

FIFTH DIVISION  
June 28, 2013

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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LINDA MICHAEL,	)	Appeal from the
	)	Circuit Court of
Petitioner-Appellant,	)	Cook County.
	)	
v.	)	No. 10 CH 53797
	)	
The RETIREMENT BOARD of the POLICEMEN'S	)	
ANNUITY and BENEFIT FUND,	)	Honorable
	)	Mary Anne Mason,
Respondent-Appellee.	)	Judge Presiding.

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JUSTICE HOWSE delivered the judgment of the court.  
Presiding Justice McBride and Justice Palmer concurred  
in the judgment.

**ORDER**

- ¶ 1 *HELD:* Retirement Board decision which denied petitioner's application for disability benefits is not against the manifest weight of the evidence.
- ¶ 2 Petitioner Linda Michael appeals from a circuit court order

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which dismissed her complaint for administrative review of a decision of the Retirement Board of the Policemen's Annuity Benefit Fund (Board). The Board found petitioner was not disabled and denied her application for duty disability benefits and ordinary disability benefits. On administrative review, the circuit court affirmed the Board's decision. Michael filed this timely appeal.

¶ 3 In this appeal Michael argues: (1) the Board's decision is against the manifest weight of the evidence, (2) the Board failed to articulate the basis for its decision, thus, inhibiting meaningful review, and (3) she has new evidence to support her claim for disability benefits and requests this court to remand the matter to the Board with instructions to hear this newly discovered evidence per section 3-111(a)(7) of the Administrative Review Law (735 ILCS 5/3-111(a)(7) (West 2010)).

¶ 4 For the reasons set forth below, we affirm the decision of the circuit court.

¶ 5 BACKGROUND

¶ 6 On May 26, 2010, petitioner Linda Michael, a Chicago police officer, filed a claim for disability benefits. Michael alleged that an injury she suffered to her right hand and wrist while at work on January 26, 2008, rendered her disabled and unable to work as a Chicago police officer.

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¶ 7 The Board held a hearing on petitioner's application on October 28, 2010. Michael was the only witness to testify at the hearing. The record before the Board also consisted of medical reports prepared for the hearing by Dr. John Sonnenberg, Michael's treating physician and Dr. Peter Hoepner, a physician who was retained by the Board to perform an independent examination and evaluation of Michael, as well as Michael's medical records.

¶ 8 Michael was assigned to the LEADS desk at the Chicago Police Department's main headquarters. One of her primary duties was to verify the validity of outstanding warrants for fellow officers.

¶ 9 Although Michael's job assignment is administrative in nature, due to the confidential nature of the information she handled, her work is required to be performed by a sworn police officer. A sworn officer must carry a weapon. Accordingly, as a prerequisite to performing her job, Michael was required to demonstrate the physical ability to execute the skills needed to meet the minimum standards for proficiency with a firearm as set by the Chicago Police Department, which is called "qualifying".

¶ 10 On January 26, 2008, Michael stood up at her work station to take a warrant for processing in the extradition department. As she moved, she caught her left foot in a computer extension cord, tripped and stumbled into the wall of her cubicle. Her right

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hand hit the wall, ripping off her index fingernail, exposing the nail bed and hyperextending her hand. Michael is right-hand dominant and the nail that was lost is on her "trigger" finger.

¶ 11 Michael testified she received treatment from Dr. Sonnenberg and she was also seen by a Dr. Cohen. She had physical therapy from February 2008, through June 2008. On July 8, 2008 she had wrist surgery. She testified the surgery relieved some of the pain. Michael testified after the surgery she eventually experienced even more pain symptoms.

¶ 12 In November of 2008, Michael was released by her doctor to return to work. Michael qualified with her weapon. However, Michael did not return to work after qualifying with her weapon. Michael was also cleared by doctors to return to work in March 2009. She again qualified with her weapon. However, Michael testified she did not return to work and her wrist pain increased.

¶ 13 At the hearing she was asked why she did not return to work in November 2008 and in March 2009 after qualifying with her weapon.

¶ 14 The following colloquy took place:

"Q. Well, after surgery, you returned to work in a limited capacity, correct?

