

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

GINO COLUCCI,)	Appeal from the Circuit Court
)	of McHenry County.
Plaintiff-Appellant,)	
)	
v.)	No. 15-MR-668
)	
CRYSTAL LAKE FIREFIGHTERS’)	
PENSION FUND and THE CITY OF)	
CRYSTAL LAKE,)	Honorable
)	Thomas A. Meyer,
Defendants-Appellees.)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Burke and Schostok concurred in the judgment.

ORDER

¶ 1 *Held:* The Pension Board did not err in determining that plaintiff was not disabled and, therefore, was not entitled to a disability pension.

¶ 2 Plaintiff, Gino Colucci, submitted an application for line-of-duty disability benefits, or, in the alternative, not-in-the-line-of-duty disability benefits under the Illinois Pension Code (40 ILCS 5/4-110, 4-111 (West 2014)), based on a sleep disorder and related anxiety. The circumstances of the case called for the Board of Trustees of the Crystal Lake Firefighters’ Pension Fund (Board) to assess the expert evaluations and distinguish between a person who might be unqualified, unfit, or impaired but still able to work versus a person who is disabled as that term is understood under the Pension Code. It also called for the Board to assess Colucci’s

credibility when testifying to the severity of his symptoms. The Board determined that Colucci was not disabled for the purposes of receiving a disability pension, and it denied his application. The circuit court affirmed. We affirm.

¶ 3 I. BACKGROUND

¶ 4 A. General Timeline

¶ 5 On November 6, 2006, the City of Crystal Lake Fire Department (Department) hired Colucci. On November 6, 2008, Colucci began “regular appointment” with the Department. For a significant portion of 2011, Colucci received workers’ compensation benefits for a shoulder injury.

¶ 6 On March 28, 2014, Colucci applied for, and received, a 12-week leave through the Family Medical Leave Act (FMLA). The application was certified by his treating psychologist, Lynda Wargolet. Colucci alleged exhaustion, among other issues. Wargolet later reported that Colucci was subject to a hostile work environment. The City initiated an investigation of that claim.

¶ 7 Meanwhile, between March and May 2014, Colucci provided the City with at least four different return-to-work dates and statuses, *i.e.*, ranging from definite to an indefinite return dates and ranging from full-duty to restricted-duty statuses. The last report, dated May 14, 2014, stated that Colucci suffered from insomnia, anxiety, depression, and exaggerated stress response consistent with Emergency Responder Exhaustion Syndrome (ERES).

¶ 8 On May 23, 2014, Colucci met with the City’s human resource director, Ann Everhart, and the Department chief, Paul DeRaedt. The record contains conflicting documentation as to what was said at that meeting. It is clear, however, that within the weeks following that meeting, Colucci simultaneously pursued three separate claims: (1) Public Employee Disability Act

(PEDA) (5 ILCS 345/0.01 *et seq.*) (West 2014) (allowing leave up to one year with full pay based on injury incurred in the line of duty)); (2) Workers' Compensation Act (820 ILCS 305/1 *et seq.* (West 2014)); and, on June 2, 2014, (3) a line-of-duty disability pension, or, alternatively, a not-in-the-line-of-duty disability pension under the Pension Code (40 ILCS 5/4-110, 4-111 (West 2014)).¹ In his pension claim, Colucci alleged a diagnosis of ERES caused by the cumulative effects of stress, such as witnessing and being involved in multiple traumatic incidents and hazardous tasks, sleep deprivation and shift-work disorder, work-related injuries, and ongoing workplace bullying within a certain clique of supervisors.

¶ 9 B. Pension Hearing

¶ 10 On March 10, 2015, the Board conducted a hearing on Colucci's pension application. The Board reviewed Colucci's employment records, medical records, the evaluations of three physicians (Catherine Frank, M.D., Robert Reff, M.D., and Steven Weine, M.D.) as required by section 4-112 of the Pension Code (40 ILCS 5/4-112 (West 2014)), and the fitness examination initiated by the City performed by Richard Harris, M.D. Colucci was the only witness to testify.

