2017 IL App (2d) 160549-U
No. 2-16-0549
Order filed February 22, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

JACK WESTPHALL, Plaintiff-Appellant, v. AURORA FIREFIGHTERS' PENSION FUND, THE BOARD OF TRUSTEES OF THE FIREFIGHTERS' PENSION FUND, The Members of the BOARD OF TRUSTEES OF THE AURORA FIREFIGHTERS' PENSION FUND, President JIM MAYNARD, HAL CARLSON, BRIAN CAPUTO, GREG JACKMAN and JOHN LEHMAN, Defendants-Appellants.	)	Appeal from the Circuit Court of Kane County. No. 15-MR-415 Honorable David R. Akemann, Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Hutchinson and Spence concurred in the judgment.

ORDER

¶ 1 *Held:* The Board's decision to deny plaintiff a line-of-duty disability pension and instead grant him a nonduty pension was not against the manifest weight of the evidence. Affirm.

¶ 2 This administrative review action was brought by plaintiff, Jack Westphall, from the denial of his application for a line-of-duty disability pension, pursuant to section 4-110 of the Illinois Firefighters' Pension Code (Code) (40 ILCS 5/4-110 (West 2014)) by defendants, the

Aurora Firefighters' Pension Fund, the Board of Trustees of the Firefighters' Pension Fund, the members of the Board of Trustees of the Aurora Firefighters' Pension Fund, President Jim Maynard, Hal Carlson, Brian Caputo, Greg Jackman, and John Lehman (collectively the Board). The Board determined, by a preponderance of the evidence, that plaintiff's disability to his lower back was neither caused by nor aggravated by his duty activities on May 15, 2011, and August 2, 2012, in order for entitlement to a line-of-duty disability pension under section 4-110. The trial court affirmed the Board's decision. Plaintiff appeals the Board's finding that his lower back disability was not causally connected to his work-related activities entitling him to a line-of-duty disability pension.

¶ 3 I. BACKGROUND

¶ 4 Plaintiff was hired as a firefighter/paramedic for the City of Aurora Fire Department on September 4, 1990. Plaintiff applied for a line-of-duty disability pension benefit under section 4-110, alleging that the incident of May 15, 2011, and the aggravation on August 2, 2012, either caused or contributed to his disability.

¶ 5 Specifically, plaintiff alleged that the first incident on May 15, 2011, occurred around 4 p.m., when he responded to a call of a fully involved fire of a multifamily apartment complex. During the search of the complex, he did forcible entry, some fire suppression, and carried victims out of the building. As a result, plaintiff alleged that he suffered a disabling injury to his lower back. Plaintiff went to the Provena Mercy Medical Center emergency room on the date of the injury, where he was diagnosed with lumbar strain, prescribed pain medications, and taken off of full duty work. The next day, he was examined by the occupational health doctor at Provena Occupational Health (Occupational Health) where he was diagnosed with back sprain. Later, an MRI finding showed L5/S1 disc protrusions and a small annular tear. Doctors placed plaintiff on work restriction.

¶ 6 On June 20, 2011, plaintiff sought the opinion and treatment of his treating chiropractor, Brian Berkey, D.C. Dr. Berkey conducted a physical examination and referred plaintiff to Dr. Patrick Sweeney, an orthopedic surgeon. On June 23, 2011, Dr. Sweeney examined plaintiff and read his MRI results. Dr. Sweeney confirmed the findings that plaintiff suffered a herniated disc at L5/S1. Plaintiff continued to treat with Dr. Berkey and Dr. Sweeney throughout 2011, 2012, and 2013.

¶ 7 In July 2011, plaintiff was sent by his workers compensation carrier for an independent medical examination to Dr. Carl Graf. Dr. Graf ordered plaintiff to continue restricted work duty and physical therapy. In December 2011, Dr. Yuan Chen performed bilateral lumbar joint facet injections on plaintiff. Plaintiff received three more epidural steroid injections between February 2012 and January 2013. On July 18, 2012, Dr. Sweeney determined plaintiff to be fully disabled to return to full service for the fire department. Apparently, plaintiff returned to full-duty service on July 30, 2012, because he had received a letter from the City of Aurora stating that he would be terminated because he was out of sick time.

¶ 8 On August 2, 2012, while attending a drill dressed in full gear and carrying a self-contained breathing apparatus (SCBA pack), plaintiff successfully negotiated the maze, but during that time, plaintiff alleged he was injured again when he experienced a "lot of pain" in his lower back. Plaintiff went to Occupational Health and has not returned to full service for the Aurora Fire Department since. Plaintiff has been diagnosed with lumbar degenerative disc disease and an L5/S1 disc herniation and has been advised by his doctors that he may not return to full service for the Aurora Fire Department due to the restrictions caused by the condition of his lower back. Plaintiff is currently on administrative leave without pay. Plaintiff has received no surgical intervention for repair of his lower back as the result of his alleged injury.

