2011 IL App (2d) 100597-U
No. 2—10—0597
Order filed September 28, 2011

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

KIRK PRESTON,	)	Appeal from the Circuit Court
	)	of Lake County.
Plaintiff-Appellant,	)	
	)	
v.	)	
	)	
CITY OF WAUKEGAN FIREFIGHTERS'	)	No. 09 MR 908
PENSION FUND, the BOARD OF TRUSTEES	)	
OF THE WAUKEGAN FIREFIGHTERS'	)	
PENSION FUND, and the CITY OF	)	
WAUKEGAN,	)	Honorable
	)	Christopher C. Starck
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE Birkett delivered the judgment of the court.
Justices McLaren and Hudson concurred in the judgment.

ORDER

Held: The finding of the Board of Trustees of the Waukegan Firefighters Pension Fund that plaintiff did not prove he was entitled to a line-of-duty disability pension because the evidence presented to the Board did not support plaintiff's assertion that he incurred a cervical herniation while responding to a structural fire was not against the manifest weight of the evidence. Accordingly, the trial court's order confirming the Board's decision is affirmed.

¶ 1 Plaintiff, Kirk Preston, filed an application for a disability pension with defendant, the Board of Trustees of the Waukegan Firefighters' Pension Fund ("Board"). The Board granted plaintiff a

"not in duty" disability pension, but denied plaintiff's request for a line-of-duty disability pension. The trial court confirmed the Board's decision. On appeal, plaintiff argues that the Board erred in denying him a line-of-duty disability pension. For the following reasons, we find that the Board's decision was not against the manifest weight of the evidence. Accordingly, we affirm.

¶ 2 I. FACTS

¶ 3 A. Evidence Presented to the Board

¶ 4 On November 6, 2007, plaintiff filed an application for a line-of-duty disability pension based upon injuries he allegedly suffered on December 3, 2006. In his application, plaintiff claimed that he was unable to perform required firefighter duties due to "lumbar disc displacement." On January 5, 2009, plaintiff changed his application to state that he was unable to perform required firefighter duties due to "cervical disc displacement." The reference to lumber disc displacement was crossed out on the disability application.

¶ 5 1. September 1999 Injury

¶ 6 On January 5, 2009, the Board held a hearing on plaintiff's application. At the hearing, medical notes were introduced regarding an earlier injury sustained by plaintiff. Those notes indicated that in September 1999, plaintiff injured his middle back while performing scuba dive training exercises for the City of Waukegan. After this injury, he attended the PRIDE program, an extensive physical rehabilitation program located at Lake Forest Hospital. Plaintiff reported "pain which is localized at his mid-back region, usually either on the right side or the left side on any given time." An MRI taken on October 7, 1999, showed several small disc herniations in the thoracic spine at T3-4, T4-5, T6-7 and T7-8. Plaintiff also reported that his symptoms remained "localized to an area between his shoulder blades deep inside with an occasional popping sensation

with twisting from side to side." At the PRIDE program, plaintiff was diagnosed with myofascial pain syndrome and pain disorder associated with psychological factors.

¶ 7 On October 4, 1999, plaintiff was seen by Dr. Michael Jacker. Dr. Jacker's notes indicate that plaintiff told him he had a history of neck problems in the past.

¶ 8 On November 30, 1999, plaintiff was examined by Dr. Martin Lanoff. Dr. Lanoff's notes from that examination indicate that plaintiff's thoracic spine showed numerous small herniations that Dr. Lanoff did not believe corresponded to his symptoms. On January 4, 2000, Dr. Lanoff reported that plaintiff did not have any reason for the continuation of his symptoms other than a muscular injury.

¶ 9 The PRIDE program's psychological intake form prepared on February 10, 2000 by Neil Mahoney, Ph.D, indicated that plaintiff reported a previous injury to his neck which resulted in a herniated disc and was treated with a single steroid injection. Plaintiff eventually recovered completely from the 1999 injury and returned to work.

¶ 10 2. December 2006 Injury

¶ 11 Plaintiff testified at the hearing that around 9 am on December 3, 2006, he got a call to go to a structure fire at 942 Adams Street in Waukegan. At the fire scene, it was plaintiff's responsibility to extend a ladder to the roof of the burning building and climb the ladder and ventilate the roof. In order to ventilate the roof, plaintiff had to pull the stovepipe out. In order to do this, plaintiff grabbed the stovepipe, "bear hugged" it, and twisted and pulled at it. The stovepipe was around six to eight inches in diameter, and it was a little bit taller than plaintiff. He could not see the bottom of the pipe because it was covered in ice and snow. While struggling with the pipe, plaintiff said that he felt a pop between his shoulder blades. Lieutenant Henry Gruba was on the roof with plaintiff. Gruba asked him what had happened, and plaintiff told him that he had

felt a pop. Plaintiff continued to work, however, in order to extinguish the fire. He was able to cut off the rubber boot that was holding the pipe to the roof of the building and to cut a hole in the roof with a chainsaw.