¶ 11 1. Employment Records

¶ 12 The Board reviewed documentation concerning Colucci's job description, workers' compensation claims, and allegation of a hostile work environment. Colucci's job description listed 16 job requirements. These included "ability to work in a shift environment," and "ability to meet the physical demands of the position." In a separate section addressing the physical

¹ An applicant cannot receive benefits under both PEDA and the Pension Code. 5 ILCS 345/1(d) (West 2014). Colucci's pursuit of the pension claim was an effective abandonment of the other claims, and the other claims remained unresolved as of the hearing.

demands of the position, the document stated: “Reasonable accommodations may be made to enable individuals with disabilities to perform the essential functions.”

¶ 13 Colucci received workers’ compensation payments during much of 2011 for a shoulder injury. In an e-mail from Everhart to the Intergovernmental Risk Management Agency, Everhart requested that Colucci receive an MRI:

“This is his second shoulder injury ([first] for this shoulder ***) and he was not doing anything really strenuous—shoveling snow around a fire hydrant. *** Just so you know, in a recent discussion around the firehouse kitchen table, when asked ‘how long he was going to milk this one?’ he said something to the effect of ‘oh a few weeks or until I can get a pension for it.’ ”

¶ 14 The City issued a report concerning Colucci’s claim of a hostile work environment. On June 9, 2014, the City received a letter from Wargolet, stating that a hostile work environment was a causative factor in Colucci’s condition. When the City asked Colucci about the claim, Colucci provided examples of several incidents dating back to 2008. However, the City had no record of any official complaint from Colucci. The City interviewed persons who witnessed those incidents. A “recurrent theme” from witnesses was that Colucci “did not accept criticism well and that he became defensive when criticized.” The witnesses disagreed that Colucci was singled out for differential treatment or harassed. The report concluded that there was no truth to Colucci’s claim of a hostile work environment.

¶ 15 2. Medical Records

¶ 16 In 2009, Colucci first sought treatment for trouble sleeping. Dr. Brian Chudik diagnosed Colucci with “shift-work disorder,” and prescribed medication for anxiety and insomnia. In 2012, Dr. Syed Munzir, a sleep specialist, diagnosed Colucci with shift-work disorder and

insomnia due to an anxiety disorder. In 2014, Wargolet issued an FMLA certification and stated that Colucci should not perform shift work for at least 12 weeks. Wargolet diagnosed Colucci with ERES, chronic insomnia, depression, and anxiety. Wargolet noted that Colucci slept only five to six hours per night.

¶ 17 3. Section 4-112 Physicians

¶ 18 i. Dr. Frank

¶ 19 Frank conducted an evaluation on December 31, 2014. She determined that Colucci had insomnia disorder, specifically, circadian rhythm sleep-wake disorder, shift work type. “Insomnia commonly has adverse effects such as fatigue, mood disturbance, anxiety, and neurocognitive impairment.” Colucci suffered from these effects. The resulting anxiety, for example, itself met the DSM-5 criteria for anxiety disorder, not otherwise specified.

¶ 20 Frank reported that, upon quitting 24-hour shift work, Colucci experienced significant improvement in his sleep pattern. Colucci performed well on concentration and attention tests. Similarly, his anxiety remitted.

¶ 21 Frank determined that Colucci is *not* currently disabled from a sleep disorder and could return to work *with accommodation*. Specifically, Colucci should not work the 24-hour swing shift or overnight shifts. “If [Colucci] were to return to his previous work schedule and have multiple nocturnal awakenings as well as swing shifts, he would in all probability develop severe insomnia again.”

