

No. 1-14-1076

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JOHN D. SERSHEN,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 13 CH 20769
)	
THE RETIREMENT BOARD OF THE POLICEMEN'S)	
ANNUITY & BENEFIT FUND OF THE CITY OF)	
CHICAGO,)	Honorable
)	Sophia H. Hall,
Defendant-Appellant.)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Justice Lampkin concurred in the judgment. Justice Hall dissented.

O R D E R

¶ 1 **Held:** We confirmed the Board's determination that the plaintiff-officer was entitled to reduced-duty disability benefits because his disability resulted from a duty-related injury which impacted a preexisting physical defect or disease, and reversed the circuit court judgment reversing that determination.

¶ 2 Defendant-appellant, the Retirement Board of the Policemen's Annuity and Benefit Fund of the City of Chicago (Board) appeals from an order of the circuit court of Cook County reversing its determination pursuant to section 5/5-154(a) (40 ILCS 5/5-154(a) (West 2012)), of

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the Pension Code (Code), that plaintiff-appellee, John D. Sershen¹, was entitled to disability benefits at 50% of his base salary, and awarding him duty disability benefits at 75% of his salary. The Board argues that the administrative record supported its determination that plaintiff's disability was the result of a duty-related injury which impacted preexisting physical defects and, accordingly, the circuit court erred in reversing its decision. We confirm the Board's determination and reverse the circuit court judgment reversing that determination.

¶ 3 Plaintiff, who was born on December 16, 1955, became a member of the Chicago police department (department) in November 1986. On March 7, 2013, after exhausting his medical leave, plaintiff applied for duty disability benefits pursuant to section 5-154(a) of the Code. 40 ILCS 5/5-154(a) (West 2012). In his affidavit attached to the claim, plaintiff stated:

"On the date of April 30, 2004, I was on duty, in uniform and working directing traffic when I was struck by a civilian vehicle and suffered injuries to my back. As a result of these injuries to my back, I am currently unable to perform the essential duties of a Chicago Police Officer."

¶ 4 At the July 26, 2013, hearing on his application, plaintiff testified that he was on duty and directing traffic on April 30, 2004, when he was struck by a civilian vehicle. Plaintiff, who is 5-foot-10-inches tall, weighed, at that time, 289 pounds. After the incident, plaintiff was transported to the emergency room at Northwestern Memorial Hospital (Northwestern). Plaintiff's x-ray results were "negative," and he was released that day. Plaintiff testified that after

¹ Plaintiff's last name is spelled "Ser Shen," at times, in the record and the briefs. We will use the spelling "Sershen."

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the accident, he experienced pain in his upper and lower back. Plaintiff subsequently received medical treatment from Dr. Bruce Goldenberg, his personal physician, and Dr. Ellis K. Nam, an orthopedic surgeon, and received pain management assistance from Dr. Kenneth Candido. Plaintiff continues to see Dr. Candido who prescribes pain medication. Plaintiff did not have surgery as a result of being struck by the vehicle. Plaintiff uses a cane because, once in a while, his right leg "kicks out."

¶ 5 Following the April 30, 2004, incident, plaintiff missed about 53 days of work before returning to full-time duty, however, he continued to experience back pain. Several months later, after seeing "a city doctor," he was placed on limited duty, and worked in that capacity for approximately eight years. He described light duty as "[b]asically office duties, records, clerical, run LEADS warrants, and so on." During that time, plaintiff struggled to come to work, took painkillers and muscle relaxers for his back pain, experienced difficulty sitting at his desk for long periods of time, and his weight increased to 350 lbs. He subsequently went on medical leave. At the time of the hearing, plaintiff said he weighed about "240, 245" pounds.

¶ 6 Plaintiff stated he was seeking disability based on the injury to his back which he suffered as a result of the April 30, 2004, incident. He testified that, prior to the incident, he was in good physical shape, and has not sustained further injuries to his back.

¶ 7 The parties stipulated to the admission of various medical records which we describe in relevant part.

¶ 8 Included in the medical records was a memo to the executive director of the Board and Dr. Peter Orris, stating plaintiff would exhaust his injured-on-duty medical days on February 19, 2013, and identified plaintiff's diagnosis as: "chronic low back pain, lumbar radiculopathy,

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lumbar spondylolysis² and pars fracture." The February 7, 2013, memo was signed by Barbara Hemmerling, a medical administrator from the department's medical section.

