2018 IL App (2d) 180277-U
No. 2-18-0277
Order filed December 19, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

CLARENCE KROPP, Plaintiff-Appellant, v. BOARD OF TRUSTEES OF THE KILDEER POLICE PENSION FUND and VILLAGE OF KILDEER, Defendants-Appellees.	)	Appeal from the Circuit Court of Lake County. No. 17-MR-0871 Honorable David P. Brodsky, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Schostok and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: The Board's decision to deny the plaintiff a line-of-duty pension or, alternatively, a non-duty pension was affirmed where the plaintiff failed to prove that he was disabled; the Board properly denied the plaintiff leave to amend his disability application after he was terminated as a police officer to include new conditions of ill-being; and surveillance videos of the plaintiff, in evidence without objection, were properly viewed by members of the Board.

¶ 2 In this administrative review action, the circuit court of Lake County affirmed the decision of the Board of Trustees of the Kildeer Police Pension Fund (the Board) denying plaintiff, Clarence Kropp, a disability pension. We affirm.

¶ 3 I. BACKGROUND

¶ 4 The following evidence was adduced at hearings held before the Board. The prehearing and hearing proceedings were held on seven dates between February 26, 2015, and March 2, 2017. In 2005, plaintiff was hired as a police officer assigned to patrol for the Village of Kildeer (Village).[1] On January 8, 2014, plaintiff filed an application with the Board for a line-of-duty disability pension arising out of an incident (duty incident) during which he allegedly injured his cervical spine. During the proceedings before the Board, plaintiff amended his application to include an alternative request for a "not on duty" disability pension. As a result of the duty incident, plaintiff also filed a worker's compensation claim. In August 2014, plaintiff was terminated because he failed to return to work or provide the chief of police with medical documentation that he was unable to do so. Plaintiff then filed a grievance in which he requested that he be reinstated in his patrolman job.

¶ 5 A. The Duty Incident

¶ 6 On December 7, 2013, plaintiff was dispatched to a banquet hall to deal with a "combative" person. After plaintiff and another officer escorted an intoxicated woman from the hall, plaintiff placed her under arrest. She resisted being placed into the back of plaintiff's squad car by kicking plaintiff's chin a couple of times and also kicking him in the chest. According to plaintiff, he felt dazed, and he also felt a pain shoot down his back into his left hand. In addition,

[1] On April 23, 2015, the Board allowed the Village to intervene in the pension proceedings over plaintiff's objections.

one of his teeth was broken. Plaintiff drove the woman to the Lake Zurich police station, waited for an ambulance to transport her to a hospital, and then drove himself to Good Shepherd Hospital.

¶ 7 The emergency room report at Good Shepherd stated that plaintiff reported neck pain and radiating pain into the left trapezius (upper back and posterior of the neck). The report further indicated that plaintiff's neck and back examinations were normal and that he appeared to be in no acute distress. An X-ray revealed an old cervical fusion but was otherwise normal. Plaintiff was diagnosed with cervical strain, prescribed medication, and was released. He thereafter followed up with his own doctor, Jonathan Citow, M.D.

¶ 8 In his pension application, plaintiff stated that he was no longer able to perform full and unrestricted duties because of numbness and weakness in both arms and loss of motion in his neck arising out of the duty incident. He reported to Dr. Harel Deutsch in August 2014 that he had zero degrees of motion in his neck.

¶ 9 On November 3, 2015, plaintiff sought leave to further amend his application to add new conditions of hearing loss, chronic knee conditions, and psychiatric illness as a basis for awarding him a disability pension. On November 19, 2015, following counsels' arguments on that motion, the Board went into executive session to deliberate. Approximately 45 minutes later, the Board was back in open session and, on the record, Board member Walsh moved to deny leave to amend the application. That motion was seconded, and when the hearing officer asked for discussion, there was none. By voice vote, the Board agreed to deny the motion to amend. The hearing officer then stated: "So the Board's denied the request to amend the disability application. So we will just be proceeding on the initial claim that was filed *** with respect to the cervical spine injury." Plaintiff did not request that the Board give its reasons for its ruling.

Then, in its written decision, the Board formally denied the motion to amend. In a two-page discussion of the issue, the Board found that (1) it had no jurisdiction to adjudicate the new claims where plaintiff was no longer a police officer when he made them, (2) the "relation-back doctrine"[2] does not apply to pension proceedings, and (3) the new claims related to different areas of the body than the original claim.

