

No. 1-14-2514

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

CARMEN DELORTO,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County
)	
v.)	
)	
VILLAGE OF WORTH FIREFIGHTERS PENSION)	
FUND, THE BOARD OF TRUSTEES OF THE WORTH)	
FIREFIGHTERS' PENSION FUND, PRESIDENT)	
GEORGE R. ACHTER, SECRETARY JOSEPH A.)	No. 11 CH 43544
WITRYK, MIKE PRITCHARD, KEVIN RYAN, THE)	
VILLAGE OF WORTH, THE NORTH PALOS FIRE)	
PROTECTION DISTRICT, FIRE CHIEF DANIEL)	
RUSSELL AND CANNON COCHRAN)	
MANAGEMENT SERVICE, INC.)	Honorable
)	Mary Ann Mason,
)	Judge Presiding.
)	
Defendants-Appellants.)	

PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justices Neville and Hyman concurred in the judgment.

ORDER

¶ 1 *Held:* The finding to deny pension disability benefits was against the manifest weight of the evidence.

¶ 2 Defendant, the Board of Trustees of the Worth Firefighters' Pension Fund (Board), appeals from a decision of the circuit court finding its decision to deny pension disability benefits to plaintiff Carmen Delorto was against the manifest weight of the evidence. For the following reasons, we affirm the ruling of the circuit court finding the Board's decision was against the manifest weight of the evidence.

¶ 3 BACKGROUND

¶ 4 Carmen Delorto was hired by the now-defunct Village of Worth Fire Department on March 6, 1988. He was promoted to Lieutenant on February 1, 2000. While serving as Lieutenant, Delorto continued performing the job duties of firefighter and paramedic in addition to his supervisory responsibilities. Many of Delorto's job responsibilities were "very heavy." These duties included pulling fire hoses, carrying heavy hand and power tools weighing up to 40 pounds, as well as rescuing people and carrying them down a ladder or lifting them into an ambulance.

¶ 5 On July 16, 2009, Delorto filed for disability pension benefits due to an injury he received to his back after lifting a patient onto a stretcher while on duty on December 14, 2008. At the hearing before the Board on his request for benefits, Delorto testified that on December 14, 2008, he responded to an emergency call for a man down in a parking lot. Delorto responded with two paramedics on scene. The individual requiring assistance was 6 feet 4 inches tall, weighed between 250 and 275 pounds and was covered in blood. Delorto reached out to lift the man onto the stretcher and, as he did so, felt a pull in his back. After the ambulance left, Delorto returned to the station. He testified that he felt his back tightening up but finished his shift and went on additional calls.

¶ 6 On December 15, 2008, the next day, Delorto was seen by his primary care physician Dr. Paul Panzica. Dr. Panzica's records show Delorto complained of pain in the lower back and radiating pain in his left buttocks. Dr. Panzica's exam was normal except for a paraspinal spasm on the right side. Delorto was diagnosed with having a poorly controlled muscle spasm. Delorto was advised not to return to work. Delorto returned to Dr. Panzica three weeks later with the same complaints. Dr. Panzica ordered an MRI. The MRI was performed on January 15, 2009 and showed a left lateral disk protrusion at L5/S1 with left lateral recess and inferior neural foramina narrowing. Dr. Panzica referred Delorto to an orthopedic surgeon, Dr. Sweeney, for further treatment.

¶ 7 Delorto was initially evaluated by Dr. Sweeney on January 27, 2009, and he complained of pain when he twisted, turned, or bent and had intermittent left lower extremity pain and numbness. Delorto stated that his pain was never entirely gone and several weeks of physical therapy had not helped relieve his pain. On February 5, 2009, Delorto reported to Dr. Sweeney that he was improving with medication and physical therapy. Dr. Sweeney referred Delorto to Dr. Jalaja Piska, a pain specialist, for a steroid injection.

¶ 8 Delorto saw Dr. Piska on February 12, 2009. Dr. Piska diagnosed Delorto with lumbago, thoracic/lumbrosacral radiculitis and displacement of lumbar disk without myelopathy. Delorto began steroid injections on February 19, 2009, and had three injections over the period of the next month. Delorto was also still undergoing physical therapy.

