

No. 1-11-1808

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IN THE APPELLATE  
COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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JACEK KOZMINSKI,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09 CH 30085
	)	
THE RETIREMENT BOARD OF THE FIREMEN'S	)	
ANNUITY AND BENEFIT FUND OF CHICAGO,	)	The Honorable
	)	Stuart E. Palmer,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE FITZGERALD SMITH delivered the judgment of the court.  
Presiding Justice Lavin and Justice Pucinski concurred in the judgment.

**ORDER**

*HELD:* Trial court's decision reversed and Board's decision to deny disability benefits to plaintiff affirmed and reinstated where trial court improperly relied on record from previous administrative hearing and where evidence from instant record demonstrated that Board's decision was not against manifest weight of the evidence.

¶ 1 Defendant-appellant The Retirement Board of the Firemen's Annuity and Benefit Fund of Chicago (Board) appeals from a trial court order finding its decision to deny disability benefits to

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plaintiff-appellee Jacek Kozminski (plaintiff) to have been against the manifest weight of the evidence. The Board contends that the trial court erred in considering a prior Board decision from 2007, that there was competent evidence to support the Board's denial of benefits, and that the trial court erred by improperly relieving plaintiff's burden of proof at trial. The Board asks that we reverse the trial court's order in its entirety and instead affirm the Board's decision. For the following reasons, we reverse the trial court's order and affirm and reinstate the Board's decision.

¶ 2

## BACKGROUND

¶ 3 In 2002, plaintiff began working for the Chicago Fire Department. On August 23, 2005, he was exiting a fire truck while on-duty when he fell and hit his left shoulder. Although x-rays showed no broken bones or fractures, plaintiff was in pain. He consulted Dr. Robert Sawchyn, who found that he had good range of motion and only slight tenderness and pain. By September 2005, plaintiff reported to the doctor that he was doing better. An MRI showed a bone contusion, and plaintiff was ordered to physical therapy. Following this, plaintiff's pain lessened and his therapist noted a normal range of motion. In November 2005, plaintiff underwent a Functional Capacity Evaluation (FCE) which indicated that he could perform under the "very heavy" category of work, the level required for a firefighter. This test also showed that plaintiff exhibited some fatigue during certain exercises, and it was recommended that plaintiff participate in a work conditioning program. After plaintiff's further complaints of instability in his shoulder, his doctor referred him to Dr. Michael Maday for a second opinion.

¶ 4 In December 2005, Dr. Maday examined plaintiff and found that, although he had good

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rotation and no tenderness, he may have suffered a superior labral tear from anterior to posterior (SLAP) lesion and recommended arthroscopic surgery. Dr. Maday believed that, with this surgery, plaintiff could return to work at full duty in approximately four months. Plaintiff had the surgery in January 2006, during which Dr. Maday discovered the SLAP lesion and a second tear; Dr. Maday repaired both. Between April and June 2006, plaintiff attended physical therapy and further examinations with Dr. Maday, who concluded that plaintiff had regained full range of motion. Dr. Maday recommended another FCE to determine when plaintiff could return to work. In July 2006, plaintiff performed the FCE and again tested at the “very heavy” level, but the test also indicated some fatigue and decreased endurance. A work conditioning program was again recommended to plaintiff. Plaintiff, however, did not attend several physical therapy sessions.

¶ 5 On July 28, 2006, plaintiff was in his car when he turned around and reached behind him for a bag of groceries, and began feeling pain in his left shoulder. Plaintiff visited Dr. Maday, who found his range of motion in his shoulder was still essentially full. Plaintiff was then re-evaluated for physical therapy. While he had no pain at rest, he complained of pain when having to perform heaving lifting.

¶ 6 In September 2006, plaintiff filed an application for duty disability benefits pursuant to section 6-151 of the Illinois Pension Code (Code). 40 ILCS 5/6-151 (West 2006). In his application, he listed both the injury he suffered while on-duty when he fell out of the fire truck and the injury he suffered while off-duty when he reached behind him in his car. Prior to the Board's hearing on the application, plaintiff was examined by Dr. George Motto, a Board physician, who also reviewed his medical records. Dr. Motto found that plaintiff's range of

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motion was full, but that he had problems when it came to reaching back and overhead. Dr. Motto opined that, because of this, plaintiff could not perform his duties as a firefighter. He also recommended an independent medical evaluation from an orthopedic specialist. Plaintiff underwent this evaluation by Dr. Guido Marra, who concluded that plaintiff probably had a re-tear or persistent tear in his shoulder, most likely caused by the incident when he reached behind in his car.

