STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Nicholas B. Thompson, Petitioner, vs. South Carolina Public Employee Benefit Authority, South Carolina Retirement Systems, Respondent.	Docket No. 20-ALJ-30-0276-CC **FINAL ORDER**

APPEARANCES: Jack E. Cohoon, Esq.
For Petitioner Nicholas B. Thompson

Melissa Alexander, Esq.
For Respondent South Carolina Public Employee Benefit Authority

STATEMENT OF THE CASE

This case is before the Administrative Law Court (ALC or court) pursuant to a request for a contested case hearing filed by Nicholas B. Thompson (Petitioner) on September 28, 2020. The Petitioner challenges the decision of the South Carolina Public Employee Benefit Authority, South Carolina Retirement Systems, (PEBA) to uphold the denial of his claim for disability retirement benefits under the South Carolina Police Officer's Retirement System (Retirement System). Specifically, PEBA contends that the Petitioner's claim was properly denied because the Petitioner did not establish that he was disabled as a result of an on-the-job injury and, therefore, did not satisfy the eligibility requirements for disability retirements benefits.

A hearing in this matter was held on May 4, 2022, at the ALC in Columbia, South Carolina. After careful consideration of the evidence presented and the applicable law, the court finds that the Petitioner failed to carry his burden of establishing eligibility for disability retirement benefits.

ISSUE

Did the Petitioner suffer an on-the-job injury qualifying him for eligibility to apply for disability retirement benefits?[1]

[1] The Petitioner does not challenge PEBA's determination that he did not have eight (8) years of earned service—the alternative path to eligibility for disability retirement benefits. Therefore, the only remaining issue in dispute is whether the Petitioner established that his disability resulted from an on-the-job injury.

FINDINGS OF FACT

Having carefully considered all testimony, exhibits, and arguments presented at the hearing in this matter, and considering the credibility and accuracy thereof, the court makes the following findings of fact by a preponderance of the evidence:

1. The Petitioner is a thirty-five-year-old Class III member of the Retirement System with approximately four (4) years and two (2) months of service credit.
2. Prior to leaving covered employment, the Petitioner was employed as a firefighter with the Bluffton Township Fire District (Bluffton Fire Department). At the time of his hire, the Petitioner completed a medical history form indicating he had no pre-existing conditions displaying a medical history of back problems or any other type of ailment.
3. On November 16, 2015, the Petitioner sought a medical evaluation from his primary care physician, Dr. David E. Dorsner, M.D., for stiffness and pain in his lower back and buttocks area. Dr. Dorsner noted "LBP to lower back, which resulted work [sic], and which occurred [five (5)] months ago." He concluded that the Petitioner should see a spine specialist.
4. On or about December 2, 2015, the Petitioner had an appointment with a spine specialist, Dr. John P. Batson, M.D., who noted that the Petitioner was experiencing pain that interrupted his work, exercise, and activities. Dr. Batson further acknowledged that the Petitioner's back pain is aggravated by bending, sitting, standing, walking, exercise, and physical activity.
5. On or about January 10, 2017, the Petitioner verbally reported to his superior within the Bluffton Fire Department that he was experiencing pain in his back. The Petitioner's superior referred him to a second spine specialist, Dr. Susan L. Cramer, M.D.
6. The Petitioner saw Dr. Cramer on February 10, 2017. Dr. Cramer reported that the Petitioner had limited range of motion due to back pain, which started about one year prior and worsened around November of 2016.[2] She noted that the Petitioner had sought chiropractic therapy for his back pain over a two-month period but that it made the pain worse. Based on her findings, Dr. Cramer restricted the Petitioner to modified light duty, indicating that the Petitioner could not lift more than twenty (20) pounds, nor push, pull,

[2] Dr. Cramer does not identify any potential or suspected causes of the Petitioner's back pain in her report.

or carry more than fifteen (15) pounds, nor engage in repetitive bending and climbing. Dr. Cramer referred the Petitioner to a neurosurgeon, Dr. James G. Lindley, Jr., M.D.

