

No. 1-11-0850

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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DONALD SARUBBI,	)	Appeal from the Circuit
	)	Court of Cook County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 10 CH 6525
	)	
THE BOARD OF TRUSTEES OF THE NORTH	)	
MAINE FIREFIGHTERS PENSION BOARD,	)	The Honorable
	)	Michael B. Hyman,
Defendant-Appellee.	)	Judge Presiding.

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PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.  
Justices Karnezis and Rochford concurred in the judgment.

**ORDER**

¶ 1 *Held:* The decision of the Board of Trustees of the North Main Firefighters Pension Board, that the plaintiff is not disabled from firefighter work, is not against the manifest weight of the evidence and is not based on improper evidence.

¶ 2 The plaintiff, Donald Sarubbi, appeals from a judgment of the circuit court confirming the decision of the Board of Trustees of the North Maine Firefighters Pension Board (Board) to deny him line-of-duty disability benefits pursuant to section 4-110 of the Illinois Pension Code (Code) (40 ILCS 5/4-110 (West 2006)). On appeal, he argues that the evidence presented to the Board did

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not support its conclusion and that the Board relied on improper evidence to reach its decision. For the reasons that follow, we affirm the circuit court's decision.

¶ 3 The following factual recitation is taken from the evidence presented at the Board hearing conducted on October 28, 2009.

¶ 4 The plaintiff testified that he began working for the North Main Fire Protection District on September 7, 2004, after passing all necessary physical and other tests. On April 13, 2007, he helped give emergency assistance to an intoxicated man who weighed, in the plaintiff's estimation, between 350 and 400 pounds. During the course of the encounter, the man fell forward out of the back of an ambulance, and the plaintiff attempted to catch him. The plaintiff testified that he felt an immediate "sharp burning sensation" in his back and radiating down his leg; he also recalled hearing a popping sound in his back. The plaintiff said that he sought treatment shortly thereafter and reported his injury to his superiors.

¶ 5 Emergency room records from the date of the accident include a radiology report stating that the claimant had a "right L4 spondylolysis."

¶ 6 The plaintiff sought follow-up care with Dr. Richard Tuttle, whom he first visited four days after the accident. In his April 17, 2007, treatment note, Dr. Tuttle noted the plaintiff's "significant discomfort" and prescribed physical therapy. The plaintiff recalled in his testimony that the physical therapy did not improve his condition and actually seemed to aggravate his pain as the therapy became more demanding. Indeed, in treatment notes for follow-up visits, Dr. Tuttle wrote that the plaintiff continued to suffer back pain. An April 27, 2007, CT scan revealed bilateral spondylolyses at the L4 and L5 levels. In a June 5, 2007, treatment note, Dr. Tuttle reviewed a new CT scan and

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concluded that the plaintiff had experienced "congenital narrowing" at the L5 level but no true fractures. In a July 4, 2007, treatment note, Dr. Tuttle wrote that the plaintiff was not progressing with conservative treatment, and he referred the plaintiff to Dr. Steven Mardjetko, an orthopedic back specialist.

¶ 7 The plaintiff saw Dr. Mardjetko on July 14, 2007. In a treatment note following that visit, Dr. Mardjetko wrote that diagnostic tests showed that the plaintiff had low-back defects that were neither fresh nor acute. Based on his examination, Dr. Mardjetko concluded that the claimant had "long-standing L4-5 and L5-S1 spondylitic defects with a small spondylolisthesis which is unstable," as well as an "acute injury to these two levels" due to a line-of-duty accident. Dr. Mardjetko planned to continue conservative treatment and escalate treatment if necessary. Dr. Mardjetko later prescribed a course of facette injections, which he administered over several months. The plaintiff said that he received only temporary relief from the injections.

¶ 8 In a December 26, 2007, treatment note, Dr. Mardjetko wrote that the claimant was reporting gradual progress with physical therapy but was also reporting upper-leg pain. Dr. Mardjetko then recommended surgery, but the plaintiff testified that he asked for more conservative treatment due to the risks associated with surgery and the likelihood that surgery would disqualify him from returning to firefighter work.

¶ 9 On March 13, 2008, Dr. Gunnar Andersson, who examined the plaintiff in relation to a workers' compensation claim the plaintiff had filed for his back injury, saw the plaintiff and concluded (as he had in a November 2007 evaluation) that the claimant suffered from spondylolysis and spondylolisthesis aggravated by his workplace accident. Dr. Andersson mentioned surgery as

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a possibility but stated that his preferred alternative was to "accept that the patient has reached maximum medical improvement" (MMI) and evaluate his condition and ability to work.

