COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. **Division of Administrative Law Appeals**

**Fiorentina Closser**,

 Petitioner

v. Docket No. CR-14-111

 Date Issued: June 24, 2016

**State Board of Retirement**,

 Respondent

**Appearance for Petitioner:**

*Pro se*

48 Whitman Street

Chicopee, MA 01013

**Appearance for Respondent:**

Salvatore Coco, Esq.

State Board of Retirement

One Winter St., 8th Floor

Boston, MA 02108

**Administrative Magistrate:**

Edward B. McGrath, Esq.

Chief Administrative Magistrate

**Summary of Decision**

The Petitioner is not entitled to disability retirement, because she failed to prove that she was physically unable to perform the essential duties of her job on her last day of work.

**DECISION**

 On March 14, 2014, the Petitioner, Fiorentina Closser, timely appealed under M.G.L. c. 32, § 16(4) the March 10, 2014 decision of the Respondent, the State Board of Retirement (the Board), not to process her application for accidental or ordinary disability retirement based on its conclusion that Closser was unable to demonstrate that she was incapable of performing the essential duties of her job when she left work in May 2013.

 A Pre-Hearing Order was issued on June 24, 2015 ordering the parties to submit Pre-Hearing memoranda. The Petitioner submitted her memorandum, with eight proposed exhibits, on July 13, 2015; I have marked this memorandum “A” for identification. The Respondent submitted its memorandum, with seven proposed exhibits, on August 24, 2015; I have marked this memorandum “B” for identification.

 I held an evidentiary hearing on November 10, 2015 at the Division of Administrative Law Appeals (DALA), One Congress Street, Boston, MA. The hearing was digitally recorded. At the hearing, I admitted fifteen documents into evidence. The Exhibits were admitted by agreement and were marked as follows:

Pet. 1 Medical Records from Wing Hospital & Medical Center;

Pet. 2 Medical Records from Chicopee/Riverbend Medical;

Pet. 3 Medical Records from Baystate Medical Center;

Pet. 4 Letter dated January 28, 2013 from Joseph H. Sklar, M.D.;

Pet. 5 X-ray Report;

Pet. 6 Treating Physician’s Statement;

Pet. 7 Letter dated March 10, 2014 from State Board of Retirement;

Pet. 8 Social Security Letter dated August 27, 2013 concerning disability under Social Security law;

Res. 1 Letter from Board dated March 10, 2014 notifying Petitioner of its decision not to process her disability retirement application;

Res. 2 Petitioner’s Appeal with DALA Date Stamp;

Res. 3 Application for ADR dated April 16, 2013;

Res. 4 Physician’s Statement Glen P. Bombardier, M.D. dated October7,2013;

Res. 5 Employer’s Statement with attached documents;

Res. 6 Petitioner’s Medical Records;

Res. 7 Application for Superannuation Retirement.

The parties agreed to eight stipulations. They are listed in the Respondent’s Pre-Hearing Memorandum and labeled Respondent’s Statement of Facts. The Petitioner testified on her own behalf. The Respondent called no witnesses. The administrative record closed at the conclusion of the hearing and, on November 12, 2015, I issued an order confirming the parties’ stipulations and the marked exhibits.

**Findings of Fact**

Based on the testimony and evidence submitted by the parties, I make the following findings of fact:

1. Fiorentina Closser was employed by the Massachusetts Department of Developmental Services (“DDS”) at the Belchertown State School from July 8, 1984 to October 18, 1986. (Test.; Resp. Ex. 3.)
2. In 1984, Closser injured her left knee while lifting a client. (Test.; Resp. Ex. 6.)
3. She returned to work following that incident without restriction, but started suffering from emphysema, Chronic Obstructive Pulmonary Disorder (“COPD”), and arthritis in her knees (Test.)
4. Closser was again employed by DDS on December 8, 2002. She worked in the Monson Development Center in Monson until its closing in 2012. (Resp. Ex. 7; Stip.; Test.)
5. At all times relevant to this appeal, Closser was employed as a Developmental Service Worker I. (Resp. Ex. 7; Stip. 2)
6. The duties of a Developmental Service Worker I include:
	1. Assists/Teaches individual personal management skills, irrespective of clinical diagnosis or level of difficulty, in: eating, bathing, toileting, dressing, clothing, maintenance, self-preservation, manners, norms, to ensure that the human rights of the individual are respected.
	2. Interacts with individuals and families of individuals, and co-workers in a positive, respectful, responsive, and open manner, as necessary to being a “team player.”
	3. Promotes the rights and dignity of all individuals: fosters community membership and relationship building.
	4. Carries out intervention strategies to promote individuals’ personal growth and development.
	5. Ensures the safety and well-being of the individuals.
	6. Direct Care Staff roles and responsibilities in the safe administration of medications.