¶ 9 On November 26, 2012, plaintiff filed an application for a line-of-duty disability pension benefit pursuant to section 4-110 of the Code. Medical evidence of independent medical examinations, treating physicians' records and reports, depositions, and hospital records were submitted. The Board ordered that plaintiff be examined by three independent physicians. The Board requested plaintiff to provide these physicians with plaintiff's medical records and a description of the duty requirements of a firefighter for the City of Aurora Fire Department.

¶ 10 A. Plaintiff's Testimony

¶ 11 Plaintiff testified at the hearing before the Board regarding the alleged work-related injury occurring on May 15, 2011, and the symptoms of his pain and treatment which he received afterwards. Initially, plaintiff testified that he saw Dr. Berkey for neck and shoulder problems from a prior incident, but then he stated that he did have some occasional back pain, which he described as a dull pain. Dr. Berkey performed chiropractic adjustments and therapy and it cleared up in a few days. However, plaintiff testified that the back pain he had experienced on May 15 was totally different from the back pain prior to the May 15 incident. Plaintiff described the pain in his back as if "somebody had taken a sharp knife, stuck it up [my] butt, and was scraping the bone." Plaintiff stated that the pain would not go away and he has had to take pain medication and muscle relaxants daily.

¶ 12 B. Plaintiff's Lower Back Treatment Prior to May 15

¶ 13 Prior to the work-related incident on May 15, Dr. Berkey's records indicate that plaintiff visited Dr. Berkey's office 10 times from June 17, 2009, through May 4, 2011, for treatment relating to plaintiff's lower back discomfort. At his evidence deposition, Dr. Berkey testified that plaintiff had been seeing him since 2004, at least periodically for pain, stiffness, and tightness in his back. On June 17, 2009, plaintiff complained of "lower back discomfort that is getting better." On February 4, 2010, plaintiff complained of an increase in low back discomfort

as the result of standing for long periods. On March 31, 2010, plaintiff reported again that his lower back was tight from lifting more due to refinishing his basement. One month later, plaintiff sought treatment for tightness in his back and neck. On February 9, 2011, plaintiff complained again of pain and discomfort in his neck and lower back from shoveling snow. Plaintiff received treatment for low back pain and discomfort on a monthly basis thereafter through May 4, 2011 (11 days prior to the initial alleged injury date). Dr. Berkey's notes of May 4, 2011, state: "Patient is complaining of pain/discomfort in the following areas: neck and low back from not being able to work out last week. Pain at lumbosacral junction." Plaintiff did not receive treatment from Dr. Berkey again until June 1, 2011, two weeks after the alleged initial event of May 15.

¶ 14 C. Medical Opinion of Causation

¶ 15 1. Dr. Patrick Sweeney

¶ 16 Dr. Sweeney testified that he began treatment on plaintiff in June 2011. After plaintiff's July 21, 2011, visit, Dr. Sweeney recommended that plaintiff return to sedentary working duty with a 10-pound lifting restriction, no bending below knee height, and no twisting or stretching. Dr. Sweeney was asked if, after reviewing the records of Dr. Berkey, he was able to form an opinion as to the cause of plaintiff's low back condition. Dr. Sweeney responded that plaintiff's conditions "clearly changed on the day of his injury to where now he was seeing the chiropractor sometimes daily, definitely weekly." In Dr. Sweeney's opinion within a reasonable degree of medical and surgical certainty, plaintiff suffered an L5/S1 herniation at the time of his injury on May 15, which was the reason for plaintiff's complaints, and that the injury plaintiff sustained on August 2, 2012, after plaintiff returned to work against Dr. Sweeney's advice, emanated from the injury in May 2011.

¶ 17 2. Brian Berkey, D.C.

¶ 18 Dr. Berkey testified that on June 15, 2011, he examined plaintiff's lower back and reviewed the images from the MRI. Following the physical examination, Dr. Berkey diagnosed plaintiff with lumbar disc herniation, lumbar nerve root injury, lumbar radiculitis, lumbar degeneration, disc degeneration, spinal facet syndrome, restricted motion, and myospasm. Dr. Berkey treated plaintiff conservatively between June 2011 and March 2013.

¶ 19 Dr. Berkey testified that, based on a reasonable degree of chiropractic certainty, the cause of plaintiff's current condition was the result of fire extinguishing and rescue attempts on May 15, 2011.

