

No. 1-17-1216

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

SERGEANT KEVIN CAMPBELL,)	Appeal from
)	the Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	
)	
EVANSTON POLICE PENSION BOARD/FUND,)	No. 16 CH 07435
)	
Defendant-Appellee)	
)	
(Timothy Schoolmaster, Board President,)	
Mark Weisburg, Ryan Glew and Aaron Wernick,)	
Trustees in Their Official Capacity,)	Honorable
)	Pamela McLean Meyerson,
Defendants).)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Connors and Delort concurred in the judgment.

ORDER

¶ 1 *Held:* The decision of the Evanston Police Pension Board/Fund that the plaintiff-appellant was not disabled was not against the manifest weight of the evidence.

¶ 2 In this administrative review action, plaintiff-appellant Kevin Campbell appeals from the judgment of the circuit court of Cook County affirming the decision of the Board of Trustees of

the Evanston Police Pension Fund (Board), denying his application for a disability pension. For the following reasons, we agree that the Board's decision was not against the manifest weight of the evidence, and thus we affirm the judgment of the circuit court of Cook County.

¶ 3 BACKGROUND¹

¶ 4 The plaintiff was employed as a police officer by the City of Evanston Police Department beginning in September 2003. While he was on duty on June 12, 2010, the plaintiff injured his right hip, when he slipped while pursuing a criminal suspect in a foot chase. The plaintiff denied any prior problems with his hip.

¶ 5 The plaintiff initially believed he had pulled a groin muscle and did not immediately seek medical attention. After his symptoms persisted, he saw Dr. Ronald Silver for treatment on August 31, 2010. Dr. Silver prescribed physical therapy. On September 16, 2010, Dr. Silver released the plaintiff to return to normal work activities.

¶ 6 On March 28, 2011, the plaintiff was promoted to sergeant. As a sergeant, the plaintiff testified that his role involved "more administrative paperwork" but that he was "still required to go out, respond to calls, be visible on the street."

¶ 7 The plaintiff saw a number of physicians in 2011 and 2012, as his right hip pain persisted. He also began to develop left hip problems because he was favoring the right hip. On April 23, 2013, the plaintiff underwent total hip replacement surgery on his right hip.

¶ 8 The plaintiff did not work from the time of his surgery until June 23, 2013, when the plaintiff was assigned to "light duty." The plaintiff explained that, while on "light duty," he worked in the police department's administrative office but was not out in a patrol car. The

¹This factual background is derived from the testimony at the Board hearing on November 24, 2015 and the documentary evidence submitted to the Board.

plaintiff testified that he desired to return to “full duty,” but continuing problems following surgery prevented him from doing so. The plaintiff described continuing pain and discomfort with his right hip, which “felt loose” and “kept clunking.” He became concerned that it “wasn’t getting any stronger.”

¶ 9 In the months following the April 2013 surgery, the plaintiff underwent physical therapy, as reflected in records presented at the Board hearing. A physical therapist note from November 4, 2013 indicated that the plaintiff was “self-limiting” and expressed “fear of return to work full duty.” Asked about this at the Board hearing, the plaintiff stated that he was “frustrated because I wasn’t responding to therapy” and “wasn’t improving at the rate that I was hoping.”

¶ 10 A notation from a physical therapy session on November 18, 2013, stated that the plaintiff “was able to perform exercises without increased pain to right hip or right ankle. Patient may be trying to prolong therapy with added injury.” A similar note from November 20, 2013 recorded: “Despite discomfort and complaints no restrictions with exercises observed or reported. Patient may be purposely guarding left hip.”

