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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
SUCV2020-01353

TERRY ABERCROMBIE

*rec'd 1/5/21
MRB*

vs.

DEPARTMENT OF CORRECTION & another¹

**MEMORANDUM OF DECISION AND ORDER ON
PLAINTIFF'S MOTION FOR REMAND FOR SPECIFIC
FINDINGS OF FACT, REVIEW OF SURVEILLANCE VIDEOTAPES,
AND COMPARISON WITH OTHER INMATES GRANTED MEDICAL
PAROLE, BOTH BY RACE AND BY ABILITY TO WALK WITH
ASSISTING DEVICE; AND PARTIES' CROSS-MOTIONS
FOR JUDGMENT ON THE PLEADINGS**

Terry Abercrombie filed this action in the nature of certiorari pursuant to G.L. c. 249, § 4 seeking judicial review of the April 16, 2020 decision of the Department of Correction ("DOC") to deny him medical parole under G.L. c. 127, § 119A. For the reasons discussed below, Plaintiff's Motion for Remand for Specific Findings of Fact, Review of Surveillance Videotapes, and Comparison With Other Inmates Granted Medical Parole is **DENIED**. Plaintiff's Motion for Judgment on the Pleadings is **DENIED** and the Defendants' Cross-Motion is **ALLOWED**.

PROCEDURAL HISTORY

The parties filed cross-motions for judgment on the pleadings on Abercrombie's complaint for judicial review. In a Memorandum of Decision and Order dated September 30, 2020, this Court remanded the matter to the Commissioner for the preparation and consideration of a medical parole plan, as required by statute, and ordered her to report her decision on an expedited basis within ten days.

¹Carol Mici, Commissioner of Correction

On October 9, 2020, the Commissioner filed a medical parole plan and a three-page decision again denying Abercrombie medical parole. In a Memorandum of Decision and Order dated November 13, 2020, this Court allowed Abercrombie's motion to supplement the administrative record and again remanded the matter to the Commissioner to consider the most recent medical information and to issue a ruling on an administrative motion for reconsideration then pending before her. In addition, this Court ordered the Commissioner to file the supplemental administrative record from the October 9, 2020 decision and any supplemental materials underlying her reconsideration decision along with the written reconsideration decision. The Commissioner did so on December 11, 2020.

ADMINISTRATIVE RECORD

In 2014, after DNA results identified him as the assailant, Abercrombie pleaded guilty to an aggravated rape committed in 1992. He received an 18 to 20 year sentence and currently is incarcerated in the general population at the Massachusetts Treatment Center ("MTC").

Abercrombie previously was incarcerated in state prison in 1985 for manslaughter and was granted parole in 1990. His parole was revoked in 1992 after he incurred new charges for assault and battery on a police officer, distribution of a controlled substance, and carrying a dangerous weapon. Those charges ultimately were dismissed, and he was discharged. In 1995, he was convicted of breaking and entering and indecent assault and battery and served two years in state prison. Abercrombie also served sentences in the House of Correction in 1994 for possession of drugs and ammunition, in 1998 for indecent assault and battery, and in 1999 for failure to register as a sex offender. He has multiple violations of probation.

On February 4, 2020, Abercrombie, through counsel, submitted to MTC Superintendent David Duarte a medical parole petition pursuant to G.L. c. 127, § 119A. This petition stated that Abercrombie hoped to reside with his mother and would agree to GPS monitoring, but also would agree to any facility placement acceptable to DOC. Abercrombie included with his petition the necessary consents for the release of confidential information regarding a medical parole plan.

In support of his petition for medical parole, Abercrombie submitted a February 13, 2020 letter from Dr. Bruce Patsner, the Medical Director at MTC. Dr. Patsner stated that Abercrombie is a 58-year-old male with AIDS and end-stage renal disease requiring intermittent dialysis. Abercrombie also suffers from Hepatitis-C and advanced arteriosclerotic cardiovascular disease with hypertension, and has a history of infected arteriovenous grafts requiring multiple removals and revisions and graft site infections. He takes 32 medications for these medical conditions. Dr. Patsner further stated that Abercrombie has chronic fatigue due to renal failure and vascular disease. He is assigned to a bottom bunk, can walk only short distances with an unsteady gait and a cane, and sleeps much of the day. Dr. Patsner concluded: "The trajectory of the combination of vascular disease, chronic renal failure with multiple infected/rejected AV shunts at his graft sites, and AIDS with anticipated more frequent hospitalizations make it likely that he has a life expectancy of 18 months or less. He is permanently incapacitated with very limited ability to perform basic activities of daily living."

