

How Presumptuous! Redux The Three Statutory Presumptions



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Three Presumptions – And Only Three!

- **Heart Law**, G.L. c. 32, Section 94, enacted in 1950.
- **Lung Law**, G.L. c. 32, Section 94A, enacted in 1962.
- **Cancer Law**, G.L. c. 32, Section 94B, enacted in 1990.

Who is Covered by the Heart Law Presumption?

- A uniformed member of a paid fire department or permanent member of a police department, or of the police force of the Massachusetts Bay Transportation Authority, or of the state police, or of the public works building police, or to any employee in the department of correction or a county correctional facility whose regular or incidental duties require the care, supervision or custody of prisoners, criminally insane persons or defective delinquents, or to any permanent crash crewman, crash boatman, fire controlman or assistant fire controlman employed at the General Edward Lawrence Logan International Airport, members of the 104th fighter wing fire department, members of the Devens fire department established pursuant to chapter 498 of the acts of 1993 or members of the Massachusetts military reservation fire department, a permanent member of the park police of a city or town.

Who is Covered by the Lung Law Presumption?

- A uniformed member of a paid fire department, including, without limitation, any permanent crash crewman, crash boatman, fire controlman or assistant fire controlman employed at the General Edward Lawrence Logan International Airport, members of the 104th fighter wing fire department, members of the Devens fire department established pursuant to chapter 498 of the acts of 1993 or members of the Massachusetts military reservation fire department....

Who is Covered by the Cancer Law Presumption?

- A uniformed member of a paid fire department, or a member of the state police assigned to the fire investigation unit of the department of fire services, or a member of the state police K-9 unit, or to any permanent crash crewman, crash boatman, fire controlman or assistant fire controlman employed at the General Edward Lawrence Logan International Airport, members of the 104th fighter wing fire department, members of the Devens fire department established pursuant to chapter 498 of the acts of 1993 or members of the Massachusetts military reservation fire department....

The Presumptions are Rebuttable

- These Heart, Lung or Cancer conditions are presumed to have been suffered in the performance of a member's duties:
 - **Heart:** Unless the contrary be shown by competent evidence.
 - **Lung:** Unless the contrary be shown by competent evidence.
 - **Cancer:** Unless it is shown by a preponderance of the evidence that non-service-connected risk factors or non-service-connected accidents or hazards undergone, or any combination thereof, caused such incapacity.

Recent PERAC Remands Regarding the Presumptions

- Pre-employment physical exam showed evidence of a lung condition, heart disease, or hypertension.
- Attempt to substitute Chief's letter due to lack of a pre-employment physical.
- Cancer was not discovered within 5-years after leaving service.
- Pre-employment physical submitted noted that the member failed and did not pass.

The All-Important Pre-Employment Physical

- All three presumptions contain the requirement for a pre-employment physical on entry into service or subsequent to entry.
- Physical cannot contain “any evidence” of condition for which retirement is sought.
- Purpose is to make sure a member did not come into service with the condition.
- The pre-employment physical must contain the actual examination records and physician notes, not just the pass/fail cover page.

Heart Law Pre-Employment Physical Requirement

- 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.

What Does “Any Evidence” of “Such Condition” Mean? (1)

■ “Any Evidence”

- Does not require a definitive diagnosis of heart disease or hypertension.
- Any findings during the pre-employment physical including elevated blood pressure or EKG testing is sufficient to rebut the presumption.
- *Sullivan v. Contributory Ret. Appeal Bd.* 61 Mass. App. Ct. 1106, *3 (2004) (Rule 1:28 decision)
 - The word “any” is clear and unequivocal. It is undisputed that there was evidence of hypertension on plaintiff’s pre-employment examination. Dr. Cowan noted plaintiff’s blood pressure to be 170/80 and stated that plaintiff was ‘hypertensive for his age.’ This statement, whatever its qualification, comes within the ‘any evidence’ requirement of G.L. c. 32, § 94.

What Does “Any Evidence” of “Such Condition” Mean? (2)

■ Such Condition

- *Cabral v. Fall River Ret. Bd. & PERAC*, CR-15-673, CR-17-211 (DALA Jun. 5, 2020) and *Shailor v. Bristol County Ret. Bd.*, CR-21-0343 (DALA Sept. 16, 2024).
 - A pre-employment physical makes the Heart Law’s presumption unavailable only if it revealed evidence of the condition that has resulted in the member’s disability.
- PERAC has appealed the *Cabral* decision as it is our position that the Legislative intent is clear that any heart condition rebuts the presumption, even if it is a different heart condition than that set forth in the member’s retirement application.

Congenital Cardiac Conditions

- Administrative bodies and courts in Massachusetts have found that medical conditions that are congenital in nature are **not work-related** medical conditions and do not fall under the Heart Law Presumption. See Laine v. Taunton Ret. Bd. & PERAC, CR-07-1144, (2012); Harney v. State Bd. of Ret., CR-09-188 (2012); Hayes v. Revere Ret. Bd., CR-95-835 (1996).
- Identified congenital conditions include, but are not limited to: bicuspid aortic valve, aortic stenosis, and familial aortic aneurysm syndrome.

Lung Law Pre-Employment Physical Requirement

- Shall, if he successfully passed a physical examination on entry into such service or subsequent to such entry, which examination failed to reveal any evidence of such condition, be presumed to have been suffered in the line of duty, as a result of the inhalation of noxious fumes or poisonous gases, unless the contrary be shown by competent evidence.

Cancer Law Pre-Employment Physical Requirement

- Shall, if he successfully passed a physical examination on entry into such service or subsequent to such entry, which examination failed to reveal any evidence of such condition, be presumed to have been suffered in the line of duty, unless it is shown by a preponderance of the evidence that non-service connected risk factors or non-service connected accidents or hazards undergone, or any combination thereof, caused such incapacity.

Special Rules for the Cancer Presumption

- Must have held the position for a minimum of five years prior to applying for retirement under the presumption.
- Must prove that they regularly responded to calls of fire or regularly investigated fire scenes.
- Only certain kinds of cancer suffice, but the list is pretty all encompassing.

Very Special Cancer Presumption Rule

- A retired firefighter (or other person covered by this Presumption) may apply for ADR.
- Cancer must be “discovered” within 5 years of the last date on which such person actively so served.
- *Connery* case, DALA 2003, distinguishes between the words “discovered” and “diagnosed.”
- Surviving spouses may also apply for Section 9 benefits.
- The only one of the three presumptions which offers a latency period for an application.

Final Points

- The Presumptions are an important part of our retirement law.
- Perhaps the Legislature will enact other presumptions in the future.
- ***Every effort should be made to preserve a member's right to invoke the given Presumption by making sure a physical is undergone, and proof of the physical is safeguarded.
- If a member isn't eligible for a Presumption for whatever reason, the retirement board should investigate a possible path to retirement under Section 7, if that avenue is available.



QUESTIONS?

If a question on this topic arises in the future:

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