¶ 11 The plaintiff was discharged from physical therapy on December 17, 2013. A corresponding note stated that he had “reached a functional and pain plateau” and “physical therapy will unlikely change patient’s presentation from this point forward. Rehabilitation potential is good.” A notation from the discharge summary recorded that the plaintiff stated: “I don’t want therapy to make my hips any worse.” At the Board hearing, the plaintiff testified that “after every session I wasn’t getting better and I would have a new pain or discomfort.” He recalled telling the therapist that he was “getting frustrated that I am trying to get better and I am not.” The same discharge summary reflects that the plaintiff stated that he still had pain “and I don’t know if I can run and do what I need to do.” The plaintiff testified that he was concerned

for his safety if he returned to full duty, as he “didn’t want to *** figure out where my limits were as I am trying to wrestle with somebody and finding out I can’t.” The plaintiff testified that physical therapy ended at the recommendation of a physician and the physical therapist.

¶ 12 On January 6, 2014, the plaintiff underwent a functional capacity evaluation (FCE) performed by Flexeon Rehabilitation. The FCE found that the plaintiff was “capable of performing the physical demands of the target job of police officer.” It found that his “physical abilities did match the demands of the target job” as he “demonstrate[d] the ability to perform the necessary lifting, pushing, pulling and carrying at the medium physical demand level on the occasional basis as required by the target job.”

¶ 13 Despite the FCE, the plaintiff testified that as of January 2014 he “was still having issues with the hip, weakness, soreness.” He felt that he could not run, that he “would put myself and my fellow officers at risk” if involved in a physical altercation, and that he was not “able to meet the physical demands of the job.”

¶ 14 Prior to seeking pension benefits, the plaintiff filed a workers’ compensation claim in connection with his hip injury. In connection with that claim, on March 19, 2014, Dr. Charles Bush-Joseph performed an independent medical examination (IME). Dr. Bush-Joseph found that “While the patient does have residual symptomatic complaint[s] and mild objective pathology, clearly his work abilities fall within the functional capacity evaluation in [the] job description. On that basis, it is certainly safe for the patient to return to work on a full-duty basis without restriction.”

¶ 15 Also in connection with his workers’ compensation claim, the Board hired a private investigator who conducted videotaped surveillance of the plaintiff in March 2014, July 2014, October 2014, and January 2015. The private investigator prepared written reports, which were

reviewed by the Board and are included in the record on appeal. The record reflects that the Board received the video surveillance, but the videos are not in the record.²

¶ 16 According to the investigator's reports, in March 2014 the plaintiff was videotaped carrying a small child and shopping with the child at a hardware store while pushing a cart. In July 2014, the plaintiff was observed doing yard work including "[p]ushing and pulling a lawnmower." In October 2014, the plaintiff was observed carrying a young child and shopping at a grocery store. Surveillance video from January 2015 recorded the plaintiff shoveling snow.

¶ 17 At the Board hearing, the plaintiff acknowledged that he performed the tasks recorded in the video surveillance. However, he stated he was "doing everything consistent with the doctors' orders and therapy" and that he "asked the doctor and therapist before I conducted these activities."

¶ 18 In June 2014, the plaintiff submitted a request to the Board for a line-of-duty disability pension under section 3-114.1 of the Illinois Pension Code (Code) (40 ILCS 5/3-114.1 (West 2014)), citing "Right Hip replacement surgery as a result of an accident while on duty on June 12, 2010."³ On September 4, 2014, the plaintiff and the City entered into a resignation agreement, to be effective July 19, 2015. The agreement specified that the plaintiff "will serve a disciplinary 12-day suspension without pay, which will be deducted from [his] accumulated

²While this appeal was pending, on September 25, 2017, the Board filed an agreed motion to supplement the record with "previously omitted surveillance videos" on compact discs. On October 3, 2017, this court directed the clerk of the circuit court to prepare a supplemental record "to include previously omitted CDs and transmit said Supplemental Record to this Court on or before November 15, 2017." However, the record on appeal was not supplemented.

³At the November 24, 2015 Board hearing, the plaintiff amended his request to seek, in the alternative to a line-of-duty pension, a non-duty disability pension pursuant to section 3-114.2 of the Code (40 ILCS 5/3-114.2 (West 2014)).

benefit time ('soft time') as discipline for his misconduct" relating to two separate incidents in March and April 2013.

