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NO. 4-13-0974

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Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

RANDY WOITH, Plaintiff-Appellant, v. THE CITY OF BLOOMINGTON FIRE PENSION FUND; THE MEMBERS OF THE BOARD OF TRUSTEES OF THE CITY OF BLOOMINGTON FIRE PENSION FUND, RON FOWLER as President, SEAN MORRISON, TRACEY COVERT, JIM STOKES, and TIM ERVIN; and THE CITY OF BLOOMINGTON, Defendants-Appellees.	)	Appeal from Circuit Court of McLean County No. 12MR507 Honorable Paul G. Lawrence, Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Holder White and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: The Board's denial of plaintiff's request for a line-of-duty disability pension was not against the manifest weight of the evidence where evidence was presented raising issues as to plaintiff's credibility.

¶ 2 Under section 4-110 of the Illinois Pension Code (Pension Code) (40 ILCS 5/4-110 (West 2008)), plaintiff, Randy Woith, a firefighter employed by defendant, the City of Bloomington, applied for a line-of-duty disability pension with defendant, the City of Bloomington Fire Pension Fund (Fund) based on two separate incidents, one occurring in March 2007, and one in December 2007. The individual defendants, Ron Fowler, Sean Morrison, Tracey Covert, Jim Stokes, and Tim Ervin, are the people that comprised the board of trustees of the Fund (Board) (Fowler recused himself from this case). In December 2011, the Board held an evidentiary hearing, and in October 2012, the Board denied plaintiff's request for a line-of-duty

disability pension. Plaintiff then filed a complaint for administrative review in the McLean County circuit court. After an October 2013 hearing, the court confirmed the Board's decision.

¶ 3 On appeal, plaintiff argues the Board's decision regarding the two incidents were against the manifest weight of the evidence. We affirm the trial court's judgment and confirm the Board's decision.

¶ 4 I. BACKGROUND

¶ 5 On September 11, 2009, plaintiff filed his section 4-110 pension application, which noted he joined the Bloomington Fire Department in June 1980 and his current position was captain. The application also listed a retirement date of April 1, 2009.

¶ 6 On December 19, 2011, the Board held an evidentiary hearing on plaintiff's application. At the beginning of the hearing, the hearing officer, Donald Craven, stated the hearing would be bifurcated, and the first hearing would address only the December 2007 incident. However, after hearing the evidence on the December 2007 incident, the Board decided it wanted to hear the evidence on the March 2007 incident and take the matter as a whole. After hearing evidence about the March 2007 incident, the Board voted to deny plaintiff's line-of-duty disability pension. The evidence presented at the hearing relevant to the issue on appeal is set forth below.

¶ 7 Plaintiff testified he was a captain in the Bloomington Fire Department at the time of both incidents. Around 10 a.m. on March 23, 2007, a call came in, and plaintiff was sent to the scene on engine 2. At the scene, plaintiff took command and gave orders and assignments to the other firefighters. Plaintiff did not directly engage in fire-suppression activities during the one and a half to two hours that he was in command. When the deputy fire chief arrived, he took over the command, and plaintiff became involved in overhaul. Overhaul involves looking for

hidden fires in walls and such after the main fire has been extinguished. For overhaul, plaintiff wore his full turn-out gear and a self contained breathing apparatus (SCBA). Plaintiff and firefighter Scott Cheeseman went into the home to pull the ceilings on the first floor. They did the kitchen and then a small office. Plaintiff left Cheeseman in the office and went into the bathroom. In the bathroom, he "popped" a few holes in the ceiling on one side of the room and then moved to the other. After a few pulls on his hook, the next thing plaintiff knew was that he was lying on his back with the ceiling on top of him. Plaintiff's whole body felt like he had been hit by a truck. Plaintiff was unable to get anyone's attention, so he wiggled himself out from under the debris. Plaintiff then found Cheeseman and told him they needed to leave. Plaintiff felt pain in his back from his neck to his tailbone. After leaving the home, plaintiff told Steve Barr, his shift commander, that he had fallen. Plaintiff sat on the bumper of a fire truck for a long time. He did not go back into the home but did help with teardown.

