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SECOND DIVISION
JANUARY 18, 2010

1-10-0421

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THOMAS McNAMARA,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	
)	No. 09 CH 15966
THE RETIREMENT BOARD OF THE POLICEMEN'S)	
ANNUITY AND BENEFIT FUND OF THE CITY OF)	
CHICAGO,)	Honorable
)	Mary Anne Mason,
Defendant-Appellee.)	Judge Presiding.

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

ORDER

Held: Where the record contained evidence that plaintiff's disability resulted from a pre-existing physical condition, plaintiff should receive a disability benefit of 50% of his salary; the circuit court's judgment upholding the Board's decision is affirmed.

Plaintiff Thomas McNamara appeals the decision of defendant, the Retirement Board of the Policeman's Annuity and Benefit Fund of the City of Chicago (the Board), that he should receive duty-related disability benefits at the level of 50%, as opposed to 75%, of his salary because his disability resulted from a pre-existing physical condition. The circuit court of Cook County affirmed the Board's decision. On appeal, plaintiff contends the Board's determination was contrary to the

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manifest weight of the evidence. We affirm.

On November 18, 2008, plaintiff, a Chicago police officer, applied for duty disability benefits pursuant to section 5-154 of the 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 undisputed 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 the benefit.

In November 2008 plaintiff applied for a duty disability benefit due to numbness in the index finger of his dominant right hand which affected his ability to fire a weapon. In support of his application, plaintiff attested that on November 26, 2000, he and another officer responded to a domestic battery call. As plaintiff struggled with the male offender, the woman involved in the domestic dispute grabbed plaintiff's head and wrenched his neck, which, according to plaintiff, caused "injury to his cervical spine." Plaintiff's application stated that his disability was "cervical degenerative disease."

At a hearing before the Board, plaintiff testified that after the 2000 incident, he received physical therapy for tingling and numbness in his right hand. The Board received into evidence various written medical reports regarding plaintiff's condition; no live medical testimony was presented.

In December 2000 plaintiff was diagnosed with a cervical strain after reporting pain in his

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neck and left thumb. Plaintiff was able to return to full duty until January 2002, when his symptoms returned and an evaluation revealed "degenerative disc" changes. In March 2002, a MRI scan indicated "multilevel degenerative disc disease." In April 2002 plaintiff was again allowed to return to full duty.

In November 2003, plaintiff complained of right shoulder and upper back pain which began in late September 2003, and was not preceded by any event or incident. At that point, plaintiff denied any right hand weakness or numbness. Plaintiff was cleared to return to full duty in late 2003; however, his symptoms recurred the following year.

Dr. David Hoffman examined plaintiff and reported in October 2004, that plaintiff's "current shoulder problems are not closely related to his accident of 2000." Plaintiff was diagnosed with a possible torn rotator cuff. In January 2005, plaintiff had surgery on his right shoulder, performed by Dr. Gordon Nuber, and plaintiff returned to work in May 2005.

In 2007, Dr. Mark Nolden treated plaintiff for complaints of "posterior neck pain with radiation into the right lateral arm, forearm and index finger." In April 2008, Dr. Nolden reported plaintiff's condition resulted from an "arthritic pinched nerve to the right at C6" and that arthritic condition "was likely present prior to his injury but aggravated by his injury."

In a May 2008 letter, Dr. Nolden stated, in relevant part:

"In regards to causation, I cannot give you an answer to any degree of certainty whether or not his current pain is related to his injury that he reports in 2000. The findings that I summarized above are all degenerative findings and not traumatic ones. Nonetheless, it

is very common in the setting of degenerative cervical findings for patients to suffer an aggravating incident causing these degenerative symptoms to become symptomatic. Once again, this is likely what has happened in [plaintiff's] care. Therefore, the degenerative changes seen were not caused by any altercation but were rather possibly aggravated by such an altercation. This is the best answer that I can give."

A December 2008 report from Dr. Edward Goldberg stated that plaintiff's numbness arose from a right C6 radiculopathy affecting his right index finger. Dr. Goldberg further stated:

"Regarding whether this is due to the accident of 2000, I will not state that it is or is not. The reason for this is that [plaintiff] had his symptoms resolve after the accident. In 2002, he had a recurrence. It was not until 2007 when his symptoms recurred. I do not believe this is truly from the original accident."

