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2016 IL App (3d) 140733-U

Order filed February 10, 2016

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2016

JAMIE RIVERA,)	Appeal from the Circuit Court
)	of the 12th Judicial Circuit,
Plaintiff-Appellant,)	Will County, Illinois.
)	
v.)	
)	Appeal No. 3-14-0733
)	Circuit No. 12-MR-1900
BOARD OF TRUSTEES OF THE)	
BOLINGBROOK POLICE PENSION FUND,)	Honorable
)	John Anderson,
Defendant-Appellee.)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justice Holdridge concurred with the judgment.
Justice McDade dissented.

ORDER

- ¶ 1 *Held:* Police pension board's determination that officer was not entitled to line-of-duty disability pension was not against manifest weight of the evidence where some physicians opined that officer's disability was caused solely by preexisting conditions.
- ¶ 2 Plaintiff Jamie Rivera filed an application with defendant Board of Trustees of the Bolingbrook Police Pension Fund (Pension Board) for a line-of-duty disability pension, or alternatively, a non-duty pension. The Pension Board concluded that Rivera was entitled to a

non-duty disability pension but not a line-of-duty pension. The trial court confirmed the Pension Board's decision. Rivera appeals, arguing that the Pension Board's decision denying him a line-of-duty pension was against the manifest weight of the evidence. We affirm.

¶ 3

FACTS

¶ 4

On January 6, 2006, plaintiff Jamie Rivera was hired as a police officer for the Bolingbrook Police Department. Before being hired, Rivera submitted to a physical examination and disclosed that he had surgery on his right knee in 1990 and again in 2005.

¶ 5

On March 16, 2010, while on duty, Rivera responded to a domestic battery call. When he arrived at the scene, he heard a female screaming and saw another officer about to enter the residence. Rivera exited his squad car to assist the other officer. As he went over a curb, he felt his right leg go the wrong way and experienced immediate pain. As the other officer on the scene was making an arrest, Rivera moved to help him and again felt his right knee buckle. Rivera continued working that day but notified a co-worker that his knee was causing him pain and put on a knee brace that he had in his locker at work.

¶ 6

On March 18, 2010, Rivera saw Dr. Jason Hurbanek. Dr. Hurbanek diagnosed Rivera with a right knee effusion and possible meniscal tear. When Rivera went back to work the next day, his sergeant suggested that he go to Physicians Immediate Care. There, he was diagnosed with a right knee sprain/strain.

¶ 7

On March 23, 2010, an MRI of Rivera's right knee was performed. According to Dr. Hurbanek, the MRI showed "degenerative changes in the lateral compartment in addition to meniscal tearing in the alt meniscus." After that, Rivera attended 26 sessions of physical therapy. Physical therapy was discontinued because there was no improvement.

¶ 8 On July 19, 2010, Rivera underwent a right knee arthroscopy with partial lateral meniscectomy. During the procedure, Dr. Hurbanek noted changes in the lateral meniscus consistent with Rivera’s previous surgery and also observed “some new tearing” in the lateral meniscus, which he removed.

¶ 9 After surgery, Rivera again attended physical therapy, which was unsuccessful. Rivera still has pain and severely decreased range of motion in his right knee. He has not been approved to return to work as a police officer.

¶ 10 In December 2010, Rivera filed an application with defendant Pension Board requesting a line-of-duty disability pension. He later amended his application to alternatively request a non-duty disability pension.

¶ 11 Rivera underwent a workers’ compensation independent medical evaluation by Dr. G. Klaud Miller. Before examining Rivera, Dr. Miller reviewed Rivera’s medical records, which included (1) a progress note from Dr. Geoffrey Kuhlman dated November 26, 2007, stating that after Rivera’s 2005 partial medial meniscectomy: “His pain resolved, but he never quite gained full knee motion. * * * Every six months or so, he had a flare of pain and swelling that lasted three to seven days, the last of which was in the summer of this year[;]” and (2) an x-ray report from November 26, 2007, stating that there was “mild to moderate degenerative changes consisting of articular space narrowing and small osteophytes” in Rivera’s right knee.

¶ 12 Dr. Miller diagnosed Rivera with “[a]rthritis of the right knee.” He found that “absolutely” no injuries arose from the March 16, 2010 incident, stating:

“This was simply another of the multiple episodes that he has had in the past approximately every 6 months. He has documented previous meniscectomies which the MRIs confirmed. Dr. Kuhlman documented arthritis in 2007, and the

x-rays taken immediately after this injury document three-compartment arthritis. Therefore, there was no injury; this was simply the spontaneous onset of symptoms from a clearly pre-existing, symptomatic, pre-accident-in-question arthritis. Dr. Kuhlman clearly documented that he had episodes of pain and swelling approximately every six months, as far back as 2007. This is simply another one of the same [e]pisodes. * * * This has absolutely nothing to do with the incident in question. He was simply walking up a sidewalk. There was no injury, and he did not fall. This could have happened anytime or anywhere he was walking and had absolutely nothing to do with his job. * * * This was simply the spontaneous onset of symptoms while walking.”