¶ 7 On February 21, 2007, following the hearing, the Board issued its decision wherein it found that it was not clear from the evidence whether plaintiff had sustained a new injury to his shoulder when, while off-duty, he reached behind him for the groceries or whether he had re-injured the previous tear he had suffered when, while on-duty, he had slipped from the fire truck. Ultimately, because of this, the Board concluded that his current condition was “not the result of a specific injury or of cumulative injuries incurred in or resulting from an act or acts of duties.” Therefore, the Board denied plaintiff’s application for duty disability benefits, holding that he had “not produced sufficient evidence to meet his burden” of proof under section 6-151 of the Code.

¶ 8 Plaintiff sought administrative review of this decision, and the Board filed a motion to dismiss. On November 8, 2007, the trial court granted the Board’s motion and dismissed plaintiff’s complaint with prejudice, finding that he had failed to properly name the Board as a defendant in the matter. Plaintiff filed a motion to reconsider, but then withdrew it. Plaintiff did not appeal the denial of his duty disability benefits application.

¶ 9 In January 2008, plaintiff returned to Dr. Maday. Plaintiff informed him that he had been

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rehabilitating his shoulder with home exercises and had been asymptomatic. Dr. Maday examined plaintiff and found that he had essentially full range of motion, no pain, full strength and normal x-rays. Dr. Maday recommended a third FCE and, on January 29, 2008, released plaintiff to full work duties, without restriction. Plaintiff underwent the FCE on January 31, 2008, testing at the “very heavy” level and showing no deficits. On March 15, 2008, plaintiff was reinstated to full active duty with the Chicago Fire Department, without restriction.

¶ 10 In January 2009, plaintiff filed an application for ordinary disability benefits for his left shoulder under section 6-152 of the Code. In this application, as in his application for duty disability benefits, he listed both the injury he suffered while on-duty when he fell out of the fire truck and the injury he suffered while off-duty when he reached behind him in his car. The Board held a hearing on his application. Plaintiff testified regarding his on-duty injury and his treatment, including that, between November 2006 and January 2008, he did not attend physical therapy but instead performed exercises at home. He further testified that he returned to full-time work status in March 2008 and, since then, has been able to perform all his duties. On July 29, 2009, the Board issued its decision denying plaintiff’s application. The Board found that plaintiff was not eligible for ordinary disability benefits because the evidence presented at the hearing showed that his shoulder injury was the result of an act on-duty, he did not prove he was disabled, and he did not provide a physician’s report from a Board physician proving disability.

¶ 11 Following the hearing, plaintiff sought administrative review of the Board’s denial of his ordinary disability benefits application. The Board filed the administrative record with the court of the 2009 hearing concerning ordinary disability benefits. In response, plaintiff filed a motion

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to supplement the record to include the record from his 2007 administrative hearing regarding his application for duty disability benefits, arguing that the court should review both hearings. The Board objected, claiming this would violate the rules of administrative review and would result in an improper collateral attack on the final 2007 judgment, which plaintiff never appealed. The trial court granted plaintiff's motion and allowed the record of the 2009 ordinary disability benefits hearing to be supplemented with the record of the 2007 duty disability benefits hearing.

¶ 12 Following briefing and oral argument, the trial court issued an order finding that the Board's decision denying plaintiff ordinary disability benefits was against the manifest weight of the evidence. The trial court noted that it examined both the record from the 2007 and 2009 hearings, and found that plaintiff was "in a unique position because he was denied duty disability benefits for not having a duty related injury and then he was denied ordinary disability benefits because the same injury was considered to be duty related." The court further commented that the Board, in 2009, "ignored the evidence" from the 2007 hearing, which included Board physician Dr. Motto's opinion that plaintiff could not perform his duties, supplemented by Dr. Marra's opinion that plaintiff had a re-tear or persistent tear in his shoulder. Ultimately, the court held that, based on all the evidence presented at both hearings, the Board's denial of ordinary disability benefits was "inconsistent, arbitrary and capricious" and, accordingly, it reversed that decision and awarded plaintiff ordinary disability benefits pursuant to section 6-152 of the Code.

