

2014 IL App (2d) 130439-U
No. 2-13-0439
Order filed February 7, 2014

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

WILLIAM FOX,)	Appeal from the Circuit Court
)	of Du Page County.
Plaintiff-Appellant,)	
)	
v.)	No. 12-MR-1586
)	
WOOD DALE FIREFIGHTERS PENSION)	
BOARD, PATRICK JOHL, President, CHRIS)	
STEINES, Secretary, NORBERT LITZ,)	
Trustee, CHRIS ROBERTS, Trustee, and)	
ROY SYE, Trustee,)	
)	
Defendants-Appellees,)	
)	Honorable
(Wood Dale Fire Protection District and)	Bonnie M. Wheaton,
Thomas Flanagan, Fire Chief, Defendants).)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Jorgensen and Birkett concurred in the judgment

ORDER

¶ 1 *Held:* The Board's decision denying plaintiff's application for a line-of-duty disability pension was reversed where the Board's findings were against the manifest weight of the evidence, and the record supported only one conclusion, which was that plaintiff sustained his burden of proving that he was permanently disabled from performing the full duties of a firefighter/paramedic.

¶ 2 Plaintiff, William Fox, applied for a line-of-duty disability pension from defendant, the Wood Dale Firefighters Pension Board (Board), because of herniated discs in his lower back. Section 4-110 of the Illinois Pension Code (40 ILCS 5/4-110 (West 2010)) provides that a firefighter who becomes permanently disabled from service in the fire department as the result of sickness, accident, or injury incurred in or resulting from the performance of an act of duty or from the cumulative effects of acts of duty, shall be entitled to a line-of-duty disability pension. The Pension Code defines “permanent disability,” in pertinent part, as “any physical or mental disability that *** can be expected to last for a continuous period of not less than 12 months.” 40 ILCS 5/4-105b (West 2010). The Board denied Fox’s application, and, on administrative review, the circuit court of Du Page County affirmed. For the following reasons, we reverse and remand.

¶ 3 I. BACKGROUND

¶ 4 Fox began working as a firefighter/paramedic for the City of Wood Dale in 1994. On June 6, 2011, he applied for a line-of-duty disability pension with the Board. He alleged that herniated discs in his lower back permanently disabled him from performing his job. Pursuant to section 4-112 of the Pension Code (40 ILCS 5/4-112 (West 2010)), the Board appointed Dr. S.I. Yen, Dr. Gary Shapiro, and Dr. Martin Lanoff to conduct independent medical examinations. Dr. Yen and Dr. Shapiro both concluded that Fox was permanently disabled. Dr. Lanoff concluded that he was not. A hearing was held over two days on February 28 and August 7, 2012. Dr. Lanoff testified at an evidence deposition on May 4, 2012.

¶ 5 A. Fox’s Testimony at February 28, 2012, Hearing

¶ 6 Fox testified that he was 48 years old and that, prior to March 2000, he had no back problems and was very active, played sports, and was outdoors as often as possible. In March

2000, Fox fell while exiting an ambulance on an emergency call. A bag hanging from his shoulder had caught on an arm rest as he was exiting the ambulance. Fox reported to the emergency room and later underwent an MRI, which revealed a herniated disc between the L4-L5 vertebrae. He had severe pain and was on strict bed rest for six to eight weeks. He then attended physical therapy. He returned to work in June 2000 but continued attending physical therapy and taking pain medication. Even after he returned to work, he was in constant pain.

¶ 7 Fox's next back injury occurred in 2004 as he was lifting bags of salt at the fire house. Fox was taken to the emergency room and given anti-inflammatories, muscle relaxers, and pain medication. An MRI following the 2004 injury revealed a second herniated disc between the L3-L4 vertebrae. When asked how long he was off of work for that injury, Fox testified, "I don't recall exactly how long but I seem to remember being off for almost a year, about 11 months." He continued attending physical therapy and taking medication, and began receiving epidural injections. The first injection he received reduced his pain for four days. The second injection lasted four months. His subsequent injections lasted between four and eight months. Fox testified that his most recent epidural injection was the Monday before the hearing.

¶ 8 Although Fox did not have any reported back injuries between 2004 and 2009, he continued to experience constant pain, take medication, and receive epidural injections. His primary duties during that period were paramedic duties. When it came to lifting patients, Fox usually would "sit back and let others lift the patients." It required only one person to remove a patient from an ambulance, so typically he would ask his partner to perform that task.

¶ 9 In September 2009, Fox injured his back again and was off of work for three days. He had transported an intoxicated patient to the hospital. The patient became combative, and Fox injured his back dealing with the man. Fox had another MRI, which showed a third herniated

disc between the L5-S1 vertebrae. He continued attending physical therapy, taking medication, and receiving epidural injections. At his annual physical in January 2010, the department physician, Dr. Adrienne Baksinski of Alexian Brothers Medical Group, told Fox he “was probably going to have to consider not being able to do this [*i.e.*, be firefighter/paramedic] any longer.”

¶ 10 Fox aggravated his back again in November and December 2010. In November, Fox was in the back of the ambulance providing treatment, and the ambulance “took a bad bump,” which caused Fox to land on the bench seat on his back. He did not lose any time off of work, but the incident aggravated his back. In December, Fox was in a hallway of a patient’s house, when he aggravated his back again. Fox “was in a very precarious situation with [his] legs up on the wall laying [*sic*] on [his] stomach trying to intubate” the patient. The position caused his back to compress. Many of the times Fox aggravated his back, his lieutenant would notice and allow Fox to lie down, or the lieutenant would call the department doctor, who would instruct Fox to take certain medications and rest on his two days off. The incidents in November and December 2010 had been “pretty painful,” so Fox had reported them.

¶ 11 Fox’s latest back injury occurred in May 2011. At a night drill lifting ladders, Fox was assigned to a 35-foot extension ladder with another firefighter. Just after he lowered the ladder to the ground, the fire department received a call. While on the call, Fox’s lieutenant “realized [Fox] had strained [his] back” and determined that Fox should go back to the fire house and rest. He was instructed to see Dr. Baksinski the following morning. According to Fox, the doctor said she would keep him on “a short leash to watch [him].” Fox saw the doctor again the following week, and that is when she ordered Fox off of work until further notice.

¶ 12 After Dr. Baksinski ordered Fox off work, he saw Dr. David Tashima of Barrington

Orthopedic. According to Fox, Dr. Tashima agreed that he should be off of work and ordered an epidural injection. The pain relief lasted only about a week and a half. Fox testified that Dr. Baksinski and Dr. Tashima determined that Fox would remain off of work pending the results of another epidural injection. According to Fox, in June 2011, Dr. Tashima made the “final determination” that he had reached maximum medical improvement and would not be able to return to work as a firefighter/paramedic.

¶ 13 Regarding his current pain, Fox explained that his left foot was “usually numb” and his right leg to his quadriceps muscle was “usually tingling.” He had undergone an electromyogram (EMG) test, which showed that he had a “pretty severe decrease in the neurological sense down to [his] foot.” Fox often tripped over his left foot due to “what they call foot drop.”

¶ 14 On cross-examination, Fox testified that, prior to his initial back injury in 2000, he had played golf and competitive baseball and racquetball, ridden his bicycle, and coached a junior wrestling team. Following his injury, when Fox tried to participate in sports, “the result [was] so painful afterwards” that he limited his activities. Fox testified that it “[s]eem[ed] the only thing [he could] do these days [wa]s ride a bike or walk.” He rode his bike “as much as [he could] tolerate.”

¶ 15 During the questioning about Fox’s pre-injury activity level, Fox’s counsel interrupted the proceedings to request a break for Fox to get up and move around. Counsel stated that Fox could not sit for long periods of time. A brief recess was held.

¶ 16 Fox was then questioned about his termination from the Wood Dale Fire Department in October 2008. Fox testified that he had been terminated for falsification of documents. He explained that he had signed someone else’s name for the delivery of oxygen cylinders to the department. The following exchange then took place:

“Q. [BOARD’S ATTORNEY:] We talked to the chief. Now the chief told us that he said you were terminated because you lied to him. Did you lie to the chief?

A. No.”

Fox further testified that he was off of work for 11 months from October 2008 to September 2009 but was reinstated through arbitration with full back pay. From October 2008 to March 2009, Fox worked at a friend’s office. From March to September 2009, Fox worked for a private ambulance company. He had no injuries while working for the ambulance company. Fox’s duties consisted of “sitting at a racetrack for half of the shift watching horses run and the other half was just driving people from Point A to Point B, most were ambulatory.” His back injury in September 2009, which occurred while Fox was subduing the intoxicated patient, took place on his first day back to work at the Wood Dale Fire Department.

¶ 17 Fox explained the timeline of his May 2011 back injury as follows: On May 2, he injured his back during the ladder drills. On May 3, Dr. Baksinski saw him and wanted him to follow up with his own doctor, but Fox was leaving the next day on a pre-scheduled week-long vacation. Fox returned to work following his vacation. On the morning of May 13, Dr. Baksinski ordered Fox off of work. Upon further questioning, Fox testified that he returned to work on May 11 and worked a voluntary overtime shift on May 12, then saw Dr. Baksinski on May 13.

¶ 18 Regarding the firefighter duties he was unable to perform due to his injuries, Fox testified that he could not wear an air pack for longer than 10 minutes without his back hurting, he could not stand for more than 15 or 20 minutes without his left foot going numb, and he could not sit for more than half an hour. Fox testified that his left heel had “been numb for the last hour.” He had not had a Functional Capacity Examination (FCE) performed because his workers’ compensation case manager had denied it. Fox testified that, according to Dr. Baksinski, the risk

of completing the exam had outweighed the potential benefit.

¶ 19 Fox admitted that he had played racquetball within the last six months. When asked if he had told the board-appointed physicians that he played racquetball, Fox said “Yes.” Fox also admitted that he had participated in RAGBRAI, which was an organized bicycle ride across the state of Iowa. When asked how many times he had ridden in RAGBRAI, Fox testified, “I rode it once,” in 2009. When asked if he rode in 2011, Fox testified, “I went in 2011. I tried to ride.”