¶ 9 The written medical evidence included the April 30, 2004, x-rays from Northwestern of plaintiff's lumbar spine and sacrum which were negative. The lumbar spine x-ray report stated that "the alignment is within normal limits and the disc spaces *** are maintained." Both x-rays showed the bones were osteopenic³.

¶ 10 The notes from plaintiff's follow-up visits to Swedish Covenant Hospital after the incident on May 4, 2004, May 17, 2004, June 1, 2004, and June 7, 2004, included assessments that plaintiff had suffered lumbosacral strains which were resolving.

¶ 11 Reports from a July 24, 2008, lumbar spine MRI and December 5, 2006, CT scan of plaintiff's spine included findings of "bilateral spondylolysis at L5 without significant spondylolisthesis⁴." The same result was included in a report for a December 16, 2010, MRI.

¶ 12 Plaintiff's medical records reflect that on January 31, 2006, the department referred plaintiff to a mandatory physical evaluation for the purpose of determining his duty status. Dr. Joan Veits conducted the examination and found "[m]ild tenderness upper lumbar spine and

² Spondylolysis involves "[t]he disintegration or dissolution of a vertebra." Attorneys' Dictionary of Medicine and Word Finder, Vol. 5 PR-TG, p. S-262 (2014).

³ Osteopenia is "[a] condition marked by a deficiency of bone mass." Attorneys' Dictionary of Medicine and Word Finder, Vol. 4 M-PQ, p. O-122 (2014).

⁴ Spondylolisthesis of L5 upon S.1 involves "[t]he forward displacement (a slipping forward) the fifth lumbar vertebra over the top surface of the first sacral vertebra. (The fifth lumbar vertebra sits normally on the top of the first sacral vertebra, which is the top of the sacrum.)" *Id.*

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bilateral paraspinous muscles with forward bend 90 degrees, limited by low back pain and also minimal decrease bilateral flexion, extension and rotation."

¶ 13 The records of Dr. Goldenberg were included in the evidence. In his progress notes, Dr. Goldenberg included a notation that the 2006 CT scan of plaintiff's lumbar spine showed bilateral L5 spondylolysis. Dr. Goldenberg's examinations showed plaintiff had decreased range of motion in the "L-5 spine" region. The notes further showed plaintiff suffered from low back pain with some radiation down the right leg, hypertension, apnea, and obesity.

¶ 14 The medical notes of Dr. Nam are also in the record. In his November 19, 2010, notes, Dr. Nam stated that plaintiff weighed 315 pounds, had a history which included diabetes, and had "chronic lumbosacral pain." On December 22, 2010, March 2, 2011, March 11, 2011, and March 16, 2011, Dr. Nam's examinations showed mild tenderness from L3 or L4 to the sacral region. In his December 22, 2010, notes Dr. Nam included in the plan section that plaintiff wants to continue losing weight "to see [if] this can decrease his pain." He noted that plaintiff's lumbar MRI's of July 24, 2008, and December 16, 2010, showed bilateral L5 spondylolysis, or "bilateral pars interarticularis defects with mild diffuse post disc osteophyte complex."

¶ 15 The records of Dr. Candido of Advocate Illinois Masonic Medical Center Pain Management are included in the evidence. Dr. Candido stated plaintiff had been receiving pain treatment since 2011 for his "low back pain with lower extreme radiculopathy" which began after being struck by a vehicle in 2004. Dr. Candido also stated plaintiff's "symptoms stem from pathological changes observed in his MRI examination in 2010, including disc displacement and arthritis of multiple joints."

¶ 16 The October 2010 notes of Dr. Paul Guske, who performed plaintiff's gastric bypass

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surgery, stated plaintiff suffered from "obesity for over 10 years," "obesity related comorbidities including diabetes," and chronic back pain. Dr. Guske noted plaintiff's history included "weight bearing arthralgias [joint pain] in the knees and back."

¶ 17 Dr. Fred Geisler, a neurosurgeon, issued a report after plaintiff visited him on July 5, 2012. Based on his examination of plaintiff and his review of plaintiff's medical records, Dr. Geisler made the following "current diagnosis":

"1. Lower back pain initiated by motor vehicle accident where he was struck in 2004 and this accident is the injury that is the direct cause of his current lower back pain and disability.