¶ 8 Four firefighters, who also responded to the aforementioned March 2007 fire, testified about plaintiff's presence at the fire. Geoffrey Grosse testified that, shortly after he arrived at the scene, he saw plaintiff in the street between two fire trucks giving commands. He did not recall seeing plaintiff again. Jeffrey Emmert testified that, when he arrived on the scene, plaintiff was in command of the fire scene. Emmert was involved in fire suppression on the third floor and never observed plaintiff in the building. Plaintiff's gear appeared clean and dry. During cross-examination, Emmert agreed with the fire report that he left the scene an hour and a half before plaintiff did. Lester Siron testified he and Lance Benedict arrived at the scene at 11:29 a.m. and plaintiff was standing outside the home. Plaintiff's turn out gear was clean and dry. That was the only time Siron recalled seeing plaintiff at the fire. Benedict testified that, when he first arrived at the scene, plaintiff was in the yard of the home. Benedict saw plaintiff a

second time in the building. Benedict did not have a tank on at the time. He saw plaintiff go in the bathroom and clean the toilet seat off to use the facilities. Plaintiff also was not wearing a tank and mask. Benedict testified plaintiff was not wearing a coat, but the gear he did have on appeared clean and dry. Benedict also testified the first floor ceilings were intact when he saw plaintiff. Benedict left the scene at 1:29 p.m.

¶ 9 Plaintiff testified that, after the March 2007 fire, he went back to the station and finished his shift. Plaintiff's back was sore. On the day of the fire, he wrote engine 2's section of the fire report. In it, he noted the ceiling was pulled on the first floor kitchen, office, and bathroom areas. However, his accident is not mentioned in the report. Plaintiff testified he included his injury in the report but accidentally deleted it. According to plaintiff, he mentioned the deletion to both Ron Brandell, who was responsible for drafting the report, and Steve Barr, the shift commander, but the report was never changed. When the Bloomington fire department submitted the complete incident report for the March 2007 fire, it did not have any fire service casualty reports or job injury reports for the fire.

¶ 10 On April 12, 2007, plaintiff went to Dr. Monica Schnack, a chiropractor, for his sore back. He had been seeing her since July 20, 2006, for headaches. Plaintiff had worked five to six shifts as a firefighter subsequent to the March 2007 incident, before seeing Dr. Schnack. Plaintiff testified his pain had continued to worsen and his back was very stiff. Dr. Schnack ordered plaintiff of work, and the first day of work plaintiff missed was April 16, 2007. Dr. Schnack also referred plaintiff to Dr. Keith Kattner, a neurosurgeon. Dr. Kattner recommended surgery, but plaintiff wanted to try other treatment options. Plaintiff received three epidural injections.

¶ 11 On April 19, 2007, plaintiff filled out an employee injury report for the March 2007 incident. In the report, plaintiff explained he was pulling the ceiling with a hook when he slipped on wet material and fell backwards against the toilet and sink, which caused him to twist his back. He did not list any witnesses. Plaintiff testified he had 45 days after an incident to complete an employee injury report. He had been hurt several times but only completed injury forms if he saw a doctor. Plaintiff further testified he knew of other firefighters that did the same thing when they were injured.

¶ 12 After being off work several days in April and May 2007, plaintiff intermittently worked as a firefighter and emergency medical technician. On December 3, 2007, he was working a 24-hour shift, and several other men were replacing the nitrogen bottle on the crash truck when the full bottle of nitrogen fell to the ground. Plaintiff estimated the bottle weighed around 350 pounds. To replace the bottle, the firefighters had to use a winch that was on the side of the truck. Plaintiff's job was to hold the bottle while the other men raised the winch and then push the bottle into the top rack. While plaintiff was doing that, he felt a sharp pain in his middle back and a very sharp pain in his lower back to the right hip area. When he felt the pain, plaintiff reached around and grabbed the area because it hurt. After the bottle was in, he went to his office and sat down. Plaintiff's back hurt a lot, and he had pain radiating down his right leg. On December 12, 2007, plaintiff filed out an employee injury report for the December 3, 2007, incident. Plaintiff listed "Ron Brandle" as a witness to the incident. Plaintiff testified he sought medical attention from Dr. Schnack before he completed the employee injury report. She performed adjustments on him.