¶ 13

#### ANALYSIS

¶ 14 The Board contends on appeal that its decision to deny plaintiff's application for ordinary disability benefits should be reinstated. It argues that the trial court erred in considering the

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record from plaintiff's 2007 duty disability benefits hearing and allowing it as part of the record in his 2009 ordinary disability benefits hearing, that its decision was not against the manifest weight of the evidence since there was competent medical evidence to support it, and that the trial court erred in improperly relieving plaintiff's burden of proof under section 6-153 the Code. In response, plaintiff refutes any error on the part of the trial court and argues that the Board's decision to deny his ordinary disability benefits was arbitrary and capricious.

¶ 15 We begin with the standard of review. The parties agree that we must proceed pursuant to a manifest weight of the evidence standard. Under this standard, courts are not to interfere with a board's discretionary authority but, rather, may only review the decision reached by the board to determine solely whether it is against the manifest weight of the evidence. See *O'Boyle v. Personnel Board of the City of Chicago*, 119 Ill. App. 3d 648, 653 (1983). Accordingly, here, the Board's findings are considered to be *prima facie* true and correct, and we, as the reviewing court, may not reweigh the evidence or make any independent determinations of fact. See *Abrahamson v. Illinois Department of Professional Regulation*, 153 Ill. 2d 76, 88 (1992). Thus, a court may not substitute its judgement for that of the Board, and reversal of the Board's decision is not justified simply because the opposite conclusion is reasonable or because the court might have ruled differently. See *Abrahamson*, 153 Ill. 2d at 88. Instead, in order for a court to find that the Board's decision is truly against the manifest weight of the evidence, it must be able to conclude that " 'all reasonable and unbiased persons, acting within the limits prescribed by the law and drawing all inferences in support of the finding, would agree that the finding is erroneous' [citation] and that the opposite conclusion is clearly evident." *O'Boyle*, 119 Ill. App.

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3d at 653 (quoting *Daniels v. Police Board*, 37 Ill. App. 3d 1018, 1023 (1976), and *Jenkins v. Universities Civil Service Merit Board of the State Universities Civil Service System*, 106 Ill. App. 3d 215, 219 (1982)); see also *Abrahamson*, 153 Ill. 2d at 88 (Board's decision is against manifest weight "only if the opposite conclusion is clearly evident"); *Yeksigian v. City of Chicago*, 231 Ill. App. 3d 307, 310 (1992) (Board's decision is not against manifest weight "unless the opposite conclusion is clearly evident \*\*\* and, no rational trier of fact, viewing the evidence in the light most favorable to the [Board], could have agreed with the [Board's] determination"). While it is true, as plaintiff points out, we may not rubber-stamp agency decisions (see *Viera v. Illinois Racing Board*, 65 Ill. App. 3d 94, 99 (1978)), it cannot be denied that the applicable standard of review here is an exacting one (see *Finnerty v. Personnel Board of the City of Chicago*, 303 Ill. App. 3d 1, 12 (1999)). Ultimately, if there is any evidence in the record which fairly supports the Board's conclusion, it is not against the manifest weight of the evidence and must be sustained. See *Finnerty*, 303 Ill. App. 3d at 12.

¶ 16 The Board's first argument on appeal is that the trial court erred in considering the record from plaintiff's 2007 duty disability benefits hearing and allowing it as part of the record in his 2009 ordinary disability benefits hearing. We agree.

¶ 17 As noted earlier, the trial court, upon administrative review initiated by plaintiff following the Board's denial of ordinary disability benefits, allowed plaintiff's motion to supplement the record of the 2009 hearing with the record from his 2007 duty disability benefits hearing. In its decision reversing the Board, the court referenced the 2007 hearing several times, stating that it was examining both records and the evidence contained in them in rendering its

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conclusion. Specifically, the court's decision to reverse was premised upon its belief that it was "arbitrary and capricious" for the Board to find that, based on the 2007 record, plaintiff's injury was not duty-related, and then find that, based on the 2009 record, his injury was duty-related.

¶ 18 We find that the trial court's decision to allow the 2007 record into evidence, and then to rely on it for its decision, was erroneous. It is axiomatic that:

"[A] prior determination by an administrative body is not *res judicata* in subsequent hearings before it. An administrative body has the power to deal freely with each situation as it comes before it, regardless of how it may have dealt with a similar or even the same situation in a previous proceeding."

(Citation omitted.)