2. Activation of preexisting asymptomatic spondylolysis without listhesis at L5-S1."

¶ 18 The medical records also included two reports of Dr. Jay Levin, an orthopedic and spinal surgeon dated April 17, 2013, and May 7, 2013. On April 17, 2013, Dr. Levin conducted an independent medical examination of plaintiff and did a review of his medical records. Dr. Levin then referred plaintiff for further studies and issued a second report on May 7, 2013. In his reports, Dr. Levin outlined plaintiff's relevant medical history, including the extent of plaintiff's complaints of back pain and physical limitations. At that time, plaintiff's weight was 268 pounds. Plaintiff had lost over 100 pounds after his gastric bypass surgery in October 2010. Dr. Levin said that as to plaintiff's x-rays done on May 4, 2004, "approximately 4 days following the occurrence of April 30, 2004, the assessment was muscle strain in the low back, neck and shoulders." Plaintiff engaged in physical therapy after the accident "for modality of pain relief." Dr. Levin noted that MRI's of plaintiff's lumbar spine from July 24, 2008, December 16, 2010, and April 25, 2008, showed bilateral L-5 spondylolysis and degenerative disc changes at L3-L4,

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L4-L5, and L5-S1. Dr. Levin stated that the July 2008 and April 25, 2008, MRI's demonstrated the "bilateral LS spondylolysis and foraminal stenosis at L3-L4 and L5-S1 [was] longstanding in nature." Dr. Levin also believed that the "L5 spondylolysis *** [was] chronic in nature." Dr. Levin diagnosed plaintiff with "chronic bilateral L5 spondylolysis with right L5-S1 [disc] protrusion/herniation and a left L3-L4 foraminal/lateral [disc] herniation." He also noted that "[plaintiff's] current complaints are based on his initial symptoms from an injury of April 30, 2004, his obesity as well as age related degenerative [disc] pathology."

¶ 19 Dr. Peter Orris, the Board's consulting physician, testified that he had not rendered any opinions which were included in plaintiff's disability package, but was aware of those given by Dr. Levin, and Dr. Geisler. Dr. Orris believed plaintiff was disabled and could not return to work. Dr. Orris agreed with Dr. Geisler's opinion that plaintiff's disability was the result of the injuries he sustained in the 2004 accident, and an activation of a preexisting condition, namely, spondylolysis of the lumbar spine. He also concurred with Dr. Levin's opinion that plaintiff's current complaints were "based on his initial symptoms from an injury of [April 30, 2004], his obesity as well as age-related degenerative disc pathology." Dr. Orris further testified that plaintiff was "markedly overweight" at the time of his injury. He testified that plaintiff's osteopenia was related to his weight and diabetes, and that his disability was a result of a combination of the accident and his weight, diabetes, spondylolisthesis, spondylolysis, and other degenerative problems. Dr. Orris believed that his assessment was consistent with Dr. Levin's and Dr. Geissler's assessments.

¶ 20 On September 3, 2013, the Board entered a written order finding that plaintiff was disabled and entitled to a disability benefit. As to the amount of the award, the Board stated that

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plaintiff had the burden of proving his disability had a causal connection with an act-of-duty injury, but was not the result of a preexisting physical defect. The Board found, as to this issue:

"1) [Plaintiff] injured his back in the 2004 incident; 2) [His] injury is an activation of preexisting [systemic spondylolysis] at L5-S1; and 3) his problems with excessive weight and other medical findings, unrelated to the 2004 incident, have all impacted on his ability to return to work."

The Board thus concluded that plaintiff was entitled to a duty disability award at the rate of 50% of his salary. In reaching this conclusion, the Board made various specific findings as to plaintiff's medical history and conditions.

¶ 21 Plaintiff filed a petition for administrative review of the Board's decision. Plaintiff argued, *inter alia*, that the record did not support the Board's decision that his disability resulted from a preexisting condition. He maintained that the April 30, 2004, accident was the direct cause of his disability.

¶ 22 On March 14, 2014, the circuit court issued a written order finding that "the record failed to establish that [plaintiff] had any physical defect prior to his on duty injury which occurred on April 30, 2004." The circuit court, thus, reversed the decision of the Board, and awarded plaintiff duty disability benefits at the rate of 75% of his salary.

¶ 23 On appeal, the parties do not dispute that plaintiff is disabled, sustained injuries while performing an "act of duty" as defined under the Code (40 ILCS 5/5-113 (West 2012)), and is eligible for duty disability benefits. The sole issue is whether the Board properly determined that plaintiff's current disability resulted from a preexisting condition, entitling him to disability benefits at the rate of 50%, rather than 75% of his salary under section 5/15-1504 of the Code.