¶ 13 Plaintiff stopped working on April 1, 2008. Dr. Kattner performed back surgery on plaintiff on April 25, 2008. Plaintiff still had back and leg pain in February 2009.

¶ 14 Fowler testified he was a retired firefighter. In the summer of 2008, he and his wife were leaving the Fiesta Ranchera restaurant in Bloomington, when he saw plaintiff and plaintiff's wife. Fowler noticed plaintiff was walking slowly. Fowler asked plaintiff how he was doing, and plaintiff mentioned his back surgery. Fowler asked plaintiff "if he did it at work," and plaintiff replied " 'no.' " Fowler did not ask any more questions about plaintiff's injury. In rebuttal, plaintiff testified he had seen Fowler at various grocery stores and restaurants and had talked to him. However, he denied both going to Fiesta Ranchera in the summer of 2008 and telling Fowler his surgery had nothing to do with work.

¶ 15 The parties also presented various reports; depositions; certificates; and records of treating physicians, Dr. Schnack and Dr. Kattner, and independent medical examiners, Dr. Michael Gross, Dr. Paul Smucker, and Dr. Per Freitag. The relevant evidence regarding the treating medical professionals was the following. Dr. Kattner gave the following opinion: "As far as causation, he specifically notes a work-related injury in 2007. It is probable that he had lateral recess stenosis prior to this injury, but pulling down the ceiling probably aggravated the condition, making the patient symptomatic and subsequently necessitating surgery after he failed conservative management." In his deposition, Dr. Kattner noted plaintiff told him "he injured himself when he fell while pulling down a ceiling during a fire." He also testified plaintiff did not mention any other incident. Additionally, in what appears to be an intake form for Dr. Kattner, plaintiff put a question mark in response to the following question: "Were your symptoms the result of an injury? (If yes, please describe.)" Plaintiff again left several questions blank, including when the symptoms began.

¶ 16 Plaintiff filed out a work/comp history for Dr. Schnack for both incidents. For the March 2007 one, plaintiff described his accident as "pulling ceiling, checking for fire extension,

and slipped on wet debris and fell against wall between toilet & sink." Dr. Schnack's note for plaintiff's April 12, 2007, appointment listed the same description of plaintiff's accident. As to the December 2007 incident, plaintiff stated he was "pushing bottle into its cradle on CR1 while the bottle is suspended by the cradle. Reinjured lower back and injured middle of back." Dr. Schnack's note again gave a similar description of plaintiff's accident. Both of the work/comp history sheets for Dr. Schnack are only partially filled out.

¶ 17 As to the independent examiners, Dr. Gross opined plaintiff's back pain was causally related to "the accident that occurred on or about 3-10-2007." Dr. Gross's patient history notes plaintiff was pulling down a ceiling at a fire and the next thing he remembered was being on the floor on his back. The history also included that plaintiff had increased pain while putting a nitrogen tank into a truck. Dr. Smucker found symptom magnification by plaintiff during his examination of plaintiff. Despite that finding, he still opined plaintiff was unable to work as a firefighter. Dr. Smucker also concluded a causal connection existed between plaintiff's injuries and his employment as a firefighter. However, he noted that opinion was "based solely on [plaintiff's] testimony of back pain beginning with the aforementioned incident, which occurred during a firefighting event." Additionally, Dr. Smucker concluded plaintiff was unable to perform the duties of a firefighter. Dr. Freitag's history of present illness describes both the March and December 2007 incidents. With regard to the March 2007 incident, plaintiff told Dr. Freitag he was pulling a home's first floor ceiling when a part of the ceiling fell down on him and hit his head. He fell backwards landing on his back and air tank. Dr. Freitag found "a definite causal connection between the two incidents described by [plaintiff] and his present state of ill being." He concluded plaintiff was unable to perform the duties of a firefighter.

¶ 18 Additionally, a June 2009 functional capacity evaluation stated only that plaintiff

"reported being injured at work on March 10, 2007 when he fell while pulling down a ceiling at a fire." Plaintiff had another functional capacity evaluation in 2010.