¶ 22 While Frank accepted that Colucci had insomnia and anxiety, she rejected many of his other allegations of illness and distress. In her view, Colucci did not have ERES. Neither the American Psychiatric Association nor the American Medical Association recognize ERES as a disorder. Even accepting ERES as a disorder, Colucci did not demonstrate the key symptom of

exhaustion. Exhaustion for the purposes of an ERES diagnosis means “depletion of [the] ability to cope,” not the lay-man’s use of the word as fatigue resulting from an inability to sleep. Also, Colucci alleged that his fatigue caused him to make serious mistakes, such as administering the wrong dosage of a therapeutic agent, but none of the mistakes were documented in a performance review. Additionally, Colucci did not have a mood disorder, psychosis, ADD, or PTSD. As to the alleged PTSD, Colucci had bad memories about responding to a fatal accident, but the memories were not intrusive and did not cause him functional impairment. Frank also doubted Colucci’s allegation of a hostile work environment: “he never spoke up regarding his concerns nor elicited the assistance of his union.”

¶ 23 ii. Dr. Reff

¶ 24 Reff performed an evaluation on January 5, 2015. He determined that Colucci’s “primary impairing condition” is a sleep disorder. In turn, Colucci’s inability to sleep caused him anticipatory anxiety. “As is typical with individuals with chronic sleep impairment, [Colucci’s] cognitive functioning suffered ***. Towar[d] the end of his tenure, he was unable to recover when at home, leading him to make mistakes [due to] impair[ed] focus, attention, concentration, and short-term memory.”

¶ 25 Reff did not believe that Colucci’s condition was “disabling,” but he also did not believe that Colucci is “currently capable of performing full and unrestricted duties as a firefighter.” Reff opined that Colucci would be currently capable of functioning in a limited or light-duty capacity, such as a shorter shift. Reff further opined that, with additional treatment, Colucci *might* be able to return to his job as a firefighter and work full duty *without any restrictions*. Reff recommended that Colucci continue psychotherapy to develop proper sleep hygiene. While continuing to engage in this treatment, Colucci should approximate the conditions of his work

environment. This technique can be accomplished in approximately 20 therapy sessions, carries no risk, and is often highly successful. Moreover, “by far and away,” Colucci has “not exhausted the [anxiety and depression] medications available to him.” Reff remained hopeful that two newer agents would help Colucci achieve a healthier state of being.

¶ 26 Reff did not credit Colucci’s allegations of bullying and harassment of supervisors, exposure to trauma, or work-related injuries.

¶ 27 iii. Dr. Weine

¶ 28 Weine performed an evaluation on January 3, 2015. He determined that, since childhood, Colucci has had (undiagnosed) ADD, and, since 2009, Colucci has had insomnia, generalized anxiety disorder, and depressive disorder, not otherwise specified. Weine did “not regard the shift work as the sole or even necessarily the primary cause of his difficulties.” Rather, Weine viewed Colucci’s condition as caused by an “interaction of multiple [factors],” including a “poor fit with firefighter paramedic work.” Regarding the interaction of ADD, overall stress, and alleged “bullying and harassment by supervisors,” it was not always clear what was the “cause” and what was the “effect.” Weine discounted Colucci’s alleged ERES diagnosis, stating that ERES was “not a valid diagnostic construct.”

¶ 29 Weine opined that, as of January 2015, Colucci “is presently disabled,” because “his symptoms have not improved sufficiently that he is able to perform full and unrestricted firefighter duties.” With the proper treatment, Colucci has a “reasonable chance of diminishing his symptoms.” However, Colucci “will continue having difficulty adjusting to shift work and that inadequate sleep and high stress will further aggravate his attention problems such that his disability will persist indefinitely.” Colucci should receive one year of treatment before returning to “light duty,” meaning a day shift. As an alternative to light duty, Colucci could

perform full-time work that is outside of firefighter/paramedic work. Also, Colucci should receive treatment during his first year of return to duty, to avoid a relapse.

¶ 30 Weine concluded: “[I]t is unlikely that [Colucci] will ever be so improved that he could resume full-time firefighter work. I say that because his history suggests that he never was very well adjusted to firefighter/paramedic work, beyond the issues of adjusting to shift work and high stress.”

