

2015 IL App (2d) 150064-U
No. 2-15-0064
Order filed August 10, 2015

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE CITY OF NORTH CHICAGO,)	Appeal from the Circuit Court
)	of Lake County.
Plaintiff-Appellant,)	
)	
v.)	No. 14-MR 365
)	
THE BOARD OF TRUSTEES OF THE)	
NORTH CHICAGO POLICE PENSION)	
FUND and VALIZA NASH, CURTIS)	
BRAME, GERALD PEDRIN, THERESA)	
McSEE-ODOMS, and TIM CLARK, as)	
Trustees of the North Chicago Police Pension)	
Fund,)	Honorable
)	Diane E. Winter,
Defendants-Appellees.)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices McLaren and Zenoff concurred in the judgment.

ORDER

- ¶ 1 *Held:* The Board's rulings that an applicant was disabled from serving as a police officer, that the disability resulted from an act of duty, and that he thus was entitled to a line-of-duty disability pension were not against the manifest weight of the evidence, as the evidence on the questions was in conflict.
- ¶ 2 The City of North Chicago (City) filed a timely complaint in the circuit court of Lake County for administrative review of a decision of the Board of Trustees of the North Chicago

Police Pension Fund (Board) granting the application of Brandon Yost, a former officer with the North Chicago police department (Department), for a line-of-duty disability pension. In his application, Yost claimed that he was “[i]nitially hurt March 2009, given full release returning to work and injured again on August 6, 2011.” The Board voted to permit the City to intervene in the proceedings on Yost’s application, and the City participated in the hearing on the application. The City argues on appeal that the Board’s decision is against the manifest weight of the evidence. We affirm.

¶ 3 At the hearing on his application, Yost testified that in the early morning hours of March 28, 2009, he responded to a report of a fight in progress. Yost became involved in a foot pursuit of a subject, who had kicked the rear quarter panel of a parked car. During the pursuit, another car pulled up to the subject who then climbed into the back seat. As Yost attempted to subdue the subject, the car drove off and Yost was dragged for about 50 feet. When Yost was able to free himself from the moving car, it ran over his foot. Yost was taken to the emergency room, where he was treated and released. Yost obtained follow-up care for back pain from Stanford R. Tack, M.D., an orthopedic surgeon. After several visits with Dr. Tack, Yost was still experiencing back pain. Tack ordered an MRI and after receiving the results, he administered two cortisone injections to Yost’s spine. Yost’s back pain did not improve. A discogram was performed in January 2010. Dr. Tack later suggested surgical fusion of the L5 and S1 vertebrae. He performed that procedure on Yost on April 29, 2010.

¶ 4 Yost testified that his back improved following the surgery. In September 2010, he was released to return to work without restrictions. At that time, he was still experiencing some pain, but he felt that it was tolerable. Yost did not notice any physical limitations in the first week or two after he returned to work. However, on October 3, 2010, Yost was required to climb over a

five-foot-high chain-link fence during the course of an investigation. When he jumped to the ground, he felt a sharp, shooting pain in his left leg. Yost was off work for two or three weeks after that incident.

¶ 5 On August 6, 2011, Yost was dispatched to a location where a number of vehicles were illegally parked. When he arrived he encountered a group of 20 or 30 people. Another officer was already at the scene and was attempting to place someone under arrest. Yost became involved in an altercation with a bystander. Yost tackled the bystander. When he did so, Yost fell and landed in a flower bed. Yost's back struck what he described as "a railroad tie or a landscaping edging." At that point he felt a tingling in his left leg. When he got up he had no feeling in that leg and his back was throbbing. Yost was admitted to Lake Forest Hospital, and he spent four days there. He then transferred himself to Condell Hospital. After he was released, he received physical therapy at home and he was referred to Reuben R. Weisz, M.D., a neurologist. According to Yost, Dr. Weisz's diagnosis was spinal-cord trauma. Dr. Weisz prescribed a different physical-therapy regime, and Yost eventually regained feeling in his leg. Yost was released to return to work on November 4, 2011. Two days later, however, Yost was involved in another altercation and, for reasons unrelated to his injuries, he was put on desk duty. Yost subsequently noticed a tingling sensation and sharp, shooting pain in his leg. He visited Dr. Weisz two or three times in the next couple of months. In February 2012, Dr. Weisz advised Yost that he should not return to duty as a police officer. Yost testified that, at the time of the hearing, he was experiencing constant back pain and a "random" tingling sensation in his leg. Yost testified that he had not obtained employment since leaving the North Chicago police department. He indicated that no one had imposed any permanent physical restrictions. Yost added, "It's kind of, you know, what I feel I can tolerate." Yost was still under Dr. Weisz's care

and visited him twice a year. Yost was not engaged in any physical-therapy program or receiving any injections and he had not been advised to undergo any further surgery.