¶ 12 After the fire, plaintiff was able to help clean up the fireground and put away all of the gear on the truck. When asked what he did to treat the pain when he got back to the station, plaintiff said, "[g]enerally after a fire, I lay in my bunk for a little while, stretch, cough, get rid of some of the garbage that I breathed in, and just basically relax for a little while. Usually I throw on headphones or something. And that's what I did at this point." He finished his shift and treated himself with heat and ice for the next 48 hours while he was not on duty. However, plaintiff did not seek medical treatment.

¶ 13 Plaintiff returned to work on December 6, 2006, although he still felt tightness in the injured area between his shoulder blades, which became worse as the shift progressed. On that day, he was rushing to an emergency call when he stepped out of the locker room with his right foot to reach a step four or five inches down. As he stepped down, he felt something pop again. Plaintiff said that it felt like someone had stabbed him. The pain was in the same general area as the pop that occurred on December 3, 2006. Despite the pain, plaintiff completed the emergency call. Upon his return, plaintiff advised Lieutenant Gruba that the pain in his upper back was still present. Gruba told him to go to Vista West Medical Center for treatment. He was treated in the emergency room, given medications and taken off of work. Plaintiff was also referred to Vista Corporate Occupational Health ("Vista") for follow up treatment. When questioned about prior neck injuries, plaintiff denied having ever injured his neck before the December 3, 2006 accident.

¶ 14 Vista's records indicate that on December 6, 2006, plaintiff complained of pain to the middle of his back and radiating to his shoulder blades. He also complained of pain when he moved his

neck or took a deep breath. However, plaintiff denied any numbness or tingling in his extremities. At Vista, plaintiff admitted that he had a prior injury to his thoracic region and that he had a history of herniated discs. Plaintiff was diagnosed with thoracic strain, given pain medication, and ordered to begin physical therapy.

¶ 15 On December 9, 2006, plaintiff had his first physical therapy visit. Notes from that session indicate that plaintiff reported that his upper back and neck hurt. In physical therapy notes dated December 12, 2006, plaintiff reported numbness and tingling in his left hand that happened one time. Plaintiff said that it felt like his hand "wouldn't work." In a physical therapy note dated December 14, 2006, plaintiff reported that he had pain in his neck and shoulder. However, the numbness in his left hand was better, and he was reported as saying, "it never bothered me." On December 15, 2006, plaintiff underwent a MRI of his thoracic spine. The MRI showed nine small disc protrusions between T3-12 as well as a moderate central disc extrusion at T7-8.

¶ 16 On December 26, 2006, plaintiff was examined by Dr. Carl Graf. Dr. Graf's medical findings indicate that plaintiff had suffered from previous "thoracic sprain/multilevel thoracic disc herniation" years earlier. Dr. Graf's notes also indicate that plaintiff complained of pain radiating into the front of his chest, but denied any radiating pain into his arms or legs. Dr. Graf also noted that plaintiff had full range of motion of his cervical spine, and had no pain upon palpitation of plaintiff's neck. Upon review of the results of the MRI of his thoracic spine, Dr. Graf opined that plaintiff was suffering from "myofascial pain with the thoracic disc herniations incidental at best."

¶ 17 On January 10, 2007, Dr. Graf examined plaintiff and found that his pain was "off and on" and that is was localized to the thoracic spine and was spasm type in nature. Dr. Graf's notes indicate that plaintiff again denied any radicular pain around the chest, arms or legs. On January 26, 2007, Dr. Graf examined the plaintiff and noted an improvement with physical therapy. Based upon

those results, Dr. Graf opined that the improvement was indicative that plaintiff's injury was truly a myofascial strain with no neurologic impingement. Dr. Graf examined plaintiff again on February 16, 2006. His notes indicate that plaintiff described his pain as localized to his back with no radicular type pain and no weakness.