7. On February 16, 2017, the Petitioner saw Dr. Lindley, who noted that the Petitioner was experiencing back pain. Dr. Lindley recommended an L4-5 disc replacement surgical procedure
8. In a Family Medical Leave Act (FMLA) certification dated February 20, 2017, Dr. Cramer indicated that the Petitioner was unable to perform any of his job functions due his back injury.
9. On February 22, 2017, the Petitioner filed an incident report stating his back pain was related to on-the-job injuries. At the time, the Petitioner attributed his injuries to "lifting a resident from the floor of a confined space."
10. On February 28, 2017, the Petitioner again saw Dr. Cramer, who noted that the Petitioner was experiencing lower back pain that began roughly eight months prior when he injured his back at work by lifting a person.
11. On March 7, 2017, Dr. Lindley placed the Petitioner on full restrictions from working in any manner.
12. In a May 2, 2017, evaluation, Jennifer C. Adams, a nurse practitioner associated with Dr. Lindley, noted the Petitioner's back pain and suggested that it may relate to or have been aggravated by three (3) specific events: 1) lifting and transferring a roughly 400lb patient in an awkward, confined space (hereinafter referred to as the "patient transfer"); 2) the strenuous multi-day cleanup effort that followed Hurricane Matthew, which required cutting and lifting fallen trees and other large, heavy debris (hereinafter referred to as "Hurricane Matthew cleanup"); and 3) a large residential fire in the Belfair community that required extreme physical exertion (hereinafter referred to as the "Belfair fire").
13. On June 7, 2017, the Petitioner filed an application for disability retirement benefits with PEBA alleging that he was disabled from performing his duties as a firefighter as the result of a back injury.
14. On July 11, 2017, Dr. Lindley wrote an opinion letter stating, to within a reasonable degree of medical certainty, that there was a direct relationship between the Petitioner's job as a firefighter and his back injuries. In the letter, Dr. Lindley noted that the Petitioner had

discussed with him the patient transfer, Hurricane Matthew cleanup, and the Belfair fire, which Dr. Lindley found "caused and/or aggravated" his lower back injury.

15. On September 15, 2017, the Petitioner was transported to the emergency room via ambulance after collapsing on the floor due to severe back pain.
16. On September 19, 2017, Dr. Lindley noted that between September 9th and 19th, the Petitioner's back pain worsened, and he was now experiencing bowel issues. The following day, Dr. Lindley referred the Petitioner to a pain management clinic, which treated the Petitioner for his back pain until he was able to have surgery.
17. Following its review of the Petitioner's application and related documents, PEBA sent him a Notification of Disability Ineligibility dated November 16, 2017, which indicated that he was not eligible to apply for disability benefits because he did not have eight years of earned service and he had not successfully demonstrated that his disability was the result of an on-the-job injury. The notice afforded the Petitioner an opportunity to submit further documentation to demonstrate that he was eligible to apply for disability retirement benefits.
18. On November 20, 2017, the Petitioner appealed PEBA's denial, and presented additional evidence to support his claim.
19. On November 29, 2017, PEBA received from the Petitioner additional documentation from his workers' compensation claim in which he alleged that his disability was due to an injury that occurred while performing his job duties.
20. In response to that documentation, PEBA requested and received a copy of the Petitioner's file from the Workers' Compensation Commission, which included documentation that his claim for workers' compensation benefits had been denied.
21. Part of the documentation from the Petitioner's workers' compensation claim included deposition testimony from Dr. Lindley. Dr. Lindley's testimony under oath is far more equivocal as to the cause or source of the Petitioner's injury than his letter of July 11, 2017. When asked specifically if he could say to a reasonable degree of medical certainty that the Petitioner's lumbar injury was related to his job duties as a firefighter, Dr. Lindley responded:

> I can't because he did have the previous complaints [from his early chiropractic therapy] and Dr. Kramer [sic] didn't refer to it [when she saw

> him on February 10, 2017]. What I can say is that he has a condition that is characterized by a degenerative process in his back and that occurred at some point in time, you know, we don't know exactly when, that was most likely exacerbated by his work related activities and by the several injuries that he sustained on-the-job and I can say that to a reasonable degree of medical certainty.

Dr. Lindley further stated that he didn't know whether the degenerative condition in the Petitioner's back resulted from an injury or wear and tear. Though he noted to a reasonable degree of medical certainty that the Petitioner's surgery was "related to the work-related events," he clarified that this was based on the Petitioner's statements that the work-related events exacerbated his symptoms. However, Dr. Lindley reiterated that he couldn't, "to a reasonable degree of medical certainty, say that his back condition is related to an on-the-job injury."