¶ 6 Documentary evidence admitted at the hearing includes reports prepared by three physicians—Jay L. Levin, M.D., Robert C. Dugan, M.D., and David A. Fetter, M.D.—each of whom was selected by the Board to perform an independent medical examination (IME) of Yost—and various medical records. Dr. Levin prepared two reports. His initial report indicated that further diagnostic testing was necessary to determine whether Yost was disabled. After the testing was completed, Dr. Levin prepared a second report that included a detailed summary of Yost’s pertinent medical history, including descriptions of the various imaging studies conducted while Yost complained of back and leg pain. Dr. Levin noted as follows:

“Following the March 28, 2009 occurrence [Yost] ultimately was diagnosed as having an L5-S1 herniated nucleus pulposus with degenerative disk changes and a combination of radicular and discogenic pain. He then underwent surgical treatment by Dr. Tack on April 29, 2010 and was returned to work full duty on September 7, 2010 by Dr. Tack ***. He did have additional flare-ups including October 3, 2010, August 6, 2011, and November 17, 2011. Following all the occurrences prior to November 4, 2011, imaging studies were obtained which showed normal postoperative changes at L5-S1 and [electromyography (EMG)] showed no evidence of radiculopathy on evaluation by Dr. Weisz on September 20, 2011.

Dr. Weiss returned [Yost] to work full duty after an August 6, 2011, flare-up and then for clinical reasons described that on February 14, 2012, he was totally disabled due to pain and discomfort as a result of the work injury last year which would therefore be

2011, without having any objective evidence to support by MRI or EMG that there was a change in his condition.

Based upon all the information I have in my possession including extensive workups done after each flare-up and the fact that on November 4, 2011, treating neurologist Dr. Weisz recommended that [Yost] could work full duty, there is no objective evidence to support following that the [sic] conclusion by Dr. Weisz on February 14, 2012 that he was totally disabled due to pain and discomfort as a result of his work injury from 2011.”

¶ 7 Dr Fetter’s report, like Dr. Levin’s, included a thorough summary of Yost’s medical history, including the results of numerous imaging studies. Dr. Fetter concluded that Yost was “not disabled to the point where he is unable to perform his duties as a police officer for the North Chicago Police Department.” Dr. Fetter’s report indicated that Yost suffered from a preexisting condition. Dr. Fetter noted that various preoperative imaging studies showed degenerative changes to the spine. According to Dr. Fetter, Yost “sustained work-related lumbar strain(s) with non-verified lumbar radiculopathy.” But those strains “were temporary conditions and resolved.” The surgery, in Dr. Fetter’s view, “was performed for a degenerative lumbar spine, and not for work-related lumbar strains.” Dr. Fetter further stated as follows:

“Mr. Yost’s condition is solely caused by a pre-existing condition and also related tolerance. Irregardless of causation, he may return to work as a police officer in this evaluator’s opinion. Lack of tolerance, as reported by the officer, is not a reason for Mr. Yost not to return to work as a police officer.”

Dr. Fetter explained that, according to the second edition of the American Medical Association *Guides to the Evaluation of Work Ability and Return to Work*, absent severe pathology that

cannot be improved medically, tolerance issues should not be the basis for finding that an individual is unable to work.

¶ 8 Dr. Dugan's report also recounted Yost's medical history, albeit more succinctly than the reports of Drs. Levin and Fetter. Dr. Dugan noted that Yost's course of treatment with Dr. Tack for back pain following the March 2009 incident began with conservative measures. When Yost reported no progress, Dr. Tack recommended an MRI. The MRI showed degenerative disc disease at L4-L5, but, according to Dr. Dugan, "the reminder [*sic*] of the examination proved to be within normal anticipation" and "[t]here were no obvious sources of neurologic compression." Dr. Dugan observed that Yost did not report relief from the cortisone injections administered by Dr. Tack and that diagnostic discography was ordered. The discograms "suggested that there was no disc pathology with the exception of the L5-S1 level" where "[i]ncreasing the intradiscal pressure did exacerbate the low back pain expressed by Mr. Yost." Dr. Dugan remarked that, following spinal fusion surgery, Yost "did very well in the postoperative phase and was cleared to return to work without limitations on September 7, 2010." Dr. Dugan noted that about a month after returning to work Yost reportedly experienced leg pain and numbness after climbing over a fence, but "[w]orkup at that time revealed that there were no effective changes in alignment of the spine, fusion masses were confirmed, and specifically no neurologic compromise was identified." Dr. Dugan similarly noted, that after the August 6, 2011, incident in which Yost fell and his back struck a wooden landscaping feature, Yost received an extensive workup including an MRI that "confirmed satisfactory alignment of the lumbar vertebral segments, good fusion mass, and no apparent neurologic compromise." Dr. Dugan's report also stated that "[o]n [Yost's] first day back to work following a minimal confrontation, his back was painful again."

