

**COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS**

May 27, 2016

Suffolk, ss.

Docket No. CR-15-118

JOHN P. FOLEY, JR., Petitioner

v.

MILTON RETIREMENT BOARD, Respondent

DECISION

Appearance for Petitioner:

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Appearance for Respondent:

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Administrative Magistrate:

Mark L. Silverstein, Esq.

Summary of Decision

A retirement board's denial of a former deputy fire chief's application for accidental disability retirement based upon job-related hypertension is affirmed. Although the deputy fire chief suffered from hypertension exacerbated by stress, there is no presumption under the "heart law," M.G.L. c. 94, § 32, that he suffered a hypertension-related disability that left him unable to perform the essential duties of his job as a Deputy Fire Chief because he did not report any hypertension-related injury or request leave on account of hypertension before he retired. In addition, a majority of the three-cardiologist medical panel that examined the deputy fire chief opined that he was not physically incapable of performing his essential job duties. There is no dispute that the panel's composition was proper or that the panel members reviewed the official description of the deputy fire chief's essential job duties or his medical records, and there is no evidence that the panel majority employed an incorrect standard in determining that he was not disabled.

Background

Petitioner John P. Foley, Jr., a career firefighter and former Deputy Fire Chief of the Milton, Massachusetts Fire Department, appeals, pursuant to M.G.L. c. 32, § 16(4), the March 6, 2015 decision of the Milton Retirement Board denying his application for accidental disability retirement benefits. Mr. Foley claimed a hypertension-related disability that left him unable to perform the essential duties of his job as a Deputy Fire Chief and, in doing so, relied upon the "heart law" presumption that this disability was "suffered in the line of duty." *See* M.G.L. c. 32, § 94.

Two of the three cardiologists comprising a regional medical panel had concluded previously that although Mr. Foley was hypertensive, he was not physically incapable of performing the essential duties of his job. The Board's denial followed this medical panel majority opinion. Mr. Foley claims on appeal that he was disabled as a result of his hypertension, and was unable to perform the specific duties of his job, before he retired, and that the disability was presumptively related to his job under the heart law. In addition, Mr. Foley claims that the medical panel majority

applied the wrong standard in reaching its conclusion because it did not assess whether he was disabled on April 1, 2014, nearly two months before his actual retirement date, and the date on which he stated in his accidental disability retirement application that he was last able to work. In particular, Mr. Foley argues, the panel majority members did not determine whether he could perform the inherently stressful duties of a firefighter without risking injury or death as a result of blood pressure that rose in response to stress. For these reasons, he contends, the retirement board was not bound by the medical panel's majority negative finding as to incapacitation.

The parties submitted prehearing memoranda¹ and exhibits. I held a hearing on April 13, 2016 at the Division of Administrative Law Appeals at 1 Congress Street in Boston. The hearing was digitally recorded. I admitted the parties' ten prefiled exhibits (Mr. Foley's Exhs. F1–F7, and the Milton Retirement Board's Exhs. M1–M3) into evidence, without objection.² Mr. Foley testified on his own behalf, and was cross-examined. The Board called no witnesses. I closed the record after Mr. Foley's testimony ended, except for post-hearing memoranda that the parties each filed by May 13, 2016.

Findings of Fact

1. Petitioner John P. Foley, Jr., born May 8, 1949 (Exh. F2: Application of John P. Foley,

¹/ See Prehearing Memorandum of Petitioner John P. Foley, Jr., Jan. 11, 2016 (Foley Mem.), and Respondent Milton Retirement Board's Prehearing Memorandum, Jan. 22, 2016 (Board Mem.)

²/ Both parties numbered their exhibits. To distinguish them overall, I have added a letter prefix showing who filed them (F for Mr. Foley's seven exhibits, and M for the Milton Retirement Board's three exhibits).

Jr. for Disability Retirement, dated May 29, 2014) at 1), began his employment as a uniformed, paid firefighter in the Milton (Massachusetts) Fire Department on August 14, 1972. (Exh. F1: Basic Information: John P. Foley, Jr., printout from Boston Retirement Board, dated May 29, 2014).

2. Prior to joining the Milton Fire Department, Mr. Foley worked at General Dynamics in Quincy, Massachusetts, from June 1967 to February 1968, and at New England Telephone and Telegraph Company in Hyde Park (Boston), Massachusetts, from April 1968 to August 1972. (Exh. F2 at 3.)

3. Although the Milton Fire Department was unable to locate a copy of Mr. Foley's initial pre-employment physical examination, the Milton Fire Chief has confirmed that "the Civil Service rules in place at the time of hire would have mandated that [Mr. Foley] would have had to attend a pre-employment physical." (Exh. M3: undated letter of Milton Fire Chief John J. Grant, Jr. "[t]o whom it may concern" re: John P. Foley, Jr., Deputy Fire Chief, included with the employer's statement pertaining to Mr. Foley's application for disability retirement.)

4. Following his temporary appointment as Milton Fire Chief in 1984, Mr. Foley was appointed Deputy Fire Chief in 1985. He held that position until he retired on May 31, 2014, at the age of 65, after 42 years of service with the Milton Fire Department. (Exh. F1 (Foley application for disability retirement) at 1; Exh. M3 (Employer's statement pertaining to Foley application for disability retirement) at 2; Foley direct testimony.)

5. As an employee of the Milton Fire Department, Mr. Foley was a member of the Milton Retirement System, one of the Commonwealth's contributory public employee retirement systems governed by M.G.L. c. 32. Respondent Milton Retirement Board (the Board) administers

the Milton Retirement System.