¶ 24 In administrative cases, we review the decision of the administrative agency, not that of the circuit court. *Wade v. City of North Chicago Police Pension Board*, 226 Ill. 2d 485, 504 (2007). The scope of our review extends to all questions of law and fact presented by the record. *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill. 2d 380, 390 (2001). The applicable standard of review, which determines the degree of deference given to the agency's decision, depends upon whether the question presented is one of fact, one of law, or a mixed question of law and fact. *Id.*

¶ 25 Rulings on questions of fact will be reversed only if they are against the manifest weight of the evidence, *i.e.*, the opposite conclusion is clearly evident. *Wade*, 226 Ill. 2d at 504. Thus, if the record contains evidence that supports the Board's factual conclusions, we will not disrupt those conclusions, even if an opposite conclusion is reasonable. *Carrillo v. Park Ridge Firefighters' Pension Fund*, 2014 IL App (1st) 130656, ¶ 21. On the other hand, we review questions of law *de novo*, and apply the clearly erroneous standard to a mixed question of law and fact. *Wade*, 226 Ill. 2d at 505. A decision is deemed clearly erroneous when the reviewing court is left with the definite and firm conviction that a mistake has been made. *Kouzoukas v. Retirement Bd. of Policeman's Annuity and Benefit Fund of City of Chicago*, 234 Ill. 2d 446, 464 (2009). Under any standard, the plaintiff, in an administrative proceeding, bears the burden of proof, and will be denied relief if he fails to meet that burden. *Wade*, 226 Ill. 2d at 505.

¶ 26 The parties disagree as to the applicable standard of review. Plaintiff contends that this court should apply the clearly erroneous standard of review (*AFM Messenger Service, Inc.*, 198 Ill. 2d at 391), while the Board argues that the manifest weight of the evidence standard is proper. *Wade*, 226 Ill. 2d at 504. In this case, applying either standard—both of which are

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highly deferential (*Niles Tp. High School Dist. 219, Cook County v. Illinois Educational Labor Relations Bd.*, 387 Ill. App. 3d 58, 70 (2008))—we would reach the same result.

¶ 27 Section 5/5-154(a)(i) provides, in pertinent part:

***An active policeman who becomes disabled on or after the effective date as the result of an injury incurred on or after such date in the performance of an act of duty, has a right to receive duty disability benefit during any period of such disability for which he does not have a right to receive salary, equal to 75% of his salary *** at the time the disability is allowed; *** provided, however, that:

**** If the disability resulted from any physical defect or mental disorder or any disease which existed at the time the injury was sustained, *** the duty disability benefit shall be 50% of salary ***.*" (Emphasis added.) 40 ILCS 5/5-154(a)(i) (West 2012).

¶ 28 This court has previously addressed whether a disability "resulted from" a preexisting-physical defect or disease, as provided in section 5/5-154(a)(i) of the Code. In *Samuels v. Retirement Board of Policemen's Annuity & Benefit Fund of City of Chicago*, 289 Ill. App. 3d 651 (1997), the officer suffered an on-duty injury in 1992. At the hearing on her disability, the officer testified that, prior to the on-duty injury, she had no problem with her back and was very active. *Id.* at 655. The Board concluded that, based on the medical evidence, her disability was the result of preexisting degenerative disc disease. *Id.* at 659. The circuit court reversed the Board's determination after finding the officer had been active and not disabled, in any way, prior to her injury. *Id.* at 660. On appeal, we held that the circuit court erred in reversing the Board's decision to award disability benefits at the rate of 50% because competent evidence

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supported the Board's determination that the officer's disability resulted from her preexisting degenerative disc disease. *Id.* at 662-63.

¶ 29 As to section 5/5-154(a), this court in *Samuels* explained:

"We find that section 5–154 is unambiguous. We interpret the statute to provide duty disability benefits in two separate instances: (1) where a disability occurs *as a result of* (is caused by) an on-duty injury; and (2) where a disability *results from* (stems from) a *preexisting condition* as opposed to being *caused by the injury*. In the first instance, the duty disability benefit is 75% of the officer's salary. In the second instance, where the disability '*resulted from* any physical defect or mental disorder or any disease which existed at the time the injury was sustained,' the duty disability benefit is 50% of the officer's salary. (Emphases added.) The statute does not include language stating that, even if an officer has a physical defect, mental disorder or disease prior to the subsequent on-duty injury, the officer is entitled to a duty disability pension of 75% of salary if 'but for' the on-duty injury the disability would not exist. Instead, under the statute, the officer will be given a duty disability pension of 50% of his salary if the disability 'resulted from' the preexisting condition, notwithstanding the effect the on-duty injury may have had on the preexisting condition. We also briefly note that while *Samuels* argues that 'it is an axiom in statutory construction that "resulted from" implies direct causation,' she cites to no authority in support of this statement and our research reveals none." *Samuels*, 289 Ill. App. 3d at 661-62.

