2011 IL App (5th) 100516-U

NO. 5-10-0516

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

CURTIS G. JACKSON, Plaintiff-Appellant, v. THE BOARD OF TRUSTEES OF THE POLICE PENSION FUND OF THE CITY OF COLLINSVILLE, DANIEL HOPKINS, MICHAEL W. BELL, DON BEAN, ROBERT CARPENTER, DR. FREEMAN HOPPER, and ERIC HERMAN, Defendants-Appellees (The City of Collinsville, Intervener-Appellee).	)	Appeal from the Circuit Court of Madison County. No. 10-MR-112 Honorable Clarence W. Harrison II, Judge, presiding.

JUSTICE WEXSTTEN delivered the judgment of the court.
Justices Goldenhersh and Spomer concurred in the judgment.

O R D E R

¶ 1 *Held*: The circuit court erred in affirming the Pension Board's determination that the plaintiff was not entitled to line-of-duty pension benefits.

¶ 2 The plaintiff, Curtis G. Jackson, was injured and filed an application for a line-of-duty disability pension with the defendants, the Board of Trustees of the Police Pension Fund of the City of Collinsville, Daniel Hopkins, Michael W. Bell, Don Bean, Robert Carpenter, Dr. Freeman Hopper, and Eric Herman (the Pension Board). The City of Collinsville intervened in the proceedings. Following a hearing, the Pension Board concluded that the plaintiff's injury did not occur in the line of duty and denied his application. The plaintiff thereafter filed an action for administrative review in the circuit

court of Madison County, and the circuit court affirmed the Pension Board's decision. The plaintiff appeals, arguing that he is entitled to a line-of-duty disability pension. We reverse the circuit court's decision.

¶ 3 BACKGROUND

¶ 4 On July 19, 2007, as a patrolman for the City of Collinsville police department, the plaintiff responded to a structural fire at a personal residence located in Collinsville. Upon arriving at the scene, he learned that two elderly persons were trapped therein. The plaintiff entered the home on his hands and knees and assisted in removing an elderly female, and her oxygen tank, from the structure. Officer Michael Bauer noted in his Collinsville police report dated the same date that after the plaintiff exited the home, his exposure to smoke and fumes from the fire caused him to cough and vomit, and the plaintiff complained of pain in his lower back.

¶ 5 The plaintiff was taken by ambulance to Anderson Hospital and treated for smoke inhalation. The plaintiff was subsequently released and came under the care of Dr. James Sola, who diagnosed his condition as avascular necrosis of the right hip. Dr. Sola performed a total hip replacement on the plaintiff.

¶ 6 On September 18, 2008, the plaintiff filed an application for a line-of-duty pension with the Pension Board. On January 5, 2010, at the hearing on the plaintiff's application for a line-of-duty disability pension, the City of Collinsville moved to intervene in the proceedings, and the board granted its request.

¶ 7 At the hearing, the plaintiff testified that he was 45 years old and had been employed by the Collinsville police department since 1994. The plaintiff testified that when he responded to the fire on July 19, 2007, he entered through the front door, got down on his hands and knees due to the heavy smoke, located the elderly female who was in a wheelchair and hooked to an oxygen machine, and pushed her towards the front door as he pulled the

oxygen unit from the home. The plaintiff testified that he attempted to keep the elderly female hooked to her oxygen machine as he moved her and the oxygen tank from the scene. The plaintiff testified that as he exited the burning home, he felt pain in his hip and could not breathe.

¶ 8 The plaintiff testified that once he reached the yard, he was vomiting and coughing severely, and the firefighters arrived. The plaintiff testified that he received medical treatment at the scene and was placed on a stretcher for transport to Anderson Hospital. The plaintiff testified that once he reached the hospital, he continued to have problems breathing and felt pain in his hip. The plaintiff testified that while at the hospital, he reported to the physicians that he felt hip pain and was having some difficulty walking. The plaintiff acknowledged that although he was initially attended to by Anderson Hospital personnel in the emergency room at 7:40 p.m., the first entry in Anderson Hospital's chart regarding his hip pain was approximately 9 p.m.