Dr. Miller further opined: “The current episode, in my opinion, to a reasonable degree of orthopedic surgical certainly [sic], has had absolutely no effect on his clearly pre-existing condition from the incident in question.”

¶ 13 Three physicians evaluated Rivera on behalf of the Pension Board: Dr. Basel Al-Aswad, Dr. Joseph Mitton, and Dr. Vincent Cannestra. In his initial report, Dr. Al-Aswad noted: “The pre-existing conditions are significant factors in [Rivera’s] current disability. However, he did not seem to have any limitation of motion prior to the injury of March 16, 2010.” Dr. Al-Aswad concluded: “His disability, in my opinion, is caused by an aggravation of an existing pre-existing condition by a relatively minor incident on March 16, 2010.”

¶ 14 One month later, Dr. Al-Aswad drafted a letter indicating that he had received more of Rivera’s medical records, specifically the progress note written by Dr. Geoffrey Kuhlman on November 26, 2007, stating that Rivera had “limited range of motion” in his right knee and “has a flare up of pain and swelling in his right knee every six months or so.” As a result of that

record, Dr. Al-Aswad modified his opinion, stating: “I now believe [Rivera] did have significant limitation of motion of his knee prior to the injury on March 16, 2010. All his existing disabilities including pain, swelling and limitation of motion are related to the preexisting conditions and not to the March 16, 2010 accident.”

¶ 15 According to Dr. Mitton: “Officer Rivera is disabled based on severe osteoarthritis and gouty degeneration of his right knee.” He further stated: “Officer Rivera’s disability is a result of degenerative changes of his right knee due to osteoarthritis and gout. He suffered a temporary exacerbation of his underlying degenerative joint disease and lateral meniscal tear in the March 16, 2010 incident.”

¶ 16 In his report, Dr. Cannestra stated:

“In regards to his pre-existing conditions, I do feel that his post-traumatic arthritis was aggravated as a direct result of his 3/16/10 injury at work. I also feel that he sustained a new lateral meniscal tear of the right knee as a result of his injury at work. However, I do not feel that his lateral meniscal tear was the primary source of his pain and functional limitations after the knee injury. I believe that it is his exacerbation and aggravation of his pre-existing post-traumatic arthritis which has limited his ability to function as an unrestricted police officer both prior and after his surgery of 7/19/10.”

¶ 17 From October 2011 to February 2012, hearings were held before the Pension Board to determine if Rivera was disabled and, if so, what type of pension he was entitled to receive. At the hearings, the Pension Board heard testimony from Rivera and reviewed his medical records, the physicians’ reports, and deposition testimony from Drs. Hurbanek and Miller.

¶ 18 Dr. Hurbanek testified at his deposition that no records existed documenting knee problems in Rivera from November 2007 to March 2010. He opined that Rivera’s meniscal tear “was caused or aggravated by the work incident” on March 16, 2010. He further opined that Rivera’s March 16, 2010 work incident “definitely could have aggravated [Rivera’s] arthritis.” He disagreed with Dr. Miller’s opinion that Rivera’s knee problem was “nothing more than a flare up of arthritis within his knee” because Rivera had “a meniscal tear as well.”

¶ 19 Dr. Miller believed that Rivera’s disability was probably caused by “his old sports injuries.” He testified that stepping on a curb “might have been painful in the sense that any arthritic knee can be painful with walking or climbing stairs[,]” but it did not “cause any additional injury or aggravate his arthritis.” He agreed that no records showed that Rivera was treated for knee pain in 2008 or 2009.

¶ 20 The Board issued a written order granting Rivera a non-duty disability pension but denying him a line-of-duty disability pension because his “right knee disability results solely from preexisting conditions.” The Board relied on the opinions of Drs. Miller, Mitton and Al-Aswad to support their decision.

¶ 21 Rivera filed a complaint for administrative review in the circuit court. The trial court entered an order confirming the Board’s decision.

¶ 22 ANALYSIS

¶ 23 In administrative cases, our role is to review the decision of the administrative agency, not the determination of the circuit court. *Marconi v. Chicago Heights Police Pension Board*, 225 Ill. 2d 497, 531 (2006). The Administrative Review Law provides that the “findings and conclusions of the administrative agency on questions of fact shall be held to be *prima facie* true and correct.” 735 ILCS 5/3-110 (West 2012); *Marconi*, 225 Ill. 2d at 534. Rulings on questions

of fact will be reversed only if against the manifest weight of the evidence. *Id.* Whether a work injury is a cause of a claimant's disability is a question of fact that will be reversed only if the agency's decision is against the manifest weight of the evidence. See *Carrillo v. Park Ridge Firefighters' Pension Fund*, 2014 IL App (1st) 130656, ¶ 22.