*Hawthorne Race Course, Inc. v. Illinois Racing Board*, 366 Ill. App. 3d 435, 443 (2006) (quoting *Hazelton v. Zoning Board of Appeals*, 48 Ill. App. 3d 348, 351-52 (1977)). Accordingly, what an administrative agency holds following one hearing is, essentially, irrelevant to its determination regarding another hearing, even if the same situation is presented. See, e.g., *Hazelton*, 48 Ill. App. 3d at 350-52 (decision on petition for variance to build room addition did not bind subsequent decision on application for permit to build same room addition); *Monat v. County of Cook*, 322 Ill. App. 3d 499, 506 (2001) (party's obtaining variance to build stable from zoning board following one hearing did not prevent zoning board from then denying permit application to build same stable following another hearing; right to build stable was not *res judicata* on zoning board determinations). This derives from the concept that, administrative agencies, which govern our public regulation, must be free to change their standards (as long as these

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changes are not arbitrary and capricious) so they can adjust our public policies in light of our ever-changing experiences. See *City of Chicago v. People of Cook County*, 133 Ill. App. 3d 435, 440-41 (1985) (citing *Mississippi Rive Fuel Corp. v. Illinois Commerce Comm'n*, 1 Ill. 2d 509, 513 (1953)). To hold otherwise absolutely binds our administrative agencies to their prior determinations, foreclosing any chance at necessary change. See *City of Chicago*, 133 Ill. App. 3d at 441 (citing *Montana Power Co. v. Environmental Protection Agency*, 608 F.2d 334, 347 (9th Cir. 1979)).

¶ 19 In the instant case, then, the Board had the power to freely make its decision in the ordinary disability benefits matter based on the facts presented to it at that time as part of that record, regardless of the record or decision it made earlier in the duty disability benefits matter. It is irrelevant that the same set of facts may have been involved. As an administrative agency, the Board is to review each particular matter as it is presented before it, without reference to anything else.

¶ 20 Here, the Board's denial of plaintiff's duty disability benefits application in 2007 occurred two years before the Board was called upon to review his ordinary disability benefits application in 2009, which he based upon the same injuries: the on-duty fall from the fire truck and the off-duty reach-back in his car. Although plaintiff sought administrative review of that decision, he did not appeal the matter when the trial court affirmed the Board's denial of benefits. Thus, that 2007 determination is, and was even in 2009, final. To allow consideration of what occurred during that prior hearing would, in effect, set a precedent of binding the Board to its prior determination regardless of the new facts presented at the later time. Yet, the trial court herein

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made it completely, and repeatedly, clear that the basis for reversing the Board's decision to deny plaintiff ordinary disability benefits was its consideration of the record and the Board's decision in his prior, 2007 cause. It even quoted medical testimony from that prior cause and admonished the Board for "ignor[ing] the evidence" from this prior hearing before ultimately holding that the Board's subsequent 2009 decision to deny plaintiff ordinary disability benefits was against the manifest weight of the evidence—evidence presented in 2007. Pursuant to our case law, this was improper.

¶ 21 We do not deny, as the trial court commented, that plaintiff is in a "unique position." It is not lost on us that he was denied duty disability benefits for not having a duty-related injury, but then also denied ordinary disability benefits because the same injury was considered to be duty related.<sup>1</sup> And, we further note that this situation seemingly placed the trial court in a precarious position while it was only trying to decipher the facts of the cause before it. However, to bind the Board's hands to a prior decision is not the remedy.

¶ 22 Unfortunately, in our view, it seems as if it was perhaps plaintiff himself who tied his own hands in this matter. Again, plaintiff had the opportunity to appeal the denial of his duty disability benefits application. He chose not to do so. The Board was called upon to examine the same situation pursuant to two different records (2007 and 2009) and with two different set of eyes (did the injury occur from an act of duty and did the injury occur from an act not of duty).

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<sup>1</sup>We note for the record that, in his brief, plaintiff states that the Board concluded in the duty disability decision that plaintiff "was disabled" and that the "disability" was not the result of a specific injury resulting from an act of duty. This is incorrect. We clarify that the Board never found that plaintiff was "disabled" or had a "disability." It concluded, rather, that plaintiff was *injured* and that his *injury* was not the result of a specific injury resulting from an act of duty.