¶ 31 4. Fitness Evaluation

¶ 32 Dr. Harris performed a fitness-for-duty evaluation on February 27, 2015. The City initiated the evaluation. According to Harris, Colucci’s central difficulty was sleep; claims of job trauma and a hostile work environment did not significantly impact his ability to work as a firefighter. Harris stated that Colucci’s sleep disturbances were “a subjective experience without *** observable manifestations.” Nevertheless, Colucci’s sleep disturbances exacerbated his natural tendency toward tension, rumination, compulsivity, and anxiety. “The unusual sleeping circumstances of firefighting were difficult for [Colucci] to manage.” Harris opined that Colucci “is not able to perform the essential functions of his position due to his inability to sleep in the fire station environment,” *but* that he “*is* capable of performing the essential functions of his position with a restriction concerning sleep.” (Emphasis added.) For example, Colucci should be able to perform the essential functions of his position if he were to work a shorter, 12- or 15-hour shift. Aside from difficulties with sleep and tensions with supervisors, Colucci retained a passion for firefighting and stated that he wished to remain a firefighter.

¶ 33 Harris questioned Colucci’s credibility: “Because of what is at stake financially, I believe he [ha]s[,] out of desperation[,] gone out of his way to ‘build a case.’ ” Harris viewed Colucci’s credibility as weakened when Colucci asserted that he could sleep better if the alarm at the

firehouse had a lower tone, but then, “in the next breath,” he said that the lower tone would not help him sleep. Harris also viewed Colucci’s credibility as weakened when, according to Harris, Colucci lied about his involvement in music. Colucci seemed to believe that being involved in music “went against his case.” (Some of Colucci’s coworkers had reported that, while at the firehouse, Colucci records music. In their view, this left him in an excited state not conducive to sleeping.) Colucci told Harris that he was no longer involved in music. However, Harris learned from Colucci’s Facebook page that Colucci recently released a new album. Harris felt that Colucci had an “overall honesty and is simply not good at being deceptive. *** He ends up revealing more than he realizes.”

¶ 34 Harris concluded that, while Colucci cannot meet the job requirements without an accommodation, he is *not* clinically impaired or ill: “Some jobs have requirements that some people can’t meet. An introverted person *** is unlikely to do well in sales. [Colucci] has a limitation of fitness rather than *** a psychiatric impairment or illness.”

¶ 35 5. Colucci’s Testimony

¶ 36 By the date of hearing, Colucci moved away from his initial claim of an ERES diagnosis caused by the cumulative effects of stress, such as witnessing and being involved in multiple traumatic incidents and hazardous tasks, sleep deprivation and shift-work disorder, work-related injuries, and ongoing workplace bullying within a certain clique of supervisors. Instead, he testified that he suffered from a sleep disorder, which perpetuated a generalized anxiety disorder. While in a sleep-deprived, anxious state, he inaccurately *perceived* a hostile work environment and other problems.

¶ 37 Colucci filed his pension petition because he “no longer felt [he] was fit for duty.” Colucci had been having similar symptoms since 2009, but it was not until a February 2014

doctor's appointment that he realized the symptoms were the result of sleep deprivation during employment. The symptoms have grown progressively worse since 2009. Colucci knew that he was contractually entitled to one term of 90 days light duty upon application. He did not want to apply for light duty, however, because he did not believe he would be capable of returning to full duty upon completion of the term.

¶ 38 Colucci stated that his sleep patterns have "absolutely" improved since he stopped working in the fire service. He slept approximately six hours per night. However, when asked whether he could currently fulfill the duties of a firefighter/paramedic, Colucci answered: "Not right now. *** Plus, I still get anxious; like dealing with this, for instance."

¶ 39 At the close of Colucci's case, the hearing officer asked the Board if it would like to hear from the City's witnesses, Everhart and the Department chief. The Board stated that it had all the evidence it needed. The City did not present any witnesses, and the parties proceeded to argument.

¶ 40 6. Argument and Oral Ruling

¶ 41 Colucci argued that he was disabled because "all the doctors" agree that Colucci has insomnia and "cannot do the full duties of a [firefighter]." "The Statute says that if you are unable to fully perform the duties of a sworn firefighter/paramedic, you have the right to request a line of duty disability pension."

