2015 IL App (5th) 140428-U

NO. 5-14-0428

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

MARC K. HARRIS, Plaintiff-Appellant, v. THE CITY OF MT. VERNON FIREFIGHTERS' PENSION FUND, THE BOARD OF TRUSTEES OF THE CITY OF MT. VERNON FIREFIGHERS' PENSION FUND, the Members of THE BOARD OF TRUSTEES OF THE CITY OF MT. VERNON FIREFIGHTERS' PENSION FUND, President AARON SHOOK, City Manager RON NEIBERT, Finance Director MERLE HOLLMANN, STEVEN ENGLAND, DAVE MILANO, and THE CITY OF MT. VERNON, Defendants-Appellees.	)	Appeal from the Circuit Court of Jefferson County. No. 12-MR-85 Honorable Timothy R. Neubauer, Judge, presiding.

JUSTICE SCHWARM delivered the judgment of the court.
Presiding Justice Cates and Justice Moore concurred in the judgment.

ORDER

¶ 1 *Held*: The pension board correctly determined that the plaintiff was not entitled to line-of-duty disability benefits.

¶ 2 The plaintiff, Marc K. Harris, filed a complaint in the circuit court of Jefferson County, seeking judicial review of the administrative decision made by the defendants, the City of Mt. Vernon Firefighters' Pension Fund, the Board of Trustees of the City of

Mt. Vernon Firefighters' Pension Fund, the members of the Board of Trustees of the City of Mt. Vernon Firefighters' Pension Fund, president Aaron Shook, city manager Ron Neibert, finance director Merle Hollmann, Steven England, and Dave Milano (collectively, the Pension Board), to deny the plaintiff's application for a line-of-duty disability pension. Defendant City of Mt. Vernon (the City) intervened in the proceedings. After a hearing, the circuit court affirmed the Pension Board's decision, and for the following reasons, we affirm the circuit court's decision.

¶ 3 BACKGROUND

¶ 4 On January 9, 2012, the plaintiff filed a line-of-duty disability pension claim before the Pension Board, alleging that as a result of exposure to noise at work, he suffered a hearing loss that prevented him from performing fire suppression duties. The evidence at the hearing before the Pension Board revealed that the plaintiff, who was 58 years old, was hired by the City as a firefighter on August 27, 1989, and was promoted to lead paramedic/inspector/training officer in 1998. In this position, the plaintiff performed, among other duties, fire suppression and had discretion to respond to any event. The plaintiff was promoted to captain in 2004, and he continued to perform fire suppression and emergency services until January 5, 2012.

¶ 5 The plaintiff testified to the various instances he was subjected to loud, grinding sounds of varying pitches while performing work duties throughout his career with the City's fire department. The plaintiff testified that in December 2011, his physician, Dr. Charles Neal, who was also the City's occupational physician, told him that he could not "hear well enough to do what [he was] doing" and advised that he "[t]ake a disability

pension and get out *** before [he was] hurt." Dr. Neal provided a disability slip to the plaintiff, advising that he be placed on light duty and that he perform "[n]o work at [f]ire [s]cenes [because of] severe hearing loss." The plaintiff submitted the note to the fire department's chief on January 5, 2012. The plaintiff testified that on January 15, 2012, he consulted Dr. Papazian, the physician selected by the City, who confirmed that he had moderate-to-severe noise-induced hearing loss. Dr. Papazian opined that the plaintiff suffered "[n]oise induced [h]earing [l]oss most [l]ikely due to his [w]ork."

¶ 6 Accordingly, on January 5, 2012, after submitting Dr. Neal's light-duty medical slip to the fire department, the plaintiff was assigned to a light-duty inspector position that accommodated his hearing loss and did not require him to respond to emergency calls or perform fire suppression services. Except for the duty of responding to fire suppression and emergency scenes, his newly assigned light-duty position involved duties similar to what he performed when he served as an inspector from 1998 to 2004. The plaintiff testified that he was not aware of anyone else in the fire department who had been offered such a permanent, light-duty position.