¶ 9 Upon examining Yost, Dr. Dugan observed that Yost “[was] able to forward flex to where the tips of his finger [*sic*] reach approximately the level of his knees.” Yost was able to rotate his shoulders only 20° left or right, his ability to bend laterally was “minimal,” and “[e]xtension of the spine also was met with great resistance in pain.” On the other hand, Yost was able to walk on his heels and on his toes, he exhibited no pain with rotation of the hip or extension of the leg, and his “[d]eep tendon reflexes about the knee and at the ankle [were] brisk and symmetric, left versus right.”

¶ 10 Dr. Dugan concluded that Yost was disabled, inasmuch as “at this time, he is incapable of placing himself in harm’s way and combat with potential assailants and criminals.” Dr. Dugan assessed Yost’s condition in accordance with the classification system of the sixth edition of the American Medical Association’s *Guides to the Evaluation of Permanent Impairment*.¹ According to Dr. Dugan, Yost had a “class I injury of the intervertebral disc and motion segment lesion, status post surgery with non-verifiable radicular complaints at a clinically appropriate level.” With respect to the cause of Yost’s condition, Dr. Dugan stated, “I have no knowledge of any preexisting problems with his lower back injury and as such, I am led to believe that his disability is a consequence directly of his job-related injury and subsequent surgical intervention.”

¶ 11 Dr. Weisz’s records were also admitted into evidence. Before releasing Yost to return to work in November 2011, Dr. Weisz reported, “My impression is cord contusion, caudal cord,

¹ We note that, in workers’ compensation cases, the level of impairment assessed in accordance with the American Medical Association’s *Guides to the Evaluation of Permanent Impairment* is presently among the factors that are considered in determining awards for permanent partial disability. See 820 ILCS 305/8.1b (West 2014).

fully recovered.” At the end of January 2012, Dr. Weisz reported, “My impression continues to be cord contusion and lumbosacral strain, status post lumbar laminectomy and fusion.” Two weeks later, Dr. Weisz reported as follows:

“Mr. Yost is now on disability due to flare-up of his symptoms. He has much more pain and discomfort, requiring treatment with pain medication, which impairs his performance. Also, on examination he definitely has no flexibility in the lumbar area, which makes it pretty much impossible for him to work as a police officer.”

¶ 12 On his own initiative, Yost scheduled an examination with Shaku Chhabria, M.D. The examination took place on August 15, 2013. In her written report, which was admitted into evidence, Dr. Chhabria diagnosed Yost with chronic lumbar pain, left-leg pain, and sciatica.

¶ 13 Drs. Weisz and Chhabria certified in writing that Yost was permanently disabled from police service. Neither Dr. Weisz nor Dr. Chhabria indicated whether the disability was the result of an act of duty.

¶ 14 In an appeal from a judgment in an administrative-review proceeding, the appellate court reviews the administrative agency’s decision, not the trial court’s. *Harroun v. Addison Police Pension Board*, 372 Ill. App. 3d 260, 261-62 (2007). Although the agency’s rulings on questions of law are reviewed *de novo*, findings of fact will be disturbed only if they are against the manifest weight of the evidence. *Id.* at 262. “ ‘An administrative agency decision is against the manifest weight of the evidence only if the opposite conclusion is clearly evident.’ ” *Wade v. City of North Chicago Police Pension Board*, 226 Ill. 2d 485, 504-05 (2007) (quoting *Abrahamson v. Illinois Department of Professional Regulation*, 153 Ill. 2d 76, 88 (1992)). It is the Board’s responsibility, as finder of fact, to make credibility determinations and assign weight to testimony and other evidence. *Edwards v. Addison Fire Protection District Firefighters’*

Pension Fund, 2013 IL App (2d) 121262, ¶ 34. Of the standards of review that apply to various questions in administrative-review proceedings, the manifest-weight-of-the-evidence standard entails the most deference to the Board’s decision. Accord *Carrillo v. Park Ridge Firefighters’ Pension Fund*, 2014 IL App (1st) 130656, ¶ 21.