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In the first instance, the evidence plaintiff chose to present showed there was no medical certainty to determine whether his injury was the result of a specific injury incurred from an act of duty. Accordingly, he failed to meet the proof requirements of section 6-151 of the Code. See 40 ILCS 5/6-151 (West 2006) (noting requirements to prevail in duty disability claim, including that a plaintiff must show with specificity that cause of injury was act of duty). In the second, plaintiff, knowing he was applying for ordinary disability benefits, filled out his application by citing and discussing mainly his on-duty injury rather than his off-duty injury, and then chose not to present any evidence to show that his injury was not caused by an act of duty; in fact, no doctors testified at the hearing at all. Accordingly, again, he failed to meet the statutory proof requirements, this time under section 6-152 of the Code. See 40 ILCS 5/6-152 (West 2008) (noting requirements to prevail in ordinary disability benefits claim, including that the plaintiff must show with specificity that cause of injury was other than performance of act of duty). While the result of his situation may be "unique" on its face, it is fully explainable by what occurred.

¶ 23 Ultimately, we find that the trial court, in reviewing the Board's denial of plaintiff's ordinary disability benefits application, improperly considered the record from plaintiff's prior, 2007 hearing concerning his duty disability benefits application. Having so found, we now turn to examine whether the Board's decision to deny plaintiff's ordinary disability benefits application was against the manifest weight of the evidence presented at the 2009, and only the 2009, ordinary disability benefits hearing. We conclude that it was not.

¶ 24 As we discussed earlier, pursuant to our standard of review, in order to find that the

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Board's decision was against the manifest weight of the evidence,<sup>2</sup> we must conclude that the opposite conclusion is clearly evident and no rational trier of fact, viewing the evidence in the light most favorable to the Board, could have agreed with the Board's determination. See *Yeksigian*, 231 Ill. App. 3d at 310. As long there is any evidence in the record to fairly support the Board's conclusion, it must be sustained. See *Finnerty*, 303 Ill. App. 3d at 12.

¶ 25 Based upon our review of the record presented at the 2009 ordinary disability benefits hearing, we find that there was ample evidence to support the Board's conclusion here.

Following his surgery in January 2006, plaintiff was making a full recovery and his medical records indicated that his doctors believed he would be able to return to work in four months.

Plaintiff's second FCE showed that he tested at the "very heavy" level necessary for work as a firefighter and, while he had some fatigue and decreased endurance, he had regained full range of motion in his shoulder. All plaintiff needed was to attend a work conditioning program and physical therapy, the latter of which he chose not to complete.

¶ 26 Even after his subsequent off-duty injury in July 2006 when he reached behind in his car, there was no indication in the record that plaintiff was disabled. To the contrary, his medical records showed that his range of motion was still essentially full. Plaintiff reported being

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<sup>2</sup>We note that in his brief on appeal, plaintiff, when discussing whether the Board's decision was against the manifest weight of the evidence, states that "it is absurd and unconscionable for the Board to claim that the Circuit Court's decision was against the manifest weight of the evidence." We wish to clarify that, pursuant to our standard of review, we examine whether the *Board's* decision to deny the benefits was against the manifest weight of the evidence and not, as plaintiff insists, whether the trial court's decision reversing the Board's decision was against the manifest weight of the evidence. See *Daniels v. Police Board of the City of Chicago*, 338 Ill. App. 3d 851, 858 (2003).

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asymptomatic, with no pain, full strength and normal x-rays. A third FCE showed plaintiff testing at the “very heavy” level and, this time, with no deficits in his abilities at all. Critically, plaintiff was medically released to full work duties without restriction on January 29, 2008, and, by March 15, 2008, he was reinstated to full active duty with the Chicago Fire Department without restriction.

¶ 27 It was upon these facts that the Board decided to deny plaintiff’s application for ordinary disability benefits. Considering them now, in the light most favorable to the Board, as we must, we find that a sufficient basis existed for its decision. That is, based on the record before us, we cannot say that the opposite conclusion is clearly evident or that no rational trier of fact could have found as the Board did here. The circumstances of this cause do not bear that out and, thus, we cannot substitute our judgment for that of the Board, even were we to have held differently under the same facts.<sup>3</sup>

¶ 28 CONCLUSION

¶ 29 Accordingly, for all the foregoing reasons, we reverse the judgment of the trial court and reinstate the Board’s decision denying plaintiff’s application for ordinary disability benefits.

¶ 30 Reversed; Board’s decision affirmed and reinstated.

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<sup>3</sup>Because we have concluded that, based on the record, the Board’s decision was not against the manifest weight of the evidence, we need not address the final argument raised by the Board on appeal asserting trial court error regarding plaintiff’s burden of proof.