¶ 7 Terry Edward Jones, who was employed by the City's fire department from August 1983 until October 1, 2003, testified that he worked for the City as a captain, lieutenant, and firefighter. Jones testified that he ceased employment with the City when he injured his back and could not pass a physical to return to work. Jones testified that he was assigned light duty for one year, but at the end of the year, he was required to file for a disability pension. Jones testified that he was not offered a permanent, light-duty

position. Jones testified that during his career, he was unaware of any fire department employee who had been offered a permanent, light-duty position.

¶ 8 Andrew Lewis testified that he was hired by the City's fire department in 1998. Lewis testified that during the course of his employment, he worked with approximately five workers assigned to light-duty positions. Lewis testified that two individuals, one of whom was Jones, remained on light duty until they retired, and the others finished with their treatment and returned to their previous positions.

¶ 9 Jim Brown testified that he had served as chief of the City's fire department for 5 years and had been a member of the fire department for 27 years. Brown testified that from June 1998 to January 2004, the plaintiff served as an inspector, and in January 2012, the plaintiff was permanently assigned as the inspector training officer. Brown identified an organizational document describing positions in the City's fire department. Section 2.05 of the document described the duties the plaintiff performed as fire inspector, including the administration of building and life safety functions and activities, code enforcement and inspections, record management, information dissemination, budgetary development, administration of fire investigations, and certification maintenance. Brown testified that since being appointed to the position in January 2012, the plaintiff had satisfactorily performed all of the duties required as fire inspector.

¶ 10 Brown testified that the section 2.05 duties, and thus policy, had been revised on March 22, 2012, after the plaintiff's transfer, to accommodate the plaintiff's hearing impairment. Brown testified that under the previous job description, the occupant of the position described in section 2.05 would have been required to respond to fire

suppression and emergency medical services calls. Brown testified that as a result of the accommodation, the plaintiff was not required to respond to fire, emergency, or hazardous material scenes. Brown testified that he was unaware of any other job description which was amended to accommodate a firefighter.

¶ 11 After hearing the evidence on June 1, 2012, the Pension Board found that the plaintiff had failed to meet his burden of proving that work-related events deteriorated his hearing ability. The Pension Board therefore denied the plaintiff's application for a line-of-duty disability pension.

¶ 12 On July 12, 2012, pursuant to the Administrative Review Law (735 ILCS 5/3-101 *et seq.* (West 2012)), the plaintiff filed an action in the circuit court of Jefferson County seeking administrative review of the Pension Board's decision. On August 6, 2014, the circuit court entered its order affirming the decision of the Pension Board. Like the Pension Board, the circuit court found that the plaintiff did not establish that his hearing loss resulted from the performance of an act of duty. The circuit court also found that the plaintiff did not establish that he was disabled because he was performing duties within the fire service as fire inspector. On August 29, 2014, the plaintiff filed a timely notice of appeal.

¶ 13 ANALYSIS

¶ 14 Section 3-110 of the Administrative Review Law provides that in any administrative review action, review "shall extend to all questions of law and fact presented by the entire record before the court. No new or additional evidence in support of or in opposition to any finding, order, determination or decision of the administrative

agency shall be heard by the court." 735 ILCS 5/3-110 (West 2012). Accordingly, upon administrative review, this court reviews the decision of the Pension Board, not the determination of the trial court. *Ahmad v. Board of Education of the City of Chicago*, 365 Ill. App. 3d 155, 162 (2006). Having functioned as the fact finder, determined witness credibility and the weight to be given statements, and drawn reasonable inferences from the evidence, the administrative agency's "findings and conclusions *** on questions of fact shall be held to be *prima facie* true and correct." 735 ILCS 5/3-110 (West 2012); see also *Young-Gibson v. Board of Education of the City of Chicago*, 2011 IL App (1st) 103804 ¶ 56; *Board of Education of the City of Chicago v. Box*, 191 Ill. App. 3d 31, 37 (1989).

