2011 IL App (2d) 101197-U
No. 2-10-1197
Order filed September 28, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

SCOTT HAGEMANN,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 09-MR-1852
	)	
BOARD OF TRUSTEES OF THE	)	
NAPERVILLE FIREFIGHTERS'	)	
PENSION FUND	)	Honorable
	)	Bonnie M. Wheaton,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Hutchinson and Burke concurred in the judgment.

ORDER

Held: The defendant's decision to deny the plaintiff's request for a line-of-duty disability pension was not against the manifest weight of the evidence.

¶ 1 The plaintiff, Scott Hagemann, appeals from an order of the circuit court of Du Page County affirming the decision of defendant, the Board of Trustees of the Naperville Firefighters' Pension Fund (Board), denying his application for a line-of-duty pension. We affirm.

¶ 2 I. BACKGROUND

¶ 3 The plaintiff became a firefighter with the City of Naperville on May 20, 1991. On July 23, 2008, the plaintiff filed an application with the Naperville Firefighters' Pension Fund, seeking line-of-duty benefits under section 4-110 of the Illinois Pension Code (Code) (40 ILCS 5/4-110 (West 2008)), or, in the alternative, a non-duty disability pension pursuant to section 4-111 of the Code (40 ILCS 5/4-111 (West 2008)). The Board held hearings on the plaintiff's application over four days and received numerous exhibits into evidence.

¶ 4 At the hearing, the plaintiff testified that before becoming a sworn member of the Naperville fire department he had never had an MRI of his lumbar spine. He began treatment with a chiropractor, Dr. Dilorio, in March 1990 due to pain across his entire low back and in his left leg. The plaintiff acknowledged that he had seen a chiropractor as early as 1986 for low back pain. The plaintiff again sought treatment from Dr. Dilorio on October 3, 1994, because he hyper-extended his back when he landed on his stomach while jumping on a trampoline.

¶ 5 The plaintiff further testified that on October 6, 1994, he was performing routine maintenance at Station 7, which involved removing heavy steel floor grates to clean underneath. While removing the grates, the alarm sounded and he stood up to respond. He felt spasms and pain in his lower back which caused him to drop to his knees. An injury report was generated. He received treatment from a chiropractor the next day for lumbar pain and spasms. He returned to see Dr. Dilorio in October and December of 1994 due to continued sporadic back pain and spasms.

¶ 6 On October 28, 1994, the plaintiff saw Dr. Angelo Sorce, an orthopedic surgeon at Delnor Hospital. He told Dr. Sorce that after cleaning floor grates he experienced severe spasms in his lower back and right sciatica. Dr. Sorce, reviewing an MRI taken at the hospital on October 23,

1994, noted that the MRI showed that the L5 disc was slightly protruded. The plaintiff acknowledged that the radiologist's review of that MRI did not note any protrusion.

¶ 7 The plaintiff continued to experience sporadic lower back symptoms after the October 1994 incident. Starting in 1995, he began to report back pain at his annual employment physicals. He was treated by Dr. Dilorio for back pain in June 1996, August 1997, April 1998, July 1998, October 1999, and January 2000. On January 27, 2000, the plaintiff went to the hospital due to severe lower back spasms. An MRI was performed at that time. On February 1, 2000, the day after he was released from the hospital, he went to see Dr. Douglas Johnson. Dr. Johnson reviewed the MRI and told him that there was a mild degenerative disc at L5-S1.

¶ 8 On April 12, 2001, the plaintiff was participating as an instructor in a training exercise. He carried a 165-pound training dummy up and down 40 to 60 stairs approximately 12 times throughout the day. He started to have lower back pain and spasms during the exercise but did not seek medical treatment until a couple days later. He notified the fire chief of the incident the next day, and a report was completed. An MRI of the plaintiff's spine was taken on April 16, 2001. The MRI indicated that there was a small central disc protrusion and early disc dessication at L5-S1.

