

SIXTH DIVISION
July 22, 2016

No. 1-15-0037

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DONALD CEDERBERG,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	13 CH 19939
)	
BOARD OF TRUSTEES OF THE CITY OF)	
EVANSTON FIREFIGHTERS' PENSION FUND,)	Honorable
)	Diane J. Larsen,
Defendant-Appellee.)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Rochford and Justice Delort concurred in the judgment.

ORDER

HELD: The Pension Board's decision denying plaintiff's application for a line-of-duty disability pension was not against the manifest weight of the evidence.

¶ 1 Plaintiff, Donald Cederberg, a firefighter/paramedic employed by the City of Evanston,

appeals from an order of the circuit court which, upon administrative review, confirmed a decision of the Board of Trustees of the Evanston Firefighters' Pension Fund ("Board") denying his application for a line-of-duty disability pension. Plaintiff argues the Board's decision was against the manifest weight of the evidence. We disagree and for the reasons that follow, we affirm the circuit court's decision confirming the Board's decision.

¶ 2

BACKGROUND

¶ 3 The following facts come from the testimony and evidence presented at the administrative hearing. Plaintiff testified that, on June 28, 2004, he was hired as a firefighter/paramedic by the City of Evanston. His primary duties included responding to fire emergencies and emergency medical conditions. While employed as a firefighter/paramedic, plaintiff owned Don Cederberg Enterprises, Incorporated, a contracting company that provides exterior home maintenance, gutter cleaning, window washing, and snow plowing. Plaintiff hired employees to perform work for the company, but would perform the duties himself when necessary.

¶ 4 Plaintiff testified that on February 2005, he first visited Dr. Burt Schell, an orthopedic surgeon, and explained that he was having pain in his lower back. At that time, plaintiff reported he had suffered back pain for a year and a half, and that it was not the result of any specific injury. A magnetic resonance imaging (MRI) was not taken, but Dr. Schell prescribed physical therapy and permitted plaintiff to return to full duty.

¶ 5 Plaintiff testified that on January 18, 2007, he injured his back during a response to an emergency call at a three-story house. He lifted the front end of a stretcher to put a patient into an ambulance and felt a “pop” in his back and electrical sensations in his leg. Plaintiff initially disregarded the pain and took the patient to the hospital. He then returned to the fire station, laid

down and stretched his back. The next day, plaintiff visited Dr. Schell, who diagnosed him with a lumbar strain and treated him with prescription medications. He also ordered an MRI of plaintiff's lumbar spine, which revealed a disc herniation. Dr. Schell opined that plaintiff's back pain was due to the herniation. Plaintiff returned to light duty in February 2007 and full unrestricted duty in March 2007. Between March 2007 and March 31, 2008, he worked without restrictions, exercised regularly, and did not report problems with his back.

¶ 6 Plaintiff testified that on March 31, 2008, he reinjured his back during a response to an emergency call in a high-rise building fire. He was carrying protective gear, including an air pack. He was ordered to retrieve a 100-foot section of hose line and heard a "pop" in his back while lifting and twisting to get the air pack over his shoulder. Plaintiff returned to the fire station and laid down to stretch his back. His supervisor called an ambulance to take him to the hospital where the treating physician prescribed painkillers and encouraged plaintiff to contact his doctor.

¶ 7 The next week, plaintiff went to see Dr. Schell, who gave him a physical examination and diagnosed a lumbar strain. The doctor prescribed physical therapy and medication, and recommended that plaintiff rest his back before returning to work. Plaintiff returned to light duty on May 12, 2008 and full duty on May 27, 2008.

¶ 8 Plaintiff testified he worked his last day as a firefighter/paramedic on August 30, 2010. That day, he responded to two particular emergency calls that further aggravated the pain in his back. The first call involved plaintiff breaking through the door of an apartment. The second call involved plaintiff carrying equipment up a flight of stairs to resuscitate a person who had stopped breathing.