¶ 9 Delorto was again seen by Dr. Sweeney on March 26, 2009 and April 23, 2009; on both occasions he reported that the epidural steroid injections he had received had no benefit and that

physical therapy had not helped. Discussion about surgery ensued and Dr. Piska suggested a spinal cord stimulator.

¶ 10 In May 2009, Delorto went to see Dr. Zelby, a workers' compensation physician. Based upon Dr. Zelby's report that Delorto was fit to work, on May 15, 2009, the worker's compensation administrator sent Delorto's attorney a letter informing him that his benefit payments would cease. The letter also ordered Delorto to report to work immediately. Delorto was informed of this letter by his attorney and attempted to return to work. When Delorto reported for work at the North Palos Fire Department, he was directed to Chief McQueen and Deputy Chief Russell. They informed Delorto that he could not return to work until he was cleared by his personal physician. Delorto had not sought a release from Dr. Sweeney. Delorto testified that he felt he was fit for duty when he presented himself for work to North Palos in May 2009.

¶ 11 Delorto's attorney responded to the letter from the workers' compensation administrator. In the letter, the attorney informed the administrator that Delorto had attempted to return to work on May 18, 2009, but the Chief would not accept the report of Dr. Zelby. The attorney also made a demand for payment of benefits.

¶ 12 Delorto continued seeing Dr. Sweeney. On May 28, 2009, Delorto told Dr. Sweeney he would like to have surgery. Delorto stated that he was not getting any better and could not live without pain medication. Dr. Sweeney ordered a discogram and a post-discographic CT scan. These tests confirmed that Delorto had annular tears at L4/L5 and L5/S1. Dr. Sweeney would not provide a release to return to unrestricted duty.

¶ 13 On July 9, 2009, Dr. Sweeney noted that Delorto's complaints were unchanged and he would rather live with the pain than have surgery. Dr. Sweeney then placed a 50 pound weight lifting restriction on Delorto and indicated that he "may" require surgery in the future. Dr. Sweeney also determined that Delorto was at maximum medical improvement for his work-related injury and permanently restricted him from "fireman duty".

¶ 14 At the time of the hearing Delorto testified that he had been treated by Dr. Sweeney in March 2011, and he continued to be treated by Dr. Sweeney every six months. Delorto reported he only took pain medication approximately twice a month. During the pension board hearing, Delorto was specifically asked whether or not he could perform the job of firefighter. He responded, "I am not exactly sure what I could do. This is as honest as I can be because I haven't tried to carry someone down a ladder. Could I say I could or couldn't? I can't say."

¶ 15 Delorto submitted to three independent medical evaluations (IME) pursuant to section 4-112 of the Illinois Pension Code (Code) (40 ILCS 5/4-112 (West 2008)). On December 17, 2009, Delorto saw Dr. David Spencer. Dr. Spencer, a board certified orthopedic spine surgeon, evaluated Delorto for five minutes. Dr. Spencer filed a Certification of Disability with the Board that stated that Delorto was not disabled from performing his duties as a firefighter and that it was not medically possible that Delorto's injury was caused by a line of duty injury or his job as a firefighter/paramedic. The certification added that Delorto's injury was not permanent as defined by the Code. Dr. Spencer's certification further added that Delorto did have reason to have pain on his left side and lower back as well as at the L5/S1 level but noted that Delorto recovered from acute symptoms and was capable of returning to his firefighter duties.

¶ 16 Dr. Spencer also testified by telephone during the hearing. It was his opinion that Delorto's degenerative condition was not caused by any traumatic episode or by this occupation. Dr. Spencer did not observe any significant range of motion restriction or pain when examining the patient. He also disagreed with Dr. Sweeney's analysis of Delorto's CT scan. Dr. Spencer did not agree that Delorto had annular tears at the L4-L5 and L5-S1. The certificate stated Delorto's injury did not require surgery and that the degenerative condition was not caused by Delorto's occupation as a firefighter but the symptoms could be.