¶ 18 On March 16, 2007, Dr. Graf examined plaintiff again. In his notes, Dr. Graf indicated that plaintiff reported that his symptoms had been exacerbated in the past week, although plaintiff could not attribute it to any true cause. Plaintiff again denied any radicular pain, but described his pain as being much higher, around the T2-5 level on both the right and left side, although the left side was greater. He also reported numbness in his right arm. In the recommendations/plan portion of his notes, Dr. Graf stated, "[i]n the meantime, *given his change in symptoms*, I would like to obtain an MRI of the cervical spine, as this could, in fact, be the cause of his pain although it is less likely and I am otherwise at a loss to prove denervation of the patient's pain." The results of the cervical MRI disclosed a C6-7 herniation on the left side. From this MRI Dr. Graf concluded, "I do not feel [plaintiff's] cervical disc herniation is related to his pain on palpitation to his thoracic spine." Plaintiff subsequently received epidural steroid injections and thoracic facet injections to alleviate his pain, but plaintiff reported that they were not successful.

¶ 19 On January 30, 2007 and May 21, 2007, Dr. Burt Schell performed medical examinations on plaintiff. On January 30, 2007, plaintiff reported to Dr Schell that he suffered from midthoracic pain and a "shooting pain" in his right shoulder blade. Dr. Schell diagnosed plaintiff as suffering from: (1) thoracic strain with myofascial pain syndrome; and (2) a T7-8 disc herniation. In his notes on May 21, 2007, Dr. Schell opined:

> "3. The patient complained of numbness in his right arm, and as a result, the MRI of the cervical spine was performed. It demonstrated an abnormality at C6-7 on the left side, which

would not correlate with the symptoms on his right side, and, therefore, I do not believe any of the abnormalities on the cervical MRI are related to his December 3, 2006, work injury."

Dr. Schell also noted that plaintiff did not complain of any cervical or lumbar pain or any radiating symptoms into his legs. According to him, the muscular strain that plaintiff incurred on December 3, 2006 should have demonstrated some evidence of improvement by this time. Dr. Schell also noted, "[w]hereas I do not have a definitive explanation of his failure to improve, I might suggest that possibly there is symptom magnification."

¶ 20 On June 5, 2007, plaintiff was examined by his family physician, Dr. David Soo. Dr. Soo diagnosed plaintiff with "thoracic sprain and strain" and "disc displacement." Dr. Soo referred him to Dr. Jonathon Citow, an orthopedic surgeon. On August 3, 2007, Dr. Citow reviewed the cervical MRI and recommended surgery. In his notes dated January 5, 2008, Dr. Citow wrote, "I believe that Mr. Preston developed his disc herniation in the neck and a cervical radiculopathy from his work accident. He never had problems with his neck and arms prior to this accident but he has had it since. Therefore I believe the accident/work injury caused his problem."

¶ 21 Plaintiff attended the PRIDE program again in June 2007. Dr. Denora Ingberman, who handled the intake, diagnosed plaintiff with myofascial pain syndrome and thoracic spine multilevel disc degeneration. A psychological exam performed by the PRIDE program diagnosed plaintiff with pain disorder with psychological factors.

¶ 22 On September 24, 2007, Dr. M. Marc Soriano performed a medical examination of plaintiff. Dr. Soriano reported that plaintiff stated that he currently had numbness and tingling in the left scapula and pointed to the T-10 area of the trapezius. Dr. Soriano further opined:

"The mechanism of injury of lifting a 20-pound pipe did not cause the injury at C6-7. His symptamology of left-sided pain, numbness and tingling did not start until he reported

> this to Dr. Citow in August of 2007. Up to this point, all complaints had been intermittently on the right arm and mostly in the mid-thoracic region with occasional anterior chest wall pain on the right. In my opinion, the mechanism of injury did not cause the injury at C6-7 and that this is a new injury, most likely related to some activity at home that has occurred between 12/03/06 and the onset of his complaints in August of 2007 to Dr. Citow. There is no evidence based upon the prior records reviewed or any history given that this new complaint of left arm pain could even remotely be related to the injury in question."

Dr. Soriano also noted that plaintiff's complaints were "clearly exaggerated" and did not correlate to any degree with any physical exam findings, radiological studies, or of any mechanisms of injury.

¶ 23 The Pension Board also employed an independent firm to select three physicians to perform plaintiff's independent medical examinations. Those physicians were Dr. Elizabeth Kessler, Dr. Terry Lichtor, and Dr. Thomas Hudgens.

¶ 24 Dr. Kessler examined plaintiff on July 17, 2008, and did not certify plaintiff as disabled. In her notes, she opined that plaintiff sustained a thoracic muscle strain in the incident at work on December 3, 2006. According to her, that type of muscle strain may cause pain, muscle spasms and limited mobility, but it will resolve within days up to about a month. She further opined:

> "[Plaintiff] also did not sustain a cervical disc herniation or cervical radiculopathy in the 12/3/06 incident. Following this incident, he complained primarily of thoracic pain. He then complained of additional neck pain and then some right upper extremity symptoms. It is not until long after the work incident that [plaintiff] reports left upper extremity symptoms. There is some variability in the left upper extremity symptoms, but even consistent paresthesias in the medial forearm, ring and little fingers would not be consistent with a C6-7 disc herniation or C7 radiculopathy. Had [plaintiff] sustained a C7

radiculopathy in the 12/3/06 incident, radicular symptoms in an actual C7 distribution would have developed immediately or within a couple of days following the incident, which is clearly not the case according to these medical records."