¶ 24 "An administrative agency decision is against the manifest weight of the evidence only if the opposite conclusion is clearly evident." *Abrahamson v. Illinois Department of Professional Regulation*, 153 Ill. 2d 76, 88 (1992). The "mere fact that an opposite conclusion is reasonable or that the reviewing court might have ruled differently will not justify reversal of the administrative findings." *Id.* A reviewing court may not reweigh the evidence or substitute its judgment for that of an administrative agency. *Marconi*, 225 Ill. 2d at 534. If the record contains evidence to support the agency's decision, the decision should be affirmed. *Id.*

¶ 25 Section 3-114.1 of the Illinois Pension Code (Code) states: "If a police officer as a result of sickness, accident or injury incurred in or resulting from the performance of an act of duty, is found to be physically or mentally disabled for service in the police department, so as to render necessary his or her suspension or retirement from the police service, that officer is entitled to a line-of-duty disability pension." 40 ILCS 5/3-114.1 (West 2012). Section 3-114.2 of the Code states that a police officer is entitled to a non-duty disability pension if he or she "becomes disabled as a result of any cause other than the performance of an act of duty, and who is found to be physically or mentally disabled so as to render necessary his or her suspension or retirement from police service." 40 ILCS 5/3-114.2 (West 2012).

¶ 26 In order to obtain a line-of-duty disability pension, a plaintiff need not prove that a duty-related injury is the sole or primary cause of his disability; rather, he must only prove that the duty-related injury "is a causative factor contributing to the claimant's disability." *Scepurek v.*

Board of Trustees of Northbrook Firefighters' Pension Fund, 2014 IL App (1st) 131066, ¶ 27. A disability pension may be based on a line-of-duty aggravation of a preexisting physical condition. *Wade v. City of North Chicago Police Pension Fund*, 226 Ill. 2d 485, 505 (2007). The claimant bears the burden of proving that there was a causal connection between an act of duty and his disability. See *Carrillo*, 2014 IL App (1st) 130656, ¶ 27.

¶ 27 It is a pension board's function to resolve conflicts in medical evidence. *Swanson v. Board of Trustees of Flossmoor Police Pension Fund*, 2014 IL App (1st) 130561, ¶ 31. Where the medical evidence is divided and some evidence supports the pension board's decision, it is not against the manifest weight of the evidence. See *id.*; *Carrillo*, 2014 IL App (1st) 130656, ¶ 34. However, a pension board's decision is against the manifest weight of the evidence if it is based solely on the opinions of one medical professional who is not credible because his conclusions are " 'inconsistent with the facts available to him.' " *Wade*, 226 Ill. 2d at 507 (citing *Wade v. City of North Chicago Police Pension Board*, 359 Ill. App. 3d 224, 230 (2005)). A pension board should not rely on the opinion of a medical professional who fails to consider or base his opinion on relevant, material evidence. *Id.*

¶ 28 Here, Rivera argues that the Pension Board's determination that his disability was caused entirely by his preexisting conditions was against the manifest weight of the evidence because it was based on the unsupported opinion of Dr. Miller and the modified opinion of Dr. Al-Aswad.

¶ 29 We agree that the Pension Board should not have relied on Dr. Miller's opinion because it was premised on incorrect information. Dr. Miller opined that Rivera's March 16, 2010 injury was one of many such injuries, stating that Rivera "had episodes of pain and swelling [in his right knee] approximately every six months." However, the medical records show, as Dr. Miller admitted in his deposition testimony, that Rivera had no reports of knee pain for over two years

¶ 36 I respectfully dissent from the majority’s ruling that the Board did not err when it determined that Rivera was not entitled to a line-of-duty disability pension. Contrary to the majority, I would find that the Board’s decision was against the manifest weight of the evidence.

¶ 37 There are several elements that a police officer must prove when seeking a line-of-duty disability pension. 40 ILCS 5/3-114.1 (West 2010). In this case, the Board found that Rivera’s injury was not the result of the performance of an act of duty. The definition of “act of duty” for article 3 comes from article 5 of the Pension Code (*Robbins v. Board of Trustees of the Carbondale Police Pension Fund*, 177 Ill. 2d 533, 540 (1997)):

“Any act of police duty inherently involving a special risk, not ordinarily assumed by a citizen in the ordinary walks of life, imposed on a policeman by the statutes of this State or by the ordinances or police regulations of the city in which this Article is in effect or by special assignment; or any act of heroism performed in the city having for its direct purpose the saving of the life or property of a person other than the policeman.” 40 ILCS 5/5-113 (West 2010).