¶ 17 On January 19, 2010, Dr. Thomas Gleason also examined Delorto for an IME at the request of the Pension Board and filed a Physician's Certification of Disability. Dr. Gleason's certificate stated that it was possible that Delorto's injury resulted from performing an act of duty or from the cumulative effects of acts of duty. Dr. Gleason took his own x-rays during his examination of Delorto's spine. He stated that the x-rays demonstrated mild degenerative disc disease with minimal anterior osteopathic spur formation. After reviewing all documentation, Dr. Gleason stated that should a disability be established pending a Functional Capacity Evaluation (FCE), the disability would be permanent as defined by the Illinois Pension Code. He opined Delorto was capable of full-time work, at a light level per the Department of Labor guidelines, he suggested an FCE be performed for a more specific determination.

¶ 18 On January 21, 2010, Delorto submitted to another IME with Dr. Daniel Samo for the purpose of assessing Delorto's disability. Dr. Samo filed a Physician's Certification of Disability with the Board. His certification stated that Delorto was disabled "from performing the essential job tasks of a firefighter." Additionally, Dr. Samo noted that Delorto's complaints are subjective but there was no evidence suggesting Delorto was being untruthful. He stated Delorto's injury

prevents him from bending, lifting, and twisting which would be required for his job. Dr. Samo believed there was a possibility that further treatment would allow Delorto to return to full duty, and that a microdisectomy would be the procedure of choice. Regarding causation, Dr. Samo stated,

“This episode of back pain started with the lifting incident at work. However, the underlying degenerative changes of the spine are normal wear and tear findings that are typically seen in a person of this age. He clearly has had recurrent back pain episodes for many years, however these had all resolved in the expected time frame for typical low back strain/sprain injuries. It is not clear what is causing his ongoing symptoms.”

¶ 19 Dr. Samo also testified by telephone during the hearing. He testified that although he did not believe the discogram to be predictive of pathology, he stated that the postdiscographic CT scan was an objective test and in Delorto's case showed annular tears at both L4/L5 and L5/S1. Dr. Samo stated that Delorto's degeneration and the tears were preexisting at the time of December 14, 2008, however his current symptoms were a result of that incident. He opined that Delorto was "permanently disabled from performing the duties of a firefighter lieutenant." He added that the degeneration and tears were not caused by Delorto's work as a firefighter but that the December 14, 2008 incident caused him to be symptomatic.

¶ 20 After receiving the IME reports, the Board authorized an FCE for Delorto as requested by Dr. Gleason. The FCE took place on March 25, 2010. The results indicated that Delorto was able to perform at a medium to very heavy physical demand level. Delorto was unable to meet the very heavy level criteria in lifting. The position of firefighter is classified as a very heavy physical demand level. The FCE results were submitted to the IME physicians for further

opinion. Dr. Spencer's opinion remained unchanged. Dr. Gleason added to his opinion that Delorto was disabled from performing firefighter duties. Dr. Samo's opinion remained unchanged; however he did not believe Delorto was a maximum improvement and with further treatment may be able to return to regular duty with work hardening.

¶ 21 After hearing all of the testimony and considering all documentary evidence, the Board voted to deny Delorto's application for disability pension benefits by a vote of 4-1 after finding Delorto was not disabled from performing his duties as a firefighter/paramedic for the Village of Worth Fire Department. The Board made findings of fact essentially reciting the evidence presented in a written order on November 17, 2011. The Board's findings noted that Delorto had the burden of proving that he is disabled in order to qualify for any disability pension under Section 4-110 or 4-111 of the Illinois Pension Code (40 ILCS 5/4-110 and 4-111 (West 2008)) and that the Board did not feel that Delorto had proven by a preponderance of the evidence that he was disabled and unable to perform his duties as a firefighter/paramedic or that his injury occurred from the performance of an act on duty.