¶ 20 The Board adjourned the hearing so that it could obtain more information.

¶ 21 B. Dr. Lanoff’s May 4, 2012, Evidence Deposition

¶ 22 On May 4, 2012, Dr. Lanoff testified at an evidence deposition. He testified that he was board certified in pain medicine and physical medicine and rehabilitation. He worked in an orthopedic group and provided non-operative care. He examined Fox on November 14, 2011. He also reviewed Fox’s medical records, but only had records dating back to 2006. Dr. Lanoff testified that he did not “have a clue” what happened before 2006 because he lacked medical records from that period. Further, the records he had were “not great,” so it was “kind of this big old gray zone for about 5 years before 2011.” His opinions were based on Fox’s current injury that took place in May 2011.

¶ 23 Dr. Lanoff testified that, based on his review of Fox’s medical records, Fox “never had any objective findings on physical examination.” The only objective findings Fox had were herniated discs shown on his MRIs. He explained that herniated discs often do not cause pain or other symptoms. Herniated discs cause pain only if they compress nerves. According to Dr. Lanoff, Fox “did eventually have objective findings of disk hernations that did correlate to his symptoms. They did correlate to his leg pain.”

¶ 24 According to Dr. Lanoff, when a patient has a herniated disc that is symptomatic, the

patient should also have correlating physical exam findings, such as “reflexes that are off,” weakness or atrophy in a specific muscle group, or sensory loss. Fox had “some of these” but none was based on an objective finding. They were based on Fox’s subjective complaints. Dr. Lanoff explained, “[A]t least for the 2011 ones, his leg symptoms correlated to the disks.” Although “the physical exam barely correlated to the findings,” the fact that Fox’s subjective complaints correlated to the objective findings on MRI was “pretty corroboratory.”

¶ 25 When asked whether Fox’s injury was a disabling one, Dr. Lanoff testified, “It depends.” He explained that some patients can function with herniated discs that pinch nerves and some cannot. “Almost all of them go away within a year. Rarely will some persist.” If the pain does not go away with conservative care, “then you have surgery and the odds of it going away with surgery are in the high 90 percent.” The pain “[g]oes away and you are back to work in a couple of months.” Dr. Lanoff testified that the surgery would be a discectomy, a laminotomy, or a laminectomy. He described the surgeries as “outpatient procedures and you are generally back to work in three months.” He further explained:

“Some patients function through the pain and go to work. Heavier jobs where it’s really important that you not drop people on their head [*sic*] where your firefighter people, co-workers are depending upon you, it’s really up to how the patient feels and if they say they can’t do it and they have the objective injury, then they can’t do it. Well then you go have a surgery and you are back to work in a couple of months. This is not a permanent disability scenario.”

¶ 26 Dr. Lanoff testified that Fox was “very, very reliable. His history is consistent. He didn’t have all the exaggeration that some people have on an exam. Really very straightforward, nice guy. Came in and the symptoms he said correlate[d] to the disks.” However, Dr. Lanoff

explained that “saying there’s disability is not really an option,” because, if conservative treatment is not working, then have surgery to take the discs out and “go on with your life.”

¶ 27 The Board’s attorney asked Dr. Lanoff, in general, whether it was psychosomatic when a patient’s subjective complaints did not correlate with any objective findings. Dr. Lanoff testified, “No. No.” He then explained that “there is that whole range of pain scenarios.” He said that, where a patient has classic symptoms that correlate to a herniated disc, but there are no objective findings on a physical exam, “[t]he answer is, they probably have it.” He then explained that “[a] different scenario is psychosocial factors in back pain.” This occurs where “the patient has something to gain by fulfilling the sick role.” He explained that it was possible for a patient to exaggerate his or her pain, but he saw “very few malingerers.”

¶ 28 According to Dr. Lanoff, Fox had a very consistent history and, although his physical exam “wasn’t really positive,” it also was not “nonorganic like you see in patients where they are making it up or they have psychological issues.” Dr. Lanoff explained that Fox had two herniated discs that “apparently aren’t going away” and that they “do apparently correlate to symptoms.” He testified that Fox’s symptoms were “in the exact spots where those discs would cause symptoms.” He would recommend that Fox undergo surgery. The other option, according to Dr. Lanoff, was to work through the pain. “It’s kind of one or the other.” He testified, “You don’t disable somebody for life for a disk herniation. That’s ludicrous. That’s ridiculous.”

¶ 29 Dr. Lanoff further testified that, even though Fox’s MRI did not indicate that the discs were contacting the nerve roots, based on Fox’s consistent and straightforward history, and the fact that his subjective complaints correlated with the herniated discs shown on the MRI, he “would say fine, you got it. It is causing your problem.” However, if the herniated discs were not what was causing Fox’s pain, “well then it’s subjective complaints out of proportion to

objective findings and then you push through it.”

¶ 30 When asked about Fox’s work restrictions, Dr. Lanoff testified that, based on Fox’s current condition and the fact that he had objective findings on his MRIs, he would keep Fox at a light duty work restriction. When asked if the restriction would be permanent, Dr. Lanoff said “No.” Either Fox could have surgery to correct the problem or, as in the vast majority of cases, the herniated discs would go away. With most of his patients who had a recent herniated disc, Dr. Lanoff would recommend epidural injections, which usually helped the patient “survive the initial onslaught of symptoms.” Usually, the pain would go away within three months “but up to a year on some cases.” If it did not go away, then the patients would have surgery.

¶ 31 When asked if Fox was disabled, Dr. Lanoff testified as follows:

“It’s such a hard question. You know, I mean, if it’s his disks and he cannot function and the pain is bothering him in the least, then he’s kind of obligated to have the surgery. It’s a free country. You can’t force somebody to have surgery. You can’t. But you can’t really go on permanent disability if it’s very treatable. That’s just not really very ethical.”

When asked if Fox would be able to return to work and perform his duties several months following surgery, Dr. Lanoff testified, “There’s no doubt.” He explained, “[W]ith the disk herniations that *** this gentleman has, with the symptoms that correlate, he should do very well if that’s what’s wrong with him.” Dr. Lanoff testified that he could not be sure that was what was wrong with him, but he was “more than 51 [percent]” sure.

¶ 32 On cross-examination, Dr. Lanoff testified that his definition of permanent disability was “his inability to do his job on a permanent or long-term basis.” When asked if Fox could perform the full functions of his job, Dr. Lanoff testified, “Probably not.” Dr. Lanoff said Fox

would have a 25-pound weight lifting restriction, which would require “more of a sedentary light-duty position” until “he can take care of what he has to take care of.” Dr. Lanoff also testified that he was not a surgeon and admitted that there were risks to surgeries.

¶ 33 Dr. Lanoff disagreed with the two other board-appointed physicians’ opinions that Fox was permanently disabled. Dr. Lanoff explained, “He either has two herniated disks that are symptomatic that should get better with surgery or I can’t tell you what’s going on in his back but it’s not something that’s identifiable.”

¶ 34 Dr. Lanoff testified that between 10% and 20% of his work per year consisted of legal work. The “vast majority” of his legal work was for the defense.

¶ 35 On redirect examination, a board member asked Dr. Lanoff whether Fox’s participation in racquetball and in RAGBRAI was inconsistent with his claim that he was unable to perform his duties as a fireman. Dr. Lanoff testified that one would “think he wouldn’t be able to do those things.” However, Dr. Lanoff also testified that he would tell some patients that the more they did short of causing leg pain, the better they would be in the long run. “[I]f that’s riding across Iowa, well, that’s pretty high function. You would think he would be able to work. That’s kind of above my 25 pound restriction.” On the other hand, Dr. Lanoff testified, Fox’s job was “a hard job where you are lifting heavy stuff all the time.” Ultimately, Dr. Lanoff could not say “for sure” whether Fox’s activities were inconsistent with his alleged inability to work.

¶ 36 When asked to explain the difference between degenerative disc disease and the objective findings of injury, Dr. Lanoff testified that degenerative disc disease was “kind of a misnomer” and “is supposedly a diagnosis that’s a rationale behind the back [pain].” However, “saying degenerative disk has something to do with the objective injury, meaning the disk herniations

and the leg pain, that's a crossover you can't make between those two worlds, those two diagnoses.”

¶ 37 C. Fox's Testimony at August 7, 2012, Hearing

¶ 38 Fox's testimony at the August 7, 2012, hearing focused on his activities following the May 2, 2011, injury. Fox testified that, in the past two years, he had played racquetball on two occasions with a friend named Allen Miller. They played at a “very low” intensity. Fox also explained his participation in RAGBRAI in July 2011. He did not ride on Wednesday or Friday. On those days, he drove the support vehicle. Each day that he rode his bicycle involved riding at his own pace and stopping frequently at towns or roadside vendors to rest.

¶ 39 Asked about his current pain, Fox described it as follows:

“I have sharp pain in my left lower back, numbness in my left buttock, numbness down the back of my left leg and into my heel, and my left two fourth and fifth toes are numb. On the right side I have some slight numbness in my knee and pain in the back, which is consistent with what it has always been.”

Fox still took anti-inflammatories and pain medications. His next epidural injection was scheduled in one or two weeks.

¶ 40 On cross-examination, Fox testified that, during RAGBRAI in 2011, he rode 59 miles on Sunday, 65 miles on Monday, and 70 miles on Tuesday. Fox also rode on Thursday. Fox explained that he had been a cyclist for many years, riding his first 100-mile ride when he was 18 years old. He testified that, during RAGBRAI, “there was pain, there was discomfort, and in the evening times when [he] was done, [he] would load up on ibuprofen and load up on Norco and [he] would recover ***.”

¶ 41 When asked if he was aware of any pending discipline at the time of the May 2011

injury, Fox testified that he was not. However, he testified, “There’s no question that I’m the least liked guy on the department.”

