2017 IL App (1st) 162126-U

No. 1-16-2126

Third Division
June 28, 2017

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

MICHAEL ORRICO, Plaintiff-Appellee, v. THE VILLAGE OF OAK LAWN FIREFIGHTERS' PENSION FUND and THE BOARD OF TRUSTEES OF THE VILLAGE OF OAK LAWN FIREFIGHTERS' PENSION FUND, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 15 CH 13222 Honorable Moshe Jacobius, Judge, presiding.

JUSTICE COBBS delivered the judgment of the court.
Justices Lavin and Pucinski concurred in the judgment.

O R D E R

¶ 1 *Held*: Pension board's finding that a firefighter had recovered from his disability was against the manifest weight of the evidence where the record contained no evidence that plaintiff had fully recovered from his disability.

¶ 2 The Village of Oak Lawn Firefighters' Pension Fund (the Fund) and the Board of Trustees of the Village of Oak Lawn Firefighters' Pension Fund (the Board) appeal the circuit court's reversal of the termination of plaintiff Michael Orrico's line-of-duty disability

pension. The Board found that plaintiff had recovered from his disability after he took a job as an assistant fire chief and it therefore terminated his disability pension. Defendants contend that the Board's factual finding that plaintiff had recovered was not against the manifest weight of the evidence. We affirm the circuit court's reversal.

¶ 3 BACKGROUND

¶ 4 Plaintiff worked as a firefighter for Oak Lawn for 19 years. In October 2006, a reversing car struck plaintiff's leg during an emergency call. His left knee was injured and required surgery. As a result, he filed an application for line-of-duty disability pension benefits. Pursuant to section 4-112 of the Illinois Pension Code (Code) (40 ILCS 5/4-112 (West 2008)), three doctors examined plaintiff and determined he was permanently disabled. Following a hearing on January 8, 2008, the Board awarded a line-of-duty disability pension to plaintiff.

¶ 5 In March 2014, plaintiff was hired as an assistant fire chief by the City of Murphy, Texas. He resigned in July 2014. The Board subsequently convened and held several hearings to determine whether plaintiff had recovered from his injury.

¶ 6 At the hearings, plaintiff testified that at the time he was initially granted a line-of-duty benefit, he suffered from "constant pain" in his knee and was unable to move freely. He needed prescription pain medicine to help with the pain that kept him awake at night and increased whenever he exerted himself. He described the pain as an 8 on a scale of 10. At the time of the hearing, he was taking a non-prescription medication to relieve the pain, although he continued to use the prescription drug "from time to time" if he "had issues" with his knee. Following the accident, plaintiff underwent physical therapy and work conditioning, a "full-body-type workout." He finished those programs before the Board awarded him the

disability pension and would go to the gym occasionally to walk on a treadmill, although he had not been to the gym in the two years before the hearing. His knee was "not much different" than when he went on disability, although he rated his pain as a 3 on a scale of 10. The pain sometimes spiked to a 9, particularly if he sat in a car for a long period of time or went down stairs. His left knee was able "to extend and flex *** fully, just like the right leg." He still had trouble walking long distances or standing for longer than 15 to 20 minutes.

¶ 7 Before his injury, plaintiff was a fire lieutenant charged with supervising other firefighters as well as normal firefighter duties, including using the fire hose to suppress fires, using axes and pry-bars to enter buildings, and climbing ladders. He was also required to wear a breathing apparatus and "turn-out gear" that weighed 15 to 20 pounds.

¶ 8 In October 2013, plaintiff found an internet job posting for an assistant fire chief position in Murphy, Texas. Prior to applying, he reviewed the accompanying job description, which indicated that the assistant fire chief would be required to "supervise[] and coordinate[]" "operation services, staff training, firefighter health and safety," and regulatory compliance. The assistant fire chief would also "be designated in charge of and responsible for some or all activities of the department" when the fire chief was absent. Plaintiff testified that he had not participated in any fire suppression or rescue efforts while assistant fire chief and that an assistant fire chief would never actively participate in fire suppression or rescue. The assistant fire chief would instead coordinate the activities of other responding firefighters.