¶ 15 "The applicable standard of review depends upon whether the question is one of fact, one of law, or a mixed question of fact and law." *Kouzoukas v. Retirement Board of the Policemen's Annuity & Benefit Fund of the City of Chicago*, 234 Ill. 2d 446, 463 (2009). "Although the Board's findings of fact are given considerable deference, they are, nonetheless, subject to reversal if they are against the manifest weight of the evidence." *Id.* Findings are against the manifest weight of the evidence if the opposite conclusion is clearly evident. *Ahmad*, 365 Ill. App. 3d at 162. It is within the province of the administrative agency to resolve conflicts presented by the evidence and to determine the credibility of the witnesses. *Peterson v. Board of Trustees of the Firemen's Pension Fund of the City of Des Plaines*, 54 Ill. 2d 260, 263 (1973). "Questions of law, however, are reviewed *de novo*, while mixed questions of law and fact are reviewed under the clearly erroneous standard." *Kouzoukas*, 234 Ill. 2d at 463-64. "An administrative

decision is clearly erroneous where the reviewing court is left with the definite and firm conviction that a mistake has been made." *Id.* at 464. "[T]he plaintiff in an administrative hearing bears the burden of proof[,] and relief will be denied if the plaintiff fails to sustain that burden." *Id.*

¶ 16 In this case, the Pension Board's decision involved both factual and legal determinations of whether the plaintiff was "disabled for service in the fire department." See 40 ILCS 5/4-110 (West 2012). Thus, this case presents a mixed question of fact and law to which the clearly erroneous standard of review is applicable. Accordingly, the Pension Board's decision is to be affirmed unless the court is left with the definite and firm conviction that a mistake has been committed. *Id.*

¶ 17 The Pension Board argues that the evidence before it demonstrated that the plaintiff was not disabled from service with the fire department because he functioned capably in the inspector position in which his hearing loss did not constitute a disability. The plaintiff claims that because fire suppression and emergency medical services were essential parts of the fire inspector job title before March 2012, his light-duty position was created simply to defeat his disability claim and cannot form a basis to affirm the Pension Board's decision to deny him line-of-duty disability benefits.

¶ 18 Section 4-101 of the Illinois Pension Code (40 ILCS 5/4-101 (West 2012)) provides for the establishment of a pension fund for the benefit of firefighters. Section 4-110 provides for a line-of-duty disability pension, stating:

> "If a firefighter, 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, is found *** to be physically or mentally permanently disabled for service in the fire department, so as to render necessary his or her being placed on disability pension, the firefighter shall be entitled to a disability pension ***." 40 ILCS 5/4-110 (West 2012).

"[A] person is not entitled to a pension under section 4-110 solely by reason of the fact that he is no longer able to perform the duties of a firefighter, but rather he must be disabled for service in the fire department, so as to render necessary his retirement from the fire service." *Peterson*, 54 Ill. 2d at 264.

¶ 19 In *Peterson*, a disability applicant was found to be permanently injured in the line of duty, and as a result, he was unable to return to his previous duties as a firefighter. Nevertheless, the pension board denied his application for a line-of-duty disability pension because there was evidence of another position available within the fire-prevention bureau of the fire department that could be performed by a person with the applicant's physical and mental capacities. *Id.* at 262. On appeal, the Illinois Supreme Court affirmed the pension board's decision, holding that a person is not entitled to a duty-related disability pension if he or she is capable of performing duties within the fire department, even if the duties are not those of a firefighter. *Id.* at 263-65.

¶ 20 Accordingly, the fact that an individual has physical limitations which prevent him from performing the duties of an active firefighter is not necessarily dispositive of the question of whether he is disabled within the meaning of the Pension Code. *Id.* at 264; *Terrano v. Retirement Board of the Policemen's Annuity & Benefit Fund of the City of Chicago*, 315 Ill. App. 3d 270, 275 (2000). An applicant must show that he is incapable

of any service in the fire department. *Kouzoukas*, 234 Ill. 2d at 469. An individual may be physically incapable of performing the duties of an active firefighter and yet not be disabled within the meaning of the Pension Code if a position is made available to him within the fire department which can be performed by a person with his physical limitations. See *Peterson*, 54 Ill. 2d at 263-65; *Kouzoukas*, 234 Ill. 2d at 469-70; *Howe v. Retirement Board of the Firemen's Annuity & Benefit Fund of Chicago*, 2015 IL App (1st) 141350, ¶ 76; *Terrano*, 315 Ill. App. 3d at 274-75; *Thurow v. Police Pension Board of the Village of Fox Lake*, 180 Ill. App. 3d 683, 691 (1989).

