

**GLOUCESTER CONTRIBUTORY RETIREMENT SYSTEM BOARD**

**P. O. Box 114**

**GLOUCESTER, MA 01931-0114**

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*Kathleen Auld*

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September 26, 2019

Joseph M. Orlando, Esq.  
One Western Avenue  
Gloucester, MA 01930

Certified Mail: 7014 2120 0002 2522 1647

RE: *Mary Beth Smith, Surviving Spouse of Michael Smith*  
*Application for Benefits under G.L. c. 32, § 100*

Dear Attorney Orlando:

Attached please find the decision of the Gloucester Retirement Board in the above captioned matter. Per your request, a copy of the recording of the Board's discussion will be forwarded to you electronically, as well as a copy of the minutes of the Board meeting.

Notice of Appeal Rights. Any party aggrieved by this decision may appeal pursuant to G.L. c. 32, § 16(4) by filing a claim with the Contributory Retirement Appeal Board, c/o the Division of Administrative Law Appeals, 14 Summer Street, 4th Floor, Malden, MA 02148, within fifteen (15) days of receipt of this notice. Appeals may also be filed by Fax: (781) 397-4720.

Sincerely,



Patricia Ivas  
Executive Director

enc: Board Decision

cc: Judith Corrigan, Esq., General Counsel, Public Employee Retirement Administration  
Commission  
Thomas F. Gibson, Esq.

COMMONWEALTH OF MASSACHUSETTS  
GLOUCESTER RETIREMENT BOARD

IN RE: MARYBETH SMITH, APPLICANT  
KILLED IN THE LINE OF DUTY BENEFITS  
M.G.L. c. 32, § 100

Introduction

At its regularly scheduled meeting on August 28, 2019, the Gloucester Retirement Board (“the Board”) met in Executive Session to review and consider the medical panel reports regarding the application of MaryBeth Smith (“Mrs. Smith”) for “Killed in the Line of Duty” death benefits under M.G.L. c. 32, § 100, resulting from the death of her husband, Michael Smith, a Gloucester Fire Fighter (“Firefighter Smith”). Present at the meeting were Board Chair Douglas A. MacArthur, who presided, and Board Members Kathleen A. Auld, Juanita Escobar, and Donna C. Leete. Board Member Kenny Costa was absent. Also present were the Board’s Executive Director, Patricia Ivas, the Board’s Assistant Executive Director, Heather Acone, and Board Counsel Thomas F. Gibson and Gerald A. McDonough. Additionally, Mrs. Smith and her counsel, Joseph M. Orlando, Esq., and Allyn and Jeanne Smith, Firefighter Smith’s parents, also attended the Executive Session.

After a review of the history of the application and the relevant legal principles from Attorney Gibson, and after hearing a statement from Attorney Orlando on behalf of Mrs. Smith’s application, the Board entered into an attorney-client discussion with Board Counsel, and excused Mrs. Smith, Attorney Orlando, and Allyn and Jeanne Smith. At the conclusion of those discussions, the Board directed its Counsel to draft Findings of Fact and Conclusions of Law consistent with the Board’s discussion. At its regularly scheduled meeting on September 25, 2019, the Board voted to adopt the following Findings of Fact and Conclusions of Law, to deny the application for Section 100 benefits, and to so notify Mrs. Smith of her appeal rights.

### Findings of Fact

MaryBeth Smith, the surviving spouse of deceased Gloucester firefighter, Michael E. Smith, filed an application for "Killed in the Line of Duty" benefits pursuant to M.G.L. c. 32, § 100 with the Board based on her husband's death from metastatic lung cancer in 2012. Mrs. Smith contends that Firefighter Smith had sustained an injury in his lungs while fighting a large fire at the Gloucester Fisherman's Wharf over a 12½ hour period in August 1998, as a result of directly inhaling smoke and toxic fumes, and that this injury was the cause of the non-Hodgkin's lymphoma that he had developed by early 2000, and for which he received chemotherapy and radiation treatments between May and September of that year. Although the treatment placed Firefighter Smith's cancer into remission and he was able to return to work as a firefighter, his condition of metastatic cancer had returned by March 2012, this time in the lungs and lymphatic system, and he died four months later.