¶ 9 He acknowledged that the job description for assistant fire chief indicated that an applicant needed to be able to climb, balance, crawl, stoop, and kneel. However, he was unable to perform many of the actions listed. Due to his knee, plaintiff could not crawl, crouch down, or stoop. Despite these limitations, plaintiff applied for the position because he

believed it was "a supervisory job and a leader job." The job summary required applicants to hold or be eligible to obtain "advanced firefighter certification" from the Texas Fire Commission. Prior to applying for certification, plaintiff researched the requirements and found that they were "basically the same" as requirements for Firefighter I certification in Illinois. Although he would be required to obtain Texas certification, plaintiff believed that he already met certification criteria because he held a more advanced certification in Illinois.

¶ 10 Plaintiff interviewed for the position with the Murphy fire chief, Mark Lee. During the interview, he told Lee that he had left the Oak Lawn fire department on a disability pension after being struck by a car. He informed Lee "that there were a lot of things that [he] could not do." He mentioned his difficulty in walking, climbing stairs, and running.

¶ 11 After being hired as assistant fire chief, plaintiff did mainly clerical duties because he was not certified as a firefighter in Texas. He had his own turn-out gear, which he wore during a training exercise. He also responded to a bus accident where he coordinated with the dispatch centers. He resigned after four months in the position due to disagreements over leadership style.

¶ 12 The Board also considered two documents describing the assistant fire chief position that plaintiff reviewed during his application process: a job summary signed by plaintiff and a job posting for the position. The job summary listed several "essential duties and responsibilities," including supervising officers, acting as fire chief in the chief's absence, and "respond[ing] to critical incidents that require an advanced level of coordination in incident management." It also indicated numerous administrative duties, including assisting in developing a budget, overseeing hiring processes, and reviewing payroll and personnel reports. The summary indicated that the assistant fire chief must be eligible to obtain an

advanced firefighter certification from the Texas Commission on Fire Protection and paramedic certification from the Texas Department of State Health Services. In a section titled "Physical Demands," the documents stated that an assistant fire chief:

> "[m]ust be able to physically perform the basic life operational functions of climbing, balancing, stopping, kneeling, crouching, crawling, reaching, pulling, lifting, talking, hearing, and perform repetitive motions. Must be able to perform medium work exerting up to (80) eighty pounds of force occasionally, (40) forty pounds frequently, and (25) twenty-five pounds of force constantly. *** Subject to hazards associated with firefighting including working in both inside and outside environments, including all types of weather conditions, and exposure to smoke and high heat. Work may be in high areas or in close quarters."

Plaintiff and Lee signed the job summary.

¶ 13 The job posting included a job description and set of requirements that were substantially similar to those listed in the job summary. The document initially listed lower weights in its lifting and carrying requirements, but also included a supplemental paragraph identical to the job summary's "Physical Demands" section.

¶ 14 At a subsequent hearing, Lee testified that physical requirements listed in the job summary were "boilerplate" and required of most city workers. The duties of an assistant fire chief position are administrative and a "whole world different than the duties of" other firefighters. Neither the chief or assistant chief would ever be expected to "perform hands-on" emergency services. Instead they would stay in the "incident command position" giving the firefighters orders and making tactical decisions. Although an assistant fire chief may be sent into a building to "take up an interior operational or sector officer's position," it would

only be to direct firefighters and not "to execute a rescue." Prior to becoming fire chief, Lee had served as assistant fire chief. He never performed direct fire suppression or rescue efforts while in that role.

¶ 15 During the interview, plaintiff told Lee that he had left the Oak Lawn fire department after being struck by a car. He informed Lee that the incident had left him on disability and unable to "do the job of a firefighter." Although plaintiff said "he could no longer function as a firefighter," he did not specifically indicate which of the physical demands he could not meet. Lee noticed that plaintiff had a visible limp on his left side.

¶ 16 As part of his employment, plaintiff was required to obtain Texas certification. Lee stated that although plaintiff's training hours from Illinois certification would be accepted, he would still need to take an exam. The exam required plaintiff to set up a ladder and put on his turn-out gear, "but not carry dummies or hose packs or to climb the ladder."

¶ 17 Following the hearings, the Board issued a written finding that the record contained "satisfactory proof" that plaintiff had recovered from his disability. It explained that plaintiff's signature on the job summary certified that he could meet the physical requirements listed therein. The Board stated that the job summary and posting "clearly contemplated that [plaintiff] could be called upon to perform fire rescue and fire suppression activities if necessary." The Board specifically rejected plaintiff's and Lee's testimony that an assistant fire chief would not be required to meet the physical demands listed. The Board also stated that plaintiff's accepting of the job indicated a belief that he could perform the physical skills necessary to obtain certification as a firefighter in Texas.