¶ 9 The plaintiff testified that after being released from the hospital, he followed up with Dr. Heffner, a neurosurgeon, who referred him to Dr. Sola, who performed a right hip replacement and subsequently replaced his left hip also. The plaintiff testified that he had been unable to perform his police duties since the date of the accident.

¶ 10 The plaintiff identified the Collinsville fire department incident report dated July 19, 2007. The plaintiff acknowledged that the report listed as the plaintiff's primary apparent symptom "[s]moke only, asphyxiation" and did not indicate that the plaintiff had suffered a "[s]train or sprain" or "[p]ain only," as listed on the form. The plaintiff further acknowledged that in the report, his primary area of body injured was listed as "[i]nternal" and that no injury to the "[s]pine" or "[l]ower extremities" was listed on the form. The disposition section of the form indicated that "Officer Jackson took in some heavy smoke as he was attempting to assist two elderly residents from the house."

¶ 11 On September 13, 2007, Dr. Christopher Heffner examined the plaintiff. The plaintiff identified Dr. Heffner's office notes, which stated the following:

> "[The plaintiff] had an injury on July 19th of this year where he was pulling some people out of a house fire and pushing and pulling an oxygen machine and was taken to the hospital with smoke inhalation and after he got up at the hospital he noticed pronounced pain in his right lower extremity."

¶ 12 Likewise, on October 17, 2007, Dr. John O. Krause examined the plaintiff. Dr. Krause's office notes indicated that the plaintiff had reported that after he assisted an elderly woman from a house fire on July 19, 2007, he was taken to the hospital where he was "getting out of the gurney to get an x-ray and felt a pop in his hip and had severe pain."

¶ 13 The plaintiff testified that he initially felt hip pain at the scene but that he remained on the stretcher from the scene to the hospital and did not mention the hip pain because he was "trying to breathe." The plaintiff testified that once he had established his breathing, he got up from the stretcher and notified hospital personnel of his right hip pain.

¶ 14 Pursuant to section 3-115 of the Illinois Pension Code (Pension Code) (40 ILCS 5/3-115 (West 2008)), the board selected three physicians, Dr. Philip G. George, Dr. James C. Strickland, and Dr. Keith Wilkey, to examine the plaintiff. Dr. George, an orthopedic surgeon, examined the plaintiff on February 9, 2009, and issued a report the same day. In his report, Dr. George concluded, "[I]f [the plaintiff] had not had intrinsic avascular necrosis prior to the alleged industrial episode, he would not have needed total hip replacement or vice versa, the need for hip replacement on both sides can be directly attributed to the intrinsic disease condition of avascular necrosis, which is not caused by a single traumatic episode."

¶ 15 In a deposition taken on October 12, 2009, Dr. George testified that pursuant to his medical records, the plaintiff had reported that on July 19, 2007, he responded to a house

fire and was helping a woman from the home when he began to note pain in his right hip. Dr. George testified that his records revealed no previous history of hip pain prior to the incident.

¶ 16 Dr. George agreed that the plaintiff's July 19, 2007, actions aggravated the preexisting condition of the right hip, the avascular necrosis, but he testified that the incident did not cause the condition. Dr. George explained that necrosis involves a condition wherein one of the blood vessels in the ball in the socket that forms the hip joint clots off so that the part of the ball that was nourished by that blood vessel undergoes death, or necrosis. Dr. George testified that avascular necrosis is caused by known diseases, such as liver disease, alcoholism, and sickle cell disease, which were not applicable in the plaintiff's case, and therefore, the plaintiff fell into a category called the idiopathic group, meaning that the doctors were unaware of the cause. Dr. George testified that the plaintiff had avascular necrosis in his right and left hip. Dr. George concluded that the plaintiff was unable to perform his duties as a police officer.