¶ 20 3. Independent Medical Examinations (IME)

¶ 21 Dr. Alpesh A. Patel was retained by the Board to perform an IME pursuant to section 4-112 of the Code (40 ILCS 5/4-112 (West 2014)). He opined that the cause of plaintiff's current symptoms and his disability was associated with the reported injury of May 15. He wrote: "I do believe that [plaintiff] has suffered an exacerbation or aggravation of a preexisting L5-S1 degenerative disk disease."

¶ 22 Dr. George E. Charuk, D.O., was the second physician retained by the Board. He wrote that, after reviewing the medical records and opinions as to the cause or causes of plaintiff's condition, he believed that, within a reasonable degree of medical certainty, that plaintiff had an exacerbation of a back problem on May 15, 2011. "As noted in the medical records, he did have complaints of back pain dating back to 2000 as noted in 2001 note and in 2009. However it did not become severe until 2011."

¶ 23 Dr. Fabrice Czarnecki, the third physician who examined plaintiff at the Board's request, opined that plaintiff was permanently disabled. However, in addressing the issue of causation, he reported the following:

"The likely cause of [plaintiff's] pain and disability is the chronic degenerative changes of his lumbar spine[.] I do not think that the event of 5/15/11 was the cause of his back pain. He had low back pain on and off for several years before the event of 5/15/11. He had been treated monthly between February and May 2011 for low back pain. He saw Dr. Berkey for low back pain just 11 days before the event of 5/515/11. He does not describe any significant injury that occurred on 5/15/11. The findings of the MRI of 6/8/11 were likely caused by degenerative changes rather than a single traumatic episode, and were likely pre-existing prior to the event of 5/15/11. It even seems that his pain has been worsening over the past 8 months despite the fact that he has not been working."

¶ 24 Dr. Carl Graf, a physician requested by the City of Aurora to perform an independent medical examination of plaintiff pursuant to Workers Compensation, after reviewing Dr. Berkey's records, reported the following, in part:

"When [plaintiff] was seen for an exam on July 1, 2011[,] he noted *** his lower back complaints were new, though he had seen a chiropractor in the past for his shoulder. At that time he denied any prior history of lumbar complaints. It is evident from the medical records reviewed that this is certainly not the case. In fact, it is evident that just days prior to the work injury in question, [plaintiff] presented to his chiropractor *** 'I had lower back pain and discomfort from not being able to work out this week.' Plaintiff continues to have treatments for his back as he had for years prior, all documented by his chiropractor. I find it extremely interesting that just one month after the injury in question, [plaintiff] notes to his chiropractor, 'I didn't have any specific back pain prior to the injury at work.' This statement is unfounded and refuted by the years of chiropractic notes as summarized above."

¶ 25 It was Dr. Graf's opinion that plaintiff's lumbar condition was preexisting in nature and bore no relation to the work injury; that there was no exacerbation of pain or otherwise. It was therefore Dr. Graf's opinion that the care and treatment received by plaintiff related to his lumbar spine and should be considered outside of his claim. Dr. Graf stated that the event of May 15 neither served as a cause nor as an aggravation of plaintiff's preexisting lower back condition, resulting in a disability.

¶ 26 The Board concluded that the evidence established plaintiff suffers from a low back disability, but that his lower back disability was not caused or aggravated by the activities of May 15, 2011, or August 2, 2012, as alleged in support of plaintiff's application. It found that plaintiff's lower back disability was neither caused nor aggravated by any specific "act of duty," as required for a "line of duty" disability pension benefit under section 4-110, and accordingly denied plaintiff a line of duty disability pension benefit. However, the Board concluded that plaintiff's physical disability entitled him to a "not in duty" disability pension benefit pursuant to section 4-111 of the Code (40 ILCS 5/4-111 (West 2014)).

¶ 27 Plaintiff sought review of the Board's decision in the trial court, arguing that the factual findings were contrary to the manifest weight of the evidence. The trial court found that the decision of the Board was not against the manifest weight of the evidence and affirmed the decision of the Board. Plaintiff timely appeals.

¶ 28 II. ANALYSIS

¶ 29 Based on the evidence provided in plaintiff's administrative case, the Board concluded that plaintiff is permanently disabled. See 40 ILCS 5/4-105b (West 2014). Having determined plaintiff to be permanently disabled, which neither party disputes, the Board then denied plaintiff's duty-related pension application because it found that plaintiff's permanent disability was not caused, in whole or in part, by any on-the-job injury. Plaintiff appeals this finding.