¶ 10 B. The Board Admits Surveillance Videos Without Objection

¶ 11 At the November 3, 2015, hearing session, the hearing officer inquired whether the parties were ready to discuss exhibits. Plaintiff's newly acquired attorney, Bernard Wysocki, acknowledged receipt of some two or three thousand pages from the Board, but did not know whether he had the Village's exhibits. Wysocki asked for, and obtained, a 90-day continuance to "cull through" the exhibits that he had been tendered. The hearing officer indicated that "if there are any issues with respect to exhibits, we can take care of those at the actual disability hearing." Wysocki responded: "Very good." The matter was continued to February 2016.

¶ 12 Because of continuances obtained by plaintiff, the disability hearing did not convene until October 27, 2016. The hearing officer explained the protocol, including that "both parties will have the opportunity to make legal objections to any of this documentation or evidence." With respect to the Village's Exhibits 1 through 20, the hearing officer indicated that those had been tendered to Wysocki the previous February, eight months prior to the hearing. Village Exhibits 20(a), 20(b), and 20(c) were DVDs containing surveillance videos of plaintiff taken on December 22, 2014, December 23, 2014, December 31, 2014, January 4, 2015, and January 6, 2015. The hearing officer inquired: "Mr. Wysocki, did you receive a copy of [the Village's] exhibits?" Wysocki replied: "I did." The hearing officer then inquired of Wysocki: "Do you have

[2] See 735 ILCS 5/2-616(b) (West 2016).

any objection to the admission into evidence of Village Exhibits 1 through 20? Wysocki answered: "I do not." The hearing officer then stated: "Okay, Village Exhibits 1 through 20 are hereby admitted into evidence *without further authentication or foundation*." (Emphasis added). The hearing officer then addressed Wysocki: "Mr. Wysocki, are you ready to proceed, sir? Wysocki replied: "I would like to make a brief opening statement, if I may."

¶ 13 In the videos, plaintiff performs physical activities that he had claimed to his doctors that he was incapable of doing. For instance, the videos show plaintiff shoveling snow, operating a snow blower, driving an SUV in traffic, unloading groceries from a cart to the SUV, walking in and out of buildings, climbing into and out of vehicles, and shopping for camera equipment in an electronics store. While in the electronics store, plaintiff is seen bending low at the waist and cranking his neck in all directions to look at bags on the bottom shelf close to the floor. He is also seen lifting a camera tripod off a high shelf while craning his neck upward and back with no apparent discomfort. The Board also admitted without objection a report by the investigators who took the videos. That report covered in narrative form every video that was in evidence.

¶ 14 C. Plaintiff's Prior Existing Condition

¶ 15 On September 13, 2002, plaintiff first injured his neck in an off-duty car accident when his vehicle was struck by another vehicle traveling between 80 and 100 miles per hour. An MRI of plaintiff's neck taken in January 2004 showed mild degenerative disc disease with a bulge at C3-C4. Plaintiff was in another car accident on August 4, 2008, which exacerbated his neck and arm pain and caused new pain in his mid-back. On November 11, 2008, plaintiff underwent a three-level fusion at C3-C4, C4-C5, and C5-C6. On April 9, 2009, plaintiff was released to full police duty without restrictions.

¶ 16 D. Plaintiff's Treatment Following the December 2013 Duty Incident

¶ 17 On December 13, 2013, plaintiff related to Dr. Citow that he had shooting pains, left-arm numbness, and trouble turning his neck as a result of the duty incident. Dr. Citow noted that plaintiff's range of motion was limited due to pain. However, an MRI demonstrated no changes in his neck since a previous MRI that was done in 2010. Dr. Citow returned plaintiff to full police duties with no restrictions as of December 21, 2013. Upset, plaintiff told Dr. Citow to keep him off work. Dr. Citow complied with plaintiff's request and then, on August 22, 2016, because of plaintiff's continued complaints of pain, Dr. Citow performed another fusion at C3-C7. Thereafter, plaintiff was found to be stable, although he continued to complain of radicular-type symptoms.

