

No. 1-11-3224

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PATRICK ANDREWS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	No. 11 CH 16723
)	
THE RETIREMENT BOARD OF THE POLICEMEN'S)	
ANNUITY and BENEFIT FUND OF THE CITY OF)	
CHICAGO,)	Honorable
)	Carolyn G. Quinn,
Defendant-Appellee.)	Judge Presiding.

PRESIDING JUSTICE SALONE delivered the judgment of the court.
Justices Neville and Sterba concurred in the judgment.

ORDER

- ¶ 1 *Held:* Where the record contained evidence that disability of plaintiff police officer after traffic collision resulted from a pre-existing physical condition, plaintiff should receive a disability benefit of 50% of his salary; the judgment of the Board was affirmed.
- ¶ 2 Plaintiff Patrick Andrews appeals the decision of defendant, the Retirement Board of the Policemen's Annuity and Benefit Fund of Chicago (the Board), awarding him a duty disability benefit of 50% of his salary after he injured his back. The circuit court affirmed the Board's

decision. On appeal, plaintiff contends he should receive a benefit of 75% of his salary because his inability to work did not stem from a pre-existing physical condition, as opined by plaintiff's treating physician, and he asserts the Board's determination was contrary to the manifest weight of the evidence. We affirm the decision of the Board.

¶ 3 On November 9, 2010, plaintiff, a Chicago police officer, applied for disability benefits pursuant to section 6-151 of the Illinois Pension Code (the Code) (40 ILCS 5/6-151 (West 2008)) for an injury that occurred while he was on duty. Under that provision, an active policeman who becomes disabled as a result of an on-duty injury has a right to receive a 75% duty disability benefit. A duty disability benefit of 50% of salary is paid if the disability "resulted from any physical defect *** or any disease which existed at the time the injury was sustained." 40 ILCS 5/5-154(a)(i) (West 2008). It is not disputed in this case that plaintiff is disabled and is eligible for a duty disability benefit. The only issue is the Board's conclusion as to the amount of that benefit.

¶ 4 Plaintiff's application for a duty disability benefit was based on a back injury that occurred on February 12, 2009, when the squad car in which he was riding was struck from behind by another vehicle. Plaintiff was taken to a hospital, where he complained of pain in his neck, shoulder and lower back, along with a headache. The record of that visit indicates x-rays were taken of plaintiff's spine, and an acute cervical strain was diagnosed.

¶ 5 An MRI of plaintiff's cervical spine taken about two weeks later, on February 27, 2009, showed a "small chronic left paracentral disk herniation" at C6-C7 that was present in an exam performed in 2002. On March 26, 2009, plaintiff's treating physician, Dr. David Spencer, wrote that plaintiff had a "neck spasm in '02 which spontaneously resolved" and was recovering from a "whiplash injury" based on plaintiff's history and a physical exam. In May 2009, Dr. Spencer

released plaintiff to return to full work duty with no restrictions on his activities. Plaintiff continued to experience neck and back pain and had back surgery in May 2010.

¶ 6 In December 2010, Dr. Jay Levin, performed an independent medical examination of plaintiff. In a January 2011 letter, Dr. Levin reported that plaintiff had received cortisone injections and other treatment for back problems in 2002. Dr. Levin stated that an MRI of plaintiff's cervical spine in 2009 "demonstrated that the only level of pathology in his neck was the C6-C7 disk herniation which, in fact, based on the normality of the other segments, would have been the same disk herniation he had in 2002." Dr. Levin opined that "[b]y this definition, [plaintiff] had a pre-existing condition *** at the level for which he required surgery on May 19, 2010."

¶ 7 At the hearing before the Board, the Board heard testimony from plaintiff and from Dr. Orris, the Board's consulting physician. Plaintiff testified that he was born in 1970 and had been a Chicago police officer for 15 years. Plaintiff complained of severe neck pain and shoulder pain at the time of his testimony and said he was under the care of Dr. Spencer.

¶ 8 Plaintiff acknowledged his personnel file listed 14 on-duty injuries and recurrences of those injuries. Prior to the instant injury in 2009, plaintiff had been treated for neck and/or shoulder pain as early as January 2000, when he "just woke up one day and had a pain" in his shoulder. Plaintiff's first on-duty injury was in May 2000, when he was in a foot chase with a burglary suspect and felt a "jolt" when he jumped from a wall that was 8 to 10 feet high. Plaintiff did not seek medical treatment after that incident. In 2002, plaintiff was diagnosed with a history of a herniated disk in his neck.

¶ 9 After the instant injury in 2009, plaintiff was hospitalized for five days. Plaintiff was eventually released to work with no restrictions. In May 2010, Dr. Spencer performed a diskectomy that alleviated plaintiff's symptoms to some extent, though plaintiff still experiences

back spasms. At the time of his testimony, plaintiff was still experiencing pain daily from a functional capacity evaluation he had a few weeks earlier to determine his ability to perform his job.

