COMMONWEALTH OF MASSACHUSETTS

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

**John J. Carr**,

 Petitioner

v. Docket No. CR-07-1033

 Date Issued: November 17, 2017

**Brockton Retirement Board**,

 Respondent

**Appearance for Petitioner:**

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**Appearance for Respondent:**

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**Administrative Magistrate:**

Edward B. McGrath, Esq.

Chief Administrative Magistrate

**SUMMARY of DECISION**

The Respondent’s decision denying the Petitioner accidental disability retirement is affirmed, because the Petitioner failed to prove by a preponderance of the evidence that the regional medical panel, which answered the certificate question addressing causation in the negative, relied on an incorrect standard or lacked pertinent medical information when it reached its conclusion.

 **DECISION**

Petitioner, John Carr, timely appealed, under G.L. c. 32, § 16(4), the Brockton Retirement Board’s (“Respondent”) decision denying his application for Accidental Disability Retirement. The matter was originally scheduled for hearing in February, 2011 and was continued to May of 2011 at the Respondent’s request. The hearing was continued again this time generally at the Petitioner’s request. In April 2015, the Division asked for a status report and the Petitioner informed the Division that he was gathering more medical information. On February 10, 2017, the Division asked for another status report and, on April 3, 2017, a Notice of Hearing was issued.

On July 12, 2017, I held a hearing at the Division of Administrative Law Appeals, One Congress Street, Boston, Massachusetts. I admitted nineteen (19) documents into evidence. (Exs. 1-19.). Mr. Carr testified on his own behalf, as did his wife. The Respondent did not call any witnesses. The parties submitted pre-hearing memoranda, which I have marked “A” and “B” for identification. The parties declined to submit post-hearing memoranda. The administrative record closed on July 12, 2017.

**FINDINGS OF FACT**

 Based on the documents and testimony presented by the parties and the reasonable inferences therefrom, I find the following facts:

1. John Carr was diagnosed as an insulin dependent diabetic when he was twelve years old. (Carr Testimony.)
2. Mr. Carr worked as a police officer for the City of Brockton from May, 1987 to January, 2007. (Carr Testimony.)
3. Mr. Carr worked as a patrolman from 1989 until 2005, and was transferred to a dispatcher position in 2006. (Carr Testimony.)
4. In 1989, Mr. Carr responded to a call about a five-year-old girl drowning in a park. The girl was unconscious when he arrived at the scene. Mr. Carr performed CPR on the girl, who died shortly thereafter at the hospital. Mr. Carr spent time with the girl’s family and attended the autopsy. This event had a tremendous effect on him as he had a son the same age as the victim. (Carr Testimony.)
5. In 2003, Mr. Carr was diagnosed with hypertension. (Carr Testimony.)
6. Mr. Carr has also been diagnosed with depression and anxiety. (Carr Testimony.)
7. In 2003, Dr. William Hsu examined Mr. Carr and stated that his diabetes control was “heading in the wrong direction.” (Ex. 9.)
8. In 2005, Mr. Carr suffered a hemorrhage in his left eye while at work and was rushed to the hospital. He had surgery on his left eye to repair some of the damage. (Carr Testimony.)
9. When Mr. Carr was cleared to return to work, he was transferred to a dispatcher position. He was able to perform the required duties of this position without restriction. (Carr Testimony.)
10. A March 2006 note from Dr. Michael Dern stated that Mr. Carr “has gone back to work full time, realizes that he cannot be in the street… He is doing dispatching and says it has actually been okay…for now, the issue, of course is his diabetes…” (Ex. 8.)
11. On January 25, 2007, Mr. Carr arrived to work in the dispatch office in the morning. After logging onto the computer, he felt tightness in his chest, nausea, severe headache, and dizziness. He began vomiting and was taken to the hospital by ambulance. (Carr Testimony.)
12. Dr. Dern stated in a note written on January 29, 2007 regarding Mr. Carr’s hospital admission that “[Carr] virtually has no vision in his left eye and minimal vision in his right eye.” (Ex. 8.)
13. Mr. Carr did not return to work after the January 25, 2007 incident. (Carr Testimony.)
14. Mr. Carr retired on superannuation. His decision to retire was not voluntary, but the Brockton Police Department gave him the option of retiring or being let go. (Carr Testimony.)
15. Mr. Carr filed an application for accidental disability retirement on March 20, 2007. (Ex. 4.)
16. He did not apply for or receive workers’ compensation or benefits pursuant to G.L. c. 41, § 111F related to his claimed disability. (Ex. 4.)
17. In his application for accidental disability retirement, Mr. Carr stated that the medical reasons for his application were: “hypertension and job stress contributing to acute visual impairment leaving me with decreased visual capability.” He referenced several dates of work injuries or hazards from 1989 to 2007. (Ex. 4.)
18. When asked to describe other circumstances, events or physical conditions that contributed to his disability, he stated: “work conditions in Dispatch area. Poor air quality. Poor air circulation, dust no windows…” (Ex. 4.)
19. In the Physician’s Statement that accompanied Mr. Carr’s application for accidental disability retirement, Dr. Dern supported Mr. Carr’s claim that work-related stressors increased his hypertension and worsened his visual acuity. He did not mention a diagnosis of PTSD or attribute Mr. Carr’s hypertension or vision problems to PTSD. (Ex. 5.)
20. Dr. Jennifer Sun treated Mr. Carr for diabetes from February of 2007 and stated that Mr. Carr’s “retinal neovascular disease is related to his diabetes.” (Ex. 9.)
21. After receiving Mr. Carr’s application for Accidental Disability Retirement, the Respondent sought the appointment of a regional medical panel for Mr. Carr. (Ex. 19.)
22. PERAC appointed Dr. Madhusadan Thaker, a cardiologist, Dr. Robert Eberhardt, an internist, and Dr. Eric Awtry, a cardiologist, to Mr. Carr’s medical panel. (Ex. 19.)
23. The panel examined Mr. Carr on July 18, 2007. The panel noted in the History of Present Complaints section of its narrative report that Mr. Carr “had prior headaches with stress; however this was worse than usual…” (Ex. 19.)
24. The panel concluded that Mr. Carr was physically incapable of performing his essential job duties, and that his incapacity was likely to be permanent. However, it also concluded that his disability was not such as might be the natural and proximate result of the personal injury sustained or hazard undergone on account of which Mr. Carr claimed retirement. (Ex. 19.)
25. The panel stated that all medical records indicated that while Mr. Carr has a history of hypertension, it “is in very good control.” The panel found no evidence of a disabling cardiac condition or disabling hypertension. They further stated that Mr. Carr’s retinopathy, renal insufficiency and proteinuria are related to diabetic nephropathy brought on by his long-standing diabetes. (Ex. 19.)
26. On September 19, 2007, the Respondent denied Mr. Carr’s application for Accidental Disability Retirement. (Ex. 2.)
27. On October 4, 2007, Mr. Carr timely appealed the Respondent’s decision. (Ex. 1.)
28. Mr. Carr was diagnosed with Post-Traumatic Stress Disorder (“PTSD”) in April, 2014. This diagnosis was confirmed by Dr. William Jamieson in October, 2016. (Ex. 12)

**DISCUSSION**

Mr. Carr has failed to prove by a preponderance of the evidence that the regional medical panel employed an incorrect standard or lacked pertinent medical information when it answered the third question on the Regional Medical Panel Certificate in the negative. Thus, he is not entitled to Accidental Disability Retirement.

G.L. c. 32, § 7(1) sets out the conditions for allowance of an accidental disability retirement application. *See Malden Ret. Bd. v. Contributory Ret. App. Bd.*, 1 Mass. App. Ct. 420, 422-23 (1970) (delineating statutory requirements for approval of accidental disability retirement application). Section 7(1), in conjunction with G.L. c. 32, § 6(3), lays out a carefully defined procedure for processing the applications. *See id.* at 423. Section 6(3)(a) requires that a three-physician regional medical panel, following an examination of the applicant, issue a certificate as to (1) the applicant’s mental or physical incapacity for duty, (2) the likelihood that the incapacity is permanent, and (3) “whether or not the disability is such as might be the natural and proximate result of the accident or hazard undergone on account of which retirement is claimed.” G.L. c. 32, § 6(3)(a). *See also Malden Ret. Bd.*, 1 Mass. App. Ct. at 423.