6. Mr. Foley's essential duties as a Deputy Fire Chief were those listed by the Commonwealth of Massachusetts for the Fire Chief position. They included emergency scene response tasks; station duty and maintenance; pre-fire planning; performing investigations related to fire prevention, and to fires and other types of emergencies; participating in public relations activities related to the fire department's duties, activities and emergency responses; public training and education related to fire prevention; and maintaining and enhancing job-related skills and abilities through professional development and training related to fire control and to chemicals and hazardous materials.³ (Exh. M3; seven-page printout of "essential functions of a fire chief," from

³/ Many of Mr. Foley's essential duties as a Deputy Fire Chief tasks were those of both a firefighter and a commanding officer. For example:

(a) *Emergency scene response tasks* included evaluating alarm information or service calls; donning protective turnout gear and equipment; standing watch to receive incoming alarms and information, and multiple alarm notification; driving firefighting apparatus to and from emergency scenes and positioning the apparatus at the emergency scene; connecting or hooking up firefighting apparatus to fire hydrants and operating pumps to supply water; stretching hose lines or using extinguishers to emergency scenes; stabilizing and operating ladder trucks, and using aerial ladders and platforms to rescue victims; carrying, raising and extending ladders to perform search and rescue operations; forcing entry into structures, vehicles and aircraft to search for and rescue victims; providing ventilation to remove heat, smoke and/or gas from structures or entrapments by, among other things, opening or breaking windows, chopping or cutting holes in roofs, walls or doors; searching areas for victims; removing victims from emergency areas; performing salvage or damage-control operations at incident scenes; opening up walls and ceilings, cutting or pulling-up floors, or moving and turning over debris to check for hidden fires that could rekindle or spread; picking up, cleaning and returning equipment to vehicles, and rolling or folding hose, so that it can be returned to service; and providing direct medical assistance to persons requiring emergency attention, and administering CPR if necessary.

(b) *Station duty and maintenance tasks* included cleaning, checking and maintaining personal gear and equipment to ensure proper and safe operation, and placing turnout gear near firefighting and other emergency apparatus; checking, cleaning and maintaining apparatus to ensure proper and safe operation;

(footnote continued on next page)

the Massachusetts Executive Office for Administration and Finance website:

and checking, cleaning and maintaining firehouse facilities.

(c) *Fire prevention and investigation* tasks included inspecting buildings for fire prevention and hazardous materials code violations; issuing burning, blasting and other permits; reviewing plans of new and remodeled buildings for fire protection code compliance; notifying owners, occupants and district inspectors of code violations; conducting on-site inspections of fire-protection devices including hydrants, alarms and sprinkler systems); assigning subordinates to building inspections and answering subordinates' questions about building inspections; determining whether building inspection training is needed; and coordinating the activities of subordinate personnel to complete the hydrant inspection program.

(d) *Pre-fire planning tasks* included including reviewing and preparing plans to provide information regarding hydrant locations, exposures, locations of hazardous materials, and locations of other high-risk areas or situations; meeting with other fire personnel to set pre-fire planning priorities depending upon the potential for and consequences of a major incident; drafting pre-fire plans and determining whether an unusual hazard or fire situation warrants the development of a pre-fire plan; and recognizing a target hazard (such as a new high-rise building or a building with hazardous materials) that may warrant the development of a pre-fire plan.

(e) *Investigation tasks* included incident scene examinations, interviews, collecting and preserving evidence, reviewing forms and reports to help determine the cause of a fire or other emergency; requesting a Massachusetts Fire Department Fire Investigator when circumstances suggest a fire or emergency of suspicious origin; responding to incidents of suspicious or undetermined origin; and testifying in court in arson cases.

(f) *Public relations tasks* included providing information to the media; controlling the public and the media, and dealing with distressed individuals, at emergency scenes; interviewing emergency scene victims concerning shelter; appearing on radio or TV talk shows; developing media contacts to disseminate fire department-related information; briefing high-level officials on the public relations consequences of actions or incidents; assigning public relations activities to subordinates; and making public presentations and conducting demonstrations of apparatus and equipment on behalf of the Fire Department.

(g) *Public training and education tasks* included overseeing, developing, conducting and/or evaluating fire prevention and other educational programs for the public; counseling individuals regarding fire prevention and evacuation procedures; consulting with building owners and managers on fire prevention strategies, equipment and procedures; and speaking to public groups about fire prevention and safety.

(Exh. M3: seven-page printout of "essential functions of a fire chief.")

<http://www.mass.gov/anf/employment-equal-access-disability/civil-serv-info/guides-and-publications/essential-funct-public-safety/fire-chief-essential-functions.html>).

7. As of May 2014, Mr. Foley's specific responsibilities as the Milton Fire Department's Deputy Fire Chief were "the management of personnel, equipment and daily activities of the group he [was] assigned to," "maintaining all reports and logs occurring during the tour of duty," and serving as "the incident commander at emergency scene unless relieved by the Chief of the Department." (Exh. M3 at 2.)

8. Mr. Foley was first diagnosed with hypertension in 2005 by his treating physician, Dr. Nasser Nabi, an internist and cardiologist. Dr. Nabi attempted treatment initially with niacin, but Mr. Foley had a "bad reaction" to it, and Dr. Nabi then prescribed metoprolol (a beta blocker used to treat hypertension), later adding hydrochlorothiazide (a diuretic used to treat high blood pressure). Mr. Foley continues to take these medications to treat hypertension. Dr. Nabi remains his treating physician and continues to monitor his blood pressure. (Foley direct testimony.)