A. Afterwards I did not return to work in a limited duty

capacity. In November, I qualified and I was to return to work, but after-

Q. What year?

A. That was in '08.

Q. Go ahead.

A. I qualified in '08, and during the time that I was off work on furlough after qualifying, some of the same symptoms were there and it got even worse and I went back on the IOD medical.

Q. What about March of '09; did you go back to work?

A. In March of '09 I qualified again. The doctor said that I was able to go back to work, and I said, "Yeah, I can try it." He released me to go back to work with limited duty with various restrictions. But before I returned to work, I had been previously seeing my back doctor for back pain and I took off to get that problem out of the way, and eventually in February of 2010, I had back surgery."

¶ 15 Michael had back surgery on February 22, 2010. She was cleared to return to work after the back surgery. However, Michael testified she did not return to work after the back surgery because of pain in her hand.

¶ 16 It was stipulated at the hearing that Michael's back is

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healed and her back condition did not render her disabled for purposes of the disability application in this case. The Board granted Michael's motion *in limine* to exclude the records related to her back treatment from the record in this case.

¶ 17 The Board arranged for an independent examination by Dr. Peter Hoepfner. He submitted a report for use at the hearing dated July 9, 2010.

¶ 18 According to Dr. Hoepfner's examination report, Michael's chief complaints were: (1) right-hand aching and swelling, (2) constant pain about the right wrist, and (3) pain, numbness and tingling in the ulnar digits of her right hand radiating to her elbow. The pain increased when she tried to bear weight. She would wake at night with wrist or hand pain. Relief following injections would last six to seven days. She took daily medication for her hand and lower back pain. Michael did not believe that she was capable of shooting a weapon. She had slightly limited right wrist motion.

¶ 19 Dr. Hoepfner observed that her right wrist, hand and fingers showed no edema or skin color changes. He noted her right forearm and wrist revealed no discomfort bilaterally. Dr. Hoepfner opined that Michael exhibited a sufficient range of motion, strength and function of her right wrist, hand and upper extremities to allow her to qualify with her weapon. While she

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may have some discomfort in her hand and wrist, Dr. Hoepfner opined that there was no structural or anatomic pathology affecting her right hand and wrist.

¶ 20 Dr. Hoepfner indicated that Michael exhibited a feigned level of weakness with static grip strength testing. Michael's rapid exchange grip strength testing was significantly higher than static grip strength testing, indicating to him that she displayed a feigned level of hand weakness with strength testing. Many subjective complaints of pain and dysfunction were simply out of proportion to the objective exam findings.

¶ 21 X-rays showed low-grade right thumb CMC arthritic changes appreciated with joint-space narrowing and squaring off of the joint. Dr. Hoepfner diagnosed atypical residual right wrist pain. In his view, the medical records revealed inconsistent complaints and diffuse locations of pain both before and after surgery. Based on his findings, he did not recommend any further treatment.

¶ 22 Dr. Hoepfner opined that Michael is capable of productive work for the Chicago Police Department, she is able to qualify with a weapon and does not require restrictions with respect to the right upper extremity.

¶ 23 Michael's physician, John Sonnenberg, M.D., an orthopedic surgeon, prepared a report for use at the hearing. His report

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was dated September 17, 2010. The medical records from Dr. Sonnenberg's treatment of Michael was also made a part of the record.

¶ 24 According to the report and records, Michael injured her right hand and wrist at work on January 26, 2008. Afterwards, Michael complained of pain in her right hand and wrist, shooting up her arm into her elbow. Two days later, she went to Little Company of Mary Hospital where an X-ray showed no evidence of fracture or dislocation. She was treated by an internist, who diagnosed pain/trauma to the right wrist and ordered her to stay off work for eight days.

¶ 25 On February 4, 2008, Michael went to see Dr. Sonnenberg. Dr. Sonnenberg diagnosed a soft tissue injury to the joints of her right hand and noted her right wrist appeared strained. He prescribed physical therapy. Because of persistent pain, Michael sought a second opinion from Dr. Mark Cohen, who affirmed Dr. Sonnenberg's findings. Michael participated in physical therapy between February and June 2008.