¶ 19 At the conclusion of the second part of the hearing, the four members of the Board that heard this case voted to deny plaintiff's application. On October 29, 2012, Fowler, as president of the Board, signed a "final order" that denied plaintiff's request. The order noted the Board's finding plaintiff failed to meet his burden of proof was "based on several factors, the most determinative of which is a finding that the testimony of [plaintiff] is not credible." It further stated plaintiff's alleged injuries from the two incidents were not fully supported by (1) the nature of the injuries, (2) his work schedule following the incidents, and (3) the incident reports and other reports submitted by the Bloomington fire department. Additionally, the Board noted plaintiff testified other firefighters were present and aware of his injuries but plaintiff did not have any of them testify. The Board specifically noted plaintiff failed to present the testimony of other firefighters supporting his version of the March 2007 fire and the testimony of the firefighters who did testify undercut plaintiff's claim of injury. Last, the Board stated plaintiff failed to document in employer reports and reports to medical providers, the nature of the injuries he claims from the incidents.

¶ 20 On November 28, 2012, plaintiff filed his timely complaint for administrative review with the McLean County circuit court. After hearing the parties' arguments on October 2, 2013, the court upheld the Board's decision. On October 30, 2013, plaintiff filed a timely notice of appeal in compliance with Illinois Supreme Court Rule 303 (eff. May 30, 2008). Accordingly, this court has jurisdiction of this appeal under Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994).

¶ 21 II. ANALYSIS

¶ 22 A. Standard of Review

¶ 23 Under section 4-139 of the Pension Code (40 ILCS 5/4-139 (West 2008)), judicial review of an administrative board's decision is conducted in accordance with the Administrative Review Law (735 ILCS 5/art. 3 (West 2008)). With administrative cases, this court reviews the administrative agency's decision, not the circuit court's. *Williams v. Board of Trustees of the Morton Grove Firefighters' Pension Fund*, 398 Ill. App. 3d 680, 687, 924 N.E.2d 38, 45 (2010). Section 3-110 of the Administrative Review Law (735 ILCS 5/3-110 (West 2008)) allows review of "all questions of law and fact presented by the entire record before the court" but does not allow the reviewing court to consider any new or additional evidence. That section further states "[t]he findings and conclusions of the administrative agency on questions of fact shall be held to be prima facie true and correct." 735 ILCS 5/3-110 (West 2008). "Accordingly, it is not a court's function on administrative review to reweigh evidence or to make an independent determination of the facts." *Kouzoukas v. Retirement Board of the Policemen's Annuity & Benefit Fund*, 234 Ill. 2d 446, 463, 917 N.E.2d 999, 1009-10 (2009).

¶ 24 With administrative review, the applicable standard of review depends upon whether the issue presents a question of fact, a question of law, or a mixed question of fact and law. *Kouzoukas*, 234 Ill. 2d at 463, 917 N.E.2d at 1010. Our supreme court has held "the question of whether the evidence of record supports the Board's denial of plaintiff's application for a disability pension is a question of fact and, as such, the manifest weight standard of review applies." (Internal quotation marks omitted.) *Kouzoukas*, 234 Ill. 2d at 464, 917 N.E.2d at 1010 (quoting *Wade v. City of North Chicago Police Pension Board*, 226 Ill. 2d 485, 505, 877 N.E.2d 1101, 1113 (2007)). " 'An administrative agency decision is against the manifest weight of the evidence only if the opposite conclusion is clearly evident.' " *Wade*, 226 Ill. 2d at 504, 877

N.E.2d at 1112-13 (quoting *Abrahamson v. Illinois Department of Professional Regulation*, 153 Ill. 2d 76, 88, 606 N.E.2d 1111, 1117 (1992)). Thus, the " 'mere fact that an opposite conclusion is reasonable or that the reviewing court might have ruled differently will not justify reversal of the administrative findings.' " *Marconi v. Chicago Heights Police Pension Board*, 225 Ill. 2d 497, 534, 870 N.E.2d 273, 294 (2006) (quoting *Abrahamson*, 153 Ill. 2d at 88, 606 N.E.2d at 1117). "If the record contains evidence to support the agency's decision, that decision should be affirmed." *Marconi*, 225 Ill. 2d at 534, 870 N.E.2d at 294. Additionally, "[u]nder any standard of review, a plaintiff in an administrative proceeding bears the burden of proof, and relief will be denied if he or she fails to sustain that burden." See *Wade*, 226 Ill. 2d at 505, 877 N.E.2d at 1113.