¶ 18 On September 4, 2015, plaintiff brought a complaint for administrative review in the circuit court of Cook County pursuant to section 3-108 of the Code of Civil Procedure (735

ILCS 5/3-108 (West 2014)). The trial court reversed the Board's decision. Defendants appeal.

¶ 19 ANALYSIS

¶ 20 Defendants contend that the trial court erred in reversing the Board's determination that plaintiff had recovered from his injury. They argue that plaintiff "certified" that he could perform the physical demands listed on the job summary when he signed it. They assert that his acceptance of and performance in the assistant fire chief position prove that he believed he was recovered enough to serve in a fire department and potentially act in fire suppression and emergency rescue situations.

¶ 21 Before reaching the merits of defendants' contention, we must determine the appropriate standard of review. Defendants assert that the deferential "manifest weight of the evidence" standard is applicable. Plaintiff replies that the issue raised requires statutory interpretation and resolution of a mixed question of law and fact. He asserts that the less deferential *de novo* and "clearly erroneous" standards are required.

¶ 22 We review the decision of an administrative agency, not that of the circuit court. *Bertucci v. Retirement Board of the Firemen's Annuity & Benefit Fund*, 351 Ill. App. 3d 368, 370 (2004). The primary question before this court is whether the Board's factual determinations had sufficient factual support in the record. Despite plaintiff's contentions otherwise, it is settled law that an administrative agency's factual determinations are reviewed under the manifest weight of the evidence standard. *Hoffman v. Orland Firefighter's Pension Board*, 2012 IL App (1st) 112120, ¶ 18; see also *O'Brien v. Board of Trustees of Firemen's Fund of City of East St. Louis*, 64 Ill. App. 3d 592, 596 (1978) (reversing administrative board's findings as "clearly against the manifest weight of the evidence.")

¶ 23 Under this standard, an appellate court will reverse an agency's factual determinations only if they are against the manifest weight of the evidence, meaning that "the opposite conclusion is clearly evident" from the record. *Hoffman*, 2012 IL App (1st) 112120, ¶ 18. The court will not reweigh evidence in order to make an independent determination of the facts. *Id.* 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." *Abrahamson v. Illinois Department of Professional Regulation*, 153 Ill. 2d 76, 88 (1992). An agency's factual determinations should be affirmed if the record contains evidence to support its conclusions. *Marconi v. Chicago Heights Police Pension Board*, 225 Ill. 2d 497, 534 (2006). Yet, administrative review is not "a rubber stamp of the proceedings below merely because the Board heard witnesses, reviewed records, and made the requisite findings." *Bowlin v. Murphysboro Firefighters Pension Board of Trustees*, 368 Ill. App. 3d 205, 211 (2006). Even if a decision is supported by some disputed evidence, "it is not sufficient if upon a consideration of all the evidence the finding is against the manifest weight." *Id.* at 211-12.

¶ 24 We note that the parties' arguments each raise tangential questions of statutory interpretation. Thus, where our review requires that we interpret the meaning of a statute, we do so *de novo*. *Mulry v. Berrios*, 2017 IL App (1st) 152563, ¶ 9.

¶ 25 Section 4-110 of the Code (40 ILCS 5/4-110 (West 2008)) provides that any firefighter injured in the line of duty, such that he or she is rendered "physically or mentally permanently disabled for service in the fire department," is entitled to a disability pension. Once a disability pension has been awarded, a board may only terminate the pension "[u]pon satisfactory proof to the board that a firefighter on the disability pension has recovered from

disability." 40 ILCS 5/4-112 (West 2008); see also *Hoffman*, 2012 IL App (1st) 112120, ¶¶ 22, 26.

¶ 26 In *O'Brien*, a firefighter was awarded a line-of-duty disability pension by a city pension board when he presented with a condition manifested by a loss of sensation in the hands. *O'Brien* 64 Ill. App. 3d at 593. According to a medical examiner, the condition permitted the firefighter "to perform light duties." *Id*. The city board reinstated the firefighter to active duty in a role that he was able to perform. *Id*. The firefighter did not accept the reinstatement and the city board, finding that he could perform light duties, removed the firefighter from the pension rolls. *Id*. at 593-94. The appellate court considered whether a board could properly terminate a disability pension if the firefighter "can perform an available job with the department involving lighter duties than fighting fires, although the fireman's original disability had not changed in any way." *Id*. at 595. On appeal, the city board stipulated that the firefighter "had not recuperated and that his neurological disability had not changed in any way." *Id*. at 594. Noting that a board could terminate a pension only upon satisfactory proof that a fireman had recovered from his disability, the court ruled, "[T]here must be some evidence of recovery from the disability to justify the pension's termination." *Id*. at 595-96. The court explained, "The statutory language unequivocally sets forth the requirement that a fireman recover from his disabling illness before [a board] can terminate the pension and reinstate the fireman into active service." *Id*. at 595. It reversed the city board's findings, concluding there was no evidence that the firefighter had recovered from his disability. *Id*. at 596.