¶ 26 In April 2008, an MRI detected tenosynovitis, an inflammation of the tendons on the side of the wrist at the base of the thumb. On July 8, 2008, Dr. Sonnenberg performed surgery on Michael's wrist. After the surgery, petitioner complained of some of the same symptoms, with excruciating pain in her hand,



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wrist and fingers with swelling.

¶ 27 According to medical records, Dr. Sonnenberg reported Michael's post-surgery x-rays had very good alignment with a satisfactory radial styloidectomy. Dr. Sonnenberg's report stated he could not detect any swelling or loss of motion after surgery and stated he was at a loss as to why Michael continued to have pain. She has seen doctors every other month since her injury, attended physical therapy and received many different injections to alleviate the pain. Despite this treatment, Michael's complaints of pain persisted. Michael went on furlough in December 2008 and was evaluated again in January 2009.

¶ 28 Dr. Sonnenberg recommended further wrist surgery. However, with ongoing issues with her back, Michael had back surgery on February 22, 2010. After her back surgery, Michael continued to stay off work to recover. Once she recovered from the back surgery, she stayed off work because of pain in her right hand.

¶ 29 Ultimately, Dr. Sonnenberg opined that Michael was unable to successfully re-qualify with her weapon. He also disagreed with the conclusion of Dr. Hoepfner that Michael could re-qualify with a weapon.

¶ 30 We note that Dr. Sonnenberg's report dated September 16, 2009, which was prepared for submission at the hearing did not mention that Michael re-qualified with her weapon in November

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2008 as was demonstrated by Michael's testimony and Chicago Police Department records.

¶ 31 We also note that in the same report, Dr. Sonnenberg erroneously stated that Michael was unable to re-qualify with her weapon in March 2009. Dr. Sonnenberg's statement that Michael was unable to re-qualify with her weapon is contradicted by Michael's own testimony at the hearing and Chicago Police Department records that showed Michael re-qualified with her weapon in March 2009.

¶ 32 On October 28, 2010, the Board denied Michael's duty disability claim, finding: (1) she was not credible, (2) her hand and wrist injury did not occur while in the performance of an "Act of Duty" as defined in the Pension Act (40 ILCS 5/5-154 (West 2006)), (3) she did not establish that her hand-wrist complaints are disabling and would prevent her from performing any assigned duties in the Chicago Police Department, and (4) Dr. Sonnenberg's opinion of her inability to qualify at the gun range was not credible in light of the fact that she qualified in 2008 and 2009 but failed to go back to work.

¶ 33 Michael's ordinary disability benefit claim was also denied, based on her testimony and her back doctor's report which returned her to duty.

¶ 34 Michael filed a timely petition for administrative review.

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On September 27, 2011, the trial court entered an order affirming the decision of the Board. Michael then filed a timely notice of appeal of the circuit court's order affirming the Board's decision to deny her application for duty and ordinary disability benefits.

¶ 35

ANALYSIS

¶ 36 Michael argues the Board's denial of her application for disability benefits was against the manifest weight of the evidence.

¶ 37 Section 5-228 of the Pension Code (40 ILCS 5/5-228 (West 2010)) provides that judicial review of the decision of the Board is governed by the Administrative Review Law (735 ILCS 5/3-101 *et seq.* (West 2010)).

¶ 38 It is well established that in administrative cases, our role is to review the decision of the administrative agency, not the determination of the trial court. *Rose v. Board of Trustees of the Mount Prospect Police Pension Fund*, 2011 IL App (1st) 102157, ¶66. The findings and conclusions of the administrative agency on questions of fact shall be held to be *prima facie* true and correct. 735 ILCS 5/3-110 (West 2010).

¶ 39 The issue presented here, whether Michael is disabled, is a question of fact which is reviewed under a manifest weight of the evidence standard. *Kramarski v. Board of Trustees of the Village*

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*of Orland Park Police Pension Fund*, 402 Ill. App. 3d 1040 (2010). "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). Therefore, the "mere fact that an opposite conclusion is reasonable or that the reviewing court might have ruled differently will not justify reversal of the administrative findings." *Id.*

¶ 40 It is not the court's function on administrative review to reweigh evidence or to make an independent determination of the facts. *Kouzoukas v. Retirement Board of the Policemen's Annuity and Benefit Fund of the City of Chicago*, 234 Ill. 2d 446, 463 (2009). If the record contains evidence to support the agency's decision, that decision should be affirmed. *Marconi v. Chicago Heights Police Pension Board*, 225 Ill. 2d 497, 534 (2006).