¶ 21 In this case, the plaintiff is not entitled to line-of-duty disability benefits because there is an available and existing full-time, light-duty position within the fire department that he has been capably performing. *Peterson*, 54 Ill. 2d at 264; *Howe*, 2015 IL App (1st) 141350, ¶ 76. The evidence before the Pension Board revealed that after being notified of the plaintiff's injury, the City's fire department transferred the plaintiff to a permanent, light-duty inspector position, which had been amended to accommodate the plaintiff's deteriorated auditory perception by removing the requirement that the plaintiff respond to fire or emergency scenes. After this transfer, the plaintiff performed the duties of the position capably and without complaint. No evidence suggested that the plaintiff's hearing loss affected his ability to function effectively in the fire inspector position offered. See *Howe*, 2015 IL App (1st) 141350, ¶ 79. Thus, similar to the circumstances in *Peterson*, the plaintiff had been offered a permanent position in the fire department that accommodated his restrictions and that he had accepted and had capably performed for several months. See *Peterson*, 54 Ill. 2d at 264; c*f. Kouzoukas*, 234 Ill. 2d at 457

(because position was never offered, there was no way to know whether officer was qualified for and capable of performing this duty, whether position was open and available to her, or whether position would accommodate restrictions); *Bowlin v. Murphysboro Firefighters Pension Board of Trustees*, 368 Ill. App. 3d 205, 210-11 (2006) (no evidence of less-strenuous job alternative available other than firefighting); *Terrano*, 315 Ill. App. 3d at 276 (no evidence that limited duty position existed or was offered to the plaintiff); *Thurow*, 180 Ill. App. 3d at 691 (light-duty position was not available or offered to the plaintiff). Accordingly, the plaintiff did not meet his burden of proof to show that he was incapable of performing any assigned duty within the fire department. See *Howe*, 2015 IL App (1st) 141350, ¶ 79 (plaintiff did not meet burden of proof to show he was incapable of performing *any* assigned duty within the department).

¶ 22 Citing *Danko v. Board of Trustees of the City of Harvey Pension Board*, 240 Ill. App. 3d 633, 643 (1992), the plaintiff argues that the permanent, light-duty position was created simply to defeat his line-of-duty disability claim, and therefore, his service in this position cannot be used to defeat his application. In *Danko*, 240 Ill. App. 3d at 643, the appellate court determined that the pension board's decision to deny the plaintiff a disability pension, on the basis that there was an established light-duty position in the department, was against the manifest weight of the evidence. The court held that there was no established full-time, light-duty position in the city's police department and, if there were such a position, it was created solely for the purpose of depriving the plaintiff of his pension. *Id.* at 647. The court in *Danko* distinguished *Peterson*, stating that "[i]n *Peterson*, the position available to the claimant was a necessary, established and existing

full[-]time position in the fire department which, even with his disability, he was able to fully perform in accord with the established requirements of the position." *Danko*, 240 Ill. App. 3d at 648.

¶ 23 The evidence in this case revealed that prior to the accommodating position the plaintiff held, a permanent, light-duty position had not existed within the fire department. However, we find *Danko* distinguishable. In *Danko*, the court held that the plaintiff's physical condition and need to frequently change physical positions to alleviate his pain rendered him unable to do any kind of meaningful work within the department and that there was no evidence that the department's alternate position could accommodate the plaintiff's type of injury. *Danko*, 240 Ill. App. 3d at 647-48. Here, it was the firm offer of the permanent, limited-duty position that the plaintiff capably performed with his physical limitations that rendered the plaintiff not disabled within the meaning of the Pension Code. See *Terrano*, 315 Ill. App. 3d at 276 ("[I]t is a firm offer of a limited duty position that could be performed by an individual with the applicant's physical limitations that renders the applicant not disabled within the meaning of the Code despite his inability to perform the duties of an active police officer.").