¶ 42 When questioned about his activities while on vacation in Aruba during May 2011, Fox testified that he lay on the beach and swam in the pool. Regarding the flight to Aruba, Fox testified that it was two flights of approximately 2 to 2 ½ hours each, with one stop in Miami. He testified that he experienced a lot of pain and discomfort following the flights.

¶ 43 Allen Miller was then called to testify. Miller testified that he had played racquetball with Fox twice in the past two years. Miller had back surgery 11 years ago and lost “a bunch of function” in his right foot. For training purposes, he had recorded one of the games he and Fox had played, and the video was played for the Board. Miller testified that the video represented the intensity at which he and Fox played. He described it as volleying back and forth.

¶ 44 D. Physicians’ Reports and Other Documentary Evidence

¶ 45 The exhibits admitted into evidence at the hearing included reports from the three board-appointed physicians; medical records from various treating physicians; MRI reports from December 2006, November 2008, October 2009, and February 2011; medical records from Fox’s annual physicals required by the fire department; incident reports concerning the November 2010, December 2010, and May 2011 injuries; and a letter dated April 30, 2012, from Dr. Tashima to the Board in response to Dr. Lanoff’s report.

¶ 46 1. *Reports of Board-Appointed Physicians*

¶ 47 Dr. Lanoff’s report was largely consistent with his deposition testimony. However, Dr. Lanoff wrote on the cover of his report that there were “caveats” to his opinion that Fox was not permanently disabled. Although Dr. Lanoff recommended that Fox undergo surgery, he noted that, in the past, surgeons had told Fox that he was “an ‘inbetween,’ not quite a surgical

candidate.” Dr. Lanoff wrote, “I would not disagree with this based on the fact that his physical examination does not correspond to his imaging findings, but his history does, and his MRI (albeit equivocal at best) still has positive findings.” Dr. Lanoff also wrote: “It does not appear that this gentleman’s condition will prove [*sic*] over time. It seems to be chronic and recurrent. Therefore, he should either have surgery or work through it.” Dr. Lanoff wrote the following at the conclusion of his report: “I do think this gentleman has temporary disability based on the above. I do think one should give him a couple of weeks to make up his mind about whether he wants to undergo surgery and then either return to work or have the surgery ***.”

¶ 48 Dr. Yen, who was a board certified orthopedic surgeon, reported that Fox’s MRI from February 2011 revealed herniated discs at L3-L4 and at L5-S1. Fox complained of pain and numbness that started in the low back and travelled to the groin area and into the anterior portion of the right leg, ending in the right foot between the first and second toes. On the left, Fox had tingling and numbness around the posterior lateral aspect of the left thigh, ending in the left heel, with constant numbness in the fourth and fifth toes. Fox did not have obvious motor weakness, tenderness in the low back, or muscle atrophy. His ankle and knee reflexes were present bilaterally. Dr. Yen’s diagnosis was multiple herniated discs, which he concluded were work-related based on Fox’s numerous injuries. Dr. Yen reported that Fox “would be unable to do prolonged standing or walking and lifting activities” and that, although “[s]ome improvement may be expected,” “he will always suffer from some residual problems.” Dr. Yen concluded, “[B]ecause of multiple disc herniations, I don’t believe he is capable of performing the job as a firefighter unless there is a sedentary type of work created for him.”

¶ 49 Dr. Shapiro, also a board certified orthopedic surgeon, reported that Fox described having severe low back pain and leg pain. Fox rated his back pain as 8 out of 10 and his leg pain as 7

out of 10. The left leg symptoms that Fox described were the “classic symptoms for an L5 radiculopathy.” On physical examination, Fox had slight difficulty with the single leg heel rise on the left. He also had low back pain when attempting a straight leg raise bilaterally. Dr. Shapiro reported that the MRI from February 2011 showed degenerative disc disease at L2-L3, L3-L4, L4-L5, and L5-S1, as well as a “left-sided herniated disc at L5-S1,” “a left far-lateral herniated disc at L2-3,” and “a right far-lateral herniated disc at L3-4.” He also reported that an EMG conducted in December 2006 revealed “left S1 radiculopathy.” Dr. Shapiro’s impressions were multilevel degenerative disc disease, multiple herniated discs, repeat soft tissue injuries of the lumbar spine, and chronic low back and bilateral leg pain. Dr. Shapiro concluded:

“My recommendation would be for him to obtain permanent disability, as his symptoms are likely to last for more than 12 months. I think it would be an unsafe environment for him to continue to work as a firefighter. I think he would put himself, his coworkers, and the general public in an unsafe environment, given the history and multiple documented events that have occurred in the last 12 years. He is unfit to work in a very heavy category from the US Department of Labor, which would be required of a firefighter.”

Dr. Shapiro reported that Fox’s condition “is permanent and will not improve.”

¶ 50 *2. Treating Physicians’ Medical Records*

¶ 51 The only medical records between 2000 and 2004 admitted into evidence were letters from one of Fox’s treating physicians to the fire chief in connection with pending workers’ compensation cases. In the first letter, dated June 26, 2000, Dr. Michael Fragen of Advocate Medical Group reported that Fox was nearing completion of an intensive physical rehabilitation program following his March 2000 back injury. Dr. Fragen released Fox to full duties at the fire

department but ordered 10 more weeks of physical therapy.

¶ 52 A letter from Dr. Fragen dated January 15, 2002, indicated that Fox had sustained a shoulder injury during a fall on ice in January 2001. Fox had undergone shoulder surgery in October or November 2002. Initially, Fox's back injury had not been aggravated by the fall, but Fox recently had begun reporting increased low back pain. Dr. Fragen reported that MRIs from March and June 2000 revealed "an operative lesion at the L4-L5 level that is consistent with his symptoms." The doctor prescribed oral steroids and recommended epidural injections but noted that surgery may be required "in the near future." He also referred Fox to a neurosurgeon. A letter from Dr. Fragen dated January 31, 2002, noted that the oral steroids had been effective and that Fox reported being pain free. He also wrote that the neurosurgeon to whom he had referred Fox "felt that his condition did not warrant [a] surgical approach at this time."

¶ 53 Dr. Fragen's next letter was dated March 1, 2004, and reported that Fox had injured his back lifting 40 pound bags of salt at the fire house. Fox was experiencing "ongoing pain in the middle to upper back and worsening of his chronic pain in the right low back radiating into the buttock and right upper thigh." Fox's pain was only "minimally responsive" to pain medication. Since January 2002, Fox had regularly taken Vicodin "on his non-shift days to dull his chronic intermittent right low back pain." Dr. Fragen concluded that Fox had "apparently suffered a sprain/strain type injury" to his back and was suffering "significant secondary spinal muscle spasm." Dr. Fragen prescribed muscle relaxers and 10 weeks of physical therapy and ordered an MRI. In a letter dated May 14, 2004, Dr. Fragen noted that Fox had received an epidural injection, but that the pain had returned after only two weeks. Dr. Fragen prescribed additional physical therapy. In a letter dated June 22, 2004, Dr. Fragen again renewed Fox's physical therapy prescription and prescribed oral steroids. On November 5, 2004, Dr. Fragen reported

that Fox had experienced two flare-ups of back pain since June. One of the flare-ups occurred when Fox was transporting a “300+ pound” patient. After each flare-up, Dr. Fragen had prescribed oral steroids. The doctor again renewed Fox’s physical therapy prescription.

¶ 54 The next medical records admitted into evidence were from Barrington Orthopedic and dated back to November 2006. On November 30, 2006, Fox saw Dr. Richard Rabinowitz at Barrington Orthopedic, complaining of deep, achy pain in the lower back that radiated into the left leg. Dr. Rabinowitz noted that Fox’s pain had begun approximately six years ago, that he had tried a chiropractor, exercise therapy, physical therapy, anti-inflammatories, and analgesics with only slight improvement. Dr. Rabinowitz ordered an MRI and a Somatosensory Evoked Potential (SSEP) test. The SSEP test was performed on December 1, 2006, and revealed “[s]ignificant evidence of conduction delay *** from the left S1 *** dermatomal responses.” Following the SSEP test, Dr. Rabinowitz prescribed epidural injections and five to six weeks of physical therapy. During a May 3, 2007, office visit, Dr. Rabinowitz reported that Fox’s “chronic complaints ha[d] improved dramatically.”

¶ 55 Fox again saw Dr. Rabinowitz on October 8, 2009, complaining of back pain following a September 2009 back injury. Dr. Rabinowitz ordered another MRI and prescribed six weeks of physical therapy, but cleared Fox for full job duties. He reported that Fox had been receiving epidural injections “about every 4 months since we saw him last in 2007.” At a follow-up on November 19, 2009, Dr. Rabinowitz noted that Fox reported worsening pain following his most recent epidural injection. The doctor noted “ongoing spasm and tenderness of the lower lumbar spine” and prescribed a repeat epidural injection and an additional six weeks of physical therapy.

¶ 56 On January 31, 2011, Fox saw Dr. David Levin at Barrington Orthopedic. Fox reported worsening of his lower back pain “the last few months,” with numbness and tingling in the right

groin and medial thigh and pain radiating to the left buttock and posterior thigh and calf. Dr. Levin ordered an MRI and a repeat epidural injection, but cleared Fox for full duty.

¶ 57 At a follow-up appointment on March 2, 2011, Dr. Levin reported that the MRI performed on February 14, 2011, had revealed a “disc herniation on the right at L3-4 resulting in moderate right L3 foraminal stenosis” and a “left L5-S1 posterolateral protrusion contact[ing] the traversing S1 nerve root.” Dr. Levin reported that Fox had right L3 and left S1 radiculopathy. He expected maximum medical improvement in eight weeks.

¶ 58 Following epidural injections at L3-L4 and L5-S1, Fox returned for a follow-up with Dr. Tashima at Barrington Orthopedic. Fox reported 50% pain relief on the left side but no sustained relief on the right side. Fox stated that he had difficulty working long shifts and lifting heavy items. The doctor ordered a repeat L3-L4 epidural injection but reported that Fox was near his maximum medical improvement. He indicated that Fox could continue his current level of work duties “as tolerated.”