¶ 18 On March 17, 2014, plaintiff underwent a worker's compensation independent medical examination (IME) by Dr. Avi Bernstein, who recommended epidural steroid injections and physical therapy for plaintiff's complaints of severe neck pain. Like Dr. Citow, Dr. Bernstein noted no structural changes between the 2010 and 2013 MRIs. In an April 2014 supplemental report, Dr. Bernstein opined that plaintiff's cervical spine was stable and that he was not a candidate for surgical intervention. By that time, according to Dr. Bernstein, he had viewed the video surveillance that revealed plaintiff performing tasks that he had denied to Dr. Bernstein that he was able to do.

¶ 19 E. The Board's Physicians' Reports

¶ 20 The Board appointed three physicians—Dr. Deutsch, a neurosurgeon, Dr. Jesse Butler, an orthopedic surgeon, and Dr. Babak Lami, a spinal surgeon—to examine plaintiff and review his medical records. Their reports were admitted into evidence without objection from plaintiff. Drs. Butler and Lami found that plaintiff was not disabled. Dr. Deutsch found plaintiff disabled but not as a result of the duty incident. Rather, Dr. Deutsch found that plaintiff's disability was

related to his 2008 three-level fusion surgery. During Dr. Deutsch's August 4, 2014, examination of plaintiff, Dr. Deutsch found that plaintiff was magnifying his symptoms.

¶ 21 F. Plaintiff's Testimony

¶ 22 Plaintiff testified that he was "just a little bit dazed" when the intoxicated woman kicked him during the duty incident. His head "snapped back," and he felt a "sharp jab" go all the way down his back. He testified: "My neck just cracked." Plaintiff testified that, by the time he got to Good Shepherd, his neck had started to "tighten up," and he was "still a little on the dazed and weak side." He reported to the emergency room doctor that his neck had started to "lock up." After the emergency room visit, plaintiff saw Dr. Citow, who told plaintiff that he was "done" with police work and should find another kind of employment. Plaintiff testified that he was fired for not attending worker's compensation medical appointments, but that he did everything that he was supposed to do.

¶ 23 Plaintiff testified that he also suffered the loss of a tooth, hearing loss, and "concussion syndrome" in the duty incident. As well, as time went on, he was having trouble with his "bowels letting loose" and continued neck pain. Plaintiff described his second fusion in 2016 and his efforts to wean himself off of narcotic medication. According to plaintiff, his pain and other symptoms improved after that surgery. Plaintiff testified that he still had to use caution while driving, could not easily turn around, could not sit in a car for more than an hour, could not run, had a loss of 30 to 35% of the motion in his neck in all directions, could not lift, could not reach above his head, and had to frequently alternate between sitting and standing.

¶ 24 On cross-examination, confronted with the surveillance video showing him shoveling snow, plaintiff denied that he was shoveling snow: "I hadn't shoveled any snow." He testified: "I might have pushed snow off my stoop or whatever, but I didn't *** shovel, like shovel snow that

I recall." When asked if he filed a grievance after his termination in which he sought full reinstatement as a police officer, plaintiff denied doing so until confronted with the document, and then he stated that the Fraternal Order of Police (FOP) had prepared the document, although he admitted signing it. Plaintiff claimed that the FOP told him that he had to sign it. When counsel asked plaintiff whether he had degenerative disc disease going back to 2002, plaintiff answered, "That's the medical opinion." Throughout cross-examination, plaintiff answered questions with statements such as "I can't answer that question," or "I can't understand what you're trying to get out of this."

¶ 25 G. Chief Steve Balinski's Testimony

¶ 26 Steve Balinski was chief of police for the Village. He testified that plaintiff did not respond to any of his certified letters or emails requesting him to return to work after the worker's compensation doctors allowed him to do so. He also testified that plaintiff did not present him with requested medical documentation supporting that he could not return to work.

¶ 27 H. The Board's Decision

¶ 28 On April 20, 2017, the Board issued its 41-page written decision and order. In it, the Board reviewed the medical evidence in meticulous detail and found that plaintiff failed to prove that he is disabled for service in the police department due to a cervical spine condition. The Board noted that all of the findings at Good Shepherd right after the duty incident, including an X-ray, were normal. The Board also noted that Dr. Citow's MRI of December 20, 2013, showed that the duty incident did not exacerbate or worsen plaintiff's cervical condition, nor did it support plaintiff's subjective complaints of pain.