(Resp. Ex. 5.)

1. Closser and her colleagues were also responsible for shoveling snow, removing trash from the building and vacuuming. (Test.)
2. On or about July 8, 2005, Closser stood up from a chair and fell on her right leg. (Test.; Pet. Ex. 1)
3. She went to Wing Memorial Hospital in Palmer, Massachusetts, where Janet Magnani, M.D., ordered x-rays of her right foot and ankle. (Pet. Ex. 1; Resp. Ex. 6.)
4. The x-ray of her foot showed a small facture. (Pet. Ex. 1; Resp. Ex. 6.)
5. Closser was given an ankle brace and crutches and was advised to stay out of work for the next two days. (Pet. Ex. 1; Resp. Ex. 6.)
6. On December 27, 2008, Closser slipped in the parking lot at the Monson Development Center and fell on her left side and hit her head on the ground. (Pet. Ex. 1; Res. Ex 6.)
7. She went to Wing Memorial Hospital, where Janet Magnani, M.D., diagnosed an acute minor head injury and left knee and hand contusions. (Pet. Ex. 1.)
8. Dr. Magnani ordered x-rays of her left knee and hand and a CT scan of her head.
9. Two days later, upon review of the x-rays and scan a radiologist, Jeffrey C. Allard, M.D., concluded that there was “small joint effusion in the left knee and mild degenerative change”. He noted “mild osteoarthritis” in the left hand. He wrote there was “no fracture or dislocation” involved with Ms. Closser’s left knee, left hand or head. (Pet.. Ex. 1.)
10. On December 29, 2008, Closser saw Jung-ah Han, M.D., who prescribed Tylenol and Vicodin for pain management. (Pet. Ex. 2; Resp. Ex. 6.)
11. On December 12, 2009, Closser injured her left shoulder and arm while assisting a client in bed. (Resp. Ex. 5.)
12. Closser went to the Chicopee/Riverbend emergency room for treatment of this injury. (Resp. Exs. 5, 6.)
13. Closser completed an Industrial Accident Report on December 13, 2009. In describing the circumstances of the injury, she explained that she “went to lift [a client] up in his bed and I felt something pull in my left shoulder area and felt pain go down my arm to my wrist.” (Test.; Resp. Ex. 5.)
14. Crystal Patel, another Developmental Service Worker I, completed a Witness Report on December 13, 2009 confirming Closser’s description of the incident. (Resp. Ex. 5.)
15. On December 14, 2009, Francesca Stiller submitted a Notice of Injury Report regarding the December 13, 2009 injury to the Executive Office of Health and Human Services. Stiller coded the injury as “Shoulder(s) (Left) – Sprains, strains,” and noted the injury’s severity as “Minor injury; no likely lost time; no likely medical bills.” (Resp. Ex. 5.)
16. On December 14, 2009, Closser was seen by Franco M. DeSantis, M.D. at the Riverbend Medical Group in Chicopee. Dr. DeSantis gave her anti-inflammatory medications to treat her shoulder and a note keeping her at limited duty for the following week. (Resp. Ex. 6.)
17. Closser applied for workers compensation benefits in relation to her December 13, 2009 injury. She received benefits of $363.06 per week until April 29, 2010. (Test.; Resp. Ex. 5.)
18. Following each of her injuries, Closser returned to work without restrictions, because she had a family to support. (Test.)
19. After April 29, 2010, Closser worked full duty without accommodations from her employer until she retired effective on May 31, 2013. (Test.)
20. Closser missed a lot of time and had difficulty working nineteen hour shifts. She also had a co-worker lift the heavier patients into the shower. (Test.)
21. Closser and her co-workers took turns doing their duties. There were times when co-workers would handle some duties when Closser was unable to perform, because of her COPD and her knee and shoulder symptoms. (Test.)
22. On March 13, 2010, James G. Nairus, M.D., an orthopedic surgeon, performed an independent medical evaluation on Closser in connection with her workers compensation claim for her December 13, 2009 injury. Dr. Nairus indicated a diagnosis of “cervical spine muscle strain.” He also noted that “Ms. Closser does not have any objective findings on her MRI examination to match her subjective complaints of left upper extremity radicular symptoms.” Dr. Nairus opined that Closser would reach a medical conclusion of no remaining disability from the December 13, 2009 injury after the completion of two additional weeks of physical therapy. He opined that she “has minimal restrictions and limitations due to her neck condition.” (Resp. Ex. 5.)
23. On June 1, 2010, Closser was seen by Sharon Babineau, F.N.P., at the Baystate Medical Center Pain Management Center. Ms. Babineau noted that Ms. Closser had been on “light duty” at work since her injury on December 13, 2009. She opined that “Ms. Closser has persistent left-sided neck, upper back and upper extremity pain.” She stated that Closser was to return for trigger point injections. (Resp. Ex. 6.)
24. On June 9, 2010, Closser returned to the Pain Management Center and received four trigger point injections. (Resp. Ex. 6.)
25. On June 30, 2010, Closser had a follow-up appointment at the Pain Management Center with Sherri Cava, N.P., and Lakshmi Madabhushi, M.D. Cava noted that Closser reported minimal relief from the trigger point injections and recommended a cervical epidural steroid injection. (Pet. Ex. 3.)
26. Cava noted that Closser