The purpose of the medical panel examination and certificate is to “vest in the medical panel the responsibility for determining medical questions which are beyond the common knowledge and experience of the members of the local [retirement] board.” *Id.* The local retirement board is bound by a medical panel certificate when the majority responds in the negative to any of the three questions contained in the certificate. *See id.* at 423 n.6. The Contributory Retirement Appeal Board is likewise bound by a medical panel’s negative response to any of the three questions, unless the medical panel has employed an erroneous medical or legal standard or lacked pertinent medical information. *See id.* at 424.

In this case, three regional medical panel physicians examined Mr. Carr. After examining Mr. Carr and giving detailed consideration to his medical history, it unanimously answered the third certificate question in the negative. (Ex. 19.) Mr. Carr’s disability retirement application thus did not survive the gatekeeping function of the medical panel. *See* G.L. c. 32, § 6(3)(a).

The panel neither applied an erroneous standard, nor lacked pertinent medical information that could have swayed its decision on Mr. Carr’s application. All relevant information regarding Mr. Carr’s history of diabetes, stress and hypertension was assessed by the medical panel. The panel stated that all medical records indicated that while Mr. Carr had a history of hypertension, it was in very good control. They concluded that Mr. Carr’s retinopathy, renal insufficiency and proteinuria, the health conditions that prevented him from continuing to work as a dispatcher, were related to diabetic nephropathy brought on by his long-standing diabetes, not by hypertension. The panel found no evidence of a disabling cardiac condition or disabling hypertension and answered the third certificate question in the negative. (Ex. 19.) The medical panel was aware of the job stress that Mr. Carr endured as this was referenced in his application and the physician’s statement. The nature and timing of the incidents that fed into this job stress was also presented during the review of Mr. Carr’s application for accidental disability retirement. In fact, the panel mentioned Mr. Carr’s stress at work in the history section of its narrative report. (Finding 23)

 Mr. Carr’s claim of “PTSD” as the cause of his vision issues was not articulated on his application for accidental disability retirement. DALA and CRAB “have consistently held that an application for accidental disability retirement benefits may not be amended retroactively to include new injuries or new incidents.”  *Robert Zajac v. State Bd. of Ret.,* 12-444 at 4 (CRAB 8/12/2015). The injury on which an application for accidental disability retirement is based must be stated in the application. Even where multiple symptoms are mentioned in the supporting physician’s statement it is the application that provides the basis for the claim of accidental disability retirement benefits. *Howard Poulten v. Boston Ret. Bd.*, Docket No. CR-11-88 at 3-4 (CRAB 8/14/2015). In addition, Mr. Carr’s physician’s statement did not mention a potential diagnosis of PTSD. In fact, the evidence of PTSD Mr. Carr puts forward did not exist until 7 years after Mr. Carr was examined by the medical panel and filed his appeal at DALA. Therefore, I do not find that information probative. *Grannum v. State Bd. of Ret.*, CR-12-501 at 8-9 (DALA 10/2/2015). Mr. Carr does not get an opportunity to amend his claim or have a retrial of the medical facts of his case, when the panel applied proper procedures and correct principles of law, because seven years after the panel examined him he comes forward with evidence of PTSD. *See Zajac* at 4; *See also Kelley v. Contributory Ret. App. Bd.,* [341 Mass. 611](http://sll.gvpi.net/document.php?id=sjcapp:341_mass_611), 617 (1961).