¶ 29 The Board accorded "substantial weight" to Dr. Bernstein's opinion that plaintiff had a stable spine and was not a candidate for surgical intervention in 2014, and it found that plaintiff

had convinced Dr. Citow to the contrary despite the objective evidence. Further, the Board gave the surveillance videos weight "in that they show [plaintiff] performing tasks inconsistent with his subjective complaints of debilitating pain that prevent him from driving and most physical activity." The Board accorded "substantial weight" to Drs. Deutsch, Butler, and Lami, although it disagreed with Dr. Deutsch's opinion that plaintiff was disabled. Specifically, the Board gave substantial weight to Dr. Deutsch's findings that plaintiff had magnified his symptoms.

¶ 30 I. The Circuit Court's Decision on Administrative Review

¶ 31 On May 25, 2017, plaintiff filed a *pro se* complaint for administrative review. Although the Village had intervened in the proceedings before the Board, plaintiff did not name it as a defendant in violation of section 3-107(a) of the Administrative Review Act (Act) (735 ILCS 5/3-107(a) (West 2016) (requiring the plaintiff to name as defendants all persons who were parties of record to the proceedings before the administrative agency)). The Board moved to dismiss the complaint on that ground, arguing that the Act prohibited plaintiff from amending the complaint to add the Village. Now represented by counsel, plaintiff sought and obtained leave to file an amended complaint adding the Village as a defendant.

¶ 32 Pertinent to this appeal, plaintiff raised three issues in his amended complaint: (1) the Board improperly denied him leave to amend his complaint for disability to include new conditions; (2) the Board denied plaintiff due process in allowing the video surveillance evidence; and (3) the Board's decision denying a disability pension was against the manifest weight of the evidence. The court concluded that the Board's denial of leave to amend was proper where plaintiff alleged that he was injured as a result of the duty incident but the new complaints of hearing loss, knee pain, and psychological disability were not related to that incident. With respect to the surveillance videos, the court found that they were admitted into

evidence without objection and were properly considered by the Board. Finally, the court found that the Board's decision was not against the manifest weight of the evidence. Plaintiff filed a timely notice of appeal.

¶ 33 II. ANALYSIS

¶ 34 We begin with the standard of review. The appellate court reviews the Board's decision rather than the decision of the circuit court. *Jones v. Board of Trustees of Police Pension Fund of the City of Bloomington*, 384 Ill. App. 3d 1064, 1067 (2008). The standard of review depends on whether the issue presented is one of fact, one of law, or a mixed question of law and fact. *Jones*, 384 Ill. App. 3d at 1067. We will reverse a ruling on a question of fact only if it is against the manifest weight of the evidence, whereas mixed questions of law and fact are reviewed under the clearly erroneous standard. *Jones*, 384 Ill. App. 3d at 1067. We review questions of law *de novo*. *Jones*, 384 Ill. App. 3d at 1067.

¶ 35 Plaintiff raises three issues: (1) the denial of leave to amend his disability application to include new conditions deprived him of due process; (2) the Board's reliance on the surveillance videos deprived him of due process; and (3) the Board's decision is against the manifest weight of the evidence.

¶ 36 We first address the Village's argument that plaintiff should not have been allowed to amend his complaint in administrative review to add it as a party defendant. Appellees may not argue alleged errors unless they timely cross-appeal as required by Illinois Supreme Court Rule 303(a)(3) (eff. July 1, 2017). *Martis v. Grinnell Mutual Reinsurance Co.*, 388 Ill. App. 3d 1017, 1024 (2009). Because the Village did not file a cross-appeal, it will not be permitted to challenge the trial court's order. See *Martis*, 388 Ill. App. 3d at 1024 (when an appellee does not file a cross-appeal, the reviewing court is confined to the issues presented by the appellant).

¶ 37 Next, the Village moves to strike plaintiff's opening brief, arguing that the statement of facts is inadequate and that plaintiff fails to provide references to the record in violation of Illinois Supreme Court Rule 341 (eff. May 25, 2018). Rule 341(h)(6) requires the appellant to include a statement of facts "necessary to an understanding of the case" with appropriate references to the pages of the record. Here, plaintiff's statement of facts is a little over two pages long and barely skims just the procedural history of the case. The statement of facts includes some record references but does not do so consistently. It is improper to set forth only the procedural history in the statement of facts and then disperse additional facts throughout the argument section of the brief. *In re Marriage of Wright*, 212 Ill. App. 3d 392, 394 (1991). This court has discretion to strike a brief and dismiss an appeal where a party fails to comply with Rule 341, but we will do so only when the procedural violations interfere with our review. *In re Marriage of Iqbal & Khan*, 2014 IL App (2d) 131306, ¶ 14. Here, the violations do not hinder our review. Nevertheless, we admonish counsel that supreme court rules are mandatory and not mere suggestions. *Menard v. Illinois Workers' Compensation Com'n*, 405 Ill. App. 3d 235, 238 (2010).