9. In October 2013, Mr. Foley participated in fighting a very heavy fire at a two-family house in Milton, which required him to help rescue individuals who were trapped on the first and second floor of the house. After he made several radio transmissions requesting a ladder truck to assist in rescuing a person who was trapped on the second floor, but received no such assistance, Mr. Foley had to run to a ladder truck and "pretty much nearly blew a gasket" trying to get the ladder truck operator to move the vehicle near the house. (Foley direct testimony.)

10. Mr. Foley did not report an injury to himself as a result of the October 2013 fire or his participation in fighting it or rescuing persons at the house. There is no evidence in the record

that he sought medical assistance during or after this event, or that he requested or took sick or medical leave, or any other type of leave, following this event.

11. There is no evidence in the record that Mr. Foley filed a notice of injury, or was absent from work at any time, because of, or related to, hypertension, or for any other reason.

12. On May 29, 2014, after his 65th birthday, Mr. Foley submitted applications to the Milton Retirement Board for both ordinary and accidental disability retirement. (Foley Mem. at 1.)

13. Mr. Foley stated, in his accidental disability retirement application, that the medical reason for his application was hypertension, and that his disability was the result of “[e]xposure to stressful situations inherent with firefighting” that occurred “throughout [his] career.” He also stated that he was last able to perform all of the essential duties of his position on April 1, 2014. (Exh. F2 at 2, 5.)

14. By that time, Mr. Foley felt that he could no longer perform his firefighter duties because almost all of them, whether they involved fighting fires, carrying out inspections, or training others in performing firefighter tasks, involved physical or emotional stress in “hostile environments,” and his blood pressure became elevated in response. He also felt that the October 2013 fire had exacerbated his stress-induced high blood pressure. (Foley direct testimony.)

15. Mr. Foley’s accidental disability retirement application included a statement by his treating physician, cardiologist Dr. Nasser Nabi, dated March 31, 2014. Dr. Nabi’s statement was on a form prescribed by the Public Employee Retirement Administration Commission (PERAC) entitled “Treating Physician’s Statement Pertaining to a Member’s Application for Disability Retirement.” (Exh. F3.)

16. The treating physician's statement asked whether Mr. Foley was "mentally or physically incapable of performing the essential duties of his particular job," and whether the condition for which he sought disability retirement (identified by the doctor as hypertension) was "likely to be permanent." Dr. Nabi checked the "yes" box in response to both questions. (Exh. F3 at 2.) However, Dr. Nabi did not fill in the date of Mr. Foley's injury or exposure, or his job title. He did not answer the questions whether he had reviewed Mr. Foley's job duties, or whether Mr. Foley was "able to perform essential duties," and, if not, when he was last able to perform essential duties. (*Id.*)

17. The treating physician's statement included a pre-printed instruction that under the "Heart Law," M.G.L. c. 32, § 94, a disability caused by heart disease or hypertension "is presumed to be suffered in the line of duty for public safety positions, including certain firefighters," that the employee "must have passed a physical examination on or after their date of hire which failed to reveal evidence of such a condition," and that "[t]he presumption can be rebutted only by competent evidence which shows the disability was not job-related." (Exh. F3 at 5) The form instructed further that if a retirement system member was applying for accidental disability retirement under a presumption (for example, the Heart Law presumption), "[a] presumption can be rebutted only by documentation of a uniquely predominant influence that shows the disability is not job-related." (*Id.* at 4.) The form asked, next:

For this particular applicant, is there no evidence of a uniquely predominant non-service connected influence on his/her mental or physical condition and/or a non-service connected accident or hazard which caused his/her incapacity? If there is no evidence of such influence, then you must answer yes. If there is evidence of such influence, you must answer no."

Dr. Nabi checked the “yes” box in response to this question. (*Id.*)

18. On November 25, 2014, the Milton Fire Department submitted its employer’s statement to the Milton Retirement Board regarding Mr. Foley’s accidental disability retirement application. (Exh. M3.) The employer’s statement was on a PERAC form, and was signed by Milton Fire Chief John J. Grant, Jr. It stated the days on which Mr. Foley’s employment began (August 14, 1972) and ended (May 31, 2014), and the last date on which Mr. Foley was able to perform essential duties (April 1, 2014). The employer’s statement also included a description of Mr. Foley’s essential duties as a Deputy Fire Chief and a printout of a Fire Chief’s duties as listed at the Commonwealth’s website. (Exh. M3 at 2 and attachment.) It described the physical requirements of Mr. Foley’s current position as “[n]ormal bodily movements.” (Exh. M3 at 2.) The question that followed asked, “[o]f the physical requirements described above, are there any that the applicant cannot perform because of the claimed disability?” The response to this question was “None.” (*Id.*) The next question posed by the form was “[c]ould the applicant perform the essential duties of his or her current position if he or she was reasonably accommodated?” The response to this question was “Yes.” (*Id.*) One of the pre-printed questions that followed was whether Mr. Foley’s medical condition had affected his attendance and job performance. The response to this question was “No.” (*Id.* at 3.) The form asked, next, whether Mr. Foley had requested modification of his job duties or other reasonable accommodations because of his medical condition, or whether the Fire Department had offered any. The response to each of these questions was “No.” (*Id.*)

19. The Milton Retirement Board requested that PERAC convene a regional medical panel to examine Mr. Foley in connection with his accidental disability retirement application.

(Foley Mem. at 2, para. 7; Milton Mem. at 3, para. 7.)

20. PERAC convened a regional medical panel comprising cardiologists Dr. Michael Johnstone, Dr. Marvin H. Kendrick, and Dr. Seth N. Schonwald to examine Mr. Foley and determine whether he was mentally or physically incapable of performing the essential duties of his job and, if so, whether the incapacity was likely to be permanent. (Exh. F4.)