¶ 59 Fox next saw Dr. Tashima on June 6, 2011, following his May 2, 2011, back injury during the ladder drills. Dr. Tashima reported that Fox had been off of work since May 13 but that his pain had “not changed much despite the rest.” Fox stated that “[h]e tried to ride his bike but was unable to go more than a few miles due to pain.” Dr. Tashima ordered epidural injections at S1 and L4. He noted that Fox “will remain off duty” and reported that “[w]e discussed that with his multiple exacerbations and considerable time since initial injury, he may not be able to return to work at full capacity as needed for his profession.”

¶ 60 At a follow-up appointment with Dr. Tashima on July 11, 2011, Fox reported that he felt “virtually ‘pain free’ for about 2-3 weeks” following the epidural injections on June 13, though his pain had “started to return some.” Fox “continue[d] to feel back and leg discomfort that

worsen[ed] throughout the day, but it [wa]s more tolerable following the injections.” Dr. Tashima reported:

“At this time, i [*sic*] do not feel that he will be able to return to work at full duty as required by his job. He has had multiple exacerbations with working and continues to have worsened pain with activity. With his medical condition, he will not be able to tolerate moderate or heavy duty work. He is at maximum medical improvement.”

¶ 61 Records from Dr. Baksinski’s examinations of Fox on May 3 and May 13, 2011, also were admitted into evidence. At the May 3 visit, Dr. Baksinski noted that Fox had aggravated his chronic low back pain during ladder drills. Fox reported his pain as 2-4 out of 10. Although Dr. Baksinski cleared Fox for full work duties, she noted that he was going on vacation and stated, “We will address his work status prior to his returning back to full duty next week.” At a follow-up appointment on May 13, 2011, Dr. Baksinski ordered Fox off of work until further examination by his treating physician.

¶ 62 *3. MRI Reports*

¶ 63 MRI reports from December 2006, November 2008, October 2009, and February 2011 were admitted into evidence. The findings in the December 2006 MRI report included disc protrusions at L3-L4 and L4-L5, and a disc bulge at L5-S1. The November 2008 MRI report contained no findings of herniated discs. The October 2009 MRI report listed “desiccation and bulging of the L2-L3 through L5-S1 discs,” a small protrusion at L2-L3, a disc extrusion at L3-L4 level “mildly compressing the right L3 nerve root,” a disc bulge at L4-L5, and a disc extrusion “which compresses the left S1 nerve root focally” at L5-S1. The February 2011 MRI report listed a disc protrusion with “minimal abutment of the exiting left nerve” at L2-L3, a small disc protrusion at L3-L4, a disc bulge at L4-L5, and a disc herniation at L5-S1. In addition, the

report stated that “[t]he exiting S1 nerve root [was] swollen.”

¶ 64 *4. Annual Physicals*

¶ 65 Medical records from Fox’s annual department-required physicals were admitted for the years 2006, 2007, 2009, and 2011. Except for the 2009 physical, each year’s records contain a functional back assessment. In April 2006, his functional back assessment was “Satisfactory.” In May 2007 and January 2011, Fox’s functional back assessment was “Unsatisfactory.” Following each year’s physical, he was categorized as fit for duty.

¶ 66 *5. Incident Reports*

¶ 67 Incident reports for the November 2010, December 2010, and May 2011 injuries were admitted into evidence. The reports are consistent with Fox’s description of the incidents.

¶ 68 *6. Dr. Tashima’s April 30, 2012, Letter*

¶ 69 Dr. Tashima wrote a letter to the Board in which he responded to Dr. Lanoff’s report. Although he agreed with much of Dr. Lanoff’s report, he did not agree with Dr. Lanoff’s conclusion that Fox was not permanently disabled from performing the duties of a firefighter/paramedic. Dr. Tashima noted that Fox had experienced multiple injuries and exacerbations of back pain since his original March 2000 injury. The first MRI from 2000 indicated a left disc protrusion at L4-L5, but no other significant pathology. The February 2011 MRI revealed multilevel pathology with a left lateral disc protrusion at L2-L3, a right lateral disc protrusion at L3-L4, bilateral lateral disc protrusions at L4-L5, and a left paracentral disc protrusion at L5-S1. Dr. Tashima also noted swelling of the S1 nerve root. He disagreed with Dr. Lanoff that all patients with lumbar radiculopathy displayed objective motor or reflex findings on physical examination. According to Dr. Tashima, a “significant amount of deinnervation has to occur before strength loss is even clinically detectable on manual muscle

testing.” Dr. Tashima reported that Fox’s symptoms correlated well with the objective findings on MRI. Accordingly, there was “an organic basis to his complaints.” Dr. Tashima concluded that Fox should be limited to light duty or sedentary duty with a 20 pound lifting restriction. Fox had “chronic radicular symptoms” and “the demanding physical nature of his job is too excessive for his condition.” Dr. Tashima wrote, “This is evidenced by his multiple failed attempts to work full duty for a sustained period of time.” Although surgery “could improve his symptoms dramatically,” it was “no guarantee.” Fox’s symptoms could be “managed fairly well with activity modifications and medications/injections as needed.”

¶ 70

E. Board’s Decision

¶ 71 On October 1, 2012, the Board issued a 10-page written decision denying Fox’s application for a line-of-duty disability pension. The Board found that Fox’s testimony “was inconsistent and seemed improbable.” Fox “had a history of lying to the fire chief in the past and was, in fact, terminated for falsification of records and lying to the fire chief.” The Board further found that Fox had “a history of lying or misrepresenting facts at the very least (statements to Fire Chief).” The Board noted that Fox’s employment had been terminated in October 2008 and that Fox had given the reason as falsifying documents. However, according to the Board, “The Fire Chief gave the basis of the firing as applicant had lied to him.” Further, “During the time that Applicant was terminated from the Wood Dale Fire Protection District, Applicant was employed by an ambulance company and during that entire period of time, Applicant did not have one accident/injury report.” Then, “[t]he first day after his reinstatement to the Wood Dale Fire Protection District, on the second call of the day, Applicant claimed an injury to his back.”

¶ 72 Regarding Fox’s complaints of pain, the Board reasoned that, although Fox “does have some disc degeneration, the disc herniations do not correlate to the patient’s subjective

symptoms.” The Board further found that “[t]he Applicant does suffer from back problems which include lumbar disc herniation causing discomfort which is due to degenerative disc disease but is not a disabling condition.” The Board found, “[T]he complaints of pain made by the applicant are subjective complaints of pain and the objective findings do not support his subjective complaints of pain.” Although two of the Board-appointed physicians had found Fox to be permanently disabled, “[o]ne of the physicians [Dr. Lanoff] found that the Applicant was not permanently disabled from firefighter’s service and that the subjective complaints of pain are not supported by the objective findings.” “The Board, in reviewing all of [Fox’s] complaints of pain[,] found [*sic*] Dr. Lanoff’s explanation that the subjective pain complaints were psychosomatic or psychosocial.” The Board wrote:

“The psychosocial issue is due to secondary gain, where someone had something to gain by playing the sick role. There had been an incident reported to the Fire Protection District as to the applicant’s conduct *** regarding a citizen complaint in regards to unprofessional and intimidating comments made on a [*sic*] EMS call which on May 12, 2011 was under investigation. *** The applicant stated he was ‘the least liked guy on the department.’ ”

¶ 73 Regarding Fox’s post-injury activities, the Board noted that Fox claimed he was injured on May 2, 2011, but on May 3, Dr. Baskinski cleared him to return to work with no restrictions. From May 5 to 11, Fox was in Aruba on vacation. Fox returned to work on May 11 and worked a voluntary overtime shift on May 12. According to the Board, this was “an agenda not consistent with a person claiming disability.” Regarding the flight to Aruba specifically, the Board reasoned, “As anyone knows, when you get on a plane you may get up and walk around and then again there may be turbulence where you are ordered to stay in your seat with your

seatbelt fastened for the entire trip.” Furthermore, Fox participated in RAGBRAI from July 24 to 30, 2011, which was “not consistent with the medical condition and pain that [Fox] claims he suffers.” Regarding Fox’s participation in RAGBRAI, the Board reasoned, “Would a person claiming such severe back pain that he cannot sit during a deposition of less than an hour’s duration even contemplate a 400 mile bike trip across the State of Iowa in addition to a car ride in excess of some 600 miles?”

¶ 74 The Board also found that Fox had “only received conservative treatment and ha[d] refused to undergo surgery which may improve his condition.” Further, “Dr. Lanoff believes that the pain the applicant claims on a subjective basis can be corrected by out-patient surgery, a discectomy and a hemilaminectomy, or will go away within the next 12 months on their [sic] own.” The Board wrote, “Dr. Lanoff stated that the Applicant could work through any pain that he had and that the Applicant should either work through his pain or undergo surgical intervention to correct the issue.” In sum, “[t]he Board believed that the applicant ha[d] exaggerated his subjective complaints and the his [sic] activities such as the trip to Aruba ***, riding on a 472 mile bike trip *** and working an additional overtime shift on May 12 after his ‘accident’ substantiates the basis that he is not disabled.” The Board concluded that Fox was “not permanently, medically disabled for service.”

¶ 75 After Fox filed a complaint seeking administrative review, the circuit court of Du Page County affirmed the Board’s decision on April 2, 2013. Fox timely appeals.

¶ 76 II. ANALYSIS

¶ 77 On appeal, Fox challenges a number of the Board’s findings and maintains that its decision to deny his application for a line-of-duty disability pension was against the manifest weight of the evidence. He argues that the Board’s findings relating to the issue of his credibility

were against the manifest weight of the evidence, that the Board misconstrued and “cherry-picked” Dr. Lanoff’s testimony, and that it improperly relied on an erroneous diagnosis of degenerative disc disease and on Fox’s refusal to have surgery.