¶ 10 Under questioning by the Board's attorney, plaintiff reviewed a summary of his work history that was provided to the Board. Plaintiff said he first experienced the neck pain in January 2000 and again in May 2000 but did not miss any work time. In 2002, plaintiff was absent from work on several days, and a report from a surgical center referred to a history of a herniated disk.

¶ 11 Dr. Orris testified that plaintiff's current disability was "related to an injury of 2009 based on the original injury of 2000 and 2002" and stated that plaintiff "clearly has a C6-C7 injury." Dr. Orris opined that plaintiff's disc was likely damaged in 2000 and the injury was "exacerbated several times following that" by the various on-duty injuries between 2000 and 2009. Dr. Orris stated that plaintiff's current condition resulted from exacerbations of the "original problem," and he agreed with Dr. Levin's assessment that plaintiff's chronic disk herniation was aggravated by the 2009 incident. Dr. Orris testified that he disagreed with the written opinion submitted to the Board by plaintiff's treating physician, Dr. Spencer, that plaintiff's disability was "not related to an episode of neck spasm from a previous injury" but was related to the February 2009 traffic accident. Dr. Spencer did not testify before the Board.

¶ 12 On April 19, 2011, the Board issued a written decision awarding a disability benefit of 50% of plaintiff's salary. The Board noted the 2000 and 2002 reports of neck pain by plaintiff and found that plaintiff was engaged in an act of duty when he sustained his neck injury in 2009, and that plaintiff was currently disabled. However, the Board found plaintiff's "current disability stems from and was exacerbated by a pre-existing physical defect (herniated disk degenerative condition)." The Board referred to the diagnostic tests, medical reports and testimony of Dr.

Orris and noted that plaintiff had offered no medical testimony in support of his application for benefits.

¶ 13 Plaintiff filed a petition for administrative review of the Board's decision in the circuit court of Cook County, arguing the evidence did not support the Board's factual findings and asking the court to reverse the Board's order and award his benefits at the 75% rate. On October 21, 2011, the circuit court entered an order affirming the Board's decision. Plaintiff now appeals.

¶ 14 On appeal, plaintiff contends that the Board's determination that his disability stemmed from a pre-existing physical defect is clearly erroneous. He argues the Board's finding that his condition did not arise from the 2009 incident was contrary to the manifest weight of the evidence. Plaintiff contends that although he had been treated for neck pain, those issues were resolved in 2000, which was nine years before the incident in question.

¶ 15 In administrative agency cases, our review is of the decision of the agency, not of the circuit court. See *Wade v. City of North Chicago Police Pension Board*, 226 Ill. 2d 485, 504 (2007). Whether the evidence presented to the Board supported a determination that plaintiff's disability resulted from a previous physical defect or disease, thus warranting a 50% duty disability benefit, is a question of fact to which this court applies the manifest weight standard. *Cole v. Retirement Board of the Policemen's Annuity and Benefit Fund*, 396 Ill. App. 3d 357, 367 (2009).

¶ 16 A 50% duty disability benefit is to be awarded where the disability results from a pre-existing condition, even if the on-duty injury that led to the request for the benefit may have affected or worsened the condition. 40 ILCS 5/5-154(a)(i) (West 2008); *Samuels v. Retirement Board of the Policemen's Annuity and Benefit Fund*, 289 Ill. App. 3d 651, 661-62 (1997) (officer's disability "resulted from her pre-existing degenerative disc disease", thus warranting

50% benefit). In comparison, a disability that occurs as a result of (being caused by) the instant injury warrants a 75% benefit under section 5-154(a). *Samuels*, 289 Ill. App. 3d at 661.

¶ 17 In arguing that the evidence supported the award of a duty disability benefit at the 75% rate, plaintiff points to the opinion of his treating doctor, Dr. Spencer, that his inability to work arose from the 2009 incident. Plaintiff questions the Board's reliance on the testimony of Dr. Orris in light of his own testimony, along with the opinions of Dr. Spencer and Dr. Levin, which he contends support a conclusion that his 2009 injury did not stem from a pre-existing condition.

¶ 18 This court's review of the Board's decision does not involve the full-scale reweighing of the testimony. This court does not weigh the evidence or substitute our judgment for that of the Board; where the record contains any competent evidence to support the agency's decision, it should be affirmed. *Marconi v. Chicago Heights Police Pension Board*, 225 Ill. 2d 497, 534 (2006). An administrative agency decision is against the manifest weight of the evidence only if the opposite conclusion is clearly evident. *Wade*, 226 Ill. 2d at 504-05. The burden of proof is on the plaintiff, and the failure to sustain that burden will result in the denial of the requested relief. *Kousoukas v. Retirement Board of the Policemen's Annuity and Benefit Fund*, 234 Ill. 2d 446, 464 (2009).