“An officer who is injured when on duty does not qualify for [an] on-duty disability merely because she was on duty. [Citation.] The critical inquiry is the capacity in which the officer was acting at the time she was injured.” *Buckner v. University Park Police Pension Fund*, 2013 IL App (3d) 120231, ¶ 15.

¶ 38 I agree with Rivera that his injury occurred while performing an act of duty. He was responding to a domestic violence call in which a husband was allegedly beating his wife with a bat. He parked his police vehicle at the scene and injured his right knee while approaching the residence, where the woman was screaming and where another officer was about to enter and might require backup. While I acknowledge that a factual issue has been concocted with regard

to whether Rivera was walking or “rushing” toward the residence, I would note that the words are not mutually exclusive—one can walk and rush at the same time. In fact, in his application for disability pension benefits, Rivera explained that the injury occurred while he was “briskly walking” toward the residence. Also, Rivera did testify, under oath, at the hearing before the Board that he rushed toward the residence. Furthermore, the circumstances of the call support a reasonable conclusion that Rivera was rushing toward the residence, even if he had been walking.

¶ 39 The other aspect of the act of duty determination that is relevant here is the causation aspect. “To establish eligibility for an on-duty disability pension, an officer need not prove the on-duty injury was the sole or primary cause of her disability; it must be a causative factor.” *Buckner*, 2013 IL App (3d) 120231, ¶ 15.

¶ 40 Here again, I agree with Rivera that his March 16, 2010, injury was a causative factor in his disability. Before he was hired by the Bolingbrook police department in 2006, he disclosed his prior knee surgeries, and he passed a pre-employment physical examination during which his knee was tested. He also completed all required physical combat training exercises. It is undisputed that Rivera was on full, unrestricted duties from the moment of his hiring, and that there were no reports of him having knee pain for at least one year before the March 16, 2010, injury. It is also undisputed that Rivera in fact tore his meniscus on that day while proceeding to the residence there the incident of domestic violence was occurring.

¶ 41 With regard to the experts’ opinions, I agree with the majority that Dr. Miller’s expert opinion was premised on incorrect information, and that the Board erred in relying upon that opinion. *Supra* ¶ 29. However, I disagree with the majority that the Board did not also err when it relied on Dr. Al-Aswad’s expert opinion. Dr. Al-Aswad had originally opined that Rivera

apparently had no limitation to his knee's range of motion prior to the March 16, 2010, injury. However, Dr. Al-Aswad later changed his opinion based on Dr. Kuhlman's 2007 progress note. The majority finds no issue with this change of opinion, but I would note that Dr. Kuhlman's report also stated that Rivera had been having a flare-up of pain and swelling approximately every six months. Here, it is undisputed that Rivera had not had any flare-up for at least one year prior to the March 16, 2010, injury. Thus, the change in Dr. Al-Aswad's opinion was based on a report that might have been accurate in 2007, but was neither accurate nor applicable for at least one year prior to the March 16, 2010, injury. Respectfully, I find it to be disingenuous for the majority to discount Dr. Miller's opinion, but not Dr. Al-Aswad's opinion, when both opinions were premised at least in large part on the same inaccurate and inapplicable progress note from 2007. Accordingly, I would also find that the Board erred when it relied upon Dr. Al-Aswad's expert opinion.

¶ 42 Without the opinions of Drs. Miller and Al-Aswad, the Board would have been left with one opinion that the March 16, 2010, incident did not cause Rivera's disability (Dr. Mitton), and two opinions that the incident did cause Rivera's disability (Dr. Cannestra and Dr. Jason Hurbanek, who was Rivera's treating physician). Dr. Mitton never examined Rivera, and he concluded from reviewing documents that Rivera's disability resulted only from an exacerbation of prior existing conditions in the knee, which was not caused by the lateral meniscal tear Rivera suffered on March 16, 2010. Unlike Dr. Mitton, both Drs. Hurbanek and Cannestra examined Rivera after the March 16, 2010, incident. Dr. Hurbanek concluded that Rivera tore his meniscus on March 16, 2010, and that the injury "definitely could have aggravated" Rivera's pre-existing conditions in his knee. Dr. Cannestra's report was the longest and most thorough of all of the reports, and after noting that Rivera suffered a new lateral meniscal tear on March 16,

2010, Dr. Cannestra concluded that the injury caused an exacerbation of pre-existing conditions in Rivera's knee, which resulted in the disability. Because both Drs. Hurbanek and Cannestra personally examined Rivera, and because Dr. Cannestra's report was the most thorough of all of the reports, I would find that it was against the manifest weight of the evidence to rely on Dr. Mitton's opinion over the opinions of Drs. Cannestra and Hurbanek. Under these circumstances, I would set aside the Board's determination. Accordingly, I respectfully dissent from the majority's decision to confirm the Board's determination.