¶ 9 The plaintiff saw Dr. Johnson on May 14, 2001, and told him of the training incident. The plaintiff had almost complete relief of his symptoms following that incident after an epidural injection and the use of anti-inflammatories and muscle relaxants. On July 2, 2001, the plaintiff experienced severe lower back spasms after swinging a golf club. Dr. Johnson recommended another course of injections. After further injections, physical therapy, and chiropractic manipulations, the plaintiff's back pain was resolved and he returned to work full time. The plaintiff saw Dr. Dilorio on at least ten occasions between June 2004 and August 2006, due to pain and spasms in his lower back.

¶ 10 The plaintiff testified that on August 24, 2006, while working out with weights, he felt a pulling sensation in his lower back. That evening he began experiencing back pain and spasms so severe that he went to the emergency room. In late 2006, following more frequent and severe back spasms, Dr. Johnson recommended that a discogram be performed. Based on the results of the discogram, Dr. Johnson recommended lumbar fusion surgery. The plaintiff had the surgery on April 4, 2007. The plaintiff testified that the surgery had diminished his pain. However, Dr. Johnson imposed a work restriction that limited him to lifting no more than 100 pounds. The Naperville fire department had not offered him another position that he could fill with his restrictions and it denied his request to rewrite the job description for a training assistant to fit his limitations.

¶ 11 The plaintiff admitted the evidence deposition of Dr. Douglas Johnson. In that deposition, Dr. Johnson testified that he was a board-certified neurosurgeon and that he completed a residency in neurosurgery at the University of Chicago. He treated the plaintiff for the first time for back pain on February 1, 2000. Dr. Johnson reviewed an MRI taken at the hospital a few days earlier and noted that the L5-S1 disc was mildly degenerative. Dr. Johnson prescribed a nonsteroidal anti-inflammatory drug and recommended that the plaintiff attend physical therapy.

¶ 12 Dr. Johnson treated the plaintiff again on May 14, 2001. The plaintiff had suffered severe low back pain following a training incident with the fire department. The plaintiff had experienced complete relief following an epidural injection and the use of anti-inflammatories and muscle relaxants. Dr. Johnson prescribed physical therapy and suggested that the plaintiff get another epidural injection. Dr. Johnson acknowledged that the April 2001 training drill would be a competent cause for an increase in the plaintiff's low back pain during that time.

¶ 13 The plaintiff sought treatment from Dr. Johnson on July 2, 2001. The plaintiff told Dr. Johnson that he was doing well until he went golfing, took one swing, and fell to the ground in

excruciating pain. Dr. Johnson referred the plaintiff to a neurologist who recommended trigger point injections, muscle relaxants, and continued physical therapy. During that visit, Dr. Johnson reviewed an April 2001 MRI and noted that there was degenerative change. The radiology report attached to the April 2001 MRI noted that there was early disc desiccation and small focal disc protrusion at L5-S1. Dr. Johnson acknowledged that the April 2001 training exercise could be a competent cause for the interval change between the January 2000 and April 2001 MRIs and was a competent cause of some of the problems that the plaintiff was having in his low back. In July 2001, Dr. Johnson was concerned that future drills, where the plaintiff had to carry a training dummy, would make the plaintiff's disc protrusion worse.

¶ 14 Dr. Johnson further testified that he treated the plaintiff again on December 28, 2006, for low back pain. The plaintiff indicated that the pain had increased over the previous six months. He reviewed the plaintiff's MRIs and found dehydration at L4-5 and L5-S1 with minimal bulge at L5-S1. The pathology at L4-5 indicated that the plaintiff had degenerative disc disease. Dr. Johnson recommended physical therapy and referred the plaintiff to a physiatrist for pain management treatment. Neither of these treatments improved the plaintiff's symptoms.

