibit 1.)

6. Occupational therapists such as Ms. Zelten are trained to assess the entire complex of a patient’s challenges. In the words of the American Occupational Therapy Association, therapists must adopt “an inclusive approach that promotes overall physical and mental health well-being.” The barriers that face patients on the way back to functionality may include problems with compliance, impulse control, agitation, aggression, and abusive or violent behavior. Such problems are not realistically separable from the challenges posed by physical symptoms. Ms. Zelten’s work relies on de-escalation techniques, stress management, and elements of cognitive behavioral therapy. She has undergone training on how to reduce violence in challenging settings. Her duties include participation in “mental health rounds,” where hospital staff discuss and assess patients’ mental health issues. (Testimony; petitioner’s exhibits 4, 7; respondent’s exhibit 1.)

7. Occupational therapy is hands-on work in close quarters. It requires the therapist to exercise judgment, skill, and responsibility for patient well-being. A performance review of Ms. Zelten states: “Mary is a highly skilled clinician While carrying out therapeutic interventions she maintains total care and custody of the patient as well as providing supervision and education.” (Testimony; petitioner’s exhibit 7; respondent’s exhibit 1.)

8. In addition to her work on A4, Ms. Zelten regularly provides coverage for other units. The unit she covers for most often is E4, where all patients are diagnosed with developmental disabilities. Ms. Zelten also often works with patients of the hospital’s psychiatry-focused wards. (Testimony; petitioner’s exhibit 7; respondent’s exhibit 1.)

9. In August 2022, Ms. Zelten asked the board to classify her in group 2 under G.L. c. 32, § 3(2)(g). The board declined, and Ms. Zelten timely appealed. (Respondent’s exhibits 1, 3, 4.)

Analysis

The retirement allowance of a Massachusetts public employee depends in part on the employee's classification into one of four groups. Membership in group 2 may yield favorable benefits as compared to group 1, the catch-all classification. Group 2 includes, among other employees, those "whose regular and major duties require them to have the care . . . of . . . persons who are mentally ill or mentally defective" G.L. c. 32, § 3(2)(g). The overarching purpose of the quadripartite grouping system is to "provid[e] early retirement incentive to employees with hazardous duties." *Pysz v. Contributory Ret. Appeal Bd.*, 403 Mass. 514, 518 (1988). See *Spencer v. Civ. Serv. Comm'n*, 479 Mass. 210, 220 (2018).

An employee's "regular and major" duties are those that consume "more than half" of the employee's working hours. *Desautel v. State Bd. of Ret.*, No. CR-18-80, at *4 (CRAB Aug. 2, 2023). "Care" in this context means direct responsibility for patient well-being. See *McKinney v. State Bd. of Ret.*, No. CR-17-230, 2023 WL 6537982, at *8, *10 (DALA Sept. 29, 2023). The archaic term "persons who are . . . mentally defective" is now understood to cover individuals with developmental disabilities. See *Burke v. State Bd. of Ret.*, No. CR-19-394, 2023 WL 5528742, at *2 (DALA Aug. 18, 2023).

For the most part, it is perfectly clear that Ms. Zelten satisfies § 3(2)(g)'s requirements. The sole bone of contention arises from CRAB's holding that, for purposes of evaluating a patient population under § 3(2)(g), "it should be the primary diagnosis that controls." *Pulik v. State Bd. of Ret.*, No. CR-10-605, at *7 (CRAB July 10, 2012). See *Lorrey v. State Bd. of Ret.*, No. CR-09-553, at *3-4 (CRAB Dec. 19, 2014); *Nowill v. State Bd. of Ret.*, No. CR-08-558, at *9 (CRAB July 10, 2012). The board maintains that the primary diagnoses of Ms. Zelten's patients were "medical" or "physical" diagnoses, in the sense that those were the diagnoses that catalyzed the patients' admissions into the A4 unit.