Mr. Carr’s history of hypertension, diabetes, job stress, anxiety, and depression were all before the retirement board and the medical panel at the time of his evaluation, as were Mr. Carr’s account of the incidents he experienced as a police officer. Mr. Carr addressed the issue of job stress as a factor in his application and it was considered by the medical panel. The only additional information is Mr. Carr’s diagnosis of “PTSD” and his treatment for mental health issues that occurred after he left the Brockton Police Department and after he was examined by the panel.[[1]](#footnote-1)

Mr. Carr’s claim related to the diagnosis of PTSD is also doomed by a timeliness issue. The only claims that may be considered in an application for accidental disability retirement are injuries or hazards undergone on the job within two years of the date on which the application was filed, unless a written notice of injury was timely provided to the member’s retirement board or if an exception applies. G. L. c. 32, §§ 7(1) and 7(3)(a) and (b); *See Zajac* at 8 *citing Sugrue v. CRAB*, [45 Mass. App. Ct. 1](http://sll.gvpi.net/document.php?id=sjcapp:45_mass_app_ct_1), 4-5 (1998) (only claims within two years of application may be considered). Mr. Carr traces the start of his severe stress issues to the tragic drowning of the young girl he attempted to save in 1989. He did not file an injury report describing a psychological injury arising from that event. He also did not file injury reports after any injury occurring before 2005. Therefore, those injuries occurring more than two years prior to the filing of his application in 2007 may not be considered unless an exception applies.

Mr. Carr’s claim would not be barred by his failure to file a written notice of injury if he received worker’s compensation for the injury. G. L. c. 32, § 7(3)(a). This portion of the statute does not apply to Mr. Carr as he was a police officer and was not eligible to receive worker’s compensation. As an alternative, c. 32 provides that an employee not eligible for worker’s compensation to fulfill the notice requirement if there is a record of a mental injury he sustained or hazard undergone on file in the official records of his department. Mr. Carr did not produce any such record for the events prior to 2005.

A failure to file written notice also would not matter if the head of Mr. Carr’s department knew of a personal injury he suffered as a result of, and in the performance of, his duties. G. L. c. 32, § 7(3)(b). In this case, the department would be required to notify the retirement board in writing of the “time, place, cause, and nature of such injury.” *Id*. Nothing in the record establishes that any official in the Brockton Police Department knew that Mr. Carr suffered a personal injury, or that the Brockton Police Department had reason to send notice to the retirement board about the traumatic events, particularly the one in 1989, and their consequences. Mr. Carr first sought mental health treatment after he retired from the Brockton Police Department and was not diagnosed with PTSD until April of 2014 by Dr. Weiner. (Ex. 12.)

Therefore, no exception under G. L. c. 32, § 7(3)(a) or (b) applies. Mr. Carr must rely on an injury or injuries that exacerbated his alleged underlying condition that occurred in the two years prior to his application for accidental disability retirement. Any incidents or mental health problems that occurred before that time are pre-existing injuries; only evidence that shows his underlying condition was aggravated in the two-year period should be considered. *Wayne Rosario v. Fall River Ret. Bd.*, CR-13-233 at 11 (DALA 4/5/2016).

There is no evidence that Mr. Carr’s pre-existing mental health condition was aggravated by any work-related injury or hazard that arose within the two year period before his application was filed. This is probably because, during much of that period, Mr. Carr was working as a police dispatcher. In his application for accidental disability retirement, Mr. Carr references dates for several injuries or hazards he endured from 2005 to 2007. However, he did not elaborate on any one of these instances being so significant as to advance his mental health condition. (Ex. 4.) His testimony, as well as that of his wife, placed the most significant traumatic events in his tenure as a police officer in the late 1980s and 1990s. The event that appeared to have caused Mr. Carr the most mental distress was the child drowning in 1989. To allow Mr. Carr to rely on events of this time period as the significant contributing factors to his disability would violate the two-year look-back requirement in c. 32, § 7(1).

**CONCLUSION and ORDER**

For reasons discussed, the Respondent’s decision to deny Mr. Carr’s Accidental Disability Retirement Application is **AFFIRMED** and Mr. Carr’s appeal is **DISMISSED**.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

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Edward B. McGrath, Esq.

Chief Administrative Magistrate

DATED: November 17, 2017

1. I note that, if Mr. Carr developed PTSD after he stopped working, the later maturing condition could not form the basis for his application for accidental disability. *Vest v. Contributory Ret. App. Bd*., 41 Mass. App. Ct. 191, 193 (1996). [↑](#footnote-ref-1)