21. It is undisputed that the Milton Retirement Board sent each of the panel members a copy of Mr. Foley's medical records and his job description, including the essential duties of his position as Deputy Fire Chief.

22. Drs. Johnstone, Kendrick and Schonwald each filled out, separately, a "regional medical panel certificate" on a PERAC-prescribed form that asked whether the panel had reviewed Mr. Foley's job description, inclusive of his essential duties, and whether the panel had received and reviewed medical records prior to rendering a medical opinion. Each physician checked the "yes" box in response to these questions. (Exh. F4 (Dr. Johnstone's certificate); Exh. F5 (Dr. Kendrick's certificate); Exh. 6 (Dr. Schonwald's certificate).)

23. The certificate also asked whether the retirement system member was "mentally or physically incapable of performing the essential duties of his or her job as described in the current job description." A majority of the regional medical panel members—Drs. Johnstone and Kendrick—answered this question in the negative, and therefore did not answer the form's question whether the incapacity was likely to be permanent, per the certificate's instruction. (Exhs. F4, F5.) Dr. Schonwald answered, in the affirmative, both the incapacity question and the question as to whether it was likely to be permanent. (Exh. F6.)

24. Dr. Johnstone examined Mr. Foley on December 9, 2014. His report relates a history given by Mr. Foley of hypertension for 8-10 years, for which he had been taking metoprolol for “many years” and hydrochlorothiazide “for 1 to 2 years,” no hospital admissions for this condition, and “no kidney issues.” It states that “[w]hen asked why he claimed hypertension as a problem, he (Mr. Foley) states that he is not sure.” According to Dr. Johnstone’s report, Mr. Foley denied any chest pain, shortness of breath, PND (paroxysmal nocturnal dyspnea, or waking from sleep due to inability to breathe), orthopnea (breathlessness in the recumbent position, relieved by sitting or standing), presyncope (lightheadedness, muscular weakness, blurred vision, and feeling faint) or syncope (fainting). Dr. Johnstone reported Mr. Foley’s height as 5 feet 7 inches, his weight as 200 pounds, and his blood pressure as 160/80, with a regular pulse of 75. He was not in acute distress, was oriented, was able to move all four extremities, and had no palpable masses. He heard no heart murmurs, although on peripheral vascular exam, Dr. Johnstone heard a right carotid bruit.⁴ He

⁴/ The website of the National Institutes of Health’s National Center for Biotechnical Information offers the following information regarding bruits, which is taken from *Clinical Methods: The History, Physical, and Laboratory Examinations* (Walker, H.K., Hall, W.D. and Hurst, J.W., Eds.), 3rd Ed. (Butterworths, Boston, 1990):

A bruit is an audible vascular sound associated with turbulent blood flow. Although usually heard with the stethoscope, such sounds may occasionally also be palpated as a thrill. In the head and neck, these auscultatory sounds may originate in the heart (cardiac valvular murmurs radiating to the neck), the cervical arteries (carotid artery bruits), the cervical veins (cervical venous hum), or arteriovenous (AV) connections (intracranial AV malformations). These sounds may be normal, innocent findings (i.e., a venous hum in a child) or may point to underlying pathology (i.e., a carotid artery bruit caused by atherosclerotic stenosis in an adult). Head and neck bruits loom especially important today because physicians encounter arterial occlusive disease more frequently as a greater proportion of our population lives longer.

concluded that Mr. Foley “has poorly-controlled hypertension, but this should not limit him from working.” He did not believe that Mr. Foley was mentally or physically incapable of performing the essential duties of his job “since I feel this condition can easily be corrected and treated with medication, and he is only on 2 medications and not even on maximal doses.” (Exh. F4.)

25. Dr. Kendrick examined Mr. Foley on December 18, 2014. His report relates a 10-year history of labile (borderline) hypertension characterized by blood pressure fluctuating from normal to as high as 156-160/96. It states that a spike in blood pressure had prompted Dr. Nabi, Mr. Foley’s cardiologist, to start him on metoprolol tartrate, 50 mg p.o.i.d., atorvastatin 10 mg p.o. daily, Proscar 2.5 mg p.o. daily, aspirin 81 mg p.o. daily, levothyroxine 137 mcg p.o. daily, and hydrochlorothiazide 25 mg p.o. daily. Dr. Nabi’s’s office records showed that since he started on this medication regime, Mr. Foley’s blood pressure had been “less than 140/90 average and considered well controlled.” Dr. Kendrick’s report states that Mr. Foley had experienced chest discomfort 20 years earlier, but had no known coronary artery disease, and that he was able to “do 5 flights of stairs without difficulty” and that he “does 5 miles a day of walking without difficulty.” During his own physical examination of Mr. Foley, Dr. Kendrick found a blood pressure of 170/96 in the right arm initially, and 160/94 on repeat. On the left arm, Dr. Kendrick found a blood pressure of 180/100 and, on repeat approximately five minutes later, it was 130/90. He heard a right carotid bruit, as Dr. Johnstone had. Dr. Kendrick diagnosed labile hypertension, under good control; acquired hypothyroidism; hyperlipidemia; and right carotid bruit. To rule out arterial sclerosis, Dr. Kendrick thought that Mr. Foley should be followed with an ultrasound examination to determine whether he had significant blockage in his right carotid artery. He noted that Mr. Foley was subject

to labile hypertension when under stress, “due to adrenergic surge in stressful situations,” but that he “was able to carry on his job as firefighter and assistant fire chief during the period starting June of 2013 and to the time when he retired,” with no ill effects. It was therefore his conclusion that Mr. Foley was not mentally or physically incapable of performing the essential duties of his job. (Exh. F5.)