¶ 25 Dr. Terry Lichtor examined plaintiff on July 22, 2008. Although Dr. Lichtor opined that plaintiff was disabled, he did not attribute plaintiff's disability to the soft tissue injuries that he received at work on December 3, 2006. According to Lichtor, those soft tissue injuries should have resolved within a few weeks or at most several months. He also believed that plaintiff suffered some other injury subsequent and secondary to the December 3, 2006 incident that caused the C6-7 herniation. Dr. Lichtor noted that plaintiff underwent an MRI of the thoracic spine several weeks after his injury, which showed only some small disc protrusions without any associated nerve root or spinal cord compressions. Those findings, Lichtor opined, would therefore be asymptomatic. It wasn't until approximately one month later that plaintiff developed symptoms involving his upper extremities.

¶ 26 Dr. Thomas Hudgens examined plaintiff on July 23, 2008. Although Dr. Hudgens' notes contain plaintiff's medical history, in the "impression" section of his notes Dr. Hudgens states, "[i]t appears from the records provided that [plaintiff] did suffer an injury as the result of the work-related injury on December 3, 2006, including herniated nucleus pulposus with subsequent disk [sic] replacement surgery." However, Dr. Hudgens did not explain how he reached that conclusion. Dr. Hudgens found plaintiff to be permanently disabled.

¶ 27 On February 25, 2008, a Dr. Egon Doppenberg performed neck surgery with artificial cervical disc displacement on the plaintiff. Dr. Doppenberg attributed the placement of an artificial disc at C6-7 to the injury plaintiff sustained on December 3, 2006. In his notes dated May 6, 2008,

Dr. Doppenberg indicated that plaintiff's injury prevented him from ever being able to work as a fireman.

¶ 28 B. Pension Board's Findings

¶ 29 On June 3, 2009, after hearing plaintiff's testimony and reviewing all the documentary evidence presented by the parties, the Board found that plaintiff was disabled from performing his duties as a firefighter because: (1) he did not recover from the cervical discectomy surgery to the point that he could perform full and unrestrictive firefighting duties; and (2) he suffered from degenerative thoracic disc changes unrelated to the December 3, 2006 incident that caused plaintiff to suffer from chronic pain disorder. However, the Board found that plaintiff did not prove that his disability resulted from an injury that was incurred or resulted from the performance of an "act of duty" as defined in the Pension Code. Instead, the Board found that on December 3, 2006, plaintiff suffered from a thoracic strain and not a C6-7 herniation, which was the basis for his line-of-duty disability request.

¶ 30 As support for its decision, the Board referred to the medical opinions of Drs. Schell, Soriano, Graf, Kessler, Lichtor, Lanoff and Jacker. Specifically, the Board referred to Dr. Schell's notes that on January 30, 2007, plaintiff reported that he suffered from midthoracic pain and a "shooting pain" in his right shoulder blade. The Board found Dr. Schell's opinion compelling that the plaintiff's left side C6-7 herniation did not correlate with his right side symptoms, and therefore Schell did not believe that the abnormalities seen on the cervical MRI were related to plaintiff's December 3, 2006 injury.

¶ 31 The Board also cited to Dr. Soriano's notes wherein he stated that plaintiff's complaint of left-side symptoms did not begin until after Dr. Citow examined him in August 2007, as well as Dr. Citow's findings that based on plaintiff's prior records and any history given to him, there was

no evidence that plaintiff's complaint of left arm pain could even remotely be related to the injury in question. The Board also referred to Dr. Graf's reports where he documented that plaintiff denied any symptoms in his arms or legs, and Dr. Graf's opinion that plaintiff's cervical disc herniation was not related to his pain on palpitation to his thoracic spine.

¶ 32 The Board also referred to the June 2007 diagnosis by Dr. Ingberman, a physician with the PRIDE program. At that time, Dr. Ingberman diagnosed plaintiff with myofascial pain syndrome and thoracic spine disc degeneration. The Board also noted that a psychological exam performed by the PRIDE program diagnosed plaintiff with pain disorder with psychological factors.