¶ 9 On September 24, 2010, plaintiff visited Dr. Schell and reported he was having significant lower back pain, with pain radiating down his left leg and into his foot. The doctor diagnosed plaintiff as suffering from a herniated disk at L5-S1 with lumbar radiculopathy. Dr. Schell ordered an MRI of the lumbar spine, physical therapy, and pain medication. The MRI showed two small disc herniations in the base of the spine.

¶ 10 In October and November 2010, plaintiff underwent a series of epidural steroid injections, but his back pain persisted. Dr. Schell eventually determined that plaintiff was physically disabled and unable to return to work based on his inability to lift more than 40 pounds.

¶ 11 On December 5, 2010, plaintiff filed an application for disability pension benefits, seeking a line-of-duty disability pension pursuant to section 4-110 of the Illinois Pension Code (Pension Code) (40 ILCS 5/4-110 (West 2010)). In his application, plaintiff gave a history of disability as follows: "While on a medical emergency call on January 18, 2007, he injured his low back and sustained a herniated lumbar disc at L5-S1 while lifting a 350 pound male patient onto a stretcher. A subsequent injury while responding to an emergency on March 18, 2008, accelerated the low back disability sustained by the Applicant. Plaintiff's low back problem advanced until September, 2010, when he was no longer able to continue working as a firefighter/paramedic."

¶ 12 The Board subsequently allowed plaintiff to amend his application "to assert that his condition was the result of the cumulative effects of acts of duty including the two incidents identified in his statement as well as the performance of his duties through the date of September 2010 that he went off of active duty."

¶ 13 At the hearing on his application, plaintiff testified as to the history set forth in the application. Additionally, plaintiff testified that in February 2011, he engaged in certain work for his personal company which was recorded on surveillance videos. Plaintiff acknowledged the videos depicted him engaging in various physical activities such as entering and exiting vehicles, bending to pump gas, lifting and carrying gas containers, operating a Bobcat to remove snow and shoveling snow. The videos were shown to four physicians who had independently examined plaintiff prior to viewing the videos.

¶ 14 Dr. Edward Sclamberg, an orthopedic surgeon, testified that, on October 2010, he conducted an independent medical evaluation of plaintiff. The doctor reviewed the two MRI scans performed on plaintiff in 2007 and 2010, and opined that he had significant lumbar disc disease and was disabled from performing firefighter/paramedic duties. However, in July 2012, after reviewing the videos of plaintiff, the doctor issued an addendum to his evaluation report stating that the activities engaged in by the plaintiff on the videos were inconsistent with the plaintiff's reported history of lower back pain and physical examinations. Dr. Sclamberg consequently revised his opinion about the plaintiff's work capability and concluded that plaintiff was able to work his regular duties as a firefighter/paramedic without any restrictions.

¶ 15 Dr. Peter Orris testified that on October 16, 2010, he saw plaintiff for an independent medical evaluation. The doctor concluded that plaintiff's disc herniation had worsened to the degree that he was permanently disabled and that the condition was directly related to work injuries. In May 2012, after reviewing the videos of plaintiff, the doctor issued a letter stating that the activities depicted in the videos did not contradict his findings nor his opinion that plaintiff was disabled. Dr. Orris noted that the videos should not be equated with the significant evidence supporting disability.

¶ 16 Dr. Steven Mather testified that on December 23, 2010, he saw plaintiff for an independent medical evaluation. He concluded that plaintiff had back pain and significant difficulty bending. The doctor determined that plaintiff's previous work-related back injuries from 2007 and 2008 had healed, and that the plaintiff's complaints in 2010 were the result of degenerative changes in the discs, and were not related to those previous work injuries.

However, in July 2012, after reviewing the videos, Dr. Mather issued a second report in which he stated that plaintiff did not make accurate reports of pain in 2010. Additionally, Dr. Mather changed his opinion and concluded that plaintiff could have returned to work without any restrictions in 2010.