¶ 41 A plaintiff in an administrative proceeding bears the burden of proof, and relief will be denied if he or she fails to sustain that burden. *Wade v. City of North Chicago Police Pension Board*, 226 Ill. 2d 485, 505 (2007).

¶ 42 Under section 5-154(a) of the Pension Code: "An active policeman who becomes disabled on or after the effective date as the result of injury incurred on or after such date in the performance of an act of duty, has a right to receive duty

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disability benefit during any period of such disability for which he does not have a right to receive salary, equal to 75% of his salary." 40 ILCS 5/5-154(a) (West 2006).

¶ 43 An "act of duty" is defined as: "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 2006).

¶ 44 A "disability" is "[a] condition of physical or mental incapacity to perform any assigned duty or duties in the police service." 40 ILCS 5/5-115 (West 2006).

¶ 45 In respect to ordinary disability benefit, "A policeman who becomes disabled \*\*\* as a result of any cause other than injury incurred in the performance of an act of duty, shall receive ordinary disability benefit during any period or periods of disability exceeding 30 days, for which he does not have a right to receive any part of his salary." 40 ILCS 5/5-155 (West 2006).

¶ 46 A policeman who receives ordinary disability benefit shall receive 50% of his salary at the time disability occurs. *Id.*

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¶ 47 In support of her claim that the Board's decision is against the manifest weight of the evidence, Michael relies on *Kouzoukas v. Retirement Board of the Policemen's Annuity and Benefit Fund of Chicago*, 234 Ill. 2d 446 (2009). In *Kouzoukas*, Chicago police officer Maria Kouzoukas injured her back when she attempted to move an intoxicated man off the sidewalk and he resisted. *Kouzoukas*, 234 Ill. 2d at 448. Kouzoukas underwent a course of medical treatment and saw several doctors. One of the doctors, Dr. Spencer, opined that her back pain was aggravating but not incapacitating.

¶ 48 At the hearing on her disability application, Kouzoukas's treating physician Dr. Yapor, a neurosurgeon, testified that there was objective evidence of pain in his physical examination which revealed localized tenderness in her lower back. *Id.* at 454. Dr. Yapor testified that based on his observations, he believed Kouzoukas suffered from lower back pain which generated from her SI joint and that her pain caused her to have difficulty sitting or standing for any period of time. *Id.* Dr. Yapor testified that he did not believe that Kouzoukas was malingering or faking her pain. *Id.*

¶ 49 The Board's physician Dr. Demorest testified that when he examined Kouzoukas he noticed "an abnormal and marked spasm (or tightening) of the paraspinal muscles on the left from T7 to the

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lower lumbar." *Id.* at 456. Dr. Demorest observed that Kouzoukas exhibited decreased ability in her flexion and lateral bending. *Id.* As a result, Dr. Demorest concluded that Kouzoukas suffered from "myofascial pain syndrome," which he defined as "a dysfunction of her muscles, ligaments, and tendons of her lower back." *Id.* Dr. Demorest also testified that Kouzoukas showed no signs that she was malingering or exaggerating her pain. *Id.* at 456-57.

¶ 50 Dr. Demorest had reservations about returning Kouzoukas to full, unrestricted duty and testified that in his opinion, returning her to full duty "would not be prudent." *Id.* at 457. The Board denied her benefits based in part on the report of Dr. Spencer. The Illinois Supreme court reversed the Board finding on the basis that the Board's funding is against the manifest weight of the evidence.

¶ 51 *Kouzoukas* is distinguishable from the instant case. In *Kouzoukas*, the doctors observed objective evidence of pain--the muscle spasms. With the exception of Dr. Spencer's report, the doctors were unanimous plaintiff was disabled.