¶ 42 The City responded that "not every inability to perform the job means that you have a disability." The City challenged Colucci's credibility, noting his "changing theory" of why he cannot perform his duties as a firefighter. The City also noted that Colucci slept roughly the same number of hours per night whether he was working or had been on an extended break—

five to six hours per Wargolet verses six hours per Colucci's own testimony—yet claimed to suffer only when working.

¶ 43 Following argument, the Board voted 5-0 to deny a disability pension. It stated that a written order would be forthcoming. But, before the Board issued its written order, Colucci sent an e-mail that led to disciplinary proceedings against him.

¶ 44 C. Disciplinary Proceedings

¶ 45 On March 10, 2015, after the hearing concluded, Colucci sent an e-mail to Everhart: “[B]ased on the pension board decision and to protect all of my rights[,] I am notifying you that I would like to report back to *active duty*.” (Emphasis added.) On March 11, 2015, Colucci added: “[S]hould it be necessary, I am requesting accommodations under the Americans with Disability Act (ADA)² for returning to duty.” (Emphasis added.) On March 12, 2015, Everhart responded directly to Colucci's March 10 e-mail:

“Your request to return back to active duty is problematic based on your testimony at the Pension Board hearing. *** During the hearing, you testified under oath that you could not perform the essential functions of your job. *** In view of this information, it appears that you are not equipped to report back to active duty as a firefighter without restrictions. *** Your most recent [March 11] e[-]mail did not identify any additional accommodation requests. If there are any other accommodations you need, please provide that information to us.”

² The citation for the Americans with Disabilities Act of 1990 is 42 U.S.C. § 12101 (West 2014).

¶ 46 On March 12, 2015, Colucci replied: “Based upon the pension decision and your response to my request to return to duty, I formally renew my request for [PEDA], and the institution of Workers’ Compensation Act Benefits.”

¶ 47 On March 19, 2015, the Department initiated disciplinary proceedings against Colucci. The Department stated that it would investigate whether Colucci had lied under oath at the pension hearing and/or abused sick leave (feigned illness).

¶ 48 On April 13, 2015, the Department conducted a disciplinary hearing. Colucci was represented by counsel. The Department questioned Colucci about inconsistent requests in the months preceding and following his pension application. Also, the Department questioned Colucci as to his motivation in seeking a pension: “Did you ever tell anyone that you were going to stay at the fire department until you could pension out?” Colucci explained that, if he did say that, he did not mean it: “It sounds like a sarcastic [statement]. It’s typical firehouse stuff.”

¶ 49 The disciplinary hearing concluded without argument, and the matter was taken under advisement. The disciplinary proceedings did not culminate in any findings, because, on April 30, 2015, Colucci resigned.

¶ 50 D. Motion to Reconsider Pension Decision

¶ 51 On July 21, 2015, the Board heard Colucci’s motion to reconsider the pension decision. The Board reopened the proofs to include testimony and evidence from the disciplinary proceedings. The Board determined that its initial decision was correct and, on October 20, 2015, issued its written order.

¶ 52 In its written order, the Board noted that Colucci had never asked for an accommodation under the ADA. It further noted that, in addition to the instant pension claim, Colucci had filed

claims under PEDA and the Workers' Compensation Act. These claims remained pending as of the hearing.

¶ 53 The Board agreed with Frank, Reff, and Harris that Colucci was “not disabled.” Specifically, it recounted, Frank determined that Colucci had insomnia, but did not have concentration and attention deficits. Next, Reff determined that Colucci suffered from a generalized anxiety disorder, but that it did not result in impairment. Finally, Harris determined Colucci was capable of performing the essential functions of his position with a restriction concerning sleep.

¶ 54 The Board disagreed with Weine that Colucci was “disabled.” Weine was the only doctor to determine that Colucci’s primary medical issue was ADD, as opposed to a sleep disorder and related anxiety. Moreover, Weine had opined that Colucci was simply a “poor fit [for] firefighter/paramedic work,” which does not support a disability.