26. Dr. Schonwald examined Mr. Foley on December 19, 2014. His report relates that for the past “8 to 10 years,” Mr. Foley had been “under the care of his primary care provider” for ongoing management of hypertension, for which Mr. Foley was taking metoprolol 50 mg twice a day and hydrochlorothiazide 50 mg once a day. Dr. Schonwald found Mr. Foley’s blood pressure to be 160/90. This reading, and “numerous” blood pressure readings in the medical records he reviewed, “suggest[ed] blood pressures typically in the 140 to 160 systolic range.” His physical examination of Mr. Foley revealed full range of motion, a clear chest, no rales, wheezes or rhonchi, a regular heartrate and rhythm and no murmur, and no abnormalities in the abdominal area or in the extremities. Dr. Schonwald did not report bruits, as Drs. Johnstone and Kendrick had. He diagnosed hypertension with a good prognosis, although he believed Mr. Foley would require “further intervention regarding ongoing management of blood pressure.” It was his conclusion that Mr. Foley was mentally or physically incapable of performing the essential duties of his job as described in the current job description, that this incapacity was likely to be permanent, and that it was “such as might be the natural and proximate result of the personal injury sustained or hazard undergone on account of which retirement was claimed.” Dr. Schonwald did not state specifically, however, why he concluded, or which factors persuaded him, that Mr. Foley was disabled. (Exh. F6.)

27. At its regular meeting on February 26, 2015, the Milton Retirement Board voted to deny Mr. Foley's application for disability retirement. Board counsel (Attorney James H. Quirk, Jr.) notified Mr. Foley that his application had been denied in a letter dated March 6, 2015. The letter stated that the Board had based its action on the findings and conclusions of the medical panel majority members, Drs. Johnstone and Kendrick, both of whom had answered in the negative as to whether Mr. Foley was incapable of performing the essential duties of his job. The letter also stated that, based upon the findings and conclusions of the medical panel majority, the Board had found that Mr. Foley was able to perform the essential duties of his position until he reached age 65 and was required to retire. (Exhs. M1, F7.)⁵

28. By letter dated March 18, 2015, Mr. Foley timely appealed the Milton Retirement Board's denial of his accidental disability retirement application.

Discussion

1. Accidental Disability Retirement: Applicable Law

a. Generally

Per M.G.L. c. 32, § 7, the three prerequisites for accidental disability retirement are incapacity, its permanence, and a proximate, work-related cause for it. *Retirement Bd. of Revere v. Contributory Retirement Appeal Bd.*, 36 Mass. App. Ct. 99, 101, 629 N.E.2d 332, 334 (Mass. App.

⁵/ Mr. Foley's Exh. F7 is a duplicate of Exh. M1, the March 6, 2015 letter notifying him of the Board's decision to deny his accidental disability retirement application.

Ct. 1994), *rev. denied*, 417 Mass. 1105, 635 N.E.2d 252 (1994). To receive accidental disability retirement benefits, a “member in service”⁶ must be found, following examination by a regional medical panel, to be “unable to perform the essential duties of his job” as a result of “a personal injury sustained, or a hazard undergone as a result of, and while in the performance of, his duties at some definite place and at some definite time on or after the date of his becoming a member . . . without serious and willful misconduct on his part.” M.G.L. c. 32, § 7(1). A majority of the medical panel’s physician members must certify this incapacity and its likely permanence. *Id.*⁷

It is for the Board (and, on appeal, for CRAB) to make the ultimate findings as to incapacity and its permanence, but the “fundamental medical questions at the core” of those issues require an application of medical expertise, and those questions must be answered first, therefore, by the medical panel’s physician members. *Retirement Bd. of Revere*, 36 Mass. App. Ct. at 111, 629 N.E.2d at 339. Neither the retirement board nor CRAB may ignore the medical panel’s findings as to incapacity and its permanence unless it is clear that the panel employed an “erroneous standard” or did not follow proper procedure, or if its decision was “plainly wrong.” *Kelley v. Contributory*

⁶/ “Member in service” means a member of a public employee retirement system who is “regularly employed in the performance of her duties.” M.G.L. c. 32, § 1. Mr. Foley was a member in service when he filed his accidental disability retirement claim.

⁷/ Per M.G.L. c. 32, § 6(3), to which section 7(1) refers, the panel:

shall be appointed by the public employee retirement administration commission from a pool of physicians developed after consultation with representatives of the Massachusetts Medical Society and the department of public health and shall consist of three physicians, who shall not be associated physicians, and who shall be selected for the purpose of examining the member whose retirement is under consideration and shall, so far as practicable, be skilled in the particular branch of medicine or surgery involved in the case.