¶ 25 Moreover, in this case the Board found plaintiff failed to meet his burden of proof based on several reasons and noted the most determinative one was its belief plaintiff's testimony was not credible. While a reviewing court should afford the Board's credibility determinations considerable weight, such determinations are not immune from review. *Kouzoukas*, 234 Ill. 2d at 465, 917 N.E.2d at 1011.

¶ 26 B. Causation of Plaintiff's Disability

¶ 27 Here, the facts are undisputed plaintiff could no longer work as a firefighter due to his back injury. The issue is the cause of plaintiff's back injury. The Board found plaintiff failed to meet his burden of proof and noted plaintiff's lack of credibility.

¶ 28 In support of his argument the Board's decision was against the manifest weight of the evidence, plaintiff relies primarily on the cases of *Lambert v. Downers Grove Fire Department Pension Board*, 2013 IL App (2d) 110824, ¶ 29, 985 N.E.2d 654, and *Roszak v. Kankakee Firefighters' Pension Board*, 376 Ill. App. 3d 130, 144, 875 N.E.2d 1280, 1291

(2007). In both cases, the reviewing court found the Board's decision, based in part on its determination the plaintiff was not credible, was against the manifest weight of the evidence. *Lambert*, 2013 IL App (2d) 110824, ¶ 29, 985 N.E.2d 654; *Roszak*, 376 Ill. App. 3d at 145, 875 N.E.2d at 1291-92. In those cases, the issue was whether the plaintiff was disabled. *Lambert*, 2013 IL App (2d) 110824, ¶ 29, 985 N.E.2d 654; *Roszak*, 376 Ill. App. 3d at 139, 875 N.E.2d at 1287. The reviewing courts rejected a part of the Board's reasoning for finding the plaintiff not credible because that reasoning was based on matters that were tangential to the issues before the Board. *Lambert*, 2013 IL App (2d) 110824, ¶¶ 29-30, 985 N.E.2d 654; *Roszak*, 376 Ill. App. 3d at 140, 875 N.E.2d at 1287. They also found the Board had improperly discounted the medical evidence that indicated the plaintiff was disabled based on its finding the plaintiff was not credible. *Lambert*, 2013 IL App (2d) 110824, ¶ 38, 985 N.E.2d 654; *Roszak*, 376 Ill. App. 3d at 144, 875 N.E.2d at 1291. Both courts noted that, while based in part on the plaintiff's subjective complaints, the doctor's medical opinions and diagnoses were supported by the physician's objective findings such as medical testing and physical examinations. *Lambert*, 2013 IL App (2d) 110824, ¶ 38, 985 N.E.2d 654; *Roszak*, 376 Ill. App. 3d at 144, 875 N.E.2d at 1291.

¶ 29 Here, unlike in *Lambert* and *Roszak*, the Board found plaintiff not credible as to the main issue in this case, how plaintiff's injury occurred. Additionally, the issue of how plaintiff's injury occurred is based solely on plaintiff's statements. While a physician may opine an injury is consistent with a plaintiff's description of how the injury occurred, a physician cannot necessarily confirm with objective evidence that it is in fact how the injury occurred. Thus, unlike a disability finding, a plaintiff's lack of credibility as to how the injury occurred could undermine medical testimony about the causal connection between an injury and a person's disability. In fact, Dr. Smucker expressly stated in his medical-examination report his causation

opinion rested solely on plaintiff's statements the back pain began during the March 2007 firefighting event. Accordingly, the reviewing courts' reasoning in *Lambert* and *Roszak* for finding the Board's credibility determination against the manifest weight of the evidence is inapplicable here.