¶ 55 The Board acknowledged the contrary diagnoses of Colucci’s treatment providers, but it chose to afford less weight to those opinions. It discounted Wargolet’s ERES diagnosis, because the other physicians had stated that ERES is not a valid diagnosis. It further noted that Wargolet was not a medical doctor but, rather, a doctor of clinical psychology.

¶ 56 Critically, the Board discounted Colucci’s testimony. It noted that: (1) Colucci seemed to be “going out of his way” to make a case for a disability pension; (2) Colucci had a history of “milking” injuries; (3) Colucci’s allegation of a hostile work environment had been unfounded; (4) Colucci first claimed an onset date of 2014, but later testified to an onset date of 2009; and (5) despite suffering from “the same symptoms” since 2009, Colucci never requested an accommodation under the ADA.

¶ 57 Because the Board determined that Colucci did not have a disability, it did not consider whether any alleged impairment resulted from an act of duty. The circuit court affirmed. This appeal followed.

¶ 58

II. ANALYSIS

¶ 59 Colucci argues that the Board's determination that he was not disabled was against the manifest weight of the evidence. He notes that the majority of the doctors determined that he had insomnia and that he could not perform "full and unrestricted" firefighter duties without accommodation. As we will explain, Colucci's argument turns on an erroneous definition of a "disability" under the Pension Code. Mindful of the proper definition, there is more than enough evidence to support the Board's determination that Colucci was not disabled.

¶ 60

A. Black Letter Law

¶ 61 The plaintiff in the administrative hearing bears the burden of proof, and relief will be denied if he fails to sustain that burden. *Wade v. City of North Chicago Police Pension Board*, 226 Ill. 2d 485, 505 (2007). The Board's denial of a disability pension presents a question of fact. *Id.* We will only reverse the Board's determination of a question of fact if it is against the manifest weight of the evidence. *Id.* at 504. A determination is against the manifest weight of the evidence only if the opposite conclusion is clearly evident. *Id.* We review the Board's decision, not that of the trial court. *Id.* As to the sufficiency of the evidence supporting the Board's decision, we note that, to reverse, it is not enough that there be mere conflicts in the evidence or even that an opposite conclusion is reasonable. *Roszak v. Kankakee Firefighters' Pension Board*, 376 Ill. App. 3d 130, 139 (2007). Where there is competent evidence to support the Board's determination, we must affirm. *Marconi v. Chicago Heights Police Pension Board*, 225 Ill. 2d 497, 534 (2006).

¶ 62 The Pension Code states that “[a] firefighter having at least [seven] years of creditable service who becomes disabled as a result of any cause other than an act of duty, and who is found, pursuant to Section 4-112 [requiring examination by three physicians], to be physically or mentally permanently disabled so as to render necessary his or her being placed on disability pension, shall be granted a disability pension of 50% of the monthly salary attached to the rank held by the firefighter in the fire service at the date he or she is removed from the municipality’s fire department payroll.” 40 ILCS 5/4-111 (West 2014). “A disability pension shall not be paid until disability has been established by the board by examinations of the firefighter at pension fund expense by [three] physicians selected by the board and such other evidence as the board deems necessary. The [three] physicians selected by the board need not agree as to the existence of any disability or the nature and extent of a disability.” 40 ILCS 5/4-112 (West 2014).

¶ 63 The Pension Code defines a “permanent disability” as “any physical or mental disability” that has lasted or can be expected to last for a continuous period of not less than 12 months.” 40 ILCS 5/4-105b (West 2014). Further, a “disability” is “[a] condition of physical or mental incapacity to perform *any* assigned duty or duties in the fire service.” (Emphasis added.) 40 ILCS 5/6-112 (West 2014).