¶ 19 Plaintiff maintains that it is "impossible to determine" whether he had a chronic disk herniation, while then proceeding to assert that the "evidence supports the finding that [he] did not." The record contains more than sufficient evidence to support the Board's decision that plaintiff's 2009 injury resulted from a previous physical defect, thus warranting a 50% duty disability benefit. Plaintiff's injury stemming from the 2009 on-duty incident was diagnosed as an acute cervical strain. As early as 2000, plaintiff was treated for neck and shoulder pain and was diagnosed with a herniated disk in his neck in 2002. Dr. Levin stated that based on his 2010 evaluation of plaintiff, the 2009 injury was the "same disk herniation" that plaintiff had in 2002

and was a pre-existing condition. Dr. Orris, the Board's consulting physician, also opined that plaintiff's disc likely was damaged in 2000 and that the 2009 accident aggravated that initial condition.

¶ 20 Despite those opinions, plaintiff maintains his injury was caused by the 2009 accident. However, causation is not the test to be applied here. Even if the 2009 injury led to plaintiff's disabled state, this court has rejected the position that a 75% benefit should be awarded if, but for an on-duty injury, the officer's disability would not exist. See *Samuels*, 289 Ill. App. 3d at 661-62; see also *Cole*, 396 Ill. App. 3d at 369. Rather, as we have stated above, a 50% duty disability benefit is to be awarded where the disability results from a pre-existing condition, even if the on-duty injury may have affected or worsened the condition. 40 ILCS 5/5-154(a)(i) (West 2008).

¶ 21 Plaintiff further contends the Board failed to give due weight to the written report of his treating physician, Dr. Spencer. He argues the Board instead focused on the doctor's absence from the administrative hearing, as shown by the Board's statement in its decision that plaintiff offered "no medical testimony in support of his application."

¶ 22 Plaintiff argues Dr. Spencer's report should be given the same weight as if the doctor had testified before the Board. Plaintiff contends the "Board had a duty to require or at the very least request that Dr. Spencer appear for the purpose of assisting" plaintiff's application for benefits. The Board responds that it did not disregard Dr. Spencer's written report but instead relied on the other evidence in the record to reach its decision.

¶ 23 To support his assertion that it was the Board's obligation, rather than his burden, to call his doctor as a witness, plaintiff cites section 5-156 of the Code, which states, in pertinent part:

"Proof of duty, occupational disease, or ordinary disability shall be furnished to the board by at least one licensed and practicing physician appointed by the board. In cases where the board

requests an applicant to get a second opinion, the applicant must select a physician from a list of qualified licensed and practicing physicians who specialize in the various medical areas related to duty injuries and illnesses, as established by the Board." 40 ILCS 5/5-156 (West 2008).

¶ 24 Plaintiff's reliance on this provision is unpersuasive. Section 5-156 does not require the Board to call a treating physician as a witness; it requires that a licensed physician appointed by the Board present proof of the applicant's condition to the Board and sets out the requirements for obtaining a second opinion. Here, Dr. Levin performed an independent medical examination for the Board, and Dr. Orris testified as the Board's consulting physician. The Board was not required to call Dr. Spencer as a witness.

¶ 25 An administrative hearing, as was held here, is distinct from a full judicial proceeding in that it is not a "partisan hearing with the agency on one side arrayed against the individual on the other," but is instead an "administrative investigation instituted for the purpose of ascertaining and making findings of fact." *Abrahamson v. Illinois Department of Professional Regulation*, 153 Ill. 2d 76, 94-95 (1992); *Williams v. Board of Trustees of Morton Grove Firefighters' Pension Fund*, 398 Ill. App. 3d 680, 691-92 (2010). "A fair hearing before an administrative agency includes the opportunity to be heard, the right to cross-examine adverse witnesses, and impartiality in ruling upon the evidence." *Abrahamson*, 153 Ill. 2d at 95.

¶ 26 The Board accurately stated in its decision that plaintiff did not present any medical testimony in support of his application. This court lacks any basis to conclude that the Board's decision was adversely affected, in plaintiff's case, by Dr. Spencer's absence as a live witness. Either party could have called Dr. Spencer as a witness. Plaintiff had the opportunity to present evidence to support his own case, and plaintiff elected not to call his treating physician, instead

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submitting the doctor's written opinion to the Board. The Board was within its authority to consider the written report of Dr. Spencer without requiring that the doctor be called as a witness.

¶ 27 In summary, because the record contains competent evidence to support the Board's decision that plaintiff's disability arose from a previous condition, the award of a duty disability benefit in the amount of 50% of plaintiff's salary is affirmed.

¶ 28 Affirmed.