¶ 19 At the Board hearing, the plaintiff denied that his decision to resign was due to disciplinary issues. Asked why he decided to resign, the plaintiff explained that he continued to have "complications" and his hip "wasn't healing the right way." He testified "we got to the point where the doctor said this is it," that he was told that he was at "maximal medical improvement" and further physical therapy would not help. The plaintiff stated that he decided to resign because he realized he "couldn't do the physical demands of the job safely." He testified: "I couldn't go back on the street, never was going to physically be able to. *** And it was a very difficult decision because I realized I had exhausted all my options and I physically couldn't do this job anymore."

¶ 20 The plaintiff underwent left hip replacement surgery on February 4, 2015. In April 2015, in connection with his workers' compensation claim, Dr. James Cohen performed an IME. In his report, Dr. Cohen opined that the plaintiff had "severe preexisting arthritis of both hips" before the June 2010 foot chase incident. Dr. Cohen stated: "I do not believe that Mr. Campbell can work the full duties of a police officer. The basis for this is that I believe that he would not be able to function at an extreme level if there was some type of altercation." Dr. Cohen's report noted that he had reviewed the surveillance videos, but that they did not change his opinion. Dr. Cohen reiterated that "I believe that [the plaintiff] can perform many of the duties of a police officer, but *** I do not feel that he could perform 100% of the duties as far as being involved in physical altercations."

¶ 21 Separately, in connection with his application for a disability pension, in May 2015 the plaintiff saw three other physicians for additional IMEs, pursuant to section 3-115 of the Code. 40 ILCS 5/3-115 (West 2014).

¶ 22 First, Dr. Harold Rees examined the plaintiff on May 19, 2015. Dr. Rees found that the plaintiff's June 2010 injury "aggravated a preexisting condition of right hip osteoarthritis likely secondary to a developmental abnormality." Dr. Rees reported that the plaintiff "notes that he is able to do most activities but really is unable to run or climb well, which would be required for his job on the police force." Dr. Rees reported that the plaintiff was "concerned that he will not be able to run in order to pursue criminal suspects, and if that activity is routinely required by his job, then he is not able to perform that task and should be considered disabled for this type of work."

¶ 23 On May 20, 2015, Dr. Daniel Samo performed a separate IME. Dr. Samo concluded that the plaintiff was "disabled from performing many of the essential job tasks of a patrol officer and is thus disabled from being a patrol officer." Dr. Samo did not believe the disability resulted from acts of duty, but opined that the plaintiff "obviously had severe degenerative arthritis prior to the [June 2010] event" and that his symptoms were "due to congenital abnormality of his hip joints."

¶ 24 Dr. Shane Nho performed a third IME on May 26, 2015. Unlike Drs. Rees and Samo, Dr. Nho concluded that the plaintiff "is not disabled to the point that he is not able to return back to his duties as described by his job description." Dr. Nho found that "the patient's work abilities do fall within the functional capacity evaluation in the job description and [he] has been able to perform the duties that have been outlined." Thus, Dr. Nho "d[id] not believe that the [plaintiff] is disabled to a point that he is not able to perform his duty as a patrol officer."

¶ 25 On July 19, 2015, pursuant to the resignation agreement executed in September 2014, the plaintiff resigned his employment with the Evanston Police Department.

¶ 26 The Board conducted a hearing on November 24, 2015. In addition to the plaintiff's testimony, the Board heard testimony from Evanston Chief of Police Richard Eddington. The Board members asked Chief Eddington about the circumstances of the plaintiff's resignation agreement. Chief Eddington recalled a "protracted negotiation," but that "the benchmark for the negotiation was an inability to return to duty, and the matter was predicated upon a disability claim." He acknowledged the discipline and suspension referenced in the agreement, but he did not recall that "disciplinary matters were the cause for the separation agreement."

¶ 27 Chief Eddington testified that when the plaintiff was on "light duty," he would not be called upon to run or engage in a physical altercation with a suspect. However, he testified that light-duty positions are "temporary" for police officers who are "rehabbing with the belief that they will return to full duty," and that there are no permanent light-duty positions.