¶ 15 Upon Dr. Johnson's recommendation, a discogram was performed on February 26, 2007. The results of the discogram showed that the plaintiff had concordant pain at the L5-S1 location. Dr. Johnson recommended a surgical procedure, an anterior and posterior L5-S1 fusion of the lumbar spine, which was performed on April 4, 2007. Dr. Johnson opined that to a reasonable degree of medical certainty the interval change and pain complaints between 2001 and 2006 were a contributory factor resulting in the necessity for surgery. After reviewing a job description for a Naperville firefighter, Dr. Johnson further opined that the plaintiff's job duties between 2001 and 2006 could have contributed to the plaintiff's disc changes, and degenerative disc disease, between

those years. Dr. Johnson also opined that the plaintiff's job duties would be a competent cause for the increase in the plaintiff's back pain since December 2006.

¶ 16 On cross-examination, Dr. Johnson acknowledged that the changes in the plaintiff's back could have been caused by leisure activities. Prior to being seen in December 2006, the plaintiff suffered from a degenerative lumbar spine at the L5-S1 level. To a reasonable degree of medical certainty, Dr. Johnson could not relate the preexisting condition to any specific work-related injury. To a reasonable degree of medical certainty the lumbar fusion was necessitated by the degenerative condition rather than by any specific work-related injury. Dr. Johnson testified that he could not give an opinion to a reasonable degree of medical certainty as to what caused or contributed to the necessity for the fusion surgery because he did not know the specific duties the plaintiff performed as a firefighter. However, it would make a difference if the plaintiff was a supervisor that sat behind a desk all day or if he was actively performing fire fighter duties every day. Dr. Johnson could not say within a reasonable degree of medical certainty whether the plaintiff's employment with the fire department caused, contributed, aggravated, or accelerated his preexisting back condition which necessitated the lumbar fusion.

¶ 17 The plaintiff was examined by three physicians, chosen by the Board, who rendered written opinions and oral testimony. These physicians were Dr. Anthony Rinella, a board certified orthopedic surgeon specializing in spinal surgery at Loyola University Medical Center; Dr. Daniel Samo, a board certified emergency room physician and the director of occupational employee health at Northwestern Memorial Hospital; and Dr. Thomas Gleason, a board certified physician who had attended Loyola University Stritch School of Medicine and completed an orthopedic residency at the University of Illinois Medical Center at Chicago.

¶ 18 In their written reports, all three physicians agreed that the plaintiff was permanently disabled. However, Dr. Rinella was the only one to conclude that the plaintiff's disability was the result of work-related injuries occurring on October 6, 1994, and April 12, 2001. Both Dr. Samo and Dr. Gleason agreed that the plaintiff's disability was not the result of any work-related duties. Dr. Samo concluded that the plaintiff's disability was "due to degenerative changes that are not related to any specific incident. These types of changes are seen in all humans regardless of their profession." Similarly, Dr. Gleason concluded that the plaintiff's disability was "not a result of sickness, accident, or injury incurred or resulting from the performance of an act of duty or from the cumulative effects of acts of duty."

¶ 19 At the hearing, Dr. Anthony Rinella testified that the incident on October 6, 1994, could be a competent cause for what was found in the MRI of the plaintiff's lumbar spine taken after that incident. He further testified that the duties of a fire fighter could be a competent cause of the degeneration that occurred over time in the plaintiff's L5-S1 disc. Disc degeneration can sometimes occur without pain or the pain can wax and wane. As such, the plaintiff's occasional improvements did not mean that the October 1994 incident stopped being a contributing cause of his back condition. Dr. Rinella acknowledged that the 1994 MRI showed a disc protrusion at L5-S1 and that the April 2001 MRI showed disc desiccation at L5-S1. He testified that there was definitely a relationship between the disc protrusion and the subsequent disc degeneration.