¶ 33 The Board then noted that two of the three independent medical examiners found that the December 3, 2006 injury did not cause plaintiff's C6-7 herniation. Specifically, it referred to Dr. Kessler's opinion that if plaintiff had suffered a C6-7 herniation in the accident, he would have developed those symptoms immediately on the left side of his body. The Board specifically found that plaintiff did not develop radicular symptoms until well after the December 3, 2006 accident. It then referred to Dr. Lichtor's opinion that plaintiff suffered some other injury subsequent and secondary to the December 3, 2006 incident that caused the C6-7 herniation.

¶ 34 With regard to plaintiff's previous injury, the Board said that it also accorded some weight to Dr. Lanoff's finding from November 30, 1999. In 1999, Dr. Lanoff examined plaintiff for pain complaints very similar to the complaints he reported after the December 3, 2006 injury. Dr. Lanoff indicated that objectively, plaintiff had no reason for the continuation of his symptoms other than a muscular injury.

¶ 35 The Board also relied on Dr. Jacker's notes from October 1999 which indicated that plaintiff reported to him that he had suffered prior neck injuries. The Board acknowledged that plaintiff denied ever having injured his neck when he testified at the hearing. However, the Board found that

Dr. Jacker's testimony was supported by the PRIDE program's 2000 psychological intake form which indicated that plaintiff had suffered from a previous neck injury. The Board concluded that plaintiff had a history of prior back and neck complaints.

¶ 36 In conclusion, the Board found: (1) plaintiff clearly suffered from degenerative discs in both his cervical and thoracic spine; (2) plaintiff did not suffer from any symptoms consistent with a C6-7 herniation or C7 radiculopathy following the December 3, 2006 incident; (3) had the incident caused the C6-7 herniation, the Board agreed with the doctors who opined that plaintiff would have reported radiculopathy symptoms consistent with the left side herniation, and plaintiff did not; (4) plaintiff suffered symptoms consistent with thoracic myofascial strain; and (5) Drs. Schell, Soriano, Kessler, Graf and Lichtor all agreed that the December 3, 2006 incident did not cause or contribute to plaintiff's C6-7 herniation. The Board found the conclusions of those doctors to be more compelling and consistent with the objective records summarizing the onset of plaintiff's subjective complaints. Therefore, the Board ordered that plaintiff's application for a line of duty disability pension benefit was denied, but granted plaintiff's application for a not in duty disability pension. Plaintiff then filed a complaint in the circuit court. The circuit court confirmed the decision of the Board and dismissed the complaint for administrative review with prejudice.

¶ 37 II. ANALYSIS

¶ 38 On appeal, plaintiff argues that the Board erred in denying his line-of-duty disability benefits based upon a cervical disc displacement that allegedly occurred on December 3, 2006.

¶ 39 In administrative review cases, the reviewing court's role is to review the decision of the administrative agency, not the determination of the trial court. *Marconi v. Chicago Heights Police Pension Board*, 225 Ill. 2d 497, 531 (2007). Section 3-148 of the Pension Code (40 ILCS 5/3-148 (West 2006)) provides that judicial review of the decision of the Board is governed by the

Administrative Review Law (735 ILCS 5/3-101 *et seq.* (West 2006)). The Administrative Review Law provides that our review of extends to all questions of fact and law presented by the entire record. 735 ILCS 5/3-110 (West 2006). The findings and conclusions of an administrative agency on questions of fact are deemed *prima facie* true and correct. *Alm v. Lincolnshire Police Pension Board*, 352 Ill. App. 3d 595, 597 (2004).

¶ 40 In reviewing the decision of an administrative agency, the applicable standard of review depends upon whether the question is one of fact, one of law, or a mixed question of fact and law. *Kouzoukas v. Retirement Board of the Policeman's Annuity and Benefit Fund of the City of Chicago*, 234 Ill. 2d 446, 463 (2009). Although the Pension Fund's findings are given considerable deference, they are, nonetheless, subject to reversal is they are against the manifest weight of the evidence. *Kouzoukas*, 234 Ill. 2d at 463. An administrative agency's findings of fact are against the manifest weight of the evidence where the opposite conclusion is clearly evident. *City of Belvidere v. Illinois State Labor Relations Board*, 181 Ill. 2d 191, 204 (1998). Questions of law, however, are reviewed *de novo*, while mixed questions of law an fact are reviewed under the clearly erroneous standard. *Kouzoukas*, 234 Ill. 2d at 463. An administrative decision is clearly erroneous where the reviewing court is left with the definite and firm conviction that a mistake has been made. *American Federation of State, County & Municipal Employees, Council 31 v. Illinois State Labor Relations Board*, 216 Ill. 2d 569, 577-78 (2005). Regardless of the standard of review applied, however, the plaintiff in an administrative hearing bears the burden of proof and relief will be denied if the plaintiff fails to sustain that burden. *Wade v. City of North Chicago Police Pension Board*, 226 Ill. 2d 485, 505 (2007).