¶ 28 Chief Eddington testified that it would be "infrequent" for a sergeant to be in a situation requiring him to run after a suspect, but that a sergeant is expected "to be able to physically perform those duties." He also stated that it would be "infrequent" for a sergeant to be engaged in a physical altercation with a suspect. No other witnesses testified after Chief Eddington.

¶ 29 Following deliberations, the Board voted to deny the plaintiff's request for either a line-of-duty or non-duty disability pension. In its written findings and decision, issued on April 28, 2016, the Board found that there was not "sufficient objective medical evidence to support the [plaintiff's] claimed disability," and that the plaintiff failed to show that he was "permanently disabled from performing the functions of a police sergeant or a police officer." The Board cited the January 2014 FCE, which "confirmed that the [plaintiff] was capable of performing the

physical demands of a police officer.” The Board also stated that, after “carefully reviewing the reports and opinions of the Board’s three IME physicians,” it “concluded that Dr. Nho’s report and opinion is more thorough than those of Drs. Rees and Samo.” The Board also found that Dr. Bush-Joseph’s IME report, prepared in connection with the plaintiff’s workers’ compensation claim, was “more persuasive on the issue of disability” as Dr. Bush-Joseph “took into account the limitations of the [plaintiff] and the safety issues with his return to full duty.” The Board expressly gave “greater credence to Drs. Nho’s and Dr. Bush-Joseph’s opinions that the [plaintiff] is not disabled from performing the duties of a police officer, than to the opinions of the other examining physicians.”

¶ 30 The Board also expressed doubts as to the plaintiff’s credibility, based on “[e]vidence of [the plaintiff]’s self-limitations when the medical evidence suggested he was capable of performing his duties.” Further, the plaintiff’s “ongoing and pending disciplinary issues caused the Board to conclude that the [plaintiff] had secondary motives for seeking disability.” Finding that the plaintiff had not proven “that he is disabled and unable to perform his duties as a sergeant or police officer,” the Board concluded that he was not entitled to either a line-of-duty disability pension under section 3-114.1 of the Code (40 ILCS 5/3-114.1 (West 2016)), or a non-duty disability pension under section 3-114.2 of the Code. 40 ILCS 5/3-114.2 (West 2016).

¶ 31 On June 1, 2016, the plaintiff filed a complaint in the circuit court for administrative review of the Board’s decision. Following briefing and a hearing, on April 12, 2017, the circuit court entered an order affirming the decision of the Board because it was “not against the manifest weight of the evidence.” On May 11, 2017, the plaintiff filed a timely notice of appeal from the circuit court order. Accordingly, we have jurisdiction.

¶ 32

ANALYSIS

¶ 33 On appeal, the plaintiff argues that the Board’s denial of his request for a line-of-duty disability pension under section 3-114.1 of the Code, or in the alternative a non-duty disability pension under section 3-114.2 of the Code, was against the manifest weight of the evidence. He argues that he proved his entitlement to a pension because he is “disabled from fulfillment of the full duties of a police officer.”

¶ 34 The plaintiff recognizes that the Board credited the conclusions of Dr. Nho and Dr. Bush-Joseph but asserts several criticisms of their opinions. First, although Dr. Nho’s report states that the IME included a “physical examination,” an “intake form,” and a “hip survey,” the plaintiff argues that the report does not include specific findings of these procedures. The plaintiff thus suggests that these examinations were not actually performed, or that their omission from the report allows an inference that they “conflicted with [Dr. Nho’s] opinion.”

¶ 35 The plaintiff also attacks Dr. Nho’s reliance on the functional capacity evaluation (FCE), because the FCE did not test running, jumping, and “physical altercations/arrests capabilities.” He also faults the FCE because it did not test the plaintiff while he was wearing his police gear, which he testified could weigh 20 to 25 pounds. The plaintiff otherwise claims that the FCE actually supports a finding of disability, as the FCE noted that the plaintiff limped or showed signs of pain during certain tests.