Retirement App. Bd., 341 Mass. 611, 617, 171 N.E. 2d 277 (1961).⁸ The burden of proving such error falls squarely upon the party challenging a retirement board’s denial of an accidental disability retirement application based upon the medical panel majority’s negative response as to incapacity and its permanence. *Retirement Bd. of Revere*, 36 Mass. App. Ct. at 106, 629 N.E.2d at 337; *see also David v. State Bd. of Retirement*, Docket No. CR-09-615 (Mass. Div. of Admin. Law App., Aug. 10, 2012). Absent any such error, a regional medical panel’s refusal to certify that an employee is unable to perform the essential duties of her job on account of a work-related injury “dictates” that a local board (and CRAB) deny the employee’s application for accidental disability retirement benefits. *Foresta v. Contributory Ret. App. Bd.*, 453 Mass. 669, 684, 904 N.E.2d 755, 766 (2009); *Queenan v. Contributory Retirement Appeal Bd.*, 2001 WL 292410 (Mass. Super Ct., 2001), *aff’d*, 56 Mass. App. Ct. 1114, 779 N.E.2d 1005 (2002) (unpublished disposition pursuant to Mass. R. App. P. Rule 1:28).

b. Heart Law Presumption

The “heart law,” M.G.L. c. 32, § 94, creates a presumption that when a full-time firefighter is disabled as a result of a heart condition or hypertension, the disability is related causally to the firefighter’s job.⁹ The presumption reflects a view of heart disease and hypertension as long-term

⁸/ “Failure to follow proper procedure” includes improper panel composition, and a “plainly wrong decision” includes panel findings that were made without reviewing all the pertinent facts. *See, e.g., Retirement Bd. of Revere*, 36 Mass. App. Ct. at 106, 629 N.E.2d at 337.

⁹/ M.G.L. c. 32, § 94 provides in pertinent part that:

Notwithstanding the provisions of any general or special law to the contrary affecting the

illnesses that can be exacerbated by the stress of working as a firefighter. *Town of Ware v. Town of Hardwick*, 67 Mass. App. Ct. 325, 332, 853 N.E.2d 599, 607 (2006). If it applies, the presumption satisfies one of the three prerequisites for accidental disability retirement—a proximate, work-related cause for a retirement system member’s incapacity—and makes it unnecessary for the member to prove the causal connection any further. *Id.*; 67 Mass. App. Ct. at 328, 853 N.E.2d at 604 (2006).

The presumption is not conclusive, however. It may be rebutted by competent evidence that the disabling heart disease or heart condition was not suffered in the line of duty. *See Hayes v. City of Revere*, 24 Mass. App. Ct. 671, 512 N.E.2d 291 (1987)(applying principle in context of a municipal policeman who was retired due to heart disease, and who died as a result). It may also be rebutted by competent evidence that although he suffered from hypertension, a police officer or firefighter was not retired on account of a hypertension-related disability, or was not totally incapacitated from performing the essential duties of his job when he retired. *See Vest v. Contributory Retirement App. Bd.*, 41 Mass. App. Ct. 191, 668 N.E.2d 1356 (1996)(former municipal police detective who had non-disabling hypertension when his employment terminated for non-medical reasons, and who applied for accidental disability retirement several years later, when the disability had matured, was properly denied accidental disability retirement benefits).

non-contributory or contributory system, any condition of impairment of health caused by hypertension or heart disease resulting in total or partial disability or death to a uniformed member of a paid fire department . . . shall, if he successfully passed a physical examination on entry into such service, or subsequently successfully passed a physical examination, which examination failed to reveal any evidence of such condition, be presumed to have been suffered in the line of duty, unless the contrary be shown by competent evidence.

Competent evidence rebutting the heart law presumption may include the finding of a majority of medical panel members that hypertension or heart disease was not incapacitating. *See Mathewson v. Contributory Retirement Appeal Bd.*, 335 Mass. 610, 615, 141 N.E.2d 522, 525 (1957)(the medical panel’s function “is fully performed by making a certification, which will be in itself in the nature of evidence before the local retirement board, and where unfavorable would be sufficient to rebut the presumption” of M.G.L. c. 32, § 94 that hypertension or heart disease is service-connected.)

2. Denial of Accidental Disability Retirement in this Case

a. Inapplicability of Heart Law Presumption

Two conditions had to be met for the heart law presumption to apply here. First, Mr. Foley needed to have “successfully passed a physical examination on entry” into the Milton Fire Department or subsequently, and the examination needed to have revealed no evidence of a condition of impairment of health caused by hypertension. M.G.L. c. 32, § 4. Second, per *Vest*, he had to have been disabled as a result of his hypertension before he retired.

There is no direct evidence that Mr. Foley took and passed a physical examination when he joined the Milton Fire Department in August 1972, or subsequently. The Milton Fire Chief confirmed, however, that Mr. Foley would have had to have passed a physical examination before entering service in the fire department. (Finding 3.) The Fire Chief’s confirmation does not say whether Mr. Foley’s physical examination in 1972 revealed any evidence of hypertension. More likely than not it revealed none; the only evidence in the record regarding the onset of Mr. Foley’s

hypertension is that Dr. Nabi first diagnosed it in 2005, thirteen years after Mr. Foley joined the Milton Fire Department.

The heart law presumption was therefore potentially applicable here. It would apply, per the Appeals Court's *Vest* decision, if Mr. Foley was totally incapacitated from performing the work of a deputy fire chief as a result of hypertension before he retired.

There is some evidence in the record that tends to support pre-retirement incapacity:

(a) Mr. Foley testified that despite Dr. Nabi's management of it, his hypertension worsened with stress, and he felt that the effects of this stress-based hypertension increased significantly as a result of the heavy fire he fought in Milton in October 2013, to the point that he was unable to perform any of his essential duties after April 1, 2014. (Finding 14.)

(b) Mr. Foley stated in his accidental disability retirement application that he was disabled due to hypertension resulting from "[e]xposure to stressful situations inherent with firefighting" that occurred throughout his career, and that he was last able to perform all of the essential duties of his position on April 1, 2014. (Finding 13.)

(c) The employer's statement pertaining to Ms. Foley's accidental disability retirement application gives the last date on which he was able to perform his essential job duties as April 1, 2014, and the date on which his employment ended as May 31, 2014. (Finding 18.)