continues to work as a nurse’s aide 40 hours per week, caring for 15 patients on a daily basis. She also continues to perform her own housework with difficulties due to neck pain. Functionally, she is able to continue to work and perform her housework without assistive devices or assistance….

 (Pet. Ex. 3)

1. In July 2010, Closser signed a Payment Without Prejudice Agreement regarding her workers’ compensation claim. (Resp. Ex. 5.)
2. The Monson Development Center closed in 2012. Closser transferred to another group home in South Hadley, Massachusetts, where she worked until her retirement. (Test.)
3. On January 28, 2013, Closser was seen by Joseph Sklar, M.D., at Bay State Orthopedics in Springfield, Massachusetts for swelling, pain, and weakness in her knees stemming from her injury in 1984. Dr. Sklar ordered x-rays, which showed “collapse of the medial compartment of both knees, worse on the asymptomatic right side than on the left.” He noted that Closser suffers from osteoarthritis. He performed an injection on her left knee. (Resp. Ex. 6.)
4. On March 21, 2013, Closser applied for superannuation retirement. (Resp. Ex. 7.)
5. Closser retired, because she could not do the job anymore, because of COPD, and pain in her knees and arm. (Test.)
6. On April 16, 2013, Closser submitted an Application for Disability Retirement, citing as her disability COPD, emphysema, severe arthritis and numbness and pain in her shoulder. She noted that she is unable to lift or transfer residents or perform her other outdoor maintenance duties. She cited three specific incidents on July 8, 2005, December 27, 2008, and December 13, 2009. (Resp. Ex. 3.)
7. Closser retired with a superannuation retirement effective on May 31, 2013. (Test.; Stip. 4.)
8. On August 1, 2013, Glen P. Bombardier, M.D. completed a Physician’s Statement pertaining to Closser’s Application for Disability Retirement. Dr. Bombardier opined that Closser is physically unable to perform the essential duties of her job, because she cannot lift without soreness and pain in her knees. He opined that Closser’s diagnoses of osteoarthritis and COPD is likely to be permanent. Dr. Bombardier opined that Closser’s permanent disability is such as might be the natural result of an injury sustained or hazard undergone in the performance of her duties, specifically noting a 1984 incident in which she had a “lift break” and her knee “went out.” (Resp. Ex. 4.)
9. Dr. Bombardier stated that he had reviewed Closser’s job duties and, when asked when was the applicant last able to perform her essential duties, he responded May 31, 2013. (Ex. 4)
10. On August 7, 2013, an Employer’s Statement pertaining to Closser’s Application for Disability Retirement was submitted. The statement noted one incident related to Closser’s job duties that occurred on December 13, 2009 in which Closser strained her left arm and shoulder. The statement also noted that Closser’s condition did not affect her attendance or job performance and that she did not request any modification of her job duties to accommodate her condition. (Resp. Ex. 5.)
11. On August 27, 2013, the Social Security Administration sent Closser a notice of award letter stating, in part, that:

We have determined that you are disabled under social security law as of May 31, 2013. Your eligibility for a period of disability is based at least partly on your government employment.

 (Resp. Ex. 2 )

1. On March 10, 2014, Nicola Favorito, Esq., Executive Director of the Board, sent a letter to Closser notifying her of the Board’s decision to not process her application for disability retirement because of her inability to demonstrate that she was disabled as of her last day of work. (Pet. Ex. 7; Resp. Ex. 1.)
2. On March 18, 2014, Closser timely appealed the Board’s decision to the Division of Administrative Law Appeals. (Resp. Ex. 2.)