¶ 30 In this case, the Board received conflicting evidence that cast doubt upon plaintiff's version of the source of his back injury. One piece of evidence is Fowler's testimony plaintiff told him in the summer of 2008, which was after plaintiff's back surgery, that his back injury was not work related. On appeal, plaintiff asks us to strike the testimony of Fowler because it had insufficient foundation. However, plaintiff's argument is conclusory with insufficient authority and argument to substantiate his assertion. "A reviewing court is entitled to have issues clearly defined with pertinent authority cited and cohesive arguments presented," and those issues that lack the former are deemed forfeited. *Obert v. Saville,* 253 Ill. App. 3d 677, 682, 624 N.E.2d 928, 931 (1993) (citing Ill. S. Ct. R. 341(e)(7) (eff. Aug. 1, 1988) (now known as Ill. S. Ct. R. 341(h)(7) (eff. Feb. 3, 2013)). Accordingly, we find plaintiff has forfeited his request to strike Fowler's testimony.

¶ 31 Next, plaintiff asserts the delay in filing an injury report for both incidents did not undermine his credibility. Plaintiff notes he had 45 days to file an injury report under his employer's policies and explained how he would wait to file a report until after he went to the doctor for an injury. However, he also testified he attempted to put his March 2007 injury in the fire report but accidentally deleted it from that report. Plaintiff testified he also told Barr, the shift commander, of his injury at the scene. Thus, plaintiff had reported and attempted to report the injury on the day of the fire. Accordingly, the delay in filling out the official injury report for the March 2007 injury is inconsistent with his oral reporting of the injury and attempted

inclusion in the report. Additionally, the magnitude of the accident that plaintiff testified to, *i.e.*, getting knocked down and trapped by debris, would warrant a quick report. As to the December 2007 incident, while the delay in reporting was shorter, plaintiff testified he grabbed his back as soon as he felt the pain and had to go rest in his office immediately afterwards in the presence of several other firefighters. A reasonable person would assume an obvious injury witnessed by other firefighters would quickly be reported.

¶ 32 Plaintiff contends his consistency in reporting how he was injured to medical professional supports his credibility. However, an examination of those records shows he first told Dr. Schnack that, at the March 2007 fire, he slipped on wet debris and fell against a wall between the toilet and sink. That version of events is different from his testimony and later reports to other physicians that he was knocked onto his back by falling debris. While plaintiff's description of the December 2007 incident was more consistent, plaintiff failed to tell all of the medical professionals about that incident, as not all of the reports mention it. Also, the intake form for Dr. Kattner, in which plaintiff put a question mark in response to the question of whether his symptoms were injury-related is inconsistent with plaintiff's description of the March 2007 injury.

¶ 33 For the first time in his reply brief, plaintiff asserts the veracity of his testimony was also corroborated by the Bloomington fire department's payment of his full and regular salary without taxes being deducted while he was injured. Arguments not raised in the initial brief and raised for the first time in the reply brief are forfeited. Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). Accordingly, we find plaintiff has forfeited this contention. Additionally, we note the case cited by plaintiff in support of this argument held the doctrine of collateral estoppel prohibited the relitigation of the issue of causation in a claim for compensation under the Public

Employee Disability Act (5 ILCS 345/0.01 *et seq*. (West 2000)) based on the finding in the workers' compensation claim that the plaintiff's injury arose out of the course of his employment. See *Mabie v. Village of Schaumburg*, 364 Ill. App. 3d 756, 761, 847 N.E.2d 796, 801 (2006). In this case, plaintiff never raised the issue of collateral estoppel.

¶ 34 Last, we note another piece of conflicting evidence is Benedict's testimony he observed plaintiff clean and dry and without an air tank in the building. Plaintiff testified he had his air tank on when he fell in the bathroom and became wet from the floor and falling debris.

¶ 35 Accordingly, we find more than ample evidence was presented for the Board to conclude plaintiff lacked credibility. In light of that evidence, it was not improper for the Board to note plaintiff's failure to present the testimony of other firefighters to support his version of the two incidents, in which other firefighters were present or nearby when the alleged incidents occurred. Thus, we find the Board's decision was not against the manifest weight of the evidence.

¶ 36 III. CONCLUSION

¶ 37 For the reasons stated, we affirm the McLean County circuit court's judgment and confirm the Board's decision.

¶ 38 Affirmed.