¶ 41 A. Standard of Review

¶ 42 Before we begin our analysis, we must determine the applicable standard of review in the instant case. Plaintiff argues that the issue of whether he was entitled to a line-of-duty disability presents a mixed question of law and fact, and that therefore the clearly erroneous standard of review should be applied. As support for his contention, plaintiff cites to *Wilfert v. Retirement Board of the Fireman's Annuity & Benefit Fund of Chicago*, 318 Ill. App. 3d 507, 514 (2000), and *Virden v. Board of Trustees of the City of Pekin Firefighters' Pension Fund*, 304 Ill. App. 3d 330 (1999).

¶ 43 In *Wilfert*, the plaintiff-paramedic was injured and found to be disabled when an automobile struck his ambulance. After plaintiff had been receiving disability payments for an undisclosed amount of time, the Board commenced another hearing to determine whether the plaintiff's disability payments should be discontinued. After a hearing, the Board found that the plaintiff was no longer disabled. The trial court subsequently denied plaintiff's petition for administrative review of the Board's decision. The appellate court reversed, finding that the transcript and the Board's brief made it clear that the Board believed the burden was on the plaintiff to show that he remained disabled, rather than on the Board to show his disability had ceased. *Wilfert v. Retirement Board of The Fireman's Annuity and Benefit Fund of Chicago*, 318 Ill. App. 3d 507, 508 (2001). In applying the clearly erroneous standard, the appellate court held that the Board's decision was factual in part, because it involved considering whether the facts supported a ruling that the plaintiff's disability had ceased; however, the decision also concerned a question of law because the decision involved interpreting the meaning of the word "disability" as defined in the Pension Code. See 40 ILCS 5/6-112 (West 1996); *Wilfert*, 318 Ill. App. 3d at 514.

¶ 44 In *Virden*, the firefighter- plaintiff suffered from debilitating hypertension and severe anxiety. The Board concluded that the plaintiff had not sustained his burden of proving that the disability resulted from an act of duty, and therefore denied plaintiff's request for a line-of-duty

pension. The trial court found that the Board clearly erred in its finding, and therefore reversed that finding and issued plaintiff a line-of-duty disability pension. In applying the clearly erroneous standard of review, the appellate court held that although the Board was required to weigh the evidence and make a factual determination when considering whether the plaintiff was permanently disabled from service in the fire department as a result of the "performance of an act of duty or from the cumulative effects of acts of duty" (40 ILCS 5/4-110 (West 1996)), it was also faced with a question of law because, to make its determination, it was required to interpret the meaning of the legal term "resulting from the performance of an act of duty or from the cumulative effects of acts of duty." Therefore, the court held that the Board's determination involved a mixed question of fact and law and the clearly erroneous standard of review applied. *Virden*, 304 Ill. App. 3d at 335.

¶ 45 Here, unlike *Virden* and *Wilfert*, this appeal only presents the question of whether the evidence supports the Board's denial of plaintiff's application for a line-of-duty pension. Our supreme court reviewed a similar case in *Marconi* v. *Chicago Heights Police Pension Board*, 225 Ill. 2d 497 (2007). In *Marconi*, the plaintiff-police officer filed an application for a line-of-duty disability pension with the Pension Board. The Board ultimately found that the plaintiff failed to prove that he suffered from a disability within the meaning of the Pension Code, which would entitle him to a disability pension. The trial court confirmed the Board's decision, but the appellate court reversed. The supreme court applied a manifest weight of the evidence standard, and reversed the decision of the appellate court. Specifically, the court held:

¶ 46 "The instant appeal presents the question of whether the evidence of record supports the Board's denial of plaintiff's application for a disability pension. This is a question of fact. The principles which guide our review of this matter are well settled. *** As stated, therefore, rulings on questions of fact will be reversed only if against the manifest weight

> of the evidence. [citation] 'An administrative agency decision is against the manifest weight of the evidence only if the opposite conclusion is clearly evident.' [citation] Therefore, the 'mere fact that an opposite conclusion is reasonable or that the reviewing court might have ruled differently will not justify reversal of the administrative findings.' [citation] *** If the record contains evidence to support the agency's decision, that decision should be affirmed. [citation]" *Marconi*, 225 Ill. 2d at 534.

¶ 47 That same year, the supreme court again reaffirmed its ruling that the determination of whether the record supports the denial of a plaintiff's application for a disability pension is a question of fact which will only be reversed if against the manifest weight of the evidence. *Wade v. City of North Chicago Police Pension Board*, 226 Ill. 2d 485, 505 (2007). Accordingly, we will review the Board's decision under the manifest weight of the evidence standard.