¶ 38 The Village next points out that the appendix to plaintiff's brief does not include a proper table of contents to the record as required by Illinois Supreme Court Rule 342(a) (eff. July 1, 2017). Rule 342(a) requires a complete table of contents, with page references, of the record on appeal, as well as the names of all witnesses and the pages on which their direct, cross, and redirect examinations begin. Instead of complying with the rule, plaintiff merely copied the table of contents prepared by the circuit clerk. We have the authority to dismiss the appeal for violations of Rule 342(a), but we will refrain from doing so where the argument section of the appellant's brief provides the needed record references. *Forest Preserve District of Cook County*

v. Illinois Fraternal Order of Police Labor Council, 2017 IL App (1st) 161499, ¶ 17. Thus, we proceed to the merits.

¶ 39 A. Plaintiff's Due Process Arguments

¶ 40 Section 3-114.1 of the Illinois Pension Code (Pension Code) (40 ILCS 5/3-114.1 (West 2014)) provides that a police officer who, as a 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 police service is entitled to a disability retirement pension as specified in the Pension Code. This type of pension is known as a "line of duty" pension. 40 ILCS 5/3-114.1. Alternatively, section 3-114.2 of the Pension Code (40 ILCS 5/3-114.2 (West 2014)) provides that 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, is entitled to a "not on duty" pension. As noted, plaintiff applied for both types of disability pensions based on his cervical-spine condition.

¶ 41 1. The Board Properly Denied Plaintiff's Motion to Amend To Add New Conditions

¶ 42 It is undisputed that plaintiff sought to amend his application to add claims of hearing loss, chronic knee conditions, and psychiatric illness after he was terminated. One reason the Board denied leave to amend was that plaintiff was no longer a police officer. To seek a pension under the Code, one must be a police officer. *Keeling v. Board of Trustees of Forest Park Police Pension Fund*, 2017 IL App (1st) 170804, ¶ 26. The term "police officer" does not include officers who have been discharged. *Keeling*, 2017 IL App (1st) 170804, ¶ 27. Consequently, one must file an application while he or she is still employed as a police officer. *Keeling*, 2017 IL

App (1st) 170804, ¶ 27. *Keeling* was decided pursuant to section 3-114.1 of the Pension Code, but its rationale is equally applicable to section 3-114.2, as the term "police officer" is used in both sections.

¶ 43 Plaintiff argues that the Board denied him due process because (1) it gave no reasons for its decision not to allow the amendment and (2) the new conditions developed while plaintiff was still employed as a police officer and thus related back to the filing of the original application within the meaning of section 2-616(b) of the Code of Civil Procedure (Code) (735 ILCS 5/2-616(b) (West 2014)). Plaintiff also maintains that the new conditions of ill-being were related to his cervical spine condition.

¶ 44 We reject plaintiff's due process argument, as the Board provided its reasons for disallowing the amendment in a lengthy discussion at pages 30, 31, and 32 of its written decision and order. At oral argument, faced with the record, plaintiff then claimed that the Board was required to give its reasons orally when it voted to deny his motion to amend. However, when the court asked for plaintiff's authority for that position, plaintiff produced none. Moreover, the record shows that plaintiff's counsel was present but did not request an oral explanation for the Board's action. The question is whether the relation-back doctrine applies. The Village and the Board do not dispute that the conditions of ill-being that were the bases for the proposed amendment existed while plaintiff was employed as a police officer.

¶ 45 The relation-back doctrine is found in section 2-616(b) of the Code, which permits an amended pleading to relate back to the date of the original pleading if the original pleading was timely and the amendment "grew out of the same transaction or occurrence set up in the original pleading." *Lawler v. University of Chicago Medical Center*, 2017 IL 120745, ¶ 20. Here, plaintiff asserts that his new claims arose out of those asserted in his original application or that

they were sufficiently closely related that they fall within the relation-back doctrine. We need not opine on this question, because the Code applies to litigation conducted in the courts (*American Airlines, Inc. v. Department of Revenue*, 402 Ill. App. 3d 579, 601 (2010)), and the Code's provisions generally do not apply to administrative proceedings. *Forest Preserve District of Cook County v. Illinois Labor Relations Board*, 369 Ill. App. 3d 733, 750 (2006). "This is because administrative procedure is simpler, less formal and less technical than judicial procedure." *Forest Preserve District*, 369 Ill. App. 3d at 750.