22. Upon review of that file and the additional information submitted by the Petitioner, PEBA concluded that the Petitioner had not demonstrated that his disability was the result of an injury that occurred while he was performing his job duties.
23. Accordingly, by letter dated May 21, 2018, PEBA notified the Petitioner that it remained unable to process his application for disability retirement benefits as a result of his ineligibility.
24. On March 13, 2019, the Petitioner requested an administrative review of PEBA's determination not to process his application for disability retirement benefits before Peggy G. Boykin, PEBA's Executive Director.
25. Pursuant to that appeal, Director Boykin appointed Joel D. Leonard, CRC, CVE, an independent vocational consultant, to review and make a recommendation on the threshold matter of the Petitioner's eligibility to apply for disability retirement benefits.
26. As part of that review, Mr. Leonard conducted an administrative telephone conference with the Petitioner on February 12, 2020, and reviewed his entire file, including the records he submitted during the initial consideration of his claim and his appeal to the Director, as well as the file PEBA obtained regarding his workers' compensation claim.
27. On February 21, 2020, following his review, Mr. Leonard issued a recommendation that PEBA should continue to refuse to process the Petitioner's application for disability retirement benefits. More specifically, Mr. Leonard concluded that the "[Petitioner] does

not meet the necessary earned service required to file a claim nor does the evidence depict a disability resulting from an injury occurring out of and in the course of the performance of his job duties."

28. On August 28, 2020, Director Boykin issued a Final Agency Determination adopting Mr. Leonard's recommendation and affirming PEBA's determination that the Petitioner is not eligible to apply for disability retirement benefits.
29. At the hearing, Mr. Leonard testified on behalf of PEBA and Mr. Thompson testified on his own behalf.
30. The Petitioner began his career as a firefighter in 2012 and started working for the Bluffton Fire Department in April of 2013. He testified to the physical rigors of being a firefighter, including many that stem from tasks beyond actual firefighting, and the injuries that he maintains were incurred on the job. In particular, the Petitioner detailed three (3) of the more physically challenging events that he experienced while serving as a firefighter for the Bluffton Fire Department and to which he attributed his back injuries. First, the Petitioner recalled an injury that he sustained from the suppression of the Belfair Fire in July of 2016. During that response, he had to hold a hose discharging 400-500 gallons of water per minute in an awkward position for 15 to 20 minutes to help suppress the fire. He explained how this event was physically demanding and very taxing on him personally. Second, the Petitioner recalled the experience of picking up and moving a 400-pound person from a confined space and feeling a jolt of pain radiate from his back to his leg in October of 2016. Third, and finally, the Petitioner recalled the physical strain he endured in October of 2016, following three (3) eight- (8) hour shifts of cutting and clearing trees and debris from Hurricane Matthew.
31. The Petitioner, who clarified that he did not have any back problems prior to his employment with the Bluffton Fire Department, attributes his back injury to these three specific events and to the cumulative trauma endured as a firefighter. He explained that he did not seek immediate medical care for the pain he experienced, nor did he make an official incident report for each of these injuries, because pain is part of the job of being a firefighter. The Petitioner noted that he always wanted to be a firefighter and his goal after being injured was always to return to duty, which he did in March of 2022 following a back surgery that provided some relief.

32. Mr. Leonard—who was offered and qualified as an expert in vocational rehabilitation—explained that "[i]n the vast majority," roughly 95%, of cases he is appointed as a consultant to review there is no dispute as to an applicant's ability to apply for disability benefits (i.e., that they earned the necessary service credits or demonstrated an on-the-job injury). In those cases, he performs a sequential analysis of vocational factors to determine the extent to which an applicant is able to or is precluded from performing their job. However, Mr. Leonard testified that, in this case, there was a "deviation" from his usual review—he did not reach that sequential analysis and "did not even get to the point where we were addressing issues of vocational rehabilitation or . . . employability." Though he acknowledged that the Petitioner did have "a serious lower back condition" from a vocational standpoint, he characterized his review of the Petitioner's file as a "gatekeeper analysis" of whether the Petitioner suffered an on-the-job injury in the first place.
33. Nevertheless, following his review of PEBA's record and the Petitioner's workers' compensation file, Mr. Leonard found insufficient evidence to demonstrate that the Petitioner's disability resulted from an on-the-job injury and, therefore, recommended that PEBA continue to deny processing the Petitioner's application. His decision was based, in part, on the denial of the Petitioner's workers' compensation claim, the lack of new evidence offered to support diverging from that decision, and Dr. Lindley's sworn deposition testimony, to which he afforded more weight than Dr. Lindley's opinion letter. Mr. Leonard conceded, however, that he did not recall any chiropractic reports in the record and further indicated that he did not find the Petitioner's version of events to be uncredible.

CONCLUSIONS OF LAW

Based on the forgoing findings of fact, the court concludes the following as a matter of law:

1. The court has jurisdiction over this matter pursuant to section 9-21-60 of the South Carolina Code. S.C. Code Ann. § 9-21-60 (2019); *see* S.C. Code Ann. § 1-23-600(A) (Supp. 2021).
2. The issue in this matter is whether the Petitioner meets the eligibility requirements to apply for disability retirement benefits from the Retirement System. Pursuant to section 9-11-80, a Class III member of the Retirement System is eligible to apply for disability retirement benefits if the member: 1) has at least eight (8) years of earned service; or 2) "is disabled as a result of an injury arising out of and in the course of the performance of the

member's duties regardless of length of membership . . . ." S.C. Code Ann. § 9-11-80(1) (Supp. 2021).