¶ 10 On April 16, 2008, the plaintiff underwent a functional capacity evaluation (FCE). The report of the FCE stated that the claimant gave inconsistent or less than maximum effort but still demonstrated the ability to do very heavy work, although the report noted that its results were obtained in a controlled environment that might not represent the demands on a firefighter in the line of duty. The report said that the plaintiff was able to lift 110 pounds from the floor to his hips and 55 pounds from his hips to overhead, and it stated that he performed the 110-pound lift after demonstrating difficulty lifting 70 pounds from the floor to his hips. The report also stated that the plaintiff demonstrated difficulty performing a full squat during a test of that movement but, later in the session and during a different test, assumed a full squat position. The plaintiff testified that he never gave suboptimal effort during his FCE, and he also testified that firefighter duty cannot be confined to "controlled" situations.

¶ 11 On May 1, 2008, Dr. Andersson, the doctor who examined the plaintiff in relation to the plaintiff's workers compensation claim, wrote a letter indicating that, after reviewing the plaintiff's FCE report, he believed that the plaintiff had reached MMI and was capable of "working at a very heavy work level in a controlled environment."

¶ 12 Dr. Michael Fragen testified that he examined the plaintiff on August 4 and August 6, 2009, at the request of the plaintiff's employer, to determine if the plaintiff was capable of returning to work. Dr. Fragen reviewed the plaintiff's history, examined him, and then evaluated both the effect of his work injury and his overall fitness for duty. Dr. Fragen concluded that the plaintiff had

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suffered a work-related aggravation of pre-existing spondylolisthesis and also suffered from radicular leg symptoms, hamstring weakness, and insufficient strength. Based on these problems, Dr. Fragen believed that the claimant was unable to return to firefighter duties. Dr. Fragen said that he had reviewed the plaintiff's FCE but disagreed with its findings, because the weight that the claimant was able to lift was inconsistent with "very heavy lifting." Dr. Fragen also noted that firefighters very often must work in uncontrolled environments, so the FCE's statement that the plaintiff could perform very heavy duty work in a controlled environment did not establish that the plaintiff could return to firefighter work. On cross-examination, Dr. Fragen said that he had no reason to believe that the plaintiff was malingering during his examinations. He did concede, however, that it was "possible" that the plaintiff's strength at the time of his examinations (and at the time of the FCE) was roughly the same as when the plaintiff was hired as a firefighter. He also agreed that, after learning during the examinations that the plaintiff had withdrawn an application for line-of-duty disability, he had encouraged the plaintiff to reapply for the benefits.

¶ 13 On April 8, 2009, the plaintiff visited Dr. Babek Lami, a Board doctor. In the plaintiff's recollection, that visit lasted no longer than ten minutes and involved only a very perfunctory physical examination and interview. Dr. Lami did not certify the plaintiff as permanently disabled from firefighter service. After reviewing the claimant's medical record, Dr. Lami reported that the claimant suffered from spondylolysis that "was not acute and was not cause[d] by an injury." According to Dr. Lami, "[a]ll the findings in the diagnostic tests preexisted [the plaintiff's] work related injury." Dr. Lami did write in his report, however, that it was "possible that [the plaintiff's] injury \*\*\* aggravated the lumbar spondylolysis." Dr. Lami further opined that the plaintiff had been

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given sufficient time to recover from his 2007 back pain and could work as a firefighter without restrictions. In an October 7, 2009, follow-up letter responding to Dr. Fragen's conclusions, Dr. Lami wrote that his opinions were unchanged, and he repeated that the plaintiff could return to work as a firefighter.

¶ 14 On April 9, 2009, the plaintiff visited Dr. Thomas Hudgins, a second Board doctor. In the plaintiff's recollection, that visit lasted approximately 15 minutes and included an interview and a physical examination with a strength and reflex test. Dr. Hudgins did not certify the plaintiff as permanently disabled from firefighter service. Based on his examination and review of medical records, Dr. Hudgins concluded that the plaintiff "appear[ed] to have had an injury of his lumbar spine consistent with a lumbar sprain" as a result of his work injury. Dr. Hudgins noted that spondylosis and spondylolisthesis are chronic conditions that could not have been caused by a single traumatic event and, in any event, could not cause some of the low-leg pain that the plaintiff was describing. Relying on FCE results that the plaintiff could engage in very heavy duty work, Dr. Hudgins opined that the plaintiff had no physical limitations or disability. On October 27, 2009, Dr. Hudgins wrote a letter responding to Dr. Fragen's opinions; in the letter, Dr. Hudgins did not alter his previously offered conclusions.

¶ 15 On August 11, 2009, the plaintiff visited Dr. John Stamelos, a third Board doctor. The plaintiff testified that his visit with Dr. Stamelos lasted approximately one hour and included many different tests as well as x-rays. Dr. Stamelos certified the plaintiff as permanently disabled from firefighter service. He concluded that the plaintiff had suffered an aggravation of his preexisting spondylitic defects on April 13, 2007, and required further treatment, perhaps surgery.