¶ 30 Section 4-110 of the Code states that a firefighter may receive a line-of-duty disability pension if the claimant "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." 40 ILCS 5/4-110 (West 2014).

¶ 31 In plaintiff's case, the acts of duty were (1) responding to a call of a fully involved fire of a multifamily apartment complex on May 15, 2011, and (2) a drill on August 2, 2012. Plaintiff alleged that, as a result of the incident of May 15, 2011, he suffered a disabling injury to his back, and the aggravation on August 2, 2012, either caused or contributed to his stated disability. The Board concluded, by a preponderance of the evidence, that plaintiff's disability was neither caused by nor aggravated by the alleged work-related incidents or activities. Plaintiff argues that the Board's finding that no work-related incidents either caused or were a contributing causative factor to his disability is against the manifest weight of the evidence.

¶ 32 Thus, the sole question on appeal is one of causation, which is a purely factual determination, ultimately reserved for the administrative board's consideration, and the board in rendering its decision must rely upon competent evidence in the record. See, *e.g.*, *Marconi v. Chicago Heights Police Pension Board*, 225 Ill. 2d 497, 540 (2006).

¶ 33 Under the Administrative Review Law, we may not consider new or additional evidence beyond what was originally presented to the Board, and the "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 2014). Accordingly, we defer to the board on questions of fact unless its findings are against the manifest weight of the evidence, meaning that the opposite conclusion is clearly evident. *Wade v. City of Chicago Police Pension Board*, 226 Ill. 2d 485, 504 (2007) (citing *Marconi*, 225 Ill. 2d at 532); *Jones v. Board of Trustees of the Police Pension Fund*, 384

Ill. App. 3d 1064, 1067 (2008). If the record contains evidence that supports the board's factual conclusions, then we shall not disrupt those conclusions, even if an opposite conclusion is reasonable. *Robbins v. Board of Trustees of the Carbondale Police Pension Fund*, 177 Ill. 2d 533, 538 (1997). Plaintiff bears the burden of proof and will be denied relief if he fails to meet that burden. *Wade*, 226 Ill. 2d at 505 (citing *Marconi*, 225 Ill. 2d at 532-33).

¶ 34 It is well established that, in order to obtain a line-of-duty pension, a claimant need not prove that a duty-related accident is the sole cause, or even the primary cause, of his disability. *Luchesi v. Retirement Board of the Fireman's Annuity & Benefit Fund*, 333 Ill. App. 3d 543, 550 (2002). "There is no requirement that the duty-related incident be the originating or primary cause of the injury, although a sufficient nexus between the injury and the performance of the duty must exist." *Barber v. Board of Trustees of the Village of South Barrington Police Pension Fund*, 256 Ill. App. 3d 814, 818 (1993) abrogated on other grounds by *Kouzoukas v. The Retirement Board of the Policemen's Annuity and Benefit Fund of the City of Chicago*, 234 Ill. 2d 446 (2009). Rather, the claimant only needs to prove "that the duty-related accident is a causative factor contributing to the claimant's disability." *Luchesi*, 333 Ill. App. 3d at 550. In particular, a line-of-duty pension may be based upon the duty-related aggravation of a claimant's preexisting physical condition. *Wade*, 226 Ill. 2d at 505; see also *Rose v. Board of Trustees of the Mount Prospect Police Pension Fund*, 2011 IL App (1st) 102157, ¶ 92; *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 205 (2003) ("even though an employee has a preexisting condition which may make him more vulnerable to injury, recovery for an accidental injury will not be denied as long as it can be shown that the employment was also a causative factor").

¶ 35 As stated, plaintiff contends that the Board's finding that no work-related incidents either caused or were a contributing causative factor to his disability is against the manifest weight of the evidence. Plaintiff's main argument is that the Board placed significant weight on the

opinions of Drs. Graf and Czarnecki and did not give any weight to plaintiff's treating physicians, Drs. Berkey and Sweeney "simply because their opinions were inconsistent." Plaintiff also contends that the opinions of Drs. Graf and Czarnecki should be disregarded as incompetent.

¶ 36 Plaintiff's arguments appear to be little more than an attempt to reweigh the evidence and make credibility determinations. The Board, as the finder of fact, makes credibility determinations and assigns weight to testimony and other evidence; we do not weigh the evidence or substitute our judgment for that of the Board. *Lambert v. Downers Grove Fire Department Pension Board*, 2013 IL App (2d) 110824, ¶ 49 (McLaren, J., dissenting). As it was entitled to, the Board placed significant weight on the detailed medical reports of preexisting treatment by plaintiff's treating chiropractor, Dr. Berkey, regarding plaintiff's history of complaints of chronic pain in his lower back. The Board also placed great weight on the report of examination of Dr. Czarnecki, and the reports of examination and evidence deposition testimony of Dr. Graf, both of whom relied, in part on plaintiff's history of back complaints in formulating their opinions that the event of May 15 neither served as a cause or aggravation of plaintiff's preexisting degenerative disc disease. Their opinions were not inconsistent with the evidence given to them.