¶ 30 We then examined the medical evidence in that case which showed the officer had degenerative disc disease prior to her on-duty injury and doctors had found her disability resulted

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from the degenerative disc disease, and other doctors had found her disability was "related to" or "secondary to" her on-duty injury. *Id.* at 662. Based on the record, we concluded that "[a]s competent evidence was presented to support the Board's decision, in viewing the evidence in the light most favorable to the Board, we cannot say that a rational trier of fact would not have agreed with the Board's decision." *Id.* at 662.

¶ 31 In *Cole v. Retirement Board of Policemen's Annuity and Benefit Fund of the City of Chicago*, 396 Ill. App. 3d 357 (2009), this court again considered the "resulted from" language in section 5/5-154(a). Beginning with an act-of-duty incident in 1993, the plaintiff-officer in *Cole* sustained various on—and off-duty injuries during a thirteen-year period. *Id.* at 358-61. The Board in *Cole* found that the officer had degenerative disc disease prior to and unrelated to the 1993 on-duty incident which did not prevent her from returning to work. The Board determined that the officer was entitled to ordinary disability benefits pursuant to section 5/5-155 of the Code (40 ILCS 5/5-155 (West 2006)), as a result of degenerative disc disease and degenerative joint disease attributable to nonduty-related accidents following the 1993 on-duty incident, or the officer's degenerative disc disease which existed prior to the 1993 on-duty incident. *Id.* at 365. The circuit court reversed, finding that the officer was disabled as the result of duty-related injuries in October 1993, but that the disability resulted from a preexisting physical condition and, therefore, that the officer was entitled to duty disability at 50% under section 5/5-154. This court affirmed the circuit court's decision, concluding that "there was evidence that the plaintiff showed signs of degenerative disc disease at the time she suffered her act-of-duty injuries." *Id.* at 370. Citing *Samuels*, we stated that "the officer will be given a duty disability pension of 50% of his salary if the disability 'resulted from' the preexisting condition, notwithstanding the effect

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the on-duty injury may have had on the preexisting condition." *Id.*; *Samuels*, 289 Ill. App. 3d at 662.

¶ 32 Plaintiff's disability claim here was based on the continued pain he suffers in his lower back since the April 2004 on-duty incident where he suffered lumbosacral muscle strains. Specifically, according to his medical records, plaintiff, upon examination, has tenderness and decreased range of motion in the L5 region of his spine. In its written decision, the Board set forth an extensive list of factual findings regarding plaintiff's medical history which were supported by the manifest weight of the evidence. Plaintiff's history, as found by the Board, included preexisting bilateral spondylolysis at L5-S1, the area of his back where he was found to have tenderness and limited range of motion, and where he suffered the muscle strains as a result of the 2004 incident. As we noted above, spondylolysis involves "[t]he disintegration or dissolution of a vertebra." *Attorneys' Dictionary of Medicine and Word Finder*, Vol. 5 PR-TG, p. S-262 (2014). Dr. Levin concluded, based on plaintiff's 2006 MRI, that plaintiff's L-5 spondylolysis was chronic and long-standing. The Board also found references to plaintiff's history of weight problems in the medical records. The medical evidence also demonstrated that plaintiff's weight issues were long-standing and that he was overweight at the time of the on-duty injury.

¶ 33 In determining the amount of the award, the Board observed that all three of the medical experts, Drs. Levin, Geisler, and Orris, opined that plaintiff's disability was the result of several contributing factors, including the on-duty injury on April 30, 2004, with an activation of his preexisting, asymptomatic spondylolysis at L5-S1. The Board also relied on the notation in Dr. Levin's report that plaintiff's condition was based on his weight, as well as age-related

degenerative disc pathology, and Dr. Orris' testimony that plaintiff's weight played a role in his disability. The Board concluded that: (1) plaintiff was injured while on duty in 2004; (2) his injury activated his preexisting, asymptomatic spondylolysis and his disability resulted, in part, from his problems with excessive weight; (3) his preexisting physical conditions—spondylolysis and excessive weight—were medical problems unrelated to the 2004 on-duty injuries; and (4) his disability—on-going lower back pain and limited range of motion—was the result of the on-duty injury and preexisting conditions which entitled him to disability benefits at 50% of his salary. Applying either a clearly erroneous or manifest weight of the evidence standard, we would confirm the Board's conclusion that plaintiff was entitled to disability benefits at 50% of his salary as it was supported by competent evidence in the record. See *Samuels*, 289 Ill. App. 3d at 662.