¶ 64 Not every physical or mental impairment entitles an applicant to a disability pension. For example, a person who has an impairment that prevents him from returning to full and unrestricted firefighter duties is not entitled to a disability pension if a comparable position³ is made available for him that he can perform with restrictions. *Howe v. Retirement Board of Fireman’s Annuity & Benefit Fund of Chicago*, 2015 IL App (1st) 141350, ¶ 76 (paramedic who

³ Section 4-112 of the Pension Code, in addressing reinstatement upon recovery from a disability, requires a return to the same “rank or grade.” 40 ILCS 5/4-112 (West 2014).

could no longer respond to emergencies was offered the administrative job of deputy district chief and, therefore, was not disabled for the purposes of receiving a disability pension); *Payne v. Retirement Board of the Firemen's Annuity & Benefit Fund*, 2012 IL App (1st) 112435, ¶¶ 46, 51 (deputy district chief who could perform the job while adhering to medical restrictions was not disabled); *Kouzoukas v. Retirement Board of the Policemen's Annuity & Benefit Fund*, 234 Ill. 2d 446, 469 (2009) (same, as applied to police officers).

¶ 65 Similarly, a person who is “unfit” for service is not necessarily disabled under the Pension Code. *Edwards v. Addison Fire Protection District Firefighters Pension Fund*, 2013 IL App (2d) 121262, ¶ 38 (affirming the denial of a disability pension to a firefighter who had been found unfit for duty based on the same physical infirmity). Proving unfitness for duty is generally a lower bar than proving a disability under the Pension Code. *Id.*; cf. *Knight v. Village of Bartlett*, 338 Ill. App. 3d 892, 900-901 (2003) (First District) (where the analysis comes close to equating being unfit with being entitled to a disability pension and does not address the difference between the two concepts, other than to disagree with a witness who tried to make the distinction).

¶ 66

B. Colucci's Argument

¶ 67 Again, Colucci argues that the Board's determination was against the manifest weight of the evidence and notes that the majority of the doctors determined that he had insomnia and could not perform “full and unrestricted” duties without accommodation. Colucci provides no authority for the proposition that the definition of the disability under the Pension Code is the incapacity to perform full and unrestricted duties. In fact, Colucci's position is contrary to the statutory definition, which states that a disability under the Pension Code is the incapacity to perform *any* assigned duty or duties in the fire service. 40 ILCS 5/6-112 (West 2012).

¶ 68 We address this error, because, if we do not, Colucci appears to have a compelling argument. After all, it is true that all of the doctors thought that Colucci would need further treatment or accommodation to perform his full duties. However, an applicant's inability to perform his duties fully and without restriction does not mean that he is *per se* entitled to a disability pension. It could be that the applicant does in fact have a physical or mental impairment but is capable of performing an approved comparable job with restrictions or accommodations, and, therefore, the impairment does not entitle him to a disability pension. *Howe*, 2015 IL App (1st) 141350, ¶ 76. It could be that the applicant cannot perform his duties because he is unqualified or unfit, rather than disabled. *Edwards*, 2013 IL App (2d) 121262, ¶ 38.

¶ 69 We acknowledge that the Board, at times, accepted Colucci's improper definition. However, other portions of the Board's written order demonstrate its understanding that, if Colucci had a condition but was capable of working with accommodation in a firefighter position offered by the Department, he was not disabled under the Pension Code. For instance, the Board stressed that Colucci never pursued an accommodation under the ADA.

¶ 70 We also acknowledge *Kouzoukas*, which stated that the Board cannot point to the officer's ability to perform a restricted duty, if no restricted duty was offered. *Kouzoukas*, 234 Ill. 2d at 469. Here, however, there is abundant evidence that Colucci failed to adequately pursue the contractually provided 90 days of light duty, accommodations through the ADA, or a shorter-term leave through PEDDA. Colucci applied for leave under the FMLA, which the Department granted, and, then, without attempting a return to work or pursuing further intermediary measures, such as an accommodation under the ADA, Colucci filed for a disability pension. Colucci had been employed for just over seven years, the minimum length of

employment required to apply for a disability pension. The Board properly denied Colucci a disability pension where, among other factors, Colucci did not first pursue accommodations that would enable him to perform his job.