¶ 17 Dr. Strickland, an orthopedic surgeon, also examined the plaintiff at the request of the Pension Board. In a February 11, 2009, letter supplementing his medical report, Dr. Strickland stated:

> "It is my medical opinion within a reasonable degree of medical certainty that the alleged injury to the patient's right hip in July of 2007 is not the cause of his need for a hip replacement. It is felt that idiopathic avascular necrosis[] in fact has involved both of his femoral heads and he has had both of his hips replaced. Again, the cause of this is not known. It is felt that the injury was not the primary cause for the patient needing hip replacement."

¶ 18 In Dr. Strickland's November 10, 2009, evidentiary deposition, he testified that although the plaintiff had reported no hip pain prior to the July 19, 2007, fire rescue, such

a traumatic event does not cause a vascular necrosis and did not cause the plaintiff to require surgery. Dr. Strickland agreed that the plaintiff's right hip replacement alone was sufficient to disqualify him from performing his duties as a patrolman for the police department.

¶ 19 In Dr. Wilkey's medical report, dated April 14, 2009, he indicated that the plaintiff had reported that, in making the fire rescue, he was required "to get low to the floor due to the smoke that was in the facility and then [in] an awkward position as he attempted to push [the] patient with her oxygen delivery system from the burning building." Dr. Wilkey's report revealed that the plaintiff's "immediate onset of pain in the right hip was noted[,] collapsed preexisting avascular necrosis of the hip."

¶ 20 In Dr. Wilkey's report, he noted no previous history of hip pain prior to the plaintiff's fire rescue. With regard to whether there was a causal connection between the plaintiff's injury to his right hip and his employment as a police officer, Dr. Wilkey stated the following:

> "This is a somewhat difficult question to answer. Clearly [the plaintiff] had preexisting asymptomatic avascular necrosis of his hips. The avascular necrosis was not directly or causally related to the injury on the date in question. However, the hip collapse that subsequently resulted in the right hip replacement was causally related to the alleged injury and accident that he sustained on July 19, 2007. This accident clearly was a significant factor in his symptoms and need for hip replacements."

Dr. Wilkey concluded that the plaintiff was permanently disabled and unable to perform his duties with the Collinsville police department. At the hearing, the plaintiff testified that of the three examinations he submitted to pursuant to the Pension Board's request, the final examination with Dr. Wilkey was the most thorough.

¶ 21 On April 29, 2010, the Pension Board denied the plaintiff's request for line-of-duty disability benefits. In its decision, the Pension Board found that the plaintiff had concluded

his on-duty activities at the house fire and was not injured until he was removing himself from the hospital stretcher, an incident that did not involve a special risk faced by police officers. Accordingly, the Pension Board concluded that the plaintiff's "disability of avascular necrosis of the right hip" did not result from the performance of an "act of duty" as required for a finding of duty disability under section 3-114.1 of the Pension Code (40 ILCS 5/3-114.1 (West 2008)). The Pension Board nevertheless concluded that the plaintiff was physically disabled and unable to perform the full, unrestricted duties of a Collinsville police officer by reason of his medical condition of avascular necrosis. The Pension Board awarded the plaintiff a "non-duty" disability pension benefit (40 ILCS 5/3-114.2 (West 2008)).

¶ 22 On May 14, 2010, the plaintiff filed his complaint in the circuit court seeking administrative review of the Pension Board's decision. On October 4, 2010, the circuit court affirmed the Pension Board's decision, finding that it was not contrary to the manifest weight of the evidence. On October 25, 2010, the plaintiff filed a timely notice of appeal.

¶ 23 ANALYSIS

¶ 24 The plaintiff argues that the evidence at the hearing clearly established that his disability resulted from the aggravation of a preexisting condition and that he aggravated the preexisting condition during his rescue at the scene of the fire. In response, the Pension Board argues that the plaintiff's disabling condition was present prior to July 19, 2007, and that if a triggering event aggravated his avascular necrosis, the event was getting up from the stretcher at the hospital, not rescuing the elderly woman with her oxygen tank from the house fire. The Pension Board does not dispute that the July 19, 2007, fire rescue constituted an act of duty or that the plaintiff suffers from a hip disability that precludes him from performing full service for the police department.