¶ 78 In an appeal from an administrative agency’s decision, we review the agency’s decision, not that of the trial court. *Lambert v. Downers Grove Fire Department Pension Board*, 2013 IL App (2d) 110824, ¶ 23. The agency’s factual findings and conclusions are held to be *prima facie* true and correct and will be affirmed unless they are against the manifest weight of the evidence. 735 ILCS 5/3-110 (West 2012); *Lambert*, 2013 IL App (2d) 110824, ¶ 23. The question of whether the evidence is sufficient to affirm the Board’s decision to deny an application for a disability pension is a question of fact subject to the manifest-weight-of-the-evidence standard of review. *Kouzoukas v. Retirement Board of the Policemen’s Annuity and Benefit Fund of the City of Chicago*, 234 Ill. 2d 446, 464 (2009). “A factual finding is against the manifest weight of the evidence when the opposite conclusion is clearly evident or the finding is arbitrary, unreasonable, or not based in evidence.” *Samour, Inc. v. Board of Election Commissioners of the City of Chicago*, 224 Ill. 2d 530, 544 (2007). It is not a reviewing court’s function to reweigh evidence or to make an independent determination of the facts. *Kouzoukas*, 234 Ill. 2d at 463.

¶ 79 A. Fox’s Lack of Credibility

¶ 80 Fox first argues that the Board’s findings relating to his credibility were against the manifest weight of the evidence. He challenges the Board’s findings that (1) he had a history of lying and was terminated for lying to the fire chief, (2) his injury-free period from October 2008 to September 2009 undermined his claim that he sustained an injury on his first day back to work at the fire department, (3) his symptoms were exaggerated and psychosomatic, and (4) his activities following his May 2011 injury were inconsistent with his claim of permanent

disability. He further contends that the Board's finding that his testimony was "inconsistent and seemed improbable," which was based on these findings, was against the manifest weight of the evidence.

¶ 81

1. *Fox's History of Lying*

¶ 82 Fox contends that the Board's finding that he had a history of lying and had been terminated in October 2008 for lying to the fire chief was against the manifest weight of the evidence. We agree. The only evidence of the basis for Fox's termination came from Fox himself. He testified that he was terminated for signing someone else's name for a delivery of oxygen cylinders and was reinstated with full back pay through arbitration. Although the Board's attorney, during his cross-examination of Fox, stated that the fire chief had "told us that *** [Fox was] terminated because [he] lied to him," an attorney's line of questioning is not evidence. See *People v. Matthews*, 2012 IL App (1st) 102540, ¶ 15 ("As defendant correctly points out, counsel's line of questioning is not evidence ***."). The fire chief did not testify, and no documentary evidence relating to Fox's termination was admitted. "[A]n agency's findings must be based on evidence of record and uninfluenced by considerations *de hors* the record." *Shapiro v. Regional Board of School Trustees of Cook County*, 116 Ill. App. 3d 397, 402 (1983). Because there was no evidence to support it, the Board's finding that Fox had a history of lying was against the manifest weight of the evidence. See *Samour, Inc.*, 224 Ill. 2d at 544 ("A factual finding is against the manifest weight of the evidence when *** not based in evidence.").

¶ 83

2. *Fox's Injury-Free Period from October 2008 to September 2009*

¶ 84 Next, Fox argues that the Board's written decision contained a "veiled conclusion *** that Fox fabricated his injuries after he returned to work" following his termination from October 2008 to September 2009, which was against the manifest weight of the evidence. Fox refers to

the Board's finding that, during the entire period that he was terminated for falsification of documents, he worked for a private ambulance company and did not have a single injury. Fox further cites the Board's finding that the day he returned to work at the fire department, he "claimed an injury to his back."

¶ 85 We agree with Fox that the only plausible explanation for including these findings in its written decision was for the Board to raise doubt regarding Fox's claim that he suffered an injury upon returning to work. We further agree with Fox that such an inference was clearly against the manifest weight of the evidence. Fox was employed at the private ambulance company from March to September 2009, not for the entire period of his termination. From October 2008 to March 2009, Fox worked at a friend's office. Further, Fox testified that his duties at the ambulance company consisted of "sitting at a racetrack for half of the shift watching horses run and the other half was just driving people from Point A to Point B, most were ambulatory." Fox adequately explained the reason for his lack of injuries during the period of his termination.

¶ 86 Additionally, the record overwhelmingly supports Fox's testimony that he was injured on his first day back to work in September 2009. The record contains contemporaneous medical records indicating that he injured his back while transporting an intoxicated patient. On October 8, 2009, Dr. Rabinowitz noted that Fox had injured his back the previous month, and he ordered an MRI and prescribed six weeks of physical therapy. The record also contains a letter from Dr. Rabinowitz to a workers' compensation insurance adjuster indicating that Fox had been injured while transporting an intoxicated patient. Dr. Rabinowitz wrote that "[t]here was a twisting injury and he developed acute onset of low back and left leg pain." At a follow-up appointment on November 19, 2009, Dr. Rabinowitz noted "ongoing spasm and tenderness of the lower lumbar spine" and prescribed an epidural injection and an additional six weeks of physical

therapy. An MRI report from October 2009 listed “desiccation and bulging of the L2-L3 through L5-S1 discs,” a “small protrusion into the left neural foramen” at L2-L3, a “superimposed right foraminal disc extrusion at the L3-L4 level mildly compressing the right L3 nerve root,” a “broad based disc bulge” at L4-L5, and a “left paracentral disc extrusion which compresses the left S1 nerve root focally” at L5-S1. Any inference that Fox’s injury upon returning to work in September 2009 was fabricated was against the manifest weight of the evidence.

¶ 87 3. *Fox’s Symptoms were Exaggerated and Psychosomatic*

¶ 88 Fox also argues that the Board’s finding that his symptoms were exaggerated and psychosomatic was against the manifest weight of the evidence. We agree. In its decision, the Board wrote that it “believed that the applicant ha[d] exaggerated his subjective complaints.” Relying on Dr. Lanoff’s testimony, the Board further found that Fox’s “subjective pain complaints were psychosomatic or psychosocial.” The Board discussed the issue of “secondary gain, where someone ha[s] something to gain by playing the sick role” and referred to Fox’s testimony that he was “the least liked guy on the department.” The Board also found that “[t]here had been an incident reported to the Fire Protection District as to the applicant’s conduct *** regarding a citizen complaint in regards to unprofessional and intimidating comments made on a [sic] EMS call which on May 12, 2011 was under investigation.”

¶ 89 Addressing the last finding first, there is no evidence in the record to support the Board’s finding that there was a pending disciplinary investigation or citizen complaint at the time Dr. Baksinski ordered Fox off of work. The only testimony regarding the existence of a pending disciplinary action was when the Board’s attorney asked Fox whether he was “aware of anything or was it noted that [he] had violated some policy or another and that [he was] going to be subject to some sort of discipline.” Fox’s response was, “I honestly don’t recall being informed

of anything of that nature,” to which the Board’s attorney responded, “I believe you.” Nothing in the record substantiates the existence of a pending disciplinary action or a citizen complaint arising out of Fox’s actions on an emergency call. Again, “an agency’s findings must be based on evidence of record and uninfluenced by considerations *de hors* the record.” *Shapiro*, 116 Ill. App. 3d at 402.

¶ 90 The Board then misconstrued Dr. Lanoff’s testimony when it relied on his testimony to conclude that Fox’s back pain was exaggerated and psychosomatic. Dr. Lanoff reached the opposite conclusion. The Board’s attorney asked Dr. Lanoff, in general terms, whether it was psychosomatic when a patient’s subjective complaints did not correlate with any objective findings. Dr. Lanoff’s response was, “No. No.” He then explained that, where a patient has classic symptoms that correlate to a disc herniation, but there are no objective findings on physical examination, “[t]he answer is, they probably have it.” He further explained that “[a] different scenario is psychosocial factors in back pain,” which occurs where “the patient has something to gain by fulfilling the sick role.” According to Dr. Lanoff, although it was possible for a patient to exaggerate his or her pain, he saw “very few malingerers.” Regarding Fox in particular, Dr. Lanoff testified that Fox was “very, very reliable,” that he had a very consistent history, and that he “didn’t have all the exaggeration that some people have on an exam.” Although Fox’s physical exam “wasn’t really positive,” it also was not “nonorganic like you see in patients where they are making it up or they have psychological issues.” According to Dr. Lanoff, Fox’s subjective complaints were “in the exact spots where those discs would cause symptoms.” Further, both Dr. Shapiro’s report and Dr. Lanoff’s report indicated that Fox had no positive Waddell’s findings on physical examination, which Dr. Lanoff explained during his testimony were used to identify patients who exaggerated their pain.

¶ 91 Because the Board relied on considerations *de hors* the record to support its finding that Fox's symptoms were psychosomatic, and because it misconstrued Dr. Lanoff's testimony, we conclude that the Board's finding that Fox's symptoms were exaggerated and psychosomatic was clearly against the manifest weight of the evidence.

¶ 92 *4. Fox's Activities Following the May 2011 Injury*

¶ 93 Fox next challenges as against the manifest weight of the evidence the Board's finding that his activities following the May 2011 injury were inconsistent with his claim of permanent disability. Fox relies on *Bowlin v. Murphysboro Firefighters Pension Board of Trustees*, 368 Ill. App. 3d 205 (2006), and argues that his pre-scheduled vacation to Aruba, his participation in RAGBRAI, and the shifts he worked on May 11 and 12, 2011, were not inconsistent with his claim of permanent disability.

¶ 94 In *Bowlin*, the plaintiff applied for a line-of-duty disability pension after suffering two work-related back injuries. A neurosurgeon treating the plaintiff placed him on permanent medium-work-duty restrictions and concluded that he was a surgical candidate for a laminectomy and fusion. The plaintiff's primary care physician also was of the opinion that the plaintiff had permanent restrictions due to his injury. Two of the three board-appointed physicians concluded that the plaintiff was disabled from performing firefighter duties. At the hearing before the board, a video of the plaintiff participating in a white-water rafting trip was introduced. The plaintiff testified that, at the time of the trip, his medical restrictions prohibited him from lifting more than 50 pounds. He testified that he did not exceed that restriction during the trip. The plaintiff also had gone elk hunting following his injury, but had modified his technique to accommodate his back. The board denied the plaintiff's application, and the circuit court affirmed. *Bowlin*, 368 Ill. App. 3d at 206-09.