¶ 48 B. The Pension Board's Decision

¶ 49 We now turn to the issue of whether the Board manifestly erred when it found that plaintiff was not entitled to a line-of-duty disability pension. The Board found, as a matter of fact, that plaintiff was disabled from performing his duties as a firefighter. However, it also found that plaintiff's accident on December 3, 2006 was not the cause of his disability. The Board found that on the date of the accident, plaintiff suffered a thoracic muscle strain, but he did not suffer from a C6-7 herniation.

¶ 50 Section 4-110 of the Pension Code provides for a line-of-duty disability pension, in pertinent part:

> "If a firefighter, 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, pursuant to Section 4-112, to be physically or mentally permanently disabled for

> service in the fire department, so as to render necessary his or her being placed on disability pension, the firefighter shall be entitled to a disability pension equal to the greater of (1) 65% of the monthly salary attached to the rank held by him or her in the fire department at the date he or she is removed from the municipality's fire department payroll or (2) the retirement pension that the firefighter would be eligible to receive if he or she retired (but not including any automatic annual increase in that retirement pension). A firefighter shall be considered 'on duty' while on any assignment approved by the chief of the fire department, even though away from the municipality he or she serves as a firefighter, if the assignment is related to the fire protection service of the municipality." 40 ILCS 5/4-110 (West 2006).

The Pension Code defines the term "act of duty" as "[a]ny act imposed on an active fireman by the ordinances of a city, or by the rules or regulations of its fire department, or any act performed by an active fireman while on duty, having for its direct purpose the saving of the life or property of another person." 40 ILCS 5/6-110 (West 2006). There is no requirement that an act of duty be the sole or primary cause of the applicant's disability. Rather, it is sufficient that an act of duty was an aggravating, contributing or exacerbating factor. *Village of Oak Park v. Village of Oak Park Firefighters' Pension Board*, 362 Ill. App. 3d 357, 371 (2005).

¶ 51 It is the Board's function, as the finder of fact, to assess the credibility of the documentary information and the testimony of any witnesses presented and to determine the appropriate weight to be given the evidence. *Marconi*, 225 Ill. 2d at 540. As noted, the findings of fact of an administrative agency are, by statute, held to be *prima facie* true and correct and may only be reversed if they are against the manifest weight of the evidence. *Marconi* 225 Ill. 2d at 540. Our supreme court has specifically held that this is a very high threshold to surmount, and as long as the

record contains evidence supporting the agency's decision, that decision should be affirmed. *Marconi*, 225 Ill. 2d at 540.

¶ 52 Here, plaintiff notes that the Board discounted the opinions of Dr. Citow, Dr. Doppenberg and Dr. Hudgens. However, plaintiff acknowledges that if there was evidence to support the doctors' opinions upon which the Board relied, then this court cannot substitute its judgment for that of the Board. Nevertheless, plaintiff claims that the evidence presented to the Board does not support that assumption.

¶ 53 As support for this contention, plaintiff claims that from the very first visit for medical treatment, he complained of pain in his neck and upper extremities, especially his left scapula and in between his shoulder blades. He contends that a review of the emergency room, corporate health and physical therapy records between the date of the accident and January 20, 2007 reveal that plaintiff complained of neck and shoulder pain, and at times a loss of sensation in his left upper extremity. Specifically, he refers to a visit to Vista on December 6, 2006, where he reported that he had pain which increased when he moved his neck, as well as pain which radiated to both shoulder blades.

¶ 54 Our review of the record indicates that plaintiff did report neck and shoulder pain immediately following the accident. At that time, however, he did not report any pain, numbness or tingling in his extremities. Nine days after the accident, on December 12, 2006, plaintiff reported numbness and tingling in his left hand. However, two days later, he said that the numbness in his left hand was better, and he was reported as saying, "it never bothered me." A thorough review of the reports from the time of the accident until the end of January indicate that plaintiff's main complaint was mid thoracic back pain. This type of minor conflicting evidence is not sufficient evidence that the Board manifestly erred in determining that plaintiff did not suffer a cervical

herniation as a result of the accident on December 3, 2006. See *Evert v. Firefighters' Pension Fund of Lake Forest*, 180 Ill. App. 3d 656, 660 (1989) (it is not sufficient that there are mere conflicts in the evidence or that an opposite conclusion might be reasonable; since the weight of the evidence is within the province of the agency, there need be only some competent evidence in the record to support its findings.)

