2018 IL App (1st) 163368-U

No. 1-16-3368

Order filed May 31, 2018

Fourth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

MICHAEL HURD,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 15 CH 18369
	)	
THE BOARD OF TRUSTEES OF THE MAYWOOD POLICE PENSION FUND,	)	Honorable
	)	Peter A. Flynn,
Defendant-Appellee.	)	Judge, presiding.

JUSTICE GORDON delivered the judgment of the court.
Justices McBride and Ellis concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's order affirming the Board of Trustees of the Maywood Police Pension Fund's decision denying plaintiff a line-of-duty disability pension was affirmed because plaintiff did not prove his injury resulted from the performance of an "act of duty."

¶ 2 Plaintiff, Michael Hurd, a police officer with the Maywood police department, appeals the trial court's order affirming the decision of the Board of Trustees of the Maywood Police Pension Fund (Board) denying him a line-of-duty disability pension (40 ILCS 5/3-114.1 (West

2014)). Plaintiff contends that the Board's decision was clearly erroneous because he sufficiently proved he sustained an injury from performing an "act of duty" as a police officer. We affirm the Board's decision.

¶ 3 In June 2014, plaintiff filed an application for line-of-duty disability pension benefits, asserting he sustained an injury to his right wrist from a vehicle accident that occurred "while on patrol" on July 28, 2010. On February 17, 2015, the Board held a hearing to determine whether plaintiff was entitled to a line-of-duty disability pension. At the hearing, plaintiff orally requested the Board consider, in the alternative, a non-duty disability pension.

¶ 4 Plaintiff testified that he had been a police officer with the Maywood police department for 10 years. In July 2010, 95% of plaintiff's day consisted of "patrol duties." On July 28, 2010, plaintiff was working the second shift, or 3 to 11 p.m., in a full unrestricted capacity. He was wearing his "full duty uniform," which consisted of blue pants and shirt, vest, and duty belt. He did not have a partner and was assigned a Maywood police department marked squad vehicle.

¶ 5 Plaintiff testified he "was patrolling looking for anything that happened, you know, crimes or whatever" and, as he was proceeding through a green light, he noticed a vehicle travelling at a high rate of speed and not attempting to stop. Plaintiff attempted to maneuver his vehicle out of the way and "tried to turn to the left, and [his] elbow hit the computer in the car, and [his] wrist snapped on impact." The driver of the other vehicle was arrested for, among other things, running a red light. This accident occurred about 45 minutes before the end of plaintiff's shift.

¶ 6 Plaintiff "was in a lot of pain," and his elbow, back, knee, and "whole basically right side" were hurting. Plaintiff completed his shift and then went home. The next day, June 29,

2010, plaintiff sought medical treatment from the police department's occupational physician for pain he was having to his right wrist. Plaintiff was referred to an orthopedic physician and has had four surgeries on his right wrist as a result of the accident. For plaintiff's application for disability benefits, he was examined by three physicians selected by the Board who all concluded he could not return to full unrestricted duties as a police officer and his condition was the result of the accident on July 28, 2010.

¶ 7 On cross-examination by the hearing officer, plaintiff testified that, on July 28, 2010, he was on patrol. Asked whether he was in his "beat," or "assigned area," plaintiff responded, "I don't even remember what my area was at that time." At the time of the accident, plaintiff was not responding to a call. Plaintiff could not recall if he completed any paperwork regarding his injury but he verbally reported his injury to his supervisor, Sergeant Horn.

¶ 8 On cross-examination by the Board, plaintiff testified he "complained to everybody when [he] came into the station" and was "holding [his] arm and limping." He testified that Sergeant Sonya Horn[1] and Lieutenant Mobley were his supervisors on July 28, 2010, and he complained to Horn about his injury. Horn asked plaintiff if he wanted to go to the hospital but he told her "no" and he would "try to deal with it."

¶ 9 After plaintiff's closing argument, the Board adjourned the hearing into a closed session. The Board subsequently returned to an open session and called two witnesses. Maywood police commander Horn testified that, on July 28, 2010, she worked the midnight shift, did not work with plaintiff that day, and had no knowledge of plaintiff's accident. Horn could not recall plaintiff reporting to her that he was injured from an accident on July 28, 2010. On cross-

[1] Plaintiff testified that Sergeant Horn was later promoted to commander.

examination by plaintiff's counsel, Horn testified she had been involved in a different motor vehicle accident with plaintiff. She acknowledged it was possible that plaintiff might have thought she was involved in the accident at issue instead of the one she supervised.