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¶ 16 In his testimony, the plaintiff recalled that, in February 2007, he underwent a physical fitness test in connection with his employment, and he said that he experienced no physical problems during his testing. He further testified that he had never felt back pain prior to his April 2007 line-of-duty incident and that he had passed his physical entrance examination, which included a test in which he was required to lift a ladder.

¶ 17 The plaintiff also described in his testimony a trip he took in April 2008 to South Korea. The plaintiff explained that he took a direct, 13- to 14-hour flight from Chicago to South Korea but stood, moved around, or used his TENS unit for much of both the flight to South Korea and the flight back. He said that his normal practice was to use the TENS unit twice per day but that he used it "multiple" times during the flights. He testified that he took the flight only after consulting with his doctor beforehand, and he expected that the discomfort from having to sit so long would be mitigated by accommodations from the plane crew to allow him to move and walk.

¶ 18 On January 19, 2010, the Board issued its decision denying the plaintiff's claim for line-of-duty benefits. In so deciding, the Board cited the opinions of Drs. Lami and Hudgins that the plaintiff was not disabled, July 2007 CT scan results showing that the plaintiff's back problems were "not fresh fractures," actions by treating physicians indicating that they "did not consider the problem serious," the FCE indicating the plaintiff's ability to return to very heavy work, evidence that the claimant "took two air flights to Korea following his injury" despite his claim that he had difficulty sitting for even short periods, Dr. Andersson's May 2008 opinion that the plaintiff could return to work, and Drs. Lami's and Hudgins's intimations that the plaintiff may have been exaggerating his symptoms. The Board discredited the opinions offered by Dr. Fragen, who the

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Board concluded "had his own agenda" because he "exceeded his direction" by instructing the plaintiff to pursue disability benefits. In response to the suggestion that the plaintiff now lacked the physical strength to perform certain job functions, the Board cited the recollection of one of its members that hiring testing showed that the plaintiff lacked that capacity even when he was hired. The Board concluded that the plaintiff had a "pre-existing condition of lumbar spondylolysis and was able to perform his duties as a firefighter with the [condition]" and that the plaintiff's condition was pre-existing and was not caused by a work-related injury. The Board further concluded that the plaintiff's primary problem was "subjective back pain." Based on these findings and conclusions, the Board determined that the plaintiff was "not disabled and fit to return" to duty.

¶ 19 The plaintiff filed a complaint for administrative review in the Circuit Court of Cook County, and the circuit court confirmed the Board's decision. The plaintiff now timely appeals.

¶ 20 On appeal, the plaintiff's primary argument is that the Board erred in finding that his lumbar spondylolysis condition pre-existed any work injury and that his back condition did not disable him from firefighter work. The Administrative Review Law (735 ILCS 5/3-101 *et seq.* (West 2008)) governs judicial review of Board proceedings and administrative decisions conducted under the Code. 40 ILCS 5/4-139 (West 2008). In administrative review actions, our role is to review the decision of the administrative agency, not the decision of the circuit court. *Lindemulder v. Board of Trustees of the Naperville Firefighters' Pension Fund*, 408 Ill. App. 3d 494, 500, 946 N.E.2d 940 (2011). Our standard of review depends on whether the question presented on appeal is one of fact, one of law, or a mixed question of fact and law. *Kouzoukas v. Retirement Board of the Policemen's Annuity and Benefit Fund of the City of Chicago*, 234 Ill. 2d 446, 463, 917 N.E.2d 999 (2009).

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Although the Board's findings of fact are given considerable deference (see 735 ILCS 5/3-110 (West 2008)), they are nonetheless subject to reversal if they are against the manifest weight of the evidence. *Kouzoukas*, 234 Ill. 2d at 463. "Questions of law, however, are reviewed *de novo*, while mixed questions of law and fact are reviewed under the clearly erroneous standard." *Kouzoukas*, 234 Ill. 2d at 463.

¶ 21 Section 4-110 of the Code states that a firefighter may receive a line-of-duty disability pension if he "as the result of sickness, accident or injury incurred in or resulting from the performance of an act of duty or from the cumulative effects of acts of duty, is found \*\*\* to be physically or mentally permanently disabled for service in the fire department[.]" 40 ILCS 5/4-110 (West 2006). The question of whether the evidence of record supports the denial of a plaintiff's application for a disability pension under the Code is a question of fact that must be analyzed under the manifest weight standard of review. *Kouzoukas*, 234 Ill. 2d at 464. Factual findings are against the manifest weight of the evidence only where it is clearly evident that the agency erred and should have reached the opposite conclusion. *Turcol v. Pension Board of Trustees of Matteson Police Pension Fund*, 359 Ill. App. 3d 795, 801, 834 N.E.2d 490 (2005). The fact that an opposite conclusion is reasonable or that a reviewing court might have ruled differently will not justify reversal of the Board's findings. *Turcol*, 359 Ill. App. 3d at 800. If the record contains evidence that supports the Board's decision, that decision should be upheld on review. *Turcol*, 359 Ill. App. 3d at 800.