¶ 17 Dr. David Shapiro testified that on January 6, 2011, he saw plaintiff for an independent medical evaluation. He concluded that plaintiff was disabled from performing his firefighter/paramedic duties due to one of the herniated discs. However, after reviewing the videos, the doctor issued an addendum to his original independent medical examination (IME) report, stating that the plaintiff's activities were inconsistent with his reported history of lower back pain and results of the physical examinations. Dr. Shapiro changed his opinion and concluded that plaintiff was not disabled as of February 4, 2011, and that he should have been able to return to work without any restrictions.

¶ 18 Dr. Schell testified that he never reviewed the videos of plaintiff, but acknowledged that if plaintiff's complaints regarding pain and functionalities were not accurate, his opinion could change.

¶ 19 Plaintiff's employment with the Evanston Fire Department was terminated in March 2011.

¶ 20 On May 19, 2011, Dr. Schell performed surgery on plaintiff's herniated discs, which resulted in a two-level infusion of plates, pedicle screws, and iliac bone grafts.

¶ 21 On June 26, 2012, Dr. Daniel Samo, at the request of the Board, conducted a review of plaintiff's medical records relating to his request for a line-of-duty disability pension. Among other opinions, he concluded that (1) Dr. Schell's opinion that plaintiff was physically disabled and unable to return to work was not based on any work-related incident but rather on the finding that plaintiff was unable to lift more than 40 pounds; (2) there was evidence of lower back problems prior to 2007 and that plaintiff had degenerative disc disease; (3) the 2007 and 2008 injuries resolved and were not the cause of any disabling condition in 2010; (4) to the extent that plaintiff was found to be disabled in 2010, it did not result from any work related activity; and (5) the surgery that was performed on plaintiff was done to treat degenerative disease in plaintiff's spine.

¶ 22 On January 15, 2013, plaintiff took a Function Capacity Evaluation (FCE), which showed his functional capabilities were within the Medium Physical Demand Level. This was below the Very Heavy Physical Demand Level required for firefighters/paramedics.

¶ 23 Following the administrative hearing, the Board denied plaintiff's application for a line-of-duty disability pension, stating that, "after weighing all of the conflicting evidence that the Applicant failed to meet his burden of proof under 40 ILCS 5/4110." On administrative review, the circuit court confirmed the Board's decision. This appeal followed.

¶ 24 STANDARD OF REVIEW

¶ 25 In administrative review cases such as this one, our role is to review the decision of the administrative agency, not the determination of the circuit court. *Provena Covenant Medical Center v. Department of Revenue*, 236 Ill. 2d 368, 385 (2010). In reviewing the decision of an

administrative agency, " [t]he applicable standard of review depends upon whether the question presented is one of fact, one of law, or a mixed question of fact and law.' " *Cinkus v. Village of Stickney Municipal Officers Electoral Board*, 228 Ill. 2d 200, 210 (2008) (quoting *American Federation of State, County & Municipal Employees, Council 31 v. Illinois State Labor Relations Board, State Panel*, 216 Ill. 2d 569, 577 (2005)).

¶ 26 The instant appeal concerns whether plaintiff's alleged back disability was caused by his work as a firefighter. This is a question of fact. *Village of Oak Park v. Village of Oak Park Firefighters Pension Board*, 362 Ill. App. 3d 357, 371 (2005); *Carrillo v. Park Ridge Firefighters' Pension Fund*, 2014 IL App (1st) 130656, ¶ 22. On administrative review, it is not a court's function to reweigh the evidence or make an independent determination of the facts. *Abrahamson v. Illinois Dep't of Prof'l Regulation*, 153 Ill. 2d 76, 88 (1992). An administrative agency's findings on questions of fact are deemed to be *prima facie* true and correct and will not be overturned unless they are against the manifest weight of the evidence. *Wortham v. City of Chicago Department of Administrative Hearings*, 2015 IL App (1st) 131735, ¶ 13. "An administrative agency decision is against the manifest weight of the evidence only if the opposite conclusion is clearly evident." *Abrahamson*, 153 Ill. 2d 76, 88. "If the record contains evidence to support the agency's decision, it should be affirmed." *Id.*

¶ 27

ANALYSIS

¶ 28 Plaintiff primarily argues on appeal that the Board's decision denying his application for a line-of-duty disability pension was against the manifest weight of the evidence. We disagree.