On January 28, 2009, Dr. Leonard Cerullo noted Dr. Goldberg's opinion that plaintiff had a chronic condition. Dr. Cerullo reported:

"In my opinion, the radiculopathy was initiated in 2000. Over the years, there have been two exacerbations of his pre-existing condition. It is difficult for me, therefore, not to understand [*sic*] how the present symptoms could not be related to his original injury. [If symptoms worsen,] he may be a candidate for cervical discectomy

and fusion at C5-6 and C6-7. Certainly, there is no guarantee that this will result in his regaining the sensation of his index finger."

Dr. Cerullo noted on plaintiff's record in June 2008 that the numbness in plaintiff's right index finger was the "result of his work-related injury."

On April 1, 2009, the Board issued a written decision granting plaintiff a 50% duty disability benefit. The Board determined that plaintiff had injured his back and finger and later complained of neck pain resulting from an act of duty, specifically the 2000 domestic battery call. The Board stated in its decision that plaintiff's complaints of a cervical neck injury and tingling in his right hand were "the result of a pre-existing degenerative condition which may have been exacerbated by the 2000 incident," as supported by the evaluations of Drs. Goldberg and Nolden.

Plaintiff filed a complaint for administrative review of the Board's decision, arguing that the evidence presented did not support the Board's findings and asking the circuit court to reverse the Board's order and grant him benefits at the 75% rate. The circuit court affirmed the Board's decision.

On appeal, plaintiff contends the Board's conclusion that his "trigger finger" disability was due to a pre-existing condition was "clearly erroneous and/or against the manifest weight of the evidence."

When considering an appeal from a judgment in an administrative proceeding, this court reviews the decision of the Board, not the ruling of the circuit court. See *Thompson v. Retirement Board of Policeman's Annuity & Benefit Fund of the City of Chicago*, 379 Ill. App. 3d 498, 503 (2008). The Board's determination that plaintiff's disability resulted from a previous physical defect or disease will be reversed only if contrary to the manifest weight of the evidence. See *Wade v. City*

of North Chicago Police Pension Board, 226 Ill. 2d 485, 505 (2007). In reviewing the Board's factual findings, 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, we will affirm. See *Marconi v. Chicago Heights Police Pension Board*, 225 Ill. 2d 497, 534 (2006).

Plaintiff argues no competent evidence was presented by which the Board could have found a pre-existing condition. He contends his disability was caused by his cervical spine injury during the 2000 domestic battery call. He points to Dr. Cerullo's opinion that his condition was "initiated in 2000," and he argues that the reports of Dr. Nolden and Dr. Goldberg expressed uncertainty about the source of his injury and whether his injury resulted from the 2000 incident.

After reviewing the record, we conclude that the record contains sufficient evidence to support the Board's decision that plaintiff's condition arose from a physical defect that existed prior to the 2000 incident. Plaintiff's application for benefits described his disability as "cervical degenerative disease."

Plaintiff first experienced numbness in his right hand after the 2000 incident. In 2007, when plaintiff again experienced right-hand numbness after his 2005 shoulder surgery, his pain was traced to an arthritic condition. Dr. Nolden reported in 2008 that plaintiff's finger numbness was a degenerative condition "not caused by any altercation" but likely aggravated by such an event. Dr. Nolden concluded plaintiff's condition was degenerative.

Moreover, Dr. Cerullo stated in 2009 that although plaintiff's injury first arose in 2000, he had exacerbated a "pre-existing condition." Dr. Goldberg's 2008 report further supports this conclusion, as he noted the recurrence of symptoms in 2002 and 2007 and stated he did not believe

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plaintiff's symptoms were a result of the 2000 altercation. The emergence of plaintiff's physical symptoms after the 2000 incident does not by itself establish that his disability resulted from that incident, as opposed to the existence of his prior physical defect. See *Samuels v. Retirement Board of the Policemen's Annuity & Benefit Fund*, 289 Ill. App. 3d 651, 661-62 (1997) (officer's disability "resulted from her pre-existing degenerative disc disease"). Further, plaintiff's symptom of numbness in his index finger resolved after treatment, only to reappear years later when it was clear that plaintiff suffered from degenerative cervical disease.

In sum, the record contains sufficient evidence to support the Board's determination that plaintiff should receive a duty disability payment of 50% of his salary because his present disability resulted from a pre-existing physical defect. Accordingly, the order of the circuit court upholding the Board's decision is affirmed.

Affirmed.