¶ 25 "In administrative cases, we review the decision of the administrative agency, not the

determination of the circuit court." *Wade v. City of North Chicago Police Pension Board*, 226 Ill. 2d 485, 504 (2007). Article three of the Pension Code involves the establishment and administration of police pension funds for the benefit of police officers in municipalities with less than 500,000 inhabitants. 40 ILCS 5/3-101, 3-102 (West 2008). Section 3-148 of the Pension Code (40 ILCS 5/3-148 (West 2008)) provides that judicial review of the Pension Board's decision is governed by the Administrative Review Law (735 ILCS 5/3-101 *et seq*. (West 2008)). Pursuant to the Administrative Review Law, the scope of our review extends to all questions of fact and law presented by the entire record. 735 ILCS 5/3-110 (West 2008); *Wade*, 226 Ill. 2d at 504. Section 3-110 of the Administrative Review Law further provides that the administrative agency's findings and conclusions on questions of fact shall be held to be *prima facie* true and correct. 735 ILCS 5/3-110 (West 2008). The plaintiff bears the burden of proof in an administrative hearing. *Marconi v. Chicago Heights Police Pension Board*, 225 Ill. 2d 497, 532-33 (2006).

¶ 26 The amount of deference we give to the Pension Board's decision "depends upon whether the question presented is a question of fact, a question of law, or a mixed question of law and fact." *Id.* at 532. "Rulings on questions of fact will be reversed only if they are against the manifest weight of the evidence." *Wade*, 226 Ill. 2d at 504. "An administrative agency decision is against the manifest weight of the evidence only if the opposite conclusion is clearly evident." *Abrahamson v. Illinois Department of Professional Regulation*, 153 Ill. 2d 76, 88 (1992). We review questions of law *de novo*. *Marconi*, 225 Ill. 2d at 532.

¶ 27 A mixed question of law and fact "involves an examination of the legal effect of a given set of facts." *City of Belvidere v. Illinois State Labor Relations Board*, 181 Ill. 2d 191, 205 (1998). When the question presented is a mixed question of law and fact, we apply a clearly erroneous standard of review. *Marconi*, 225 Ill. 2d at 532; *Jones v. Board of*

Trustees of the Police Pension Fund of the City of Bloomington, 384 Ill. App. 3d 1064, 1068 (2008); *Merlo v. Orland Hills Police Pension Board*, 383 Ill. App. 3d 97, 99-100 (2008). The Illinois Supreme Court has described this standard as "between a manifest weight of the evidence standard and a *de novo* standard so as to provide some deference to the [agency's decision]." *City of Belvidere*, 181 Ill. 2d at 205. An agency's decision presenting a mixed question of law and fact "will be deemed 'clearly erroneous' only where the reviewing court, on the entire record, is 'left with the definite and firm conviction that a mistake has been committed.' " *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill. 2d 380, 395 (2001) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)).

¶ 28 The Pension Code must be liberally construed in favor of the rights of the applicant. *Johnson v. Retirement Board of the Policemen's Annuity & Benefit Fund*, 114 Ill. 2d 518, 521 (1986). Section 3-114.1(a) of the Pension Code provides for a pension equal to 65% of the officer's salary if the officer becomes disabled as a result of "the performance of an act of duty." 40 ILCS 5/3-114.1(a) (West 2008). Specifically, section 3-114.1(a) provides, in relevant part, as follows:

> "If a police officer[,] as the result of sickness, accident[,] or injury incurred in or resulting from the performance of an act of duty, is found to be physically or mentally disabled for service in the police department, so as to render necessary his or her suspension or retirement from the police service, the police officer shall be entitled to a disability retirement pension equal to *** 65% of the salary attached to the rank on the police force held by the officer at the date of suspension of duty or retirement ***.
>
> A police officer shall be considered 'on duty' while on any assignment approved by the chief of the police department of the municipality he or she serves,

whether the assignment is within or outside the municipality." 40 ILCS 5/3-114.1(a) (West 2008) (entitled "Disability pension–Line of duty").