3. As the moving party in this matter, the Petitioner bears the burden of establishing, by a preponderance of the evidence, that he meets the eligibility requirements to apply for disability benefits pursuant to section 9-11-80. *See Leventis v. S.C. Dep't of Health & Envtl. Control*, 340 S.C. 118, 132-33, 530 S.E.2d 643, 651 (Ct. App. 2000) (holding that the burden of proof in administrative proceedings generally rests upon the party asserting the affirmative of an issue); *see also* 73A C.J.S. *Pub. Admin. Law and Proc.* § 296 (May 2022 Update) ("In administrative proceedings, the general rule is that an applicant for relief, benefits, or a privilege has the burden of proof, and the burden of proof rests upon one who files a claim with an administrative agency to establish that required conditions of eligibility have been met.").
4. Unless otherwise required by law, the standard of proof in an administrative proceeding such as this is by a preponderance of the evidence. S.C. Code Ann. § 1-23-600(A)(5) (Supp. 2021); *Anonymous (M-156-90) v. State Bd. of Med. Exam'rs*, 329 S.C. 371, 375, 496 S.E.2d 17, 19 (1998) (citation omitted). A 'preponderance of the evidence' is evidence which convinces as to its truth. *Frazier v. Frazier*, 228 S.C. 149, 168, 89 S.E.2d 225, 235 (1955).
5. Because the Petitioner has less than eight (8) years of earned service, he has the burden of establishing by a preponderance of the evidence that he is disabled as a result of an injury arising out of and in the course of the performance of his duties to satisfy the eligibility requirements to apply for disability retirement. S.C. Code Ann. § 9-11-80(1).

OPINION

The sole issue before the court in this matter is whether the Petitioner sufficiently demonstrated that his back issues resulted from an on-the-job injury. The Petitioner contends that that his injury resulted from a combination of three (3) specific, physically demanding events—the patient transfer, Hurricane Matthew cleanup, and the Belfair fire—and the repetitive physical trauma he endured day-to-day as a firefighter. PEBA, on the other hand, maintains that the Petitioner has not demonstrated that his back injury arose out of and in the course of his job for three primary reasons: 1) his workers' compensation claim for the same disability was denied; 2) a lack of new evidence warranting a deviation from the workers' compensation decision; and 3)

Dr. Lindley's refusal to state, to a reasonable degree of medical certainty, that the Petitioner's back issues resulted from an on-the-job injury. As explained below, and bearing in mind the burden of persuasion born by the parties, the court is constrained to find that the Petitioner did not present sufficient evidence to establish that his disability arose from his job.

Initially, the court recognizes that the evidence firmly establishes that the job of a firefighter can be physically taxing. Likewise, the evidence reveals that the Petitioner—who the court found to be genuine, competent, and credible—had severe back issues that significantly interfered with his personal and professional life. The court has no reason to dispute his testimony regarding the patient transfer, Hurricane Matthew cleanup, or Belfair fire, and the physical strain that those specific events caused the Petitioner. In fact, the record supports a finding that those events, in conjunction with the physical day-to-day activities of a firefighter, aggravated or exacerbated his back issues.

However, the relevant question is not whether the Petitioner had a disability, or whether his disability was aggravated or exacerbated by his job, but whether his disability "[arose] out of and in the course of" his job. S.C. Code Ann. § 9-11-80(1). The Petitioner's eligibility for disability benefits, therefore, hinges on whether there is sufficient evidence in the record to support such a finding.

The Petitioner testified that he did not have back pain prior to his employment with the Bluffton Fire Department, and injured his back through a combination repetitive trauma and the three particularly onerous events mentioned above. He also presented statements and reports from his medical practitioners attributing his back issues to his employment as a firefighter. Most notably, the Petitioner pointed to Dr. Lindley's July 11, 2017, opinion letter, wherein he stated, to a reasonable degree of medical certainty, that the Petitioner's injuries were causally connected to his job.

On the other hand, the Petitioner first sought medical care from Dr. Dorsner for lower back pain on November 16, 2015—some seven (7) months prior to the Belfair fire, the first of the three injurious events mentioned by the Petitioner. Thereafter, following the patient transfer and Hurricane Matthew cleanup in October of 2016, the Petitioner did not verbally notify his superior of his back pain for at least three (3) months and did not file a written report for roughly four (4) months. While eligibility for disability retirement benefits does not have the same reporting requirements as workers' compensation, the fact that the Petitioner did not timely report the

injuries or seek appropriate medical care, in conjunction with his earlier treatment for back pain,[3] tends to obscure the original source of his injury or condition.