Dr. Steven Descoteaux, the Statewide Medical Director of Wellpath, submitted a short April 1, 2020 addendum to Dr. Patsner's letter stating that Abercrombie's condition had not changed since February and he had not required hospitalization or emergency room evaluation since then. Dr. Descoteaux stated that Abercrombie's only medical restrictions are a no-cuff

order, bottom bunk order, and a cane to ambulate due to unsteady gait. He further noted that Abercrombie can dress, feed, and bathe himself.

On March 2, 2020, Superintendent Duarte recommended against medical parole for Abercrombie. Duarte noted that according to the Housing Officer at MTC, Abercrombie showers and uses the bathroom independently, dresses himself, goes to the chow hall, interacts with staff and fellow inmates, and attends sex offender treatment. Duarte further noted that Abercrombie has incurred thirteen disciplinary reports while incarcerated, with recent infractions of physical assault on another inmate on February 19, 2018, use of an illicit substance on August 7, 2018 and September 29, 2018, and refusing a direct order on May 8, 2019. A 2014 Risk Screen Assessment determined that Abercrombie's risk of violence is medium, his risk of recidivism is high, and his risk of substance abuse is low. Superintendent Duarte concluded that Abercrombie was not eligible for medical parole because his medical conditions are not "so debilitating that the prisoner does not pose a public safety risk" as required by G.L. c. 127, §119A.

The Suffolk County District Attorney's Office filed a written statement opposing medical parole on the following grounds: "Mr. Abercrombie's role in the crime, his entry of a guilty plea five years ago, the lack of time he has spent in prison compared to the length of his sentence, and his recent failure to accept the official version of the crime he pleaded guilty to committing and that DNA evidence specifically determined he committed."

In her April 16, 2020 decision denying Abercrombie's petition, the Commissioner stated:

Mr. Abercrombie is not so debilitated that he does not pose a public safety risk within the statutory meaning of "permanent incapacitation." Mr. Abercrombie resides safely in general population, is able to complete daily living activities independently, ambulates steadily with a cane, interacts with his peers and staff,

and attends programming. Accordingly, based on the evidence before me, Mr. Abercrombie does not qualify for release pursuant to the medical parole statute [and] I do not believe that if released, Mr. Abercrombie would live and remain at liberty without violating the law. G.L. c. 127, § 119A. Furthermore, I find that Mr. Abercrombie's release would be incompatible with the welfare of society because of the risk he poses to public safety.

Abercrombie commenced this action seeking certiorari review on June 29, 2020.

Dr. Patsner again evaluated Abercrombie on September 24, 2020. Patsner noted that Abercrombie was medically stable and his multiple chronic conditions were under good control with occasional episodes of new complaints. Patsner opined that Abercrombie insisted on using a wheelchair although staff determined it was not medically necessary. Patsner concluded that Abercrombie "unquestionably does not have a life expectancy of 18 months or less nor does he have a medical condition which has not been able to be navigated well enough to preserve the quality of his life."

Following the September 30 remand by this Court, Dr. Patsner evaluated Abercrombie on October 8, noting that he had been transported to Boston Medical Center for chest pain but a heart attack was ruled out. Patsner opined that Abercrombie's cardiac disease was not life-threatening and noted that he resides in general population and can dress, feed, and bathe himself. His only medical restrictions are a bottom bunk and a cane for intermittent unsteady gait. Dr. Descoteaux wrote an addendum to this evaluation, stating that Abercrombie was stable but hospitalized for a non-life threatening condition. Descoteaux stated: "The earlier assessment seemed informed by the fact that Mr. Abercrombie had multiple serious but not lethal problems, and had some occasional fatigue, and 32 medications. However, when pressed to provide statistics etc., it was not possible to support a conclusion of probable death within 18 months."

On October 9, 2020, Superintendent Duarte filed a medical parole plan stating that Abercrombie does not require a nursing home placement but requires transportation three times a week to dialysis treatment. Abercrombie cannot live with his mother because she lives in Section 8 housing. Hope House in New Bedford will not accept Abercrombie due to his conviction of a sex offense. However, Community Resources for Justice, a transitional residential service for parolees in New Bedford, will accept Abercrombie and provide him with the necessary transportation.