¶ 36 Although the Board credited Dr. Nho’s report as “more thorough,” the plaintiff asserts that Dr. Nho merely “parrot[ed]” prior records “which has little impact and weight since he failed to include or address his own physical examination findings.” He also faults Dr. Nho’s report for failing to comment on certain medical records discussing continuing problems with his hip after the January 2014 FCE. The plaintiff also asserts that because Dr. Nho’s report fails to

mention the surveillance videos, we may infer “that the videos conflict with Dr. Nho’s opinion.” The plaintiff further claims that Dr. Nho’s report “raise[s] a question of impartiality and possible double billing,” as he suggests that Dr. Nho’s office requested payment from the workers’ compensation carrier in addition to the Board.

¶ 37 The plaintiff also criticizes the Board’s reliance on Dr. Bush-Joseph’s opinion, to the extent that his opinion was premised on the FCE. The plaintiff also emphasizes that although Dr. Bush-Joseph stated that the plaintiff “should” improve, Dr. Bush-Joseph did not state that the plaintiff “will improve” and did not perform a subsequent evaluation to confirm that the plaintiff did, in fact, improve.

¶ 38 The plaintiff emphasizes that he need not prove that a work-related injury was the *sole* cause of his disability, but that “a disability pension may be based upon the line-of-duty aggravation of a preexisting physical condition.” *Wade v. City of North Chicago Police Pension Board*, 226 Ill. 2d 485, 505 (2007). He argues that he established that his June 2010 on-duty injury aggravated a pre-existing hip condition. In support, he summarizes medical records from 2010 through 2014. He also emphasizes: (1) Dr. Rees’ opinion that the plaintiff is disabled because he “is not able to run”; (2) Dr. Samo’s opinion that the plaintiff was disabled, even after viewing the surveillance videos; and (3) Dr. Cohen’s opinion that the plaintiff “would not be able to function at an extreme level” during an altercation. In light of these opinions, he claims that he established his entitlement to a line-of-duty pension and that the Board’s decision was “unsupported and contrary to the manifest weight of [the] evidence.”

¶ 39 Separately, the plaintiff argues that there was no basis for the Board to doubt his credibility due to any disciplinary matters. He emphasizes that both he and Chief Eddington testified that his resignation was prompted by his physical disability rather than pending

discipline. The plaintiff claims that the Board improperly disregarded that testimony and “substitut[ed] their own opinion without any evidentiary basis.”

¶ 40 The plaintiff claims that the Board’s denial of a line-of-duty disability pension was “arbitrary and not based upon adequate evidence in the record.” In the alternative, he claims that the evidence supports his entitlement to a non-duty disability pension.

¶ 41 We first note that, in administrative cases, “we review the decision of the administrative agency, not the determination of the circuit court.” *Wade*, 226 Ill. 2d at 504. “[T]he board of trustees of a police pension fund is the entity statutorily empowered to verify an applicant’s disability and right to receive benefits. [Citation.]” *Id.* at 513. “Whether a police officer is entitled to disability benefits is a question of fact to be resolved by the board of trustees of the pension fund. [Citations.]” *Peacock v. Board of Trustees of Police Pension Fund*, 395 Ill. App. 3d 644, 652 (2009). Thus, our review is focused on the decision of the Board.

¶ 42 The factual findings of an administrative agency “are, by statute, held to be *prima facie* true and correct (735 ILCS 5/3-110 (West 2002)) and may only be reversed if they are against the manifest weight of the evidence—a very high threshold to surmount.” *Marconi v. Chicago Heights Police Pension Board*, 225 Ill. 2d 497, 540 (2006). “An administrative agency decision is against the manifest weight of the evidence only if the opposite conclusion is clearly evident. [Citation.] Therefore, 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. [Citation.]” *Id.* at 534. In examining such factual findings, “a reviewing court does not weigh the evidence or substitute its judgment for that of an administrative agency. [Citation.] If the record contains evidence to support the agency’s decision, that decision should be affirmed. [Citation.]” *Id.*