¶ 10 Maywood police sergeant Wayne Welch testified that, on July 28, 2010, he was the highest ranking officer on the midnight shift. Welch signed the Illinois traffic crash report for plaintiff's accident because the reporting officer on plaintiff's shift did not complete it. Welch heard that plaintiff had been injured but did not have personal knowledge of his injury. Plaintiff never told Welch he was injured from the accident. On examination by plaintiff's counsel, Welch acknowledged he was not the supervisor on duty for plaintiff on July 28, 2010, and, although plaintiff did not report his injury to Welch, that did not mean plaintiff did not report it to someone else.

¶ 11 The Board admitted into evidence plaintiff's application for disability pension benefits, which stated that his injury occurred "while on patrol." The Board admitted into evidence plaintiff's medical records, which included a letter from plaintiff's treating physician stating he examined plaintiff on July 29, 2010, and plaintiff indicated "he was in a motor vehicle accident on July 28, 2010" and "was driving his squad car (his sirens were not on)." The Board also admitted into evidence the job description for a Maywood police department police officer, records received from the Maywood police department in response to a subpoena, independent medical-examination reports from three physicians, and the Illinois traffic crash report for plaintiff's accident.

¶ 12 At the conclusion of the hearing, the Board voted to deny plaintiff a line-of-duty disability pension and grant him a non-duty disability pension. On November 16, 2015, the

Board issued a written decision. The Board found plaintiff evasive, not credible, and that he was not injured while engaged in an "act of duty." The Board found that plaintiff failed to prove he was on "patrol" or that his "attention was divided in any way" at the time of the accident, noting that the only evidence he submitted was his "self-serving testimony" and the "testimony regarding his being on 'patrol' only occurred once he filed a worker's compensation claim and filed for disability benefits." The Board concluded that, "[d]ue to the lack of evidence demonstrating [plaintiff] was on 'patrol', the [Board] finds [plaintiff] was simply driving around, much like a taxi driver, delivery driver, or other civilian who is driving around town."

¶ 13 On December 21, 2015, plaintiff filed a complaint for administrative review in the trial court. The trial court affirmed the Board's decision.

¶ 14 Plaintiff contends on appeal that the Board should have granted him a line-of-duty disability pension because he sufficiently proved he sustained an injury from an "act of duty" as defined under section 3-114.1 of the Illinois Pension Code (40 ILCS 5/3-114.1(a) (West 2014)). He contends he was working "patrol duties" at the time of the accident and was injured due to the unique configuration of the police squad vehicle, as his elbow hit the computer in the squad vehicle. Plaintiff asserts the Board "completely disregarded unrebutted evidence" that he was "driving in his patrol car" when he was injured. Plaintiff claims it was "clear his squad car was hit while he was on-duty performing patrol duties looking for crimes" and his job description required him to, among other things, be responsible for crime prevention, enforcement of laws, and apprehension of criminals. Plaintiff contends that, based upon a review of the record, we should be left with a definite and firm conviction that a mistake was made and reverse the Board's decision.

¶ 15 Section 3-114.1 of the Illinois Pension Code (Code) provides that a police officer is entitled to a "line of duty" disability pension if, in relevant part, the officer becomes "physically or mentally disabled" as the result of "the performance of an act of duty." 40 ILCS 5/3-114.1(a) (West 2014). See *Fedorski v. Board of Trustees of Aurora Police Pension Fund,* 375 Ill. App. 3d 371, 372 (2007). Here, the Board concluded that plaintiff was not entitled to a "line of duty" disability pension because plaintiff did not prove his injury resulted from the performance of an "act of duty."

¶ 16 Review of administrative decisions by the Board is governed by the Administrative Review Law (735 ILCS 5/3-101 *et seq.*) (West 2014)). 40 ILCS 5/3-148 (West 2014). In administrative cases, we review the agency's decision, not the trial court's decision. *Marconi v. Chicago Heights Police Pension Board,* 225 Ill. 2d 497, 531 (2006). In an administrative proceeding, the plaintiff bears the burden of proof. *Marconi,* 225 Ill. 2d at 532-33.