The Board requested that the Public Employee Retirement Administration Commission ("PERAC") determine whether Mrs. Smith was eligible to receive Section 100 Benefits based upon her husband's death from cancer, and whether PERAC would convene a single-member medical panel to determine whether Firefighter Smith sustained injuries during the 1998 Gloucester Fisherman's Wharf fire that resulted in his cancer death in 2012, as would be required to grant "Killed in the Line of Duty" benefits pursuant to M.G.L. c. 32, § 100. PERAC, answering both questions in the negative, concluded that Firefighter's Smith's fatal metastatic lung cancer was most likely related to his earlier radiation treatment, and therefore was not the result of injuries sustained while in the performance of his duties and either responding to or returning from a fire alarm, or at the scene of a fire or any emergency, and was neither the basis for an award of Section 100 benefits nor a ground for convening a medical panel to consider

Mrs. Smith's Section 100 benefits application.

On April 25, 2013, the Board denied Mrs. Smith's application on the ground that its further review of her application was precluded as a matter of law by PERAC's decision. The Board acted on an application by Mrs. Smith for accidental death benefits under M. G.L. c. 32, §§ 9 and 94B, and granted benefits to Mrs. Smith.

On April 29, 2013, Mrs. Smith timely appealed PERAC's April 18, 2013 decision, and the Board's April 25, 2013 decision, pursuant to M.G.L. c. 32, § 16(4). On July 29, 2015, DALA held an evidentiary hearing, and, on October 24, 2018, the DALA Magistrate issued his Decision, finding that Mrs. Smith had made a prima facie case for a further medical review by a medical panel. The Magistrate directed the Board to request PERAC to convene a medical panel to determine whether Firefighter Smith's exposure to smoke and toxic fumes while fighting the Gloucester Fisherman's Wharf fire during a 12½ hour period in August 1998 caused him to sustain injuries that resulted in a condition of cancer that caused his death in 2012.

Following the Board's request, PERAC convened a three-member medical panel consisting of Aymen Elfiky, M.D. ("Dr. Elfiky"), a specialist in internal medicine and medical oncology; Karl D'Silva, M.D. ("Dr. D'Silva"), a specialist in oncology; and Douglas Tisdale, M.D. ("Dr. Tisdale"), also a specialist in oncology.

After his review of the medical records, Dr. Elfiky issued a report dated May 21, 2019, in which he concluded that Mr. Smith's exposure to smoke and toxic fumes in August 1998 contributed to the development of his lung cancer. Dr. Elfiky also noted that it is "well established in epidemiological studies that firefighters are at a higher risk of developing lung cancer as a result of accumulated exposures over the course of their careers." Regarding the mediastinal radiation therapy that Firefighter Smith received in 2000, Dr. Elfiky believed that

both the 1998 exposure and the 2000 therapy “contributed to his subsequent development of lung cancer in 2012.” Dr. Elfiky then offered the following conclusions:

For Mr. Smith, it was the initial exposure in 1998 that more likely than not began the processes that would ultimately place his lungs at increased risk of developing malignancy and with the subsequent radiation exposure, this process, with other radiation exposure, contributed to the poorly-differentiated feature of his lung cancer.

Both Dr. D’Silva, on May 15, 2019, and Dr. Tisdale, on April 19, 2019, issued reports that, in PERAC’s view, failed to adequately address the question contained in the Magistrate’s order, and PERAC requested that they comply with those instructions.

On or about July 16, 2019, Dr. Tisdale issued a revised report, in which he provided the following medical opinion:

[Firefighter Smith’s] original non-Hodgkin’s lymphoma may have been related to smoke and toxic exposure sustained during his work as a firefighter in August 1998 but this cannot be definitely determined with medical certainty. Mr. Smith’s subsequent stage IV fatal lung carcinoma also cannot be directly linked to any specific workplace incident.

On or about July 19, 2019, Dr. D’Silva issued a revised report. Dr. D’Silva concluded that Firefighter Smith’s exposure to toxic fumes and chemicals during his career as a firefighter contributed to his ultimate cancer diagnoses and ultimately his passing, but, in addressing whether the 1998 exposure was the cause, Dr. D’Silva made the following observations:

I am asked if a singular and specific occasion and incident at a fire in 1998 at Fisherman’s wharf was a definitive cause of Mr. Smith’s cancer diagnoses. Based on the information provided, I do not have substantial definitive evidence that the exposure to the fire in 1998 at Fisherman’s wharf in Gloucester definitively caused his cancer. This cannot be stated with any definitive medical certainty or probability.

