

No. 1-10-1677

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

SECOND DIVISION
April 12, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JAMES BUCKLEY,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	
)	No. 09 CH 45380
THE RETIREMENT BOARD OF THE POLICEMEN'S)	
ANNUITY AND BENEFIT FUND OF THE CITY)	
OF CHICAGO,)	Honorable
)	Peter Flynn,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Karnezis and Connors concurred in the judgment.

O R D E R

HELD: Where record established plaintiff's disability resulted from aggravation of pre-existing physical condition, Board's award of disability benefit of 50% of his salary was not contrary to manifest weight of the evidence; the circuit court's order is reversed, and the Board's decision is affirmed.

Defendant, the Retirement Board of the Policeman's Annuity and Benefit Fund of the City of Chicago (the Board), awarded plaintiff James Buckley a duty disability benefit of 50% of his salary after he injured his back. The circuit court reversed that decision, concluding plaintiff should receive a benefit of 75% of his salary. On appeal, the Board contends the record supported its determination that plaintiff's disability resulted from a pre-existing condition, thus warranting a 50% benefit. Because the record contains evidence to support the Board's decision, we reverse the judgment of the circuit court.

On April 10, 2009, plaintiff, a Chicago police officer, applied for duty disability benefits pursuant to section 5-154(a) of the Illinois Pension Code (40 ILCS 5/5-154(a) (West 2008)), which states that an active policeman who becomes disabled as a result of an on-duty injury has a right to receive a 75% duty disability benefit. A duty disability benefit of 50% of salary is paid if the disability "resulted from any physical defect *** or any disease which existed at the time the injury was sustained." 40 ILCS 5/5-154(a)(i) (West 2008). It is not disputed in this case that plaintiff is disabled and is eligible for a duty disability benefit. The only issue is the Board's conclusion as to the amount of that benefit.

Plaintiff's application for a duty disability benefit was based on a back injury sustained in 2008 while plaintiff chased a

suspect on foot. An MRI taken in March 2009 indicated a disc protrusion at the L5-S1 location of his back.

In June 2009, plaintiff was examined by Dr. Kern Singh, who reviewed the MRI and described the injury as a herniated disk. Dr. Singh concluded plaintiff "sustained an aggravation of a pre-existing degenerative condition." Dr. Singh did not testify before the Board.

The Board also heard evidence of a back injury plaintiff sustained in 2005 while tripping over a seat belt as he got out of a police car. A report of an X-ray two weeks after that incident indicated "mild disk space narrowing at L1-L2 and L2-L3 as well as at L5-S1." The report also indicated the formation of Schmorl's nodes.

At the hearing before the Board, the Board's physician, Dr. S. David Demorest, described Schmorl's nodes as small lesions or holes in vertebrae "usually seen in degeneration." Dr. Demorest said the condition on the 2005 X-ray would have predated the 2005 incident because it was a degenerative change that occurred over time. Dr. Demorest said plaintiff's condition in 2005 would have made him "more susceptible to problems" such as a herniated disk after the 2008 incident.

However, when asked if the herniated disk occurred "as a result of" the 2008 incident, Dr. Demorest replied: "I would not disagree with that based on the information and what the officer

has testified to." The doctor explained that an X-ray, such as the one taken in 2005, would not reveal a herniated disk, as shown in the 2008 MRI, but would show degenerative changes. When asked by plaintiff's counsel if plaintiff's current inability to work was the result of the 2008 injury, Dr. Demorest replied, "I believe it is."

On October 16, 2009, the Board issued a written decision awarding a disability benefit of 50% of plaintiff's salary, finding that plaintiff's "current disability stems from and was exacerbated by a pre-existing physical defect (degenerative condition) which was exacerbated by the act of duty incidents as evidenced in part by diagnostic tests and medical reportings." Among various factual findings, the Board found the X-rays taken after plaintiff's 2005 injury indicated mild disk space narrowing at several locations including L5-S1 and that the doctors had noted the Schmorl's nodes and degenerative changes at that time. The Board found the 2008 MRI taken after the present injury indicated a herniated disk at L5-S1. The Board noted Dr. Demorest's testimony that the existence of Schmorl's nodes and disk narrowing preceded the 2008 incident and made plaintiff more susceptible to a herniated disk.

Plaintiff filed a petition for administrative review of the Board's decision in the circuit court of Cook County, arguing the evidence did not support the Board's factual findings and asking

the court to reverse the Board's order and award him benefits at the 75% salary rate. On May 20, 2010, the circuit court entered an order finding the Board's decision "clearly erroneous" and remanding with instructions "to award Officer Buckley a duty disability pension at the rate of 75% of salary." The Board now appeals that ruling.