¶ 43 In this matter, the plaintiff applied to the Board for a line-of-duty pension, or, in the alternative, a non-duty disability pension. Section 3-114.1(a) of the Code provides for a line-of-duty pension as follows:

“If a police officer as the result of sickness, accident or injury incurred in or resulting from the performance of an act of duty, is found to be physically or mentally disabled for service in the police department, so as to render necessary his or her suspension or retirement from the police service, the police officer shall be entitled to a disability retirement pension equal to the greatest of (1) 65% of the salary attached to the rank on the police force held by the officer at the date of suspension of duty or retirement, (2) the retirement pension that the police officer would be eligible to receive if he or she retired *** or (3) the pension provided under subsection (d), if applicable.

A police officer shall be considered ‘on duty’ while on any assignment approved by the chief of the police department of the municipality he or she serves ***.” 40 ILCS 5/3-114.1(a) (West 2016).

¶ 44 If an officer’s disability is not related to an act of duty, the officer may still be entitled to a pension under section 3-114.2 of the Code, which provides:

“A police officer who becomes disabled as a result of any cause other than the performance of an act of duty, and who is found to

be physically or mentally disabled so as to render necessary his or her suspension or retirement from police service in the police department, shall be entitled to a disability pension of 50% of the salary attached to the officer's rank on the police force at the date of suspension of duty or retirement." 40 ILCS 5/3-114.2 (West 2016).

¶ 45 Under either section, the plaintiff must prove that he is disabled so as to render necessary his or her suspension or retirement from the police service. The Board found that the plaintiff was not disabled, relying primarily on Dr. Nho, one of the three physicians who performed IMEs in connection with the plaintiff's pension claim, and Dr. Bush-Joseph, who performed an IME in connection with his workers' compensation claim.

¶ 46 We recognize that other doctors—including the two other physicians who performed IMEs in connection with his pension claim—opined that the plaintiff was disabled. We further acknowledge that, if we were in the position of the Board as fact-finder, we might have assigned different weights to the various medical opinions, and could have reached a different conclusion as to whether the plaintiff was disabled. However, this does not mean that the Board's conclusion was against the manifest weight of the evidence.

¶ 47 The Board's factual findings, including its conclusion that the plaintiff was not disabled, are presumed to be correct. *Marconi*, 225 Ill. 2d at 540. As long as there is some evidence to support the Board's conclusion, we will affirm. *Id*; see also *Peacock*, 395 Ill. App. 3d at 652 ("Because the weight of the evidence and the credibility of the witnesses are within the province of the [agency], there need only be some competent evidence in the record to support its findings."). In this case, there was competent medical evidence supporting the Board's

conclusion, in the form of the medical opinions of Drs. Nho and Bush-Joseph. Although several other physicians who examined the plaintiff found that he was disabled, the Board was not bound to accept the conclusion reached by the majority of examining physicians, but could independently weigh the various conflicting opinions, in light of the totality of the evidence. See *Marconi*, 225 Ill. 2d at 540 (“Faced with this conflict of evidence, it was the Board’s function, as the finder of fact, to assess the credibility of the documentary information and the testimony of the witnesses and to determine the appropriate weight to be given the evidence.”). Given the two medical opinions that he was not disabled, there was evidence to support the Board’s conclusion, such that the Board’s decision was not against the manifest weight of the evidence. As a result, we must reject the plaintiff’s argument that the Board’s decision was not based upon adequate evidence.

¶ 48 In light of the medical evidence supporting the Board’s finding, the plaintiff’s arguments regarding the credibility of his testimony are unavailing. The medical evidence provided by Dr. Nho and Dr. Bush-Joseph was sufficient to support the Board’s finding that he was *not* disabled, regardless of the Board’s assessment of the plaintiff’s credibility. Put another way, whether or not the Board believed that the plaintiff sincerely doubted his ability to return to duty, the Board could still credit and rely upon the medical opinions that he was not disabled. In any event, the Board had discretion, as the finder of fact, to credit or reject the plaintiff’s testimony, and it is not our role to re-weigh such credibility determinations.

¶ 49 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 50 Affirmed.