¶ 20 Dr. Rinella further testified that the April 2001 training drill could have aggravated or accelerated the plaintiff's disc protrusion at L5-S1 and could have made the plaintiff's back more symptomatic. The plaintiff's increasing amount of back pain after the 2001 training drill indicated that the worsening of the plaintiff's lumbar spine was proximately related to that incident. Dr. Rinella opined that the plaintiff's duties as a firefighter between 2001 and 2006 would certainly be

a contributing factor to the cause, aggravation, and acceleration of the plaintiff's symptoms in his lumbar spine. Finally, Dr. Rinella testified that all his opinions were based on a reasonable degree of medical certainty.

¶ 21 Dr. Samo testified that, based on an MRI report dated December 22, 2006, the plaintiff had disc degeneration at L5-S1. However, he further testified that degenerative disc disease is a part of life and that it is seen in everybody. Dr. Samo testified that studies have shown that discs degenerate at about the same rate regardless of the jobs people perform. Dr. Samo did not believe that lifting a 165-pound training dummy up four flights of stairs ten times in a row would cause or accelerate disc degeneration in the lumbar spine. Intermittent heavy lifting had never been shown to be related to disc degeneration. Intermittent heavy lifting was more likely to cause soft tissue injuries such as sprains, strains, and tears in muscles, tendons, and ligaments, especially in those that are unfit.

¶ 22 On cross-examination, Dr. Samo acknowledged that firefighting duties could aggravate anybody's back pain. The plaintiff had been having back problems since he was 28 years old and it was likely that he would be having back problems even if he had never been a Naperville firefighter. No doctor could say why the plaintiff was experiencing back problems. He reiterated that the drill with the training dummy was more likely to have resulted in a soft tissue injury because the plaintiff was treated and improved with time.

¶ 23 Dr. Gleason testified that it was reasonable to believe that the incident that occurred in October 1994 when the plaintiff lifted the floor grates was the cause of the low back pain that occurred immediately thereafter. Lifting the floor grates likely caused a strain or a temporary aggravation of whatever preexisting condition the plaintiff had. Typically that type of incident would not cause permanent injury and the records suggested that there were no lasting effects. Dr.

Gleason did not believe this type of lifting incident could cause a disc protrusion. Rather, disc protrusions occur naturally as part of the "aging, wearing process."

¶ 24 Dr. Gleason testified that if the plaintiff had a disc protrusion, he would not, to a reasonable degree of medical certainty, be able to relate the protrusion to the lifting of a 165-pound training dummy up 15 flights of stairs. That activity could have aggravated the L5-S1 but he could not say it caused the protrusion. The training incident likely caused a soft tissue strain or a temporary aggravation of a preexisting condition. He did not believe the training incident accelerated the plaintiff's degenerative disc condition.

¶ 25 On November 5, 2009, the Board denied the plaintiff's request for line-of-duty benefits but found that he was entitled to a non-duty pension. The Board found that the plaintiff's disability was caused by degenerative disc disease, a natural part of the aging process. It further found that the work-related injuries on October 6, 1994 and April 12, 2001 were temporary soft-tissue injuries, which did not cause or contribute to that disability.

¶ 26 On December 10, 2009, the plaintiff filed a complaint for administrative review in the circuit court, and on November 4, 2010, the trial court affirmed the Board's decision. The plaintiff then filed a timely notice of appeal.

¶ 27 II. ANALYSIS

¶ 28 On appeal, the plaintiff argues that the Board's decision denying his application for a line-of-duty disability pension, under section 4-110 of the Code (40 ILCS 5/4-110 (West 2008)), was against the manifest weight of the evidence. Section 4-110 provides for a line-of-duty pension 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 to be physically or mentally permanently disabled from service in the fire department.