¶ 15 Pursuant to section 3-114.1(a) of the Illinois Pension Code (Code), a police officer found to be disabled from service in the police department “as the result of sickness, accident or injury incurred in or resulting from the performance of an act of duty *** shall be entitled to a disability retirement pension equal to *** 65% of the salary attached to the rank on the police force held by the officer at the date of suspension of duty or retirement ***.” 40 ILCS 5/3-114.1(a) (West 2012). Where a disability results from any cause other than an act of duty, the officer is entitled to a pension equal to 50% of the salary attached to the officer’s rank at the date of suspension of duty or retirement. 40 ILCS 5/3-114.2 (West 2012). In order to receive a line-of-duty pension, an applicant must establish a causal connection between his or her disability and an act of duty. *Ryndak v. River Grove Police Pension Board*, 248 Ill. App. 3d 486, 489 (1993).

¶ 16 The City contends that the Board’s findings that Yost’s back and leg problems disabled him from serving as a police officer, and that those problems resulted from the performance of an act of duty, are against the manifest weight of the evidence. The City stresses that two of the three physicians selected by the Board to perform IMEs—Dr. Levin and Dr. Fetter—found that Yost was not disabled. Although the third physician selected by the Board to perform an IME—Dr. Dugan—found that Yost was disabled as a result of injuries sustained in the line of duty, the City contends that the reports prepared by Drs. Levin and Fetter “are more thorough and objectively substantiated than that of Dr. Dugan.”

¶ 17 It is true that Dr. Dugan's report is *shorter* than those of Drs. Levin and Fetter, both of whom catalogued in great detail the various imaging studies and other diagnostic tests performed on Yost. Although Dr. Dugan's report is more succinct, we cannot say that it is somehow inherently less reliable. Dr. Dugan's summary of the results of diagnostic testing is generally consistent with the more detailed inventory set forth in the reports of Drs. Levin and Fetter. That Dr. Dugan did not set forth the type of inventory that appears in the other reports does not necessarily mean that his conclusions must be disregarded. To hold otherwise would require us to reweigh the evidence and substitute our judgment for the Board's. "On administrative review, neither this court nor the circuit court can reweigh the evidence or the determination of the credibility of the witnesses, which is to be made by the agency." *Haynes v. Police Board of the City of Chicago*, 293 Ill. App. 3d 508, 511-12 (1997).

¶ 18 The City's contention that the reports prepared by Drs. Levin and Fetter were more "objectively substantiated" than Dr. Dugan's report is evidently based on the weight each physician gave to the results of imaging studies and other diagnostic tests, most of which revealed no basis for Yost's complaints. Dr. Dugan appears to have placed less weight on imaging studies and other diagnostic tests than did Drs. Levin and Fetter. It by no means follows, however, that Dr. Levin's and Dr. Fetter's findings were more credible than Dr. Dugan's. See *Kouzoukas v. Retirement Board of the Policemen's Annuity & Benefit Fund of the City of Chicago*, 234 Ill. 2d 446, 465 (2009). A finding that an applicant for a disability pension suffers from disabling pain may be based on a physician's physical examination of the applicant, notwithstanding the fact that diagnostic tests fail to reveal any abnormality that would explain the applicant's pain. *Id.* at 465-66. It was the Board's responsibility, not ours, to determine the credibility of the various witnesses. *Edwards*, 2013 IL App (2d) 121262, ¶ 34.

¶ 19 Dr. Dugan was the only one of the three physicians selected by the Board to examine Yost who concluded that he was disabled. However, Yost obtained certificates of disability from one of his treating physicians (Dr. Weisz) and from a physician chosen by Yost to perform an examination (Dr. Chhabria). In February 2012, Dr. Weisz reported that Yost was experiencing “pain and discomfort, requiring treatment with pain medication, which impairs his performance.” Dr. Weisz additionally noted that “on examination [Yost] definitely has no flexibility in the lumbar area, which makes it pretty much impossible for him to work as a police officer.” Dr. Chhabria diagnosed Yost with chronic lumbar pain, left-leg pain, and sciatica.