¶ 37 Plaintiff goes to great lengths in his brief to show how Dr. Graf's opinions are flawed or incompetent. Plaintiff notes that Dr. Graf could not explain how plaintiff was able to work without any work restrictions, without any pain medication, and was able to perform all of the strenuous work activities prior to May 15 but not afterwards. Plaintiff notes Dr. Graf's response: "I can answer that anything is possible. I would have to look at the symptoms beforehand and afterwards, which were similar; and that is why I had rendered the opinion that I had regarding causation." Plaintiff asserts Dr. Graf's opinion was not reasonable because after May 15,

plaintiff had subjective complaints of chronic pain. Plaintiff further maintains that Dr. Graf's opinion was not made within a "reasonable degree of medical certainty."

¶ 38 Plaintiff appears to misconstrue Dr. Graf's opinion. At his evidence deposition, Dr. Graf was asked whether the fact that plaintiff was given work restrictions and epidural steroid injections after the May 15 event indicated that something changed. In reply, Dr. Graf stated "No." It was Dr. Graf's opinion that plaintiff had identical complaints of pain prior to and following his injury and he opined that, if plaintiff would have presented prior to the May 15 event, he would have had restrictions just as he recommended following the injury in question.

¶ 39 Moreover, plaintiff misstates the record. In his evidence deposition testimony, Dr. Graf repeatedly stated "within a reasonable degree of medical and surgical certainty" that plaintiff's current condition and complaints of low back issues were not related to any work injury and that any disc herniation experienced by plaintiff predated the initial event of May 15. See *Carillo v. Park Ridge Firefighters' Pension Fund*, 2014 IL App (1st) 130656, ¶ 33 (it is permissible for expert to express opinion in terms of probability instead of absolute certainty).

¶ 40 Plaintiff argues that this case is analogous to *Wade v. City of North Chicago Police Pension Board*, 226 Ill. 2d 485 (2007). In *Wade*, four doctors found the plaintiff to be disabled. One stated that the plaintiff's condition " 'could [have] been aggravated' " by a 2002 incident. *Id*. at 496. Three other doctors all affirmatively stated that the plaintiff's condition was either caused or aggravated by the work incident. *Id*. at 498-99. A fifth doctor, Dr. James Milgram, was the only dissenter, finding that the plaintiff was not disabled and that the tears in his knee were due to a preexisting condition. *Id*. at 501. However, in his report, Dr. Milgram made multiple misstatements of the evidence which showed that he either "selectively disregarded, failed to recall, or never reviewed portions of plaintiff's medical records." (Internal quotation marks omitted.) *Id*. at 506. The *Wade* court found that Dr. Milgram "was not credible, because

his conclusions were inconsistent with the facts available to him" and therefore, the Board erred in relying solely upon his opinion to deny the plaintiff a line-of-duty disability pension. (Internal quotation marks omitted.) *Id*. at 507-08.

¶ 41 *Wade* is distinguishable from the present case. In *Wade*, the Board rested its decision upon the testimony of a single doctor whose report was not credible because his conclusions were inconsistent with the facts available to him. By contrast, here, both Dr. Graf and Dr. Czarnecki opined that plaintiff's disability was not related to any work-related incident or incidents. Moreover, plaintiff presents no reason to question their credibility. Both doctors based their opinions on the available facts, including plaintiff's history of treatment for back pain.

¶ 42 In sum, it is clear that the medical evidence in this case was divided on the issue of causation. However, the Board chose to believe the opinions of Drs. Graf and Czarnecki, as well as the medical reports of preexisting treatment, rather than the opinions of Drs. Berkey, Sweeney, Patel, and Charuk. We cannot say that the Board's determination was against the manifest weight of the evidence. Here, the record contains sufficient evidence to support the Board's conclusion that no act of duty was a contributing causative factor to plaintiff's disability.

¶ 43 III. CONCLUSION

¶ 44 For the preceding reasons, we find that the Board's decision to deny plaintiff a line-of-duty disability pension and instead grant him a nonduty pension was not against the manifest weight of the evidence. The decision of the Board and the judgment of the circuit court are affirmed.

¶ 45 Affirmed.