¶ 24 Citing *Medina Nursing Center, Inc. v. Health Facilities & Services Review Board*, 2013 IL App (4th) 120554, the plaintiff also argues the circuit court improperly affirmed the Pension Board's decision on the basis that he could perform light work duties within the fire service of the City's fire department. In *Medina Nursing Center, Inc.*, the court remanded to the defendant agency, finding it could not conduct a meaningful review of the agency's decision because the agency had stated few findings of fact and had not

adequately explained its decision. *Id.* ¶ 27. The plaintiff argues that the Pension Board made no findings of fact or conclusions of law with respect to this issue, and therefore, the issue is not subject to judicial review by the circuit court or by this court.

¶ 25 The Pension Board denied the plaintiff's application for line-of-duty disability benefits solely on the basis that the plaintiff failed to "meet his burden of proving that work-related events–rather than hobbies such as hunting and riding Harley Davidson motorcycles or the natural aging process–deteriorated his hearing ability." We decline to reach the merits of this finding, however, as there is sufficient evidence in the record to affirm the Pension Board's decision on other grounds. On administrative review, this court may affirm the Pension Board's decision on any basis appearing in the record. *Younge v. Board of Education of the City of Chicago*, 338 Ill. App. 3d 522, 530 (2003).

¶ 26 In denying the plaintiff's application, the Pension Board did not conclude, as the circuit court and this court do, that the plaintiff failed to show he was disabled within the meaning of the Pension Code because he was capably performing service within the fire department. However, in addition to showing that work-related events deteriorated his hearing ability, the plaintiff was also required to show that he was incapable of any service in the fire department. See *Kouzoukas*, 234 Ill. 2d at 469; *Howe*, 2015 IL App (1st) 141350, ¶ 76; *Payne v. Retirement Board of the Firemen's Annuity & Benefit Fund of Chicago*, 2012 IL App (1st) 112435, ¶ 46. In this case, there is uncontroverted evidence in the record which shows that the plaintiff had been offered, had accepted, and was capably performing in a position in the fire department that had been amended to accommodate his hearing loss. Accordingly, the testimony at the administrative hearing

before the Pension Board was preserved in the record and provides sufficient grounds to allow this court to affirm the Pension Board's decision. *Kimball Dawson, LLC v. City of Chicago Department of Zoning*, 369 Ill. App. 3d 780, 787 (2006) (if testimony at administrative hearing is preserved in the record, reviewing court has sufficient grounds to examine an agency's determination, and reviewing court may rely on any basis in record to affirm that decision). Although the Pension Board's denial of the plaintiff's application was on a different basis, judicial review of an administrative decision extends "to all questions of law and fact presented by the entire record before the court." 735 ILCS 5/3-110 (West 2012). We may affirm on any basis in the record, even though the Pension Board relied on another basis to support its decision. See *Baker v. Department of Employment Security*, 2014 IL App (1st) 123669, ¶ 15; *Unity Christian School of Fulton, Illinois v. Rowell*, 2014 IL App (3d) 120799, ¶ 37; *Slocum v. Board of Trustees of the State Universities Retirement System*, 2013 IL App (4th) 130182, ¶ 41; *Cunningham v. Schaeflein*, 2012 IL App (1st) 120529, ¶ 34; *Northern Moraine Wastewater Reclamation District v. Illinois Commerce Comm'n*, 392 Ill. App. 3d 542, 563 (2009); *Ahmad*, 365 Ill. App. 3d at 162; *Younge v. Board of Education of the City of Chicago*, 338 Ill. App. 3d 522, 530 (2003); *Boaden v. Department of Law Enforcement*, 267 Ill. App. 3d 645, 652 (1994) (because appellate court reviews administrative agency order, not reasoning underlying it, it may affirm the decision when justified in law for any reason).

¶ 27 Accordingly, we agree with the circuit court's conclusion that the plaintiff failed to show he was disabled within the meaning of the Pension Code because the evidence

showed he was capably performing service within the fire department. We therefore affirm the Pension Board's decision to deny the plaintiff's request for line-of-duty disability benefits on this basis alone.

¶ 28 CONCLUSION

¶ 29 For the reasons stated, we affirm the circuit court's judgment affirming the Pension Board's decision.

¶ 30 Affirmed.