(d) On the physician's statement in support of Mr. Foley's accidental disability retirement application, Dr. Nabi answered "yes" to the questions asking whether Mr. Foley was mentally or physically unable to perform the essential duties of his job as a result of hypertension, whether this condition was likely to be permanent, and whether there was no evidence showing that this disability

was not job-related. (Findings 16, 17.)

(e) Medical panel member Dr. Seth N. Schonwald, who dissented from the panel majority's negative certificates as to whether Mr. Foley was incapacitated from performing the essential duties of his job, concluded that Mr. Foley was mentally or physically incapable of performing the essential duties of his job and that his incapacity was likely to be permanent. (Finding 26.)

There is, however, more reliable evidence in the record, as well as an absence of evidence on several material points, that tends to negate pre-retirement disability due to hypertension:

(a) After diagnosing Mr. Foley with hypertension in 2015, Dr. Nabi managed this condition with apparent success over the next nine years, and Mr. Foley continued to work as deputy fire chief without limitation, and without taking sick leave or medical leave due to hypertension, until he retired in May 2014 at age 65. (Findings 8, 10 and 11.)

(b) Mr. Foley did not report an injury to himself as a result of the October 2013 fire or his participation in fighting it or rescuing persons at the house, and there is no evidence in the record that he sought medical assistance during or after this event, or that he requested or took sick or medical leave, or any other type of leave, following this event. (Finding 10.)

(c) Although it was stated on both Mr. Foley's accidental disability retirement application and the Milton Fire Department's employer's statement that he was last able to perform the essential duties of his job on April 1, 2014 (Findings 13 and 18), there is no evidence in the record that Mr. Foley was absent from work at any time on, before or after April 1, 2014, whether because of hypertension or for any other reason. (See Finding 11.)

(d) On the employer's statement regarding Mr. Foley's accidental disability retirement

application, the Fire Department answered “no” to the question whether there were any physical requirements of his job that he could not perform because of his claimed disability, and “yes” to the question whether Mr. Foley could perform the essential duties of his current position if he were “reasonably accommodated.” It also answered “no” to the questions whether Mr. Foley’s medical condition had affected his attendance and job performance, and whether he had requested modification of his job duties or other reasonable accommodations because of his medical condition. (Finding 18.)

(e) Medical panel majority member Dr. Michael Johnstone concluded that Mr. Foley’s hypertension did not make him mentally or physically incapable of performing the essential duties of his job because it could “easily be corrected and treated with medication,” and Mr. Foley was “only on 2 medications and not even on maximal doses.” Dr. Johnstone noted that Mr. Foley had not been hospitalized for hypertension and had no “kidney issues.” He reported that Mr. Foley stated he was not sure why he claimed hypertension “as a problem,” and that Mr. Foley had also denied any chest pain, shortness of breath, waking from sleep due to inability to breathe, breathlessness in the recumbent position relieved by sitting or standing, fainting, or pre-fainting symptoms. (Finding 24.)

(f) Medical panel majority member Dr. Marvin H. Kendrick concluded that Mr. Foley’s labile hypertension did not make him mentally or physically incapable of performing the essential duties of his job. In reaching this conclusion, Dr. Kendrick noted that Mr. Foley’s hypertension had fluctuated between normal to as high as 156-160/96 before Dr. Nabi started him on a medication regime including metoprolol, and that subsequently Mr. Foley’s blood pressure had been 140/90 on average, as a result of which his hypertension was “considered well controlled.” Dr. Kendrick noted

that when he examined him in December 2014, Mr. Foley was able to “do 5 flights of stairs without difficulty” and was walking 5 miles daily without difficulty. Dr. Kendrick also noted that although Mr. Foley’s hypertension increased in stressful situations, he had been able to carry on his duties as firefighter and deputy fire chief between June 2013 and his retirement with no ill effects. (Finding 25.)

(g) Although medical panel member Dr. Schonwald concluded that Mr. Foley was incapable of performing the essential duties of his job, he diagnosed hypertension with a good prognosis, provided there was further medical intervention and management of Mr. Foley’s blood pressure. Dr. Schonwald did not explain how his diagnosis of hypertension with a good prognosis, if managed properly, squared with his conclusion that Mr. Foley was mentally or physically incapable of performing the essential duties of his job, and he did not furnish a factual basis for his conclusion. (Finding 26.)

The competent evidence shows preponderantly that Mr. Foley’s labile hypertension has existed for some time but has been, and can continue to be, well-managed. Both the evidence and the evidentiary gaps in the record also show, without contradiction, that Mr. Foley performed his essential duties as deputy fire chief, including tasks required of him at a fire scene, without interruption for hypertension-related leave or absence until he retired after reaching the mandatory retirement age of 65. They also show that between 2005 and his retirement in May 2014, he was performing those tasks without interruption while his hypertension was being medically managed.

What is shown in sum, therefore, is that while Mr. Foley had a “condition of impairment of health caused by hypertension,” this condition had not resulted in a medically-documented total or

partial disability before he retired. There was, as a result, no disability to which the heart law presumption applied.

b. No proof of job-related causation

Even if the heart law presumption could be said to apply here because Mr. Foley's hypertension was diagnosed while he was serving as a firefighter, the competent evidence also sufficed to rebut the presumption. The majority of the medical panel members found, and the remainder of the evidence showed, that Mr. Foley's hypertension was not incapacitating, and that he was not incapacitated from performing the work of a deputy fire chief when his employment ended. Although Mr. Foley's last day of work (as opposed to employment) was April 1, 2014, and he testified that he felt he was unable to perform any of the essential duties of his job as of that date because each of those duties exacerbated his hypertension, there is no medical evidence that he was actually disabled on that date. There is also no evidence that he requested, and was granted, a medical leave from his work as of that date.