¶ 46 At oral argument, the court asked plaintiff if he had authority for his position that section 2-616(b) of the Code applies to pension board proceedings. Plaintiff referred us to *Porter v. Decatur Memorial Hospital*, 227 Ill. 2d 343 (2008), cited at page 7 of his reply brief and *In re Olympia Brewing Company Securities Litigation*, 612 F.Supp. 1370 (N.D. Ill. 1985), cited at page 9 of his reply brief. Neither of those cases involved administrative proceedings or addressed the issue of whether section 616(b) applies in administrative proceedings. *Porter* involved a medical malpractice claim and *Olympia Brewing* involved federal racketeering and securities fraud litigation in which the issue was whether an amendment to the complaint adding a RICO claim could relate back to the filing of the original complaint under Fed.R.Civ.P. 15(c). *Olympia Brewing*, 612 F.Supp. at 1371. Because plaintiff does not cite any case applying section 2-616(b) of the Code to police pension board proceedings, we reject his relation-back argument. Moreover, plaintiff provides no cogent argument linking the new conditions to his cervical-spine condition. Accordingly, we hold that the Board properly denied plaintiff leave to amend his application.

¶ 47 2. The Board Properly Considered the Surveillance Videos

¶ 48 Plaintiff next claims that he was denied due process by the Board's reliance on "hearsay" evidence in the form of the surveillance videos and the surveillance investigation report. More specifically, without *any* basis in the record, plaintiff claims that the Board's viewing of the videos constituted *ex-parte* communications, that the Board held hearings outside plaintiff's presence, and that he was given no opportunity to rebut the content of the videos.

¶ 49 Plaintiff argues that the videos were not authenticated, completely ignoring that he did not object to them or the report being introduced into evidence and that the hearing officer stated that the videos were admitted without further authentication or foundation. At oral argument, when the court pointed out to plaintiff's appellate counsel that plaintiff's trial counsel did not object to the admission of the videos, plaintiff's appellate counsel argued that the lack of objection should not matter because the Board deprived plaintiff of due process. Appellate counsel represented to this court that the Board and the Village never gave plaintiff copies of the videos in advance of the disability hearing, somehow tricking him. That representation is not supported by the record. The record establishes that the Village tendered the videos to plaintiff's trial counsel eight months prior to the disability hearing. The hearing officer specifically asked Wysocki if he had received the Village's exhibits and Wysocki answered "I did." Plaintiff's appellate counsel also represented at oral argument that the investigation report containing narratives of what was on the videos conflicted with the videos themselves. Appellate counsel represented that there were additional videos that were not referenced in the report. Those representations are also belied by the record. The report shows that the investigators who conducted the surveillance made entries detailing that surveillance for every date of every video.

¶ 50 A party who does not object at trial to the failure to lay a proper foundation for the admission of evidence forfeits the issue on appeal. *People v. Korzenewski*, 2012 IL App (4th)

101026, ¶ 14. Forfeiture aside, the record demonstrates a sufficient foundation for the videos. The investigation report contains the necessary information as to who made them, when they were made, and that they accurately depict what they purport to depict.

¶ 51 Further, plaintiff does not explain why the videos are hearsay. To the contrary, surveillance videos contain substantive evidence concerning the extent of a plaintiff's injuries. *Shields v. Burlington Northern & Santa Fe Ry. Co.*, 353 Ill. App. 3d 506, 513 (2004). In addition, plaintiff's conduct as captured on the videos constituted an admission that he was not disabled. Relevant admissions of a party, whether they consist of a statement or conduct, are admissible as an exception to the hearsay rule. *People v. Cruz*, 162 Ill. 2d 314, 374-75 (1994). Even if the videos were hearsay, it is well established that when hearsay evidence is admitted without objection, it is to be considered and given its natural probative effect. *Jackson v. Board of Review of the Department of Labor*, 105 Ill. 2d 501, 508 (1985).