¶ 20 The City argues that Dr. Weisz’s reports are inconsistent inasmuch as he found that Yost was fully recovered and able to return to work in November 2011, but then a few weeks later found that Yost was disabled due to a “flare-up of his symptoms.” The City faults Dr. Weisz for failing to explain what changed Yost’s condition. The salient point, however, is that, in Dr. Weisz’s clinical judgment, Yost’s prior injury or injuries became symptomatic once again. There is nothing implausible or suspect about Dr. Weisz’s conclusion that Yost experienced a disabling “flare-up” of his symptoms. Although Dr. Weisz’s failure to provide a specific explanation for the change in Yost’s condition might bear on the weight to be given to Dr. Weisz’s conclusions, it was the Board’s responsibility to decide what weight to assign to this evidence, and we are not permitted to substitute our judgment for the Board’s. *Edwards*, 2013 IL App (2d) 121262, ¶ 34.

¶ 21 The City further argues that, “[a]s Yost’s injuries cannot be conclusively and independently medically established by any of the IMEs, his credibility becomes critically important in the judgment of whether or not he is disabled.” In challenging Yost’s credibility, the City contends that Yost gave a different account of “the critical events of November 2011” to

each of the physicians selected by the Board to examine him. Dr. Dugan's report indicated that Yost was "able to return to work on November 6, 2011," but his back pain reemerged "after a minimal confrontation." Dr. Fetter's report indicated that Yost returned to full duty on November 4, 2011, and experienced back pain thereafter. The report did not mention any "confrontation" in November, 2011. According to Dr. Levin's report, Yost indicated that he was still experiencing discomfort when he returned to work and that he suffered an injury while helping other officers subdue an individual who was under the influence of drugs. Any discrepancies in these accounts are trivial at most. Yost told both Dr. Dugan and Dr. Levin that, after he returned to work, some incident triggered or aggravated his back symptoms. Although Dr. Fetter's report did not mention such an incident, it appears that Dr. Fetter compiled Yost's history primarily from medical records rather than whatever history Yost provided when Dr. Fetter examined him. Moreover, the statement in Dr. Dugan's report that Yost was "able to return to full duty" does not imply that Yost had no residual pain. In this regard, Dr. Dugan's report is not inconsistent with Dr. Levin's. Again the City's argument is, in effect, nothing more than an attempt to have us assume the role of trier of fact.

¶ 22 The City also contends that Yost's testimony was inconsistent with the IME reports because Yost's testimony indicated that he did not sustain an *injury* during the altercation that occurred shortly after he returned to work in November 2011. However, Yost testified that not long after that incident "his leg randomly started going numb." Whether this phenomenon is properly characterized as an injury in itself or as part of the symptomatology of the injuries sustained in prior incidents has no bearing on the credibility of Yost's testimony.

¶ 23 The City maintains that there is no causal link between Yost's present condition and the injuries he sustained in March 2009 and August 2011. We disagree. The medical evidence on

causation is conflicting. Dr. Fetter opined that Yost's traumatic injuries resolved that his residual problems were related to degenerative changes. Dr. Dugan indicated that he was "led to believe that [Yost's] disability is a consequence directly of his job related injury and subsequent surgical intervention." It was the Board's responsibility to resolve the conflict.

¶ 24 The City argues that, by awarding a line-of-duty disability pension to Yost, the Board breached its fiduciary duty to "all current pensioners and those who may apply in the future." Suffice it to say that the argument depends entirely on the premise that the Board's decision is against the manifest weight of the evidence. Accordingly, the argument does not call for any independent analysis.

¶ 25 The City contends that Yost's testimony that he visited his physician only twice per year, was not receiving physical therapy or other treatment, and was under no specific physical restrictions amounted to an admission that he was not disabled. We disagree. The City does not point to evidence that any additional appropriate treatment was available for Yost's disabling condition. Moreover, Yost's testimony regarding physical restrictions was in response to questioning about his employment history after leaving the North Chicago police department. His response to the effect that he was cleared to engage in work that he felt he could tolerate is hardly evidence that he is fit to return to duty as a police officer.

¶ 26 Finally, the City complains that the Board's written decision lacks sufficiently detailed findings and conclusions. The City notes, for instance, that "[t]he written findings do not mention the IME opinions related to disability and do not examine the weaknesses of Dr. Weisz's opinion, which are laid bare by the reports issued by Dr. Fetter and Dr. Levin." The City relies on *Roman v. Cook County Sheriff's Merit Board*, 2014 IL App (1st) 123308, ¶ 82, where the First District stated, "an agency should adequately articulate the bases for its action,

showing a rational connection between the facts found and the choice made, in order that we may conduct a meaningful review of the issues.” Although the Board’s written findings are terse, we do not find them to be insufficient to permit meaningful review.

¶ 27 For the foregoing reasons, the judgment of the circuit court of Lake County is affirmed.

¶ 28 Affirmed.