Assuming that there was a heart law presumption to rebut here, its rebuttal shifted onto Mr. Foley the burden of demonstrating, per M.G.L. c. 32, § 7(1), that he suffered from a hypertension-related disability that was the reasonable and proximate result of an injury sustained, or hazard undergone, while in the performance of his duties. To meet this burden, Mr. Foley was required to prove one of two hypotheses—that his disability was caused by a single work-related event or a series of work-related events, or that his employment exposed him to an identifiable condition that was not common or necessary to all or a great many occupations that resulted in disability through

gradual deterioration. *See Blanchette v. Contributory Retirement App. Bd.*, 20 Mass. App. Ct. 479, 481 N.E.2d 216 (1985). He has not proved either hypothesis.

Mr. Foley identified only one work-related event—the October 2013 house fire in Milton—as causative or as aggravating his hypertension to the point of incapacitation. There is, however, no evidence that he reported a personal injury as a result of the fire, or that he sought medical leave or was absent from work on account of it. Moreover, Mr. Foley’s stress-related hypertension was diagnosed eight years before the October 2013 fire, and there is no medical evidence in the record that the fire aggravated it to the point of leaving him unable to perform the essential duties of his job. Neither his treating physician, Dr. Nabi, nor the medical panel’s dissenting member, Dr. Schonwald, mentioned the October 2013 fire, or any other specific event in Mr. Foley’s firefighting career, as having caused or aggravated his hypertension.

Mr. Foley also argued that his hypertension was the result of the exposure to which he was subjected as a firefighter over the course of his service. His hypertension was, however, diagnosed as being stress-related, and not as the product of exposure to smoke, fumes, toxins and other hazardous substances or conditions to which firefighters are uniquely subjected in the course of performing their duties. Mr. Foley testified at the hearing that he became unable to perform any of the essential duties of a deputy fire chief, at least following the October 2013 house fire, because every one of them was stressful, whether physical (for example, as a result of having to lift and carry hoses and climb ladders) or emotional—for example, from having to confront property owners and occupants regarding fire hazards and code violations, or from having to give orders to subordinates or perform educational or public relations duties, any of which could generate resistance. These

types of physical and emotional stresses were, however, common and necessary to all or a great many occupations, and were not conditions to which Mr. Foley was uniquely exposed.

c. No medical panel error

I turn, finally, to Mr. Foley's claim that the majority medical panel members, Drs. Johnstone and Kendrick, applied the wrong standard in reaching their conclusion because they did not assess whether he was disabled on April 1, 2014, nearly two months before his actual retirement date, and that the retirement board was therefore not bound by the majority panel finding that Mr. Foley was not incapacitated by hypertension before he retired.

Each of the medical panel members reviewed the medical records and job description that the Milton Retirement Board sent them. (Findings 21 and 22.) Mr. Foley does not assert that these records were insufficient, or that any of the medical panel members failed to review them. Each panel member performed a physical examination of Mr. Foley and made similar findings. All three panel members performed essentially the same physical examination. With the exception of bruits that Drs. Johnstone and Kendrick noted but Dr. Schonwald did not, each medical panel member reported similar findings upon examining Mr. Foley. There was another similarity as well—neither Dr. Johnstone nor Dr. Kendrick made a specific finding as to whether Mr. Foley was disabled as of April 1, 2014, but neither did Dr. Schonwald.

Even without this finding, each medical panel member was able to reach a conclusion as to whether Mr. Foley was mentally or physically incapable of performing the essential duties of his job. Two of them (Drs. Johnstone and Kendrick) concluded that he was not, while Dr. Schonwald

concluded that he was, based upon the medical records and job descriptions that the retirement board supplied, and similar physical examinations and findings. This suggests that any failure to find whether Mr. Foley was disabled on April 1, 2014 specifically, rather than at any time between Dr. Nabi's diagnosis of his hypertension in 2005 and Mr. Foley's retirement in May 2014, was without medical consequence. The two majority medical panel members found no hypertension-related disability when they examined Mr. Foley at the end of 2014. Absence any evidence that Mr. Foley's hypertension abated as the year progressed, it is unlikely that Drs. Johnstone and Kendrick would have found that the disability had existed earlier in the year. In addition, Mr. Foley has not identified any medical evidence of a hypertension-related disability as of April 1, 2014 specifically that either physician overlooked.

If there was such evidence, Dr. Schonwald, the dissenting panel member, did not identify it, and he, too, did not focus on the presence or absence of a hypertension-related disability as of that date specifically. Therefore, if failure to find specifically whether Mr. Foley was disabled on April 1, 2014 due to hypertension was of medical consequence, the omission would undercut both the majority and minority medical panel member opinions as to whether Mr. Foley was incapable of performing the essential duties of his job. The omission (if there was one) would, in other words, undercut the persuasiveness of the minority panel member's opinion of incapacity on which Mr. Foley relies.

I conclude that the medical panel majority did not employ an erroneous standard in determining that Mr. Foley was not incapable of performing the essential duties of a deputy fire chief. As a result, the retirement board could not ignore the panel majority's negative finding as to

incapacity, and it relied upon it appropriately in denying Mr. Foley's application for accidental disability retirement benefits.

Conclusion and Disposition

The Milton Retirement Board's denial of Mr. Foley's accidental disability retirement application is affirmed.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

Mark L. Silverstein
Administrative Magistrate

Dated: May 27, 2016