**DISCUSSION**

After careful consideration of the evidence presented in this case, the Board’s decision not to process Closser’s application for disability retirement benefits is affirmed. Closser has failed to prove that she was permanently disabled on her last day of work.

Closser bears the burden of proving her entitlement to ordinary or accidental disability retirement by a preponderance of the evidence. *Lisbon v. Contributory Retirement Appeal Bd.*, 41 Mass. App. Ct. 246, 255 (1996). To qualify for ordinary disability retirement, an applicant must prove that she is ‘unable to perform the essential duties of [her] job and that such inability is likely to be permanent.’ M.G.L. c. 32, § 6(1). To qualify for accidental disability retirement, an applicant must prove the additional element that the disability was caused “by reason of a personal injury sustained or a hazard undergone as a result of, and while in the performance of, [her] duties.” M.G.L. c. 32, § 7(1).

Generally, the retirement board will convene a three-physician regional medical panel which, following an examination of the applicant, must certify the applicant’s permanent mental or physical incapacity to perform the essential duties of her job. M.G.L. c. 32, §§ 6(3)(a) & 7(1); *Malden Retirement Bd. v. Contributory Retirement Appeal Bd.*, 1 Mass. App. Ct. 420, 423 (1970). However, pursuant to 840 CMR 10.09(2), “[a]t any stage of a proceeding on an ordinary or accidental disability retirement application the retirement board may terminate the proceeding and deny the application if it determines that the member cannot be retired as a matter of law.” Here, the Board decided not to process Closser’s application based on its determination that Closser failed to demonstrate adequately that she was disabled at the time of her retirement. (Pet. Ex. 7.)

It is well settled that in order to be eligible for disability retirement benefits, a member must have been mentally or physically disabled on their last day of work so as to be rendered incapable of performing the essential duties of their job. *See Vest v. CRAB & Boston Retirement Bd.*, 41 Mass. App. Ct. 191, 194 (1996). As the Appeals Court said,

an employee who has left government service without an established disability may not, after termination of government service, claim accidental disability retirement status on the basis of a subsequently matured disability.

*Id.*

In this case, a preponderance of the evidence supports the conclusion that Closser was able to perform the essential duties of her job on her last day of work on May 30, 2013. The Treating Physician’s Statement states that she was last able to perform her essential duties on May 31, 2013, the day her retirement was effective. Closser returned to work on a full duty basis after each of the injuries she cites as contributing to her disability. (Test.; Resp. Exs. 3, 5, 6.) On June 30, 2010, Dr. Madabhushi stated that “Functionally, [Closser] is able to continue to work and perform her housework without assistive devices or assistance.” (Resp. Ex. 6.) Additionally, Closser’s employer, in the Employer’s Statement stated numerous times that Closser returned to work after her December 13, 2009 injury and that she “worked gainfully until her retirement.” (Resp. Ex. 5.)

 Although Closser testified that co-workers would sometimes perform some of her duties after her 2009 injury when she was unable to, she also testified that “they took turns” with the duties. This testimony was insufficient to overcome the statements contained in the Petitioner’s medical records, the Employer’s Statement, and the Treating Physician’s Statement and prove that she was disabled as of the last day of her work. *See Falardeau v. Massachusetts Teachers’ Ret System,* CR-13-539 \* 7-8 (DALA Dec. 4/29/2016; No CRAB Dec.) The letter from Social Security stating that Closser’s disability began on May 31, 2013 does not persuade me otherwise. *See Collins v. Worcester Reg. Ret. Brd.* CR-10-64 \* 6 (DALA Dec. 3/11/2013; No CRAB Dec.) (*Vest* applicable when Social Security award in evidence)*,* First, that is the date Closser’s retirement became effective, the day after her last full day of work. Moreover, unlike the opinion contained in the Treating Physician’s Statement, the vague statement contained in the Social Security award does not address Closser’s ability to perform her job duties.

 In summary, Closser failed to prove that she was unable to perform the essential duties of her job on her last day of work. As this is one of the requirements for eligibility for disability retirement benefits, Closser has failed to prove that she is eligible for disability retirement as a matter of law. Accordingly, the Board’s decision was proper pursuant to 840 CMR 10.09(2).

**Conclusion and Order**

In conclusion, the Board properly decided not to process Closser’s application for accidental disability retirement benefits, because Closser was not disabled on her last day of work. The Board’s decision is therefore affirmed.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

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Edward B. McGrath, Esq.

Chief Administrative Magistrate

DATED: June 24, 2016