¶ 29 Section 4-110 of the Illinois Pension Code (40 ILCS 5/4-110 (West 2012)) provides for a line-of-duty disability pension if "a firefighter, as the result of sickness, accident or injury incurred in or resulting from the performance of an act of duty or from the cumulative effects of

acts of duty, is found *** to be physically or mentally permanently disabled for service in the fire department, so as to render necessary his or her being placed on disability pension. The Pension Code defines an "act of duty" as: "Any act imposed on an active fireman by the ordinances of a city, or by the rules or regulations of its fire department, or any act performed by an active fireman while on duty, having for its direct purpose the saving of the life or property of another person." 40 ILCS 5/6-110 (West 2012).

¶ 30 To be eligible for a line-of-duty disability pension, a claimant must prove that a duty-related incident was a causative factor contributing to the claimant's disability. *Carrillo*, 2014 IL App (1st) 130656, ¶ 23. A line-of-duty disability pension may also be based upon the duty-related aggravation of a claimant's preexisting physical condition. *Id.*

¶ 31 In the present case, the Board found plaintiff had not met his burden to establish a right to a line-of-duty disability pension and in doing so made the following findings: plaintiff did not prove by a preponderance of the evidence that in 2010 and 2011 he was disabled from work-related injuries; and plaintiff did not prove by a preponderance of the evidence that surgery was required as a result of work-related injuries rather than degenerative disease.

¶ 32 Plaintiff alleged his back disability was caused by two duty-related incidents. He claimed his first injury occurred on January 18, 2007, when he lifted the front end of a stretcher to put a patient into an ambulance and felt a "pop" in his back and electrical sensations in his leg. Dr. Schell diagnosed plaintiff as suffering from a lumbar strain and treated him with prescription medications. Plaintiff returned to light duty in February 2007 and full unrestricted duty in March 2007. Plaintiff never returned for his follow-up appointment with the doctor. He worked without restrictions, exercised regularly, and did not report problems with his back.

¶ 33 Plaintiff claimed he reinjured his back approximately a year later, on March 31, 2008, when he retrieved a 100-foot section of hose line and heard a “pop” in his back while lifting and twisting to get an air pack over his shoulder. Dr. Schell diagnosed plaintiff as suffering from a lumbar strain and treated him with prescription medications and physical therapy. The doctor also recommended that plaintiff rest his back before returning to work. Plaintiff returned to light duty on May 12, 2008 and full duty on May 27, 2008. Again, plaintiff did not return for his follow-up appointment with the doctor.

¶ 34 After review, the Board determined that plaintiff's duty-related injuries sustained on January 18, 2007 and March 31, 2008 had been resolved through conservative medical treatment by the time plaintiff elected to undergo back surgery on May 19, 2011. The Board also determined that any post-surgery disability was unrelated to plaintiff's work as a firefighter/paramedic.

¶ 35 The Board supported its conclusions with the following evidence and medical opinions: Dr. Samo opined that to the extent plaintiff was found to have been disabled in 2010, it did not result from any work-related activity; the back surgery plaintiff underwent was performed to treat degenerative disease in his spine; although plaintiff filed workers' compensation claims for the duty-related injuries he sustained in 2007 and 2008, he did not file any claim for the alleged duty-related injury he sustained on August 30, 2010, and did not fill out a job injury report concerning this injury; and, after viewing the surveillance videos, three of the four doctors reversed their positions that defendant was disabled from performing his duties in 2010 and 2011.