DALA's magistrates have worried from time to time about the primary diagnosis rule's uneasy relationship with the text and purpose of § 3(2)(g). See, e.g., *Micle v. State Bd. of Ret.*, No. CR-18-657, at *9 (DALA Dec. 23, 2022); *Hong v. State Bd. of Ret.*, No. CR-17-843, 2022 WL 16921455, at *3 (DALA May 6, 2022); *Richard v. State Bd. of Ret.*, No. CR-16-72, at *10 (DALA Feb. 7, 2020). Happily, CRAB has recently updated the rule's contours. In *Popp v. State Bd. of Ret.*, No. CR-17-848 (CRAB Nov. 16, 2023), the member's patients "had primary diagnoses of hospice." CRAB nonetheless deemed the member eligible for group 2, explaining:

[A] strict interpretation of the primary diagnosis analysis . . . would deviate from a plain reading of the statute. The purpose of the primary diagnosis test is to evaluate what truly drives the patients' care, distinguishing mental illness diagnoses which are merely incidental or derivative of physical illnesses from principally mentally ill patients. A diagnosis of mental illness is what should govern the care a patient receives.

Id. at *5-6.

The heart of *Popp's* analysis bears emphasis. It is now clear that diagnoses are "primary" in the pertinent sense if they "truly drive the patients' care" or "govern the care a patient receives." *Id.* Diagnoses are "secondary" if they are "merely incidental or derivative." *Id.* at *6. See *Johnson v. State Bd. of Ret.*, No. CR-18-586, 2022 WL 16921457, at *4 n.6 (DALA Apr. 8, 2022). A member's group classification thus flows from the substance of the conditions that the member's patients are treated for. The analysis does not turn on the histories of the patients' admissions or on the ordering of their diagnoses in a hospital's records. See also *Popp, supra*, at *6 n.27 (discussing the factors that made the diagnoses in *Nowill* and *Pulik* secondary).

Popp's holding fits comfortably into § 3(2)(g)'s plain meaning and legislative intent. In common parlance, people whose mental health conditions do not drive their care are unlikely to be regarded as "mentally ill." Likewise, the public employees who care for people with merely

incidental or derivative mental health diagnoses are probably not among those whom the Legislature hoped to invite into early retirement. *See Johnson*, 2022 WL 16921457, at *4 n.6. *See generally Pysz*, 403 Mass. at 518. Parallel considerations apply to the statutory category of “persons who are . . . mentally defective.”¹

When these principles are applied to Ms. Zelten’s circumstances, it is reasonably clear that she belongs in group 2. Her patients’ psychiatric and developmental conditions are not derivative of or incidental to their physical diagnoses. The patients’ medical care is driven by the interrelated demands of their physical, psychiatric, and developmental issues. Their programs of treatment are designed to address the problems with impulse control, agitation, and aggression that make them unsuited to ordinary hospitals. Techniques focused on stress management and de-escalation are integral to their care. The hospital staff treats mental health symptoms as key elements of the patients’ conditions. *Cf. Johnson*, 2022 WL 16921457, at *4 n.6. For all of these reasons, Ms. Zelten’s patients make up the type of population that the statutory phrase “mentally ill or mentally defective” is intended to cover.

Conclusion and Order

The board’s decision is REVERSED.

¹ The pertinent portion of *Popp* focuses on identifying the types of populations that qualify as “mentally ill.” A member who provides “care, custody, instruction or other supervision” to such a population, § 3(2)(g), may be entitled to be classified in group 2 regardless of whether the member’s services are rooted in a mental-health discipline. Group 2 covers teachers, prison guards, primary care physicians, and other professionals charged with direct responsibility for the wellbeing of qualifying populations. *See Larose v. State Bd. of Ret.*, No. CR-20-357, 2023 WL 4548411, at *3 (DALA Jan. 27, 2023).

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/s/ Yakov Malkiel

Yakov Malkiel

Administrative Magistrate