¶ 52 In this case, Michael's symptoms were multiple subjective complaints of pain to palpation about her right wrist that were non-specific and mild right basilar thumb joint pain to palpation. The record also contains evidence supporting the

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Board's decision, including: (1) Dr. Hoepfner's opinion that Michael's lack of strength is feigned, (2) Dr. Hoepfner's opinion that Michael has full range of motion with her right wrist, (3) Dr. Hoepfner's opinion she is capable of performing her work duties without any restrictions, (4) Dr. Sonnenberg's report that Michael's post-surgery x-rays showed very good alignment with a satisfactory radial styloidectomy, (5) Dr. Sonnenberg's report where he could not detect any swelling or loss of motion after surgery, and (6) Dr. Sonnenberg's report where he stated he was at a loss as to why Michael continued to have pain.

¶ 53 Moreover, the board found reason to doubt the reliability of Dr. Sonnenberg's opinion that Michael is unable to qualify with a weapon because Dr. Sonnenberg was apparently unaware Michael re-qualified in November 2008 and he had a mistaken belief that she failed to re-qualify in March 2009.

¶ 54 We recognize that Michael's treating physicians did not challenge the veracity of her complaints, however, our review of the record leads us to conclude that there is evidence to support the findings of the Board under the standard set out in *Marconi*. *Marconi*, 225 Ill. 2d at 534.

¶ 55 However, under the Administrative Review Law, we are required to hold the factual findings of the agency as *prima facie* true unless they are against the manifest weight of the



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evidence. 735 ILCS 5/3-110 (West 2010); *Kramarski*, 402 Ill. App. 3d at 1040. It is not our function to reevaluate witness credibility or resolve conflicting evidence. *Marconi*, 225 Ill. 2d at 540. So long as the record contains evidence supporting the agency's decision, that decision should be affirmed. *Id.*

¶ 56 Based on the record before us, we cannot say the Board's decision to deny Michael duty and ordinary benefits was against the manifest weight of the evidence nor can we say the opposite conclusion is clearly evident. *Abrahamson*, 153 Ill. 2d at 88.

¶ 57 Next, Michael claims her case should be remanded to the Board because it failed to articulate a specific basis for its decision, thereby preventing meaningful appellate review. In support of her claim, Michael cites *Violette v. The Department of Healthcare and Family Services*, 388 Ill. App. 3d 1108 (2009). In *Violette*, the plaintiff was denied disability benefits by a state agency. *Violette*, 388 Ill. App. 3d at 1109. After a hearing, the agency adopted the findings of fact of the hearing officer, consisting exclusively of photocopies of medical evaluation decisions completed by the "client assessment unit." *Id.* at 1110. The agency stated in its decision that the plaintiff's impairment must meet the criteria as defined by the "Social Security guidelines" but did not specifically identify these guidelines. *Id.* at 1113. The results of the evaluation

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decisions was that the plaintiff was not disabled.

¶ 58 The Fifth District Appellate Court found the record insufficient for meaningful review and that the agency failed to state the appropriate standards it applied when it determined that the plaintiff was not eligible for benefits. *Id.* at 1111

¶ 59 *Violette* is distinguishable because the Board here, unlike the agency in *Violette*, expressly listed in its written decision actual findings of fact derived from Michael's hearing, doctor reports, and a review of her medical records.

¶ 60 In the instant case, unlike *Violette*, the Board, under the authority provided by the Illinois Pension Code (40 ILCS 5/1-101 *et seq.* (West 1010)), expressly identified the standards used in making its determination when it stated:

"Michael to obtain a duty disability benefit had the burden to prove, 1) that she was injured in an act of duty; 2) that the injury complained of is causally related to her act of duty incident; 3) that the injury received was disabling and prevents her return to service with the CPD; and 4) that the disability was not the result of any physical defect or other disease which existed at the time the injury was

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sustained."

¶ 61 In respect to Michael's testimony, it was the Board's function as the finder of fact to assess the credibility of the documentary information, the testimony of the witnesses and to determine the appropriate weight to be given the evidence. *Marconi*, 225 Ill. 2d at 540. Under section 10-50 of the Illinois Administrative Procedure Act, the Board is required to include in its written decision: (1) findings of fact, and (2) a concise and explicit statement of the underlying facts supporting the findings. 5 ILCS 100/10-50 (West 2010).