¶ 36 Plaintiff contends that the validity of his disability was supported by him undergoing back surgery and his FCE results classifying his functional capabilities within the Medium

Physical Demand Level. Although this evidence lends support to one possible factual determination, this Court may not reweigh the evidence or make an independent determination of the facts. *Abrahamson*, 153 Ill. 2d 76, 88. Moreover, we find the record replete with evidence supporting the Board's conclusion.

¶ 37 The Board reviewed both the surgery and the FCE but found the physicians' opinions and the surveillance videos more persuasive. Plaintiff's back surgery occurred three months after he was recorded performing the various physical activities seen in the surveillance videos. Of the four physicians who performed independent medical evaluations of plaintiff, three of them – Dr. Shapiro, Dr. Sclamberg and Dr. Mather – opined that the activities were inconsistent with the extent of disability plaintiff had reported to them, and that plaintiff was not disabled and was able to return to work without any restrictions based on the physicians' opinions, it cannot be said that the opposite conclusion from that of the Board is clearly evident.

¶ 38 Plaintiff directs our attention to the decision in *Lambert v. Downers*, 2013 Ill App (2d) 110824 (2013) to support his argument, however the facts in that case are distinguishable from those here. In *Lambert*, a firefighter applied for a line-of-duty disability pension following a right knee injury during a training exercise. *Id.* at ¶3. Although the doctors' medical opinions and diagnoses indicated that claimant was not able to continue to work as a firefighter, the Board denied his application. *Id.* at ¶20. The Board found that claimant's disability was not credible because he was able, *inter alia*, to sit without pain, control his pain with medication, manage it according to the functional capacity evaluation, and failed to show that he was working toward reemployment. *Id.* at ¶30-35. The Board also found that a video surveillance recording of claimant showed him walking up steps, climbing a ladder, and carrying household objects around his home. *Id.* at ¶35. On appeal, the reviewing court reversed the Board's decision,

reasoning that claimant was not allowed to take medications while he was working, was not ready to work full-time under the functional evaluation report, and that evidence he was not working toward improvement was minor. *Id.* at ¶¶30-35. Further, the court reasoned that claimant's testimony and the Board's observation on the video surveillance recording were not inconsistent, since claimant had never testified he could not sit, walk up steps, climb up a ladder, or carry household objects, but only that he could not carry heavy objects like he would be required to do as a firefighter. *Id.* at ¶ 36.

¶ 39 Contrastingly, the doctors' opinions in the instant case indicate the exact opposite of the doctors in *Lambert*, in that they opined in 2010 that plaintiff was able to continue to work as a firefighter/paramedic. After reviewing the video, Dr. Sclamberg and Dr. Shapiro issued addenda to their original independent medical evaluation reports and Dr. Mather issued a second report—each opining that plaintiff was not disabled. Unlike in *Lambert*, except for the opinion of Dr. Orris, the doctors' opinions do not conflict with the video surveillance but were influenced by it. The present case is also distinguishable from *Lambert* because here plaintiff's credibility was contradicted by video evidence rather than the numerous inconsistencies found in *Lambert* (e.g. the ability to sit, to take medications while working, and making efforts toward reemployment). For these reasons, we reject plaintiff's contention that the Board erred in concluding plaintiff was unlikely to be disabled at the time he stopped working in 2010.

¶ 40 The Board found that even if plaintiff was disabled in 2010 when he stopped working, there was no specific act of duty while he was working as a firefighter/paramedic that either caused or was a contributing causative factor to his disability. Plaintiff contends that this finding is against the manifest weight of the evidence. Based upon our review of the record, including

the transcript of the hearing before the Board and the various medical reports submitted in this case, we disagree.