¶ 17 If the issue on appeal of an agency's decision is purely a question of law, our review is *de novo. Merlo v. Orland Hills Police Pension Board,* 383 Ill. App. 3d 97, 99 (2008). If the issue is a question of fact, we review whether the findings of fact "are against the manifest weight of the evidence." *Parikh v. Division of Professional Regulation of Department of Financial & Professional Regulation,* 2014 IL App (1st) 123319, ¶ 19. However, if the issue "presents a mixed question of fact and law," we review the agency's decision under a clearly erroneous standard. *Merlo,* 383 Ill. App. 3d at 99.

¶ 18 The parties agree that the question presented here is a mixed question of law and fact, *i.e.*, "an examination of the legal effect of a given set of facts." *Jensen v. East Dundee Fire Protection District Firefighters' Pension Fund Board of Trustees,* 362 Ill. App. 3d 197, 202

(2005). We agree and will therefore apply the clearly erroneous standard when reviewing the Board's ultimate decision. See *Frances House, Inc. v. Illinois Department of Public Health*, 2015 IL App (1st) 140750, ¶ 23. However, for underyling questions of fact, we will review whether the Board's findings are against the manifest weight of the evidence. See *Parikh*, 2014 IL App (1st) 123319, ¶ 19.

¶ 19 The clearly erroneous standard "lies between the manifest weight of the evidence standard and the *de novo* standard, and lends some deference to the agency's decision." *Frances House, Inc.*, 2015 IL App (1st) 140750, ¶ 24. An agency's decision is considered clearly erroneous only when "the reviewing court, on the entire record, is 'left with the definite and firm conviction that a mistake has been committed.' " *AFM Messenger Service, Inc.*, 198 Ill. 2d 380, 395 (2001) (quoting *United States v. United States Gypsum Co*., 333 U.S. 364, 395 (1948)).

¶ 20 It is the agency's responsibility "to weigh the evidence, determine the credibility of witnesses, and resolve conflicts in testimony." *Hurst v. Department of Employment Security*, 393 Ill. App. 3d 323, 329 (2009). The agency's findings and conclusions on questions of fact are "deemed *prima facie* true and correct" and we will not disturb the findings unless they are against the manifest weight of the evidence, "meaning that the opposite conclusion is clearly evident." *Alm v. Lincolnshire Police Pension Board*, 352 Ill. App. 3d 595, 597-98 (2004). "Because the weight of the evidence and the credibility of the witnesses are uniquely within the province of the administrative agency, there need only be some competent evidence in the record to support its findings." *Trettenero v. Police Pension Fund of City of Aurora*, 268 Ill. App. 3d 58, 63 (1994).

¶ 21 Section 5-113 of the Code, which applies here, defines "act of duty" as follows:

> "Any act of police duty inherently involving special risk, not ordinarily assumed by a citizen in the ordinary walks of life, imposed on a policeman by the statutes of this State or by the ordinances or police regulations of the city in which this Article is in effect or by a special assignment; or any act of heroism performed in the city having for its direct purpose the saving of the life or property of a person other than the policeman." 40 ILCS 5/5-113 (West 2014); see *Fedorski*, 375 Ill. App. 3d at 373.

A police officer does not perform an "act of duty" just by being "on duty" at the time of the accident. *Sarkis v. City of Des Plaines*, 378 Ill. App. 3d 833, 837 (2008). Further, "[n]ot all police functions involve special risk." *Jones v. Board of Trustees of Police Pension Fund of City of Bloomington*, 384 Ill. App. 3d 1064, 1070 (2008).

¶ 22 In *Johnson v. Retirement Board of Policemen's Annuity & Benefit Fund*, 114 Ill. 2d 518, 521 (1986), our supreme court concluded that "special risk" under section 5-113 of the Code does not include only "inherently dangerous activities." The court noted that "[p]olice officers assigned to duties that involve protection of the public discharge those duties by performing acts which are similar to those involved in many civilian occupations," *i.e.*, driving a vehicle or crossing a street. *Johnson*, 114 Ill. 2d at 521-22 (police officer's injury resulting from crossing an intersection in response to a citizen's call for help was considered an "act of duty"). To determine "whether an officer is entitled to a line-of-duty benefit, '[t]he crux is the capacity in which the police officer is acting' rather than the precise mechanism of injury." *Alm*, 352 Ill. App. 3d at 599 (quoting *Johnson*, 114 Ill. 2d at 522). "Whether a police officer has suffered a line-of-duty injury is fact specific." *Filskov*, 409 Ill. App. 3d 66, 71 (2011).