¶ 55 Next, plaintiff claims that although there are medical reports asserting that his herniated cervical disc was not related to his accident on December 3, 2006, these reports assume facts that are not in the record, and they assume facts that are contradicted by the record. Specifically, plaintiff refers to Dr. Soriano's opinion, which the Board used it its findings, that plaintiff did not complain of pain or numbness or tingling in his left upper extremity until his first visit to Dr. Citow in August 2007. Contrary to Dr. Soriano's opinion, plaintiff contends, the MRI test that disclosed the cervical disc herniation was performed on March 28, 2007, and it showed the presence of a disc herniation in plaintiff's neck. Therefore, plaintiff claims, "this objective proof of disk [sic] herniation therefore predates the assumption of Dr. Soriano by a period of five (5) months."

¶ 56 We are not persuaded. First, the medical reports containing the doctors' opinions that plaintiff's herniated cervical disc was not related to his December 3, 2006 accident do not assume facts which are not in the record. To the contrary, those doctors' opinions were based upon physical examinations of plaintiff and/or a review of his medical records which contained information about what symptoms plaintiff reported at each visit from the time of the accident until he underwent disc displacement surgery in February 2008.

¶ 57 Second, although we agree that the plaintiff's cervical disc herniation was discovered as a result of the cervical MRI performed on March 28, 2007, the record reflects that Dr. Graf ordered the cervical MRI after plaintiff described his pain as much higher up on his back than his earlier

complaints of mid thoracic pain, along with complaints of pain on both his right and left side, with the pain on the left side being greater. However, plaintiff denied any radicular pain, and only complained of numbness in his right arm, not his left arm. As we have noted, the only reference to plaintiff's left upper extremity before this time was a small notation made on December 12, 2006, where plaintiff reported numbness and tingling in his left arm, which disappeared two days later and which plaintiff was reported as saying, "it never bothered me." Based upon this extremely sparse evidence, we cannot say that Dr. Soriano's opinion that plaintiff failed to report any left-side *pain*, numbness and tingling in his left upper extremity until August 2007 was inaccurate. In any event, when reviewing the totality of doctors' opinions that found plaintiff's cervical disc herniation was not caused by the December 3, 2006 accident, the Board's agreement with those conclusions was not manifestly erroneous.

¶ 58 For example, Dr. Schell's notes indicated that on January 30, 2007, over eight weeks after the accident, plaintiff was reporting symptoms of midthoracic pain and pain in his right shoulder blade. Dr. Soriano therefore found that plaintiff's left side C6-7 herniation did not correlate with his right side symptoms. Also, although Dr. Graf examined plaintiff on December 26, 2006, January 10, 2007, January 26, 2007 and February 16, 2007, it wasn't until March 16, 2007 that plaintiff complained of pain higher up on his back and pain on his left side. In his notes, Dr. Graf specifically indicated that *given plaintiff's change in symptoms*, he ordered a cervical MRI for plaintiff, which revealed the cervical disc herniation. Dr. Kessler noted that plaintiff complained primarily of thoracic pain, and then some upper right extremity symptoms, but it was not until long after the December 3, 2006 accident that plaintiff reported left upper extremity symptoms. Accordingly, we find that these physicians' medical reports, which indicated that plaintiff's

herniated cervical disc was not related to his accident on December 3, 2006, did not assume facts that were not in the record, and they also did not assume facts that were contradicted by the record.

¶ 59 Finally, plaintiff argues that the Board's finding that plaintiff's prior neck complaints preceded his accident on December 3, 2006 is against the manifest weight of the evidence. He argues that his treating history does not disclose any treatment or lost time from work due to a problem of pain or neurologic disability in plaintiff's cervical spine. Again, we are not persuaded. As the Board noted, the record reflects that Dr. Jacker's notes from October 1999 indicate that plaintiff told him that he has suffered prior neck injuries. Further, the Board found that Dr. Jacker's report was supported by the PRIDE program's 2000 psychological intake form, which also indicated that plaintiff had suffered from a previous neck injury. Although the Board concluded that plaintiff had a history of prior back and neck complaints, however, it is clear that the Board's denial of plaintiff's application for a line-of-duty disability pension was predicated upon its finding that plaintiff did not suffer from a cervical herniation following the December 3, 2006 incident. Our review of the record reveals that such a finding was not against the manifest weight of the evidence.

¶ 60 III. CONCLUSION

¶ 61 For the foregoing reasons, we find that the Board's decision to deny plaintiff a line-of-duty disability pension was not against the manifest weight of the evidence. Accordingly, the judgment of the circuit court of Lake County confirming the Board's denial of plaintiff's application for such a disability pension is affirmed.

¶ 62 Affirmed.