¶ 52 The record demonstrates that plaintiff's due process claims are meritless. Plaintiff does not explain how the videos could be *ex-parte* communications when they were admitted into evidence without objection. Plaintiff cites no authority for his assertion that the Board had to view the videos in his presence. Indeed, plaintiff had the opportunity during his direct testimony to explain away what was shown on the videos, but he did not attempt to do so. At oral argument, plaintiff railed about chicanery surrounding the videos, but the record demonstrates that neither the Board nor the Village engaged in any such deceptiveness.

¶ 53 B. The Board's Decision Is Not Against the Manifest Weight of the Evidence

¶ 54 Plaintiff's last contention is that the Board's decision to deny him a disability pension is against the manifest weight of the evidence. A plaintiff in an administrative proceeding has the burden of proof, and if he or she fails to meet that burden, relief will be denied. *Goodman v.*

Morton Grove Police Pension Board, 2012 IL App (1st) 111480, ¶ 26. On administrative review, the court's function is to ascertain whether the agency's findings and decision are against the manifest weight of the evidence. *Turcol v. Pension Board of Trustees of Matteson Police Pension Fund*, 359 Ill. App. 3d 795, 801 (2005). In making that determination, the appellate court does not reweigh the evidence or make an independent determination of the facts. *Turcol*, 359 Ill. App. 3d at 801. That an opposite conclusion is reasonable or that we might have ruled differently does not justify reversal of the administrative findings. *Turcol*, 359 Ill. App. 3d at 801. If the record contains evidence to support the agency's decision, it should be upheld. *Turcol*, 359 Ill. App. 3d at 801.

¶ 55 Here, plaintiff argues that we should review the medical evidence *de novo*, as it was admitted in the form of documentary evidence, and that the Board should have weighed the evidence differently. Specifically, plaintiff argues that the Board was biased in favor of those medical reports that found that plaintiff was not disabled. However, it is the Board's function to assess the credibility of the documentary information and the witnesses' testimony and to determine the appropriate weight to be given the evidence. *Marconi v. Chicago Heights Police Pension Board*, 225 Ill. 2d 497, 540 (2007). The Board's findings of fact are *prima facie* true and correct. *Marconi*, 225 Ill. 2d at 541.

¶ 56 At oral argument, plaintiff argued for the first time that in a letter from Balinski to plaintiff dated July 30, 2014, the Village acknowledged that plaintiff was disabled from police work. In the letter, Balinski stated: "[I]t appears that you are not capable of performing the essential functions of your job and that there is no way of determining when, if ever, you will be able to return to work and perform the essential functions of your patrol officer position." Points

not asserted in a party's briefs cannot be raised for the first time in oral argument. *Phillips v. Gannotti*, 327 Ill. App. 3d 512, 519 (2002). Consequently, we will not consider this argument.

¶ 57 We conclude that there is ample evidence to support the Board's decision. When plaintiff was seen in the Good Shepherd emergency room following the duty incident, his X-ray and examination were normal. Most telling, there was no change in his MRI after the duty incident. Dr. Citow's continued invasive treatment was undertaken based on plaintiff's subjective complaints of pain. Two of the three physicians appointed by the Board to examine plaintiff and review his medical records concluded that he was not disabled. The third doctor, Dr. Deutsch, found that plaintiff was exaggerating his symptoms. As much as plaintiff wishes the surveillance videos away,[3] they are probative of the extent of his injuries (see *Shields*, 353 Ill. App. 3d at 513), and the Board properly considered them in assessing plaintiff's credibility. Plaintiff's credibility was further diminished when he filed a grievance asking for his patrolman job back at the same time that he contended that he was disabled from being able to perform police duties. At oral argument, plaintiff explained that he asked for his job back only because an employment relationship is a prerequisite for an award of worker's compensation benefits. (See *Roberson v. Industrial Comm'n.*, 225 Ill. 2d 159, 174 (2007) (an employment relationship is a prerequisite for an award of benefits under the Worker's Compensation Act)). Be that as it may, asking to be returned to his patrolman duties implied that he was able to perform those duties and was inconsistent with his claim of disability from all police duties. For all of these reasons, we hold that the Board's decision was not against the manifest weight of the evidence.

[3] Plaintiff even argues that there is no evidence that he is depicted in the videos. The record shows that plaintiff was present before the members of the Board, who saw him and could obviously identify him in the videos.

¶ 58 III. CONCLUSION

¶ 59 For the reasons stated, we affirm the Board's decision and affirm the judgment of the circuit court of Lake County.

¶ 60 Affirmed.