¶ 22 Delorto sought review of the Board's decision in the circuit court and filed a multi-count complaint. Relevant to this case, Count I of his complaint alleged that the Board's decision was against the manifest weight of the evidence. The circuit court ruled in favor of Delorto finding that the Board's decision to deny disability pension benefits was against the manifest weight of the evidence. The court noted that the only medical testimony that supported the Board's decision was the testimony of Dr. Spencer, who saw Delorto for five minutes. The other physicians were of the opinion that Delorto was permanently disabled and that "there was a causal relationship between the incident of December 14, 2008, and the aggravation or the

condition that he previously had becoming symptomatic to the point that it did." The court also noted that the FCE demonstrated, as Dr. Spencer acknowledged, that Delorto is "incapable of performing the very heavy lifting requirements that a firefighter is expected to perform." The court then granted the Board's motion for a 304(a) finding, staying Count II and finding no just reason to delay an appeal from the court's ruling on Count I. The Board then filed its notice of appeal in this court.

¶ 23

II. ANALYSIS

¶ 24 The Board argues that its decision to deny Delorto disability pension benefits was not against the manifest weight of the evidence and the trial court's finding was erroneous. The Board argues that the evidence did not show that Delorto was permanently disabled or that his disability was the result of an act of duty.

¶ 25 Judicial review pursuant to Administrative Review Law (735 ILCS 5/3-101 (West 2008)) requires this court to review all questions of law and fact presented by the record in relation to the administrative agency's decision and not the decision of the circuit court. *Lindemulder v. Board of Trustees of the Naperville Firefighter's Pension Fund*, 408 Ill. App. 3d 494, 500 (2011). The standard of review this court applies depends on the question presented. *Comprehensive Community Solutions, Inc. v. Rockford School District no. 205*, 216 Ill. 2d 455 (2005). "When an issue of pure law is raised, we review *de novo*." *Parikh v. Division of Professional Regulation of the Department of Financial & Professional Regulation*, 2014 IL App (1st) 123319, ¶19 (quoting *Village Discount Outlet v. Dep't of Employment Security*, 384 Ill. App. 3d 522, 525 (2008)). "When the issue raised is one of fact, we will only ascertain whether such findings of fact are against the manifest weight of the evidence." *Parikh*, 2014 IL App (1st)

123319, ¶ 19 (quoting *Provena Covenant Medical Center v. Department of Revenue*, 236 Ill. 2d 368, 386-87 (2010)). Lastly, “[a] mixed question of law and fact is reviewed under the clearly erroneous standard.” *Parikh*, 2014 IL App (1st) 123319, ¶ 19 (quoting *Heabler v. Illinois Department of Financial & Professional Regulation*, 2013 IL App (1st) 111968, ¶ 17). A mixed question of law and fact is one “in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard[.]” *Parikh*, 2014 IL App (1st) 123319, ¶ 19 (quoting *Pullman-Standard v. Swint*, 456 U.S 273, 289 n.19, (1982)).

¶ 26 Our supreme court has held that “ ‘the question of whether the evidence of record supports the Board’s denial of plaintiffs application for a disability pension’ ” is a question of fact and, as such, the manifest weight standard of review applies. *Kouzoukas v. Retirement Board of the Policeman’s Annuity Benefit Fund of the City of Chicago*, 234 Ill. 2d 446, 464 (2009); (quoting *Marconi v. Chicago Heights Police Pension Board*, 225 Ill.2d at 534, 543 (2005)). Accordingly, we review this case to determine whether the Board’s decision to deny Delorto pension disability benefits was against the manifest weight of the evidence.

¶ 27 “Even under the manifest weight standard applicable in this instance, the deference we afford the administrative agency’s decision is not boundless.” *Wade v. City of North Chicago Police Pension Board*, 226 Ill. 2d 501, 507 (2005). When reviewing an administrative agency’s decision, we may put aside any findings which are clearly against the manifest weight of the evidence. *Sangamon County Sheriff’s Department v. Illinois Human Rights Comm’n*, 233 Ill. 2d 125 (2009).

¶ 28 In order for an active fireman to be entitled to duty disability benefits, he must establish: (1) that he is disabled; and (2) that his disability was caused by an injury incurred in or resulting from an act of duty. 40 ILCS 5/4-110, 111 (West 2008). The burden is on the petitioner to prove that he is disabled. *Id.*

¶ 29 Without making credibility determinations or analyzing the applicability of the facts to the Code, the Board in this case simply stated that Delorto failed to meet his burden to establish that his injury was caused by the performance of an act of duty and that he was disabled.