On appeal, the Board contends the record supports its decision to award a 50% benefit. The Board points to Dr. Demorest's statement that at the time of the 2008 injury, plaintiff had a degenerative condition that made him more likely to suffer a herniated disk, as well as Dr. Singh's conclusion in 2009 that plaintiff aggravated "a pre-existing degenerative condition."

In administrative agency cases, our review is of the decision of the agency, not of the circuit court. See *Marconi v. Chicago Heights Police Pension Board*, 225 Ill. 2d 497, 539 (2006). The parties set forth different standards of review. The Board contends its decision to award a 50% benefit should be upheld unless found to be clearly erroneous, while plaintiff contends this appeal involves the construction of section 5-154 and other sections of the Pension Code, a task of statutory interpretation that warrants *de novo* review.

Whether the evidence presented to the Board supported a determination that plaintiff's disability resulted from a

previous physical defect or disease, thus warranting a 50% duty disability benefit as opposed to a 75% benefit, is a question of fact to which this court applies the manifest weight standard. See *Marconi*, 225 Ill. 2d at 534; *Cole v. Retirement Board of the Policemen's Annuity and Benefit Fund*, 396 Ill. App. 3d 357, 367 (2009). An administrative agency's decision is against the manifest weight of the evidence only if the opposite conclusion is clearly evident or the findings appear to be unreasonable, arbitrary, or not based on the evidence. *Wade v. North Chicago Police Pension Board*, 226 Ill. 2d 485, 504-05 (2007). A plaintiff in an administrative proceeding bears the burden of proof. *Marconi*, 225 Ill. 2d at 532-33.

We thus consider whether the Board's decision was contrary to the manifest weight of the evidence. In doing so, this court does not weigh the evidence or substitute our judgment for that of the Board; where the record contains any competent evidence to support the agency's decision, it should be affirmed. *Marconi*, 225 Ill. 2d at 534.

After the 2008 injury, Dr. Singh examined plaintiff and concluded that plaintiff aggravated a previously existing degenerative condition. Dr. Demorest testified the condition of plaintiff's back in 2005 made him "more susceptible" to the injury that occurred in 2008. A 50% duty disability benefit is to be awarded where the disability results from a pre-existing

condition, even if the on-duty injury that led to the request for the benefit may have affected or worsened the condition. *Samuels v. Retirement Board of the Policemen's Annuity and Benefit Fund*, 289 Ill. App. 3d 651, 661-62 (1997). In comparison, a disability occurring as a result of (being caused by) the instant injury warrants a 75% benefit under section 5-154(a). *Samuels*, 289 Ill. App. 3d at 661.

Plaintiff acknowledges the evidence of a pre-existing back condition but argues the Board did not hear "expert medical evidence" as to the cause of his disability. He asserts no physician offered an opinion that his disability resulted from his pre-existing degenerative back condition at L5-S1. The record contradicts that assertion. Both Dr. Singh and Dr. Demorest stated that plaintiff's 2008 herniated disk had its origin in his degenerative back condition.

Even if the present injury led to plaintiff's disabled state, this court has rejected the position that a 75% benefit should be awarded if, but for an on-duty injury, the officer's disability would not exist. *Samuels*, 289 Ill. App. 3d at 661-62. The Board heard evidence to support its conclusion that plaintiff's disability resulted from his pre-existing back condition.

It is necessary to point out that Dr. Demorest offered an opinion to support either outcome when he testified the herniated

disk occurred as a result of the 2008 incident. See *Samuels*, 289 Ill. App. 3d at 661-62 (75% benefit awarded when disability occurs "as a result of (is caused by) an on-duty injury"). However, the scope of review here does not involve weighing conflicting evidence but, rather, determining whether any competent evidence existed to support the Board's decision. Furthermore, while plaintiff now complains of a lack of specificity in Dr. Singh's report and questions the basis of the doctor's conclusion, plaintiff did not choose to call Dr. Singh as a witness before the Board and question him in order to raise those objections to the doctor's opinion.

In conclusion, the record contains competent evidence to support the Board's decision that plaintiff's disability resulted from a pre-existing condition, warranting the award of a 50% duty disability benefit. Therefore, the circuit court erred in reversing the decision, and the Board's decision is affirmed.

Circuit court reversed; Board's decision affirmed.