¶ 23 Several cases have examined whether a police officer who was injured on routine patrol was injured in an act of duty. For example, in *Alm v. Lincolnshire Police Pension Board*, 352 Ill. App. 3d 595, 596 (2004), the reviewing court examined the risks to which an officer was exposed when determining that a bicycle officer's knee injury was suffered during an act of duty. The court concluded that the bicycle officer was "performing in a capacity that amounted to an act of duty" when he was injured, finding that he faced risks not ordinarily encountered by civilians and the officer's bicycle patrol had "no clear counterpart in civilian life." *Alm*, 352 Ill. App. 3d at 601. In reaching its conclusion, the court reasoned that the officer "was required to ride his bicycle at night over varying terrain, looking after his own personal safety while also remaining vigilant in the performance of his patrol duties," had to carry "a significant amount of additional weight," and faced the risks of "falls and collisions as well as dangerous encounters with unsavory elements of society." *Alm*, 352 Ill. App. 3d at 601.

¶ 24 The reviewing court in *Jones v. Board of Trustees of Police Pension Fund of City of Bloomington*, 384 Ill. App. 3d 1064, 1073-74 (2008), reached a similar conclusion regarding a patrol officer who was injured in his squad car while driving to investigate an area that had reports of speeders. The reviewing court concluded that the officer was performing "an act of police duty," finding he "was performing the duties of patrol officer at the time of the injury," and, even though the officer was not responding to a call, "he was conducting his patrol and an investigation, and he did face special risks associated with being on patrol duty." *Jones*, 384 Ill. App. 3d at 1073-74.

¶ 25 A similar result was reached in *Rose v. Board of Trustees of Mount Prospect Police Pension Fund*, 2011 IL App (1st) 102157, ¶ 78. In *Rose*, an officer on routine patrol was injured

while driving out of a gas station, where he had stopped to pursue an investigation. *Rose*, 2011 IL App (1st) 102157, ¶ 78. This court found the Board's decision that the officer was not performing an "act of duty" was clearly erroneous. *Rose*, 2011 IL App (1st) 102157, ¶ 89. In reaching this conclusion, this court noted that, even though the Board found that the officer had completed his investigation when he was driving out of the gas station, the record revealed that, at the time of the accident, the officer "was performing his patrol duties, which required special skills not ordinarily encountered by everyday citizens, namely, 'hav[ing] his attention and energies directed towards being prepared to deal with any eventuality.' " *Rose*, 2011 IL App (1st) 102157, ¶ 84 (quoting *Johnson*, 114 Ill. 2d at 522).

¶ 26 However, courts still look to the nature of the tasks or activities of the officer and have not universally concluded that riding in, or driving, a squad vehicle is an act of duty. For example, in *Fedorski v. Board of Trustees of Aurora Police Pension Fund*, 375 Ill. App. 3d 371, 371-72 (2007), where an officer, who was working as evidence technician, was injured while riding in a squad vehicle back to the police station to complete an investigation, the reviewing court concluded that he was not injured in an "act of duty." The court noted that the officer "was not acting in a capacity that entailed any special risk at that particular time" and he "was merely riding in an automobile and he faced risks essentially no different from those faced by any other automobile passenger." *Fedorski*, 375 Ill. App. 3d at 375-76. In reaching its conclusion, the court stated that "the proper focus is on the particular activities the officer is engaged in when he or she is injured," not the title or general nature of the officer's duty assignment. *Fedorski*, 375 Ill. App. 3d at 376.

¶ 27 Likewise, *Filskov v. Board of Trustees of Northlake Police Pension Fund*, 409 Ill. App. 3d 66, 68 (2011), found that an officer was not injured in an act of duty because he was not responding to a call and had not yet resumed patrol when another officer inadvertently drove the squad vehicle over his foot. This court concluded he was not injured as a result of a "special risk arising from his being a police officer" and the "capacity in which he was acting was that of a passenger entering a motor vehicle, which is the same activity all passenger civilians do everyday." *Filskov*, 409 Ill. App. 3d at 72-73.