In contrast, section 3-114.2 of the Pension Code provides that an officer disabled as the result "of any cause other than the performance of an act of duty" is entitled to a disability benefit of 50% of his salary at the time the disability occurred. 40 ILCS 5/3-114.2 (West 2008) (entitled "Disability pension–Not on duty").

¶ 29 For purposes of these provisions, the definition of "act of duty" set forth in section 5-113 of the Pension Code (40 ILCS 5/5-113 (West 2008)) applies. See *Robbins v. Board of Trustees of the Carbondale Police Pension Fund*, 177 Ill. 2d 533, 540-41 (1997). Section 5-113 of the Pension Code defines an "[a]ct of duty," in pertinent part, as follows:

> "Any act of police duty inherently involving special risk, not ordinarily assumed by a citizen in the ordinary walks of life, imposed on a policeman by the statutes of this State or by the ordinances or police regulations of the city in which this Article is in effect or by a special assignment; or any act of heroism performed in the city having for its direct purpose the saving of the life or property of a person other than the policeman." 40 ILCS 5/5-113 (West 2008).

¶ 30 "Something more than being 'on duty' is required to receive a line-of-duty pension." *Jones*, 384 Ill. App. 3d at 1069; *Merlo*, 383 Ill. App. 3d at 100. Although not all police functions involve "special risk," the term is not limited to only inherently dangerous activities. *Johnson*, 114 Ill. 2d at 521; *Jones*, 384 Ill. App. 3d at 1070. A police officer is entitled to line-of-duty benefits when he is injured while on duty performing an act involving a special risk not shared by ordinary citizens. 40 ILCS 5/5-113 (West 2008); *Johnson*, 114 Ill. 2d at 522. "[A]n officer performing duties involving special risks will be entitled to line-of-duty benefits even if the immediate cause of injury is an act involving only an ordinary risk." *Alm v. Lincolnshire Police Pension Board*, 352 Ill. App. 3d 595, 599

(2004).

¶ 31 "In order to succeed in a claim for a line-of-duty disability pension, plaintiff must establish a causal connection between plaintiff's condition and an act of police service." *Ryndak v. River Grove Police Pension Board*, 248 Ill. App. 3d 486, 489 (1993). Although a sufficient nexus between the injury and the act of duty must exist, the performance of an act of duty need not be the originating or primary cause of the injury. See *Wade*, 226 Ill. 2d at 505; *Kellan v. Board of Trustees of the Firemen's Pension Fund of the City of Park Ridge*, 194 Ill. App. 3d 573, 582 (1990); *Olson v. City of Wheaton Police Pension Board*, 153 Ill. App. 3d 595, 598 (1987). A line-of-duty pension is properly awarded if the plaintiff proves that his act of duty exacerbated or aggravated a preexisting condition. *Virden v. Board of Trustees of the Firefighters Pension Fund of the City of Pekin*, 304 Ill. App. 3d 330, 336 (1999).

¶ 32 Accordingly, in determining whether the plaintiff is entitled to line-of-duty disability benefits, we must focus on the capacity in which the plaintiff was acting when injured and, in particular, any special risks he faced when acting in such a capacity. See *Johnson*, 114 Ill. 2d at 522. Pursuant to the plaintiff's testimony, the plaintiff was injured when performing a function peculiar to police officers–an act that ordinary citizens are not obligated to perform–in that he was responding to a citizen in need of fire rescue. See *Johnson*, 114 Ill. 2d at 522 ("unlike an ordinary citizen, the policeman has no option as to whether to respond [to a citizen's request for assistance]; it is his duty to respond regardless of the hazard ultimately encountered" (emphasis omitted)). The plaintiff faced special risks as he maneuvered the smoke and unfamiliar structure, looking after his own personal safety and remaining vigilant in the performance of his duty to remove persons from inside the burning building. See *Alm*, 352 Ill. App. 3d at 601; *Wagner v. Board of Trustees of the Police Pension Fund of Belleville*, 208 Ill. App. 3d 25, 29 (1991).