On October 9, the Commissioner issued a three-page Reconsideration Decision again denying Abercrombie medical parole. Based on the updated medical evaluations, the Commissioner concluded that Abercrombie is not terminally ill or permanently incapacitated as defined in G.L. c. 127, § 119A(a). She noted that Abercrombie's medical conditions are stable, he is not likely to die within 18 months, and he is able to conduct activities of daily living and retains independent mobility. The Commissioner incorporated by reference her previous decision.

Dr. Patsner conducted an updated medical evaluation of Abercrombie on November 6, 2020, noting that his recent diagnosis of high-grade coronary artery disease changed his life expectancy because although the coronary stent should prevent him from dying from a heart attack, the heart disease coupled with his chronic renal failure and history of COVID "has now created a situation where Mr. Abercrombie's life expectancy has been significantly shortened." Dr. Patsner concluded: "Given the risk of a second cardiac event that follows an initial one, a life expectancy of around 18 months may be a possibility in a worst case scenario." Dr. Patsner noted that over the next six weeks, Abercrombie was hospitalized twice for chest pain. The first occasion was secondary to a subclinical fracture. The second hospitalization led to cardiac

catheterization which demonstrated an 80% occlusion of the left anterior descending coronary artery and a 50% occlusion of the right. Dr. Patsner noted that Abercrombie still had no medical restrictions other than the bottom bunk and a cane due to intermittent unsteady gait. He further noted that Abercrombie was fully ambulatory, resides in the general population, and is able to dress, feed, and bathe himself.

On November 11, 2020, counsel for Abercrombie emailed counsel for DOC, stating that Abercrombie's bones were spontaneously fracturing, causing him pain and limiting his mobility. Counsel noted that although Abercrombie used a wheelchair while in the hospital, DOC had denied him the use of a wheelchair. Counsel further noted that Abercrombie had been treated for an infected bedsore, stating: "Bedsore result from immobilization. People who freely ambulate don't get them."

Dr. Patsner conducted the most recent medical evaluation of Abercrombie on December 10, 2020. He noted that Abercrombie had been successfully treated with placement of a coronary artery stent and anticoagulation therapy. Patsner opined that all of Abercrombie's chronic medical conditions were under very good control and he did not have a life expectancy of 18 months or less. Dr. Strauss of Wellpath filled in for Dr. Descoutaux and reviewed this evaluation to determine whether Abercrombie was likely to die within 18 months. He opined that Abercrombie had no risk of death. Dr. Patsner then confirmed that in his opinion, Abercrombie did not appear to qualify for medical parole.

The supplemental administrative record contains updated medical records, including from Abercrombie's hospitalization at Morton Hospital for a right rib fracture and chest pain in late October of 2020 and transfer to Boston Medical Center. The supplemental record also contains notes from group sex offender treatment sessions attended by Abercrombie which recommend

that he increase his verbal participation in the group and continue to explore the ways in which hostility toward women may relate to his offending.

On December 11, 2020, the Commissioner issued a four-page reconsideration decision, again denying Abercrombie medical parole. The Commissioner noted that Abercrombie continues to suffer from multiple chronic medical conditions including end stage renal disease treated by dialysis several times a week, HIV, gout, and coronary artery disease. However, the Commissioner concluded that Abercrombie is not terminally ill or permanently incapacitated as defined in G.L. c. 127, § 119A(a) based on Dr. Patsner's November 6 evaluation, which involved a worst case scenario and did not conclude that death within 18 months was likely. The Commissioner concluded that Abercrombie does not meet the statutory definition of permanent incapacitation because he is able to perform many daily functions without assistance and retains independent mobility with the use of his cane. Finally, the Commissioner concluded that Abercrombie poses a public safety risk due to the violent, sexual nature of his crime, his criminal history, and the fact that he has not taken responsibility for his crime. Accordingly, the Commissioner again denied medical parole.

DISCUSSION

A prisoner aggrieved by a decision denying medical parole may petition for relief under section 4 of chapter 249. See G.L. c. 127, § 119A(g). Certiorari review under G.L. c. 249, § 4 is available to correct substantial errors of law apparent on the record that adversely affect material rights. Crowell v. Massachusetts Parole Bd., 477 Mass. 106, 110 (2017); Doucette v. Massachusetts Parole Bd., 86 Mass. App. Ct. 531, 541 (2014). The court reviews parole decisions to ensure that they are not arbitrary and capricious, or based on an error of law.