¶ 95 The appellate court concluded that the plaintiff's recreational activities following his injury had "improperly influenced" the board's decision and reversed. *Bowlin*, 368 Ill. App. 3d at 212. The court noted that the plaintiff had been physically active prior to his injury, that there were many activities in which he could no longer participate, and that no physician had instructed him not to engage in recreational activities that fit within his medium-work-duty capacity. *Bowlin*, 368 Ill. App. 3d at 212-13. The court reasoned:

"For the Board to equate 'activities which require some exertion[] and place strain on the back' to evidence that [the plaintiff] can perform the high-work-level capacity required of a firefighter amounts to an impermissible substitution of the Board members' lay opinions for the medical opinions of the five physicians finding otherwise. *** While it may seem unfair to the Board that [the plaintiff] is still able to enjoy some of his former recreational activities and at the same time be eligible for a disability pension, the Board's only statutory consideration should be whether, based on the evidence presented, he can perform those work-related duties. Even if [the plaintiff] is incapable of performing the highly strenuous duties involved in firefighting, he is not relegated to sitting in front of a television. The fact that [the plaintiff] may still lead a somewhat full life is immaterial to the Board's inquiry." *Bowlin*, 368 Ill. App. 3d at 213.

¶ 96 We agree with Fox that the Board's finding that his post-injury activities were inconsistent with his claim of permanent disability was against the manifest weight of the evidence. Regarding his pre-scheduled vacation to Aruba, Fox testified that he lay on the beach and swam in the pool. Commenting on Fox's flight to Aruba, the Board stated, "As anyone knows, when you get on a plane you may get up and walk around and then again there may be turbulence where you are ordered to stay in your seat with your seatbelt fastened for the entire

trip.” This reasoning was improper and not based on evidence, as there was no testimony about the amount of time Fox was able to walk around during the flight. The only testimony about the flight was that Fox had changed planes in Miami, that each leg of the flight was between 2 and 2 ½ hours, and that Fox experienced a lot of pain and discomfort following the flight. None of this was inconsistent with Fox’s claim that his injuries disabled him from his work duties.

¶ 97 We reach the same conclusion with regard to Fox’s participation in RAGBRAI. The only medical evidence concerning Fox’s participation in RAGBRAI came from Dr. Lanoff, who could not say “for sure” whether Fox’s post-injury activities were inconsistent with his alleged inability to work. Dr. Lanoff explained that Fox’s job was “a hard job where you are lifting heavy stuff all the time.” Thus, even though one would “think he wouldn’t be able to do those things [*i.e.*, cycling long distances and playing racquetball],” his participation in those activities did not mean that he could perform the full duties of his job. Dr. Lanoff testified that bed rest was the worst thing a patient could do for a back injury and that the more a patient did short of causing leg pain, the better he or she would be in the long run. Although Dr. Lanoff testified that participating in RAGBRAI was “kind of above [his] 25 pound restriction,” he never testified that Fox could perform the heavy duty work required of a firefighter.

¶ 98 Moreover, Fox testified that cycling was one of the few recreational activities in which he could continue to participate following his injury. Prior to his original injury in March 2000, Fox had been very active, had been outdoors as much as possible, had played golf and competitive racquetball and baseball, and had coached a junior wrestling team. Following his injury, when he tried to participate in sports, “the result [was] so painful afterwards” that he limited his activities. According to Fox, it “[s]eem[ed] the only thing [he could] do these days [wa]s ride a bike or walk.” He rode his bike “as much as [he could] tolerate.” As the court in *Bowlin*

reasoned, it comes as no surprise that Fox, who had always been very physically active, continued to find ways to be physically active despite his back pain. “While it may seem unfair to the Board that [the plaintiff] is still able to enjoy some of his former recreational activities and at the same time be eligible for a disability pension, the Board’s only statutory consideration should be whether, based on the evidence presented, he can perform [his] work-related duties.” *Bowlin*, 368 Ill. App. 3d at 213.

¶ 99 Fox also testified that his participation in RAGBRAI was not pain-free. He testified that he stopped frequently to take breaks and that “there was pain, there was discomfort, and in the evening times when [he] was done, [he] would load up on ibuprofen and load up on Norco and [he] would recover ***.” He testified that he was unable to complete the full ride as he had in the past, instead having to drive the support vehicle on two days.

¶ 100 Regarding the two shifts Fox worked on May 11 and 12, 2011, after returning from his vacation to Aruba, no evidence was presented of Fox’s level of activity during the two shifts. Based on the record before us, we do not know whether Fox was required to lift patients or heavy items during the shifts, or whether he sat in the fire department and received no emergency calls. Nor do we know Fox’s level of pain during the shifts. The only evidence was that Fox worked the two shifts and that the next day, May 13, 2011, Dr. Baksinski ordered Fox off of work until further notice. The Board’s conclusion that Fox’s ability to work the two shifts was inconsistent with his claimed disability was against the manifest weight of the evidence.

¶ 101 *5. Fox’s Testimony Lacked Credibility*

¶ 102 We have found to be against the manifest weight of the evidence the Board’s findings that Fox had a history of lying and was terminated for lying to the fire chief, that his injury-free period from October 2008 to September 2009 somehow undermined his claim that he sustained

an injury on his first day back to work, that his symptoms were exaggerated and psychosomatic, and that his injuries following his injury in May 2011 were inconsistent with his claim of permanent disability. Fox contends that the Board's finding that his testimony was "inconsistent and seemed improbable," which was based on these findings, must therefore be against the manifest weight of the evidence as well. We agree.

¶ 103 In making findings related to the issue of Fox's credibility, the Board freely relied on considerations *de hors* the record, made findings unsupported by any evidence, and blatantly misconstrued the testimony. "Although it is true that the Board's credibility determinations should be afforded considerable weight, they are not immune from review." *Kouzoukas*, 234 Ill. 2d at 465. A credibility finding by the Board may be put aside if clearly against the manifest weight of the evidence. *Kouzoukas*, 234 Ill. 2d at 465. Here, the Board's finding that Fox's testimony was "inconsistent and seemed improbable" was clearly against the manifest weight of the evidence. Evidence that could have supported the Board's credibility findings simply was not included in the record. Even at oral argument, the Board's attorney continued to refer to matters outside the record, discussing photographs allegedly on Fox's Facebook page, which were never admitted into evidence or even discussed at the hearing before the Board.

¶ 104 On appeal, the Board argues that its finding that Fox lacked credibility is supported by other aspects of his testimony. The Board argues that Fox attempted to conceal his participation in RAGBRAI. However, the record does not support the Board's contention. At the February 28, 2012, hearing, although Fox initially testified that he had only participated in RAGBRAI once, in 2009, when asked if he rode in 2011, Fox testified, "I went in 2011. I tried to ride." The Board's attorney asked no follow-up questions about Fox's level of participation. At the August

7, 2012, hearing, upon further questioning, Fox explained in detail his participation in RAGBRAI in 2011. He did not conceal his participation in the event.

¶ 105 The Board also contends that Fox “never disclosed his physical capabilities or any activities that would have been relevant for a full and proper medical diagnosis.” The Board does not cite to any pages in the record to support this contention. Again without citation to the record, the Board contends that “[n]one of the three examining physicians who were hired to evaluate Plaintiff’s condition were informed of his ability to ride a bike hundreds of miles over the course of a few days.” Nothing in the reports of the three Board-appointed physicians indicates that Fox reported an inability to perform any activities. The physician’s conclusions were based on their physical examinations of Fox, on his MRI reports, and on his medical records. The only time Fox was asked whether he disclosed his recreational activities to the examining physicians was when the Board’s attorney asked Fox whether he told them he played racquetball. Fox responded, “Yes.” Even assuming *arguendo* that the examining physicians did not know about Fox’s participation in RAGBRAI, without any medical evidence, the Board was unable to speculate about whether that information would have changed the physicians’ opinions.

¶ 106 The Board also contends that Fox’s testimony about his injury in 2004, which he incurred while lifting bags of salt at the fire department, is contradicted by the record. The Board asserts that “[t]here is no evidence in the record to show that a [*sic*] MRI was performed in 2004, [and] there is no evidence of a herniation at L3-L4 as Plaintiff testified.” The Board’s contention is without merit. In his letter to the fire chief dated March 1, 2004, Dr. Fragen reported that Fox had injured his back lifting 40 pound bags of salt and would be undergoing an MRI. Although no MRI report from 2004 appears in the record, the MRI report from December 2006 indicates

that comparison was made to an MRI from March 2, 2004. The December 2006 MRI report states that the “right lateral protrusion” at L3-L4 “is unchanged.” Thus, the record corroborates Fox’s testimony that an MRI was performed in 2004 that revealed a herniated disk at L3-L4.

¶ 107 The Board also contends that Fox’s testimony that he was off of work for 11 months or one year following the 2004 injury was contradicted by the record. This contention is correct. In his letters to the fire chief following Fox’s 2004 injury, Dr. Fragen reported that Fox had been working full shifts despite his pain. Nevertheless, we disagree with the Board that Fox’s apparent inability to accurately remember which dates he was out of work nearly 10 years ago supports the Board’s finding that his testimony lacked credibility. We note that the record reveals that Fox was off of work for a substantial period of time in 2001 due to a shoulder injury after he slipped and fell on a patch of ice outside the fire station.

¶ 108 Finally with respect to Fox’s credibility, the Board refers to the recess Fox’s counsel requested during the hearing on February 28, 2012, so that Fox could stand up and walk around. Apparently to establish that Fox’s need for a recess was not credible, the Board states in its brief that it “witnessed Mr. Fox’s delicate routine to rotate himself in his chair, use the table to support himself, and hobble away into the hallway.” Not only does this statement not support the Board’s contention about Fox’s credibility, but also nothing in the record indicates the manner in which Fox left the hearing room during the recess. The Board’s argument is improper, as it refers to matters outside the record, and will not be considered. *Keener v. City of Herrin*, 235 Ill. 2d 338, 346 (2009) (“A party may generally not rely on matters outside the record to support its position on appeal. [Citation.] When a party’s brief fails to comply with that rule, a court of review may strike the brief, or simply disregard the inappropriate material.”).