¶ 29 On appeal from a judgment in an administrative review proceeding, we review the decision of the administrative agency, not the trial court's decision. *Lindemulder v. Board of Trustees of the Naperville Firefighters' Pension Fund*, 408 Ill. App. 3d 494, 500 (2011). The agency's ruling on a question of fact will be upheld unless it is against the manifest weight of the evidence. *Id.* We review questions of law *de novo*. *Id.* However, an agency's decision on a mixed question of law and fact will be reviewed under the "clearly erroneous" standard. *Id.* "The examination of the legal effect of a given set of facts *** requires review under the 'clearly erroneous' standard." *Id.* In the present case, in finding that plaintiff's disability was caused by degenerative disc disease and that no on-duty incidents caused or contributed to that disability, the Board ruled on questions of fact. Accordingly, our review is whether the Board's decision was against the manifest weight of the evidence. *Id.*

¶ 30 After considering the entirety of the evidence, we cannot say that the Board's decision was against the manifest weight of the evidence. Dr. Rinella was the only physician who clearly concluded that the plaintiff's disability was the result of his firefighting duties. Dr. Johnson's testimony was less clear. Although Dr. Johnson testified that the plaintiff's job-related duties could have contributed to his degenerative disc condition and that the April 2001 training exercise was a competent cause of some of the problems the plaintiff was having in his low back, he also testified that he could not, within a reasonable degree of medical certainty, say that the plaintiff's job-related duties contributed to, aggravated, or accelerated the plaintiff's disc condition. On cross-examination, Dr. Johnson acknowledged that the plaintiff's degenerative disc condition could have been caused by leisure activities.

¶ 31 In contrast, the testimony of Drs. Samo and Gleason clearly support the Board's determination. Dr. Samo concluded that the plaintiff's disability was the result of his degenerative

disc condition and that discs degenerate regardless of the jobs people perform. Both Drs. Samo and Gleason testified that the October 1994 and April 2001 work-related incidents likely only caused soft tissue injuries that did not result in permanent injury to the plaintiff's back and did not accelerate his degenerative disc condition. In making its determination, the Board apparently found the testimony of Drs. Samo and Gleason most credible, and those credibility determinations should be afforded considerable weight. See *Kouzoukas v. Retirement Board of the Policemen's Annuity & Benefit Fund of the City of Chicago*, 234 Ill. 2d 446, 465 (2009). Furthermore, other evidence did not contradict these determinations. The plaintiff's and Dr. Johnson's testimony indicated that the plaintiff recovered after the October 1994 and April 2001 incidents and returned to work full-time.

¶ 32 The plaintiff argues that the Board "wrongly excluded" Dr. Johnson's opinion because he did not have personal knowledge of the plaintiff's daily firefighting activities. However, there is no evidence in the record, nor has the plaintiff cited to any evidence, to show that the Board excluded or disregarded Dr. Johnson's opinions. An administrative agency, such as the Board, is entitled to a presumption that it properly read and considered all the evidence before it. *Watra, Inc. v. License Appeal Commission, City of Chicago*, 71 Ill. App. 3d 596, 601 (1979). In its findings and decision, the Board set forth a detailed account of Dr. Johnson's testimony. We find this to be an express acknowledgment that the Board considered Dr. Johnson's testimony. The fact that the Board found the testimony of Drs. Samo and Gleason more persuasive, and Dr. Johnson's testimony less persuasive, is not an indication that the Board improperly disregarded Dr. Johnson's testimony.

¶ 33 The plaintiff also argues that the Board held Dr. Johnson to a different standard of proof when it required him to possess "specific knowledge" as to the plaintiff's daily duties as a fire

fighter. Specifically, the plaintiff takes issue with the following line of questioning of Dr. Johnson by defense counsel on cross-examination:

> "Q. Do you have specific knowledge as to what [the plaintiff's] day-to-day service was with the fire department?
>
> A. No, you asked me that, and I said I do not. That's why I said if he was performing his duties as a typical fireman, yeah, that's a whole different set of activities.
>
> Q. So not knowing what his specific activities were with the Naperville Fire Department, would you agree that you can't give an opinion within a reasonable degree of medical certainty as to whether or not his employment in the fire service caused or contributed to his lumbar fusion in April of 2007; would you agree with that?
>
> A. I'd have to agree with that."