¶ 41 In its decision, the Board found that the plaintiff showed signs of degenerative disc disease at least two years before the 2007 incident. The Board further found that after receiving "conservative treatment," plaintiff recovered from each of the incidents of 2007 and 2008, and then returned to full, unrestricted duty as a firefighter/paramedic. Moreover, the Board concluded that in 2010, the plaintiff did not file a job injury report with his superiors nor did he file any claim for worker's compensation benefits as he had done after the 2007 and 2008 incidents.

¶ 42 Plaintiff attempts to draw support from the decisions in *Kouzoukas , v. Ret. Bd. of Policemen's Annuity & Benefit Fund of City of Chicago*, 234 Ill. 2d 446, 473 (2009), *Rose v. Bd. of Trustees of Mount Prospect Police Pension Fund*, 2011 IL App (1st) 102157, ¶98, and *Scepurek v. Board of Trustees of Northbrook Firefighters' Pension Fund*, 2014 IL App (1st) 131066, ¶36, where the Court held that the Boards' decisions were against the manifest weight of the evidence. Plaintiff's reliance is unavailing, as each of these cases present facts distinguishable from the facts here in our case.

¶ 43 In *Scepurek*, a firefighter/paramedic alleged that his back pain resulted from an injury sustained while performing cardiopulmonary resuscitation (CPR) on a patient, or that it exacerbated many prior back injuries. *Scepurek*, 2014 IL App (1st) 131066, ¶6. Although all the physicians concluded that the incident contributed to claimant's disability, the Board nevertheless found that the claimant's accident did not contribute to claimant's disability and instead determined that the sole cause for the disability was the preexisting degenerative changes in his lower back. *Id.* at ¶29-30.

¶ 44 Similarly, in *Rose*, a police officer alleged that his back pain resulted from an injury sustained during an automobile accident while driving his squad car. *Rose*, 2011 IL App (1st) 102157, ¶ 1. Although eight of nine doctors who were asked to offer opinions as to the cause of claimant's disability concluded that the accident contributed to the claimant's disability, the Board concluded that claimant's injury was not a result of the accident because he fully recovered before having a second collision while off-duty. *Id.* at ¶ 97.

¶ 45 Lastly, in *Kouzoukas*, a police officer alleged that her back pain resulted from her attempt to move an intoxicated man off the sidewalk. *Kouzoukas*, 234 Ill. 2d at 448. Although every doctor who treated her, except one, opined that her pain stemmed from the incident, the Board concluded that the officer's disability was not work-related. *Id.* at 472.

¶ 46 Unlike the cases cited, this is not a case where a majority of the physicians consulted support plaintiff's position. None of the medical opinions, except for that of Dr. Orris, support the conclusion that plaintiff's disability was the result of injuries sustained in 2007 and 2008. Dr. Mather stated that he did not believe plaintiff's back pain was related to any of plaintiff's previous work injuries. He explained that plaintiff's previous back injuries had healed, and that the 2010 pain complaints were the result of degenerative changes in the discs dating back to 2005. After performing a medical records review regarding plaintiff's treatment and examination, Dr. Samo concluded that the 2007 and 2008 injuries received conservative treatment, were subsequently resolved, and were not the cause of any disabling condition in 2010. Dr. Samo also concluded that to the extent that plaintiff was found to be disabled in 2010, his disability was not a product of any work related activity.

¶ 47 In light of plaintiff's preexisting back condition and the fact plaintiff returned to full unrestricted duty as a firefighter/paramedic following his 2007 and 2008 injuries, we find the

record contained sufficient evidence to support the Board's determination. Consequently, we reject plaintiff's contention that it was clearly evident that the Board erred in concluding plaintiff's back injury was not work related and should have reached the opposite conclusion. The Board's factual findings, including its finding that the surgery was not related to work but rather degenerative diseases, are not against the manifest weight of the evidence, and for the reasons set forth above, we affirm the judgment of the circuit court of Cook County confirming the Board's decision.

Affirmed.