¶ 109

B. Dr. Lanoff’s Opinions

¶ 110 Fox next challenges the Board's findings with respect to Dr. Lanoff's testimony. He argues that Dr. Lanoff's testimony was "replete with contradictory opinions," that the Board "cherry picked" and "distorted" Dr. Lanoff's testimony, and that the Board improperly relied solely on Dr. Lanoff's opinion to the exclusion of the opinions of the other board-appointed physicians. Fox again relies on *Bowlin* for support.

¶ 111 In *Bowlin*, as we noted above, two of the three board-appointed physicians concluded that the plaintiff was disabled from performing firefighter duties due to two work-related back injuries. *Bowlin*, 368 Ill. App. 3d at 207-08. The third physician, Dr. Wayne, concluded that, although the plaintiff demonstrated a mild-to-moderate degree of partial disability due to a preexisting spondylolisthesis condition, whether he returned to work related "entirely to the patient's level of comfort and motivation." *Bowlin*, 368 Ill. App. 3d at 208.

¶ 112 On appeal, the court concluded that it was "inconsistent that Dr. Wayne found [the plaintiff] to have a mild-to-moderate degree of permanent partial disability but also be capable of returning to the highly physically demanding job of firefighting without restrictions." *Bowlin*, 368 Ill. App. 3d at 211. The court noted that the two other board-appointed physicians, as well as three of the plaintiff's treating physicians, all had concluded that the plaintiff was permanently disabled from performing his job duties. *Bowlin*, 368 Ill. App. 3d at 211. The court determined that, "while the Board's decision is supported by some evidence, the opinion of Dr. Wayne, there is nothing in the record or in the Board's findings that supports the Board's reliance on only Dr. Wayne's opinion over the opinions of the five other doctors who reached the opposite conclusion." *Bowlin*, 368 Ill. App. 3d at 212. The court further noted that, because none of the other five physicians had testified at the hearing, "the Board's conclusions regarding the doctors' opinions could not have hinged on any credibility issues outside of the medical reports and

records.” *Bowlin*, 368 Ill. App. 3d at 212. The court concluded that the board’s exclusive reliance on Dr. Wayne’s opinion was “arbitrary and untenable.” *Bowlin*, 368 Ill. App. 3d at 212.

¶ 113 While we agree with Fox that there are some similarities between this case and *Bowlin*, it nevertheless is distinguishable. In *Bowlin*, the court reasoned that Dr. Wayne’s opinions were “called into doubt because he [found the plaintiff] to have a ‘mild to moderate degree of permanent partial disability,’ but at the same time he inexplicably state[d] that [the plaintiff’s] ability to perform the heavy-work-level capacity of firefighting depend[ed] entirely on his ‘level of comfort and motivation.’ ” *Bowlin*, 368 Ill. App. 3d at 212. Here, Dr. Lanoff never testified that Fox had any level of permanent disability. Although Dr. Lanoff testified that, in his current condition, Fox would be limited to light-duty work, he further testified that Fox’s condition was not permanent because either he could undergo surgery to repair the herniated discs or he could work through the pain. He gave Fox the light-duty work restriction only because Fox’s subjective complaints correlated to the objective findings of herniated discs on the MRIs. Dr. Lanoff explained that, if the herniated discs were not what was causing Fox’s symptoms, then it was “subjective complaints out of proportion to objective findings and then you push through it.”

¶ 114 Although Fox’s reliance on *Bowlin* is misplaced, his argument that the Board “distorted” Dr. Lanoff’s testimony has merit. We have already concluded that the Board misconstrued Dr. Lanoff’s testimony in finding that Fox’s symptoms were exaggerated and psychosomatic. The Board also misconstrued Dr. Lanoff’s testimony when it found that Fox’s “subjective complaints of pain [we]re not supported by the objective findings” and that “the complaints of pain made by the applicant [we]re subjective complaints of pain and the objective findings do not support his subjective complaints of pain.”

¶ 115 Dr. Lanoff repeatedly testified that, although Fox’s subjective complaints either did not correlate with any objective findings on physical examination or “barely correlated” with objective findings on physical examination, they did correlate with objective findings on his MRIs. Dr. Lanoff wrote in his report to the Board that “[t]he disk herniations do correlate to the patient’s symptoms.” He also testified that Fox’s subjective complaints were “in the exact spots where those discs would cause symptoms.” He explained that, even though Fox’s MRIs did not indicate that the discs were contacting nerve roots, based on Fox’s consistent and straightforward history, and the fact that his subjective complaints correlated with the disc herniations shown on the MRIs, he “would say fine, you got it. It is causing your problem.” Dr. Lanoff was “more than 51” percent sure that the herniated discs were causing Fox’s symptoms. When the Board found (and reiterated throughout its decision) that “the disc herniations d[id] not correlate to the patient’s subjective symptoms,” its finding was against the manifest weight of the evidence.

¶ 116 C. Fox’s Disc Degeneration

¶ 117 Fox also challenges the Board’s finding that he suffered from degenerative disc disease, as opposed to work-related herniated discs. The Board found that, although Fox “does have some disc degeneration, the disc herniations do not correlate to the patient’s subjective symptoms.” The Board further found that “[t]he Applicant does suffer from back problems which include lumbar disc herniation causing discomfort which is due to degenerative disc disease but is not a disabling condition.” To the extent that the Board was conflating Fox’s objective findings of herniated discs with a diagnosis of disc degeneration, we agree with Fox that it ignored the evidence that overwhelmingly supported the opposite conclusion. Dr. Lanoff testified that degenerative disc disease was “kind of a misnomer” and was “supposedly a diagnosis that’s a rationale behind the back [pain].” He testified that “saying degenerative disk

has something to do with the objective injury, meaning the disk herniations and the leg pain, that's a crossover you can't make between those two worlds, those two diagnoses." Although Dr. Lanoff also testified that every person of Fox's age suffers from some level of disc degeneration, he clearly explained that the diagnosis of herniated discs was distinct from the diagnosis of disc degeneration. Further, all three Board-appointed physicians concluded that Fox's herniated discs were work-related injuries, not the results of degenerative disc disease. The Board's finding that Fox's back pain was attributable to degenerative disc disease was against the manifest weight of the evidence.

¶ 118 D. Fox's Refusal to Have Surgery

¶ 119 Relying on *Luchesi v. Retirement Board of the Firemen's Annuity & Benefit Fund of Chicago*, 333 Ill. App. 3d 543 (2002), Fox argues that it was error for the Board to support its denial of Fox's application with a finding that he had refused to undergo surgery. In *Luchesi*, the court explained the rules regarding a disability-pension-applicant's refusal of medical treatment:

"[I]f the refusal of treatment rises to the level of a superseding cause of continuing disability, then the [Pension] Code permits the denial of benefits. But where *** the record lacks evidence that the claimant would have recovered the ability to work as a firefighter or police officer if he had all recommended treatment, the refusal constitutes only one of several causes of the continuing disability. It does not qualify as a superseding sole cause of the continuing disability." *Luchesi*, 333 Ill. App. 3d at 555.

The court in *Luchesi* reversed a board's denial of benefits to a firefighter who had suffered a work-related shoulder injury where there was no evidence that his refusal to pursue physical therapy was the sole cause of his continuing disability. *Luchesi*, 333 Ill. App. 3d at 555, 557.

¶ 120 As Fox argues, the only evidence that surgery would have permitted Fox to return to work at full duty came from Dr. Lanoff—the only non-surgeon of the three board-appointed physicians—who testified that there was “no doubt” that Fox would be able to return to work within several months following surgery. However, Dr. Lanoff also testified that he was only a little more than 51% sure that the herniated discs shown on the MRIs were causing Fox’s symptoms. Dr. Lanoff testified that Fox “should do very well” following surgery for his herniated discs “*if that’s what’s wrong with him.*” (Emphasis added.) He wrote in his report that, in the past, surgeons had told Fox that he was “an ‘inbetween,’ not quite a surgical candidate.” He then wrote, “I would not disagree with this based on the fact that his physical examination does not correspond to his imaging findings, but his history does, and his MRI (albeit equivocal at best) still has positive findings.” The certainty that Dr. Lanoff, who was not a surgeon, expressed at times that surgery would solve Fox’s symptoms conflicted with the uncertainty he expressed that the herniated discs were the cause of Fox’s symptoms.

¶ 121 Furthermore, none of Fox’s medical records indicate that his treating physicians had recommended surgery. As Fox points out, in a letter dated January 31, 2002, Dr. Fragen noted that the neurosurgeon to whom he had referred Fox “felt that his condition did not warrant [a] surgical approach at this time.” In a letter dated November 5, 2004, Dr. Fragen again wrote that Fox was not a surgical candidate because his flare-ups were responding well to oral steroids. In Dr. Tashima’s letter to the Board dated April 30, 2012, he wrote that, although surgery “could improve his symptoms dramatically,” it was “no guarantee.” Dr. Tashima opined that Fox’s symptoms could be “managed fairly well with activity modifications and medications/injections as needed.” Considering that nothing in the record indicates that his treating physicians had recommended surgery, it stretches the imagination to think that it would be prudent for Fox to

undergo surgery at the recommendation of a Board-appointed physician who was not a surgeon and who performed the “vast majority” of his legal work for the defense.

¶ 122 Based on Dr. Lanoff’s equivocal opinions regarding the likelihood that surgery would cure Fox’s symptoms, and the absence in the medical records of any indication that Fox’s treating physicians had recommended surgery, the Board’s finding that Fox had “refused to undergo surgery which may improve his condition” was against the manifest weight of the evidence.