Despite this line of questioning, there is no evidence in the record to indicate that the Board held Dr. Johnson to a different standard of proof. Even before Dr. Johnson was asked whether he was aware of the plaintiff's daily activities with the fire department, Dr. Johnson testified that, within a reasonable degree of medical certainty, the plaintiff's lumbar fusion surgery was necessitated by the plaintiff's degenerative disc condition and he could not relate that condition to any work-related incident. Moreover, Drs. Samo and Gleason did not need to be questioned regarding "specific knowledge" because they both agreed that job duties would not contribute to a degenerative disc condition. This line of questioning merely shows that Dr. Johnson believed that whether the plaintiff's job duties contributed to his ultimate disability depended on whether he was performing typical firefighting duties or whether he was mostly sitting behind a desk. On direct examination the plaintiff presented Dr. Johnson with a job description of a Naperville firefighter and elicited testimony that such activities could have caused the changes in the plaintiff's lumbar spine between

2001 and 2006 as depicted on MRIs. As noted above, there is no evidence that the Board did not consider this testimony.

¶ 34 The plaintiff cites *Kouzoukas* in support of his argument that the Board's decision was against the manifest weight of the evidence. However, in *Kouzoukas*, the court reversed the Board's decision, denying duty disability benefits, because every physician who examined Kouzoukas and testified at trial determined that she suffered pain as a result of a work-related injury and that she was unable to return to work as a full-duty police officer. *Kouzoukas*, 234 Ill. 2d at 467. The only medical evidence in support of the Board's decision was a medical report from a physician that did not testify at the hearings and whose opinions, therefore, could not be explored. *Id.* at 466. *Kouzoukas* is in sharp contrast to the present case where two examining physicians, Drs. Samo and Gleason, agreed that the plaintiff was not disabled as a result of his duties as a firefighter, and all the physicians were subject to cross examination. The plaintiff's reliance on *Kouzoukas* is, therefore, unpersuasive.

¶ 35 The plaintiff also cites *Devaney v. Board of Trustees of Calumet City Police Pension Fund*, 398 Ill. App. 3d 1 (2010), to argue that the Board's decision was against the manifest weight of the evidence because it failed to consider the entirety of Dr. Johnson's testimony. In *Devaney*, the Board, in denying Devaney's application for a line-of-duty disability pension, placed great weight on an examining physician's statement that the plaintiff had severe degenerative disc disease prior to the work-related injury at issue and that there was no significant change between pre- and post-injury MRIs. *Id.* at 10. The *Devaney* court reversed the Board's decision because the examining physician neither identified the cause nor eliminated the work-related injury as the cause of Devaney's disability. *Id.* at 11. In addition, three other physicians found that Devaney's disability was caused by the work-related injury. *Id.*

¶ 36 The plaintiff argues that, as in *Devaney*, the Board selected specific statements made by Dr. Johnson that advanced its position, and failed to consider the entirety of his testimony. We disagree. As stated, there is no evidence that the Board did not consider Dr. Johnson's testimony in its entirety. Furthermore, upon our own review of the record, Dr. Johnson's testimony as to whether the defendant's disability was caused by an act of duty or the cumulative effect of acts of duty was equivocal. Although Dr. Johnson testified that the plaintiff's acts of duty could have contributed to his degenerative disc condition, he also testified that, within a reasonable degree of medical certainty, he could not relate the plaintiff's lower back condition to any work-related incidents. Moreover, unlike *Devaney*, there is other evidence in support of the Board's decision. Drs. Samo and Gleason both testified that the plaintiff's disability was not caused by any work-related injury and was not the result of the cumulative effects of his acts of duty.

¶ 37 III. CONCLUSION

¶ 38 For the foregoing reasons, the judgment of the circuit court of Du Page County is affirmed.

¶ 39 Affirmed.