Without the benefit of the Board's reasoning, we can only assume that the Board relied almost exclusively on the report and testimony of Dr. Spencer in reaching its decision to deny Delorto pension disability benefits.

¶ 30 Delorto submitted to an IME with Dr. Spencer for the purpose of assessing Delorto's disability. Dr. Spencer spent about five minutes with Delorto. Afterwards, Dr. Spencer filed a Certification of Disability with the Board. The certification stated that it was not medically possible that Delorto's injury was caused by a line of duty injury and he was not permanently disabled from performing his duties as a firefighter. Although Dr. Spencer admitted that Delorto did have a legitimate reason for having lower back pain due to a degenerative condition, Dr. Spencer opined that Delorto had fully recovered and could return to active duty. He also stated that the degenerative condition of his lower spine was not caused by Delorto's career as a firefighter, but any symptoms he was having may have been caused by his profession.

¶ 31 Dr. Gleason and Dr. Samo had differing opinions. Dr. Gleason's certificate stated that it was possible that Delorto's injury resulted from performing an act of duty or from the cumulative effects of acts of duty. After reviewing all documentation, Dr. Gleason stated that

should a disability be established pending a FCE test, the disability would be permanent as defined by the Illinois Pension Code. After receiving the results of the FCE test, Dr. Gleason concluded that it was medically possible that Delorto's injury was a result of his performance in the line of duty, and that Delorto was permanently disabled. Dr. Samo's certification stated Delorto was permanently disabled. Regarding causation, Dr. Samo stated,

“This episode of back pain started with the lifting incident at work. However, the underlying degenerative changes of the spine are normal wear and tear findings that are typically seen in a person of this age. He clearly has had recurrent back pain episodes for many years, however these had all resolved in the expected time frame for typical low back strain/sprain injuries. It is not clear what is causing his ongoing symptoms.”

Dr. Samo testified that Delorto's degeneration and the tears were preexisting at the time of December 14, 2008, however his current symptoms were a result of the injury he sustained on that date.

¶ 32 We find based on the certifications of Dr. Gleason and Dr. Samo, as well as their testimony, that Delorto's injury that occurred on December 14, 2008 clearly qualifies as an injury occurring during an act of duty. “An act of duty is any act imposed on an active fireman by the ordinances of a city, or by the rules or regulations of its fire department, or any act performed by an active fireman while on duty, having for its direct purpose the saving of the life or property of another person.” 40 ILCS 5/6-110 (West 2008). The injury occurred when Delorto responded to an emergency call for a man down in a parking lot. The individual requiring assistance was 6'4" and weighed between 250 and 275 pounds and was covered in blood. Plaintiff reached out to lift the man onto the stretcher and as he did so felt a pull in his

back.

¶ 33 The fact that Delorto may have had preexisting injuries to his back does not mean that he is precluded from collecting disability pension benefits due to his current injury. “Evidence of a preexisting physical disability does not bar a duty disability pension where it can be shown that a claimant's disability was caused by an act of duty which aggravated his preexisting condition.”

Thigpen v. Retirement Board of Firemen's Annuity and Benefit Fund of Chicago, 317 Ill. App. 3d 1010, 1020 (2000). Dr. Samo testified that Delorto's degeneration and the tears were preexisting at the time of December 14, 2008, however his current symptoms were a result of that incident. Even Dr. Spencer admitted that the degenerative condition of his lower spine was not caused by Delorto's career as a firefighter, but any symptoms he was having may have been caused by his profession. “A plaintiff need not prove that an injury received on duty was the sole cause of his disability; the injury need only have contributed to the disability.” *Id.*

¶ 34 After considering all of the evidence, we find that the Board's decision to deny Delorto pension disability benefits was against the manifest weight of the evidence. There was sufficient evidence in the record to establish that Delorto was injured on December 14, 2008, while on duty, that left him permanently disabled.

¶ 35 **CONCLUSION**

¶ 36 For the foregoing reasons, we affirm the decision of the circuit court finding the Board's decision to deny Delorto pension disability benefits was against the manifest weight of the evidence.

¶ 37 Affirmed.