¶ 123 E. Sufficiency of the Board’s Remaining Findings

¶ 124 If a reviewing court determines that any of an agency’s findings are against the manifest weight of the evidence, then it looks to the remaining factual findings to determine whether they provide a sufficient basis for affirming the agency’s decision. *Luchesi*, 333 Ill. App. 3d at 549. If the remaining findings are insufficient to affirm, the court then decides whether the record as a whole permits only one resolution of the case. *Luchesi*, 333 Ill. App. 3d at 549. If so, it can order that resolution. *Luchesi*, 333 Ill. App. 3d at 549. If resolution of the case depends upon evaluating witnesses’ credibility or resolving conflicts in the evidence, however, then the court must remand the case to the agency for further proceedings. *Luchesi*, 333 Ill. App. 3d at 549.

¶ 125 We have found to be against the manifest weight of the evidence the Board’s findings that Fox’s testimony was “inconsistent and seemed improbable,” that Fox’s subjective complaints did not correlate to objective findings, that Fox’s herniated discs resulted from disc degeneration, and that Fox had refused to undergo surgery that would resolve his condition. Simply put, there are no remaining findings of any substance that would permit this court to affirm the Board’s decision. Therefore, we turn to the record as a whole to determine whether it

permits only one resolution of the case, or whether it supports conflicting resolutions, in which case we must remand to the Board.

¶ 126

C. The Record

¶ 127 The record contains overwhelming evidence that Fox sustained repeated work-related injuries to his back from 2000 to 2011 and that his complaints of pain correlated with objective findings of herniated discs. Fox's original injury to his back occurred in March 2000 when he fell out of an ambulance. He suffered a herniated disc at L4-L5, experienced severe pain, and was out of work for three months. Even after he returned to work, he continued to experience pain and to undergo physical therapy. In late 2001, while recovering from shoulder surgery, Fox's back pain increased again, and, in January 2002, he was prescribed oral steroids. For the next two years, Fox continued taking prescription Vicodin on his non-shift days for pain. In March 2004, Fox again injured his back while lifting bags of salt at the fire department. He was prescribed muscle relaxers and physical therapy. An MRI revealed a herniated disc at L3-L4.

¶ 128 Although Fox had no reported injuries from 2004 to 2009, the medical records reveal that he continued experiencing pain, taking prescription medication, and undergoing physical therapy. Fox experienced flare-ups of his back pain, including one that occurred while transporting a "300+ pound" patient, for which he was prescribed oral steroids. He also began receiving lumbar epidural injections in either late 2006 or early 2007. A nerve conduction test performed in December 2006 revealed "[s]ignificant evidence of conduction delay *** from the left S1 *** dermatomal responses." An MRI performed that same month revealed herniated discs at L3-L4 and L4-L5 and a disc bulge at L5-S1. Fox received an "unsatisfactory" rating on his functional back assessment at his annual physical in May 2007. From 2007 to 2009, Fox received epidural injections approximately every four months.

¶ 129 In September 2009, Fox again injured his back while transporting an intoxicated patient to the hospital. He underwent an MRI that revealed herniated discs at L2-L3, L3-L4, and L5-S1, as well as a “broad based disc bulge” at L4-L5. The herniated disc at L3-L4 was “mildly compressing the right L3 nerve root,” and the herniated disc at L5-S1 was “compress[ing] the Left S1 nerve root focally.” Fox underwent at least 12 weeks of physical therapy and continued receiving epidural injections. At a follow-up appointment in November 2009, Fox reported worsening pain following his most recent injection, and the doctor noted “ongoing spasm and tenderness of the lower lumbar spine.”

¶ 130 In November and December 2010, Fox again aggravated his back in work-related incidents. During the first incident, he was providing care to a patient in cardiac arrest when the ambulance in which he was riding “took a bad bump,” causing him to land on the bench seat on his back. During the next incident, Fox was attempting to intubate a patient during an emergency call. He was in a precarious position in the hallway of the patient’s house, and he compressed his back. Fox again received an “unsatisfactory” rating on his functional back assessment at his annual physical in January 2011.

¶ 131 In February 2011, Fox reported an increase in his back pain, with numbness and tingling in his legs. Fox underwent another MRI, which again revealed herniated discs at L2-L3, L3-L4, and L5-S1, as well as an “annular bulge” at L4-L5. There was “minimal abutment of the exiting left nerve” at L2-L3, and “[t]he exiting S1 nerve root [was] swollen.” He was diagnosed with right L3 and left S1 radiculopathy. Following epidural injections at L3-L4 and at L5-S1, Fox reported 50% improvement in his left-side symptoms but no sustained relief on the right side. At that time, he had difficulty working long shifts and lifting heavy items.

¶ 132 Fox then injured his back in May 2011 during ladder drills. He saw Dr. Baksinski the following day, who cleared him for full duty but noted that Fox was leaving on a prescheduled vacation and that she would reassess his work status when he returned. At a follow-up appointment on May 13, Dr. Baksinski ordered Fox off of work. Because the medical records from Dr. Baksinski contain little information, and because Dr. Baksinski did not testify, we know little about her reasons for ordering Fox off of work. The medical records from Dr. Tashima provide some detail. Following an appointment on July 11, 2011, Dr. Tashima wrote that he did “not feel that [Fox would] be able to return to full duty as required by his job.” Fox had experienced “multiple exacerbations” of back pain while working and “continue[d] to have worsened pain with activity.” Dr. Tashima wrote, “With his medical condition, [Fox] will not be able to tolerate moderate or heavy duty work. He is at maximum medical improvement.”

¶ 133 The record also contains overwhelming evidence that the pain and numbness Fox experienced in his back, legs, and feet impaired his ability to fully perform the heavy duty work of a firefighter/paramedic. At the hearings, Fox testified that his left foot was “usually numb” and his right leg to his quadriceps muscle was “usually tingling.” He also often tripped over his left foot due to “what they call foot drop.” He testified that he could not wear an air pack for longer than 10 minutes without his back hurting, he could not stand for more than 15 or 20 minutes without his left foot going numb, and he could not sit for more than half an hour. Fox testified that his left heel had “been numb for the last hour.” He further testified that he often could not assist with lifting patients and would rely on others to do so. At the August 7, 2012, hearing, Fox described having sharp pain in his left lower back; numbness in his left buttock, leg, heel, and toes; and pain numbness in his right knee and leg.

¶ 134 In addition to Fox’s treating physicians, all three Board-appointed physicians concluded

that Fox could not perform the heavy duty work required of a firefighter-paramedic in his current condition. Dr. Lanoff testified that he would give Fox light-duty work restrictions based on his current condition, and he wrote in his report that Fox had “temporary disability.” Dr. Yen wrote that Fox was not “capable of performing the job as a firefighter unless there is a sedentary type of work created for him.” Dr. Shapiro reported that Fox would put himself, the public, and his coworkers at risk if he returned to work. He wrote that Fox was “unfit to work in a very heavy category from the US Department of Labor, which would be required of a firefighter.” The physicians’ opinions are supported by the manner in which Fox either injured or aggravated his back over the years (*i.e.*, lifting heaving patients and ladders, providing emergency care in moving ambulances, dealing with belligerent and intoxicated patients).

¶ 135 Given that the record contains overwhelming evidence that Fox sustained numerous work-related back injuries, that his symptoms correlated with objective findings of injuries, and that he was unable to perform the full duties of his job as a firefighter/paramedic in his current condition, resolution of this case turns on whether his condition was permanent. Again, the Pension Code defines “permanent disability,” in pertinent part, as “any physical or mental disability that *** can be expected to last for a continuous period of not less than 12 months.” 40 ILCS 5/4-105b (West 2010).

¶ 136 On this issue, the evidence also overwhelmingly fell in Fox’s favor. All three board-appointed physicians were in agreement on the objective findings of Fox’s injuries, which primarily were multiple herniated discs shown on MRIs. The only disagreement was over the conclusion to be reached based on those objective findings. On this issue, Dr. Lanoff, a non-surgeon, was the only physician to conclude that Fox was not permanently disabled, because he believed that surgery would resolve Fox’s symptoms. As we already concluded, however, the

Board's reliance on Dr. Lanoff's opinion regarding surgery, which was equivocal and contradicted by Dr. Lanoff's own written report, was against the manifest weight of the evidence. Although Dr. Lanoff also testified that herniated discs often were asymptomatic and in the "vast majority" of patients would resolve on their own within three months or "up to a year on some cases," this clearly did not apply to Fox's condition. As Dr. Lanoff himself testified, Fox had two herniated discs that "apparently aren't going away." In his written report, Dr. Lanoff noted that Fox's herniated disc at L3-L4 was present in the MRIs from December 2006, October 2009, and February 2011, and that his herniated disc at L5-S1 was present in the MRIs from October 2009 and February 2011. Dr. Lanoff further wrote that Fox's condition was "chronic and recurrent" and that it did "not appear that this gentleman's condition will prove [*sic*] over time." Similarly, Dr. Yen wrote in his report that, although "[s]ome improvement may be expected," Fox would "always suffer from some residual problems." Dr. Shapiro wrote that Fox's condition "is permanent and will not improve." Fox's treating physician, Dr. Tashima, wrote in his report following Fox's July 11, 2011, appointment that he was "at maximum medical improvement." The Board's finding that the "pain that the applicant claims on a subjective basis can be corrected by out-patient surgery *** or will go away within the next 12 months on their [*sic*] own" ignored the overwhelming evidence supporting the opposite conclusion.

¶ 137 We conclude that the record in this case permits only one resolution, which is that Fox sustained his burden of proving that he was permanently disabled from performing the full duties of his job as a firefighter/paramedic. This conclusion does not depend upon resolving conflicts in the evidence or assessing the credibility of witnesses. Therefore, we need not remand to the

Board for further proceedings. We remand to the Board only for the limited purpose of entering an order granting Fox's application for a line-of-duty disability pension.

¶ 138

III. CONCLUSION

¶ 139 For the reasons stated, the decisions of the circuit court of Du Page County and the Wood Dale Firefighters Pension Board are reversed and the case is remanded to the Board with directions to enter an order granting Fox's application for a line-of-duty disability pension.

¶ 140 Reversed and remanded.