¶ 33 We find that the Pension Board's factual conclusion, that the plaintiff's hip was not injured until moving from the stretcher at the hospital, is against the manifest weight of the evidence. The plaintiff in an awkward position pushed an elderly woman in her wheelchair while he pulled her oxygen delivery system from the fire, and he testified that he felt pain in his hip as he exited the burning home. The Collinsville police department report confirmed that at the scene the plaintiff was coughing and vomiting and had advised that his lower back was hurting. The plaintiff thereafter notified the physicians at Anderson Hospital that he was experiencing pain in his right hip, and this notification was documented by hospital personnel.

¶ 34 That he did not complain of hip pain upon entering the hospital for smoke inhalation treatment was reasonable considering that he was having difficulty breathing and had at the scene been placed on a stretcher from which he had not yet exited. The plaintiff testified that upon removal from the stretcher, he again experienced the hip pain. The causal chain was not broken even if the plaintiff's subsequent move from the stretcher further aggravated the preexisting hip condition that had been weakened by his fire rescue activities. See *Devaney v. Board of Trustees of the Calumet City Police Pension Fund*, 398 Ill. App. 3d 1, 12 (2010) ("The law is clear that a subsequent accident that aggravates the condition that was weakened by a work-related accident does not break the causal chain."). Thus, the evidence supports the conclusion that the plaintiff was injured while acting in his capacity as a police officer engaged in a function peculiar to police officers and inherently involving special risks not ordinarily assumed by a citizen in the ordinary walks of life. See 40 ILCS 5/5-113 (West 2008).

¶ 35 Having concluded that the plaintiff sufficiently established that he experienced hip pain and was injured at the scene of the fire, we find that the medical evidence in the record supports the plaintiff's claim that the July 19, 2007, fire rescue aggravated his preexisting

avascular necrosis and established a sufficient nexus between the injury and the act of duty. Dr. George testified that the plaintiff's actions aggravated the preexisting condition of his right hip, and Dr. Wilkey testified that "the hip collapse that subsequently resulted in the right hip replacement was causally related to the alleged injury and accident that [the plaintiff] sustained on July 19, 2007." Dr. Wilkey characterized the plaintiff's actions as a "significant factor" in the plaintiff's symptoms and need for hip replacement.

¶ 36 Although Dr. Strickland's report indicated that the plaintiff's July 19, 2007, rescue was "not the primary cause" for the need for hip replacement, this evidence did not contradict Dr. George's and Dr. Wilkey's testimony that the plaintiff's actions on July 19, 2007, were causally related to the need for hip replacement and aggravated the preexisting avascular necrosis. A duty-related incident need not be the originating or primary cause of the injury; a disability pension may be based upon the line-of-duty aggravation of a preexisting physical condition. See *Wade*, 226 Ill. 2d at 505; *Devaney v. Board of Trustees of the Calumet City Police Pension Fund*, 398 Ill. App. 3d 1, 8 (2010); *Alm*, 352 Ill. App. 3d at 598. The evidence at the hearing supported the conclusion that the plaintiff, while engaged in an act of duty, sustained aggravation to a preexisting hip condition and was entitled to full disability benefits. See *Kellan*, 194 Ill. App. 3d at 582 (appellate court held that firefighter sustained aggravation to preexisting back condition and thus was entitled to full disability benefits).

¶ 37 Even under the manifest weight standard applicable in this case, the deference afforded the administrative agency's decision is not boundless. See *Wade*, 226 Ill. 2d at 507. Having carefully reviewed the evidence at the hearing, we hold that the Pension Board's conclusions that the plaintiff was not injured until he was removing himself from the hospital stretcher and that his disability did not result from the performance of an act of duty were against the manifest weight of the evidence. Instead, we find that the plaintiff qualified

for line-of-duty disability pension benefits pursuant to section 3-114.1 of the Pension Code (40 ILCS 5/3-114.1 (West 2008)). Accordingly, the circuit court erred in affirming the Pension Board's order denying the plaintiff's request for line-of-duty disability pension benefits.

¶ 38 CONCLUSION

¶ 39 For the foregoing reasons, we reverse the order of the circuit court of Madison County, and we remand the cause for further proceedings.

¶ 40 Reversed; cause remanded.