Just as the DALA Magistrate noted that several physicians who had examined Firefighter Smith noted that he had worked as a housepainter as well as a firefighter, Dr. D’Silva too noted that Firefighter Smith had worked as a housepainter. In the Brigham & Woman’s hospital record of

December 22, 2000, it was noted by Mr. Smith's treating physicians that Mr. Smith "had returned to his part-time painting job. He is currently not working in the fire department as of yet."

### Conclusions of Law

Modern life exposes us all to a plethora of potential toxins that may well lead to cancer, and no occupational group is more susceptible to cancer, due to their exposure to toxins, than firefighters. It is because of the relationship between certain kinds of cancers and the toxic substances that firefighters regularly experience, that the Legislature created the so-called Cancer Presumption Law, M.G.L. c. 32, § 94B, because the causal link between cancer and firefighting, the causal relationship that is required for most accidental disability retirements, is often impossible to prove. Because of the cancer presumption, firefighters who are disabled due to cancer do not have to prove causation to any specific event or exposure, a central element of any accidental disability retirement under Chapter 32. This presumption also applies to accidental death benefits under M.G.L. c. 32, § 9, and, as a result, the surviving spouse of a firefighter is entitled to an accidental death benefit that is equivalent to 72% of the deceased firefighter's last salary, and where applicable, a return of the member's deductions and dependency benefits.

The Legislature, however, has not seen fit to extend the cancer presumption to Killed in the Line of Duty benefits under M.G.L. c. 32, § 100, but has expressly prohibited the application of the presumption created by § 94B to such claims, in pertinent part, that, "[t]he presumption[] created by section[] ... ninety-four B shall not be applicable to the death of any firefighter ... for which a pension is provided under this section." In such a case, therefore, as the DALA Magistrate held in his Decision, the applicant has the burden of showing that a specific work-related incident was the **proximate or direct cause** of the death. See MaryBeth Smith v.



Gloucester Retirement Board and PERAC, CR-13-249, p. 39 (DALA Oct. 24, 2018). While not defined in Chapter 32, proximate cause is ordinarily defined as a “cause that directly produces an event and without which the event would not have occurred.” See Black’s Law Dictionary (11th ed. 2019). Under Chapter 32 jurisprudence, it is clear that a factor that is only a contributing factor is not sufficient to be the **proximate or direct** cause of a disabling injury. See Blanchette v. Contributory Retirement Appeal Board, 20 Mass. App. Ct. 479, 487 (1985); see also, e.g., Linda Palermo v. Revere Retirement Board, CR-15-13 (CRAB Dec 21, 2017); Anthony Luster v. State Board of Retirement, CR-08-80 (DALA Oct. 22, 2010); Kathleen Cahalane v. Norwood Retirement Board, CR-05-9 (DALA Jan. 5, 2006).

With regard to Mrs. Smith’s application, none of the physicians on the medical panel opined that the 1998 fire was the **proximate or direct** cause of Firefighter Smith’s death. Dr. Elfiky offered an opinion that the 1998 fire, and other exposures in Firefighter Smith’s career, contributed to his death. Dr. Tisdale’s conclusion was that Firefighter Smith’s lung cancer “cannot be directly linked to any specific workplace incident.” Dr. D’Silva stated that it “cannot be stated with any definitive medical certainty or probability” that the 1998 fire caused Firefighter Smith’s cancer.

The Board is certainly aware of the dedication and heroism exhibited by Firefighter Smith throughout his career of service to the people of Gloucester, and the Board is sympathetic to the trauma that Firefighter Smith’s family has faced because Firefighter Smith’s death was undoubtedly the result of his exposure to toxins throughout his career. The question before the Board, however, is whether the 1998 fire was the **proximate or direct** cause of Firefighter Smith’s death. The Board followed the directive from the DALA Magistrate and sought opinions

from three physicians, none of whom concluded that the 1998 fire was that **proximate or direct** cause. The Board, therefore, denies Mrs. Smith's application.

*So Voted and Adopted by the Gloucester Retirement Board, September 25, 2019*