¶ 27 Defendants assert that *O'Brien* is inapposite and that it was wrongly decided. They argue that the Code does not require recovery to be shown by proof that an individual is once more

able to perform full and unrestricted firefighting duty. They cite section 6-112 of the Code (40 ILCS 5/6-112 (West 2008)) for the proposition that a disability is "a condition of physical or mental incapacity to perform any assigned duty or duties in the fire service." They argue that therefore a board need only prove that a firefighter could perform any duties in the fire service. We disagree. The question before the Board was not whether a disability existed sufficient to grant a disability pension. It had already made that decision and could not reverse its determination absent a showing that plaintiff had recovered from his disability. See *Hoffman*, 2012 IL App (1st) 112120, ¶ 7 (holding that a board may not "revisit its initial decision to award the plaintiff a disability pension" without proof of recovery). The question before the Board was whether plaintiff had recovered. Section 4-112 indicates that a pension will be terminated upon proof an individual "has recovered" not proof that the individual has partially recovered. See 40 ILCS 5/4-112 (West 2008). Accordingly, we decline defendants' invitation to disregard *O'Brien*'s reasoning.

¶ 28 Under *O'Brien*, we must determine whether the record contains sufficient proof that plaintiff had fully recovered from his disability such that he could once more perform the duties of an active firefighter. We find that the record contains no such evidence. The Board presented no direct evidence that plaintiff had physically recovered. Plaintiff testified that he was still in constant pain and listed the various activities he could no longer do. Chief Lee testified that plaintiff had told him he could not perform the duties of an active firefighter and that he had noticed that plaintiff limped on his left side. There was no medical evidence[1] offered to indicate that plaintiff's knee had recovered, nor was there any evidence of plaintiff performing activities that showed he had recovered. Although the Board asserts that plaintiff

[1]Although we note that medical evidence could have bolstered the trial court's finding, we disagree with plaintiff's unsupported contention that medical evidence was necessary.

certified that he could perform the physical tasks listed in the job summary, the "boilerplate" requirements listed do not equate to the more strenuous tasks required of firefighters. Nor is there any support for the Board's finding that the assistant fire chief position must involve some potential for active fire suppression and emergency rescue. Both plaintiff and Chief Lee testified that the assistant fire chief would never be expected to perform such active duties. The job posting and summary listed administerial and supervisory duties without any suggestion that the position would involve active fire suppression or rescue. We generally defer to an agency's credibility determinations; however, that "deference is not boundless." *Roman v. Cook County Sheriff's Merit Board*, 2014 IL App (1st) 123308, ¶ 84. Even if we accept the Board's dismissal of plaintiff and Lee's testimony, that does not provide positive evidence for its conclusion that plaintiff was likely to perform firefighter duties.

¶ 29 Defendants also argue that plaintiff intended to attempt to gain Texas certification and would therefore have to perform fire suppression tasks for an examiner. This argument is unpersuasive. The record is unclear on exactly what physical tasks plaintiff would have to perform to complete certification in Texas, given his Illinois certification. Yet even if the certification required a full demonstration of fire suppression and rescue skills, at most there is evidence that plaintiff thought he might be able to pass the examination. Although plaintiff applied for certification, he never actually performed the tasks required for an examiner. There is no evidence that he ever practiced the skills or demonstrated an ability to successfully complete certification. Plaintiff's willingness to attempt the physical tasks alone does not show an actual recovery from his disability. Viewing the record in its entirety, we must therefore find the Board's finding that plaintiff had recovered from his disability was against the manifest weight of the evidence.

¶ 30 CONCLUSION

¶ 31 For the foregoing reasons, we find the Board's determination to be against the manifest weight of the evidence. Accordingly, we affirm the circuit court of Cook County's reversal of the Board's decision.

¶ 32 Affirmed.