¶ 28 Here, to support the Board's conclusion that plaintiff was not injured in an "act of duty," the Board found that plaintiff failed to prove he was on "patrol" and it made the factual finding that he "was simply driving and not on 'patrol' " at the time of the accident. From our review of the record, we cannot find that the Board's factual finding is against the manifest weight of the evidence. See *Jensen*, 362 Ill. App. 3d at 202 (the agency's findings and conclusions on questions of fact are "deemed *prima facie* true and correct" and will only be set aside if they are against the manifest weight of the evidence).

¶ 29 The record shows that there was no evidence that plaintiff was responding to a call, had engaged in an investigation before the accident, was heading to investigate a matter, or was driving in his assigned patrol area, as he could not remember "what [his] area was at that time." The only evidence offered to show he was performing his patrol duties, or not "simply driving around," was his testimony that the accident occurred as he "was patrolling looking for anything that happened, you know, crimes or whatever." However, the Board found plaintiff not credible and this testimony self-serving. It is not this court's function to substitute our judgment on the issue of credibility. See *Koulegeorge v. State of Illinois Human Rights Comm'n*, 316 Ill. App. 3d

1079, 1087 (2000) (the agency must determine the credibility of witnesses and the weight to give to their testimony, and we will not substitute our judgment on these issues). Accordingly, based on this record, we cannot find that the Board's factual finding that plaintiff failed to prove he was "on patrol" rather than just "simply driving around" like a taxi or delivery driver at the time of the accident is against the manifest weight of the evidence.

¶ 30 Given the Board's factual finding on this issue, we cannot conclude that plaintiff was performing an activity associated with a police officer that involved "special risk, not ordinarily assumed by a citizen in the ordinary walks of life." 40 ILCS 5/5-113 (West 2014); see *Filskov*, 409 Ill. App. 3d at 71 ("In those cases where a police officer is found to have suffered a line-of-duty injury the facts demonstrate that the officer faced a special risk associated with serving as a police officer at the time the injury occurred."). Plaintiff therefore has not met its burden of proving he was injured as a result of the performance of an "act of duty" and the Board's decision was not clearly erroneous.

¶ 31 We note that, as previously discussed, the courts in *Jones* and *Rose* found that the police officers who were injured from vehicle accidents while on patrol were injured in an act of duty. *Rose*, 2011 IL App (1st) 102157, ¶ 89; *Jones*, 384 Ill. App. 3d at 1074. We find these cases distinguishable. In *Jones*, the police officer was injured while driving to a specific location to investigate an area that had complaints about speeders. *Jones*, 384 Ill. App. 3d at 1066. In *Rose*, the police officer specifically testified about his patrol duties and gave a detailed account of an investigation he had been pursuing just before the accident occurred. *Rose*, 2011 IL App (1st) 102157, ¶¶ 10-11. Accordingly, in *Jones* and *Rose*, there was evidence that, when the police officers were injured while on patrol, they were not simply driving around like ordinary citizens

but were performing their patrol duties looking for crimes being perpetrated or conduct violating laws. In contrast, here, the Board found there was no credible evidence that plaintiff was "on patrol" when plaintiff could not remember the area in which he was to patrol and the record did not show that, at the time of the injury, he was responding to a call, heading to an investigation, engaged in an investigation, or actually on patrol. In *Jones* and *Rose*, there were no factual findings by the Boards that the officers were not "on patrol" or performing their patrol duties when the accidents occurred. Thus, the facts of this case are distinguishable from the facts in *Jones* and *Rose*.

¶ 32 In plaintiff's reply, he asserts that "[t]here is not one scintilla of evidence to establish he was not working patrol duties at the time he was struck." However, as previously noted, in administrative proceedings, as here, plaintiff had the burden of proof. *Marconi*, 225 Ill. 2d at 532-33. It was therefore plaintiff's burden to prove he was working his patrol duties and was injured as a result of the performance of an act of duty. The fact that he could not recall the area where he was on patrol led the Board to believe differently.

¶ 33 Accordingly, based on the foregoing, we cannot conclude that we are " 'left with the definite and firm conviction that a mistake has been committed.' " *AFM Messenger Service, Inc*., 198 Ill.2d at 395 (quoting *United States Gypsum Co*., 333 U.S. 364, 395 (1948)). Thus, the Board's decision to deny plaintiff a line-of-duty disability pension because he failed to prove his injury resulted from the performance an "act of duty" was not clearly erroneous.

¶ 34 For the reasons explained above, we affirm the judgment of the circuit court affirming the Board.

¶ 35 Affirmed.