¶ 34 Plaintiff contends that the Board ignored major evidence, including the medical report prepared by Dr. Geisler, which was favorable to him. Plaintiff's assertion, however, is belied by the record. First, the Board's decision includes particular numerous factual findings as to plaintiff's medical history which reflect consideration and review of plaintiff's medical records and the opinions of the three medical experts. The Board's determination was not inconsistent with Dr. Geigler's finding that, although the April 2004 on-duty injury initiated and caused lower back pain, this injury also activated preexisting asymptomatic spondylolysis. Dr. Geigler supports a conclusion that the disability was a result of a prior defect, even if the spondylolysis had been asymptomatic prior to April 2004. See, *e.g.*, *Samuels*, 289 Ill. App. 3d at 662.

¶ 35 Finally, plaintiff argues that once he established that he was disabled and that his disabling injury was connected to an act of duty, he met his burden for receiving duty disability

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benefit at the rate of 75% of his salary, and that he does not have the burden to "explain away" any preexisting conditions. To the contrary, as noted above, a plaintiff in an administrative proceeding bears the burden of proof as to the relief requested, and the failure to sustain that burden will result in denial of the relief sought. *Wade*, 226 Ill. 2d at 505. Here, as to his request for 75% disability benefits, plaintiff had a burden to prove his injury was not the result of his preexisting conditions and, since plaintiff failed to meet that burden, we cannot say that the Board reached an incorrect decision.

¶ 36 Having so found, we necessarily conclude that the circuit court erred in reversing the Board's decision (*Samuels*, 289 Ill. App. 3d at 662-63), and we reverse its order and confirm the Board's decision.

¶ 37 Board confirmed; circuit court reversed.

¶ 38 JUSTICE HALL dissenting:

¶ 39 The majority concludes that the Board's determination, that plaintiff was entitled to disability benefits at 50% rather than 75% of his base salary because his disability resulted from a duty-related injury which impacted preexisting physical defects, was not against the manifest weight of the evidence. I disagree.

¶ 40 In this case, the Board found that plaintiff's back was injured in the 2004 on-duty accident, that his injury activated his preexisting, asymptomatic spondylosis, and that his excessive weight and other medical problems, unrelated to the accident, resulted in his disability. Therefore, plaintiff was entitled to a benefit at 50% of his salary rather than 75%. However, Drs. Levin, Geisler, and Orris uniformly found that plaintiff's disability resulted from the on-duty

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injury *and* his pre-existing, asymptomatic medical conditions including his weight and degenerative disc disease. *Samuels* is distinguishable since in that case, the plaintiff's on-duty injuries did not prevent her from returning to work. Rather, she was prevented from returning to work because of her preexisting degenerative disc disease. *Samuels*, 289 Ill. App. 3d at 659.

¶ 41 The majority's reliance on *Cole* is misplaced. In that case, the plaintiff returned to full duty after she sustained on-duty injuries, and the Board denied the plaintiff any duty disability benefit. This court affirmed the circuit court's determination that the plaintiff was entitled to a 50% duty disability benefit because her disability was caused by her preexisting condition of degenerative disc disease. *Cole*, 396 Ill. App. 3d at 371. Moreover, while the issue of whether the plaintiff was entitled to a 75% duty disability benefit was raised on appeal, we lacked jurisdiction to consider the issue because the plaintiff failed to file a cross – appeal. *Id.* at 366.

¶ 42 Unlike the plaintiffs in *Cole* and *Samuels*, here plaintiff's disability did not result from any preexisting condition. This is not a case where the officer had a preexisting condition and "but for" the on-duty injury he would not be disabled. *Samuels*, 289 Ill. App. 3d at 661-62.

Unlike *Samuels*, the competent evidence in this case before the Board established that the on-duty injury caused the disability, rather than merely affecting or worsening his condition. *Id.* at 661.

¶ 43 I would conclude that the Board's decision was against the manifest weight of the evidence, and the circuit court's reversal of the Board's decision was proper.

¶ 44 Therefore, I respectfully dissent.