Furthermore, contrary to his July 11, 2017 letter, Dr. Lindley declined to state to a reasonable degree of medical certainty in sworn testimony at a later deposition that the Petitioner's back issues resulted from an on-the-job injury. Dr. Lindley's hesitation appeared to stem, in part, from reports of earlier chiropractic treatment and the lack of any work-related notes in Dr. Cramer's initial report. Notably, Dr. Lindley refused to make that connection despite acknowledging that he had not been shown any records indicating some other mechanism of injury, and that he had no reason to believe that the Petitioner would lie about his mechanism of injury. Though the court recognizes that the Petitioner's case need not be proven to a reasonable degree of medical certainty, it is striking that the one medical practitioner willing to make that claim refused to reiterate it during his later sworn deposition. The refusal of Dr. Lindley to reiterate his earlier opinion while under oath, as well as the lack of any other medical evidence indicating that, if what the Petitioner reported about injuring his back at work is assumed to be true, it is then probable or even possible that the injury arose from his job, hampers this court in its ability to determine the source of the Petitioner's back injury.

Mr. Leonard testified that, after reviewing the Petitioner's file, he found insufficient evidence to establish that the Petitioner's disability resulted from an on-the-job injury. His opinion was primarily based on the denial of the Petitioner's related workers' compensation claim, the lack of compelling reasons to depart from that conclusion, and Dr. Lindley's sworn deposition testimony, which was afforded more weight than his earlier opinion letter. However, despite Mr. Leonard being qualified as an expert in vocational rehabilitation, he acknowledged that he rarely performs threshold eligibility determinations like this case. Therefore, while the court does not doubt Mr. Leonard's expertise in the area of vocational rehabilitation, the court places little weight on his testimony, which appeared to be on the periphery of his qualified area of expertise. Nevertheless, the court agrees that Dr. Lindley's sworn deposition testimony should be afforded more weight than his earlier statements in his opinion letter. The court also agrees that the denial of the Petitioner's workers' compensation claim for the same back issues must also be considered. Though not controlling, and subject to certain important legal differences, the regulatory

[3] The Petitioner also proactively sought chiropractic therapy for back issues at some point prior to the July 2016 Belfair fire, perhaps as early as 2014. However, the precise date of those treatments is not in evidence.

framework for workers' compensation claims is similar to that for disability retirement benefits. *See Crooks v. S.C. Budget & Control Bd., S.C. Ret. Sys.*, Docket No. 05-ALJ-30-0059-CC, 2005 WL 3308546, at *9 n.10 (S.C. Admin. Law Ct. Oct. 31, 2005) (citations omitted) ("Since both South Carolina Worker's Compensation and the disability retirement laws are intended to protect injured state employees, the two statutes should be interpreted consistently, if possible . . . ."); *Spartanburg Cnty. v. Arthur*, 180 S.C. 81, 185 S.E. 486, 488 (1936) (stating that "to aid in the construction of the language of a statute, the court should look to the construction placed upon similar language in other statutes dealing with the same or a cognate subject-matter"). Therefore, in the absence of any new evidence or compelling reason to differ, the denial of the Petitioner's workers' compensation claim belies the Petitioner's claims regarding the original source of his injury. Consequently, in light of the above, the court is compelled to find that the Petitioner has not met his burden of establishing that his back issues arose out of and in the course of his job as a firefighter.

CONCLUSION

The court is deeply sympathetic to the Appellant's situation, but is, nevertheless, obligated to determine whether the evidence sufficiently demonstrates that his disability resulted from an on-the-job injury. While the court appreciates that firefighting is a physically demanding profession that can readily lead to injury, bearing in mind the burden of the parties and the lack of medical evidence corroborating the cause of injury, the court is constrained to find that the evidence does not adequately support a finding that the Petitioner's injury arose out of and in the course of his job. Therefore, for the reasons set forth above, PEBA should decline to process the Petitioner's application on eligibility grounds.

ORDER

IT IS THEREFORE ORDERED that PEBA should **DENY** the Petitioner's application for disability retirement benefits.

AND IT IS SO ORDERED.

June 29, 2022
Columbia, South Carolina

S. Phillip Lenski
S.C. Administrative Law Judge

CERTIFICATE OF SERVICE

I, Erika S. Easler, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

Erika S. Easler
Judicial Law Clerk

June 29, 2022
Columbia, South Carolina