Crowell v. Massachusetts Parole Bd., 477 Mass. at 111; Doucette v. Massachusetts Parole Bd., 86 Mass. App. Ct. at 541.

Under the medical parole statute, upon submission of a petition for medical parole by a prisoner, his attorney, his family, or a medical provider, the superintendent must promptly consider the petition and develop a recommendation as to the release of the prisoner. Buckman v. Commissioner of Corr., 484 Mass. 14, 18 (2020). The commissioner must review the recommendation and supporting materials, provide notice to interested parties, and receive written statements from those parties. Id. The statute provides in relevant part:

If the commissioner determines that a prisoner is terminally ill² or permanently incapacitated³ such that if the prisoner is released the prisoner will live and remain at liberty without violating the law and that the release will not be incompatible with the welfare of society, the prisoner shall be released on medical parole. The parole board shall impose terms and conditions for medical parole that shall apply through the date upon which the prisoner's sentence would have expired.

G.L. c. 127, § 119A(e).

Motion For Remand

Abercrombie contends that there is further information, within the unique control of the Commissioner, that is necessary for this Court to determine whether the denial of medical parole

²For purposes of medical parole, “terminal illness” means “a condition that appears incurable, as determined by a licensed physician, that will likely cause the death of the prisoner in not more than 18 months *and that is so debilitating that the prisoner does not pose a public safety risk.*” G.L. c. 127, § 119A(a) (emphasis added).

³“Permanent incapacitation” means “a physical or cognitive incapacitation that appears irreversible, as determined by a licensed physician, *and that is so debilitating that the prisoner does not pose a public safety risk.*” G.L. c. 127, § 119A(a) (emphasis added).

was arbitrary and capricious or legally erroneous. He asks this Court to remand the matter so that the Commissioner can supplement the administrative record with the following information: a list of those inmates not confined full time to a wheelchair who have been found to be sufficiently debilitated to qualify for medical parole; how many of those inmates were African-American; and a report detailing how many African-American inmates applied for medical parole, how many were granted medical parole, and of that number, how many received medical parole through litigation.

Abercrombie also seeks the production of all communications about his case, written and oral, between the Commissioner and counsel, medical staff, and the Superintendent.⁴ He further seeks all communications between Wellpath staff and DOC concerning the medical parole cases of inmates Jerry Adrey and Richard Pearson, and all materials relating to the firing of Dr. Blank, a Wellpath employee who allegedly was forced to apologize for supporting Pearson's medical parole application. In addition, Abercrombie seeks a list of all cases where medical staff changed their diagnosis, description, or prediction to an inmate's detriment following a communication from the Commissioner, her counsel, or institutional staff.

Finally, Abercrombie requests an order that the Commissioner view and enter into the administrative record "videotape surveillance" of Abercrombie "so that the Court can assess whether the Commissioner has correctly exercised her discretion in determining whether Abercrombie is debilitated as argued."

Certiorari review is confined to the record of the administrative proceedings below and leave to present additional evidence extraneous to the record is contrary to certiorari procedure

⁴As noted by DOC, this request implicates the attorney-client privilege.

and practice under the statute and Superior Court Standing Order 1-96. Mello Constr., Inc. v. Division of Capital Asset Mgmt., 84 Mass. App. Ct. 625, 631 n.23 (2013), rev. den., 467 Mass. 1103 (2014); Durbin v. Board of Selectmen of Kingston, 62 Mass. App. Ct. 1, 7 (2004). The certiorari statute authorizes the court to enter “such other judgment as justice may require,” which may encompass a remand for the taking of additional evidence and further fact-finding when necessary to enable proper judicial review. Cf. Boston Edison Co. v. Department of Pub. Utilities, 419 Mass. 738, 748-749 (1995). Here, however, the purpose of Abercrombie’s request for remand is not to have the Commissioner make findings of fact necessary to her decision under the medical parole statute. Rather, his request, in essence, is that DOC produce discovery to enable him to submit to this Court evidence to support his allegations that the Commissioner: denies medical parole to African-American inmates; has found other inmates who do not require a wheelchair to be permanently incapacitated and eligible for medical parole; and pressures DOC medical providers to provide evaluations supporting the denial of medical parole.