¶ 71 Also, the evidence supports the Board's finding that Colucci is not disabled, because the expert evaluations weigh against Colucci and because Colucci's own testimony undermined his case. Two of the three section 4-112 physicians determined that Colucci was not disabled. Frank stated that Colucci was not disabled and could return to work with accommodation. Reff provided a more optimistic prognosis, stating that, with further sleep-hygiene therapy, Colucci had a chance at full recovery and could return to work without accommodation. Also, according to Reff, Colucci had, "by far and away," not exhausted his options for prescription medication.

¶ 72 Although the third section 4-112 physician, Weine, stated that Colucci was disabled, the Board chose to discount Weine's opinion. Weine misunderstood the meaning of the word disabled under the Pension Code. For example, Weine stated that Colucci was disabled because "his symptoms have not improved sufficiently that he is able to perform full and unrestricted firefighter duties." Again, a person who *is* able to work with approved accommodations and restrictions is not entitled to leave Department employment and receive a disability pension. Additionally, Weine stated that Colucci "never was well adjusted to firefighter/paramedic work," which is not consistent with having a disability. A person who is naturally a poor fit for firefighter work is different than a person who has developed a disability that prevents him from doing firefighter work.

¶ 73 The fitness evaluator, Harris, also determined that Colucci was not disabled. In his view, Colucci had a limitation of fitness, not a disability. Colucci had a natural tendency toward

tension and anxiety, but he did not exhibit physical manifestations of sleep disturbance. He was capable of performing the essential functions of his job with a restriction concerning sleep.

¶ 74 To the extent that Wargolet's FMLA certification and subsequent reports were favorable to Colucci, the Board reasonably discounted them. Among other issues, Wargolet accepted Colucci's claim of a hostile work environment. This misinformation shaped her report.

¶ 75 Colucci's own testimony also hurt his case. The Board determined that Colucci was not credible, and we defer to its determination. See *Belvidere*, 181 Ill. 2d at 204. That all five board members declined the opportunity to hear from the City's witnesses on any points in dispute, indicates that the entire Board was confident in its assessment of Colucci's credibility. The Board reviewed testimony from disciplinary proceedings against Colucci. The Board noted that: (1) Colucci had a history of "milking" injuries; (2) Colucci's allegation of a hostile work environment had been unfounded; (3) Colucci seemed to be "going out of his way" to make a case for a disability pension; (4) Colucci first claimed an onset date of 2014, but later testified to an onset date of 2009; and (5) despite suffering from "the same symptoms" since 2009, Colucci never requested an accommodation under the ADA. (Rather, he applied for a disability pension shortly after serving the requisite seven years.) In fact, Colucci *had* been working without accommodation, completing the full duties of his position, for several years before he took FMLA leave and applied for a disability pension.

¶ 76 Colucci's credibility was also damaged by his changing theory of the case. Both at the time of his initial application in June 2014 and again following the oral ruling in March 2015, Colucci made inconsistent representations about the severity of his symptoms and his ability to work. Most problematically, in March 2015, Colucci testified that he was not capable of working as a firefighter. Then, that same day, he requested to return to active duty. The next

day, as though an afterthought, he stated that he would seek accommodations, *if* necessary. In a space of 24 hours, Colucci represented both that: (a) he was not capable of working as a firefighter; and (b) he was capable of returning to active duty, possibly, but not necessarily, with accommodations. These inconsistent representations hurt Colucci's case.

¶ 77 Given the unfavorable expert assessments and the Board's negative credibility assessment of Colucci, we must affirm the Board's determination. This case called for the Board to distinguish between a person who is unqualified, unfit, or impaired but still able to work versus a person who is disabled as that term is understood under the Pension Code. These fine distinctions are best left to the expertise of the Board and, when based on supporting evidence, should be left undisturbed. We do not address Colucci's argument that his sleep disturbance resulted from the performance of his duties, because we affirm the Board's finding that Colucci's sleep disturbance was not of a nature or degree to entitle him to a disability pension.

¶ 78

III. CONCLUSION

¶ 79 For the reasons stated, we affirm the Board's denial of disability benefits.

¶ 80 Affirmed.