¶ 22 To argue that the Board's findings here are against the manifest weight of the evidence, the plaintiff emphasizes the opinions of Drs. Stamelos, Andersson, and Fragen, all of whom concluded

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that a work-related exacerbation of his back condition had left him unable to work as a firefighter. However, there was also evidence, much of which the Board cited, to support the Board's decision. That evidence included the opinions of Drs. Lami and Hudgins, who both examined the plaintiff and determined that he had a pre-existing back condition and had a work injury that might have sprained his back or aggravated his back condition. However, both also determined that, notwithstanding his work-related incident, the plaintiff was able by 2009 to return to work as a firefighter. The plaintiff correctly points out that these two medical opinions followed relatively short physical examinations, but that fact alone is insufficient to impeach the opinions. Drs. Lami's and Hudgins's opinions were based also on their reviews of the plaintiff's medical history and analysis of his diagnostic testing results, both of which revealed to those doctors no objective basis for the plaintiff's claims.

¶ 23 The FCE report, which the Board itself also relied on, provided further basis for Drs. Lami and Hudgins's opinions regarding the plaintiff's level of activity. According to that report, the plaintiff was able to lift 110 pounds from the floor to his hips and 55 pounds from his hips to overhead, despite the FCE administrator's assessment that the plaintiff did not give full and consistent effort during the test. Although the plaintiff is correct that the report's ultimate conclusion said only that he was capable of very heavy work "in a controlled environment," a phrase neither party disputes does not describe a fireman's working situation, the findings underlying that conclusion provide strong support for Drs. Lami's and Hudgins's conclusions, as well as that of the Board.

¶ 24 Aside from its reliance on the FCE and the opinions of Drs. Lami and Hudgins, the Board also noted that it placed no weight on the opinion of Dr. Fragen, a physician who testified in support

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of the plaintiff's disability claim. In his brief, the plaintiff strongly contests the Board's decision to disbelieve Dr. Fragen. However, while it is possible to interpret the record as supporting Dr. Fragen's opinions, there is also evidence, summarized above, to undercut his opinions. The Board relied on the latter evidence, and it also assessed Dr. Fragen's testimony as incredible based on its perception that his actions demonstrated his bias in the plaintiff's favor. It is the Board's province to resolve evidentiary conflicts and assess the credibility of witnesses. *Peterson v. Board of Trustees of Firemen's Pension Fund of the City of Des Plaines*, 54 Ill. 2d 260, 263, 296 N.E.2d 721 (1973). Even if we might disagree with the Board's assessment that Dr. Fragen's actions biased his medical opinion, there was evidentiary support for the Board's decision to accord more weight to the opinions of Drs. Lami and Hudgins than to the opinion of Dr. Fragen. Accordingly, we will not disturb the Board's decision on appeal.

¶ 25 Aside from his challenges to the Board's interpretation of the evidence, the plaintiff also argues that the Board improperly relied on evidence that he could not complete a pre-employment physical. The plaintiff notes that, pursuant to section 4-107(c) of the Code (40 ILCS 5/4-107(c) (West 2006)), a person otherwise qualified for participation in the pension fund may not be excluded for failure to pass age or fitness requirements that existed prior to 1995, and he argues that the Board's reliance on his pre-employment fitness examination to deny him benefits violates the Code.

¶ 26 The plaintiff's argument misconstrues the Board's reasoning. The Board did not deny the plaintiff benefits because it found him unqualified for firefighter work due to his initial fitness examination; it used that examination as a reference point to establish that the plaintiff is able to do physical work roughly equivalent to the work he could do when he started his employment. That

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is, the Board consulted the plaintiff's initial entrance examination, in which the plaintiff purportedly struggled to perform certain tasks, cited the fact that the plaintiff had nonetheless worked for many years as a firefighter, noted that his physical abilities had not appreciably changed, and concluded that the plaintiff could perform firefighter work even with his back problems. For that reason, we reject the plaintiff's argument that we must set aside the Board's decision due to its improper reliance on his pre-employment fitness test.

¶ 27 For the foregoing reasons, we affirm the judgment of the circuit court, which confirmed the Board's decision.

¶ 28 Affirmed.