Ordering the production of such extra-record materials is simply beyond the limited scope of certiorari review. See Super. Ct. Standing Order 1-96(5). Cf. She Enterprises, Inc. v. State Building Code App. Bd., 20 Mass. App. Ct. 271, 273-275, rev. den., 396 Mass. 1102 (1985) (denying, in Chapter 30A appeal, request to consider extra-record material bearing on question of alleged discriminatory or retaliatory enforcement of building code). Any allegation of racial discrimination in administrative decision-making is disturbing. However, information about whether other African-American inmates have received medical parole is unlikely to have probative value, as it will be virtually impossible to show that any two inmates are similarly situated but treated differently based on race, given the fact-intensive, individualized medical and public risk inquiry required by G.L. c. 127, § 119A. Similarly, evidence that other inmates who

ambulate without a wheelchair have been deemed permanently incapacitated has little bearing on whether the Commissioner properly denied Abercrombie medical parole.

This Court is troubled by counsel's assertion that the Commissioner routinely relies on surveillance video to support the denial of medical parole but refuses to consider it when offered in favor of granting medical parole. Any such policy or practice, if it exists, would be arbitrary and capricious. However, it does not appear to be the case that Abercrombie offered specific surveillance footage to support his petition and the Commissioner refused to view it. Rather, it appears that Abercrombie wants the Commissioner to cull through hours of prison surveillance video to find footage that depicts his daily activities. Such a request is unduly burdensome and unreasonable. Moreover, such video would show Abercrombie's conduct and demeanor at a particular point in time, but would not necessarily furnish a proper basis for concluding that he is terminally ill or permanently incapacitated in either the medical or the public risk sense. Thus, the surveillance video sought has limited relevance to this case. For all these reasons, Abercrombie's motion for a remand, specific findings of fact, and review of videotape must be denied.

Review on the Merits

Abercrombie argues that the Commissioner's denial of his petition for medical parole is arbitrary and capricious because she disregarded the evidence concerning his fragile medical condition and placed undue weight on the nature of his crime and his minor disciplinary infractions. A decision is arbitrary and capricious when it lacks any rational explanation that reasonable persons might support, or when it fails to take into account relevant, reliable evidence

concerning a factor required to be considered by statute or regulation. Doe, Sex Offender Registry Bd. No. 68549 v. Sex Offender Registry Bd., 470 Mass. 102, 112 (2014); Adrey v. Department of Corr., 2020 WL 4347617 at *7 (Mass. Super. Ct.) (Krupp, J.). This Court is mindful that in conducting certiorari review, it may not substitute its own opinion for that of the Commissioner. See Frawley v. Police Comm'r of Cambridge, 473 Mass. 716, 729 (2016). Rather, the court reviews the Commissioner's decision only to ensure that it is reasonable in light of the facts and circumstances shown in the record.

The Commissioner determined that Abercrombie is not terminally ill or permanently incapacitated within the meaning of G.L. c. 127, § 119A. This determination rests on the discounting of Dr. Patsner's February 13, 2020 opinion that Abercrombie was likely to die within eighteen months, sleeps much of the day, and "is permanently incapacitated with very limited ability to perform basic activities of daily living," in favor of his subsequent opinions that Abercrombie is not likely to die within eighteen months and can independently conduct daily living activities.⁵ Where there is conflicting expert testimony, the Commissioner as factfinder generally has discretion to accept one expert's reasonable opinion and reject another. See Adams v. Adams, 459 Mass. 361, 388 (2011). However, in the view of this Court, the Commissioner's decision does not include a rational, adequate explanation for the change in Dr. Patsner's opinion. See Hercules Chem. Co. v. Department of Env'tl. Prot., 76 Mass. App. Ct. 639, 642 (2010) (it is arbitrary and capricious for agency to change its reasoning without warning and without thorough explanation). The only explanation in the record is Dr. Descoteaux's

⁵DOC's medical parole regulations define a "debilitating condition" as one "which causes a prisoner significant and serious impairment of strength or ability to perform daily life functions such as eating, breathing, toileting, walking or bathing so as to minimize the prisoner's ability to commit a crime if released on medical parole, and requires the prisoner's placement in a facility or a home with access to specialized medical care." See 501 Code Mass. Regs. § 17.02.