¶ 62 The written decision of the Board shows compliance with the Administrative Procedure Act, in that the Board made certain findings of fact such as: (1) Michael has not returned to work because of complaints of pain in her right wrist and hand, (2) Dr. Sonnenberg's opinion that Michael cannot re-qualify with her weapon, (3) Dr. Hoepfner's opinion that Michael's pain does not match her medical records showing no structural or anatomic pathology affecting her hand and wrist, (4) and Dr. Hoepfner's opinion that Michael is capable of productive work without restrictions.

¶ 63 After viewing Michael's demeanor, hearing her testimony and reviewing all the documentary evidence, the Board made certain credibility determinations. It found that Michael was not

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credible because she qualified with a weapon after her injury twice but did not return to work; Dr. Hoepfner's report was credible and persuasive, and Dr. Sonnenberg's assessments written in his records were not credible.

¶ 64 Based on an analysis of its findings of fact and credibility determinations, the Board found that Michael was not disabled and denied her application for duty and ordinary disability benefits.

¶ 65 Neither the cases cited by Michael (*Violette* and *Lucie B. v. Department of Human Services*, 2012 IL App (2d) 101284), the Pension Code or Administrative Procedure Act, ask for anything more than what the Board provided here. The gist of the cases cited by Michael is that the findings of the administrative agency must be specific enough to permit an intelligent review of the agency's decision. *Violette*, 388 Ill. App. 3d at 1108; *Lucie B.*, 2012 IL App (2d) 101284, ¶17.

¶ 66 Based on our analysis, we cannot say the Board here failed to issue a decision that would permit an intelligent review. *Id.* Under *Marconi*, the Board is required to provide a decision supported by the evidence in the record. *Marconi*, 225 Ill. 2d at 540.

¶ 67 Here the Board explained why it discounted the medical opinion provided by Dr. Sonnenberg, Michael's treating physician, and gave greater weight to the opinion of Dr. Hoepfner. The

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record shows that Michael injured her trigger finger in an accidental fall. The critical issue in her return to work is whether she could qualify with her weapon. The Board discredited Dr. Sonnenberg's opinion that Michael could not re-qualify because he was unaware she re-qualified in November 2008 and mistakenly believed she failed to re-qualify in 2009. Therefore the foundation for his opinion was incomplete and erroneous. Based on the record before us, we cannot say the Board failed to base its decision on evidence in the record.

¶ 68 Finally, Michael claims she has new evidence to support her claim for disability benefits and requests this court remand the matter to the Board with instructions to hear this newly discovered evidence per section 3-111(a)(7) of the Administrative Review Law. Section 3-111(a)(7) provides that the circuit court has authority to allow newly discovered evidence:

"Where a hearing has been held by the agency, to remand for the purpose of taking additional evidence when from the state of the record of the administrative agency or otherwise it shall appear that such action is just. However, no remandment shall be made on the ground of newly discovered evidence unless it appears to the satisfaction of the

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court that such evidence has in fact been discovered subsequent to the termination of the proceedings before the administrative agency and that it could not by the exercise of reasonable diligence have been obtained at such proceedings; and that such evidence is material to the issues and is not cumulative." 735 ILCS 5/3-111(a)(7) (West 2010)

¶ 69 In *Morelli*, the Third District Appellate Court held the trial court erred when it failed to allow newly discovered evidence that a witness recanted her testimony. *Morelli v. Ward*, 315 Ill. App. 3d 492 (2000). Michael requests that we remand this case, so the Board can hear new evidence concerning carpal tunnel surgery performed on Michael's right wrist after the Board hearing and the opinion of a new physician.

¶ 70 The Board argues that Michael's surgery took place in March 2011. Michael was therefore aware she had surgery while her case was pending before the circuit court. However, Michael never made a request that newly discovered evidence be admitted before the circuit court. Our review is limited to the record. Michael never made a request before the circuit court that newly discovered evidence be admitted. Her argument is therefore

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waived.

¶ 71 Accordingly, we deny Michael's section 3-111(a)(7) request.

¶ 72 CONCLUSION

¶ 73 For the foregoing reasons, the decision of the Board is affirmed.

¶ 74 Affirmed.