comment on Dr. Patsner's initial opinion that "when pressed to provide statistics, etc., it was not possible to support a conclusion of probable death within 18 months." Without more, this statement does not furnish a reasonable explanation for the reversal in medical diagnosis.⁶

Nor is there a clear explanation in the record for the fact that Dr. Patsner characterized Abercrombie in February as sleeping most of the day and "permanently incapacitated with very limited ability to perform basic activities of daily living," but thereafter repeatedly characterized him as able to independently perform basic life activities. It appears from the record that the placement of a stent to treat Abercrombie's cardiovascular disease may have contributed to this improvement. In addition, the record shows that Abercrombie resides in the general population, walks with a cane, and does not require a skilled nursing placement if released. Nonetheless, this Court is concerned by the Commissioner's failure to expressly address the contradictory initial assessment concerning the degree to which Abercrombie is incapacitated.

This deficiency in the Commissioner's decision is not fatal, however, because the statute demands not only a medical assessment but also a public safety one. With respect to the determination that Abercrombie's multiple chronic serious medical conditions are not so debilitating that he poses no public safety risk, the Commissioner largely relied on the Superintendent's recommendation. The medical parole statute charges the Superintendent with "assessment of the risk for violence that the prisoner poses to society." G.L. c. 127, § 119A(c)(1). Superintendent Duarte recommended against release based on Abercrombie's criminal history, which includes several acts of violence, a parole revocation and multiple

⁶Unsurprisingly, there is no evidence in the administrative record to support counsel's allegation that DOC routinely pressures its medical staff to alter evaluations that favor the release of inmates on medical parole. Nonetheless, as noted, there is no reasonable explanation in the Commissioner's decision for the change in Dr. Patsner's opinion.

probation violations, thirteen disciplinary reports while incarcerated, and a risk screen assessment which concluded that his risk of violence in 2014 was medium and risk of recidivism was high.⁷

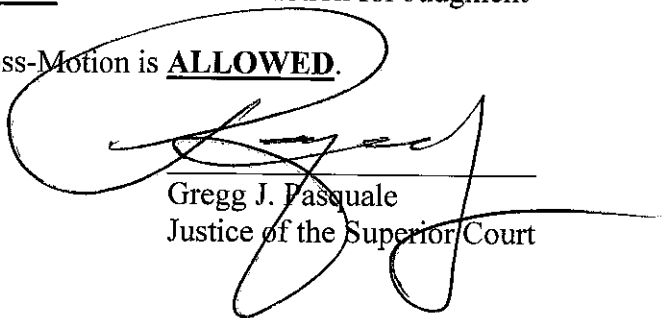
To grant medical parole, the Commissioner must determine that if released, “the prisoner will live and remain at liberty without violating the law and that the release will not be incompatible with the welfare of society.” G.L. c. 127, § 119A(e). In denying Abercrombie medical parole, the Commissioner concluded that his release would be incompatible with the welfare of society because he still poses some risk to public safety. This Court notes that Abercrombie’s violent offenses were committed decades ago and his most recent disciplinary offense for assault on another inmate occurred two years ago. Nonetheless, this Court cannot substitute its judgment for that of DOC with respect to public safety concerns. Cf. Greenman v. Massachusetts Parole Bd., 405 Mass. 384, 387 (1989) (court grants considerable deference to parole board’s evaluation of record). The Superintendent’s recommendation and the record as a whole furnish a rational explanation for the Commissioner’s determination that despite multiple chronic medical conditions impairing his functioning, Abercrombie poses some public safety risk if released.⁸ Accordingly, Abercrombie has not met his heavy burden to demonstrate that the denial of medical parole was arbitrary and capricious.

⁷DOC regulations require the risk for violence assessment to consider the prisoner’s terminal illness/permanent incapacitation, clinical management, and prognosis; his current housing situation; an assessment of his mobility, gait, and balance; the medically prescribed and required durable equipment or other assistive devices; and his ability to manage activities of daily living. See 501 Code Mass. Regs. § 17.05.

⁸The record before this Court does not support counsel’s assertion that Abercrombie is so ill and so weak that “anyone could outrun him” and he poses no risk of violence.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that Plaintiff's Motion for Judgment on the Pleadings is **DENIED** and the Defendants' Cross-Motion is **ALLOWED**.



Gregg J. Pasquale
Justice of the Superior Court

DATED: December 24th, 2020